

201.

BOARD OF EDUCATION, TRUSTEE, RECORD OF PROCEEDINGS EARMARKING TRUST FUNDS — MEMBER OF BOARD, WITHDRAWAL FROM TAKING PART, CANNOT, WHEN—LIABILITY OF MEMBER.

SYLLABUS:

1. *Where a board of education has accepted any trust to be administered by it, the record of proceedings provided for in Section 4754, General Code, must show: that, each and every one of the trust funds are dealt with and kept separate and distinct from other moneys of the board of education; that, there is a "proper accounting" of each trust fund; that, each trust is distinctly earmarked by its own appellation; and that, the trust, all securities and any other property belonging to any one of the trusts, are held in the name of the board of education, as trustee.*

2. *It is not necessary to keep the transactions of the board of education in regard to administering such trusts separate and apart from the record of proceedings of the meeting as is provided for in Section 4754, General Code. Any transaction in regard to administering the trusts should be transacted at a regular or special meeting of the board of education. Approval of such transactions should be by the members of the board of education acting as members of the board.*

3. *A member of the board of education can not withdraw from acting or taking part in any transaction concerning administering such trusts. A member may refuse to vote on such a transaction. Such refusal, however, does not lessen the liability of the member.*

COLUMBUS, OHIO, March 3, 1937.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN: This will acknowledge receipt of your recent communication which reads as follow:

"We are enclosing herewith a letter from the clerk of the Board of Education of Toledo City School District in which your opinion is requested upon four questions stated therein, with reference to certain bequests to Toledo City Board of Education.

Attached to said letter are copies of excerpts from the Will of E. D. Libbey, and transcript from the Minutes of the board

of education in connection with the use of the proceeds of these bequests.

You are respectfully requested to furnish this department your opinion upon the questions submitted in the said clerk's letter."

The letter addressed to you from the Clerk of the Board of Education of Toledo City School District containing the questions that I am requested to answer, is as follows:

"Enclosed find transcript from the minutes of the Board of Education from May, 1927, to May, 1935, inclusive, relative to Trust Funds. Also, transcript from that portion of the Will of E. D. Libbey bequeathing to the Board:

\$200,000 for the E. D. Libbey Scholarship Fund

100,000 for the E. D. Libbey Teachers' Scholarship Fund

15,000 for the E. D. Libbey High School Library Fund.

Since the receipt of the Libbey funds, the board has received various small bequests most of which are for the benefit of the crippled children.

The board, at its meeting on January 4th, voted unanimously to request an attorney general's opinion on the following questions:

1. Should the board continue handling these trust funds as now set up—that is as the board of education?

2. Should the board act merely as trustees of these funds, and all actions pertaining to same be approved by the board members as trustees, the minutes to be kept separate and apart from board transactions?

3. If the latter method is the proper procedure will it not be necessary for the board to pass a resolution setting forth the reason for removing the record of all future transactions from the minutes of the board, also, set up a plan for transacting business in the future?

4. If the board members act as trustees only, may an individual member of the board withdraw from such trusteeship?

A prompt opinion on the above questions will be greatly appreciated."

The "excerpts from the Will of E. D. Libbey and transcript from the minutes of the board of education" referred to in your letter are too lengthy to be copied verbatim herein, therefore I shall set forth only

such portions of the facts as seem to me to be pertinent to the questions raised.

By the terms of the Will of Edward Drummond Libbey there were given and bequeathed "unto the Board of Education of the City School District of the City of Toledo, in Lucas County, Ohio, and unto its successor and successors" three separate bequests, as follows: A students' scholarship fund of \$200,000, a teachers' scholarship fund of \$100,000 and a Libbey High School library fund of \$15,000. The conditions and stipulations of each of the three bequests are the same with the exception as to the amounts and objects of the bequests. The amounts and objects of the bequests being immaterial to the questions herein asked, I think it is therefore only necessary to set forth the provisions of one of the bequests, which reads as follows:

"Item XX.

