

OPINION NO. 67-036**Syllabus:**

1. The cost of the investigation as to character, family relations, past conduct, earning ability and financial worth in divorce proceedings which is mandatory pursuant to Section 3105.08, Revised Code, may not, by rule, be taxed as a cost of the action. Opinion No. 913, Opinions of the Attorney General for 1951, approved and followed.

2. The Court may by rule provide for a higher deposit for costs in cases where foreign service is required provided that such cost differential is reasonable.

To: Neil M. Laughlin, Licking County Pros. Atty., Newark, Ohio
By: William B. Saxbe, Attorney General, April 13, 1967

Your request for my opinion reads as follows:

"This office has been requested by the Common Pleas Court for the opinion of your office as to the following proposed Rule of Court:

"The Court, relative to Domestic Relations cases, being actions in either divorce or alimony where minor children are involved, intends to adopt as a Rule of Court that in each such case filed an additional deposit of \$10.00 will be required. This additional deposit of \$10.00 will be utilized to defray the expenses of the Adult Probation Department in making investigations as required by law to determine the fitness of either or both parents as to the custody of the minor children. This new Rule of Court would require in cases, as hereinabove stated, a total deposit of \$35.00. However, as provided by law a person may file an Affidavit of Indigency in lieu of depositing the court costs in a Domestic Relations case. Would such an Affidavit of Indigency also apply to the proposed new Rule of Court to increase deposits from \$25.00 to \$35.00 to cover the expenses of the aforesaid investigation? Your attention is directed to Section 3105.08 of the Revised Code.

"The Court is further contemplating by Rule of Court requiring that in all other actions filed in the court that a minimum deposit of \$25.00 be made at the time of commencement of the action if the plaintiff and the defendant or defendants are residents of Licking County. In the event foreign service is required, then the minimum deposit would be \$35.00. The question propounded by the Court being: May the Court, by adoption of such rules, establish the various amounts required for commencement of suits as hereinabove set forth?"

Section 2323.31, Revised Code, provides the authority for a Court of Common Pleas, by rule, to require an advance deposit to secure the costs of an action. That section reads as follows:

"The court of common pleas by rule may require an advance deposit for the filing of any civil action or proceeding. On motion of the defendant, and if satisfied that such deposit is insufficient, the court may require it to be increased from time to time, so as to secure all costs that may accrue in the cause, or may require personal security to be given; but if a plaintiff makes an affidavit of inability either to prepay or give security for costs, the clerk of the court shall receive and file the petition. Such affidavit shall be filed with the petition, and treated as are similar papers in such cases."

In the case of State ex rel. Davis v. Masgay, 14 O. O. 2d,

73, Section 2323.31, supra, was considered and Headnote No. 2 reads:

"RC § 2323.31, providing that a court of common pleas, by rule, may require an advance deposit for the filing of any civil action or proceeding, makes the adoption of a rule requiring such an advance deposit discretionary, and the fact that a common pleas court of one county adopted a rule requiring a deposit, while similar courts in other counties have no such rule, does not defeat the uniform application of the statute throughout the state."

The Court stated at page 74:

"In 1923, in an original action in mandamus in our Supreme Court in the case of State ex rel. Hawke v. Le Blond, 108 Ohio St. 126, at page 135, 140 N.E. 510, at page 513, the court had this to say:

"We are of the opinion, however, that courts have the inherent right to formulate rules for their government, so long as such rules are reasonable and not in conflict with general laws. The right to make rules must be held to come within the implied powers of courts of justice. The Legislature has never prescribed in minute detail all of the procedure necessary in conducting courts of justice in an orderly manner, and many things must necessarily be left to the sound discretion of the court, and it is, of course, desirable that as far as possible those details be carried out in an orderly manner and according to a published rule."

The test therefore that must be applied to a rule of court is whether it is "reasonable and not in conflict with general laws."

Your first question requires a consideration of Section 3105.08, Revised Code, and whether the cost of the investigation which is mandatory may be charged as court costs.

