Introduction

Respondent County of Cole files this brief to address only Point III of the Brief of Appellant, Treasurer of the State of Missouri. The County of Cole joins in the arguments presented in the Respondent's Brief of the Receiver, Julie Smith, in her Points I, II, IV, V, VI, VII, VIII, IX and X.

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Jurisdictional Statement

The trial court determined that the statute giving the Treasurer the power to bring an action to collect unclaimed property (§ 447.575) from the courts (§ 447.532) is an unconstitutional delegation of authority under Article IV, § 15 of the Missouri Constitution. The trial court held that such an action under the statute would exceed the limits placed on the duties of the state treasurer by the constitutional provision that states: "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 and funds received from the United States Government." Mo. Const. Art. IV, § 15. This case, then, involves the validity of the Missouri Uniform Disposition of Unclaimed Property Act and the construction of a state constitutional provision defining the state treasurer's duties. Article V, § 3 grants this Court exclusive jurisdiction to hear such matters.

Statement of Facts

This case, *In re Old Security Life Insurance Company, et al.*, Case No. CV186-1282CC, was commenced on December 31, 1986 without the filing of a petition.[1] (L.F. 1.) The matter was apparently opened for the purpose of holding or distributing the fund at issue, derived from the liquidation of the life insurance company. (L.F. 19-26.) Rather than a petition, this case commenced when Judge Kinder entered an Order Regarding Distribution of Settlement Proceeds, finding that checks totaling $146,023.28 were issued to claimants but were either returned or uncashed, and that another $208,877.70 in checks were never issued because the intended recipients could not be located. (L.F. 20.) Judge Kinder concluded these funds could best be administered by a specially appointed receiver, and he appointed Elaine Healey as the receiver. (L.F. 15, 24.) Judge Kinder ordered that Ms. Healey receive $200.00 per month in additional compensation for her duties as a receiver. (L.F. 17.) Judge Kinder ordered the receiver to "hold said sums for the benefit of unlocated class members indefinitely." (L.F. 26.)

In his Order Appointing Receiver, Judge Kinder stated that "it will be necessary to hold and administer these funds for a lengthy period of time" and concluded that the expense of administering the funds should be borne from the interest generated from the investment of the funds. (L.F. 13.) Judge Kinder concluded that a receiver should be appointed to perform those administrative duties which, absent the appointment of a receiver, would be performed by the circuit clerk. (L.F. 15.) His reasons for this

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[1] With some amendments and deletions, the County of Cole accepts the Treasurer's Statement of Facts.

conclusion included: 1) it would not be "fair to impose upon the Clerk of the Circuit Court, herself, the additional responsibilities that are engendered by a close monitoring of the investment in the funds"; 2) "the responsibility for administering [these] funds now falls upon the undersigned judge and those of his staff who work with him the closest"; 3) the Court "intends that these responsibilities be exercised only by someone in whom this Court has complete confidence and also by one who is readily available to the Court"; and 4) the Court "believes that the investment decisions with respect to the funds should be retained by the Court itself." (L.F. 13-14.) The Court "reserve[d] unto itself the final investment decisions"; ordered that interest received from such investments be paid over directly to the receiver and that from such interest the receiver "shall first pay therefrom the lawful expenses and fees regarding the administration of the funds as may from time to time be authorized to be paid or allowed by the Court; there shall next be paid therefrom such amounts as may be lawfully requisitioned by the Circuit Clerk of Cole County for the purpose specified and allowed for such Clerk in subsection 2 of Section 483.310, RSMo and the remaining balance shall be paid into the general revenue fund of Cole County as provided in subsection 2 of Section 483.310 RSMo." (L.F. 16.) The docket sheet reflects that this case was disposed of on the same day this order was entered, December 31, 1986. (L.F. 3.)

