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ATTORNEY GENERAL OPINION NO. 80- 9

The Honorable Joan Finney
State Treasurer
535 Kansas
Topeka, Kansas

Re: Personal and Real Property--Disposition of Unclaimed Property Act--Unclaimed Property Held by a Utility

Synopsis: The provisions of the "Disposition of Unclaimed Property Act," K.S.A. 1979 Supp. 58-3901 et seq., relating to unclaimed security deposits of utilities, apply only to the deposits of those utilities which are not municipally owned. Unclaimed security deposits of municipally-owned utilities should remain in the custody of the utility and should be accounted for in accordance with the provisions of K.S.A. 1979 Supp. 12-822.

* * *

Dear Ms. Finney:

You request our opinion as to the construction which should be given to K.S.A. 1979 Supp. 58-3904, relating to unclaimed property held or owing by a utility. Your request is made in light of certain provisions of K.S.A. 1979 Supp. 12-822, which concerns transfers of security deposits of customers of municipally-owned utilities to the "operating fund" of such utilities. The question which you have raised is whether "unclaimed" security deposits of municipally-owned utilities must be reported and delivered to the state treasurer under the former statute, which statute is part of the "Disposition of Unclaimed Property Act," K.S.A. 1979 Supp. 58-3901 et seq.

The "Disposition of Unclaimed Property Act" was enacted by the 1979 Legislature (L. 1979, ch. 173) and closely parallels the "Uniform Disposition of Unclaimed Property Act," as revised in 1966 and approved by the National Conference of Commissioners on Uniform State Laws. The Act represents the first substantial exercise by this state of long recognized rights over "unclaimed" or "abandoned" tangible and intangible personal property. Briefly stated, the Act is custodial in nature, i.e., it does not result in the loss of the owner's property rights, and prescribes a procedure for the reporting and delivery of certain property, which is presumed abandoned, to the state treasurer. K.S.A. 1979 Supp. 58-3904 is the section of the Act relating to security deposits of utilities, and provides as follows:

> "The following unclaimed property held or owing by any utility shall be presumed abandoned property:
>
> "Any deposit made by a subscriber with a utility to secure payment for, or any sum paid in advance for, utility services to be furnished in this state, less any lawful deductions, that has remained unclaimed by the person appearing on the records of the utility entitled thereto for more than seven (7) years after the termination of the services for which the deposit or advance payment was made."

If considered in isolation, the above-quoted statute would require the reporting and delivery of unclaimed security deposits of municipally-owned utilities to the state treasurer pursuant to the provisions of K.S.A. 1979 Supp. 58-3912 and 58-3914. However, in our judgment, the statute must be harmonized with K.S.A. 1979 Supp. 12-822, a law specifically restricting the collection of security deposits by public and municipally-owned utilities. The following provisions relating to "unclaimed" security deposits of municipally-owned utilities were enacted by the 1978 Legislature as an amendment to K.S.A. 1979 Supp. 12-822 (see L. 1978, ch. 59, §1):

"Any amount of security deposit, and the accrued interest thereon remaining in the account of any customer of a municipally owned utility shall be placed in the operating fund of such utility, upon the following conditions: (a) Such money has remained on deposit with the municipal utility for a period of more than three (3) years from the date service was discontinued;

"(b) no demand for such money has been made at any time during the three-year period;

"(c) the whereabouts of the person to whose account the money is credited is unknown and a reasonable effort has been made to determine the same; and

"(d) following the expiration of the three-year period, the utility has published, once each week for two (2) consecutive weeks in a newspaper of general circulation in the county in which the utility is located, a notice listing any person whose deposit remains on account, and that a demand for such money must be made within sixty (60) days. Sixty (60) days after the last publication of such notice, any security deposits remaining in the account of any such customer shall be placed in the operating fund of such utility."

