

CORPORATIONS:

Charitable, religious, or other corporations subject to Chapters 352 and 355, RSMo 1959, may not qualify as executors under Missouri's Probate Code, but may serve as testamentary trustees in carrying out trusts only for any of the legitimate purposes for which they are organized.

PROBATE:

August 2, 1961



Honorable James E. Woodfill
Prosecuting Attorney
Vernon County
Nevada, Missouri

Dear Mr. Woodfill:

This opinion is rendered in reply to your inquiry reading as follows:

"There has been called to my attention a situation related to possible missuser of franchise that could call for quo warranto proceedings under either Section 352.240 or 355.490, Revised Statutes of Missouri, 1949.

"In this connection I would appreciate your opinion in regard to the following questions:

"1. Does a religious or charitable association incorporated by pro forma decree under Chapter 352, Revised Statutes of Missouri 1949, have the power to accept the appointment and act as executor or testamentary trustee, in the absence of provision therefor in its charter or articles, in a situation serving no benevolent, religious, scientific, fraternal-beneficial or educational purpose?

"2. Would such a provision in the charter or articles be valid, and permit such acts?

"3. Would it make any difference if the association served with or without compensation?

"4. Would the answers to the foregoing questions be any different in the case of a corporation organized under, or accepting the provisions of, Chapter 355, Revised Statutes of Missouri 1949?"

Honorable James E. Woodfill

Article XI, Section 5, Missouri's Constitution of 1945 provides:

"No corporation shall engage in business other than that expressly authorized in its charter or by law, nor shall it hold any real estate except such as is necessary and proper for carrying on its legitimate business; provided, that any corporation may hold, for ten years and for such longer period as may be provided by general law, real estate acquired in payment of a debt, by foreclosure or otherwise, and real estate exchanged therefor."

At 33 C.J.S., Executors and Administrators, Section 28, j, p. 916, we find the following text:

"The right to act as executor is usually restricted to corporations of a fiduciary character, and will ordinarily be denied a corporation designated by the will as executor where its charter powers do not include the right to act in such capacity; * * *."

As late as 1924, in the case of State ex rel. Burnes National Bank v. Duncan, 302 Mo. 130. 1.c. 137, 257 S.W. 784, the Supreme Court of Missouri reviewed our statutory provisions on this subject and spoke, in part, as follows:

"Before any corporation in this State can have a right to act in a fiduciary relation in administering estates there must be express authority given that kind of a corporation and that statutory authority must be construed in pari materia with the chapter relating to Administration."

We find no express authority in Chapter 352, RSMo 1959, governing the formation of benevolent, religious, scientific or charitable corporations, authorizing such corporations to act as executor under a last will, or as administrator with or without the will annexed, of the estate of any deceased person.

Section 473.117, RSMo 1959, disclosing what persons are disqualified from administering estates of deceased persons, takes cognizance of the fact that a corporation may be named as an executor in a will when the following language is used:

"* * 2. When any corporation is named as executor in any will hereafter executed, and qualifies as such, * * *."

Honorable James E. Woodfill

In State ex rel. Burnes National Bank v. Duncan, supra, the Court spoke as follows at 302 Mo. 130, l.c. 137, on the power of corporations to act as executors:

"It must be remembered that there was no common law right to make a will or appoint an executor. It is purely a matter of statutory regulation. The statute authorizing certain persons to act as executor is an enabling statute, and it must be construed according to the intent of the Legislature in enacting it. The intent of the Legislature to include only natural persons in the authority granted in that article appears not only in the terms of the article, but is shown by the actual grant, in another statute, of the authority to trust companies to act as executors, and in other fiduciary relations. There would have been no need of such affirmative act if this chapter on Administration had granted such authority to all corporations."

When the Court, in the preceding quotation from State ex rel. Burnes National Bank v. Duncan, supra, referred to another statute as containing a grant of power to trust companies, it was referring to what is now Section 363.170, RSMo 1959, which reads, in part, as follows:

"Corporations may be created under this chapter for any one or more of the following purposes:

* * * * *

"(9) To act as executor and trustee under last will, or as administrator with or without the will annexed, of the estate of any deceased person, * * *."

