

2516

OPINIONS

2820.

APPROVAL, BONDS OF MEIGS COUNTY, OHIO—\$12,000.00.

COLUMBUS, OHIO, November 1, 1928.

*Retirement Board, State Teachers Retirement System, Columbus, Ohio.*

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2821.

APPROVAL, BONDS OF MEIGS COUNTY, OHIO—\$4,500.00.

COLUMBUS, OHIO, November 1, 1928.

*Retirement Board, State Teachers Retirement System, Columbus, Ohio.*

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2822.

APPROVAL, BONDS OF MEIGS COUNTY, OHIO—\$2,100.00.

COLUMBUS, OHIO, November 1, 1928.

*Retirement Board, State Teachers Retirement System, Columbus, Ohio.*

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2823.

AGREEMENT—SURRENDER OF CHILD TO INSTITUTION—FORM MANDATORY—SECTION 8025, GENERAL CODE, IMPLIEDLY REPEALED WHERE INCONSISTENT WITH SECTION 1352-12, GENERAL CODE.

**SYLLABUS:**

1. *The provisions of Section 1352-12, General Code, requiring agreements, for the surrender of the custody of children to the institutions mentioned in said section, to be "in writing, on forms prescribed and furnished by the division of charities, department of public welfare," are mandatory to the extent that the form used must be in accord with the form so prescribed in all essential details, and an agreement made otherwise is invalid.*

2. *Section 1352-12 repealed Section 8025 by implication, to the extent only, that the latter is inconsistent with the former.*

COLUMBUS, OHIO, November 1, 1928.

HON. JOHN E. HARPER, *Director, Department of Public Welfare, Columbus, Ohio.*

DEAR SIR:—The Division of Charities of your department has directed to me the following communication:

“We are interested in the matter presented in the communication sent your office by the Honorable William H. Lueders, judge of the Probate Court of Hamilton County.

Our department would appreciate it if your office would render an opinion in this matter.”

The letter referred to in said communication from the Honorable William H. Lueders has been received. In view of the fact that the Attorney General cannot properly undertake to render official opinions to probate judges, this opinion will be directed to your department, which, of course, may properly request my opinion. The request of Judge Lueders reads:

“Re: *Adoption Proceedings.*

I am submitting to you for your opinion and advice thereon a question in adoption proceedings that arises out of the facts hereinafter stated. The ----- Maternity Hospital and Infant Asylum is an institution incorporated under the laws of Ohio, operated under the auspices of the ----- of Cincinnati, and devoted to the care of mothers and their new born babes. It is licensed and certified by the Division of Charities, Department of Public Welfare and is under the direct surveillance of the Bureau of ----- Charities of said Archdiocese.

Nearly three years ago a child born at said hospital and asylum was, under the guidance of said Bureau of ----- Charities, placed in a Cincinnati home. This home was duly approved. The persons with whom the child was placed desire now to adopt it. In preparing for the adoption proceedings the Bureau of ----- Charities requested the afore-said hospital and asylum to furnish to said bureau a copy of the surrender of said child to said institution. Attached is a copy of said surrender. The mother of said child was not, at the time of its birth or surrender, or at any time previous thereto, a wife.

*The surrender is not on a form prescribed by the Division of Charities, Department of Public Welfare, and it is this fact which raises the question that I am presenting to you, because it is practically impossible now to locate the mother of the child to secure her consent in the adoption proceedings.*

Section 1352-12, G. C., provides that ‘the parents, parent, guardian \* \* \* of a child \* \* \* may make an agreement surrendering such child into the permanent custody’ of any public, semi-public or private association or institution of this state established for the purposes of aiding, caring for, or placing children in homes, and which has been approved and certified by the Division of Charities, Department of Public Welfare. Said Section 1352-12, G. C., further provides that,—

‘Such agreements provided for herein shall be in writing *on forms prescribed and furnished by the division of charities, department of public welfare*, and may contain any and all proper and legal stipulations for proper care of the child, and may authorize the association or institution, when such agreements are for permanent care and custody, to appear in any proceeding for the legal adoption of such child, and consent to its adoption, as provided

in Section 8025 of the General Code. The adoption order of the judge made upon such consent shall be binding upon the child and its parents, guardian or other person, as if such persons were personally in court and consented thereto, whether made party to the proceeding or not.'

