STATE OF KANSAS

Office of the Attorney General

1st Floor, State Capitol Bldg. (913) 296-2215 Topeka, Kansas 66612

Curt T. Schneider
Attorney General

January 25, 1978

ATTORNEY GENERAL OPINION NO. 78- 46

The Honorable R. E. Miller
Judge of the District Court
Lyon County Courthouse
Emporia, Kansas 66801

Re: Probate Code--Jurisdiction and Powers--Examination of Court Records

Synopsis: Abstracters are categorically subject to public inspection provisions found at K.S.A. 59-214, and are subject to same restrictions as are other members of public under restrictions regarding access to records in custody of district court or treatment facility of patients or former patients as provided in K.S.A. 59-2931.

* * *

Dear Judge Miller:

You request the opinion of this office whether licensed Kansas abstracters are considered members of the public as that term is employed in K.S.A. 59-214. You express concern that in some cases involving the disposition of real estate owned by "mentally ill persons" [as defined at K.S.A. 59-2902(1)] it becomes necessary on occasion for abstracters to examine portions of such individuals' records in the custody of the district court in order to adequately prepare the requisite abstract of title necessary for the sale of such property.

K.S.A. 59-214 mandates in part that

> "[t]he books and records of the district court involving proceedings pursuant to chapter 59 of the Kansas Statutes Annotated shall be open to inspection by *all persons* at

> all times, except as provided in adoption proceedings and in K.S.A. 59-2931. The court shall furnish a certified or authenticated copy of any document on file or of record which is *open to public inspection*, upon payment therefor . . . ." [Emphases added.]

The above language clearly reflects the legislature's intent to employ the words "public inspection" as an all-inclusive term. As such it does not appear subject to subcategorization by professional occupations since it is clearly defined in the same paragraph as meaning to include "all persons."

Abstracters, of course, pursuant to K.S.A. 58-2804 have access to "county records of the several county officers." Such provisions do not convey additional authority which would authorize abstracters to pierce the privilege qualification established by K.S.A. 58-2931.

You do not detail in your letter what court records are to be considered. If an abstracter requests district court records relative to proceedings held pursuant to the Act for Obtaining Treatment for the Mentally Ill Person, K.S.A. 59-2901 *et seq.*, then by virtue of the express provisions of K.S.A. 59-2931, such material is privileged and may be divulged only as permitted under the statute.[1] On the other hand, should an abstracter seek the district court records relative to the conservatorship or guardianship for a mentally ill individual then he or she would have access to such material via K.S.A. 59-214, where such information would not perforce fall within the manifest scope of K.S.A. 59-2931.[2]

Yours truly,

Curt Schneider

CURT T. SCHNEIDER
Attorney General

CTS:JPS:kj

---

1. *See*, 5 Kans. Atty. Gen. Op. 421 (1967), attached hereto for your convenience.

2. *Ibid. Also see*, 6 Kans. Atty. Gen. Op. 280 (1968), attached hereto.

Pursuant to 59-2935, those persons adjudged insane prior to the adoption of this act are now designated as "mentally ill," and come under the provisions of sections 59-2901 to 59-2941. It therefore follows that the probate court records of the mental proceedings of such persons are privileged and should be disclosed only as provided for by 59-2931; however, those proceedings pertaining to conveyances of real estate made by guardians of the estates of persons previously adjudged insane should be open to public inspection. (See sections 59-214 and 58-2804.)

JKS

LETTER, February 3, 1966, to Mr. Robt. H. Meyer, Jewell County Attorney, Mankato, Kansas.

Re: SAME—*Disclosure by Abstractors of Privileged Information*

In your letter of February 1, 1966, you have asked for a clarification of our letter issued November 29, 1965, addressed to Mr. R. L. Carrier, Vice-chairman of the Abstracters' Board of Examiners. The specific question of which you inquire is:

"Does the Probate Judge have the duty to index proceedings pertaining to mentally ill persons according to the name of the subject of such proceedings in the general index in his office."

In your letter, you cited K. S. A. 1968 Supp. 59-212 which relates to the duties of the probate court and which states in part as follows:

"The following books shall be kept by the probate court: . . . (3) A general index, in which files pertaining to estates of decedents shall be indexed under the name of the decendent, those pertaining to guardianships under the name of the ward, those pertaining to conservatorships under the name of the conservatee, *those pertaining to mentally ill persons under the name of such person,* those pertaining to adoption of children under both the name and adopted name of the child. After the name of each file shall be shown the file number, the book and page of the appearance docket in which the documents pertaining to such file are listed, and the date of filing of the first document." (Emphasis added.)

