

OPINION NO. 82-054**Syllabus:**

1. A probate court judge may not invest prepaid and unearned costs in United States Treasury Bills; rather, such costs must be held by the court or deposited as provided in R.C. 2335.25. Where such funds are deposited or invested any interest earned thereon should be paid into the county treasury to the credit of the general fund. (1965 Op. Att'y Gen. No. 65-190 and 1961 Op. Att'y Gen. No. 2720, p. 748, overruled in part.)
2. Interest earned on the deposit or investment of prepaid and unearned costs by a probate court is "public money" as defined in R.C. 117.10 for purposes of examination by the Bureau of Inspection and Supervision of Public Offices.

To: Thomas E. Ferguson, Auditor of State, Columbus, Ohio
By: William J. Brown, Attorney General, July 30, 1982

I have before me your request for my opinion concerning the disposition of interest earned on prepaid and unearned costs which have been deposited with a probate court and thereafter invested by the court. You have asked the following questions:

1. Where prepaid and unearned costs deposited in a probate court are invested by the court is the interest earned thereon "public money," as defined in R.C. 117.10?
2. Should such interest be credited to the general fund of the county wherein the court sits or distributed pro-rata to the persons who are entitled to the costs?

You have indicated that the interest has been earned by investment in United States Treasury Bills. I must, therefore, initially consider whether such investment

by a probate court is proper. The investment was made by a probate court judge acting in his capacity as clerk of the court pursuant to R.C. 2101.11 which states:

Each probate court judge shall have the care and custody of the files, papers, books, and records belonging to the probate office. He is authorized to perform the duties of clerk of his own court. He may appoint deputy clerks, stenographers, a bailiff, and any other necessary employees, each of whom shall take an oath of office before entering upon the duties of his appointment, and when so qualified, may perform the duties appertaining to the office of clerk of the court. Each appointee may administer oaths in all cases when necessary, in the discharge of his duties. (Emphasis added.)

Neither R.C. 2101.11 nor any other section in R.C. Chapter 2101 describes the duties of the clerk of a probate court, but R.C. 2303.31 states that "[t]he duties prescribed by law for the clerk of the court of common pleas shall, so far as they are applicable, apply to the clerks of other courts of record." Since a probate court is a court of record, the duties of the clerk of that court are the same as those of the clerk of a common pleas court so far as they are applicable to the probate court.

R.C. 2335.25 makes provision for money payable to courts of record and states:

Each clerk of a court of record, the sheriff, and the prosecuting attorney shall enter in a journal or cashbook, provided at the expense of the county, an accurate account of all moneys collected or received in his official capacity, on the days of the receipt, and in the order of time so received, with a minute of the date and suit, or other matter, on account of which the money was received. The cashbook shall be a public record of the office, and shall, on the expiration of the term of each such officer, be delivered to his successor in office. The clerk shall be the receiver of all moneys payable into his office, whether collected by public officers of court or tendered by other persons, and, on request, shall pay the moneys to the persons entitled to receive them.

The clerk of the court of common pleas or of the county court may deposit moneys payable into his office in a bank or a building and loan association, as defined in section 1151.01 of the Revised Code, subject to section 131.11 of the Revised Code. Any interest received upon the deposits shall be paid into the treasury of the county for which the clerk performs his duties. (Emphasis added.)

This section permits the clerk of a common pleas court and, by virtue of R.C. 2303.31, a probate court clerk to deposit moneys payable to each of their offices in a bank or building and loan association as defined in R.C. 1151.01 subject to R.C. 131.11. There is no such authority for a probate court clerk to invest such moneys in U.S. Treasury Bills.¹

I recognize the fact that the disposition of funds in accordance with prevailing custom in the business community has been sanctioned by the Ohio Supreme Court. The Court has stated, however, that such action is not permitted where the legislature has made express provision for the disposition of the funds. See *Busher v. Fulton*, 128 Ohio St. 485, 191 N.E. 752 (1934); see also 1961 Op. Att'y Gen. No. 2720, p. 748; 1961 Op. Att'y Gen. No. 2113, p. 175. According to the rule of *expressio unius est exclusio alterius* the express provision for the deposit of funds in

¹I note that an investment in U.S. Treasury Bills is permitted by R.C. 135.14. That section, however, applies only to investments or deposits made by a treasurer or governing board. The definitions of treasurer and governing board as set forth in R.C. 135.01 do not include the clerk of a probate court. Therefore, R.C. 135.14 is not applicable to this situation.

a bank or building and loan association implies that they may not be dealt with in any other manner. See Kroger v. Bowers, 3 Ohio St. 2d 76, 209 N.E.2d 209 (1965); State ex rel. Boda v. Brown, 157 Ohio St. 368, 105 N.E.2d 643 (1952); 1979 Op. Att'y Gen. No. 79-048. Therefore, a probate judge acting as clerk of the probate court has no authority to invest prepaid and unearned costs in U.S. Treasury Bills; rather, such moneys must be held by the court or deposited in a bank or building and loan association as provided in R.C. 2335.25.²