Judge Kinder ordered the receiver to annually publish notice in the St. Louis, Kansas City and Jefferson City newspapers indicating the names of the unlocated class members and stating that "funds are being maintained by the Court for payment of their individual awards" (L.F.23-24, 26.) Such annual notice was published in all three papers one time only, in July 1987. (L.F. 27-45.) Neither the notice as sent to the newspaper publisher, nor the notice as published listed the hundreds of people or entities to whom the money was owed in alphabetical order. (L.F. 32-37, 39, 41-42, 45.) In May 1988, Judge Kinder entered

an order terminating annual publication of names of persons who could not be located because "such expenditure of the class funds would not be appropriate or financially feasible due to the lack of response." (L.F. 53-54.)

In December 1990, Judge Kinder requested class attorneys review his proposed order regarding the establishment of a trust. The attorney responded: "Because this is designed to allow principal funds to remain available for a longer period of time to presently unknown class members, we have no objection." (L.F. 68.) On January 18, 1991, Judge Kinder entered his "Order Establishing Trust for Undistributed Class Action Proceeds." (L.F. 72-80.) In it Judge Kinder noted that he had appointed Elaine Healey as Receiver of the fund in December 1986, in order to "provide a mechanism for maintaining the availability of the fund to pay claims that might be asserted by class members not previously located or advised of the Settlement Agreement." (L.F. 72.) He further noted that "[c]laims continue to be made against the settlement fund but only infrequently," but "[d]espite the reduced rate at which claims occur, the fact that they continue to be asserted convinces the court that the fund created by the Settlement Agreement should remain available so that the intent of the Agreement can continue to be satisfied as claimants step forward." (L.F. 72-73.) "In the meantime, the court believes that the income which results from the investment of the fund should be used for purposes consistent with those underlying the Settlement Agreement. It is the opinion of the court that one such purpose would be the provision of monies to make the courts of this county better able to resolve major litigation matters of statewide interest, such as the action which gave rise to the settlement." (L.F. 73.)

Judge Kinder ordered the fund held by Elaine Healey, as receiver, be transferred in trust to Elaine Healey, as trustee. (L.F. 73.) The trust would cease and terminate whenever the purpose of it was

accomplished "through the payment of all the principal to claimants properly entitled to shares of the same pursuant to the Settlement Agreement." (L.F. 77.) The trustee was to dispose of the net income, after deducting all necessary administration expenses, by "paying over to the Cole County Commission, from time to time, those amounts of such income which have accumulated since the last payment was made." (L.F. 74.) Despite the broad powers granted to the trustee, the trusteeship operated in the same manner as the receivership, with Judge Kinder continuing to issue orders directed to the trustee with regard to investment of the funds and payments of the interest (L.F. 81, 82, 87, 107, 113, 119, 130, 136, 137, 142, 145, 148, 153).

The court's order required the trustee to "publish annually a notice drafted by class attorneys indicating the names of unlocated class members and that funds are being held in trust for payment of their individual awards." (L.F. 80.) The docket sheet indicates such notice was published only twice, and then only in one paper – the Jefferson City News Tribune – in June 1989 and March 1992. (L.F. 5-6, 97-106.)

Reports filed on the Investments and Disbursements of the Fund reflect no increase in "disbursements to claimants" after March 1991. (L.F. 84, 91, 94, 109, 115, 123, 128, 133.) October 23, 1989 was the filing date of the last application for "payment of claim to member of class action." (L.F. 5). One subsequent application for "payment to IRS for certain claimant" was filed on February 7, 1990. (L.F. 5.) From December 31, 1986 (when the receiver was first appointed) through October 23, 1989 (when the last application for payment was made), the docket sheet reflects applications for payments of claims or orders approving payments of claims entered on the following dates: January 26, 1987, February 18, 1987, May 11, 1987, July 23, 1987, September 4, 1987, and October 23, 1989. L.F. 1.

