





Your letter indicates you are concerned that a potential conflict exists between the provisions of R.C. Chapter 4505 and R.C. 2923.36.<sup>1</sup>

The office of clerk of the court of common pleas is statutorily authorized. R.C. 2303.01 ("[t]here shall be elected quadrennially in each county, a clerk of the court of common pleas"). A clerk of a court, being a statutorily created office, has only such duties as are set forth by statute. *State v. Shaw*, 43 Ohio St. 324, 329, 1 N.E. 753, 755 (1885). Various specific duties of the clerk are listed in R.C. Chapter 2303. See, e.g., R.C. 2303.08 (clerk shall enter all orders, decrees, judgments and proceedings); R.C. 2303.09 (clerk shall file and preserve all papers delivered to him); R.C. 2303.11 (clerk shall issue writs). A clerk of a court is primarily an arm of the court, issuing its process, entering its judgments and performing duties the court itself may perform. *State ex rel. McKean v. Graves*, 91 Ohio St. 23, 109 N.E. 528 (1914). Additionally, the clerk of the court of common pleas has the duty to administer portions of R.C. Chapter 4505 regarding motor vehicle registration law. See R.C. 2303.29; *Reed v. Portage County Board of Commissioners*, 30 Ohio App. 3d 41, 506 N.E.2d 249 (Portage County 1985).

Because your request focuses on the clerk's duties to issue motor vehicle titles, it is necessary to discuss the applicable motor vehicle statutes. Any person who sells or disposes of a motor vehicle is required to deliver to the transferee a certificate of title with an assignment showing the transfer of ownership. R.C. 4505.03. Without issuance of a certificate of title, a person who acquires a motor vehicle from its owner fails to acquire any right, title, claim or interest in or to the motor vehicle. R.C. 4505.04. Application for a certificate of title must be filed with the common pleas clerk pursuant to R.C. 4505.06, and the clerk "shall issue certificates of title" pursuant to R.C. 4505.08. Liens,<sup>2</sup> mortgages and encumbrances may be noted upon a certificate of title. R.C. 4505.13; *Bill Swad Leasing Co. v. Stikes*, 571 F.2d 1361 (5th Cir. 1978) (in order to be perfected under Ohio law, a security interest in a motor vehicle must be noted on the vehicle title certificate).

The clerk of courts may be presented with a "corrupt activity lien notice." R.C. 2923.36(A) permits such filing by stating, in relevant part:

Upon the institution of any criminal or civil proceeding under

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<sup>1</sup> R.C. 2723.36 was recently amended by Sub. H.B. No. 190 (118th Gen. A. (1989) (eff. Sept. 25, 1989). R.C. 2923.36 is thereby amended by the removal of the language that has permitted the filing of a lien notice with "any other appropriate agency." On September 25, 1989 and thereafter, a corrupt activity lien notice may be filed for recording with the county recorder under 2923.36 and with the clerk of court of common pleas when the lien attaches to a motor vehicle under R.C. 4505.13. This opinion focuses on the current R.C. 2923.36. With the exception noted in footnote 5, *infra*, the discussion herein also applies to the substantive changes made by Sub. H.B. No. 190.

<sup>2</sup> The definition of "lien" is provided by R.C. 4505.01(A)(1), which states: "'Lien' includes, unless the context requires a different meaning, a security interest in a motor vehicle." R.C. Chapter 4505 does not define "security interest." R.C. 1301.01(KK), for purposes of R.C. Chapter 1301 through R.C. Chapter 1309, defines a security interest, in part, as "an interest in personal property or fixtures which secures payment or performance of an obligation." While the corrupt activity lien is not perfected pursuant to R.C. Title 13 but by R.C. 2923.36, this definition captures the common meaning of the term. See *Black's Law Dictionary* 1217 (5th ed. 1979) (security interest is defined by setting forth verbatim the definition incorporated in R.C. 1301.01(KK)). Words used in a statute and not otherwise defined are to be given their common meaning. R.C. 1.42, *State v. Dorso*, 4 Ohio St. 3d 60, 446 N.E.2d 449 (1983). A corrupt activity lien is, therefore, a "security interest" and a "lien."

section 2923.32 or 2923.34<sup>3</sup> of the Revised Code, *the state*, at any time during the pendency of the proceeding, *may file with the county recorder or any other appropriate agency a corrupt activity lien notice* in any county in which property subject to forfeiture may be located. No fee shall be required for filing the notice. The recorder or agency immediately shall record the notice pursuant to section 317.08<sup>4</sup> of the Revised Code. (Footnotes and emphasis added).

