

SCHOOLS: State Board of Education may retain
SCHOOL FOR THE BLIND: investments coming to it for the use
SCHOOL FOR THE DEAF: of Missouri School for the Blind and
STATE BOARD OF EDUCATION: Missouri School for the Deaf if prudent
TRUSTS: man under all circumstances prevailing
would do so.

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October 1, 1959

Mr. Hubert Wheeler
Commissioner of Education
State Department of Education
Jefferson Building
Jefferson City, Missouri

Dear Sir:

This is in response to your request for opinion dated September 21, 1959, which request reads as follows:

"The State Board of Education is authorized by law, Section 177.025, Laws of 1959, to receive and administer any grants, gifts, devises, or donations by individuals or corporations to the Missouri School for the Blind and the Missouri School for the Deaf. Any grants, gifts, devises, bequests or donations made for a specified use shall not be applied to any other uses.

"Section 177.030 provides that the State Board of Education shall have the care and control of all property, real and personal, owned by the schools. This law further provides that the State Board of Education may sell, convey, exchange or convert into money, property of any nature, real, personal or mixed, acquired through any grant, gift, bequest, devise or donation to the School for the Blind and the School for the Deaf, for their use when deemed necessary by the State Board of Education.

"Section 177.035 directs that all funds derived from grants, gifts, donations or bequest or from the sale or conveyance of any such property shall be deposited in

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the State Treasury and credited to special trust funds and shall be appropriated only for the purpose of carrying out the objects for which the funds were given as recommended by the State Board of Education.

"Since the effective date of these laws the State Board of Education has received and accepted considerable personal property. Any money received by the State Board of Education has been deposited to the credit of the proper fund in the State Treasury as provided by law. Some personal property, such as securities in the form of certificates of stock, or shares, have been received by the State Board of Education. Full title of ownership has been established in the transfer of such stock. Some of the securities received by the State Board could well be sold and turned into cash immediately while for others it seems to be more advantageous to hold until such time as may be determined by the State Board of Education.

"The question at issue is whether the State Board of Education, under the laws providing for the acceptance of property and the converting of such property into money, has discretionary power for determining when property, real or personal, shall be sold or converted into money so that it may be deposited in the State Treasury.

"I shall appreciate your advice and official opinion in answer to the following question:

Does the State Board of Education have discretionary power in determining when property received through grants, gifts, devises, or donations, shall be sold and turned into money? If it is found advantageous to hold some securities for some period of time and that it would not prevent carrying out the purpose for which the funds were given, could such securities be retained until such time as the State Board of Education may desire to authorize the sale of them?"

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Senate Bill No. 8 of the 70th General Assembly added Sections 177.025 and 177.035 and amended Section 177.030, RSMo. Those sections read as follows:

§177.025.

"The state board of education may receive and administer any grants, gifts, devises, bequests or donations by any individual or corporation to the Missouri School for the Blind at St. Louis and the Missouri School for the Deaf at Fulton. Any grants, gifts, devises, bequests or donations made for a specified use shall not be applied either wholly or in part to any other use or uses."

§177.035.

"1. All funds derived from grants, gifts, donations or bequests or from the sale or conveyance of any property acquired through any grant, gift, donation, devise or bequest to or for the use of the Missouri School for the Blind shall be deposited in the state treasury and credited to a special fund known as the 'School for the Blind Trust Fund', which is hereby created.

"2. All funds derived from grants, gifts, donations or bequests or from the sale or conveyance of any property acquired through any grant, gift, donation, devise or bequest to or for the use of the Missouri School for the Deaf shall be deposited in the state treasury and credited to a special fund known as the 'School for the Deaf Trust Fund', which is hereby created.

"3. The moneys in the school for the blind trust fund or in the school for the deaf trust fund shall not be appropriated for the support of such schools in lieu of general state revenues but shall be appropriated only for the purpose of carrying out the objects for which the grant, gift, donation, devise or bequest was made as recommended by the state board of education."

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\$177,030.

"The state board of education shall have the care and control of all property, real and personal, owned by the schools. The state board of education shall not sell or in any manner dispose of any real estate belonging to the schools without an act of the general assembly authorizing the sale or disposal of such real estate, except that the state board of education may sell, convey, exchange or convert into money property of any nature, real, personal or mixed, acquired through any grant, gift, bequest, devise or donation by individuals or corporations to the Missouri School for the Blind at St. Louis or to the Missouri School for the Deaf at Fulton, for their use when deemed necessary by the state board of education."

Since these sections are new, the courts of this state have not construed them as yet; consequently, it is necessary to look to analogous situations in order to ascertain the answer to your question.

The most nearly analogous case we have been able to find is that of *Burrier v. Jones*, 338 Mo. 679, 92 SW2d 885. There, a testator left the residue of his estate "to the Macon County, Mo., school funds." A statute, now Section 456.090, RSMo 1949, provided then, as now, that each county in this state should have power to act as trustee for charitable uses. Among other things, the court found that a gift for the advancement of education was a charitable use and that the lower court was correct in ruling that this clause of the will should be construed to mean "that Macon County, Missouri, has been designated as trustee, and that the trust can be made operative under the direction and control of the judges of the county court of said county, for the use and benefit of the school funds of the county."

Even though on its face this was an absolute gift to the county school fund, the court found that by operation of law it was actually a charitable trust with the county to act as trustee.

Similarly, many of the gifts to the Missouri School for the Blind and the Missouri School for the Deaf may be phrased

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as absolute gifts. Nevertheless, by applying the reasoning of the Burrier case we believe that they would be held to constitute charitable trusts with the State Board of Education acting as trustee.

