

October 14, 1994

OPINION NO. 94-073

The Honorable Thomas E. Ferguson
Auditor of State
P.O. Box 1140
Columbus, Ohio 43266-0040

Dear Auditor Ferguson:

You have requested an opinion concerning the Uniform Management of Institutional Funds Act ("UMIFA") and its application to the Ohio Veterans' Children's Home ("the Home"). Your questions are these:

1. Is the Ohio Veterans' Children's Home considered an "institution" for purposes of the UMIFA?
2. If so, may only donations be invested pursuant to the UMIFA or may all public moneys received by the Home be invested pursuant to the UMIFA?

The Uniform Management of Institutional Funds Act (UMIFA)

The UMIFA is a proposed set of statutory provisions adopted in 1972 by the National Conference of Commissioners on Uniform State Laws. Unif. Mgmt. of Institutional Funds Act, 7A U.L.A. 705 (1985). Its general purpose is to provide the various states with standard provisions governing the investment authority of eleemosynary institutions, particularly colleges and universities. The provisions of the UMIFA permit the prudent use of appreciation in invested funds, grant specific investment authority and the authority to delegate investment decisions, provide a standard of business care and prudence for the exercise of duties, and establish a method of releasing restrictions on the use of funds or selection of investments by donor acquiescence or court action. Unif. Mgmt. of Institutional Funds Act, Prefatory Note, 7A U.L.A. 706-09 (1985).

Ohio adopted its version of the UMIFA in 1975 and codified it in R.C. 1715.51-.59. *See* 1975-1976 Ohio Laws, Part I, 532 (Am. S.B. 171, eff. Nov. 26, 1975). Ohio's version differs in a number of respects from the Uniform Act. In particular, the UMIFA applies to institutions that are operated "for educational, religious, charitable, or other eleemosynary purposes," *see* Unif. Mgmt. of

Institutional Funds Act §1(1), 7A U.L.A. 712 (1985), while Ohio's provision encompasses only "educational or religious purposes," *see* R.C. 1715.51(A).

The Ohio Veterans' Children's Home Is Not an "Institution" for Purposes of R.C. 1715.51-59

For purposes of Ohio's UMIFA provisions, R.C. 1715.51 defines "[i]nstitution" to mean "an incorporated or unincorporated organization organized and operated exclusively for educational or religious purposes, or a governmental organization to the extent that it holds funds exclusively for either of these purposes." R.C. 1715.51(A). The Ohio Veterans' Children's Home is a governmental organization whose responsibilities include educational functions. *See* R.C. 5909.01 (the basic duties of the Home are to "care for and educate children of deceased and disabled veterans and children of Ohio residents who are unable to provide support and education for their children"); R.C. 5909.02, .05-.06. To the extent that the Home holds funds exclusively for educational purposes, it would appear to be an institution for purposes of R.C. 1715.51-.59.¹ The Home cannot come within the definition of "institution," however, because it does not "hold" funds in the sense in which that word is used in R.C. 1715.51-.59.

A. Meaning of "Hold"

The word "hold" is not defined for purposes of determining what constitutes an "[i]nstitution" under R.C. 1715.51(A). "Hold" is a word that is susceptible of a variety of meanings, depending upon the context and purpose of the statute. *See* 1990 Op. Att'y Gen. No. 90-044.² As

¹ Whether particular funds are held exclusively for educational purposes in accordance with R.C. 1715.51(A) is a question of fact. Funds that are donated for the general purposes of the Ohio Veterans' Children's Home, however, are not held exclusively for educational purposes because the Home's purposes are not exclusively educational. *See, e.g.,* R.C. 5909.01, .13-.16. *See generally* R.C. 5909.06(B) ("[t]he board of control [of the Ohio veterans' children's home] and the board of education of the Xenia city school district shall jointly study the feasibility of all children residing at the home attending the schools of the school district beginning in the 1995-1996 school year").

² 1990 Op. Att'y Gen. No. 90-044 states, in part:

The word "held" is susceptible of a variety of meanings, depending upon the context in which it is used. *See, e.g.,* R.C. 1301.01(T) ("_holder_ means a person who is in possession of a document of title or a certificated instrument or an investment security drawn, issued, or indorsed to him or to his order or to bearer or in blank"); *Gregory v. Gregory*, 343 Ill. 630, 643, 175 N.E. 804, 809 (1931) ("the word _held_ has no primary or legal technical meaning and ... the meaning to be given to the word is determined largely by the connection in which it is used;... it has been held that the word _having_ or _hold,_ as to property, imports ownership and time of ownership..."); *Black's Law Dictionary* 657-58 (5th ed. 1979) (including the following definitions of the word "hold": "1. To possess in virtue of a lawful title;... 9. To keep; to retain; to maintain possession of or authority over"); *Webster's New*