Meanwhile, Judge Kinder ordered the receiver/trustee to pay interest income from the fund to the

County Court of Cole County on March 28, 1988, in the amount of $30,000 (L.F. 49); to the County Court of Cole County on February 14, 1990, in the amount of $25,000 (L.F. 62); to the Cole County Commission on January 4, 1991, in the amount of $2,951.84 (L.F. 71); to the Cole County Commission on January 23, 1991, in the amount of $479.00 (L.F.81); to the Cole County Commission on February 1, 1991, in the amount of $1,157.65 (L.F. 82); to the Cole County Commission on June 19, 1991, in the amount of $2,840 (L.F. 87); to the Cole County Library Fund on July 28, 1992, in the amount of $1,000 (L.F. 107); to the Cole County Commission on April 6, 1993, in the amount of $1,797.00 (for computer) (L.F. 113, 118); to the Cole County Commission on December 30, 1993, in the amount of $5,000 (L.F. 119); to the Clerk of the Circuit Court of Cole County, for the purposes of the Cole County Library Fund on October 3, 1995, in the amount of $1,500 (L.F. 136); to the Cole County Commission "for the purposes of payment for installation of bookshelves, countertop and door, for the Division I judge's chambers" on November 20, 1995, in the amount of $7,775.62 (L.F. 137); to the Cole County Commission "for the purposes of payment for installation of lexan glass at the Prenger Family Center installed by Brady's Paint and Glass Company" on December 9, 1996, in the amount of $1,823.76 (L.F. 142); to the Cole County Commission on April 15, 1998, in the amount of $10,000 (L.F. 145); to the Cole County Commission on December 8, 1998, in the amount of $5,000 (L.F. 148) to the Cole County Commission on December 30, 1999, in an unknown amount (L.F. 8); to the Cole County Commission on October 13, 2000, in the amount of $6,000 (L.F. 8). As indicated above, some payments were made for a specific purpose and it does not appear that the balance of the interest earned was ever transferred to Cole County. L.F. 48, 51, 56, 59, 60, 63, 66, 86, 90, 96, 112, 118, 122, 127, 135, 139, 141, 144, 147, 150, 152 and 155.

On July 16, 2001, the Attorney General notified the trustee that he was preparing, on behalf of the State Treasurer, a lawsuit to recover unclaimed property, namely, the fund at issue in this case. (L.F. 170-71.) On July 20, 2001, the trustee filed a "Motion and Petition for Joinder of Additional Parties and for Relief in an Ancillary Adversary Proceeding in the Nature of Interpleader and for Other Relief." (L.F. 156-171.) On that same date, Judge Kinder 1) considered the Motion and Petition, 2) sustained the Motion and Petition, 3) ordered a separate trial and proceedings with regard to "Ancillary Adversary Proceeding Questions," 4) determined that the "only issues for determination in the Ancillary Adversary Proceedings shall be the Ancillary Adversary Proceeding Questions as defined in the Trustee's Motion and Petition," 5) ordered the State Treasurer added as a party to the Ancillary Adversary Proceedings, 6) ordered the State Treasurer to file a pleading asserting any claims which she as State Treasurer had under the Uniform Disposition of Unclaimed Property Act, 7) added the Cole County Circuit Clerk and Cole County as parties, 8) ordered the Cole County Circuit Clerk and Cole County to file a pleading asserting any claims they may have to the fund or the interest income from the fund, 9) authorized and directed the trustee to participate in the Ancillary Adversary Proceedings, and 10) permitted the trustee's attorney to be compensated for his services and expenses. (L.F. 172-75.)

After determining 1-10, above, Judge Kinder recused himself on his own motion because of the "issues raised by the Attorney General in Osage County Circuit Court Case No. 01CV330548 [the quo warranto case previously filed by the Attorney General and pending against Judge Kinder with regard to this fund and now before this Court on application for transfer in SC84301] and to remove questions or suggestion of any question about [him] participating in the determination of the Ancillary Adversary Proceeding Questions." (L.F. 174.) Judge Kinder retained jurisdiction, however, "with respect to all other

issues and matters in this case, including but not limited to the investment and reinvestment of the funds herein and the determination of the holding or disposition of any funds which are determined in the Ancillary Adversary Proceedings to not be required to be disbursed to the State Treasurer by reason of the Uniform Disposition of Property Act." (L.F. 174-75.) Following notification of Judge Kinder's recusal, this Court assigned the Honorable Ward B. Stuckey to this case. (L.F. 9.)

