STATE OF KANSAS

Office of the Attorney General

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Curt T. Schneider
Attorney General

April 14, 1976

ATTORNEY GENERAL OPINION NO. 76-129

Mr. Ivan D. Krug
Rush County Attorney
711 Main Street
LaCrosse, Kansas 67548

Re: Probate Court--Refusal to Grant Letters

Synopsis: A creditor petitioning for "Refusal of Letters of Administration" should be represented by an attorney.

A creditor, other than a corporation, may file and present his petition for allowance of his demand against an estate in the Probate Court, without having to have an attorney.

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Dear Mr. Krug:

In your letter to this office under date of February 20, 1976, you advise that you have a question regarding the unauthorized practice of law by persons who are not classified as attorneys, and advise that apparently, under the probate court sections generally under the category of "refusal to grant letters" starting at K.S.A. 1975 Supp. 59-2287, some probate courts are being asked to accept pleadings by creditors who are filing the proceedings without an attorney. You ask if this constitutes the unathorized practice of law since there are more persons interested in such procedure than just the creditor, and if so how could this procedure be stopped. You further ask, " can a probate judge adopt a policy refusing to accept pleadings filed on a pro se basis by a creditor."

Your inquiry presents two separate and distinct questions:

1. May a creditor petitioning for "Refusal of Letters of Administration" upon an estate, pursuant to K.S.A. 59-2287, represent himself, herself, or itself if a corporation, pro se, or must said petitioner be represented by an attorney.

2. Must a creditor filing a petition for allowance of his, her or its demand against an estate in the probate court, be represented by an attorney or may said petitioner represent himself, herself or itself if a corporation, pro se.

We will discuss each question separately.

K.S.A. 1975 Supp. 59-2287 was first enacted in 1965 and has been amended several times. The pertinent part of which now reads as follows:

> "(a) The Probate Court in its discretion, may refuse to grant letters in the following cases: . . . (2) When the real and personal estate of the decedent does not exceed two thousand dollars ($2,000) and there is no widower, widow or unmarried minor children, any creditor of the estate may apply for refusal of letters by giving bond in the sum of not less than the value of the estate. Said bond shall be approved by the Probate Court and conditioned upon the creditor obligating himself or herself to pay, so far as the assets of the estate will permit, the debts of the decedent in the order of their preference, and to distribute the balance, if any, to the persons entitled thereto under the law, . . . (b) . . . If the court is satisfied . . . that the real and personal estate does not exceed two thousand dollars ($2,000) when the application is made by a creditor, the court may order that no letters of adminis-

> tration shall be issued on the estate . . .
>
> After the making of the order, the surviving spouse, or minor children, may collect and sue for all of the personal property belonging to the estate.
> (c) When the application under this section is made by a surviving spouse, or minor children, notice of the proceeding shall be given pursuant to K.S.A. 1975 Supp. 50-2222.
> (d) Whenever it shall be made to appear to the court that further proceedings in the administration of an estate pursuant to this section are unnecessary, and after the payment of Kansas inheritance taxes, if any, the court shall enter an order terminating the administration of such estate. Such order shall be made without notice unless the court otherwise orders . . .".

This section is silent about the employment of attorneys, or the allowance of an attorney fee, to a petitioning creditor. Subsection (b) provides that after the making of the order, the surviving spouse or minor children may collect and sue for all the personal property belonging to the estate. It does not give a creditor who has given bond as provided in subsection (a)(2) of the section, the right to sue for personal property belonging to the estate. Nor does it require that notice be given upon the application of the creditor for the right to collect the assets of the estate.

This statute has now been in effect, though amended several times, for more than ten years, and we have been unable to find any Kansas court decisions interpreting it, nor have we been able to find any decisions from other jurisdictions interpreting a similar statute.

In 19 A.L.R. 3d, 1104, we find a brief annotation of decisions as to the necessity of executors, administrators, trustees, or other fiduciaries, especially banks and trust companies to be represented by an attorney in administration proceedings in the

probate court. See, State Bar Association v. Connecticut Bank and Trust Co., (1950), 146 Conn. 556, 153 A.2d, 453, 19 A.A.R. 3d, 1105 Par. 3; Frazee v. Citizens Fidelity and Trust Co. (1964 Ky.) 393, S.E. 2d, 778, 19 A.L.R. 3d 1104; Detroit Bar Association v. United Guardian Trust Co. (1958), 282 Mich. 707, 281, S.W. 432, 19 A.L.R. 3d, 1104; State ex rel. Baker v. County Court of Rock County (1965), 29 Wis. 2d, 1, 138 N.W. 2d. 162, Nebr. 116, 271, N.W. 282, 19 A.L.R. 3d, 1106; Grand Rapids Bar Association v. Denkma (1939), 290 Mich. 56, 287 N.W. 377, 19 A.L.R. 3, 1108, Par. 4(b).