Section 8025, G. C., provides in clause (b) that in adoption proceedings written consent to the adoption must be given by each of the living parents, or by the mother of an illegitimate child. Clause (f) of this section, however, provides the following exception to the rule established by clause (b) :

'If the parent or parents, having the legal custody give the custody of such child for the full term of its minority to any institution or agency established under the laws of the state to care for children, and under the approval of the board of state charities, *or if such institution or agency has otherwise legally acquired the custody and control of such child*, the president or secretary of such institution or agency shall file a certified copy of the consent of the board of trustees, or of the proper officers authorized by such institution or agency to act in matters of adoption.'

Section 1352-12, in its present form, was adopted April 4, 1923, and approved April 20, 1923; Ohio Laws, Vol. 110, page 235. Section 8025, in its present form, was adopted April 20, 1921, and approved May 5, 1921; Ohio Laws, Vol. 108, page 178.

The questions concerning which I seek your opinion and advice are as follows:

1. Are the provisions of Section 1352-12 requiring the use of forms of surrender prescribed and furnished by the Division of Charities, Department of Public Welfare, mandatory or simply directory? In other words, does failure or neglect to use such forms nullify a surrender in all other respects substantially legal and valid?

2. If you should hold these provisions as to forms to be mandatory, what is the effect, if any, of the passage of Section 1352-12 in 1923, upon the provisions of Section 8025, clause (f), passed in 1921, and especially upon that portion of it pertaining to cases where *'such institution or agency has otherwise legally acquired the custody and control of such child'*? Is this latter provision repealed, and, if not, does the provision protect such a surrender as was used by the above named hospital and asylum in this case?"

The form of consent enclosed and the basis of the inquiry reads:

"-----Hospital

\* \* \* \*

The undersigned represents that she is the parent of Anna May X, a minor child of the age of 14 days, -----months, -----year. The undersigned hereby voluntarily surrenders said child to the ----- Maternity Hospital and Infant Asylum (a corporation duly organized under the laws of the State of Ohio).

The undersigned parent hereby consents to the adoption of said child to any person or persons who in the opinion of the ----- of ----- Maternity Hospital and Infant Asylum, is or are a responsible, proper and suitable person or persons.

The undersigned parent further consents that the name of the child be changed.

(SEAL)

(Signed) Anna X,  
Cincinnati, Ohio,  
January 8, 1926.

Witnesses:

(Signed)

-----Y  
-----Z"

The Division of Charities has prescribed a form for the permanent surrender of a child, under the authority of Section 1352-12, General Code, which is as follows:

"PERMANENT SURRENDER OF A CHILD

To comply with Sec. 1352-12 and Sec. 1352-13, General Code.

The undersigned-----  
(Name of Parents, Father, Mother or Guardian)  
residing at-----,

(Street—R. F. D.) (City)  
-----, the -----  
(County) (State) Parents, Father,

-----, of -----  
Mother or Guardian) (Name of Child)  
born the ----- day of -----, 19-----,

in -----, -----, -----  
(City) (County) (State)

desire that said child be received by-----  
(Name of Licensed Institution or  
-----, being unable to care for said child for the following reasons:  
Association)

-----  
(Give detailed reasons why cannot care for child)  
-----

-----  
therefore do hereby surrender and entrust to the managing officers of said  
association or institution, the permanent guardianship of said child.

It is agreed that the managing officers of the said association or institution  
shall have the sole and exclusive guardianship of said child and the right to  
place it in a foster home and to consent in court to its adoption, as pro-  
vided in Section 8025 of the General Code of Ohio.

It is further agreed that the undersigned will abide by the rules and reg-  
ulations of the association or institution, not to communicate with said child,  
or induce it to leave the institution or any family with whom it might be  
placed, and to sever all connections with said child unless additional arrange-  
ments are made by the association or institution because of exceptional cir-  
cumstances.

Witness my hand this-----day of-----, 19-----

Witnessed by:

-----  
----- (Father)  
-----  
----- (Mother)  
-----  
----- (Guardian)

THE STATE OF OHIO, }  
-----COUNTY. } ss.:

----- being duly sworn, say----- he----- has-----  
voluntarily signed the foregoing permanent surrender, the same having been  
carefully read and explained, and that the statements therein are true to the  
best of ----- h----- knowledge. -----

Sworn to before me and signed in my presence this ----- day of  
-----, 19-----

Notary Public in and for-----  
County, State of Ohio.