Where the correct procedure for the deposit of prepaid and unearned costs is implemented by a probate court, R.C. 2335.25 directs that the interest earned on such deposit be paid into the county treasury. That provision was added to R.C. 2335.25 by 1975-76 Ohio Laws 1452 (Am. Sub. H.B. 49, eff. Sept. 1, 1975). Prior to that time one of my predecessors had concluded that interest earned on the deposit of fees and trust funds by a common pleas court clerk accrue and should be paid to the party entitled to the principal. 1965 Op. Att'y Gen. No. 65-190. That opinion was based on the express provision for such distribution contained in R.C. 2919.02. That section was repealed, however, by 1971-72 Ohio Laws 1866 (Am. Sub. H.B. No. 511, eff. March 23, 1973). Similarly, another predecessor concluded that the interest earned on such funds when deposited by the clerk of a municipal court should be distributed along with the principal. 1961 Op. No. 2720. That conclusion was also based on R.C. 2919.02 which, as noted, was repealed in 1973. The same bill which amended R.C. 2335.25 for common pleas courts also amended R.C. 1901.31 to provide that any interest earned on the deposits made by a municipal court clerk should be paid into the city treasury.³ Am. Sub. H.B. 49. Based on the amendments to R.C. 2335.25 and R.C. 1901.31 and the repeal of R.C. 2919.02, I do not feel bound by the conclusions of my predecessors and overrule them to the extent that they are inconsistent with the views expressed herein. Therefore, I conclude that interest earned on deposits made pursuant to R.C. 2335.25 must be paid into the county treasury. Since the county treasury would have been entitled to the interest earned on the proper deposit of such funds by the probate court, it is similarly entitled to any interest earned on the unauthorized investment thereof. See 1957 Op. Att'y Gen. No. 1439, p. 758.

Once money is paid into the county treasury R.C. 5705.10 directs the fund to which it should be credited and states: "All revenue. . . from sources other than the general property tax, unless its use for a particular purpose is prescribed by law, shall be paid into the general fund." Since no provision has been made for the use of interest derived from the deposit or investment of prepaid and unearned costs by a probate court, such interest should be credited to the general fund of the county.

In your first question you have asked whether the interest earned on the investment of prepaid and unearned costs is "public money" for purposes of examinations made by the Bureau of Inspection and Supervision of Public Offices. R.C. 117.10 states that public money "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." In 1975 Op. Att'y Gen. No. 75-079 I opined that the intent of the legislature in enacting R.C. 117.10 was to subject all funds in the hands of public officials to audit by the Bureau. That conclusion was based in part upon the decision of the Ohio Supreme Court in State ex rel. Robusky v. Chisko, 17 Ohio St. 2d 1, 244 N.E.2d 478 (1969). In

² Prepaid and unearned costs may be retained by the court until they are paid to the persons entitled to receive them pursuant to R.C. 2335.25, or turned in to the county treasury pursuant to either R.C. 325.31 as "fees, costs, penalties, percentages, allowances, and perquisites collected. . . for official services," or R.C. 2335.35 as unclaimed costs.

³ R.C. 1901.31 was further amended and currently provides that interest earned on deposits by the Hamilton county municipal court should be paid into the treasury of Hamilton County. 1977-78 Ohio Laws 2874 (Am. Sub. H.B. 517, eff. Jan. 16, 1978).

that case the Court concluded that even though there was no authority for the sheriff to sell accident reports money derived from the sale thereof was subject to examination by the Bureau because such reports were available to him solely by reason of his office. Therefore, while a probate court judge has no authority to invest prepaid and unearned costs in U.S. Treasury Bills, because those costs come into his possession by reason of his position as judge, the interest earned on those investments is "public money" as defined in R.C. 117.10 for purposes of examination by the Bureau of Inspection and Supervision of Public Offices. See 1937 Op. Att'y Gen. No. 496, vol. I, p. 797 (witness fees and deposits for costs are "public moneys" for purposes of G.C. 286 (now R.C. 117.10)); 1935 Op. Att'y Gen. No. 4645, vol. II, p. 1184 (moneys held by a clerk of a municipal court which will subsequently be dispersed to private individuals may be considered "public moneys" such that a national bank may secure the deposit thereof).

Based on the foregoing, it is my opinion, and you are advised, that:

1. A probate court judge may not invest prepaid and unearned costs in United States Treasury Bills; rather, such costs must be held by the court or deposited as provided in R.C. 2335.25. Where such funds are deposited or invested any interest earned thereon should be paid into the county treasury to the credit of the general fund. (1965 Op. Att'y Gen. No. 65-190 and 1961 Op. Att'y Gen. No. 2720, p. 748, overruled in part.)
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