used in the UMIFA, the concept of holding funds applies to the entity that has custody of the funds and power to invest them. R.C. 1715.51 defines an "[i]nstitutional fund" as a fund "held by an institution for its exclusive use, benefit, or purposes," excluding a fund "held for an institution by a trustee that is not an institution." R.C. 1715.51(B). The investment authority of R.C. 1715.54 authorizes "the governing board of an institution" to invest and reinvest institutional funds in various types of property, "subject to any specific limitations set forth in the applicable gift instrument or in the applicable law other than law relating to investments by a fiduciary." R.C. 1715.54. Other provisions permit the governing board of an institution to delegate its authority to act in the investment and reinvestment of institutional funds, again subject to provisions of the applicable gift instrument or applicable law, *see* R.C. 1715.55, or to "appropriate for expenditure for the uses and purposes for which an endowment fund is established up to fifty per cent of the net appreciation, realized and unrealized, in the fair value of the assets of an endowment fund over the historic dollar value of the fund," subject to a standard of prudence or a contrary intention of the donor, R.C. 1715.52; *see also* R.C. 1715.53. The provisions of the UMIFA thus clearly contemplate that the governing board of an institution will have direct authority to make investments.

B. The Ohio Veterans' Children's Home Has No Authority to "Hold" Funds as that Term is Used in R.C. 1715.51(A)

Statutory provisions governing the Home appear in R.C. Chapter 5909. The Home is under the charge of the Board of Control, which consists of the Superintendent of Public Instruction, the Director of Human Services, the Director of Youth Services, and two appointed members representing veterans. *See* R.C. 5909.02. The Board of Control has the power to select and employ personnel, to admit and support children and provide for their education, to purchase supplies, and to

World Dictionary 668 (2d college ed. 1978) (defining "hold" to mean "to have and keep as one's own; have the duties, privileges, etc. of; own; possess... [to *hold* shares of stock...]"). An examination of the usage of "held" in R.C. 145.09, together with related statutes, suggests that securities may be "held" in the name of the [Public Employees Retirement] Board or its nominee even though they are registered in the name of Cede & Co.

Op. No. 90-044 at 2-186.

carry out related activities. *See* R.C. 5909.03-.16. The provisions of R.C. Chapter 5909, however, do not grant authority for the Home or its Board of Control to accept and invest funds that are donated to the Home. *Compare, e.g.,* R.C. 3345.16 (authorizing the board of trustees of a state college or university to receive, hold in trust, and invest moneys received as donations).

The authority for the Home to accept and benefit from donations arises, instead, from the following language:

The state; a county, a township, or a cemetery association or the commissioners or trustees of a county, township, or cemetery association; a municipal corporation or the legislative authority, a board, or other officers of a municipal corporation; and *a benevolent, educational, or correctional institution*, wholly or in part *under the control of the state*, or the board of directors, trustees, or other *officers of the institution may receive by gift, devise, or bequest moneys, lands, or other properties* for their benefit or the benefit of any of those under their charge *and may hold and apply the moneys, lands, or properties according to the terms of the gift, devise, or bequest.*

R.C. 9.20 (emphasis added). The Home is a benevolent or educational institution under the control of the state, *see* R.C. Chapter 5909, which is thus authorized to receive moneys, lands, or other properties and "hold and apply the moneys, lands, or properties according to the terms of the gift, devise, or bequest." *Id.*

The language of R.C. 9.20 clearly authorizes the Home to accept donations. It does not, however, relieve the members of the Board of Control of their statutory duty to pay to the Treasurer of State any moneys received on behalf of the Home. *See* R.C. 9.38 ("[a] state officer, employee, or agent shall pay to the treasurer of state all public moneys received by him as required by rule of the treasurer of state adopted pursuant to [R.C. 113.09]"); R.C. 113.08 ("[e]xcept as otherwise provided by law, every state officer, employee, and agent shall, at the times and in the manner prescribed by rule of the treasurer of state, pay to the treasurer of state all money, checks, and drafts received for the state, or for the use of the officer, employee, or agent, from taxes, assessments, licenses, premiums, fees, penalties, fines, costs, sales, rentals, or otherwise"); R.C. 5705.10 (revenue derived from a source other than the general property tax must be paid into the appropriate fund).