\$200,000 — *THE EDWARD DRUMMOND LIBBEY SCHOLARSHIP FUND.*

From the rest, residue and remainder of my estate I give and bequeath unto the Board of Education of the City School District of the City of Toledo, in Lucas County, Ohio, and unto its successor and successors, the sum of Two Hundred Thousand Dollars (\$200,000) as a perpetual endowment, to be known and designated 'The Edward Drummond Libbey Scholarship Fund,' the capital thereof to be held, managed controlled, invested and reinvested by it and them separate and distinct from all other property, and the income therefrom to be divided each year into equal parts as near as may be of not more than Three Hundred Dollars (\$300) each, to be designated 'Edward Drummond Libbey Scholarship,' and to be awarded, respectively to worthy and ambitious students residing in said City School District of said City of Toledo, desiring to avail themselves of courses in mechanical or fine arts or to obtain a technical, as distinguished from an academic education, in the schools of said School District, who would otherwise, because required by their earnings to contribute to the support and maintenance of themselves or of those dependent upon them, be compelled to abandon, in whole or in part, their studies; the recipients of such scholarships to be designated by a majority vote of a Commission consisting of the president of said Board of Education and its successors, the superintendent of schools of said City Schools District and its successors, and the president of the Board of Trustees of said The Toledo Museum of Art and its successors, the amount of

each scholarship to be paid by said Board of Education and its successors, upon the order of a majority vote of said commission to or for the use of the recipient thereof in such installments and at such times as said commission may from time to time determine, but only while the recipient shall continue to prosecute his or her studies to the approval of said commission; provided that a temporary cessation of studies, because of physical disability, shall not disentitle a recipient to payment thereof. Such commission may adopt and, at its discretion, change rules respecting the standards of scholarship and other qualifications of recipients of such scholarships, the amount and times of payments of installments thereof, and such other matters as it shall deem desirable to effectuate the purpose of this bequest for its own government and for the performance of its duties;"

The minutes of the Board of Education contain proceedings in regard to a "Swayne Fund for Crippled Children" and a "Dorothy Tester Memorial Fund." The "transcript from the minutes of the Board of Education from May, 1927, to May, 1935, inclusive," contains the record of the proceedings and transactions that have been taken by said board of education in regard to the acceptance and handling of trust funds which have been bequeathed to said board of education. These proceedings in regard to the trust funds are incorporated in the record of the proceedings of the special and regular meetings of said board of education. The minutes do not show that these trust funds are held in the name of the board of education, trustee. Each trust fund is distinctly earmarked by its own appellation, for example, "\$200,000 Edward Drummond Libbey Student Scholarship Fund."

An opinion in regard to this same Will was rendered by a former Attorney General in Opinions of the Attorney General, 1928, Volume III, page 2143. A reading of that opinion will show that your first question was answered therein. At page 2146, it was said:

"It has, it is true, accepted certain moneys for certain specified purposes. It has agreed to administer for the benefit of the deserving students the fund in question and in the administration of the fund the board owes exactly the same duties as any other testamentary trustee."

It was further stated on pages 2147 and 2148:

“In the present instance the intention of Mr. Libbey was clearly to give to the board of education the sole management and control of the fund in question with respect to its investment and reinvestment and he specifically requires that the funds be kept separate and distinct from all other property. * * * In reaching this conclusion I am not unmindful of the provisions of Section 5625-9, which requires the establishment of a separate fund for moneys held in trust. This provision should, of course, be followed and the books of the board of education should accurately reveal the condition of the trust in question. This is in no wise inconsistent with the terms of the will, but is merely a mandate requiring proper accounting for the terms. In the absence of any statutory provision it would follow as a matter of good business practice and proper fulfillment of the duties of trustees that such accounts be kept.”

At page 2145 it was stated:

“Mention is also made of Section 5625-9, General Code, enumerating the various funds which shall be established by each subdivision, among which is (i) in the following language:

(i) A trust fund for any amount received by a subdivision in trust for any lawful purpose.”

