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1. DIVORCE CASE—COURT APPOINTED INVESTIGATOR—COMPENSATION MAY BE PAID INVESTIGATOR UPON WARRANT OF COUNTY AUDITOR THROUGH PROPER CERTIFICATE OF JUDGE OF COMMON PLEAS COURT ALLOWING CLAIM—SYLLABUS 3, OPINION 913, OAG, 1951, PAGE 724, MODIFIED—SECTIONS 307.55, 3105.08, RC, 2460, 8003-9 G. C.
2. COURT REPORTER, ASSISTANT—NOT INCOMPATIBLE WITH POSITION, COURT CONSTABLE—ASSIGNED TO INVESTIGATE DIVORCE CASES—INVESTIGATOR APPOINTED BY VIRTUE OF INHERENT POWER OF COURT TO CONDUCT INVESTIGATION—SECTIONS 2701.07 RC, 1692 GC.

SYLLABUS :

1. Where a court has appointed an investigator to make an investigation in a divorce case, as is provided by Section 3105.08, Revised Code, Section 8003-9, General Code, compensation may be paid such investigator under the provisions of Section 307.55, Revised Code, Section 2460, General Code, upon the warrant of the county auditor upon the proper certificate of the Common Pleas Court judge allowing the claim. Syllabus No. 3, Opinion No. 913, Opinions of the Attorney General for 1951, page 724, modified.

2. The position of assistant court reporter is not incompatible with the position of court constable, appointed by authority of Section 2701.07, Revised Code, Section 1692, General Code, and assigned to the investigation of divorce cases, or the position of an investigator in such divorce cases, appointed by virtue of the inherent power of the court to conduct such investigation.

Columbus, Ohio, October 16, 1953

Hon. Ray Bradford, Prosecuting Attorney
Clermont County, Batavia, Ohio

Dear Sir:

This will acknowledge receipt of your request for my opinion as to the authority of the Judge of the Common Pleas Court of Clermont County to appoint an assistant court reporter, who is salaried, as a salaried investigator in divorce cases.

Section 3105.08, Revised Code, Section 8003-9, General Code, provides that on the filing of a petition for divorce or for alimony, the Court of Common Pleas may, and in cases where there are children under fourteen years of age involved shall, cause an investigation to be made as to the character, family relations, past conduct, earning ability and financial worth of the parties to the action.

This section has been the subject of interpretation in Opinion No. 913, Opinions of the Attorney General for 1951, page 724, and in the case of *Smith v. Smith*, 93 O. App., 294, Court of Appeals of Clinton County. As pointed out in the *Smith* case, the statute, while commanding an investigation and report thereof in certain cases, includes no direction to the court in the selection of an investigator, nor does it make any provision for payment of any expense or compensation which would appear to be a necessary incident thereto and which one must assume was within the contemplation of the Legislature.

In Opinion No. 913, I enumerated two possible methods by which the court could cause such an investigation to be made and pay the cost thereof; first, by the appointment of a constable under the provisions of Section 1692, General Code, Section 2701.07, Revised Code, and the payment of compensation as authorized by Section 1693, General Code, Section 2701.08, Revised Code, and second, by the appointment of an investigator for a particular case with payment to be made upon the allowance of the county commissioners as provided in Section 2460, General Code, Section 307.55, Revised Code.

The Court of Appeals in the *Smith* case indicated agreement as to the authority of the court to so appoint a constable under Section 1692, General Code, but pointed out that in such case no such appointment had been made. The court also indicated general agreement as to my conclusion as to the inherent power of the court to appoint an investigator for a particular case, but held that under the language of Section 2460, General Code, "except in those cases in which the amount due is fixed by law, or is authorized to be fixed by some other person or tribunal," the approval of the county commissioners is not necessary and that payment may be made upon the warrant of the county auditor upon the proper certification of the Common Pleas Court judge allowing the claim. The court stated at page 296:

“Under the language of the statute it, therefore, becomes the judicial prerogative and the duty of the Common Pleas Court to exercise its sound discretion in the selection of an investigator and to direct and control any and all expenditures necessary thereto, including the mode and manner of payment.”

Upon reconsideration, I am inclined to agree with the Court of Appeals in this regard. In any event, it is the only judicial construction of the statutes on this question to my knowledge. I, therefore, modify the third paragraph of the syllabus of Opinion No. 913 accordingly.

Regardless of whether an assistant court reporter appointed as constable by authority of Section 2701.07, Revised Code, be assigned as such to the investigation of divorce cases as provided in Section 3105.08, and be paid compensation under Section 2701.08, or whether he be appointed as investigator by virtue of the inherent power of the court to make such appointment and be paid compensation under the provision of Section 307.55, the basic question presented by your request is the same. Is the position of assistant court reporter compatible with that of such constable or investigator?

I know of no statute which would specifically prohibit the holding of both positions at the same time. Your question, therefore, must be answered upon the basis of the common law rule of incompatibility. This rule is well stated in the case of *State, ex rel. v. Gebert*, 12 O.C.C. (N.S.), 274, as follows:

“Offices are considered incompatible when one is subordinate to, or in any way a check upon the other; or when it is physically impossible for one person to discharge the duties of both.”

The question of whether it is physically possible for one person to discharge the duties of both of the positions here under consideration is a question of fact to be determined by the court which makes the appointment in each case. I believe it apparent, from an examination of the statutes relating to the duties of the assistant court reporter, that neither of the positions in question is subordinate to or in any way a check upon the other. The basic duty of a court reporter or an assistant court reporter, as stated in Section 2301.20, Revised Code, is to “take accurate shorthand notes of the oral testimony or other oral proceedings, which notes shall be filed in the office of the official shorthand reporter and care-

fully preserved." An assistant court reporter is, of course, appointed by the court and responsible to the court. The same would be true as to a constable assigned to the investigation of divorce cases, or an investigator appointed for this specific purpose.

In conclusion, it is my opinion that :

1. Where a court has appointed an investigator to make an investigation in a divorce case, as is provided by Section 3105.08, Revised Code, Section 8003-9, General Code, compensation may be paid such investigator under the provisions of Section 307.55, Revised Code, Section 2460, General Code, upon the warrant of the county auditor upon the proper certificate of the Common Pleas Court judge allowing the claim. Syllabus No. 3, Opinion No. 913, Opinions of the Attorney General for 1951, page 724, modified.

2. The position of assistant court reporter is not incompatible with the position of court constable, appointed by authority of Section 2701.07, Revised Code, Section 1692, General Code, and assigned to the investigation of divorce cases, or the position of an investigator in such divorce cases, appointed by virtue of the inherent power of the court to conduct such investigation.

Respectfully,

C. WILLIAM O'NEILL

Attorney General.