

BONDS:

Bondsman may establish qualification by means of encumbered property having clear value in excess of encumbrance, or by personal property having stable value, but not by property held by entiresities.

September 30, 1969

OPINION NO. 411



Honorable G. William Weier
Prosecuting Attorney
Jefferson County Court House
Hillsboro, Missouri 63050

Dear Mr. Weier:

This official opinion is submitted in response to your request through your assistant, William T. Brooking, Jr., presenting certain questions regarding the property holdings of bondsmen as specified in Supreme Court Rule 32.15. Such rule provides as follows:

"In addition to the qualifications specified in Rule 32.14, an individual shall not be taken as a surety on any bail bond unless he shall be the owner of real estate or personal property having a reasonable market value, in excess of all encumbrances thereon, exemptions and all other liabilities, at least equal to the amount specified in the bond which he proposes to execute. In order to qualify upon the basis of real estate owned, an individual shall be the sole, legal and equitable owner thereof in fee simple and of record. If there are several sureties, the aggregate market value of real estate or personal property owned by them in excess

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of encumbrances, exemptions and all other liabilities, shall be at least equal to the amount specified in the bond."

We will discuss the several questions in sequence.

1. May a bondsman qualify on the basis of property standing in the names of himself and his wife?

Under the law of Missouri property standing in the names of two persons who are in fact husband and wife is held in estate by entirety unless there is an unequivocal indication to the contrary. The wife's interest in property so held is not subject to the tort or contract liabilities of the husband and the husband has no power to create a lien or charge against this property without her consent. Among the many cases so holding are *Dickinson v. Gault*, 229 S.W.2d 283 (St.L.Ct.App. 1950) and *Wilson v. Fower et al.*, 155 S.W.2d 502 (K.C.Ct.App. 1941).

The husband, then, is not the "sole owner" of entirety property and may not use such property as a basis for qualification under Rule 32.15. It is apparent that the entirety property would not be available to satisfy the husband's obligation as a bondsman, unless the wife had so agreed.

2. May a bondsman establish his eligibility by means of property which is subject to deed of trust, mortgage or other encumbrance?

The first sentence of Rule 32.15 requires property "having a . . . value, in excess of all encumbrances . . . at least equal to the amount specified in the bond . . ." By mentioning a value in excess of encumbrances, the rule clearly connotes the possibility that there will be encumbrances, and does not say that encumbered property is disqualified. The first sentence of the rule does not distinguish between real and personal property, for both are specified in the sentence.

We feel that these clear indications in the first sentence should prevail over the less specific language of the second sentence, requiring that the bondsman be "the sole legal and equitable owner" of the property considered in determining his qualifications. In technical speech the trustee of a deed of trust has legal ownership of the property involved and the cestui que trust has an equitable ownership, and any holder of an encumbrance

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would have a species of equitable ownership, but to read the second sentence of Rule 32.15 as precluding any encumbrance would make portions of the first sentence meaningless, and language is construed to avoid this result whenever possible. We feel that it is more reasonable to read the second sentence of the rule as requiring clear ownership, over and above the maximum demonstrable value of encumbrances. The requirement that ownership be "in fee simple" precludes qualification on the basis of some lesser estate such as a life estate or vested or contingent remainder. The requirement that the ownership be "of record" would rule out property held in the name of a "straw party." The provisions would also exclude property which is the subject of a contract for sale and in which the purchaser would therefore have an equitable ownership. These situations give ample meaning to the second sentence, and would support a construction which would not preclude all encumbrances.

Encumbered property would qualify only if the encumbrance had an ascertainable value, so that the value of the property over and above the encumbrance may be clearly demonstrated. If the encumbrance is such that it might consume the entire property under certain contingencies, then the requirement of the rule would not be met and the property would not be eligible.

3. Would cars, household goods and similar property qualify as security?

The rule permits qualification on the basis of personal property as well as real property and Rule 32.16 permits the scheduling of personal property. Nothing would exclude tangible personal property such as you describe.

Even so, we feel that the responsible authority would not be obliged to accept such items as automobiles and household goods in qualification. Automobiles are subject to rapid depreciation, and therefore are not satisfactory security for bonds which may run for several years. Household goods are difficult to value, and the ownership situation is often confused as between husband and wife. Since the purpose of the qualification requirements is to ensure the financial responsibility of the bondsman, the authorities who are responsible should not have to accept property which is of unstable value or in which the value is difficult to demonstrate or realize.

4. Is a note secured by deed of trust acceptable security for a bondsman?

A note, secured or otherwise, is intangible personal property. Nothing in the rules says that property of this type is not available to demonstrate a bondsman's qualification. The ascertainable value of the note, therefore, may be so used.

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CONCLUSION

It is the opinion of this office:

1. That a bondsman may not establish his qualification under Supreme Court Rule 32.15 by property standing in the names of himself and his wife.

2. That property encumbered by deed of trust, mortgage, or otherwise may be so used to the extent of its demonstrable value in excess of all encumbrances.

3. That tangible property such as automobiles and household goods is not categorically excluded, but that the official responsible for approving a bondsman's qualifications could exclude such property if of the opinion that it does not have a stable or demonstrable value.

4. That a bondsman may establish his qualifications by the demonstrable value of a promissory note, secured or unsecured, and owned by him.

The foregoing opinion, which I approve, was prepared by my special assistant, Charles B. Blackmar.

Sincerely yours,



JOHN C. DANFORTH
Attorney General