In considering this amendment to K.S.A. 1979 Supp. 12-822, the first question which arises is whether it should be construed to be an "escheat" statute or a "custodial" statute. As noted in the annotation at 84 L.Ed. 18, "escheat" statutes give depositors or their heirs "no right of reclamation at all or allow only a limited period within which deposits may be claimed," whereas "custodial" statutes make the state merely the custodian of the dormant deposit, "subject to payment thereof to the true owner, whether the depositor or his heir, whenever he proves his right thereto." While custodial statutes have been upheld where deposits were to be taken over upon notice only, without any judicial decree of actual abandonment, <u>Anderson Nat. Bank v. Luckett</u>, 321 U.S. 233 (1944), it appears clear that the due process clause of the federal constitution requires judicial proceedings, or at least the right of judicial review, in order to permanently terminate property rights through escheat. See Hamilton v. Brown, 161 U.S. 256 (1895); Provident Savings v. Malone, 221 U.S. 660 (1911); Security Sav. Bank v. California, 263 U.S. 282 (1923); In re Harrisburg Gas Co., 38 Pa. D. & C. 611, 627 (1940); Commonwealth v. Cunningham, 337 Pa. 289, 299 (1940); Standard Oil Co. v. New Jersey, 341 U.S. 428, 434 (1951). Since no judicial proceedings or right of judicial review are provided for in K.S.A. 1979 Supp. 12-822, we must conclude that the legislature intended the statute to be custodial in nature, and that the statute was intended merely as a procedure whereby municipally-owned utilities might transfer unclaimed security deposits to an "operating fund." Such a construction recognizes that K.S.A. 1979 Supp. 12-822 does not expressly terminate the property rights of the owners of the security deposits, and is in accord with the rule of statutory construction that "[a] statute should, if reasonably possible, be so construed as to uphold its constitutionality." Addington v. State, 199 Kan. 554, 559 (1967).

Having construed K.S.A. 1979 Supp. 12-822 to be a "custodial" statute rather than an "escheat" statute, it is apparent that the "unclaimed security deposits" of municipally-owned utilities, which have been transferred to the "operating fund" of such utilities, have not become the sole "property" of the utility. Where the ownership rights of the depositor have not been extinguished, a debtor-creditor relationship continues to exist between the utility and the depositor. In re Harrisburg Gas Co., 38 Pa. D. & C. 611, 619 (1940); State v. Atlantic City Electric Co., 128 A.2d 861, 867 (1957).

The question, therefore, arises as to whether, by enacting K.S.A. 1979 Supp. 58-3904, the legislature intended to give custody of such security deposits to the state treasurer under the provisions of the "Disposition of Unclaimed Property Act," or whether the legislature intended the deposits to remain in the operating fund of the utility under the provisions of K.S.A. 1979 Supp. 12-822. While we recognize that K.S.A. 1979 Supp. 58-3929 lists specific tangible and intangible personal property to which the provisions of the "Disposition of Unclaimed Property Act" do not apply, and that unclaimed security deposits of municipally-owned utilities are not included in such list, it should also be noted that section 31 of the Act (L. 1979, ch. 174, §31) did not repeal any of the provisions of K.S.A. 1979 Supp. 12-822. Since repeals by implication are not favored, Marshall v. Marshall, 159 Kan. 602, 606 (1945), K.S.A. 1979 Supp. 12-822 and the "Disposition of Unclaimed Property Act" must be construed, if reasonably possible, in such a manner as to give effect to both laws. Id. In attempting to arrive at such a construction, it is apparent that the rule of statutory construction, that specific language takes precedence over language which more generally deals with the particular subject in another statute which otherwise might be controlling, Harris v. Shanahan, 192 Kan. 629, 637 (1964), is of great importance. In our opinion, the provisions of the "Disposition of Unclaimed Property Act" relating to security deposits of utilities must be construed as applying only to the deposits of those utilities which are not municipally owned. Unclaimed security deposits of municipally-owned utilities should remain in the custody of the utility and should be accounted for in accordance with the provisions of K.S.A. 1979 Supp. 12-822.

Very truly yours,

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RTS:BJS:TRH:gk