Since the petitioning creditor gives a bond in the sum not less than the value of the estate, conditioned that said creditor obligates himself or herself to pay so far as the assets of the estate will permit, the debts of the decedent in the order of their preference and will distribute the balance, if any, to the persons entitled thereto under the law, he like an executor, administrator or a trustee or other fiduciary is representing not only himself, but others, who are or may be interested in the estate, either as creditors, or heirs of the deceased, or both, and in and to a limited extent, stands in the position of an executor, administrator or other fiduciary of an estate, and following the rule laid down in the above cited cases, it is the opinion of this office that a petitioning creditor for "Refusal of Letter of Administration" should be represented by counsel, and that failure to have counsel, and to represent himself or herself pro se constitutes the unauthorized practice of law. You ask how to stop the practice of creditors petitioning for such refusal without counsel. The way to stop it would be for the probate court to refuse to file such a petition, when the petitioning creditor is not represented by counsel.

We now come to your second question, whether a creditor filing a petition for allowance of his demand against an estate must be represented by counsel. We assume that this question refers to cases where there is a regular administration of the estate, and the creditor is seeking to have his demand allowed against the estate in the regular course of administration of the same.

K.S.A. 1975 Supp. 59-2237 provides that:

> "Any person may exhibit his demand against the estate of a decedent by filing his petition for its allowance in the proper probate court. Such demand shall be deemed

> duly exhibited from the date of filing of said petition."

In 7 Am. Jur. 2d, 46, Attorneys at Law, § 6, entitled "Necessity That Litigant Appear By Counsel", we find the following:

> "The right of a litigant to appear by attorney does not make that method of appearance obligatory. A party to an action may appear in his own proper person or by an attorney, unless the party is a corporation, in which case it may appear only by attorney."

See, Osborn v. Bank of United States, 9 (Wheat)(United States) 738, 6 L.Ed. 204; Funded Debt Comms. v. Younger, 29 Cal. 147; Abernathy v. Burns, 206 N.C. 370, 173 S.E. 899. A litigant has a right to act as his own attorney, but if he does so, he should be restricted to the same rules of evidence and procedure as those qualified to practice law; otherwise, ignorance is justifiably rewarded. Hence, the fact that a layman elects to represent himself does not excuse him from a failure to prove his cause of action. Lombardi v. Citizens National Trust and Savings Bank, 137 Cal. App. 2d, 206, 289 P.2d, 823; 7 Am. Jur. 2d, 46 Par. 6, Note 12.

In 5 Am. Jur. 2d, 487, Appearance, § 10, entitled "Who May Appear, we find the following:

> "As a general rule, any person who is sui juris may enter an appearance and thereby confer on the court jurisdiction over his person. This rule embraces domestic corporations, foreign corporations, municipal corporations and individuals. As a general rule an appearnce is made through an attorney, although that is not necessary. One may appear in his own proper person or may authorize another to appear for him."

See, Beardsley v. Beardsley, 144 Conn. 725; 137 A. 2d. 752; Drougly v. Dougly, 55 Wash. 2d, 718, 349 P.2d. 1073. In all courts of the United States, the parties may plead and conduct their own cases personally or by counsel; 28 U.S.C. 1654.

K.S.A. 60-205(b) provides that:

> "Whenever under this article service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the court."

K.S.A. 60-211 provides that:

> "Every pleading of a party represented by an attorney of record shall be signed by at least one attorney of record in his individual name, who address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address."

In conclusion, as to your second question and based upon the above cited authorities, it is the opinion of this office, that a creditor, who is not a corporation, may file his petition for allowance of his demand against an estate himself and need not have an attorney to represent him in filing and presenting such petition to the court. Even though we have found only one citation, Osborn v. Bank of the United States, supra, that a corporation must always be represented by an attorney, it is the opinion of this office that a corporation should be represented by an attorney in filing and presenting its petition for allowance of its demand against an estate to the court.

The probate judge is in error in requiring an individual creditor to be represented by an attorney in filing and presenting his petition for allowance of his demand against an estate to the court, and you as county attorney, should advise her that a creditor other than a corporation, has the right to file and present his petition for allowance of his demand against an estate, without having to retain an attorney to represent him, but that corporations should be represented by an attorney, and that she should modify her policy accordingly.

Sincerely yours,

Curt Schneider

CURT T. SCHNEIDER
Attorney General

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