Opinion No. 913, Opinions of the Attorney General for 1951, page 723, considered Section 3105.08, supra, (Section 8003-9, General Code), in response to an inquiry from the Common Pleas Court of Clermont County. The syllabus reads:

"1. When a petition for divorce or for alimony is filed in a court of common pleas, such court may, and in cases where there are children under fourteen years of age involved, shall cause an investigation to be made pursuant to Section 8003-9, General Code.

"2. In causing this investigation to be made, such court of common pleas may appoint and designate one or more court officers, in accordance with Section 1692, General Code, to

conduct the investigation. An officer or officers so appointed shall be paid as provided in Section 1693, General Code.

"3. By virtue of the duties imposed by Section 8003-9, General Code, a court having the inherent power to do those things necessary for the performance of its business, may also appoint one or more investigators, or appoint investigators from time to time, to be paid however, only upon the allowance of the county commissioners as provided by Section 2460, General Code.

"4. Costs cannot be taxed and charged for the services of an investigator, appointed in accordance with branches 2 and 3 above, because there is no statutory authority to do so."

In the discussion concerning the fourth paragraph of the syllabus the then Attorney General stated at page 727:

"Thus far this opinion has pointed out that the investigators, discussed herein, are to be paid from the county treasury. This leads to the following question: Is the burden of supplying the treasury with funds for that purpose upon the taxpayer or upon one of the litigants to a divorce proceeding? As a general proposition, any sum of money paid from the county treasury for personal services of a county officer must come from the tax-paying public unless there is some statute which provides that the service rendered shall be compensated by court costs. Authority for the rule that court costs may be charged and collected for particular services only where there is a statute which so provides is found in the case of *City of Euclid, Appellant v. Vogel, et al., Appellees*, 152 Ohio St., 538. The pertinent portion of the syllabus in that opinion is quoted as follows:

"'2. Costs are allowed only by authority of statute.'

"Since there is no statute in the Ohio General Code which provides that court costs may be taxed and charged for the services performed by such an investigator, it necessarily follows that the money for such services must be paid from county funds."

In the case of *Smith v. Smith*, 93 O. App. 294, the Court also considered Section 3105.08, Revised Code (Section 8003-9, General Code). Headnote No. 3 of that case reads:

"3. The expenses of such investigation may not be taxed as costs and assessed against the parties, since there is no statutory provision to that effect and 'costs are allowed only by authority of statute.'

(City of Euclid v. Vogelín, 152 Ohio St., 538, paragraph two of the syllabus.)"

It would seem to me that it would be inappropriate for the Court to formulate a rule requiring that the cost of such investigation be charged as a "cost" of the action.

The second part of your inquiry poses a different question. Section 2303.16, Revised Code, provides as follows:

"The clerk of the court of common pleas shall not issue a writ in a civil action to another county until the party requiring the issuing thereof has deposited with him sufficient funds to pay the officer to whom it is directed for executing it, and the clerk shall indorse thereon the words, 'Funds deposited to pay for the execution of this writ.' On the return thereof, the clerk shall pay to such officer the fees for executing such writ, and no officer shall be required to serve such writ unless it is so endorsed."

It appears that the statute is inclusive of the writ of summons. This would be a cost of the action which could properly be included in the deposit required at the time of commencement of the action, provided of course, that the cost differential as proposed here is reasonable. Whether the amount of \$10.00 is a reasonable additional cost would be one of fact.

Therefore, it is my opinion and you are hereby advised:

1. The cost of the investigation as to character, family relations, past conduct, earning ability and financial worth in divorce proceedings which is mandatory pursuant to Section 3105.08, Revised Code, may not, by rule, be taxed as a cost of the action. Opinion No. 913, Opinions of the Attorney General for 1951, approved and followed.

2. The Court may by rule provide for a higher deposit for costs in cases where foreign service is required provided that such cost differential is reasonable.