Under R.C. 2923.32(B)(3), any personal or real property in which a defendant convicted of engaging in a pattern of corrupt activity under R.C. 2923.32(A) has an interest and that was used in, derived from or realized through the corrupt activity shall be forfeited to the state. As used in R.C. 2923.32(B)(3), "personal property" means "any personal property" and includes "any interest in personal property." R.C. 2923.31(H). The term "personal property," within the definition provided in R.C. 2923.31(H), however, is not further statutorily defined. Absent such statutory definition, words generally should be accorded their common or plain meaning. R.C. 1.42; *State v. Dorso*, 4 Ohio St. 3d 60, 446 N.E.2d 449 (1983). Personal property is "everything that is subject of ownership, not coming under denomination of real estate...or any right or interest which one has in things movable." *Black's Law Dictionary* 1096 (5th ed. 1979). A motor vehicle, thus, would be properly considered personal property under both the dictionary definition and R.C. 2923.31(H). See also R.C. 5701.03 (as used in R.C. Title 57, personal property "includes every tangible thing which is the subject of ownership,...and motor vehicles registered by the owner thereof").

No Ohio statute specifies the precise procedures the clerk of courts is to apply when presented with a corrupt activity lien notice. Notation of a lien on a motor vehicle title is, however, controlled by R.C. 4505.08 and 4505.13. If there are one or more liens against a motor vehicle when a certificate of title is issued, R.C. 4505.08 requires that the clerk of courts shall issue the certificate of title in duplicate. The clerk retains one copy to be filed in the clerk's office. The other copy is required to be delivered to the holder of the first lien. The owner of the motor vehicle subject to a lien may obtain a memorandum certificate of title. R.C. 4505.12. R.C. 4505.13, which sets forth in detail the procedure which the clerk of courts must follow to note a lien on a certificate of title and on the clerk's records, states, in relevant part:

The secured party, upon presentation of the security agreement to the clerk of the county in which the certificate of title was issued, together with such certificate of title, and the fee prescribed by section 4505.09 of the Revised Code, may have a notation of the security interest made on the face of such certificate of title. The clerk shall enter such notation and the date of it over his signature and seal of office, and he shall also note the security interest and the date thereof on the automated title processing records of the clerk. The clerk shall also indicate by appropriate notation on such agreement itself the fact that the security interest has been noted on the certificate of title.

The clerk of courts, thus, must note any security interest, including a corrupt activity lien, upon the motor vehicle title records of the clerk by applying the procedures of R.C. 4505.13, to the extent applicable.

Several disparities are apparent, however, when R.C. 2923.36(A) and R.C. 4505.13 are compared. Procedural inconsistencies and ambiguities must be

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<sup>3</sup> R.C. 2923.31 through R.C. 2923.36 prohibits engaging in a pattern of corrupt activity.

<sup>4</sup> R.C. 317.08 enumerates the mandatory separate sets of records to be kept by the county recorder. R.C. 317.08(G) requires the county recorder to keep a separate set of records containing all corrupt activity lien notices filed with the recorder unless the county recorder's records are kept in an integrated set denominated "official records."

harmonized to give effect to the legislative intent of both statutes. See, e.g., *Lucas County Board of Commissioners v. City of Toledo*, 28 Ohio St. 2d 214, 277 N.E.2d 193 (1971) (arguably conflicting statutory elements are to be harmonized where possible to yield a reasonable result); *Snevely v. Lowe*, 18 Ohio 368 (1849) (if two apparently inconsistent statutory provisions may be reconciled by any fair course of reasoning, both will stand); *Fifth Third Union Trust Co. v. Peck*, 161 Ohio St. 169, 118 N.E.2d 398 (1954) (if a statute is ambiguous, the language will be construed so as to not thwart the purpose of the statute). Despite the several disparities apparent in the procedures of R.C. 2923.36 and R.C. 4505.13, the two statutes may be interpreted harmoniously.

