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DISPOSITION—GIFTS—UNCLAIMED—INMATES OF STATE INSTITUTIONS—DEPARTMENT OF MENTAL HYGIENE AND CORRECTION — GIRLS' INDUSTRIAL SCHOOL — SPECIAL FUND—SUBJECT TO PROVEN RIGHT OF ANY CLAIMANT—SECTION 5119.13 RC..

SYLLABUS:

The disposition of unclaimed gifts to inmates of institutions under the control of the Department of Mental Hygiene and Correction, as authorized by Section 5119.13, Revised Code, discussed.

Columbus, Ohio, January 21, 1955

Bureau of Inspection and Supervision of Public Offices
Columbus, Ohio

Gentlemen:

Your request for my opinion reads as follows:

"In an examination of one of our State Hospitals for the mentally ill the Bureau of Inspection and Supervision of Public Offices Examiner finds that certain funds, the ownership of which is vested in the patients, have been turned over to the Superintendent of the Hospital to keep and control for such patients. In most instances these funds originated from gifts by relatives or friends to the patient, to be by him used for the purchase of various sundry items, such as candy, soft drinks, newspapers, etc., items not usually supplied by the hospital in which he is an inmate. The Superintendent holds these funds in trust for the use and benefit of the inmate. A record is kept of the funds standing to the credit of each and every one of such inmates.

"Over the years many of such patients have been discharged, some deceased, and others, for various reasons, severed their status as inmates without drawing down or being given the funds standing to such inmate's credit. A diligent search by hospital authorities has failed to find such inmates and the funds which have been left standing for many years are serving no useful purpose.

"In most of the State's institutions and hospitals there is an Industrial and Entertainment Fund, which Fund is used for many and varied purposes, such as providing materials which the inmates fashion into useful and saleable articles, and, likewise, the fund is used to provide entertainment, etc., not usually provided for by the taxpayers. Bequests, gifts, etc. are made to such fund, and, in some instances, in sizeable amounts. There is no question but what the so-called I. & E. Account accomplishes a very useful purpose in the rehabilitation work going on in these various hospitals.

"In the Hospital in which a Bureau Examiner is now making an audit he finds that by order of the Superintendent of this Hospital, unclaimed balances standing to the credit of discharged patients have been transferred from the account standing in the name of the patient, and for which fund the Hospital Superintendent acted as trustee, to the I. and E. Account when the balance has been less than $10.00, and to the Supervisor of Support Bureau when the balance has been in excess of $10.00, in

order to close out the keeping of records on the patient since he left the Hospital and to put the monies into a fund where it can be and does provide a useful function.

"However, I can find no law either under Section 5123.03, et seq. of the Revised Code (G. C. 1890-1, et seq.), or under Rev. Code, Section 5121.02, et seq. (G. C. 1815-1, et seq.), which would grant authority to a Superintendent to transfer such funds to such an I. & E. Account.

"An opinion is therefore requested as to whether or not such a transfer is legal, and if your opinion is to the effect that it is not, what disposition is to be made of this unclaimed money in view of the fact that it is impossible to locate the rightful owners, and since the amounts, in most instances, are quite small and the expense of locating the rightful claimants would in most cases exceed the value of the fund?

"The same situation prevails at the Girls' Industrial School, now being audited, and some of these balances in the inmates' accounts go back to 1915. Obviously, it is almost impossible to trace such former inmates and, in several cases, where the identity of the former inmate has been learned, the check in payment was refused since the lawful recipient preferred not to have her connection with the Girls' Industrial School publicly disclosed, which it would have been had the recipient endorsed the check."

By way of historical background, it may be noted that the practice of transferring funds as described above to the Industrial and Entertainment Fund began many years ago under the supposed authority of a resolution by the Ohio Board of Administration on December 16, 1912. Such resolution is as follows:

"Whereas a large number of accounts are being carried on the books of the State Institutions under the control of the Board of Administration showing various accounts due to individual patients who are now dead or have left the institution, and said accounts have been unclaimed and the legal owners of said accounts are unknown,

"Resolved: that the Managing Officers be and are hereby authorized to charge off all such accounts by crediting them to a separate fund to be known and used as an 'Industrial and Entertainment Fund'

"Provided that in case any of said accounts are hereafter claimed by the legal owners of the same, then the same are to be paid out of said special fund."

