

**OPINION NO. 80-104****Syllabus:**

1. As administrator of a bureau of support established pursuant to R.C. 2301.35, a judge is personally liable for any deficiency in funds resulting from the acceptance of personal checks that are later returned for insufficient funds or upon which payment is stopped when the disbursement of the amount of the checks has already been made to the persons to whom support payments are due.
2. Public funds may not be used to offset any deficiency in funds for which a judge is personally liable absent a specific legislative provision allowing such offset.

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**To: Anthony G. Pizza, Lucas County Pros. Atty., Toledo, Ohio**  
**By: William J. Brown, Attorney General, December 31, 1980**

I have before me your request for an opinion regarding questions from Judge June Galvin, Division of Domestic Relations of the Lucas County Court of Common Pleas, concerning the administration of a bureau of support, established pursuant to R.C. 2301.35. Your questions may be restated as follows:

1. Is the judge who is responsible for administering a bureau of support personally liable for any deficiency in funds resulting from the acceptance of personal checks that are later returned for insufficient funds or upon which payment is stopped when the immediate disbursement of those funds to the proper recipient has already occurred?

2. May the interest earned on investments be segregated and not paid into the county general fund, but held to offset any loss from such checks being returned when disbursement has already occurred?

R.C. 2301.35 provides in pertinent part:

(A) (1) Each court of common pleas shall establish, by rule, a bureau of support. The bureau of support shall be responsible for the collection of payments due under support orders. In any court of common pleas in which a division of domestic relations is established, the bureau of support shall be established and administered by the judge or administrative judge of the domestic relations division.

A bureau of support, established by a court of common pleas or by a joint board of county commissioners pursuant to division (B) of this section, may contract in writing, with the clerk of courts for the clerk to administer the bureau's obligations, under sections 2301.35 to 2301.41 of the Revised Code, to collect and disburse payments made pursuant to a support order. (Emphasis added.)

By this provision, the judge of the domestic relations division, court of common pleas, is required to establish and administer a bureau of support. The bureau is responsible for the collection of "payments" due under support orders. It appears clear from the above grant of authority that the judge of the domestic relations division of the Lucas County Court of Common Pleas is the proper administrative authority to set forth any policy regarding whether the bureau of support established in that division is to accept personal checks. However, a public officer may accept a personal check only as conditional payment, and may not bind the government if the check is not paid. Manck v. Fratz, 7 Ohio Dec. Reprint 704 (Superior Ct. of Cincinnati 1897). To determine whether such conditional payment has become absolute, the payee must deposit such check. If the bank makes payment upon demand, the check becomes absolute payment. Summit Mall, Inc. v. Guran, 7 Ohio App. 2d 53, 218 N.E.2d 637 (Summit County 1966). Of course, it would follow that, if the bank refuses to make payment upon demand, then no payment has been made by the payor. Therefore, the payor's obligation to make payment still exists, and the public official cannot be liable therefor. Manck v. Fratz.

You have, however, posed a situation in which a judge proposes to accept checks and make immediate disbursement of funds, without waiting to ascertain that payment is made upon the checks. You ask whether the judge would be personally liable for any deficiency caused by reason of a check being returned for insufficient funds or payment being stopped on the check.

R.C. 2301.36 provides in pertinent part:

(A) Upon entering a support order, the court shall, upon the request of either party or the court's own motion or when required by court rule, require that support payments be made to the bureau of support as trustee for remittance to the person entitled to receive payments, except as otherwise provided in sections 2151.49 and 3113.07 of the Revised Code.

(B) Upon entering a support order or at any time thereafter, the court may order the bureau of support to transmit the payments or make them payable to any third person that is either agreed upon by the parties and approved by the court or appointed by the court. Third persons include but are not limited to a trustee, a custodian, the guardian of the estate of the child, the county department of public welfare, county children's services board, or any appropriate social agency.

(C) Any person named pursuant to division (B) of this section is entitled to receive the support payments.

R.C. 2301.35(C) provides:

The bureau of support shall maintain records listing the date a support order was entered, the amount of any payment made under it, the date on which payments are required to be made, the names and addresses of the parties affected by the order, and the current records of payments and disbursements.

These provisions authorize the bureau, acting as trustee, to receive support payments and remit such payments only to the persons entitled to such payments. I am aware of no provision which would authorize a bureau to remit support payments to anyone other than the persons for whom they were intended, or to remit support payments prior to such time as they were received. Thus, it is not clear to me precisely where the judge will obtain funds for disbursement prior to such time as payment has been made on a particular check.