An examination of the “Transcript from the Minutes of the Board of Education of the Toledo City School District” shows: that, at the time the board of education received the trust funds from the Executors of the Edward Drummond Libbey Estate it set up the \$200,000 Edward Drummond Libbey Students’ Scholarship Fund, \$100,000 Edward Drummond Libbey Teachers’ Scholarship Fund, and \$15,000 Edward Drummond Libbey High School Library Fund” and placed each fund in a separate savings account in the Security Savings Bank and Trust Company; that, thereafter securities were purchased with the moneys in each respective fund and the identity of each fund was retained as the “Edward Drummond Libbey Students’ Scholarship Fund, the Edward Drummond Libbey Teachers’ Scholarship Fund, and the Edward Drummond Libbey High School Library Fund”; that an “income account” was started in the Security Savings Bank and Trust Company for each of the three respective funds; and that, the same procedure was taken in the creation of the “Swayne Fund for Crippled Children” and “Dorothy Tester Memorial Trust.”

It is further shown by the "Transcript of the Minutes of the Board of Education from May, 1927, to May, 1935, inclusive" as follows: that each and every one of the trust funds are dealt with and "kept separate and distinct" from other moneys of the board of education; and that, assuming all figures and the entire set up of investments contained in said minutes, are correct, the minutes "reveal the condition" of each trust fund and show a proper account for each trust fund. In my opinion this is in conformity with the procedure outlined in the above mentioned opinion of a former Attorney General. However, this is not all that is necessary.

Each and every trust must not only be distinctly earmarked by its own appellation, but it must be held in the name of the Board of Education of the Toledo City School District, Trustee. The minutes fail to show that this was done at the time the funds were received and placed in a savings account in the Security Savings Bank and Trust Company. It is not shown that the "income account" is held in the name of the Board of Education of the Toledo City School District, Trustees, nor that the various securities were purchased in this name. The board of education is the testamentary trustee and the law is well established that trust money or personal property of the trust estate must be held in the name of the trustee. The following appears in Ohio Jurisprudence, Volume 40, Section 143, pages 376 and 377:

"Trust money or personal property in his possession should be kept separate and not be commingled with his own, and properties of separate trusts in the same trustee should ordinarily not be commingled unless the trust instrument permits it."
(page 376.)

"Whenever the trustee purchases land for the trust, buys stock, bonds, or other securities, or opens bank deposits, he should always earmark the property by making it appear that the title has been taken in his capacity as trustee." (page 377.)

Your second question states: "Should the board act merely as trustees of these funds, and all actions pertaining to same be approved by the board members as trustees, the minutes to be kept separate and apart from board transactions?"

The Board of Education of the Toledo City School District is the testamentary trustee. The members of the board are not trustees. The board of education through the action of its members performs the functions and duties of a trustee. We find that this was also the conclusion reached in the above cited opinion of a former Attorney General. The syllabus of that opinion held:

"1. Where funds are left by will to a board of education in trust for certain purposes, with right of investment and reinvestment of the principal and the application of the income to such purposes, *such board of education functions in the capacity of a trustee* and is subject to the equitable jurisdiction of the courts with respect to the administration of such trusts." (Italics the writer's.)

At page 2148 in the same opinion it stated:

"The board is responsible as a trustee and its individual members will be held liable for the proper administration of the trust in question."

A reading of the hereinabove quoted portion of the Edward Drummond Libbey Will shows that the primary object of that testator was the establishment of a perpetual trust for certain educational purposes. He chose the board of education as the means or instrumentality for administering this trust. His intention that this trust be exercised perpetually and successively by the board of education is found in the following words of the bequest:

"unto the Board of Education of the City School District of the City of Toledo, in Lucas County, Ohio, and unto its successor and successors, the sum of . . . as a perpetual endowment."

It is reasonable to assume that the same object actuated the giving of the other bequests to the Board of Education of the City of Toledo, that appear in the minutes of said school board as "trusts."

The board of education accepted these trusts. Its power to do so has been unquestioned so far back as the famous case of *Dartmouth College vs. Woodward*, 4 Wheaton 518, in which at page 642, it was said:

"When the donors of property denote it to a charitable purpose and choose an existing, or create a new corporation as an instrument by which this purpose is to be effected, they make this instrument their perpetual representative for that purpose. These gifts were made, not indeed to make a profit for donors or their posterity, but for something in their opinion of inestimable value; for something which they deem a full equivalent for the money with which it was purchased. The consideration for which they stipulated, is the perpetual application of the fund

to its object, in the mode prescribed by themselves . . . They are represented by the corporation. The corporation is the assignee of their rights, stands in their place and distributes their bounty as they would themselves have distributed it, had they been immortal."

