1976 S.C. Op. Atty. Gen. 96 (S.C.A.G.), 1976 S.C. Op. Atty. Gen. No. 4284, 1976 WL 22904

Office of the Attorney General

State of South Carolina
Opinion No. 4284
March 4, 1976

***1** Senator James B. Stephen
State House
Columbia, South Carolina

Dear Senator Stephen:
The Free Conference Report of the General Assembly of South Carolina dated March 3, 1976, recommends the passage of H. 2727, as amended. The proposed legislation, among other things, would establish a probate court in each of the several counties in South Carolina. Section 3 of that proposal provides as follows:
In addition to the judge of probate, there shall be an associate judge of probate in those counties in which the governing body thereof appropriates the necessary funds therefor. Associate judges of probate shall be appointed by the judge of probate to serve at his pleasure for a term coterminous with the term of the judge of probate. The associate judge of probate shall have jurisdiction to hear and decide all matters within the jurisdiction of the probate court hearing such matters as may be assigned him by the judge of probate. The judge of probate shall be accountable and responsible for all acts of his associate within the scope of his duties.

You have requested that we advise you as to whether or not, in our opinion, the provision just quoted is constitutional.

As our Supreme Court observed in State, ex rel. McLeod v. the Court of Probate of Colleton County, —— S.C. ——, —— S.E.2d ——, Opinion No. 20129 filed December 10, 1975:
There can be no doubt but that the probate courts of this State come within the orbit of new Article V. Slip Op. at 22.

Article V, Section 8 reads as follows:
Jurisdiction in matters testamentary and of administration, in matters appertaining to minors and to persons mentally incompetent, shall be vested as the General Assembly may provide, consistent with the provisions of Section 1 of this Article.

And, Article V, Section 1 reads:
The judicial power shall be vested in a unified judicial system, which shall include a Supreme Court, a Circuit Court, and such other courts of uniform jurisdiction as may be provided for by general law.

The Court declared unconstitutional various acts which altered the powers of several probate judges and courts because those acts extended the present non-unified system of probate courts. Clearly, the rationale that led to the invalidation of the acts contested in the aforementioned action is not applicable here because the proposed legislation does not in any way extend the present non-unified probate court system. To the contrary, it establishes a new unified system.

We do not feel that the fact that several counties may have associate judges of probate, depending upon the action of their governing bodies, would render the proposed legislation unconstitutional. The probate courts that are to be established

would still exercise uniform jurisdiction. Cf., Cort Industries Corp. v. Swirl, Inc., 264 S.C. 142, 213 S.E.2d 445 (1975). Moreover, in their final report to the Governor and to the General Assembly of South Carolina, the drafters of the new judicial article stated:

***2** It is anticipated that the General Assembly would enact laws providing for the courts authorized by this [Article]. The laws could be drafted so that local areas may determine which of these courts would be established. See, Final Report of the Committee to Make a Study of the South Carolina Constitution of 1895 at 61.

If, as the drafters of Article V anticipate, the General Assembly could prescribe laws by which local areas could constitutionally determine which courts established by general law such areas could have, it necessarily follows that the General Assembly by general law may constitutionally prescribe that local areas, in this case counties, could determine which judicial officers are to serve such courts.

As long as the jurisdiction of the probate courts which would be established by the proposed legislation remains uniform so that the powers and duties exercised by one probate court are exercisable by all other probate courts in the State, the fact that some counties would have associate probate judges and others would not would be immaterial so long as those counties which would not have such judicial officers possessed the opportunity to secure them.

Finally, in our opinion, the fact that some counties will have associate probate judges and some counties will not does not render the unified system any less unified. 'A unified judicial system in the present constitutional sense,' the Supreme Court held in State, ex rel. McLeod v. Knight, —— S.C. ——, —— S.E.2d ——, Opinion No. 20035 filed June 16, 1975, 'means a state-wide system.' The feature questioned here is state-wide in its application. Any county governing body may elect to provide for the office of associate probate judge.

In summary, the provision quoted above is constitutional, in our opinion.

Kind regards,

C. Tolbert Goolsby, Jr.

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