



STATE OF KANSAS

Office of the Attorney General

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Curt T. Schneider
Attorney General

February 6, 1978

ATTORNEY GENERAL OPINION NO. 78-56

Ms. Ernestine Gilliland
State Librarian
Kansas State Library
535 Kansas Avenue
Topeka, Kansas 66603

Re: Libraries--Property--Use

Synopsis: A lot located at Seventh and Washington Streets, devised to the board of directors of the city library of the City of Junction City under a will executed in 1904, may be sold by the board, with the approval of the governing body, and the proceeds thereof applied to the construction of a library facility elsewhere in said city.

* * *

Dear Ms. Gilliland:

On behalf of the board of directors of the George Smith Public Library of the City of Junction City, you transmit to us an inquiry from the chairman of that board concerning the interpretation of the will of Mr. Smith, an early citizen of the City of Junction City, who made a substantial bequest to the city for the establishment of a public library and reading room.

The request indicates that prior to the death of Mr. Smith on January 9, 1905, the city had no library. In his will, he made substantial provision for the establishment of one, stating thus:

"First. It is my wish and purpose to provide out of my estate for the establishment

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and maintenance of a public Library and reading room in Junction City, Kansas for the use of the inhabitants of said City, and to effect that purpose I hereby give, bequeath and devise unto the City of Junction City the whole of my real and personal property, after the payments of debts and charges hereinafter named, the title to said property to be vested in a board of directors to be appointed by the Mayor and council of said City, under the Act of the Legislature of Kansas entitled 'An act to authorize cities to establish and maintain free public libraries and reading-rooms.'

Mr. Davis, chairman of the present board, indicates in his letter his understanding that a number of tracts of real estate which Mr. Smith had acquired during his lifetime were sold, and eventually all the cash assets of his estate were distributed to the city or the library board, and, in fact, a library building was built on the corner of Seventh and Washington, the ground floor of which was rented and the second floor of which was made the public library and reading room. This action was taken, apparently, pursuant to the second paragraph of the will, which states thus:

"Second. It is my wish if this shall be deemed by said board of directors most expedient, that the lot owned by me on the corner of seventh and Washington streets shall be improved by the erection of permanent stone or brick buildings or building, the lower story of which to be rented for store rooms, suitable rooms provided in the upper stories for a library and reading rooms, and the rents and income from such property and other estate to be devoted to the perpetual maintenance of such library and reading rooms."

Mr. Davis advises that the library still occupies the building thus constructed. The ground floor is rented to various businesses, and the top floor provides a library facility for the city. However, the library needs of the city have long outgrown the second-floor quarters, and the library board of directors is exploring the possibility of seeking larger and more spacious quarters for the library facility.

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The question which is posed is whether the language in the second paragraph of the will, quoted above, is mandatory upon the board or whether it is merely precatory.

In the first paragraph of the will, the testator did "give, bequeath and devise unto the City of Junction City the whole of my real and personal property," title to be vested in a statutory library board appointed by the city governing body. In the second paragraph, he made especial provision for certain of that property, a lot at the corner of Seventh and Washington Streets, that it be improved by the erection of a building of stone or brick to be used to house store rooms on the lower floor, and a library and reading rooms in the upper stories, and the

"rents and income from such property and other estate to be devoted to the perpetual maintenance of such library and reading rooms."

However, he expressly characterized the erection of a building for the designated uses as "my wish if this shall be deemed by said board of directors most expedient. . . ." Thus, he indicated that it was his wish that the building be erected and used for the stated purpose, but only if that course of action were "deemed by said board of directors most expedient" He chose expressly to defer to the judgment of the board of directors regarding the use of that property for library purposes, having in the preceding paragraph bequeathed absolutely all his real property to the library board.

The testator detailed at some length his wishes in the second paragraph, specifying a building of brick or stone and the uses of the lower and upper floors of the building. In addition, he specifies that the rents and income from the property and "other estate [should] be devoted to the perpetual maintenance of such library and reading rooms." I think it is clear that the testator intended that all income from his estate received by the board should be applied to the perpetual maintenance of the library and reading rooms, regardless of what use was made of the property at Seventh and Washington. At the same time, however, the testator chose specifically to defer regarding the construction of a library on this particular lot to the judgment of the library board itself, i.e., the library should be built on that lot if, and only if, the board deemed it most expedient." The testator made that use of that property clearly a statement of his wishes,

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expressly to be followed only if expedient in the judgment of the library board, and not a mandatory and unconditional direction.

In *In re Estate of Cribbs*, 180 Kan. 840, 308 P.2d 111 (1957), the court stated thus:

"It is . . . well established that a gift in clear terms cannot be taken away or diminished by later obscure and ambiguous provisions or mere precatory language. To diminish or encumber an absolute gift, it is necessary to find or supply language in the later clause equally as plain and unequivocal as in that of making the gift, expressing an intention to limit the devise already made

. . . .
Words in a will which are merely expressive of a desire or intention on the part of the testator, and are merely advisory or precatory in character, do not amount to a testamentary disposition, or control or alter express dispositions in the will, unless it is apparent that it was the testator's intention that such words of desire or intention should be mandatory, and then only to the extent fixed by testator's dominant purpose."
180 Kan. at 843.

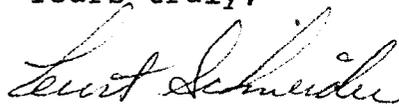
The absolute devise and bequest was made in paragraph one, for the stated wish and purpose to provide for the establishment and maintenance of a public library and reading room in the city for the use of its inhabitants. The testator declared no controlling and mandatory direction that the library be constructed on and only on the Seventh and Washington lot. That property was to be used for that purpose only if the library board deemed it expedient. If it deemed it inexpedient to do so, the proceeds from the sale or rental of the lot, like all other real property devised in the first paragraph, would be applied to his overriding purpose, the erection of a library somewhere in the city, on property received from the testator or elsewhere.

Thus, to respond specifically to the question raised, it is my judgment that the lot at Seventh and Washington was bequeathed absolutely to the library board, to be used for the erection of

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a library thereon only if deemed expedient by the board. The testator's wishes being precatory in 1904, they remain equally precatory today, and the board is free, in my judgment, to sell the library property and apply the proceeds therefrom to the purchase of land and erection of a building thereon to be used for a library; alternatively, the board may rent the entire building and use the proceeds therefrom for the maintenance of a new library building.

Yours truly,



CURT T. SCHNEIDER
Attorney General

CTS:JRM:kj

cc: The Honorable Charles J. Schwartz
State Representative
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