



**THE ATTORNEY GENERAL  
OF TEXAS**

October 5, 1989

**JIM MATTOX  
ATTORNEY GENERAL**

Honorable Mike Driscoll  
Harris County Attorney  
1001 Preston, Suite 634  
Houston, Texas 77002

LO-89-77

Dear Mr. Driscoll:

You ask the following questions:

1. May the county clerk charge a fee for funds held under V.T.C.A. Probate Code, §144;
2. At what amount should the fee be set;
3. From whom should the fee be collected.

Your questions appear to arise as the result of a debtor paying money to the county clerk owed to "a resident minor, a resident person legally adjudged to be of unsound mind or a habitual or common drunkard, or the former ward of a guardianship terminated under section 404(c) [of the Probate Code]" pursuant to section 144 of the Probate Code. Section 144 provides in part:

Upon receipt of such payment by the clerk, he shall forthwith call same to the attention of the court and shall invest such money as authorized by the Probate Code pursuant to the orders of the court in the name and for the account of such minor or other person entitled to same. Any increase, dividend or income from such investments shall be credited to the account of such minor or other person entitled to such investment.

The limit on the amount a debtor may pay into the clerk's office on behalf of a "creditor" (the term used in the code for any of the foregoing described persons) is \$25,000. Probate Code § 144 (as amended by Acts 1989, 71st Leg., ch. 1035, § 9, at 4166).

Upon receipt of the money, section 144 provides that the clerk shall call the same to the attention of the court and invest same as authorized by the Probate Code pursuant to the orders of the court. Provision is made for withdrawal of the money upon certain designated relatives of the "creditor" filing application with the clerk and posting a bond to be approved by the county judge. When the relative (referred to as custodian in the code) shall have expended the money in accordance with the directions of the court, he shall file a sworn accounting with the clerk. Upon approval by the court, the custodian is discharged from liability under the bond. The "custodian" receives no commission or fees for his duties in connection with the handling of the money on behalf of the "creditor." Any income from the money invested by the clerk is credited to the account of the "creditor."

In your first two questions you ask whether the county clerk may charge a fee for funds handled under section 144, and if so, at what amount.

Section 118.052(2) of the Local Government Code provides fees for county clerks for services rendered to any persons in probate court actions. No provision is made for any fee in handling funds under a section 144 proceeding. Section 118.011(c) covers duties performed by the clerk for which a fee is not prescribed. Section 118.011(c) (as renumbered by Acts 1989, 71st Leg., ch. 1, § 18, at 20, effective Aug. 28, 1989) states:

The clerk shall charge reasonable fees for performing other duties prescribed or authorized by statute for which a fee is not prescribed by this subchapter. (Emphasis added.)

Chapter 117 of the Local Government Code addresses the matter of handling deposits placed in the custody of the county or district clerk pending order of the court. Section 117.052 provides that a county or district clerk who has custody of money deposited in court pending the result of a legal proceeding shall deposit the money in the county depository pending the result of the legal proceeding. Section 117.055 (as amended by Acts 1989, 71st Leg., ch. 1, § 16a, at 16) allows the commissioners court to set a fee of up to \$50.00 to compensate the county for handling the trust funds for the benefit of litigants in civil proceedings. This fee is charged against the nonprevailing party in the

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litigation or from the party the court designates. Before there can be litigation there must be a controversy and for a controversy there must be adverse parties. Davis v. First Nat'l Bank of Waco, 161 S.W.2d 467, at 472 (Tex. 1942). While section 117.055 would not appear to cover a section 144 proceeding in that the "debtor" and "creditor" would not be characterized as parties engaged in litigation, it provides a useful guideline in determining a "reasonable fee" to be allowed clerks under section 118.011(c). In the event that the amount paid into the clerks office on behalf of the creditor is so small that a \$50 fee would be unreasonable, a lesser fee may be dictated. This would, of course, result in a factual determination to be made on a case-by-case basis.

In your third question you ask from whom the fee should be collected. Where a duly appointed guardian manages an estate of a ward, expenses incurred in the management of the estate, including attorney fees, guardian's commissions, and court costs, are chargeable to the estate of the ward upon the guardian making "satisfactory proof" of same to the court. Probate Code §§ 242, 247. See 42 Tex. Jur. 3d Guardianship and Conservatorship, § 261 (1985).

While section 144 makes no provision for taxing of fees, a review of the history of this section is instructive. At the inception of the Probate Code in 1956, the amount authorized to be paid to the county clerk on behalf of a "creditor" under section 144 was limited to \$500. Acts 1955, 54th Leg., ch. 55, at 134, effective Jan. 1, 1956. The current limit of \$25,000 was the result of House Bill 570 at the 1989 session of the legislature. Acts 1989, 71st Leg., ch. 1035, § 9, at 4166, effective Sept. 1, 1989 (lowering the limit from \$30,000 to \$25,000).

The Bill Analysis to Senate Bill 274, Acts 1969, 61st Leg., ch. 671, § 1, at 1978, effective Sept. 1, 1969, reflects the desire of the legislature to reduce the cost to a ward incurred in a guardianship proceeding. The background information and purpose of Senate Bill 274 reflect the following:

Under existing law creditor minors are entitled to \$500. of their estate unless a legal guardian is appointed. Often times when the estate is small but greater than \$500. most of the estate is used up in administrative cost while a guardian is being appointed.

. . . .

S.B. 274 proposes to increase the maximum legal amount of an estate in which both resident, and non-resident creditor minors are entitled to, from \$500. to \$2,500. S.B. 274 also provides for investment of the money by the county clerk, and for an annual report.

The following comment is taken from a South Texas Law Journal article written shortly before the passage of Senate Bill 274 in 1969.

The intent of this statute would be best served by the passage of this amendment. The \$1,500. limitation is a more realistic figure and is the same amount that has been allowed for similar deposits in the district clerk's office for some time.

As observed in an earlier section of this paper the costs of a guardianship action may be substantial. If the expenses of a formal proceeding, e.g., attorney's fees, court costs, guardian's commissions and bond premiums, have to be deducted when the total estate is nominal (between \$500. and \$1,500.), the proportionate amount of funds remaining for the support, maintenance and education of the ward will be greatly reduced. This reduction could easily amount to between twenty-five to fifty percent of the gross estate.

Cross, Opening and Administering the Texas Guardianship, 11 South Texas L. J. 60, at 87 (1969).

The repeated increases in the maximum amount to be administered through the section 144 procedure reflect a desire on the part of the legislature to reduce the effect on the estate of the costs of attorney fees, commissions of guardians, bond premiums, and court costs incurred in a

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formal guardianship.<sup>1</sup> However, there is no indication that the "creditor's" account should not be charged with the relatively small fee allowed the county clerk for handling the funds. Because the "creditor" receives the benefit of the clerk's services in handling the money and the fee, it is our opinion that the imposition of a reasonable fee is appropriate. No reason is perceived why this fee should not be charged to the "creditors" account.

Yours very truly,



Tom G. Davis  
Assistant Attorney General  
Opinion Committee

APPROVED: Rick Gilpin, Chairman  
Opinion Committee

Sarah Woelk  
Chief, Letter Opinion Section

TGD/SW/bc

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1. In 1971, section 144 was amended to raise the limit from \$1,500 to \$3,000. In 1979 the legislature increased the maximum to \$10,000 and in 1985 the ceiling was raised to \$15,000. Two years later an amendment resulted in the \$30,000 level. Recently, the 71st Legislature decreased that amount to \$25,000. See Historical Note following Probate Code § 144.