The legal status of the Industrial and Entertainment Fund, and of similar funds, such as the Commissary Funds, and the Entertainment and Amusement Funds, as maintained at the several state penal and benevolent institutions, has been discussed by my predecessors in Opinion No. 1994, Opinions of the Attorney General for 1921, p. 303, in Opinion No. 2439, Opinions of the Attorney General for 1928, p. 1911, and in Opinion No. 3651, Opinions of the Attorney General for 1941, p. 234. In the 1921 opinion, supra, the writer says at page 304:

> "The establishment of this fund, or other fund having the same purpose for which this fund and the commissary are maintained, finds legal sanction under the broad power assigned for the creation of the board of administration in section 1832 G. C., which declares the intent of the legislature. * * *
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> "If this fund may not be said to get a proper legal status from the general intention expressed in the creation of the board of administration, it is certainly sufficiently authorized under the provisions of the statute as found in sections 1838 and 1840 G. C. * * *."

In the 1928 opinion, supra, the first paragraph of the syllabus reads:

> "Moneys in the custody of the Matron of the Reformatory for Women at Marysville, constituting the entertainment and amusement fund for the institution, should not be deposited in the State Treasury. Said fund is a trust fund and should be held and administered as such in accordance with the terms of Section 1840, General Code."

In the 1941 opinion, supra, the writer after quoting at some length from the two prior opinions above mentioned, said, pp. 245, 246:

> "I concur with my predecessors in office in the reasoning and conclusions of the two opinions above quoted from and am of the opinion that both of the funds about which you inquire are trust funds created and maintained for the benefit of the reformatory, that is, to promote the welfare and further the betterment of the inmates of that instituiton. * * *
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> "The public has a direct and substantial interest in the well being and rehabilitation of the inmates of the reformatory and the funds in question were lawfully created by the proper public officer for this purpose. Certain it is that both upon reason and authority the funds in question are trust funds and might with propriety be called public trust funds, or trust funds tinged with a public interest, and being trust funds they may only be used for the purposes for which the trust was created."

The statutory provisions, analogous to Section 1840, General Code, now applicable to the question presented are found in Section 5119.13, Revised Code, which reads as follows:

> "The department of mental hygiene and correction shall accept and hold on behalf of the state, if it is for the public interest, any grant, gift, devise, or bequest of money or property made to or for the use or benefit of any institution, described in section 5119.05 of the Revised Code or any pupil or inmate thereof, whether directly or in trust. The department shall keep such gift, grant, devise, or bequest as a distinct property or fund, and shall invest the same, if in money, in the manner provided by law. The department may deposit in a proper trust company or savings bank any fund left in trust during a specified life or lives, and shall adopt rules and regulations governing the deposit, transfer, or withdrawal of such funds and the income thereof. The department shall, upon the expiration of any trust according to its terms, dispose of the funds or property held thereunder in the manner provided in the instrument creating the trust.
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> "The department shall include in the annual report a statement of all such funds and property and the terms and conditions relating thereto. Moneys or property deposited with officers of institutions by relatives, guardians, conservators, and friends for the special benefit of any pupil or inmate, shall remain in the hands of such officers for use accordingly. Each such officer shall keep an itemized book account of the receipt and disposition thereof, which book shall be open at all times to the inspection of the department."

It will be observed that the section just quoted, refers to a gift for "any pupil or inmate thereof" as a "trust." But whether it is a living trust, solely for the benefit of the inmate; whether it is to pass to his heirs, if any, in case of his death; whether the donor intended to retain such interest in it that a resulting trust might arise in his favor; whether it is property which, for want of any claimant, escheats to the state, are questions which might afford an excuse for an extended research into the law of trusts. The answer to those questions would depend upon the ascertainment of facts which, under the circumstances presented in your communication, would be not only exceedingly difficult but expensive, far out of proportion to the amounts involved, and in most cases absolutely unascertainable.