Its right to do so also is found in Sections 4749 and 4755, General Code, which provide as follows:

Sec. 4749. "The board of education of each school district, organized under the provisions of this title, shall be a body politic and corporate, and, as such, capable of suing and being sued, contracting and being contracted with, acquiring, holding, possessing and disposing of real and personal property, and taking and holding in trust for the use and benefit of such district any grant or devise of land and any donation or bequest of money or other personal property and of exercising such other powers and privileges as are conferred by this title and the laws relating to the public schools of this state."

Sec. 4755. "By the adoption of a resolution, a board of education may accept any bequest made to it by will or may accept any gift or endowment from any person or corporation upon the conditions and stipulations contained in the will or connected with the gift or endowment. For the purpose of enabling the board to carry out the conditions and limitations upon which a bequest, gift or endowment is made, it may make all rules and regulations required to fully carry them into effect. No such bequest, gift or endowment shall be accepted by the board if the conditions thereof shall remove any portion of the public schools from the control of such board."

By the board's acceptance of these trust funds it obligated itself to administer said trusts, so long as the board existed, *Veasi vs. McGugin*, 40 O.S. 365.

In the case of *Michael O'Neal, et. al. vs. Mary Caulfield*, 5 O. N. P., 149, it was stated:

" a trust created for a charitable purpose is not subject to the limitations of the statute, but may continue for a permanent and indefinite time."

The board of education must exercise in the same manner and mode all of its duties and powers in reference to administering these

trusts that it does in the exercise of its duties and powers conferred upon it by law in the administration of the schools. In its action in regard to the trusts, the board functioning through its members, performs its duties as trustee, while in its action in regard to school matters it acts as the Board of Education. In both cases it must act as a body politic through the acts of its members. Action can be taken only by a board of education when it acts as a board in regular or special session. The law makes no provision for it to act otherwise in any case. Therefore, any action by the board of education as trustee must be taken pursuant to a regular or special meeting of such board. This contention is clearly substantiated in the case of *Thomas McCortle vs. Bethel Bates, et. al.*, 29 O. S. 419, which states:

“The board is constituted, by statute, a body politic and corporate in law, and as such is invested with certain corporate powers, and charged with the performance of certain public duties. Their powers are to be exercised, and these duties discharged in the mode prescribed by law. The members composing the board, have no power to act as a board, except when together in session. They then act as a body or unit. The statute requires the clerk to record in a book to be provided for that purpose all their official proceedings. They have, in their corporate capacity, the title, care and custody of all school property whatever within their jurisdiction, and are invested with full power to control the same in such manner as they may think will best subserve the interest of the common schools and the cause of education.”

Section 4754, General Code, imposes upon the clerk of the board of education the mandatory duty of recording the proceedings of each meeting. This section reads as follows:

“The clerk of the board of education shall record the proceedings of each meeting in a book to be provided by the board for that purpose, which shall be a public record. The record of proceedings at each meeting of the board shall be read at its next succeeding meeting, corrected, if necessary and approved, which approval shall be noted in the proceedings. After such approval, the president shall sign the record and the clerk attest it.”

The language of this statute is clear and not susceptible of any other construction than its plain language imports that all proceedings and

actions of each meeting of the board of education must appear in the minutes. Conversely it means, that no valid proceedings or transactions of any kind can be transacted by the board unless transacted at a regular or special meeting, recorded by the clerk and approved at the next succeeding meeting.

