Opinion No. 58-159

July 29, 1958

BY: OPINION OF FRED M. STANDLEY, Attorney General Joel B. Burr, Assistant Attorney General

TO: Judge Gerald D. Fowlie, Probate Judge of Bernalillo County, Suite 508, Simms Building, Albuquerque, New Mexico

QUESTION

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1. Is there a distinction between filing a will with the County Clerk of Probate Clerk:

(a) Before death of the testator?

(b) After death of the testator?

(c) Filing a will for probate?

2. What fees are to be charged?

CONCLUSION

1. (b) and (c) are the same; however

(a) differs from the other two.

2. See Opinion.

OPINION

ANALYSIS

The following statutory provisions are dispositive of your first inquiry:

"30-2-1. Any person having the custody of a will, shall, as soon as he is informed of the death of the testator, file the same with the county clerk, who shall open and read the same. If any person having the custody of the will, fail to produce the same as herein required, after receiving a reasonable notice to do so, the probate judge may commit him to jail until he produce the same, and he shall be liable for all damages occasioned by the failure to produce such will."

"30-2-3. After the will is produced and read, the probate judge or county clerk shall ascertain from the will, and by the affidavit of the person producing the same any other satisfactory evidence that may be obtained, the names and residences of the widow or husband or heirs-at-law of the decedent, of their guardians if any, and shall thereupon fix a day for proving the will, which day shall be during a term of the probate court and may be postponed from time to time, in the discretion of the court."

"30-2-11. If the probate judge finds the due execution and validity of the will to be proved, he shall render a judgment approving it as the last will and testament of the decedent, which shall be entered of record in the case.

"30-2-20. After being approved and allowed the will, together with the certificate above mentioned, shall be recorded in a book kept for that purpose, and the original will and certificate shall remain in the custody of the court; and authenticated copy of the will shall be placed in the hands of the executor therein named or otherwise appointed.

"16-4-29. The clerk shall also record at length in books kept for that purpose, all bonds given by executor, administrators and guardians, and **all wills admitted to probate.**

"30-2-22. It shall be the duty of the county clerk to register all wills, letters of administration and other acts pertaining to the same, in a book of record provided for the purpose."

A reading of the above statutory provisions indicate that there is no distinction between filing a will with the county clerk or probate clerk after the death of the testator, and filing a will for probate.

Sec. 30-2-1, Supra., makes it mandatory on all persons having custody of a will to file the same with the county clerk upon being informed of the death of the testator. The county clerk or probate judge is then **required** under Sec. 30-2-3 supra to ascertain from the will and by the affidavit of the person producing the same and any other satisfactory evidence that may be obtained, the names and residences of the heirs of the decendent and fix a day for proving the will. If after hearing, the probate judge finds the due execution and validity of the will to be proved, he renders a judgement approving it as the last will and testament of the decedent. (See 30-2-11 Supra). After being approved and allowed the will is recorded in a book kept for that purpose. (See 30-2-20 Supra.)

It should be noted that Sec. 16-4-29, allows for the recordation of wills only if they have been admitted to probate. On the other hand, Sec. 30-2-22, does not appear to contain such a restriction. It is to be noted, however, that the latter section was enacted prior to Sec. 16-4-29 supra. A reading of the statute also indicates that the compilers of the 1915 Code substituted the words "county clerk" for the words "clerk of the probate judge." Inasmuch as the law does not favor repeals by implication, and in view of the fact that the general tenor of the statute in question indicates that the registration be done after the will is admitted to probate, it is our opinion that the word "registration"

found therein is synonymous with "recordation" and that the same may be done only if the will has been admitted to probate.

A diligent search of our statutes has failed to reveal any section which allow a county clerk to accept a will for filing prior to the death of the testator. Nor is there any existing provision for the collection of a fee for such a service. Sec. 71-2-8, N.M.S.A., 1953 Comp., specifically exempts last will and testaments from all the provisions of the records and recording sections of our statutes.

We therefore conclude that all wills must be filed for probate upon the death of the testator as outlined above, and that no will may be accepted for filing prior to the death of the testator.

Inasmuch as we have concluded that all wills must be filed for probate upon the death of the testator, it follows that the fees to be charged are to be found in Sec. 16-4-22 which sets out the fees to be charged by clerks of the probate courts for docketing each cause and provides as follows:

"16-4-22. Clerks of the probate courts shall be entitled to receive the following docket fees in all matters:

For docketing each cause, to be paid by the party docketing the same, ten dollars ($ 10.00), which shall include all costs of such clerks in any cause in said court, provided that a fee of fifteen cents (15c) per folio in addition to the docket fee above provided for, may be charged for any excess of twenty (20) folios in cases where judgments or decrees or orders exceed twenty (20) folios; Provided, further that proceedings for the appointment of guardians may be filed in any of the several probate courts by the New Mexico department of public welfare without the payment of the docket fee herein provided for or the payment of any costs whatsoever.