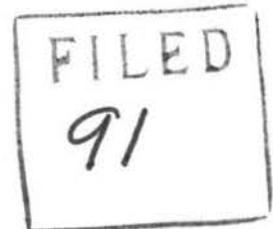


May 26, 1971

Answered by Letter - Bartlett  
OPINION LETTER NO. 91



Honorable William E. Robinson  
State Treasurer  
State of Missouri  
State Capitol Building  
Jefferson City, Missouri 65101

Dear Mr. Robinson:

This letter is in response to your request for the official opinion of this office on the following question:

"We are enclosing copies of correspondence and stipulation agreement pertaining to disposition of \$50,000 set aside as a 'reserve against attorney's fees and expenses of the Trustees and costs of court' in the Babler Trust litigation.

"Since the Supreme Court order of September 16, 1970 ended the litigation in the above case, will you please advise if we should make payment as requested in Mr. Jaeger's letter of December 17, 1970, or should we pay Supreme Court costs and Circuit Court costs as directed in the order dated August 3, 1970, and pay the balance plus interest earned into the Babler Memorial State Park Fund, as set out in Sec. 253.360 R. S. 1969."

Mr. Jaeger, Director of Parks for the Missouri State Park Board, has written three letters to you concerning payment of the court costs in the Babler Trust litigation which was terminated

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by the Missouri Supreme Court's decision in Mercantile Trust Co., et al v. Jaeger, et al, 457 S.W.2d 727 (Mo. 1970). In summary, Mr. Jaeger's three letters request that you disperse in a particular manner the \$50,000 fund (plus accrued interest) being held by you to cover court costs and expenses of this litigation. Specifically, in Mr. Jaeger's latest letter dated March 1, 1971, he requested that a check in the amount of \$143.35 be made payable to the Clerk of the Circuit Court of the City of St. Louis and that the balance of the court costs and expense fund being held by you be paid to the Dr. Edmund A. Babler Memorial State Park Fund.

We interpret your question to be whether you should comply with the request made by Mr. Jaeger.

On July 7, 1966, two lawsuits were filed -- one by the trustees under a testamentary trust established by the will of Jacob L. Babler, and the other by the Attorney General. Both lawsuits sought adjudication of a dispute which had arisen between the co-trustees of the trust estate and the Attorney General with respect to the amount of compensation due the trustees on termination of the trust. After the suits were filed a stipulation was entered into between the parties providing, in part, that a portion of the corpus of the trust would be set aside by the State Treasurer as a reserve against attorneys' fees, expenses and court costs which might be allowed against the trust as a result of this litigation. The stipulation provided as follows with regard to this reserve:

"1. (B) From the corpus of the trust estate conveyed by the Trustees hereunder to the Treasurer of the State of Missouri, the Treasurer of the State of Missouri shall set aside, and hold apart as a separate fund, pending a final judgment in this case, the sum of \$50,000 as a reserve against attorney fees and expenses of the Trustees and costs of Court, if any, which may be allowed against the trust; it being understood that the Circuit Court and any Appellate Court to which this cause may be appealed retains jurisdiction over said segregated fund of \$50,000 and of the disposition of same; and if the Trustees' attorney fees and expenses and Court costs are ordered paid from the trust estate, the Treasurer of the State of Missouri shall apply said fund of \$50,000 towards payment of such obligations as the Circuit Court and any Appellate Court to which this cause may be appealed in its order shall direct."

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In the Missouri Supreme Court's decision in the Mercantile Trust Company case, the following appears with regard to the payment of court costs:

" . . .The court costs in both the trial court and this court are assessed against appellants and ordered paid out of the fund held by the State Treasurer for that purpose." 457 S.W.2d at 735-736.

Therefore, based on the terms of the Stipulation Agreement and on the order of the Missouri Supreme Court terminating this litigation, we conclude that court costs in the Circuit Court for the City of St. Louis and court costs in the Missouri Supreme Court should be paid out of the fund being held by you for that purpose. In this regard, we suggest that you ascertain from the parties to the Babler Trust litigation what court costs have been incurred and, upon receipt of proper verification of these costs from the clerk of the court in question, payment should be made directly to these courts.