I am unable to see any inconsistency in the board of education, at either a regular or special meeting, transacting both general business in regard to the schools and transacting matters in regard to administering these trusts. As stated above, in both cases it would be the members acting as the board of education, in the one case transacting regular school business and in the other transacting business pertaining to the trusts. In the transactions in regard to general business or in regard to the trusts, no act would be valid without the approval of a majority of members of the board of education constituting a quorum for the transaction of business. It is important to note, that either in transactions of general business or in transactions in regard to the trusts, the necessary approval by the members of the board would be in the capacity of members of the board of education and not, in the case of transactions in regard to these trusts, as individual trustees. Therefore since any transactions in regard to these trusts must be had at a regular or special meeting and there is nothing inconsistent in having such transactions taken up by the board of education as trustees along with general business and the approval by the members of the board is in the capacity of members of the board of education, in both instances, I do not see any necessity for the minutes in regard to trusts being kept separate and apart. The only mandatory duty that the law places upon a trustee in the keeping of his records is as stated in Bogert, Trusts and Trustees, Vol. 4, Section 962:

“It is the duty of the trustee to keep full, accurate and orderly records of the status of the trust administration and of all acts thereunder.”

In 40 Ohio Jurisprudence, Section 134, at page 354, it states:

“It is well settled that one of the most important duties imposed upon the trustee is that of keeping a careful account of his administration of the trust and rendering, at stated intervals, a report or account to the proper court or to the beneficiaries.”

After a careful survey of the “Transcript from the Minutes of the Board of Education” for the period of May 1927 to May 1936, in-

clusive, it is my opinion that the minutes set forth a full, accurate and orderly record of the status of the trust administration and of all acts thereunder, as the law requires of the trustee.

The answer to your second question that there is no necessity for keeping the minutes in regard to trusts, separate and apart, eliminates the answer to your third question.

However, I wish to make this observation that there is no provision in the law that prevents the minutes in regard to the transactions pertaining to administering these trusts being kept separate and apart from the minutes of the general transaction of business of the board of education. *State of Ohio, ex rel., James A. Green, et al. vs. Robert E. Edmondson, Auditor*, 12 O. N. P. (N. S.) 577, at page 585, it was said:

“In view of the recognized practice in courts and other legal bodies of dividing up their journals into different parts so that work may be done upon all such parts at the same time, it is admitted that no inconvenience will arise by reason of a part of the journal being used by the county commissioners and part by the building commission.”

Your fourth question reads as follows:

“If the board members act as trustees only, may an individual member of the board withdraw from such trusteeship?”

It has been stated hereinabove that the board members do not act as trustees only. In any business or transaction which comes before the board of education in regard to these trusts, a member of the board can not withdraw from acting or taking part in such transactions. After an acceptance of the trust, the business of administering the same is as much the duty of the board of education as the performance of any other duty imposed upon the board by law. The board can act only through its members. There can be no withdrawal by a member except by complete resignation. A member of the board is given no discretion to choose in which matters he shall or shall not act, unless by refusing to vote on a certain transaction. However, not voting on a certain transaction in no wise affects or lessens the liability of that member. This principle of law is well settled. *Merchant vs. North*, 10 O. S., 251, which held:

“Since the duties of a commission or board involves the exercise of judgment and discretion, a meeting is necessary at

which all members shall be actually or constructively present in order that there may be a full consultation and discussion, after which each member is to exercise his judgment before acting. See also, *State ex rel, Cline vs. Trustees*, 20 O. S., 288, *McCortle vs. Bates*, 29 O. S., 419."

Specifically answering your questions, it is my opinion:

1. That these trusts should be handled as now set up, and also, the book wherein the minutes of the board of education are recorded should show that the "income account," the securities, and any other property belonging to any one of the trusts are held in the name of the Board of Education of the Toledo City School District, Trustee.

2. It is not necessary to keep the transactions of the board of education in regard to administering such trusts separate and apart from the record of proceedings of the meetings provided for in Section 4754, General Code. Any transaction in regard to administering the trusts should be transacted at a regular or special meeting of the board of education. Approval of such transactions should be by the members of the board of education acting as members.

3. A member of the board of education can not withdraw from acting or taking part in any transaction concerning administering such trusts. If a member refuses to vote on such a transaction, it does not relieve him of any liability for which the members of the board of education may become personally liable.

Respectfully,

HERBERT S. DUFFY,
Attorney General.

202.

TREASURER OF COUNTY, DELINQUENT TAX COLLECTOR,
EXPENSES WHEN—PERSONAL AUTO, USE—MILEAGE.

SYLLABUS:

The appropriation for the expense of the operation of the office of the county treasurer may not be legally used to pay the county treas-