TO BE SIGNED IN DUPLICATE, ONE COPY TO BE RETAINED BY  
PARENT OR GUARDIAN.

Form 148, Prescribed by  
Division of Charities,  
Department of Public Welfare.

(over)"

On the reverse side of said form the following appears:

"-----, Ohio.  
-----, 192-----

TO THE SUPERINTENDENT (OR DIRECTOR) OF THE-----

-----  
(Name of Association or Institution.)  
We, the undersigned Trustees (or Admitting Committee) of the-----

-----  
(Name of Association or Institution.)  
-----

after a careful and impartial investigation, believe that-----

-----  
(Name of Child)  
because of -----  
(State Conditions Causing Dependency, etc.)  
-----

is a suitable child to be received by the said-----  
(Name of Association or Institution)  
-----

You are hereby directed to receive such child.

SIGNED:

-----  
-----  
-----  
-----  
-----

A full family history and record of a complete physical examination must accompany this surrender."

The said Division of Charities has also approved forms for temporary surrender of a child which need not be considered herein.

Section 1352-12, General Code, provides:

"The parents, parent, guardian or other person or persons having the custody of a child, may enter into an agreement with any public, semi-public or private association or institution of this state established for the purposes of aiding, caring for or placing children in homes, and which has been approved and certified by the division of charities, department of public welfare, placing such child in the temporary custody of such institution or association; or such parent, guardian or other person may make an agreement surrendering such child into the permanent custody of such association or institution, to be taken and cared for by such association or institution, or placed in a family home.

Such agreements provided for herein shall be in writing, on forms prescribed and furnished by the division of charities, department of public welfare and may contain any and all proper and legal stipulations for proper care of the child, and may authorize the association or institution when such agreements are for permanent care and custody to appear in any proceeding, for the legal adoption of such child, and consent to its adoption, as provided in section 8025 of the General Code. The adoption order of the judge made upon such consent shall be binding upon the child and its parents, guardian, or other person, as if such persons were personally in court and consented thereto, whether made party to the proceeding or not."

As suggested in the communication of Judge Lueders, one of the questions presented is whether the provisions relative to such agreements, as are mentioned in the section last quoted relative to being upon forms prescribed by the Division of Charities, are directory or mandatory.

In determining whether a statute is directory or mandatory the objects and purposes to be attained by reasons of the enactment must be considered together with the specific language employed.

In the instant case it would seem clear that the strict requirements, made in connection with surrendering the rights of a child to an institution, are made for the protection of the child as well as the parent, who in such a proceeding may forever lose custody thereof. The Legislature in its wisdom has seen fit to grant broad powers to the Division of Charities in providing for the welfare of the unfortunate children of the state and the supervision and control of the agencies assisting therein. I am informed that there are some two hundred institutions in the state authorized to become permanent guardians and that some seventy-five hundred children are surrendered to such institutions in the course of one year, all of which suggests the magnitude of the task confronting the Division of Charities in its investigation and supervision of such undertakings. The law has justly ever carefully scrutinized any proceedings, which is intended forever to separate a child from its actual parents.

Section 1352-12, *supra*, was enacted on April 13, 1923, (110 v. 265), and supplements other sections, which govern the commitment of children to the State Board of Charities and its associated institutions.

Because of the nature of the proceedings, undoubtedly the Legislature, in the public interest, intended to safeguard such agreement to the end that the Division of Charities should have complete supervision over such contracts, and that such

solemnity should surround the execution of such transactions as the Division of Charities in its judgment deemed expedient. In a number of instances the Legislature has required state agencies to prepare and distribute forms.

Section 1465-44, General Code, provides that the Industrial Commission of Ohio "shall" among other things "regulate and provide for the kind \* \* \*" of forms of application of those claiming to be entitled to compensation, etc. In accordance with said provision the Commission has provided by rule that an application for benefits should be made upon the forms which said Commission has adopted and distributed. In *Industrial Commission vs. Homer Stephens*, the Court of Appeals of Noble County, in an unreported case in substance held a proper application should be made on such forms and further held one otherwise made to be invalid.