With reference to the balance of the reserve fund which you are holding, we note that the Stipulation Agreement provides that this fund shall come from the corpus of the trust estate. Under the Stipulation Agreement the entire corpus of the trust estate with the exception of an amount held by the trustees as compensation claimed by them for their services as trustees, was paid to you as Treasurer of the State of Missouri. We believe that such a disposition of the corpus was consistent with Section 253.360, RSMo 1969, and that the balance of the reserve for court costs, attorneys' fees and expenses which you are holding should be similarly handled. Subsections 1 and 2 of Section 253.360, RSMo 1969, provide as follows:

"1. There is hereby created the 'Doctor Edmund A. Babler Memorial State Park Fund'. All money, funds, and securities acquired as provided in section 253.350 shall be deposited with the state treasurer to the credit of the fund. All income, interest, rights or rent earned through the operation of the fund shall also be credited to the fund.

"2. The state treasurer shall be the custodian of all money, bonds, securities or interests and rights therein deposited in the state treasury to the credit of the Doctor Edmund A. Babler memorial state

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park fund and he and his sureties are responsible on his official bond for the faithful performance of his duties in the safekeeping of all money or property of the fund as provided in this section and section 253.350 and for the disbursement of such money or property upon warrants drawn by the Missouri state park board."

Under these provisions, we believe that the State Treasurer is designated as the custodian of all moneys, bonds, securities, interests and rights deposited in the State Treasury to the credit of the Dr. Edmund A. Babler Memorial State Park Fund. Therefore, we conclude that the balance of the reserve fund should be paid to the Dr. Edmund A. Babler Memorial State Park Fund and held by you as custodian.

We are aware of the fact that on the twenty-third day of November, 1966, an agreement was entered into entitled, "Investment Advisory and Custodial Agreement" between the Missouri State Park Board, M. E. Morris, Treasurer of the State of Missouri, and the St. Louis Union Trust Company. Under this agreement, the St. Louis Union Trust Company agreed to act as custodian for the State Treasurer of the assets of the Dr. Edmund A. Babler Memorial State Park Fund. Certain provisions of this agreement setting forth the Trust Company's responsibilities are as follows:

"Trust Company shall have full power and authority to hold all money and securities deposited by said Depositor with said Trust Company and, upon order of Principal, to sell, exchange, assign, transfer, or otherwise dispose of all or any of such securities, or any reinvestments thereof, for such consideration, at such times and upon such terms and conditions as Principal shall deem for the best interest of the Fund; to invest all or any part of the stocks, bonds or other securities deposited with the Trust Company, or proceeds arising from the sale of any of said securities, in such bonds, notes, stocks, both common and preferred, and other securities, domestic or foreign, as Principal may consider safe and desirable; and to make changes of investments and reinvestments thereof whenever deemed advisable by Principal.

"Principal, from time to time, may direct

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the sale, exchange, assignment, transfer or other disposition of any stocks, bonds or other securities then in the account of said Fund held by Trust Company in the name of Depositor, by an appropriate directive duly made in writing from Principal to Depositor. A copy of such directive together with appropriate transfer documents shall be forwarded to Trust Company by Principal. Receipt of a copy of such directive together with appropriate transfer documents by Trust Company shall constitute an order from Depositor to Trust Company to execute the terms of said directive."

It is our conclusion that under Section 253.360, RSMo 1969, the State Treasurer "shall be the custodian of all money, bonds, securities or interests and rights therein deposited in the State Treasury to the credit of the Dr. Edmund A. Babler memorial state park fund. . . ." Furthermore, the State Treasurer and his sureties are responsible "for the faithful performance of his duties in the safe keeping of all money or property of the fund as provided in this section and in Section 253.350. . . ." Under the Investment Advisory and Custodial Agreement of November 23, 1966, the State Treasurer has delegated to the St. Louis Union Trust Company performance of his duties as custodian of this fund. We do not believe that such a delegation is authorized by the statute.