In *Murphey v. Dalton, Mo.*, 314 SW2d 726, 730, the Supreme Court said:

" * * * it is well established that the duties and liabilities of the trustees of public charitable trusts are like the duties and liabilities of the trustees of private trusts, and that the same principles applicable to private trusts govern in public charitable trusts. * * *"

As a trustee, the State Board of Education is in a different position than other trustees because it has no authority to invest or reinvest the trust funds. This is so because of Section 177.035, supra, which requires that funds derived from grants, gifts, donations or bequests, or from the sale or conveyance of any property acquired through any grant, gift, donation, devise or bequest to or for the use of the Missouri School for the Blind or Missouri School for the Deaf, shall be deposited in the state treasury to the credit of the appropriate trust fund. Even though the State Board of Education as trustee does not have the problem of determining what would be a proper investment for funds in its hands as trustee, it is subject to the same rules and restrictions as any other trustee in determining what investments coming to it by way of gift, grant, bequest or devise should be retained or converted to cash.

In some states, trustees are limited by statute as to the securities in which they may invest. The same rule generally is made applicable to retention of investments received from the settlor. In Missouri, however, there is no statutory regulation of investments. Rather, by court decision, trustees are held to the standard of a prudent man both in investments and retention of investments. For example, in *Warmack v. Crawford*, 239 Mo. App. 709, 195 SW2d 919, 925, the testator had established a trust estate which consisted mostly of stock of the International Shoe Company. The trust instrument provided that the "trustees, without accountability for loss, may retain as investments of the trust estate, any and all real estate, or bonds, stocks, loans, and other securities received in trust hereunder." The question was whether, under the

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provisions of the will, and under all the circumstances, the trustees were required to sell and dispose of any portion of the International Shoe Company stock held by them as a part of the trust estate, and whether they would be guilty of any breach of legal duty or abuse of discretion in continuing to hold all of said stock. The court said at 8W2d 1.c. 925:

" * * * The court should have advised the trustees that under the terms of the will they were not required to sell and dispose of any portion of the stock of the International Shoe Company unless it appeared to them that said stock was not such an investment as a prudent man would make, having primarily in view the preservation of the estate, and the amount and regularity of the income to be derived. Rand v. McKittrick, 346 Mo. 466, 142 S.W.2d 29; St. Louis Union Trust Co. v. Toberman, 235 Mo. App. 559, 140 S.W.2d 68; Fairleigh v. Fidelity Nat. Bank & Trust Co. of Kansas City, 335 Mo. 360, 73 S.W.2d 248. In determining this matter, the question of diversification need not be ignored, but it is not a controlling factor. The whole thing rests within the sound discretion of the trustees. They alone can exercise it. They cannot shift the duty to the Court. The Court can interfere only where there is an abuse of that discretion."

In other words, the court seems to have said that, even though the trust instrument authorized the retention of investments received from the testator, the trustees would still be held to the prudent man standard.

In the usual trust situation, the matter of retention of investments is covered by the trust instrument. In the case of securities coming to the Missouri School for the Blind and the Missouri School for the Deaf, however, it is regulated by statute. Specifically, Section 177.030, supra, provides that the State Board of Education may sell, convey, exchange or convert into money such investments "when deemed necessary by the state board of education." This language obviously was inserted as an exception to the preceding clause prohibiting the sale of any real estate belonging to the schools so as to authorize the conversion of such gifts to cash without a special

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act of the General Assembly. However, the last-quoted clause, "when deemed necessary by the state board of education," goes farther and vests discretion in the State Board as to whether such investments shall be retained. In other words, on its face this section authorizes retention of investments until and unless the State Board of Education deems it necessary to convert them to cash, etc.

In spite of this seemingly broad grant of discretionary power, in our opinion the State Board of Education would be held to the prudent man standard the same as the trustees were in the Warmack case, supra. The only major difference between the two cases is that in the Warmack case the authorization to retain investments was granted by the will, whereas here it is by statute. This should make no difference in the applicable law.

In Scott on Trusts, Second Edition, Volume III, Section 230, pp. 1715, 1718, the following is found:

(P. 1715)

"Where a trustee on the creation of the trust receives securities which are not proper trust investments, it is his duty to dispose of them within a reasonable time and to invest the proceeds in securities which are proper trust investments, unless it is otherwise provided by the terms of the trust or by statute. This is true not only where the securities which he receives are not of the limited type of investments permitted in some states by statute or decision, as for example where they consist of shares of stock in jurisdictions in which a trustee is not permitted to invest in shares of stock, but also where the particular securities have become of such a speculative character that a prudent man would not invest in them. There are numerous cases in which a trustee has been surcharged for failing to sell such securities within a reasonable time after the creation of the trust. On the other hand, a trustee is not liable merely because he fails to sell the securities immediately or even after a considerable interval, if under the circumstances he acted prudently in postponing the sale."

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(P. 1718)

"In several states it is provided by statute that trustees may retain investments received from the testator even though they are not proper investments for a trustee to make. The effect of these statutes is to establish a different rule with respect to the making and the retention of investments by trustees. Even under these statutes, however, it is the duty of the trustee to exercise prudence in determining whether to retain investments made by the settlor. As we shall see, an authorization or even a direction to retain securities does not justify the trustee in retaining them if there is subsequently such a change of circumstances that it becomes imprudent to retain them."

CONCLUSION

It is, therefore, the opinion of this office that Senate Bill No. 8 of the 70th General Assembly (§177.025 - 177.035, RSMo) does vest the State Board of Education with discretion in determining when it is necessary to sell securities and other investments coming to it for the use and benefit of the Missouri School for the Blind and the Missouri School for the Deaf. It is our further opinion that the State Board of Education, in the retention of such investments, is subject to the prudent man standard. In other words, it may, in the exercise of its discretion, retain such investments if a prudent man under all the circumstances prevailing would do so.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

Yours very truly,

JOHN M. DALTON
Attorney General

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