1976 S.C. Op. Atty. Gen. 115 (S.C.A.G.), 1976 S.C. Op. Atty. Gen. No. 4297, 1976 WL 22917

Office of the Attorney General

State of South Carolina
Opinion No. 4297
MARCH 15, 1976

***1** The Judge of Probate is Master-in-Equity ex officio in Colleton County. No references may be made in Colleton County, except to the Probate Judge as Master.

TO: Senator James P. Harrelson

QUESTIONS PRESENTED:

(1) What is the state of the law with respect to Masters and Referees in Colleton County?

(2) If Referees have been erroneously appointed, are their actions valid?

CASES AND STATUTES INVOLVED:

State ex rel, McLeod v. Court of Probate of Colleton County et al., (S. C. Supreme Court filed December 10, 1975) and Supplement Opinion thereto filed February 10, 1976.

South Carolina Code Sections 15–419, 15–501, and 15–504.

Act 136 of 1973.

Act 973 of 1974.

DISCUSSION:

State ex rel, McLeod v. The Court of Probate of Colleton County et al., (S. C. Supreme Court, December 10, 1975) declared inter alia Act 136 of 1973 and Act 973 of 1974 unconstitutional. These Acts attempted certain changes in the offices of Master-in-Equity and Probate Judge in Colleton County. The question before this office simply put is what is the overall effect of this decision on the office of the master and the appointment of referees in Colleton County.

Act 136 of 1973 would have amended South Carolina Code Section 15–419. Act 973 would have amended South Carolina Code Section 15–501, and repealed South Carolina Code Section 15–504.

McLeod v. Court of Probate of Colleton County, et al., was decided along with twenty-four other cases. Although the specific question of continued validity of a legislative enactment which the legislature attempted to repeal or amend by an invalid act was not raised in this case; it was in several of the companion cases. One of the companion cases involved Act 143 of 1973 which attempted to amend South Carolina Code Section 15–1671.2, relating to the Civil and Criminal Court of Spartanburg County, and this question was raised. The Court ruled:
Act No. 143 of 1973 Acts of the General Assembly is hereby declared unconstitutional. Section 15–1671.2 which the Act attempted to amend, remains in effect. (Emphasis added)

This language supports the proposition that valid legislative acts are unaffected by attempts to amend or repeal which fail constitutionally.

Furthermore, the essence of this decision, and the earlier cases decided, such as Cort Industries Corporation v. Swirl, Inc., 246 S. C. 142, 213 S.E.2d 445 (1975) is that existing courts may not be modified if they are to be continued pursuant to Art. V, Section 22 of the Constitution, except as they are made a part of the unified judicial system mandated in Art. V, Section 1. Hence, any interpretation other than that the Probate Court of Colleton must continue as it was prior to the effective date of Article V (April 4, 1973), except as it is brought into the unified system, would be inconsistent with the holding nullifying Act 136 of 1973 and Act 973 of 1974.

***2** Therefore, it is the opinion of this office that sections 15–419, 15–501, and 15–504 were unaffected by Act 136 of 1973 and Act 973 of 1974, and remain in effect as they were on April 4, 1973.

(1) South Carolina Code Section 15–419, prior to the attempted amendment provided:
The probate judge of Colleton County is hereby forbidden to practice either alone or in partnership with another in the probate court, the court of common pleas on the equity side of the court of said county or the Supreme Court in any equity cases arising in said county.

This language is in effect now.

(2) South Carolina Code Section 15–501, prior to the attempted amendment provided for the Probate Judge in several counties, including Colleton to be the Master. The amendment (Act 973 of 1974) would have stricken Colleton from these counties wherein the Probate Judge and Master are one. The Probate Judge of Colleton County is therefore the Master-in-Equity ex officio.

(3) South Carolina Code Section 15–504, which Act 973 of 1974 sought to repeal, provides:
All equity causes arising in Colleton County shall be within the jurisdiction of the probate judge as referee and the practice of referring cases to a referee as provided elsewhere in this Code shall not exist or be used in said county but all such duties shall be performed by the judge of probate.

The repeal is ineffective, and this code section is in effect now.

This last point raises an additional question. If referees have been appointed in Colleton County in spite of the prohibition in South Carolina Code Section 15–504, what validity do the acts of such referees have?

The South Carolina Supreme Court has, with respect to those judicial officers holding unconstitutional positions as a result of the ruling in State ex rel McLeod v. Court of Probate of Colleton County et al., supra, ruled that they were de facto judges, whose judgments, sentences and actions must be honored. See Supplement to Opinion in State, ex rel McLeod v. Court of Probate of Colleton County et al., filed February 10, 1976. The Court quoted with approval In Re Wingler 231 N.C. 560, 58 S.E.2d 372 (1950) as follows:
'A judge de facto may be defined as one who occupies a judicial office under some color of right, and for the time being performs its duties with public acquiescence, though having no right in fact. Cooley: Constitutional Limitations, 8th Ed., Vol 2, page 1355. A person will be deemed to be a de facto judge when, and only when, these four conditions concur: (1) He assumes to be the judge of a court which is established by law; (2) he is in possession of the judicial office in question, and is discharging its duties; (3) his incumbency of the judicial office is illegal in some respect; and (4) he has at least a fair color of right or title to the judicial office, or has acted as its occupant for so long a time and under such circumstances or reputation or acquiescence by the public generally as are calculated to afford a presumption of his right

to act and to induce people, without inquiry, to submit to or invoke official action on his part on the supposition that he is the judge he assumes to be.'

***3** It is the opinion of this office that these four conditions would also exist with respect to referees appointed in violation of South Carolina Code Section 15–504, and that they were, therefore, de facto referees whose actions must be honored.

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