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1. BEQUEST—COUNTY CHILDREN'S HOME—NO CONDITIONS OR RESTRICTIONS—TRUSTEES OF COUNTY CHILDREN'S HOME ENTITLED TO RECEIVE AND ADMINISTER PROCEEDS OF SUCH BEQUEST—COUNTY COMMISSIONERS—IF IN POSSESSION OF PROPERTY, AUTHORIZED TO TRANSFER AND TURN OVER SAME TO TRUSTEES.

2. WHERE PROCEEDS OF BEQUEST, WITHOUT STIPULATIONS OR CONDITIONS, RECEIVED BY TRUSTEES, THEY HAVE POWER TO USE SAME FOR BEST INTEREST OF INSTITUTION—MAY INVEST FUNDS AND USE INCOME TO PURCHASE ANYTHING CONSIDERED CONDUCTIVE TO COMFORT AND WELFARE OF CHILDREN INMATES—SECTION 3083 G. C.

SYLLABUS:

1. Where a bequest is made to a "county children's home", with no conditions or restrictions attached thereto, the trustees of such county children's home are entitled to receive and administer the proceeds of such bequest, and if the same have been received by the county commissioners of said county, said commissioners are authorized to transfer and turn over such proceeds to such trustees.

2. Where the proceeds of a bequest made to a "county children's home" have been received by the trustees of said children's home, there being no stipulations or conditions attached to such bequest, such trustees have the power under Section 3083, General Code, to use the same in such manner as they deem for the best interest of the institution, and may in their discretion invest the same and use the income therefrom in the purchase of anything which they consider conducive to the comfort and welfare of the children inmates of such institution.

Columbus, Ohio, June 24, 1943.

Hon. Raymond O. Morgan, Prosecuting Attorney,
Wooster, Ohio.

Dear Sir:

I acknowledge receipt of your communication requesting my opinion, and reading as follows:

"The county auditor of this county has requested me to obtain your opinion upon the following questions:

A. G. R., a resident of Ashland County, Ohio, died testate leaving a Last Will and Testament, a copy of which is enclosed, which Will was duly probated in the Probate Court at Ashland, Ohio. Thereafter a suit was filed to contest the Will by the heirs of said decedent, which action was settled by agreement between the heirs and the board of county commissioners of both Wayne and Ashland counties, as well as the board of trustees of the Children's Home of Ashland County and Wayne County, whereby one-half of the estate, after the payment of debts, costs and expenses, was distributed in accordance with the provisions of the Will, particularly Item 3 thereof. A copy of the journal entry is also enclosed.

Upon completion of the administration of the estate, the sum of \$2506.52 was received by Wayne County on October 7, 1940, and deposited with the county treasurer in custody of the board of county commissioners by virtue of Section 3080, General Code of Ohio. It was my opinion at the time that according to the terms of the Will and 1934 Opinion of the Attorney General, No. 3806, this fund could have been accepted and administered by either the board of county commissioners or the trustees of the Children's Home.

The question now is whether or not the board of county commissioners can transfer this fund to the board of trustees of the Children's Home. The auditor would also like to know if the board of trustees of the Children's Home could invest this money and use the income therefrom to supply the children at the Children's Home with things they do not receive from the money appropriated and expended by the county."

Attached to your letter is a copy of the will of A. G. R., which, after making several bequests, provides:

"Item 3. I give to the Ashland County Ohio Infirmary and the Ashland County Children's Home and to the Wayne County Infirmary and the Wayne County Children's Home, the rest of my estate divided equal the one fourth ($\frac{1}{4}$) to each."

Attached also is a copy of the entry mentioned in your letter, from which I quote the following:

"The Court further finds that by agreement of all parties, a settlement of said controversy was reached, whereby all just debts, costs and expenses were to be paid by the Executor and the balance remaining to be divided, one-half to the next of kin and heirs at law of the said A. G. R., the plaintiffs herein, and one-half to be divided equally between the county of Ashland and the county of Wayne."

Sections 3077 to 3126 of the General Code deal with children's homes and their management. Section 3077 provides:

"The county commissioners of any county, or of several counties acting jointly, shall have power to establish a children's home for such county or district, provided the approval of the director of public welfare of Ohio has been first obtained."

Section 3080 reads as follows:

"Such commissioners may receive and hold in trust for the use and benefit of the home, any grant or devise of land and any donation, bequest, money or other personal property that may be made for the establishment and support of such home."

Section 3081 provides that when the necessary site and buildings have been provided by the county, the commissioners shall appoint a board of five trustees, and Section 3082-1 et seq., prescribe the general duties of the trustees in the management of the home. Section 3083 reads:

“When a person has bequeathed, or hereafter bequeaths any property to the use and benefit of a county children’s home, the trustees thereof may accept and use such bequest as they deem for the best interests of the institution consistent with the provisions and conditions of such bequest.”

We have therefore in Section 3080 power lodged in the county commissioners to receive and hold in trust gifts, devises and bequests, and in Section 3083 a somewhat similar power given to the trustees. At first glance these provisions seem to be overlapping. However, there are some differences. The power given to the commissioners includes gifts and devises of land, while that given to the trustees is limited to bequests of personal property. Furthermore, Section 3080 appears to contemplate gifts for the establishment of the home as well as its support, whereas bequests referred to in Section 3083 must necessarily be limited to those given for the maintenance of the home, since the board of trustees does not come into existence until the institution has been established and the buildings constructed.