It is clear that all money paid into the bureau as support payments must be disbursed, in full, to the persons entitled to receive the payments. R.C. 2301.36. The only money which the bureau is otherwise expressly authorized by statute to collect is a fee to be paid by the obligor. R.C. 2301.35(D) states that such fee shall be used "for the administration of support orders" (emphasis added); clearly, this money was not intended to be channeled through the bureau for disbursement as support payments.

Assuming, however, that the judge has access to some funds which may be disbursed as support payments prior to such time as a particular check has cleared, I am compelled to conclude that the judge will be personally liable for any deficiency resulting if payment is not made on the check.

R.C. 117.10 provides in pertinent part:

"Public money" as used in this section includes all money received or collected under color of office, whether in accordance with or under authority of any law, ordinance, order, or otherwise, and all public officials are liable therefor. All money received under color of office and not otherwise paid out according to law is due to the political subdivision or taxing district with which the officer is connected and shall be paid into the treasury thereof to the credit of a trust fund, and there retained until claimed by the lawful owner. If not claimed within a period of five years, such money shall revert to the general fund of the political subdivision where collected. (Emphasis added.)

This provision defines "public money" as all money received or collected under color of office, and holds all public officials liable therefor. Of course a judge of the domestic relations division of a court of common pleas is a public official, see State ex rel. Leland v. Mason, 61 Ohio St. 513, 56 N.E. 468 (1900); Coyne v. State, 22 Ohio App. 462, 153 N.E. 876 (1926), and the payments received by the bureau of support administered by that judge are public money. See R.C. 2301.36 (requiring payments to be made to the bureau of support). Therefore, under R.C. 117.10 the judge administering the bureau of support is liable for the public money that comes into his hands as such official. Accord, State v. Herbert, 49 Ohio St. 2d 88, 358 N.E.2d 1090 (1976); Seward v. National Surety Co., 120 Ohio St. 47, 165 N.E. 537 (1929). That is, those public officers who, in their official capacities, have control over public funds will be held personally liable for missing public funds. See City of Youngstown v. Hindman, 66 Ohio App. 337, 38 N.E.2d 319 (Mahoning County 1939), appeal dismissed, 135 Ohio St. 579, 21 N.E.2d 863 (1939). I note in particular that a probate judge becomes the personal custodian of money which he receives in his official capacity, and is personally liable to account for the money,<sup>1</sup> unless such official is released and discharged pursuant to R.C. 131.18 or other legislative action. See State ex rel. Bolsinger v. Swing, 54 Ohio App. 251, 6 N.E.2d 999 (Hamilton County 1936).

<sup>1</sup>State ex rel. Adgate v. Meiley, 22 Ohio St. 534 (1872).

It is clear from the statutes governing a bureau of support that no one becomes entitled to receipt of support payments from the bureau unless payments for such person are received by the bureau. By permitting disbursement upon receipt of a check, the judge is essentially determining that the money has been constructively received by the bureau. If the money is not actually received, the judge has, in essence, allowed an unauthorized disbursement of funds. As noted above, a public officer is personally liable for such a disbursement. See generally 1980 Op. Att'y Gen. No. 80-074.

In regard to your question as to whether the interest earned on investments can be segregated and not paid into the county general fund, but held to offset any loss from personal checks being returned after disbursement has already occurred, I am not clear as to the "investments" to which you refer. However, I am aware of no statute or principle of law which would allow the use of public funds to offset any loss for which a judge is personally liable. See State ex rel. Bolsinger v. Swing, 54 Ohio App. 251, 6 N.E.2d 999 (Hamilton County 1936) (the legislature could relieve a public officer from liability for loss of public funds or could provide for reimbursement, but "[i]n the absence of any specific statute the law of Ohio imposed upon officers intrusted with public funds the liability of insurers of the safety of such funds").

It is, therefore, my opinion, and you are advised, that:

1. As administrator of a bureau of support established pursuant to R.C. 2301.35, a judge is personally liable for any deficiency in funds resulting from the acceptance of personal checks that are later returned for insufficient funds or upon which payment is stopped when the disbursement of the amount of the checks has already been made to the persons to whom support payments are due.
2. Public funds may not be used to offset any deficiency in funds for which a judge is personally liable absent a specific legislative provision allowing such offset.