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Honorable Melvyn W. Salter
Cherokee County Judge of Probate
Cherokee County Administrative Center
260 Cedar Bluff Road, Suite 101
Centre, Alabama 35960

Conservators – Minors – Investments – Assets – Private Corporation

Section 26-2A-145 of the Code of Alabama requires that a conservator act as a prudent person in handling the assets of another. Section 74 of article IV of the Recompiled Constitution of Alabama forbids a conservator from investing the assets of another in stocks and bonds of private corporations that are publicly traded unless a court with proper jurisdiction or the document creating the fiduciary relationship provides authorization to so invest. A legal list of permissible investments is detailed in section 19-3-120 of the Code of Alabama.

Dear Judge Salter:

This opinion of the Attorney General is issued in response to your request.

QUESTION

Does section 26-2A-145 of the Code of Alabama allow a conservator to invest the assets of another in stocks and bonds of private corporations that are publicly traded?

FACTS AND ANALYSIS

In your letter of request, you have asked whether a conservator may invest a minor's assets in instruments that are unsecured or where the possibility of "safe" growth of such assets is more variable or volatile. Specifically, you inquire as to the ability of a conservator to invest the minor's assets in stocks of publicly traded companies or bonds purchased in the open bond market.

Section 26-2A-145 of the Code of Alabama is typically used to define the appropriate conduct of conservators. It states as follows:

> A conservator, in relation to powers conferred by this division, or implicit in the title acquired by virtue of the proceeding, shall observe the standards in dealing with the estate of the protected person that would be observed by a prudent person dealing with the property of another, and if the conservator has special skills or is appointed conservator on the basis of representations of special skills or expertise, the conservator is under a duty to use those skills.

ALA. CODE § 26-2A-145 (1992). The prudent-person standard was further clarified by the Supreme Court of Alabama in *Gordon v. Brunson,* 287 Ala. 535, 253 So. 2d 183 (1971). In *Brunson,* the Court stated that "[a] guardian making investments for his ward is bound to act honestly and . . . exercise a sound discretion such as men of ordinary prudence and intelligence use in their own affairs . . ." *Brunson*, 287 Ala. at 540, 253 So. 2d at 187, *citing Hall v. Esslinger*, 235 Ala. 451, 179 So. 639, 642 (Ala. 1938).

Section 19-3-120 of the Code of Alabama provides an authorized listing of classes of investments for the fiduciary, in addition to those otherwise provided by law. Generally, these classes of investments are limited to investments secured by the United States government or individual state governments. Opinion to Honorable Cindy D. Neilson, Probate Judge, Marengo County, dated May 15, 2008, A.G. No. 2008-082. Unless authorized by a court having jurisdiction thereof, or by the will, trust agreement, or other document that is the source of authority, the fiduciary is limited to making investments within one of the specified classes set forth in section 19-3-120, *et seq.*, of the Code. ALA. CODE

§ 19-3-120 (2007); opinion to Honorable Frank H. Riddick, Probate Judge, Madison County, dated July 28, 1998, A.G. No. 98-00190.

Section 74 of article IV of the Recompiled Constitution of Alabama, as amended by Amendment 40, states that "[n]o act of the Legislature shall authorize the investment of any trust funds by executors, administrators, guardians or other trustees in the bonds or stocks of any private corporation; and any such acts are now avoided, saving investments heretofore made." ALA. CONST. art. IV, § 74 (amend. 40). The comments to section 26-2A-145 of the Code of Alabama state that the constitutional prohibition will remain as an additional restriction on the prudent-person standard. ALA. CODE § 26-2A-145, cmt. (1992).

The Supreme Court of Alabama further expounded on its interpretation of section 74 and the limitation therein in the opinion of *White v. White*, 230 Ala. 641, 162 So. 368 (1935). Specifically, the court stated as follows:

> [Section 74 of the Recompiled Constitution] is not only a limitation on the power of the Legislature, but its provisions declare and establish the public policy of the state in respect to the investment of trust funds in stocks and bonds of private corporations, and such investment is unauthorized, certainly in the absence of express authority conferred by the instrument creating the trust.

White, 230 Ala. at 645, 162 So. at 372.

Based on the foregoing, it is the opinion of this Office that section 26-2A-145 of the Code of Alabama requires a conservator to act in a prudent manner with regard to dealing with the property of another. Section 74 of article IV of the Recompiled Constitution of Alabama and section 19-3-120 of the Code of Alabama further set forth the expected standard of care. Specifically, section 74 prohibits a person who maintains a custodial relationship over the funds of another from investing such funds in stocks and bonds of private corporations, unless such action is authorized by a court of competent jurisdiction or by the instrument creating the fiduciary relationship. Section 19-3-120 of the Code provides the "legal list" of permissible investments that a fiduciary may invest in without having to petition the court.

Investments in stocks and bonds of a private corporation are not contained within the legal list of permissible investments. Under the principle of *expressio unius est exclusio alterius*, a rule of statutory construction, where a statute enumerates certain things on which it is to operate, the statute must be construed as excluding from its effect all things not expressly mentioned. *Ex parte T.B.*, 698 So. 2d 127, 129 (Ala. 1997); *Ex parte Holladay*, 466 So. 2d 956, 960-61 (Ala. 1985); *City of Birmingham v. Brown*, 241 Ala. 203, 208, 2 So. 2d 305, 309 (1941); *Hall v. Blan*, 227 Ala. 64, 68, 148 So. 601, 603 (1933). Neither stocks nor bonds of a private corporation purchased in the open bond market are permissible investments under section 19-3-120 of the Code of Alabama. Bonds purchased on the open market, secured by the United States government or a state government, however, are listed as a permissible investment of a minor's assets.

CONCLUSION

Section 26-2A-145 of the Code requires that a conservator act as a prudent person in handling the assets of another. Section 74 of article IV of the Recompiled Constitution forbids a conservator from investing the assets of another in stocks and bonds of private corporations that are publicly traded unless a court with proper jurisdiction or the document creating the fiduciary relationship provides authorization to so invest. A legal list of permissible investments is detailed in section 19-3-120 of the Code of Alabama.

I hope this opinion answers your question. If this Office can be of further assistance, please contact Monet Gaines of my staff.

Sincerely,

TROY KING
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By:

BRENDA F. SMITH
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