

OFFICIAL OPINION NO. 68-18, County law book and law library fee. Actions to which such fee is applicable Ch. 146, Session Laws of 1968

STATE OF SOUTH DAKOTA
OFFICE OF
THE ATTORNEY GENERAL

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Thomas G. Ries
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Watertown, South Dakota 57201

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Dear Mr. Ries:

You have asked my official opinion based upon the following factual situation:

"The Circuit Court Judges of the Third Judicial Circuit in and for Codington County, in pursuance to Ch. 146 of the Session Laws of 1968 have filed an order creating the county law book and county law library revolving fund, and have directed the clerk of courts of the county to levy the fee provided in such statute,"

With this factual situation you have submitted the question as to what actions filed with the clerk are subject to such fee, and asked that I outline guidelines to guide your clerk and any other interested clerks of court in collecting such fee.

Specifically, you have asked my opinion as to whether or not actions for guardianships, adoptions, inheritance tax determinations and similar actions are subject to such fee, or exempt therefrom.

In order to answer your specific questions and to furnish guidelines in regard to the fee, it is necessary to determine the legislative intent as to the extent of such fees, as it is well settled that without legislative sanction, no county official may collect a fee for the

performance of duties required by statute. In Chapter 146 of the Laws of 1968 the Legislature has provided that such fee shall be collected:

"In each civil action, proceeding for judicial remedy and probate proceedings, except such as commenced by the state or county or municipality or school district therein . . ."

It is my opinion that by the use of the term "each civil action, proceedings for judicial remedy and probate proceedings" the Legislature has expressed an intent that such fee be collected in all suits at law or actions in equity wherein one party seeks redress for a private wrong or to enforce or protect a private right in any court whose papers are filed in the office of the county clerk of courts, Such fee is also collectible in any action for a judicial remedy as provided in South Dakota statute, and in all proceedings within the probate jurisdiction of the county court. All actions subject to the fee, however, must be civil in nature (as distinguished from criminal proceedings) and cannot come within any exception thereto either expressed by the statute itself or the South Dakota or Federal Constitution.

It is my opinion that in order to effectuate the provisions of Section 20 of Article VI of our Constitution, and as a matter of public policy, although not expressly excepted from the imposition of such fee, that actions such as habeas corpus seeking release from a state penal or charitable institution (SDC 37.55), an action to collect the statutory penalty for oppressive garnishments (SDC 37.55); a discharge of a judgment against a bankrupt (SDC 37.53); and an action for discharge from jail on civil liability (SDC 37.54) while within the literal definition of a "civil action" or a "proceeding for a judicial remedy," are not subject to the imposition of such fee. The basis for this conclusion is that the mentioned remedies are offered to the indigent and the poor and should not be subject to such fee.

The statute itself furnishes an exception to the imposition of such fee to "such actions as are commenced by the state or county or municipality or school district therein; . . ."

In conformity with **Mitchell Produce Co. v. Morrison**, 63 SD 127, 257 N.W. 47, this exception from the imposition of the fee must be strictly but reasonably construed, and extended only so far as the language of the exception itself warrants.

A reasonable and fair construction of such exception is that the terms "state," "county," "municipality" or "school district" includes not only such enumerated entities themselves, but also subdivisions of such public bodies. Therefore, it is my opinion that the term "state" not only includes the "State of South Dakota," but also any agency, department or

commission thereof, together with any inferior subdivision of the state government created by statute. (As to such subdivisions, many of them can be classified as "municipalities" within the broad meaning of such term.) A suit commenced in an official capacity by the members of any such department, agency, or subdivision, likewise is not subject to the imposition of the fee. The same result should be reached as to any subdivision of a county, municipality or school district, or official action of any inferior board or commission of such public bodies. Thus a city or county planning board, or the members thereof, if acting in their official capacity, may commence an action, but such is not subject to the fee.

I am hopeful that this basic interpretation of the statute provides guidelines as to the imposition of the fee. Tersely stated, the guidelines in determining whether or not a particular action filed is subject to the imposition of such fee may be determined by answering the following four questions:

1. Is this action civil in nature, or within the probate jurisdiction of a court?
2. Do the statutes require the papers in such proceedings to be filed with the county clerk of courts?
3. Does the Constitution or public policy require this particular action not to be subject to the fee?
4. Is this action commenced by the State of South Dakota, any county, district of this state, or any subdivision thereof?

If Questions 1 and 2 are answered YES; and Questions 3 and 4 NO, the action is subject to the tax.

In considering your question as to guardianship and adoption proceedings, as such actions are within the probate jurisdiction, and the papers must be filed with the county clerk of courts and it is not an action which the Constitution and public policy requires to be exempt from such fee, it is clear that such actions are subject to the fee, unless such is commenced by the state, a county, municipality or school district, or an agency thereof. If such guardianship or adoption is commenced by an individual, a religious or charitable corporation, the fee is collectible. If, on the other hand it is commenced by the Child Welfare Division, or any other state agency, such is not subject to such fee.

It is my opinion that as actions to determine inheritance taxes are ordinarily commenced by an individual, or the personal representative of an estate or an individual, and not by a public entity, that ordinarily these actions would be subject to such fee.

I am hopeful that the guidelines herein set forth will be helpful to your clerk of courts and any other clerks of court in collecting the fee imposed by Chapter 146 of the Session Laws of 1968.

Respectfully submitted,

Frank L. Farrar
Attorney General