

OPINION 43

OFFICIAL OPINION NO. 43

June 9, 1952.

Mr. Otto K. Jensen,
State Examiner,
State Board of Accounts,
Room 304, State House,
Indianapolis, Indiana.

Dear Sir:

Your request for an official opinion reads as follows:

"Chapter 224, Acts 1951 referred to as the Reciprocal Enforcement of Support Act, has created questions relative to the taxing and collection of court costs in proceedings initiated under the provisions of said act.

"The act, *supra*, authorizes this state and other states having a similar law to enforce payment of support by civil proceeding. Actions may be commenced and prosecuted by an initiating state or prosecuted in a responding state. Jurisdiction of all such proceedings in the State of Indiana is vested in the Circuit Courts.

"The prosecuting attorney is required to carry on proceedings in behalf of an obligee or the state or political subdivision having furnished support to an obligee and to act in cases referred by a court of another state wherein the State of Indiana is the responding state. The obligee is not prohibited from being represented by an attorney in initiating any such proceeding.

"We request an official opinion upon the following:

"1. If an action or proceeding is initiated by or in behalf of an obligee in this or another state having a similar law, is the docketing of the action in a circuit court of this state considered an institution of a civil action within the purview of Chapter 128, Acts 1949?

"2. If your answer is in the affirmative, is prepayment of the filing fee required at the time of docketing

the action wherein Indiana acts either as the initiating or responding state?

"3. If your answers to questions 1 and 2 are in the negative, are non-resident plaintiffs required to furnish a cost bond or undertaking to the approval of the clerk as required by Burns' 2-4708, 4709 and 49-1406?

"4. Is the clerk required to tax, charge and collect a prosecuting attorney fee of \$10.00 in each such proceeding as required by the last paragraph of Burns' 49-2511?"

Your first question involves the filing of a proceeding in Indiana to be enforced in another state. Under such circumstances, will the prepayment of a filing fee of \$10.00 as a civil action be required?

Attention is called to Official Opinion No. 30 of 1949, page 117, which reads as follows:

"Our courts have construed 'civil action.' In *Berry v. Berry*, 147 Ind. 176-9 the court said:

"* * * It has been held by this court also that an action "is any judicial proceeding which, conducted to a termination, will result in a judgment," and that a civil action "is an action wherein an issue is presented for trial, formed by the averments of the complaint, and the denials of the answer, or the replication to new matter, and the trial takes place by the introduction of legal evidence to support the allegations of the pleadings, and a judgment in such an action is conclusive upon the rights of the parties, and could be plead in bar." * * *

"See: *Evans v. Evans*, 105 Ind. 204;

"*State ex rel. Bradshaw v. Probate Court*, — Ind. —, 73 N. E. (2) 769.

"It thus appears that a 'civil action' is considered an adversary proceeding and that the docket fee is payable when such civil action or proceeding is made a matter of record, by a docket, by filing such an action."

OPINION 43

It will be seen that the filing of the proceeding in an Indiana Court is but a qualification of the proceeding to be transmitted to a court of another state for a trial, finding and judgment and enforcement of the court's order. It is seen that no summons is issued in the State of Indiana and no jurisdiction of the obligor is procured in Indiana, so that the proceeding in Indiana does not amount to a civil action. The civil action is begun in the foreign state, where a summons is issued and jurisdiction of the person of the obligor is acquired. Attention is called to the provisions of Secs. 11 and 12 of Chapter 224, Acts of 1951, which reads as follows:

"Sec. 11. If the court of this state acting as an initiating state finds that the complaint sets forth facts from which it may be determined that the defendant owes a duty of support and that a court of the responding state may obtain jurisdiction of the defendant or his property, he shall so certify and shall cause certified copies of the complaint, the certificate and an authenticated copy of this act to be transmitted to the court of the responding state."

"Sec. 12. When the court of this state, acting as a responding state, receives from the court of an initiating state the aforesaid copies, it shall (1) docket the cause, (2) notify the prosecuting attorney of the judicial circuit in which said court is located, (3) set a time and place for a hearing, and (4) take such action as is necessary in accordance with the laws of this state to obtain jurisdiction."