In the case at hand the Legislature intended to give the Division of Charities supervisory powers over such agreements, as are authorized by Section 1352-12 and by the terms of the section gives them power to control the substance of the contract as well as to form. The form prescribed is evidently much more complete as to detail than the form, which is the basis of your inquiry. To illustrate, the prescribed form requires the disclosure of the residence of the parents as to city, county and state, requires the reasons to be stated why the parents cannot care for the child, and is to be executed in duplicate and under oath. There are a number of other provisions bringing more forcibly to the attention of the parents their intention and action, with reference to the surrender of their child and as to their duties and obligations thereunder, than is provided in the form used in the case presented. The form also provides for the approval of the trustees, or admitting committee, of the institution and requires a full family history and record, of complete physical examination to accompany the surrender. Said form was so approved by the Division of Charities during the year 1924. It is evident that there is a wide distinction in the two forms considered.

In the case of *Devine vs. State, ex rel.*, 105 O. S. 288, it was held:

"1. An act of the General Assembly will not be regarded as directory or discretionary as to those upon whom it is intended to operate, unless such directory or discretionary character clearly appears from the entire text of the act."

In perusing Section 1352-12, *supra*, and its related sections, there does not appear to be any legislative intent to make the kind of forms used in such agreement a discretionary matter. On the other hand in view of the purposes intended to be accomplished it would seem that the Legislature intended the use of the prescribed forms to be mandatory. In exercising this power the Division of Charities governs the substance of the contract. It logically follows that any such contract that does not comply with the requirements would be invalid. Of course, in this conclusion, I would not go so far as to say that, if a contract were entered into under oath, duly witnessed and in every other respect contains the substance in the prescribed form, that the same would not be valid. In other words, such a form could be prepared on a typewriter, or otherwise written, or the contents of the form could be arranged in different order, or expressed in different words, and if it meets the requirements of the prescribed form in *all essential respects*, in my judgment the same would be sufficient.

You further inquire whether the following phrases in Section 8025, General Code, were repealed by implication by Section 1352-12, as enacted in 1923, *viz.*:

"or if such institution or agency has otherwise legally acquired the custody and control of said child,"

as used in Clause (b) of said section, and

"such institution or agency has otherwise legally acquired the custody and control of such child,"

as used in Clause (f) of said section.

The two sections are in *pari materia*, and therefore, must be construed together. Both sections relate to the same subject matter in respect to the power of the Division of Charities and its licensed agencies to consent to the permanent adoption of a child. While Section 8025, *supra*, appears in connection with the regular adoption sections, deals with consent in such proceedings generally, when the child is in one of the institutions therein mentioned, Section 1352-12, *supra*, contains a special provision insofar as it affects the children mentioned in said section, and therefore is inconsistent with Section 8025, *supra*, insofar as the latter authorizes that which the former prohibits.

As indicated in your letter Section 1352-12, *supra*, expressly mentions Section 8025, *supra*, in reference to such consent and is later, in the order of enactment. Therefore, applying the familiar rules of construction to the statutes being considered, the conclusion is irresistible, that Section 8025, *supra*, was repealed by implication by Section 1352-12, *supra*, as amended in 1923 to the extent that the former is inconsistent with the latter.

In passing it may be pointed out, that no hardship need result in the case you present for the reason that the child, if abandoned by its parent, may be committed as a dependent by the Juvenile Court and then of course such agency could obtain the same guardianship as if the original relinquishment had been in proper form. Moreover, a next friend could be appointed under Section 8025, *supra*, who would be authorized to consent to such adoption.

In conclusion and in specific answer to the inquiries submitted, you are advised that, in my opinion, the provisions of Section 1352-12, General Code, requiring agreements, for the surrender of the custody of children to the institutions mentioned in said section, to be "in writing, on forms prescribed and furnished by the Division of Charities, Department of Public Welfare," are mandatory to the extent that the form used must be in accord with the form so prescribed in all essential details and that an agreement made otherwise is invalid. It is my further opinion that Section 1352-12 repealed Section 8025 by implication, to the extent only, that the latter is inconsistent with the former.

Respectfully,  
EDWARD C. TURNER,  
*Attorney General.*

2824.

APPROVAL, BONDS OF BROADVIEW HEIGHTS VILLAGE, CUYAHOGA COUNTY—\$25,350.00.

COLUMBUS, OHIO, November 2, 1928.

*Retirement Board, State Teachers Retirement System, Columbus, Ohio.*