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March 26, 1986

Larry W. Propes, Deputy Director
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Dear Larry:

In a letter to this Office you requested an opinion as to whether there are any specific statutory or constitutional exceptions to requiring the payment of the appropriate filing fee to initiate actions in the court of common pleas and the family court.

By statute, some courts have been provided authority to waive court fees generally. See: Sloatman v. Gibbons, 448 P.2d 124 (Az. 1968); Benjamin v. National Super Markets, Inc., 351 So.2d 138 (La. 1977); Davila v. Soto, 378 A.2d 443 (Pa. 1977). However, I am unaware of any statutes of this State granting such broad authority. An examination of State statutory provisions reveals very limited circumstances in which fees are waived. Section 8-21-310 of the 1976 Code of Laws provides the general fee schedule for clerks of court. Section 20-7-1440 of the 1976 Code of Laws provides as follows:

(i)n delinquency, dependency and neglect actions, no court fee shall be charged against, and no witness fee shall be allowed to any party to a petition. No officer of the State or of any political subdivision thereof shall be entitled to receive any fee for the service of process or for attendance in court in any such proceeding, except that in divorce proceedings such officer shall be allowed such fee as is now provided by law. All other persons acting under orders of the court may be paid for services or service

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of process the fees provided by law for like services in cases before the circuit court, to be paid from the appropriation provided when the allowances are certified to by the judge.

Additionally, as you pointed out in your letter, no filing fee is collected for filing criminal appeals from magistrates' and municipal courts or for filing an original application for post-conviction relief. Section 8-21-310 (11) (a). Also, as referenced in our telephone conversation, according to Section 41-39-30 of the 1976 Code of Laws no fees of any kind are authorized in any proceedings brought pursuant to the State Employment Security Law, Sections 41-27-10 et seq., of the 1976 Code of Laws. Aside from these specific statutory exceptions, I am unaware of any other statutory exceptions to filing fee requirements. However, if you are aware of any other provisions, please advise.

As to any question of whether courts in the absence of statutory authority have inherent authority to waive any fees or costs associated with a civil action, there is a difference of opinion. Generally, the majority view prevails that there must be statutory authorization for any such waiver. 20 Am.Jur.2d, Costs Section 47 p. 38; 20 C.J.S., Costs Section 147 p. 386. However, one court has noted that

unless a statute requiring the posting of security for costs clearly and manifestly expresses an intent to deprive the courts of their common law power to waive fees and security for costs of an indigent litigant, under the doctrine of in forma pauperis the court retains this inherent power.

Bank of America National Trust and Savings Assoc. et al v. The Superior Court of Fresno County, et al., 63 Cal. Rptr. 366 (1967). See also: Martin v. Superior Court et al., 168 P. 135 (1917); O'Connor v. Matzdorff, 458 P.2d 154 (Wash. 1969); Ex Parte Dibble, 279 S.C. 592, 310 S.E.2d 440 (1983) (the State Court of Appeals notes "(c)ourts have the inherent power to do all things reasonably necessary to insure that just results are reached to the fullest extent possible." This case however did not deal with the issue of fees but instead dealt with the appointment of attorneys to represent indigents.)

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As to constitutional considerations, based upon various decisions of the United States Supreme Court, the right of an indigent under the United States Constitution to initiate court proceedings without paying court fees is dependent upon the nature of the proceeding. In Boddie v. Connecticut, 401 U.S. 371 (1971) the Supreme Court dealt with the right of indigent persons to have filing fees and service of process fees established by state statute waived in divorce proceedings. The Court held that it was a violation of due process to deny persons access to the courts which were the sole means in Connecticut to obtain a divorce.

In its decision the Court held:

... given the basic position of the marriage relationship in this society's hierarchy of values and the concomitant state monopolization of the means for legally dissolving this relationship, due process does prohibit a State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages.

401 U.S. at 374. However, the Court further stated:

(w)e do not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the due process clause of the Fourteenth Amendment so that its exercise may not be placed beyond the reach of any individual....

401 U.S. at 382.

Subsequently, in United States v. Kras, 409 U.S. 434 (1973) the Supreme Court dealt with the issue of a bankrupt individual's right to file his petition in bankruptcy and proceed without a prepayment of filing fees on the ground that he was indigent. Noting that there is no constitutional or fundamental right to obtain a discharge of one's debts in bankruptcy, the Court distinguished the situation involving a bankrupt individual from that of a person seeking dissolution of marriage. As a result, the Court determined that Boddie did not control.

Similarly, in Ortwein v. Schwab, 410 U.S. 656 (1973) the Supreme Court refused to allow indigent recipients of welfare and old-age assistance whose assistance was reduced after

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evidentiary administrative hearings to waive the filing fee required by a state statute for appellate court review of the administrative decisions. The Court held that its decision in Kras rather than its decision in Boddie governed inasmuch as in the Court's opinion, the interest of welfare recipients in increased welfare payments has far less constitutional significance than the interest of those married in dissolving their relationships. The Court noted "(a)s in Kras, we see 'no fundamental interest that is gained or lost depending on the availability' of the relief sought...." 410 U.S. at 659.

As to your question of whether there are any specific statutory or constitutional exceptions to requiring the payment of appropriate filing fees to initiate actions in the court of common pleas or the family court, it is clear that consistent with the referenced decisions of the United States Supreme Court, due process does not require a waiver of filing fees in civil actions involving indigents unless a fundamental interest, such as marriage, is involved. Moreover, as noted, the statutory authority to waive fees in this State for filing actions is limited to specific types of cases, such as criminal appeals from magistrates and municipal courts, application for post-conviction relief, employment security cases, and certain family court cases.

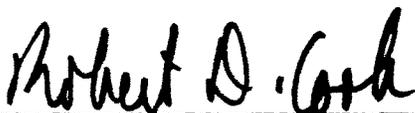
Sincerely,



Charles H. Richardson
Assistant Attorney General

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REVIEWED AND APPROVED BY:



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