It has been firmly established that moneys received by public officials as donations for the operation of public facilities are public moneys that must be deposited and invested as provided by statute. *See, e.g.,* 1985 Op. Att'y Gen. No. 85-085; 1983 Op. Att'y Gen. No. 83-055. If a particular governmental entity has statutory authority itself to hold and invest donations that it receives, it may do so. *See, e.g.,* R.C. 3345.16; Op. No. 83-055. *See generally, e.g.,* 1992 Op. Att'y Gen. No. 92-054; 1992 Op. Att'y Gen. No. 92-030 at 2-117 n.9; 1992 Op. Att'y Gen. No. 92-025; 1987 Op. Att'y Gen. No. 87-027. If a particular governmental entity does not have statutory authority itself to invest and hold moneys that it receives as donations, the moneys must be paid to the appropriate treasurer for deposit and investment. *See, e.g.,* Op. No. 85-085. *See generally* 1948 Op. Att'y Gen. No. 3269, p. 273.

The Home has no authority in addition to R.C. 9.20 that might permit it to hold its own investments. As discussed above, the provisions of R.C. 9.20 do not authorize the Home to invest funds without following procedures requiring payment to the Treasurer of State. *See, e.g.*, Op. No. 85-085 (authority of a board of education to accept gifts does not exempt it from requirement of R.C. 9.38 that moneys be paid into the treasury); *see also Christy v. Commissioners of Ashtabula County*, 41 Ohio St. 711, 718 (1885) (finding that R.S. 20, predecessor to R.C. 9.20, authorized the county commissioners to accept a devise or bequest and other statutes made it their duty "to place county money, that comes to their custody, in the treasury"); 1918 Op. Att'y Gen. No. 1076, vol. I, p. 414 at 414 (syllabus) ("[a] bequest _to the state of Ohio_ should be paid into the state treasury to the credit of the general revenue fund"). *See generally* 1993 Op. Att'y Gen. No. 93-056.³ Pursuant to R.C.

³ The conclusion that R.C. 9.20 does not, in itself, provide authority for the Ohio Veterans' Children's Home to invest donated funds without following procedures requiring payment to the Treasurer of State is supported by the fact that certain existing statutes expressly authorize specific public entities to hold and invest donated moneys. For example, R.C. 3345.16 authorizes the board

9.38, R.C. 113.08, and R.C. 5705.10, donations received by the Home must be paid to the Treasurer of State for deposit and investment. Therefore, notwithstanding the language of R.C. 9.20 authorizing the Home or its Board of Control to "hold" gifts, the Home cannot be considered an institution for purposes of R.C. 1715.51-.59 because its Board of Control has no authority to hold and invest donated moneys.⁴

of trustees of a state college or university to receive donations, hold them in trust for the use of the college or university, invest and manage trust funds, and hold title to investment properties in trust, rather than vesting the properties in the state. *See also, e.g.*, R.C. 5101.13 (Department of Human Services). If R.C. 9.20 authorized state officials to invest donations directly instead of paying them to the Treasurer of State, there would be no need for such statutory provisions. *Cf., e.g.*, R.C. 901.04(A) (creating in the state treasury an agro Ohio fund to receive donations made to the Department of Agriculture); R.C. 1501.01 (authorizing the Director of Natural Resources to accept and expend gifts under the terms set forth in R.C. 9.20). *But see generally, e.g., Scott v. Trustees of Marion Township*, 39 Ohio St. 153 (1883) (finding that a board of township trustees had full power to manage and invest property received pursuant to R.S. 20, predecessor to R.C. 9.20).

⁴ Moneys that are paid to the Treasurer of State, whether they are in the state treasury or in a contingent or custodial account, are subject to statutory investment restrictions. *See* R.C. 135.01(K) ("[p]ublic moneys" means all "moneys in the treasury of the state ... or moneys coming lawfully into

the possession or custody of the treasurer of state"); R.C. 135.17; 2 Ohio Admin. Code 113-2-01; 1989 Op. Att'y Gen. No. 89-094. *See generally, e.g.,* 1987 Op. Att'y Gen. No. 87-049; 1985 Op. Att'y Gen. No. 85-085. The UMIFA has as its goals to clarify the investment authority of governing boards of institutions and to make the standards governing those boards more uniform and reasonable. *See* Unif. Mgmt. of Institutional Funds Act, Prefatory Note, 7A U.L.A. 706-09 (1985); Ohio Legislative Service Commission, *Summary of 1975 Enactments January-October*, 127-29 (1975) (Am. S.B. 171, which enacted Ohio's version of the UMIFA). The UMIFA does not seek to modify the investment authority of the Treasurer of State and it should not be construed to do so.

Conclusion

In light of the analysis set forth above, it is unnecessary to address your second question. It is, therefore, my opinion, and you are advised, that the Ohio Veterans' Children's Home is not an institution for purposes of Ohio's Uniform Management of Institutional Funds Act, R.C. 1715.51-.59.

Respectfully,

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Attorney General

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Auditor of State
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SYLLABUS:

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