Furthermore, consideration of the legislative history of these two sections will, I think, lead to the conclusion that the Legislature intended to limit the power of the commissioners to gifts, testamentary or otherwise, of land or money for the establishment of the institution, and give to the trustees full control of bequests made to an established home to be used by them as they deem for the best interests of the institution, consistent with the provisions and conditions of such bequests. In the original act providing for children’s homes (73 O. L. p. 61), the provision now embodied in Section 3080, General Code, conferring power on the commissioners, appears in substantially the same language. Later that provision became Section 929 of the Revised Statutes. There was nothing in that act giving the trustees any power in the matter of bequests. In 1896 (92 O. L. 382) the Legislature enacted a new section known as Section 936a, Revised Statutes, relating to what were then styled “district children’s homes” and giving to the trustees of such homes the power now contained in Section 3083, General Code. By subsequent amendment (94 O. L. 26) this section was changed to its present form, referring only to county children’s homes.

This, in my opinion, together with the fact that no duties are left to the commissioners in the management of these homes, indicates an intention on the part of the Legislature to commit to the trustees all powers and duties relative to the management of a children’s home, including the administration of a trust created by a bequest of money or property.

The statutes which I have been discussing were the subject of consideration by one of my predecessors in an opinion found in Opinions of the Attorney General, 1935 p. 1960. He held that where the bequest was "to the children's home, it might be accepted and administered either by the county commissioners or the trustees of the home; but where the language of the bequest was "to the trustees of the children's home", it should be accepted and administered by the trustees. While I cannot entirely follow this distinction, I do not feel that it is necessary either to overrule or modify that opinion, since your communication appears to assume that the commissioners are willing to turn over to the trustees the fund in question, and their question is as to their power. It will be noted that Section 3083, in granting the power to the trustees to receive and administer a bequest, does not limit that power to a case where the bequest is "to the trustees", but includes all bequests "to the use and benefit of a county children's home."

Independent of Section 3083, above quoted, it would appear that the trustees of such a home find abundant authority in Section 18 of the General Code to receive and administer gifts, bequests and devises of real and personal property for the benefit of the institutions under their charge. That section reads as follows:

"The state, a county, a township or cemetery association, the commissioners or trustees thereof, a municipal corporation, the council, a board or other officers thereof, a benevolent, educational, penal or reformatory institution, wholly or in part under the control of the state, the board of directors, trustees or other officers thereof, may receive by gift, devise or bequest, moneys, lands or other properties, for their benefit or the benefit of any of those under their charge, and hold and apply the same according to the terms and conditions of the gift, devise or bequest. Such gifts or devises of real estate may be in fee simple or of any lesser estate, and may be subject to any reasonable reservation. This section shall not affect the statutory provisions as to devises or bequests for such purposes."

It follows from a consideration of the foregoing provisions of the statutes, and it is my opinion, that the board of county commissioners will be justified in transferring to the trustees of the children's home the funds realized from the bequest in question.

Coming to your second question relative to the investment by the trustees of the proceeds of this bequest and the use of the income therefrom, I note that by the terms of the will there are no stipulations or conditions whatsoever as to its use. Therefore, the provision of Section 3083, General Code, that the trustees "may accept and use such bequest

as they deem for the best interests of the institution consistent with the provisions and conditions of such bequest", would give the trustees full discretion either to spend the fund or invest it; and if invested, they would have the right to use the proceeds for such purposes as they saw fit so long as such purposes were appropriate to the management of the home and the comfort and welfare of the children therein.

As to the mode of investment, the trustees have a discretion limited only by the rule that they must use good faith and prudent judgment in selecting their investments. The case of *Scott v. Trustees*, 39 O. S. 153, involved facts closely paralleling those under present consideration. I quote from the syllabus:

"Property was devised to the trustees of M. township, and their successors perpetually, for the exclusive benefit of the poor of the township, with authority to the trustees to manage the trust 'as they think best for the benefit of said poor.'

Held: The trustees were thereby authorized to invest the moneys belonging to the trust, in notes or other securities, and such power was not limited, by the act of April 19, 1865, S. & S. 910, to loans upon real estate security."

The court in the opinion, at page 156, said:

"By the will of Bellis, the trustees are given full power to manage the trust fund, 'as they think best for the benefit of said poor'. They may invest it upon real estate security, or in notes or bonds without such security, being responsible for good faith and prudent management."

Specifically answering your questions, I am of the opinion:

1. Where a bequest is made to a "county children's home," with no conditions or restrictions attached thereto, the trustees of such county children's home are entitled to receive and administer the proceeds of such bequest, and if the same have been received by the county commissioners of said county, said commissioners are authorized to transfer and turn over such proceeds to such trustees.

2. Where the proceeds of a bequest made to a "county children's home" have been received by the trustees of said children's home, there being no stipulations or conditions attached to such bequest, such trustees have the power under Section 3083, General Code, to use the same in such manner as they deem for the best interest of the institution, and may

in their discretion invest the same and use the income therefrom in the purchase of anything which they consider conducive to the comfort and welfare of the children inmates of such institution.

Respectfully,

THOMAS J. HERBERT,
Attorney General.