

OPINION NO. 82-022**Syllabus:**

Although R.C. 2101.19 impliedly authorizes a probate court judge to sell marriage certificates providing the cost does not exceed one dollar, Ohio Const. art. IV, §6(B) prohibits the judge from retaining the proceeds personally. Such proceeds must be paid over to the county pursuant to R.C. 325.27. (1934 Op. Att'y Gen. No. 2596, vol. I, p. 562, overruled.)

To: Thomas E. Ferguson, Auditor of State, Columbus, Ohio
By: William J. Brown, Attorney General, April 26, 1982

I have before me your request for my opinion concerning the authority of a probate judge to sell "marriage certificates" and to retain the profits from such sale personally. You have stated that the certificates are not required by law but are purchased because applicants for marriage licenses often desire to have a decorative marriage certificate or because they are under the impression that the certificate and the \$1.00 fee are required by law. Your specific questions are:

1. In the absence of express statutory authority, is a judge of a probate court authorized, either directly or by the use of court personnel, to sell merchandise in connection with a license, order or document issued by the court and retain the proceeds personally?
2. Does Section 2101.19, Revised Code, or any other provision of Ohio law, authorize, either expressly or impliedly, the sale of merchandise by a probate court judge in the manner specified in question number one, above, and the retention of the proceeds of such sales personally?
3. If the answer to questions one or two are in the affirmative, is this privilege a "perquisite" which is prohibited by Article IV, Section 6, of the Ohio Constitution?
4. What is the proper disposition of the proceeds from such sales?

As you recognize in your third question, Ohio Const. art. IV, §6 apparently prohibits a probate court judge from selling merchandise in connection with a license, order or document issued by the court and retaining the proceeds from such sale personally. Ohio Const. art. IV, §6(B) provides that: "[t]he judges. . .of all courts of record established by law, shall, at stated times, receive, for their services such compensation as may be provided by law. . . . Judges shall receive no fees or perquisites. . . ." I have previously agreed with one of my predecessors in concluding that the prohibition against the receipt of fees or perquisites set forth in art. IV, §6 applies to all judges. 1973 Op. Atty Gen. No. 73-081; 1969 Op. Atty Gen. No. 69-131.

Although the Constitution clearly prohibits a judge from receiving any perquisites, that term is not defined therein. I, therefore, must resort to the common usage of the term. R.C. 1.42. A "perquisite" is defined as "something additional to regular profit or pay, resulting from one's position." Webster's New World Dictionary 1061 (2nd ed. 1978). It is my understanding based on conversations between your office and a member of my staff that the marriage certificates in question are sold by court personnel during their regular working hours on court premises. Clearly, but for the fact that the seller is also the judge exercising control over the court, no such sales could be made. Thus, personal profits resulting from those sales are the direct result of the seller's position as judge. It, therefore, appears that any personal profit obtained by a probate court judge from the sale of marriage certificates by court personnel during regular working hours on court premises is a perquisite which is prohibited by Ohio Const. art. IV, §6. Therefore, in answer to your first question, it is my opinion that a probate court judge may not sell merchandise in the manner set forth above and retain the proceeds personally.

Your second question asks whether R.C. 2101.19 or any other provision of Ohio law authorizes the action in question. R.C. 2101.19 provides:

No probate judge or his deputy clerk shall sell or offer for sale for more than one dollar any merchandise to be used in connection with any license, order, or document issued by the probate court, nor shall he make any charge in connection with the issuance of any license, order, or document except that specifically provided by law.

While R.C. 2101.19 does not expressly authorize a probate court judge to sell the enumerated items for one dollar or less, such authority may be logically implied. R.C. 2101.19 does not, however, specify what is to be done with the proceeds from

any sales impliedly authorized. The disposition of such proceeds is controlled by R.C. 325.27 which states:

All the fees, costs, percentages, penalties, allowances, and other perquisites collected or received by law as compensation for services by a county auditor, county treasurer, probate judge, sheriff, clerk of the court of common pleas, county engineer, or county recorder, shall be received and collected for the sole use of the treasury of the county in which such officers are elected, and shall be held, accounted for, and paid over as public moneys belonging to such county in the manner provided by sections 325.30 and 325.31 of the Revised Code. (Emphasis added.)

Thus, any fee charged for marriage certificates sold pursuant to R.C. 2101.19 and collected or received by a probate court judge must, in accordance with R.C. 325.27, be received and collected for the sole use of the treasury of the county in which he was elected.

In concluding that a probate court judge may not sell marriage certificates and retain the proceeds personally where the sale is made by court personnel during regular working hours on court premises, I am not unmindful of 1934 Op. Atty Gen. No. 2596, vol. I, p. 562. That opinion was based in large part upon the reasoning that since there was no provision in the General Code permitting a judge to sell marriage certificates, the sale was a personal act. The then Attorney General, quoting from State ex rel. Pogue v. Lenders, Case No. 152667 (C.P. Hamilton County February 10, 1913), stated that:

[G.C. 2977 (now R.C. 325.27)] requires only fees, charges, etc., provided by law to be turned into the public treasury, and as the fees for this ornamental paper are not provided by law, it necessarily follows that the money collected therefrom is not to be turned into the public treasury, but is the property of the person receiving the same.

1934 Op. No. 2596 at 565. The reasoning thus set forth in 1934 Op. No. 2596 does not, of course, apply in light of the implied authority for such acts provided by R.C. 2101.19. G.C. 10501-64, the predecessor of R.C. 2101.19, was enacted subsequent to 1934 Op. No. 2596 by 1943-44 Ohio Laws 330 (H.B. 336, eff. Feb. 9, 1945). Thus, since 1945 there has, in fact, been implied statutory authority for the sale of marriage certificates by a probate judge to the extent of one dollar.

Additionally, 1934 Op. No. 2596 did not consider Ohio Const. art. IV. At the time that opinion was written the prohibition against perquisites did not apply to judges of probate courts. See former Ohio Const. art. IV, §14 ("The judges of the supreme court, and of the court of common pleas. . . shall receive no fees or perquisites. . ."). Since the 1968 Modern Courts Amendment, effective May 7, 1968, the prohibition against the receipt of fees or perquisites has applied to all judges, including those of probate courts. Because of the changes in Ohio law subsequent to 1934, I do not feel bound by my predecessor's conclusion and, accordingly, overrule 1934 Op. No. 2596.

Based on the foregoing, it is my opinion, and you are hereby advised, that although R.C. 2101.19 impliedly authorizes a probate court judge to sell marriage certificates providing the cost does not exceed one dollar, Ohio Const. art. IV, §6(B) prohibits the judge from retaining the proceeds personally. Such proceeds must be paid over to the county pursuant to R.C. 325.27. (1934 Op. Atty Gen. No. 2596, vol. I, p. 562, overruled.)