The Treasurer was served with both the motion and order on July 23, 2001. (L.F. 176.) By special appearance only, she filed a "Motion to Vacate and Disqualify" on August 20, 2001. (L.F. 177-214.) She alleged that Judge Kinder did not have personal jurisdiction over her necessary to enter any order directed toward her, as she was never a party to the original action and was never served with summons or with petition seeking relief; Judge Kinder had no legal authority to order her, as a non-party, to file a lawsuit against hand-picked defendants and on issues chosen by the Judge; Judge Kinder did not have subject matter jurisdiction to enter the July 20, 2001 order, in that a final, unappealed judgment had long-since been entered in this case; the trustee, as a non-party, had no standing to file motions designed to continue the maintenance and expenditure of trusteeship funds for the benefit of any person or entity other than the owners of those funds; and Judge Kinder was disqualified by Supreme Court Rule 51.07 from issuing the July 20 order because he had a substantial interest in the outcome and a close interest in or relationship with the movant. *Id*. The Treasurer did not file an answer in the "Ancillary Adversary Proceedings." On October 5, 2001, she noticed her "Motion to Vacate and Disqualify" for hearing on October 18, 2001. (L.F. 238.)

On October 12, 2001, the trustee filed a motion for judgment on the pleadings. (L.F. 240-246.) On that same date, the trustee noticed her motion for hearing on October 18, 2001. (L.F. 247-249.) The

Treasurer filed suggestions in opposition and objections on October 18, 2001. (L.F. 250-363.)

On November 27, 2001, trial court overruled the Treasurer's Motion to Vacate. (L.F. 373.) He determined that Judge Kinder continued to have jurisdiction over Case No. CV186-1282CC and that any person who has a claim against the fund must assert it, as well as any claims against the trustee, in Case No. CV186-1282CC, "and not in any other case in this Court, or in any administrative proceeding." (L.F. 371-372.) With regard to such a claim by the Treasurer, the trial court held that the State Treasurer's duties are limited by the Missouri Constitution, Article IV, § 15, to those "related to the receipt, investment, custody and disbursement of state funds and funds received from the United States." (L.F. 372.) The court determined that the funds in question were not state funds or funds received from the United States and, therefore, "the Treasurer has no standing or right to assert claims against the funds in Case No. CV186-1282CC or against the Trustee with respect to those funds." (L.F. 372.) The court further held that the funds "are subject to disposal by the Circuit Court of Cole County," are "subject to disposition as determined by the Circuit Court of Cole County," and "are not required to be disbursed to the Treasurer pursuant to the provisions of the Uniform Disposition of Unclaimed Property Act." (L.F. 372.) Finally, the court held that interest on the funds "may properly be used for expenses of administration and that the balance may properly be paid to the Cole County Commission from time to time." (L.F. 373.) This appeal followed. (L.F. 367.)

Point Relied On

III.

The trial court did not err when it determined that the Circuit Court had the authority to appoint a receiver under Supreme Court Rule 68.02 to administer the funds, deposited in the Court registry, in that Section 483.310, RSMo does not require that the Circuit Court appoint the Circuit Clerk as custodian of funds in the Circuit Court's registry because Section 483.310, RSMo, is not mandatory as to who may invest and administer such funds, further it is the legislative purpose of this section to permit the interest generating from the fund to be used for the public good, and the Circuit Court did not interfere with the Circuit Clerk's discretion under Section 483.310, RSMo to make purchases for the public good under Section 483.310, RSMo.