We read the language quoted above to specifically require the probate judge to maintain in the general index a notation relating to proceedings pertaining to mentally ill persons under the name of such person. This is true despite what we stated in our earlier letter that the probate court cannot divulge the contents of his records. We trust that this will clarify any misunderstanding which may have resulted from our earlier opinion.

KCG

LETTER, November 6, 1968, to the Honorable Jerry L. Mershon, Riley County Probate and Juvenile Judge, Manhattan, Kansas.

Re: SAME—*Access to Mental Illness Case Records, Denial by Probate Judge*

Your letter of November 1, 1968, inquired of this office whether K. S. A. 1967 Supp. 59-2931 authorizes a probate judge to deny access to mental illness case records on file with the probate court to title abstracters.

K. S. A. 1967 Supp. 59-2931 provides in pertinent part:

"The probate court, hospital or medical records of any 'patient' or former 'patient' that are in the possession of any probate court, 'psychiatric hospital,' 'general hospital' or 'other facility for "care or treatment"' shall be privileged and shall not be disclosed. . . ."

There is no provision in this section or in the encompassing act on the "Care and Treatment of Mentally Ill Persons" which authorizes title abstracters to have access to the probate court's records on "patients" or former "patients," as defined in K. S. A. 1967 Supp. 59-2902.

In contrast to the foregoing statute, K. S. A. 58-2804 provides in pertinent part:

"For the purpose of operating such licensee's business of abstracting and the compiling, posting, and keeping up of abstract books necessary for the proper conduct of said business such licensee shall have free access to the county records of the several county offices. . . ."

In determining which statute is to prevail in this matter, we note that K. S. A. 58-2804 is the earlier of the two statutes and provides only general statutory authorization of access to county records. Therefore, following the rule of statutory construction that a later statute prevails over an earlier statute and a specific statute prevails over a general statute, it is our opinion that K. S. A. 1967 Supp. 59-2931 controls in this matter and prohibits the release of information on mental illness case records on file in the probate court.

This opinion is in consonance with K. S. A. 1967 Supp. 58-2802 which, in dealing with the registration, licensing and bonding of abstracters, provides in pertinent part:

"*Provided further,* That it shall not be necessary to show therein [referring to any abstract title] any privileged or confidential document or proceeding which is not open for inspection on file or of record in the probate court and a failure so to show said matters shall not be deemed incompleteness, imperfection or error on the part of those compiling such abstract, nor shall the abstracter be held liable on his bond. . . ."

Further, we find no rule of statutory construction which would limit the effectiveness of the confidential character of mental illness

records under K. S. A. 1967 Supp. 59-2931 to those records coming into existence after the effective date of the act. It is our opinion that the statute in question applies to all records of mental illness patients or former patients on file in the possession of the probate court. However, of course, this protection does not extend to those immediate records pertaining to the conveyance of real estate made by conservators.

LETTER, January 29, 1969, to Mr. R. B. Barefield, Ottawa County Attorney, Minneapolis, Kansas.

Re: SAME—*De facto Judge*

You have outlined in your letter dated December 26, 1968, certain facts relating to the office of Judge of the Probate Court of Ottawa County, Kansas. On July 22, 1968, Governor Docking appointed Mr. Bob Humpert to fill the vacancy caused by the death of Judge Marcus Henry. This appointment was made in accordance with K. S. A. 59-206. Mr. Humpert was defeated in the November 1968 general election by Aline Funk who announced on November 12, 1968, that she was the duly elected judge by virtue of K. S. A. 25-314 and was prepared to take over the office and filed her bond and oath of office. You further state that Judge Humpert surrendered the office without question and Judge Funk served as Probate Judge since November 12, 1968. You ask whether the acts of Judge Funk since taking office can now be attacked collaterally.

We agree that K. S. A. 59-206 is controlling over K. S. A. 1968 Supp. 25-314 in this instance, and think that it is clear that Judge Humpert could have remained as Judge of the Probate Court of Ottawa County until January 13, 1969.

A *de facto* judge may be defined as one who occupies a judicial office under some color of right, and for the time being performs its duties with public acquiescence, though having no legal right to the office. There could be no question but that the acts of Judge Funk as a *de facto* judge cannot now be attacked collaterally. This principle has been upheld by our Supreme Court in the case of *State v. Roberts*, 130 Kan. 754 (1930), cited in your letter, and later recognized in *Stawitz v. Nelson*, 188 Kan. 430 (1961). We feel that the general requisites for a *de facto* judge have been met in this instance because there is an office to which Judge Funk is claiming title, she is in possession of the office, and there is a vacancy in the office by virtue of the actions of Judge Humpert and his statement that he had no desire to return to the office.