The holding by the Supreme Court of Missouri in State ex rel. Burnes National Bank v. Duncan, supra, was that, exclusive of trust companies, only natural persons were qualified to be appointed executors or administrators of deceased persons' estates. That ruling was reversed by the Supreme Court of the United States insofar as it was applicable to national banks, and the latter ruling may be found cited as State of Missouri ex rel. Burnes National Bank v. Duncan, 265 U.S. 17, 44 S. Ct. 427, 68 L. Ed. 381. The Supreme Court of the United States held that the power given by Congress to national banks to act as trustee, executor, administrator or in any fiduciary capacity in which state banks and trust companies

Honorable James E. Woodfill

which come into competition with national banks are permitted to act, transcended the State law on the subject. However, such ruling only modifies the ruling of the Supreme Court of Missouri to the extent that it comprehended national bank corporations.

In view of the foregoing it must be reasonably concluded that no corporation formed under the provisions of Chapter 352 RSMo 1959, may qualify to serve as executor by appointment under Missouri's probate code found at Chapters 472, 473, 474 and 475, RSMo 1959, and any attempt to incorporate such powers into a corporate charter acquired under Chapter 352, RSMo 1959, would be in excess of powers granted. In the absence of power to act as an executor a corporation's offer to serve as executor without compensation would avail it nothing.

We have reviewed the statutory provisions found in Chapter 355, RSMo 1959, embracing The General Not For Profit Corporation Law of Missouri, and no express authority has been found therein allowing corporations subject thereto to serve as executor. This fact places such corporations in the same position as those created under Chapter 352, RSMo 1959, with reference to their right to serve as executor.

Up to this point we have considered whether the corporations in question may qualify as executors of the estates of the deceased persons, and to such question we have given a negative answer. Attention is now given to determining whether those corporations formed under Chapters 352 and 355, RSMo 1959, may serve as testamentary trustees.

The following language from *Riggs v. Moise*, 344 Mo. 177, 1.c. 182-184, 128 S.W. 2d 632, will disclose the difference in legal character between an executor on the one hand, and a testamentary trustee on the other:

"One who creates a trust has the freedom of choice and complete power to name his trustee so long as such trustee possesses the legal qualifications. * * * No procedure in any court for the confirmation of the appointment of a trustee so named is compelled in Missouri, as it is in some states, as a condition precedent to a trustee entering upon the performance of his duties. * * * The court cannot 'prevent or promote the transmission and vesting of the title of estates devised in trust, in those who are named trustees.'"

To the same point we submit the following language from *In re Beauchamp's Estate* (Mo. App.), 184 S.W. 2d 729, 1.c. 733:

Honorable James E. Woodfill

"In the first place, there is no question that the functions of executor and trustee may be united in the same person who may act in both capacities, but the capacities are separate and distinct. There is a fundamental difference between the office of trustee and that of executor and the office of trustee is not merged in that of executor by the designation of the same person as both. The person designated acts in a dual capacity. State ex rel. Richards et al. v. Fidelity & Casualty Co. of New York (Mo. App.) 82 S.W. 2d 123."

Section 352.030, RSMo 1959, provides:

"Corporations may be formed under the provisions of this chapter, to execute any trust the purpose whereof is within the purview of this chapter, and may receive and take, by deed or devise, in their corporate capacity, any property, real and personal, for the uses and purposes of such trust, and execute the trust so created."

Section 355.090, RSMo 1959, provides, in part, as follows:

"Each corporation shall have power:

* * * * *

(5) To receive and take by gift, grant, assignment, transfer, devise or bequest, any real or personal property in trust for any charitable, religious, educational, scientific, or benevolent purposes and for such other purposes as may be necessary and proper for carrying on its legitimate affairs and to perform all such trusts in accordance with the terms, conditions, limitations, and restrictions thereof; * * *."

Section 352.030, RSMo 1959, quoted supra, applicable to charitable, benevolent and religious corporations formed under Chapter 352, RSMo 1959, clearly confers authority on such corporations to act as testamentary trustee in carrying out any trust within the purview of said chapter. Section 355.090, RSMo 1959, quoted supra, clearly confers authority on corporations formed under Chapter 355, RSMo 1959, to act as testamentary trustee for any charitable, religious, educational, scientific, or benevolent purpose for which said corporation was formed.

Honorable James E. Woodfill

CONCLUSION

It is the opinion of this office that no corporation formed under Chapters 352 or 355, RSMo 1959, may qualify as executor of estates of deceased persons, but they may serve as testamentary trustees in carrying out trusts only for any of the legitimate purposes for which they are organized.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JO'M:BJ