Christian Disposal, Inc. v. Village of Eolia, 895 S.W.2d 632 (Mo. App. E.D. 1995)

§ 483.310, RSMo 2000

State ex rel. Taylor v. Wade, 231 S.W.2d 179 (Mo. 1950)

Standard of Review

"The position of a party moving for judgment on the pleadings is similar to that of a movant on a motion to dismiss; i.e., assuming the facts pleaded by the opposite party to be true, these facts are, nevertheless, insufficient as a matter of law." *State ex rel. Nixon v. American Tobacco Company, Inc.*, 34 S.W.3d 122, 134 (Mo. banc 2000). A motion for judgment on the pleadings should be sustained where no issue of material fact exists. *Angelo v. City of Hazelwood*, 810 S.W.2d 706 (Mo. App. E.D. 1991). A motion for judgment on the pleadings should be sustained if, on the basis of the pleading, the moving party is entitled to judgment in his favor as a matter of law. *Id*. at 707. Therefore, the review of the question of law by this Court is de novo and no deference to the judgment of the trial court is necessary. *Id*. at 707.

Argument

III.

The trial court did not err when it determined that the Circuit Court had the authority to appoint a receiver under Supreme Court Rule 68.02 to administer the funds, deposited in the Court registry, in that Section 483.310, RSMo does not require that the Circuit Court appoint the Circuit Clerk as custodian of funds in the Circuit Court's registry because Section 483.310, RSMo, is not mandatory as to who may invest and administer such funds, further it is the legislative purpose of this section to permit the interest generating from the fund to be used for the public good, and the Circuit Court did not interfere with the Circuit Clerk's discretion under Section 483.310, RSMo to make purchases for the public good under Section 483.310, RSMo.

The State argues under Section 483.310, RSMo, that the Circuit Clerk, and the Circuit Clerk alone, is vested with the authority to make investment decisions with regard to money deposited in the Circuit Court's registry. Under the Treasurer's reasoning, Section 483.310, RSMo, limits a Circuit Court's jurisdiction and discretion in the investment and/or disposition of funds that the same Circuit Court has ordered paid into its registry. The Treasurer's argument is legally incorrect. Section 483.310, RSMo, does not limit the Circuit Court's jurisdiction, since the requirements of the section are not mandatory by its terms and the Circuit Court's order does not limit the discretion, duties or privileges given the Circuit Clerk under Section 438.310.2, RSMo

In the underlying case[2], the Circuit Court appointed a receiver, rather than the Circuit Clerk, to oversee the administrative details of maintaining and investing the money that was deposited in the Circuit Court's registry. Such appointment was based upon an unusual need determined to exist by the Court after its considered judgment. In its Order, the Circuit Court determined that a receiver was necessary in light of the large amounts of money that were to be deposited repeatedly and regularly, and because the money deposited was to be held in the registry for a possibly "lengthy" period of time. (L.F. 13-14.)

The Circuit Court had the authority to appoint a receiver under Supreme Court Rule 68.01(a) under the following circumstances:

> Whenever in a pending legal or equitable proceeding it appears to the court that a receiver is necessary to keep, preserve and protect any business, business interest or property, including money or other thing deposited in court or the subject of a tender, the court, or any judge thereof in vacation, may appoint a receiver whose duty shall be to keep, preserve and protect, to the extent and in a manner that the court may direct, that which the receiver is ordered to take into receiver's charge. (Emphasis added.)

In accordance with Section 483.310, RSMo, the Court made a finding that an unusually large amount of money, would be deposited and held in the Court's registry for a "lengthy" period of time. (L.F. 14-15). The Court also prudently found that:

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[2] *In Re Old Security Life Insurance Company*, Case No.: CV186-1282CC.

> The court further does not believe that it is fair to impose upon the circuit clerk herself the additional responsibilities that are engendered by a close monitoring of investment of those funds, these responsibilities being over and above what would ordinarily be expected of the circuit clerk personally in the investment of funds." (L.F. 14.)

