

Opinion No. 76-25

August 10, 1976

BY: OPINION OF TONEY ANAYA, Attorney General Jill Z. Cooper, Assistant Attorney General

TO: Judge John B. Wright, Eighth Judicial District, P. O. Box 160, Raton, New Mexico 87740

QUESTIONS

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What is the proper disposition of the interest earned on trust funds belonging to litigants and deposited by the court clerk in interest bearing obligations pursuant to Section 16-3-24, NMSA, 1953 Comp.?

CONCLUSION

See Analysis.

OPINION

{*96} ANALYSIS

Section 16-3-24, **supra**, provides that:

"Each district court clerk shall open a trust fund checking account, designated as the "court clerk trust account," in a bank which is a member of the federal deposit insurance corporation. Not later than two (2) working days after receipt the district court clerk shall deposit to this account all money which belongs to a litigant and all money which might be refunded to a litigant. Whenever the district court, by written order filed with the clerk, authorizes payment of money to a litigant from the court clerk trust account, the district court clerk shall issue his check on the account in accordance with the order. As prescribed by regulation of the director of the administrative office of the courts, money in the court clerk trust account may be invested by the district court clerk in obligations of the United States or in federally insured bank or savings and loan association savings accounts."

No specific provision for the disposition of the interest is made by the statute. However, as the court clerk trust account may be invested "as prescribed by regulation of the director of the administrative office of the courts," we would conclude that this question may be resolved by appropriate regulations issued pursuant to this statute.

Obviously, such regulations would provide either that the interest on the trust fund account be paid over to the litigants or that it be paid over to the State. There are no apparent limitations on the discretion of the court administrator in this regard.

The New Mexico Constitution provides at Article VI, Sec. 30 that:

"All fees collected by the judicial {*97} department shall be paid to the state treasury as may be provided by law and no justice, judge or magistrate of any court shall retain any fees as compensation or otherwise."

As the trust funds are not fees collected by the judicial department, this limitation is not applicable.

Nor are these funds public money since Section 16-3-24, **supra**, specifically states that the money deposited in the court clerk trust account is "money which belongs to a litigant and all money which might be refunded." Thus, none of the constitutional or statutory provisions governing public monies would be applicable.

Nor is there any New Mexico case law on this point. The question was raised in an original proceeding in mandamus, **State of New Mexico ex rel. I. E. Shahan, et al. v. The District Court in and for the Second Judicial District**; S. Ct. 10807, but the court never reached the determination of whether or not the district court had a mandatory nondiscretionary duty to account to the litigants for the interest earned on the trust account. Instead, the Supreme Court ordered that "payment be made of the interest pursuant to the stipulative formula from the interest on funds now on deposit when such interest is earned."

The experience of other jurisdictions, however, tends to support the view that interest on trust fund accounts accrues to the litigants.

For example, in **Sellers v. Harris County**, 483 SW2d 242 (Tx. 1972), the Texas Supreme Court said that "the interest earned by deposit of money owned by the parties to the lawsuit is an increment that accrues to that money and to its owners". 483 SW2d at 243. The Texas court further held that a statutory provision entitling the county to interest on funds deposited in court in an interpleader action, without regard to the actual value of county services in safeguarding and investing that sum, was in violation of the due process clauses of the state and federal constitution.

In **Bordy v. Smith**, 150 Neb. 272, 34 NW2d 331 (1948), the court held that absent a statute to the contrary, the interest becomes part of the fund by whose investment it was produced.

In **McMillan v. Robeson County**, 262 NC 413, 137 SE2d 105 (1964) the court held that the earnings of the fund are a mere incident of ownership of the fund itself and the constitutional prohibition against depriving a person of his property without due process of law would apply to the earnings as well as to the principal.

Thus, although New Mexico law gives no specific direction to the court administrator in regulating the disposition of interest on trust fund accounts, we would suggest that due process may require regulations awarding the interest on the account to the owner of the principal.