Opinion No. 63-70

June 21, 1963

BY: OPINION of EARL E. HARTLEY, Attorney General

TO: Honorable Alex J. Armijo State Auditor State Capitol Building Santa Fe, New Mexico

QUESTION

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Must a national bank acting as a fiduciary in New Mexico, and particularly as the guardian of the estate of a minor or incompetent under the jurisdiction of the Veteran's Administration, maintain deposits with the state Auditor to qualify as such guardian without giving bond?

CONCLUSION

No.

OPINION

*{*147}* **ANALYSIS**

In your letter of May 1, 1963, in which you asked the above question, you call attention to Sec. 48-5-5, N.M.S.A., 1953 Compilation. That Section provides any trust company organized under the New Mexico statutes, which maintains a deposit described in the section, and has satisfied the state auditor of its solvency, may qualify as a fiduciary, including a guardian, without giving bond as such.

In your same letter you called to our attention the provisions of Sec. 48-2-30, which provides that national banks which have qualified under the provisions of the *{*148}* National Bank Act may serve as guardians in New Mexico without giving bond as otherwise required.

The National Banking Act is Title 12, U.S. Code. Sec. 92a of that title provides that the Comptroller of the Currency, by special permit, may authorize national banks to act as fiduciaries, including guardians, where local state banks and trust companies in competition with such national banks are permitted to perform such function. However, where such state laws require corporations acting in a fiduciary capacity to make deposits with the state authorities for the protection of private or court trusts, national banks so acting shall be required to make similar deposits.

Also, by the same section of the National Banking Act, where state corporations under similar circumstances are exempt from the requirement to execute the bond usually required of individuals, national banks shall likewise be exempt.

In this area, federal laws supersede state law. A state may not prohibit or condition the doing of business by a national bank, where it has met the requirements of federal law. See the annotation at 153 ALR 415.

We call to your attention the language of Sec. 48-5-5, supra, indicating that the purpose of the deposit mentioned in that section is to permit the trust company making the deposit to qualify as fiduciary including guardian, "without giving bond as such".

We call to your attention also the language of Section 48-1-2, which is a part of Chapter 67, Laws of 1915, which is the same enactment which Sec. 48-5-1 (original) and Section 48-5-5 are parts. The title of such original enactment was "an Act to define and regulate the business of banking".

Such Sec. 48-1-2, defining a "Bank", expressly excepts National Banks. It further defines a "Trust Company" as a bank. It is therefore our opinion that the Bank Act, Chap. 67 of the Laws of 1915, was not intended to apply to National Banks.

It is further our opinion, that since the Bank Act does not apply to national banks, and also since the depository requirement of Sec. 48-5-5, about which you inquire, is solely for the purpose of enabling the trust company to avoid the requirement of giving bond, and since the provisions of Sec. 48-2-30, to which you refer, expressly exempt from giving bond the national banks organized under the National Bank Act, and resident within this state, which have qualified under the provisions of the National Bank Act to act as guardians, the depository requirements of Sec. 48-5-5, supra, do not apply to such national banks.

Therefore, if you satisfy yourself properly that a National Bank is resident within this state and has a special permit from the Comptroller of the Currency to act as guardian of estates in New Mexico, you may release to it any deposits which you hold, which have been made for the purpose of compliance with Sec. 48-5-5, supra.

The foregoing opinions relate to appointments of National Banks as guardians of estates prior to midnight of June 30, 1963. After that time, the new "Banking Act", House Bill No. 53 of the 26th Legislature, will be in effect. Section 18 of this act reads as follows:

*{*149}* "No oath or bond shall be required of a bank to qualify upon appointment as a fiduciary, unless the instrument creating a fiduciary position expressly otherwise provides".

Sec. 32-1-13, N.M.S.A. 1953 Compilation, requires that every person appointed as a guardian of a minor shall enter into a bond. Section 32-2-3 provides that before any

person can perform any act as guardian for an incompetent person, he shall give a surety bond.

The question arises as to whether the provisions of the statutes on guardians, just referred to, are to be read into every "instrument creating a fiduciary position", so that every such instrument shall be deemed to provide expressly that the bank must give a bond. However, it is our opinion that this is not the legislative intention.

The history of the legislation on this subject, as exemplified by the provisions considered in this opinion, demonstrates that it has been the general intention of the New Mexico Legislature to exempt properly qualified banks from giving such bonds. It is our opinion that it was the legislative intention in this new "Banking Act" to excuse from giving such bonds unless, in a specific instance, the court appointing the guardian should decide that a bond ought to be given.

In any event, since there is nothing in the new Banking Act requiring the deposit of money or securities in order to avoid giving bond, the effective date of the new act will cause no alteration in your operation regarding the releasing of deposits in accordance with our opinion expressed herein.

By: Leslie D. Ringer

Special Assistant Attorney General