The Court further found, based upon the existing and anticipated circumstances, that the Court should retain the investment decision making authority over these funds. (L.F. 14.) The Court correctly determined that under Supreme Court Rule 68.02 a receiver may administer these funds instead of the circuit clerk. (L.F. 14-15.) In its Order, the Circuit Court was also careful to note that even though the Circuit Clerk would not be personally administering the account, that the account would be administered in accordance with Section 483.310, RSMo. (L.F. 15.) Specifically, the receiver was directed to perform those administrative duties in relation to these funds which, absent the appointment of the receiver, would have been performed by the Circuit Clerk under the provisions of Section 483.310, RSMo. Finally, the Court's Order indicates that the Circuit Clerk will have the authority to disburse the interest earned from the corpus on those items permitted under Section 483.310, RSMo. (L.F. 15-16).

The incorrect and hyper-technical misinterpretation of Section 483.310, RSMo, proposed by the Treasurer contradicts the clear purpose of the legislature in enacting this statute. The Treasurer argues in its brief that the trial court erred when it found that the Circuit Court was justified in spending the interest of the funds in accordance with Section 483.310.2, RSMo because only the Circuit Clerk may make such election. This argument flies in the face of the statutory purpose of Section 483.310, RSMo. Section 483.310, RSMo was enacted to relieve the Circuit Court of some of the burden of administration of sums

of money deposited into the Circuit Court's registry. Section 483.310, RSMo, provides for an alternative agent (the Circuit Clerk) to protect, and by investment even to increase, the funds or property deposited in the Circuit Court registry.[3] This statute was not intended to reduce the Circuit Court's jurisdiction, authority or discretion in the receipt, control, maintenance or disposition of funds in the Circuit Court's registry.[4] It is obvious from the language of the statute and amendments in subsequent years that the legislature intended to increase the safe administration/investment alternatives that a circuit court, clerk or a receiver had in the protection and investment of money deposited in the Circuit Court's registry. While it is evident that the legislature did not intend that the judge, circuit clerk or receiver have unlimited discretion to invest such funds, the legislature, through this statute, has established a legislative framework that permits the continued and appropriate exercise of discretion by the Circuit Court after a finding that funds will be deposited in the registry in unusual amounts, at frequent intervals and for a lengthy period of time. See Section 483.310.1, RSMo.

It is important to note that the legislature could have required certain mandatory steps to be taken in regard to all property deposited into the Circuit Court registry. The legislature chose not to do so in Section 483.310, RSMo, by using language which is directory and not mandatory. In determining whether

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[3] Nor does Section 483.310, RSMo limit the Circuit Court's authority to appoint a receiver under Sup. Ct. R. 68.01(a) to keep, preserve and protect the money deposited in a Circuit Court's registry.

[4] It should be noted that the legislature did not specifically change the title of the depository where the money was to be placed. The money and/or property still must be deposited into the Circuit Court registry, and not into a "Circuit Clerk" registry.

the requirements of a statute are mandatory (that one must do what it requires or suffer a punishment) rather than directory, the language and context of the statute must be evaluated. See *Christian Disposal, Inc. v. Village of Eolia*, 895 S.W.2d 632 (Mo. App. E.D. 1995). As the Court in *Eolia* noted:

> To determine whether a statute is mandatory or directory, the general rule is when a statute provides what results shall follow a failure to comply with its terms, it is mandatory and must be obeyed. However, if the statute merely requires certain things to be done and, yet, does not prescribe what results will follow if those requirements are not met, such a statute is merely directory.

Id. at 634, citing *State ex rel. 401 N. Lindbergh Assoc. v. Ciarleglio*, 807 S.W.2d 100, 104 (Mo. App. E.D. 1990).