Thus it appears that the filing in the initiating state does not amount to a civil action and the filing fee of \$10.00 is not required.

The question then should be confined to the case of a petition filed in another state and then transmitted to Indiana for the determination and enforcement of an order.

In the absence of any reciprocal agreement among the states that may adopt the Uniform Enforcement of Support Act, it would appear that the filing of such civil action in this state as the responding state from another state as the initiating state, would have the same status as any other civil action as contemplated by Chapter 128, Acts of 1949, which

provides for a filing fee of \$10.00 (Sec. 12). It is noted that Chapter 128, Acts of 1949, does not require prepayment of the \$10.00 filing fee in proceedings instituted by or in behalf of the state (of Indiana) or any of its political subdivisions. This provision, however, would not exempt any other state from prepayment of the filing fee.

Therefore, it is my opinion that in the case of an action or proceeding under Chapter 224, Acts of 1951, initiated in another state and transmitted to Indiana as the responding state, the prepayment of the \$10.00 filing fee is required as provided by Chapter 128, Acts of 1949.

It should be noted that Chapter 128, Acts of 1949, provides that the \$10.00 filing fee is taxed as costs and that "if the party instituting any such action or proceeding shall recover judgment, such judgment shall also include as costs an amount equal to the docket fee provided for by this section." Therefore, it would appear, that in the event of a judgment by an Indiana Court against an obligor that the judgment would carry the filing fee and the obligor would be liable therefor.

Since we have said that the filing fee of \$10.00 is required when the action is filed in the State of Indiana as the responding state, it appears that an answer to question number 3 is not required.

It should be noted that \$3.00 of the filing fee is applied to the court costs.

It may be noted further the Court now has the responsibility of fixing the cost bond, as provided by Chap. 215, Acts of 1947; Burns' Stat., Sec. 2-4727. It may be noted further that the filing of such bond is not considered jurisdictional under Burns' Stat., Sec. 2-4708, but a party may be permitted to file such bond after suit upon order of the Court.

Your question number 4 presents the question as to whether or not, under the provisions of the Enforcement Act, it is required that the Clerk charge a prosecuting attorney fee of \$10.00 in each proceeding. Burns' Stat., Sec. 49-2511, provides in part as follows:

"In all other cases where the prosecuting attorney is required to prosecute or defend, the fee shall be ten dollars."

OPINION 43

The legislature has provided that the prosecuting attorney fee shall belong to the county. (Burns' Stat., Sec. 49-2695.)

Section 21, Chapter 224, Acts of 1951, provides as follows:

"Sec. 21. It shall be the duty of the prosecuting attorney of each county in this state to:

"(a) Prepare and file on behalf of an obligee defined herein or on behalf of any state or political subdivision thereof having furnished support to an obligee when requested to do so.

"(b) Carry on all proceedings under this act in any case referred by the court wherein the State of Indiana is the responding state. Provided that nothing herein shall prevent an obligee being represented by an attorney in initiating any proceeding under the provisions of this act."

We note the following language from Sec. 95, Chap. 253, Acts of 1945 (Burns' Stat., Sec. 49-2695), to-wit:

"The various prosecuting attorneys shall appear in all cases, in all courts, including justices of the peace, where the law now provides that they shall appear, and the fees as now provided by law in such cases shall be charged and collected, where possible, as the property of and for the benefit of the general fund of the county *in the manner of which fines are now collected.*"

This language would indicate that the prosecuting attorney's fees are not to be considered as costs, but are to be collected as fines are collected. It would appear that prosecutor's fees are to be treated in the nature of penalties to be collected by execution on property or attachment of the person. Such fees could not be recovered as costs by the party instituting the proceedings. Since Chapter 224, Acts of 1951, is a reciprocal remedy among the various states that adopt the Act, and since no specific provision is made in the Act for prosecutors' fees, it is my opinion that such fees are not required to be taxed or charged in such proceedings.