First, while R.C. 4505.13 requires a fee to be paid for the notation of a lien, R.C. 2923.36(A) specifically dispenses with the payment of any such fee. R.C. 2923.36(A), as a part of the corrupt activity forfeiture procedures at R.C. 2923.31 through R.C. 2923.36, is a special statute. See *Leach v. Collins*, 123 Ohio St. 530, 176 N.E. 77 (1931) (a special statute is enacted for a particular purpose, provides a specific definite proceeding and prescribes in detail the method and form of procedure). A special statute must be regarded as an exception to the general relevant statutory provisions. R.C. 1.51; *Leach v. Collins*, 123 Ohio St. 530; *State ex rel. Crabbe v. City of Cleveland*, 115 Ohio St. 484, 154 N.E. 738 (1926). Inasmuch as R.C. 2923.36(A) is a special statute and, thus, an exception to the more general R.C. 4505.13, no fee is required to be paid for the recording of a corrupt activity lien notice.

Another practical disparity exists because R.C. 4505.13 requires the presentation of the certificate of title to the motor vehicle as a step in the lien notation process. In many, if not most, of the cases, the county prosecutor who presents the lien notice for recording will not be in possession of the certificate of title. Either the owner of record or the first lienholder, if any, will actually have possession of the certificate of title issued pursuant to R.C. 4505.08. The express provisions of R.C. 2923.36 do not require the presentation of the pertinent certificate of title before the clerk of courts "records" the lien. In fact, if the presentation of the certificate of title were a condition precedent for the lien to attach to the subject motor vehicle, as required by R.C. 4505.13, the effect of the corrupt activity lien laws would be circumvented. R.C. 2923.36 and R.C. 4505.13 must be read together and harmoniously to give the fullest reasonable effect to both provisions. See *Bobl v. Marchant*, 14 Ohio St. 3d 1, 469 N.E.2d 847 (1984). To allow both R.C. 2923.36 and R.C. 4505.13 to have some effect, the statutory construction rule of *in pari materia* requires both sections to be read together and permits the limitation of conflicting provisions. See *Southern Surety Co. v. Standard Slag Co.*, 117 Ohio St. 512, 159 N.E. 559 (1927). The portion of R.C. 4505.13 requiring presentation of the certificate of title issued to the owner of the motor vehicle or the holder on the first lien is, therefore, limited and the requirement is inapplicable.

A third area in which R.C. 2923.36 and R.C. 4505.13 appear to be incompatible is the "recording" of the lien itself. While R.C. 2923.36 requires the recording of a corrupt activity lien notice pursuant to R.C. 317.08, R.C. 4505.13(A)(1) explicitly states, in relevant part, "the deposit, filing, or other record of a security interest covering a motor vehicle" is not "permit[ted]" or "require[d]." Inasmuch as R.C. 2923.36 requires recording, R.C. 4505.13 must be limited to permit the filing of the security interest represented by a corrupt activity lien notice. Because R.C. 2923.36 requires recording of the lien pursuant to R.C. 317.08, corrupt activity lien notices should be filed in a separate record.<sup>5</sup> The provisions of R.C. 4505.13, which permit the recording of security interests by notation of such interests, should also be followed. Thus, the clerk of courts is required to record a corrupt activity lien notice in a separate record and also is mandated to place a

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<sup>5</sup> Sub. H.B. No. 190 removes the requirement that an agency that receives a corrupt activity lien notice for filing shall record the notice pursuant to R.C. 317.08. On September 25, 1989 and thereafter, a corrupt activity lien notice may be presented to the clerk of courts so that the lien may be noted pursuant to R.C. 4505.13, but the clerk is not permitted, under R.C. 4505.13, to accept the notice for "deposit, filing or other record."

notation of the corrupt activity lien upon the copy of the certificate of title kept by the clerk of courts. In addition, the lien must be noted upon the automated title processing records of the clerk.