To determine whether a statute's requirements are mandatory or directory, the intent of the legislature should be determined by the context of the statute and the terms and remedies that the legislature provided. See *School District of Mexico, Mo. v. Maple Grove School District*, 359 S.W.2d 743, 746 (Mo. 1962). The failure of the legislature to include a penalty for the failure to comply with the terms of the statute is evidence that the statute is directory rather than mandatory. See *Garzee v. Sauro*, 639 S.W.2d 830, 832 (Mo. 1982). Further, the use of terms by the drafters in the statute is considered important in determining the legislative intent. If the legislature employed the term "shall" instead of "may" this may be considered some evidence that the legislature intended the statute to be mandatory. *State ex rel. Taylor v. Wade*, 231 S.W.2d 179, 181 (Mo. 1950).

In Section 483.310, RSMo, it is evident that the legislature did not intend this statute to be

mandatory, nor was it intended to reduce the equitable powers of the Circuit Court.[5] It should be noted that the statutory term directing the circuit clerk to invest money is by the adjective "may," as opposed to "shall." In fact, Section 483.310.2, RSMo, was specifically amended in 1989 to replace the word "shall" with the word "may" regarding how the Clerk may spend the money. See Historic and Statutory Notes for Section 483.310, V.A.M.S. This amendment is evidence that the legislature does not intend to impose any mandatory requirements on the clerk or on the circuit court in the exercise of their discretion. *Hagler v. Director of Revenue*, 968 S.W.2d 704, 706 (Mo. banc 1998). Further, the Court had discretion to order, or not order, the Circuit Clerk to deposit such funds in various "safe investments" under Section 483.310.1, RSMo. (... "The court may make an order directing the clerk to deposit such funds...".) There is no mandatory language in Section 483.310, RSMo that the Circuit Court must appoint the Circuit Clerk to deposit and invest the funds under Section 483.310.2, RSMo, nor is there any prohibitory language preventing appointment of a receiver. In sharp contrast to the Treasurer's view that the Circuit Clerk is indispensable under this statute, the plain language used by the legislature instead reveals that while potentially increasing the Circuit Clerk's role in handling funds in the Circuit Court's registry, Section

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[5] Another primary rule of statutory construction is that a statute should not be construed to render it unconstitutional or to require an otherwise absurd result. *Spradlin v. City of Fulton*, 982 S.W.2d 255, 258-259 (Mo. banc 1998). The legislature should not be presumed through misconstruction to be violating the constitutional prohibition against improperly reducing a Circuit Court's judicial powers in equity under the doctrine of the separation of powers. See Article II, Section 1, Missouri State Constitution; *State ex rel. York v. Locker*, 181 S.W. 1001 (Mo. 1916).

483.310, RSMo is in no way reducing the Circuit Court's jurisdiction, powers, duties and discretion in regard to that fund. There is simply no requirement that the Circuit Court must appoint the circuit clerk, and only the circuit clerk, to manage Court Registry funds; instead, that is only an available option that the Circuit Court may (and does) use in the ordinary course of business.

It is anticipated that the Treasurer will argue that Section 483.310.1, RSMo directs or requires that the interest be returned to the principle because of the use of the term "shall" used in the sentence that disposes of the interest earned in Section 483.310.1, RSMo. A remarkable similar situation was addressed by this Court in *Christiansen Disposal v. Village of Eolia*, 895 *supra* at 632. In *Eolia*, a contract of a waste disposal business with a city was terminated without a two year statutorily required notice. Since the business had not provided some information required under Section 260.247, RSMo, the city argued that the business was estopped from invoking the two year notice requirement. This Court disagreed, noting that the purpose of the statute was to provide a "terminated" business with sufficient notice to make necessary "business adjustments." *Id*. at 634. In response to the city's argument that the statute used the term "shall" in regards to its reporting requirement this Court noted:

> Although "shall" when used in a statute will usually be interpreted to command the doing of what is specified, the term is "frequently used indiscriminately and courts have not hesitated to hold that legislative intent will prevail over common meaning." *Id*. at 634.

