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JUVENILE COURT—COUNTY AUDITOR MAY LEGALLY PAY TO PROBATE JUDGE PRESIDING OVER JUVENILE COURT SUCH COMPENSATION AS WILL BRING PROBATE JUDGE'S SALARY UP TO BUT NOT TO EXCEED SALARY OF COMMON PLEAS JUDGE OF COUNTY—SECTION 1639-7 G. C.—SENATE BILL 50, 122 O. L. 390, SECTION 1.

SYLLABUS:

A county auditor may legally pay to the Probate Judge presiding over the Juvenile Court of such county as provided by Section 1639-7, General Code, such of the compensation provided for in Senate Bill No. 50, 122 O.L. 390, Section 1, which became effective during the judge's term, as will bring the Probate Judge's salary up to but not to exceed the salary of the Common Pleas Judge of such county.

Columbus, Ohio, March 28, 1949

Hon. Sumner J. Walters, Prosecuting Attorney
Van Wert County, Van Wert, Ohio

Dear Sir:

This will acknowledge receipt of your request for my opinion, which reads as follows:

"On August 20, 1947, your predecessor in office rendered an opinion with respect to substitute Senate Bill 223 and amended Senate Bill 50, to the effect that probate judges could not receive compensation for their duties as judge of the Juvenile Court provided for in the aforementioned Senate Bills. More recently, the Common Pleas Court of Medina County rendered an opinion in response to a petition for declaratory judgment to the effect, in short, that inasmuch as amended Senate Bill 50 and Substitute Senate Bill 223 did not provide for additional compensation during term but merely fixed compensation for an office previously created and for which no compensation was ever fixed.

"Therefore, Probate Judges are entitled to receive compensation for the duties as Juvenile Judge as provided in the aforementioned senate bills. In view of these conflicting authorities, please give me your opinion as to whether or not the Auditor of Van Wert County may legally pay to the Probate Judge of Van Wert County such of the compensation provided for in Senate

Bill 50 which became effective during the judge's term as will bring the Probate Judge's salary up to, but not exceeding the salary of the Common Pleas Judge."

This precise question has been answered by a well considered opinion in the case of *Derhammer v. Board of County Commissioners of Medina County*, 53 Ohio Law Abstract, 110, and inasmuch as there have been no conflicting decisions and this case has been followed in allowing a writ of mandamus to issue in the case of *State ex rel. Edwards v. Dixon*, Aud., No. 18777, in the Court of Common Pleas of Madison County, decided December 29, 1948, and in the case of *State ex rel. Handley v. Grunder*, Auditor of Carroll County, No. 8535, in the Court of Common Pleas of Carroll County, decided December 18, 1948, which raised similar questions, I shall quote at length, from the *Derhammer* case.

Section 1639-7, General Code, read:

"The juvenile court or court of common pleas, division of domestic relations of any county, separately and independently created, established and functioning as such by law, shall have and exercise the powers and jurisdiction conferred in this chapter. Except in counties in which there now is, or may hereafter be created, a separate and independent juvenile court or court of domestic relations, there is hereby established and created within the probate court, a juvenile court, presided over by the probate judge, which shall be a court of record, and which shall exercise such powers and jurisdiction. The judge of such court shall receive such compensation as may be provided by law.

"Whenever the judge of the court exercising the powers and jurisdiction conferred in this chapter is absent from the county, or is unable to attend court, or the volume of cases pending in court necessitates it, and upon request of said judge, the presiding judge of the common pleas court shall assign a common pleas judge of the county to act in his place or in conjunction with him. In the event no such common pleas judge is available for said purpose, the chief justice of the supreme court of Ohio shall assign a common pleas judge, a juvenile judge or a probate judge from some other county to act in the place of such judge or in conjunction with him, who shall receive such compensation and expenses for his services as is provided by law for judges assigned to hold court in courts of common pleas."

Section 1639-7a, General Code, read:

"In all counties where the state is not paying a salary direct to the judge exercising the powers and jurisdiction conferred in

this chapter the state shall pay into the county treasury of the county, wherein such judge was elected, the sum of \$1500—annually. The juvenile judge in such counties shall receive as his annual compensation fifteen hundred dollars. Provided that the combined salaries, allowances and compensation of the probate judge and juvenile judge of said county shall not exceed the total salary provided by law for a common pleas judge in said county. Any unused portion of said fund shall remain in the county treasury to be used in the maintenance and operation of the juvenile court.”