A summary of my conclusions regarding the procedural steps to be employed by a clerk of courts when presented with a corrupt activity lien notice is useful here to place the discussion of the remaining issues in context. The clerk of the court of common pleas must retain the corrupt activity lien notice in a separate record, place a notation of the lien upon the motor vehicle certificate of title retained by the clerk and place a notation of the lien upon the automated title processing records of the clerk. The clerk of courts may not require a fee or presentation of the owner's certificate of title as a condition of filing or recording the lien notice.

Your second question concerns the effect of a corrupt activity lien and its priority over other rights of ownership and security interests. The express language of R.C. 2923.36(E) succinctly sets forth the effect of the lien created by stating:

From the date of filing of a corrupt activity lien notice, the notice creates a lien in favor of the state on any personal or real property or any beneficial interest in the property located in the county where the notice is filed that is then or thereafter owned by the person named in the notice or under any of the names set forth in the notice.

*The lien created in favor of the state is superior and prior to the interest of any other person in the personal or real property or beneficial interest in the property, if the interest is acquired subsequent to the filing of the notice. (Emphasis added.)*

Based on the explicit grant in R.C. 2923.36(E) of a priority to the State of Ohio, I conclude that the priority is superior to the ownership rights or security interest of any person acquired after the corrupt activity lien notice is filed, whether such filing is with the county recorder or the clerk of the common pleas court. See R.C. 2923.36(A); R.C. 317.08(G).

In your third question you raise the issue of the effect of lack of actual notice of a filed corrupt activity lien. You have noted that a transferee or lienholder may acquire a right or interest subsequent to the filing of a corrupt activity lien notice with the county recorder but may not have actual knowledge of the filing of the lien notice with the clerk of courts. The lien may be filed pursuant to R.C. 2923.36, but the motor vehicle title records of the clerk of courts would not reflect the lien unless the corrupt activity notice were filed with the clerk of the court of common pleas in the clerk's motor vehicle certificate of title capacity. Under this scenario and any in which a person takes an interest or right in a motor vehicle subject to a corrupt activity lien already recorded, actual knowledge of the lien is not required for it to be effective against such person. Since the terms of R.C. 2923.36(E) state that the lien is effective "[f]rom the date of filing," I conclude that R.C. 2923.36(E) does not require actual knowledge. This conclusion is further supported by the absence of a specific exclusion of innocent persons who are bona fide purchasers<sup>6</sup> from the priority established by R.C. 2923.36(E). Under R.C.

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<sup>6</sup> R.C. 2923.31(D) provides:

"Innocent person" includes any bona fide purchaser of property that is allegedly involved in a violation of section 2923.32 of the Revised Code, including any person who establishes a valid claim to or interest in the property in accordance with division (E) of section 2923.32 of the Revised Code, and any victim of an alleged violation of that section or of any underlying offense involved in an alleged violation of that section.

2923.32(E)(4), however, an innocent person may obtain relief from a judgment of forfeiture of the property subject to the corrupt activity lien and forfeiture.<sup>7</sup>

Your final question raises the issue of the existence of the clerk of court's duty to warn a person who acquires an interest in a motor vehicle that a priority right has been granted the state by virtue of a corrupt activity lien. No provision of R.C. Chapter 4505 or R.C. Chapter 2923 imposes a duty to warn upon the clerk of the court of common pleas. Absent clear imposition of a duty, the clerk is not required to act. *See State v. Shaw*, 43 Ohio St. at 329, 1 N.E. at 755.

Although I have been unable to find any case law analyzing the imposition of a duty on a clerk of a court absent statutory mandate, such analysis exists for the county recorder whose duties and functions are analogous to the motor vehicle title duties and functions of the clerk of courts.<sup>8</sup> Numerous opinions of the Attorney General have failed to find the existence of a duty of the county recorder absent specific statutory language imposing such a duty. *See, e.g.*, 1965 Op. Att'y Gen. No. 65-233 (recorder is not required to see that proper documentary stamps are attached to deed before recording); 1953 Op. Att'y Gen. No. 668, p. 639 (recorder is not required to go beyond the language of a financing statement itself to index the document); 1962 Op. Att'y Gen. No. 3289, p. 723 (recorder is not required to examine documents for legal sufficiency before recording); 1933 Op. Att'y Gen. No. 431, vol. I, p. 427 (recorder is not required to search through the various records of the office to make a statement as to the status of the title to the property covered by an instrument deposited for record); 1918 Op. Att'y Gen. No. 1437, vol. II, p. 1161 (it is not the duty of the recorder to consult the indexes upon the request of a citizen). Other public offices have been found not to have a specific duty, where the duty was not required by statute. *See, e.g.*, 1976 Op. Att'y Gen. No. 76-011 (there is no agency duty of the Department of Public Welfare to collect, collate or analyze data or information on request of a member of the public); 1967 Op. Att'y Gen. No. 67-018 (court reporter is not required to transcribe notes at the request of one not a party to the case). Inasmuch as a county recorder does not have duties beyond those based on statutory provision, I conclude that a clerk of the court of common pleas has no duty to inform a person who applies for a certificate of title or lien notation that a prior corrupt activity lien has been noted or has priority.