The Court also noted that the statute in *Eolia* (as with Section 483.310) was not mandatory because the statute did not "prescribe" a penalty for a failure to comply with its terms. *Id*. at 634. The intent of Section 483.310, RSMo is not to limit the Circuit Court's jurisdiction, it is rather to use the interest

generated by the funds deposited in the Circuit Court's registry for public purposes.

Further, there is little or no difference between Section 483.310.1 or .2, RSMo except that a party makes an application to invest the money under Section 483.310. The Circuit Court complied with Section 483.310.1, RSMo and invested the money in a series of orders. The Clerk, a receiver or the Circuit Court has the discretion to invest the funds in identical investment opportunities under either Section 483.310.1 or Section 483.310.2. The Treasurer's contention that the filing of an application transforms the property deposited in the Circuit Court's registry which would turn the fund from a fund that the interest could be used to purchase items for public purposes to a fund which would sit fallow and unproductive. Such a result makes no legislative sense. In Section 483.310 the legislature recognized that the county could use the interest from the funds in the Circuit Court's registry to a fund worthy of public purposes. Whether the Circuit Court, Clerk or a receiver administers the funds, the purpose of Section 483.310, RSMo is to protect the funds and use the interested generated by the funds to achieve a public good.

The Treasurer suggests that the Circuit Court's own Order some how deprives the Circuit Clerk of the "election" to make investment decisions. However, as previously explained the Circuit Court is under no compulsion to surrender its jurisdiction to supervise the property in its own registry, and the Treasurer offers no plausible argument for why it should. The Treasurer's argument that the Clerk is deprived of some "right" to manage the Court Registry is similarly without basis. The Circuit Clerk's only real "authority" under the statute is her right to use some of the interest generated to purchase items for the use of the public. See Section 483.310.2, RSMo. In the Circuit Court's Order, however, it specifically left that discretion and authority with the Circuit Clerk and ordered that it be funded and performed.

From such interest which is received the receiver shall first pay therefrom

> the lawful expenses of the administration of the fund as may from time to time be authorized to be paid or be allowed by the court; there shall next be paid therefrom such amounts as may be lawfully requisitioned by the Circuit Clerk of Cole County for the purpose specified and allowed for such clerk in subsection 2 of Section 483.310, RSMo..."

(L.F. 16.)

In summary, there is nothing in the Order of the Circuit Court in this case which would deprive the clerk of any discretion or authority belonging to the Circuit Clerk under Section 483.310, RSMo. The clerk has duties, authority and discretion to deposit and invest funds in the registry only if the Circuit Court "may make an order" to that effect (Section 483.310.1, RSMo), and the Clerk's authority to access the interest on such funds to make authorized purchases is fully protected. (Section 483.310.2, RSMo). The legislature's purpose was to permit the Circuit Court, clerk or a receiver to use the interest of the funds deposited in the Circuit Court's registry for the public good. Nothing in Section 483.310, RSMo, or any other provision of law requires the Circuit Court of Cole County to appoint only the Cole County Circuit Clerk to control and invest funds in the Court's registry; nor does any provision of law otherwise limit the Circuit Court's jurisdiction and discretion to appoint an appropriate receiver to administer funds held in the Court's registry, particularly in the unusual and peculiar circumstances of this case.

Conclusion

The trial court did not err when it found the Circuit Court properly appointed a receiver and was not required to appoint the Circuit Clerk to make the investment decisions.

Respectfully submitted,

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CERTIFICATE OF ATTORNEY

I hereby certify that the foregoing Brief complies with the provisions of Special Rule No. 1(b), and that:

(A) It contains 6,376 words, as calculated by counsel's word processing program;

(B) A copy of this Brief is on the attached 3 1/2" disk; and that

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Respondent County of Cole's Brief and a 3 1/2" disk containing this Brief were sent U.S. Mail, postage prepaid to the following parties of record on this 21st day of May, 2002:

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