The whole situation as to the right of any person to these remnants of funds which have been contributed for the benefit of the inmates, is nebulous in the extreme.

We must keep in mind, too, that we are not dealing with a single gift of a substantial character, but rather with a large number of trivial remnants ranging from ten dollars down to a few cents. We may well apply to each of them the maxim "de minimus non curat lex," and seek for a practical rather than a strictly legal answer to the problem presented.

It seems almost impossible to try to work out a solution on resulting trust principles. Such trusts depend upon the *presumed* intent of the donor when there are no *tokens* showing what was the actual intent of the donor.

This becomes a mixed question of law and fact. Your inquiry does not, and I suppose cannot detail the facts and circumstances surrounding each gift from which an *intent* could be found. It seems to me that since in most cases the amount of the gift or its remnant is small, and that in all cases there is an absence of any formality, it could be said that the party making the gift intended, once and for all, to part with his entire interest in the property, to be used for the individual designated and thereafter to be used by the institution in the manner that it had been using such "left over" funds under their existing practice, that is, for the benefit of inmates generally. This, I submit, is a practical answer since, as I have already stated, the facts in each situation are not available.

Of course, the institution should attempt to locate the beneficiary, but if he cannot be located or refuses the money, then the institution should as a practical matter be permitted to use the same as it has in the past.

It is suggested that the institution should provide that all such gifts should hereafter be received by written memorandum providing for and thus expressing the intent of the parties concerning the disposal of the money in the event of the death of the beneficiary, his refusal to accept repayment, or inability to locate such beneficiary or the donor.

I cannot adopt the idea that simply because it is highly difficult and seemingly impossible to determine whether the inmate who was the beneficiary of a trust is alive or dead, or if deceased, whether he left heirs, or whether the original donor is living, or if deceased, left no heirs, therefore these small remnants should escheat to the State. In the absence of any proof or legal determination that there is no possible claimant, I do not think that the principle of escheat can be applied. When the superintendent of the institution first received this money, he had a right to hold it, and under the terms of the statute to which I have referred, he was under no

obligation to turn it in to the state treasurer's hands, even for custody. Since it was so received, nothing has happened which definitely and *positively* changes his right to retain the money so contributed.

The plan adopted by the Board of Administration as long ago as 1912, and sanctioned by forty years of administrative procedure, appears to me to be the only practical solution to the whole doubtful problem, and it has the merit of putting this fund to a substantial and beneficial use, at the same time recognizing the possible, though remote claim of someone who might establish his right to a refund.

Accordingly, without an attempt to lay down a specific ruling on the legal status of the small sums mentioned in your communication, it is my conclusion:

1. Under the terms of Section 5119.13, Revised Code, the superintendent of any institution under the control of the department of mental hygiene and correction is authorized to receive contributions by relatives or friends for the special benefit of any pupil or inmate and to retain the same in his hands for use according to the terms of the gift. Each such officer is required to keep an itemized book account of the receipt of such contribution and the disposition thereof.

2. The director of mental hygiene and correction has authority under Section 5119.01, Revised Code, to make rules as to the custody and handling by the superintendents of the several institutions under his control, of moneys contributed for the special benefit of pupils and patients; and a rule authorizing the transfer of petty unclaimed balances of any such gift to a special fund held and used by such superintendent for the comfort of the inmates generally, but subject to refund to any rightful claimant of such balance, would not be an abuse of the power of such director.

3. In order to avoid the uncertainty that may arise as to the disposition of any unused remnant of such contributions after the death or discharge of an inmate it would seem to be in the interest of efficient administration that in the future there be obtained from each such donor a statement in writing of his desires as to the use and disposition of such gift and any unused balance thereof.

4. Where, pursuant to a resolution of the Ohio Board of Administration adopted in 1912, unclaimed remnants of less than ten dollars, of gifts by friends and relatives to inmates of the charitable and corrective

institutions of the state have been placed in a special fund for the benefit of the inmates generally but subject to the proven right of any claimant to a refund of the balance belonging to him, such procedure is not unlawful so as to require a recovery under the provisions of Section 117.10 of the Revised Code.

Respectfully,
C. WILLIAM O'NEILL
Attorney General