640323.1

DIVORCE: Default Judgment – requires only payment of $4.00 default judgment fee under § 2528(5) of R.J.A. 1963.

No. 4222 March 23, 1964.

Mr. Wayne Richard Smith
Prosecuting Attorney
Emmet County
Petoskey, Michigan

You have requested my opinion on the question whether a divorce taken *pro confesso* requires only the payment of a $4.00 default fee under Act 240, P.A. 1963, and does not require payment of either a trial fee as specified in R.J.A. 600.2528(4) or a judgment fee as specified in R.J.A. 600.2528(6).

Act 240, P.A. 1963, amending certain sections of Act 236, Public Acts of 1961 (R.J.A. 1963) including Section 2528(5) provides in pertinent part as follows:

> "(4) For each trial before a court of record, with or without a jury, the plaintiff shall pay to the clerk of the court the fee of $5.00. The clerk shall pay such trial fees into the county treasury, to apply to the credit of the general fund.
>
> "(5) Before the entry of any final judgment by default in pleading in an action without a jury or by consent without trial, or the entry of a judgment against a garnishee defendant upon a justice's transcript, or upon the entry of a judgment on an award from any board or referee upon whose award the law permits the entry of judgment, there shall be paid to said clerk the sum of $4.00.
>
> "(6) Before the entry of any final judgment in an action wherein trial has been had, or where a jury is called to render a verdict upon default in pleading, there shall be paid to said clerk the sum of $5.00."

G.C.R. 728.2 governs the handling of default cases relating to domestic relations. This rule provides that no judgment of divorce may be entered of course by the default of the defendant but that every such cause shall be heard in open court on proofs taken except as otherwise provided by statute or court rule. It is further provided that defaults (or *pro confesso*) cases in domestic relations matters are governed by the practice established in G.C.R. 520 which requires entry of default prior to entry of judgment, and which provides for the setting aside of a default upon good cause shown, before further proceedings.

As you point out, the entry of judgment by default of *pro confessor* in divorce action does not preclude the taking of testimony by the court, but such testimony is taken under *pro confesso* or default procedures; that is, such testimony is not taken on an adversary basis but rather on an inquisitorial basis to ascertain whether a decree of divorce should be granted. Where the defaulting spouse wishes to be heard, he may do so as provided by statute and under the case law.[1] Where a previously defaulted case is to be handled

[1] C.L.S. '61 § 552.40; M.S.A. 1961 Cum. Supp. § 25.116. And see, for example, *Meier v. Meier*, 362 Mich. 653 (*pro confesso* decree set aside for failure of proper service on wife).

on an adversarial basis, it is taken off the *pro confesso* docket and handled on a regular trial docket under Rules 501.2 and 507, rather than as *pro confesso.*

The word "trial" is defined by *Black's Law Dictionary* as the judicial consideration of *contested* issues of fact or law. No divorce case is placed upon the *pro confesso docket* unless there has been entry of default, which is to say that no case is placed on or remains on the *pro confesso* docket unless the record shows there are no contested issues.

See *Crane v. Reader,* 28 Mich. 527, 535, defining trial as the actual litigation of the merits in an action at law as distinguished from debate on the merits in a case in equity. Divorce cases sound in equity as set forth by statute.

From the precise language of Act 240, P.A. 1963, at Section 2528(5), it appears that the entry of a final judgment of divorce in a defaulted or *pro confesso* divorce case is governed by the requirement that there shall be paid to the court the sum of $4.00. Being governed by the provisions of subparagraph (5), it is therefore not governed by the provisions of (4) and (6) unless and until it has been removed from the *pro confesso* docket and placed upon a trial docket.

FRANK J. KELLEY,
Attorney General.

640323.2

FIRE DEPARTMENT: Sick leave.

Personnel regulations differentiating as to city employees between firemen and nonfiremen in debiting employees' accrued sick leave held invalid classification as established by the charter of the city of Saginaw.

No. 4310 March 23, 1964.

Hon. James H. Karoub
State Representative
The Capitol
Lansing, Michigan

You have addressed an inquiry to this office respecting the city employee sick leave provisions set forth in the 1938 Personnel Manual (your copy—1961 Revision) of the city of Saginaw, Michigan. The sick leave provisions are found at Section 4-5 of the manual and the part pertinent to your inquiry is found at Section 4-5.1 and reads as follows:

> "Each permanent full-time salaried employee may accumulate sick leave at the rate of ten (10) working days per year, except firemen on duty an average of sixty-three (63) hours per week, who shall accumulate sick leave at the rate of ten (10) calendar days per year. All such employees, other than firemen, shall have their accumulated sick leave reduced by one day for each working day of approved absence due to illness. Firemen shall have their accumulated sick leave reduced by one day for each calendar day of approved absence due to illness, beginning with the first duty day of absence, including each