On February 5, 1949, Section 1639-7a, General Code, was amended to read:

“In all counties where the state is not paying a salary direct to the judge exercising the powers and jurisdiction conferred in this chapter the state shall pay into the county treasury of the county wherein such judge was elected, the sum of fifteen hundred dollars annually. The juvenile judge in such counties shall receive as his annual compensation, fifteen hundred dollars. Provided that the combined salaries, allowances and compensation, of the probate judge and juvenile judge of said county shall not exceed the total salary provided by law for a common pleas judge in said county. *Said limitation, however, shall be restricted only by the formula established by law for the total salary of a common pleas judge in said county whose term of office has begun, or will begin, subsequent to September 18, 1947.* Any unused portion of said fund shall remain in the county treasury to be used in the maintenance and operation of the juvenile court.”

(Emphasis added.)

The primary rule in the construction of statutes is to give effect to the intention of the legislature. 37 O. Jur., 480, paragraph 257.

In analyzing the question propounded, two major factors appear: (1) Has the legislature by enacting Section 1639-7, General Code, created a new and separate court distinct and apart from the Probate Court and if so what are the powers and duties of the legislature in establishing such court? (2) Is the salary mentioned in Section 1639-7a, General Code, compensation, the amount of which is to be determined by mathematical formula, and awarded the judge exercising the powers and jurisdiction under the chapter? Or, is the salary mentioned in Section 1639-7a, an additional compensation to be paid the probate judge?

Article IV, Section 1, of the Constitution of Ohio provides:

“The judicial power of the state is vested in a supreme court, court of appeals, courts of common pleas, courts of probate, and such other courts inferior to the courts of appeals as may from time to time be established by law.”

Manifestly, under the terms of this provision of the Constitution, the legislature is vested with the authority and charged with the duty of establishing courts inferior to the courts of appeals, as the needs of justice and society demand. The juvenile courts of Ohio, established by Section 1639-1 et seq., General Code, pursuant to Article IV, Section 1 of the Constitution, are such courts inferior to the courts of appeals and are therefore statutory courts and not courts created by the Constitution. They are courts separate and apart from other courts of the state. They are separate and distinct courts, even though “within the probate court.” In *re Morningstar*, 24 O. O., 123. The *Derhammer* case, *supra*, held:

“The jurisdiction and powers of the Juvenile Court as created and set forth in G. C. 1639-1 et seq. have no relation to the jurisdiction of the Probate Court as fixed by law, nor are they enlarged or restricted by the law of Ohio governing Probate Courts. The Probate Judge is required as ex-officio clerk of said court to file a bond, and the juvenile judge, as ex-officio clerk of that court is required to file a separate bond. The Probate Court and Juvenile Court have separate official seals as provided by law. The right to appoint employees in the two courts is governed by separate statutes and these separate sections for the giving of bond by the employees of each court each provide a distinct and different result as to the remaining liability of each judge for the acts of such employees. The right of each judge to require appropriations for each court is under a separate section, and the authority is not the same. The method of invoking jurisdiction for citation of parties, for service of notices, warrants and subpoenas and the manner of hearing are separate and distinct. For each court a separate appearance docket, journal, cash book and records are kept, and in counties where available, separate hearing rooms and even a separate building for the juvenile court are maintained. G. C. 10501-12 provides when a Probate Judge is absent from the county, etc., a Common Pleas Judge of that county may preside, and if none is available a Common Pleas Judge of another county may be assigned by the Chief Justice of the Supreme Court, but G. C. 1639-7 provides that when a Juvenile Judge is absent, etc., and no Common Pleas Judge of that county is available the Chief Justice of the Supreme Court may assign a Common Pleas Judge, or a Juvenile Judge or a Probate Judge from another county.” *Derhammer v. Board of County Commissioners of Medina County, Ohio*, *supra*.