Under Section 253.360, the State Park Board is authorized to retain the services of a professional investment counselor or trust company "to advise it in the selection of such investments":

"So far as practicable, the money, bonds, and other securities of the fund shall be kept safely invested so as to earn a reasonable return. The Missouri state park board shall select such investments as are permitted by the laws of Missouri relating to the investment of the capital, reserve and surplus funds of life insurance companies or casualty insurance companies organized under the laws of Missouri, and the state treasurer shall make such investments or reinvestments as directed by the board. The board may retain the services of and pay a reasonable fee to a professional investment counselor or a trust company to advise it in the selection of such investments."

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There is no authority in this section to retain the services of or to designate a trust company to perform the custodial functions given to the State Treasurer by the express wording of this statute.

Furthermore, subsection 4 of Section 253.360 provides that "the state treasurer shall make such investments or reinvestments as directed by the board." Under the above quoted portion of the Investment Advisory and Custodial Agreement, the trust company makes the investments or reinvestments as directed by the board. Again, we find no authority in this statute to support a delegation to the trust company of the State Treasurer's responsibility to make investments or reinvestments of this fund.

Subsection 4 of Section 253.360 provides in part as follows:

". . .The Missouri state park board shall select such investments as are permitted by the laws of Missouri relating to the investment of the capital, reserve and surplus funds of life insurance companies or casualty insurance companies organized under the laws of Missouri, and the state treasurer shall make such investments or reinvestments as directed by the board. . ."

Permitted investments for the reserve and surplus of a life insurance company include stocks and bonds of private corporations. See Sections 376.300 and 376.305, RSMo 1969.

Under Article IV, Section 15, Constitution of Missouri, 1945, the investment powers of the State Treasurer as custodian of all state funds are set out:

"State treasurer--duties--custody, investment and deposit of state funds--duties limited. The state treasurer shall be custodian of all state funds. All revenue collected and moneys received by the state from any source whatsoever shall go promptly into the state treasury, and all interest, income and returns therefrom shall belong to the state. Immediately on receipt thereof the state treasurer shall deposit all moneys in the state treasury to the credit of the state in banking institutions selected by him and approved by the governor and state auditor, and he shall hold them for the benefit of the respective funds to

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which they belong and disburse them as provided by law. The state treasurer shall determine by the exercise of his best judgment the amount of state moneys that are not needed for current operating expenses of the state government and shall place all such moneys not needed for payment of the current operating expenses of the state government on time deposit, bearing interest, in banking institutions in this state selected by the state treasurer and approved by the governor and state auditor or in short term United States government obligations maturing and becoming payable one year or less from the date of issue or in other United States obligations maturing and becoming payable not more than one year from the date of purchase. The investment and deposit of such funds shall be subject to such restrictions and requirements as may be prescribed by law. Banking institutions in which state funds are deposited shall give security satisfactory to the governor, state auditor and state treasurer for the safekeeping and payment of the deposits and interest thereon pursuant to deposit agreements made with the state treasurer pursuant to law. No duty shall be imposed on the state treasurer by law which is not related to the receipt, investment, custody and disbursement of state funds."

The Missouri Supreme Court defined "state money" as follows in State ex rel. Thompson v. Board of Regents of Northeast Missouri State College, 305 Mo. 57, 264 S.W. 698 (banc, 1924):

". . .[S]tate money means money the state, in its sovereign capacity, is authorized to receive, the source of its authority being the Legislature. . . ."

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". . .[N]o statute required the payment into the state treasury of the money here in controversy, and that a statutory enactment was a prerequisite to such pay-

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ment and its receipt and deposit by the treasurer to entitle it, under the Constitution, to be classified as state money. . . ." Id at 700 - 701.

Sections 253.350 and 253.360 authorize the receipt of property given to the state for the benefit of the Dr. Edmund A. Babler Memorial State Park. Therefore, we conclude that any property given to the state pursuant to these sections constitutes "state funds" as the term is used in Article IV, Section 15.

Having so concluded, the investment of these state funds must be in accordance with the direction of Section 15. Any legislative direction in Section 253.360 which conflicts with Section 15 would be invalid.

Based on the foregoing, the balance of the reserve against attorneys' fees and expenses of the trustees and costs of court should be deposited by you in the Dr. Edmund A. Babler Memorial State Park Fund and held by you as custodian.

Very truly yours,

JOHN C. DANFORTH  
Attorney General