It is, therefore, my opinion, and you are hereby informed, that:

1. Prior to the effective date of Sub. H.B. 190, 118th Gen. A. (1989) (eff. Sept. 25, 1989), upon receipt of a corrupt activity lien notice issued pursuant to R.C. 2923.36 setting forth the name of the person, a description of the motor vehicle subject to the lien and the present owner to whom it attaches, the clerk of the court

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<sup>7</sup> R.C. 2923.32(E)(4) provides:

If the court, by a preponderance of the evidence, determines...that the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of the purchase reasonably without cause to believe that the property was subject to forfeiture under this section, it shall amend, in accordance with its determination, the judgment of forfeiture to protect the rights of innocent persons.

<sup>8</sup> *See, e.g.*, 317.08(E) ("recorder may index, keep, and record...liens"); 317.09 (recorder to record notice of federal tax lien). The functions of the recorder and the clerk of courts are both ministerial, and both have limited duties. *See generally* 1988 Op. Att'y Gen. No. 88-077; 1981 Op. Att'y Gen. No. 81-086. The motor vehicle title function of the clerk of the court of common pleas is separate and distinct from the clerk's court-related duties. *Whitman v. Magee*, No. 3938 (Ct. App. Trumbull County December 18, 1987); *State ex rel. Stacey v. Halverstadt*, No. 87-C-30 at 5 (Ct. App. Columbiana County October 23, 1987) ("the operation of the title department by the clerk of courts is not a judicial function and has nothing to do with the operation of the judicial branch of government").

of common pleas shall retain the corrupt activity lien notice and promptly place a notation of the corrupt activity lien upon the certificate of title retained by the clerk and upon the automated title processing records of the clerk as prescribed by R.C. 4505.13. The clerk must file the notice and note the lien without a fee. The clerk is without authority to require presentation of the owner's certificate of title as a condition of noting the lien.

2. On the effective date of Sub. H.B. 190, 118th Gen. A. (1989) (eff. Sept. 25, 1989) and thereafter, upon receipt of a corrupt activity lien notice issued pursuant to R.C. 2923.36 setting forth the name of the person, a description of the motor vehicle subject to the lien and the present owner to whom it attaches, the clerk of the court of common pleas shall promptly place a notation of the corrupt activity lien upon the certificate of title retained by the clerk and upon the automated title processing records of the clerk as prescribed by R.C. 4505.13. The clerk must note the lien without a fee. The clerk is without authority to require presentation of the owner's certificate of title as a condition of noting the lien.
3. By filing a corrupt activity lien obtained pursuant to R.C. 2923.36, the State of Ohio obtains priority over the right of ownership or security interest of any person that obtains a right or interest subsequent to the recording of the notice by the county recorder or subsequent to the notation of the corrupt activity lien upon the motor vehicle records of the clerk of the court of common pleas.
4. The priority created by a corrupt activity lien exists from the time the lien is recorded by the county recorder or noted on the motor vehicle records of the clerk of the court of common pleas, regardless of actual notice of such lien by a person that obtains a right or interest in the motor vehicle subsequent to the recording or notation of the lien on the motor vehicle records of the clerk.
5. A clerk of the court of common pleas has no duty to warn or otherwise put on notice a transferee or lienholder who obtains an interest or right in a motor vehicle subsequent to the recording or notation of a corrupt activity lien notice that the title to the motor vehicle is subject to the lien.