There is no constitutional inhibition against a judge of the Probate Court serving also as judge of an independent court, and receiving compensation therefor, if there is no conflict in duties or jurisdiction. Article IV, Section 14 of the Constitution; State ex rel. Metcalf v. Donahey, 101 O. S., 40; Fulton v. Smith, 99 O. S., 230.

Article II, Section 20 of the Ohio Constitution, reads as follows:

“The General Assembly, in cases not provided for in this Constitution, shall fix the term of office and the compensation of all officers; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished.”

Thus:

“* * * not only the power but the duty to fix and establish the salary of juvenile judges is vested solely in the Legislature. *Until and unless the Legislature has acted to credit a salary, it can not be said to have increased, diminished or changed a salary which is non-existent.*” (Emphasis mine.)

“The Legislature has created a Juvenile Court, or Court of Common Pleas, Division of Domestic relations and had fixed the term of office; the Legislature had fixed the compensation of the Juvenile Court, Court of Common Pleas, Division of Domestic Relations; and the Legislature had created a Juvenile Court within the Probate Court in the other counties of the state and had fixed the term of the Judge of Juvenile Court, but the Legislature had failed, prior to passage of Am. S. B. 50 Secs. (1639-7 and 1639-7a G. C.) as far as the Juvenile Court within the Probate Court is concerned, to fix the compensation of the Juvenile Judge, but the constitutional power and duty were continuing until exercised and had remained alive but dormant.

“If the General Assembly had intended to require the Juvenile Judge to serve for the compensation previously provided for the Probate Judge, it should have affirmatively so legislated, and in the absence of such legislation there was simply a failure to perform a constitutional duty which was continuing. Rather than contending that the incumbent judge entered the office knowing that no salary was provided, it must be concluded that he had presumptive knowledge that the Legislature could and should fix compensation for the Juvenile Judge.” Derhammer case, supra.

The legislature by enacting Section 1639-7 has evidenced its intention to pay a separate salary to “the judge exercising the powers and jurisdiction conferred in this chapter.”

It is further stated in *Derhammer v. Medina County Board of Commissioners*, page 117:

“A constitutional or statutory provision prohibiting a change of compensation during term of office does not apply where, prior to such time no salary or compensation has been fixed for the office, and compensation can be fixed after the officer has entered on his duties, *State ex rel. Taylor v. Carlisle*, 16 O. D. 263, (also see 15 O. D. 287 and 18 O. D. 289); *Wise v. Barberton*, 20 C. C. N. S. 390; *Schreiner v. Madigan*, 31 O. C. D. 504; 32 O. Jur. page 1029; Section 169; 139 A. L. R. pg. 741; 144 A. L. R. page 689; *Gwynn v. McKinley*, 30 Cal. App. 381, 158 P. 1059; *State ex rel. Reardon v. Harper*, 33 Okla. 572, 123 P. 1038; *Hughes v. Oklahoma County*, 50 Okla. 410, 150 P. 1029, (writ of error dismissed in 243 U. S. 625, 61 L. Ed. 935, 37 S. Ct. N. O. D.); *Harper v. Oklahoma County*, 54 Okla. 545, 149 P. 1102, (modified on rehearing on other grounds in 54 Okla. 555, 154 P. 529, writ of error dismissed in 243 U. S. 631, 61 L. Ed. 938, 37 S. Ct. 477); *Shearer v. Flannery* 68 Cal. App. 91, 228 P. 549.”

“* * * Even where there are not two distinct offices involved and additional duties not germane or incident to an office are imposed upon the incumbent, the constitutional inhibition does not apply. 32 O. J. 1027; 21 A. L. R. 258; 51 A. L. R. 1522.”

Therefore, in consideration of the facts and opinion recited in the *Derhammer* case and the acceptance by various courts of common pleas of the decision in that case, and there appearing no cases to the contrary, it is my opinion that the Auditor of Van Wert County may legally pay to the Probate Judge of Van Wert County such of the compensation provided for in Senate Bill No. 50, which became effective during the Judge's term, as will bring the Probate Judge's salary up to, but not exceed the salary of the Common Pleas Judge.

Respectfully,

HERBERT S. DUFFY,
Attorney General.