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FORMAL)
OPINION)
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of)
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No. 99-6
And Withdrawal of No. 99-2
AG Alpha No. TR TR AGAWH

July 30, 1999

This opinion responds to the February 28, 1999, request from the State Board of the Great Outdoors Colorado ("GOCO") Trust Fund (the "Board") for reconsideration of the authority of the State Treasurer to invest unused portions of money administered by the Board in specific investments of the Treasurer's choosing, as provided by January 11, 1999 Colorado Attorney General Opinion, Op. Att'y. Gen. No. 99-2 (January 11, 1999).

QUESTION PRESENTED AND CONCLUSION

ISSUE: Does the Great Outdoors Colorado Board or the State Treasurer have the authority to select specific investment vehicles for the State Board of the GOCO Trust Fund?

ANSWER: According to the plain language of Article XXVII of the Colorado Constitution, the Board has the sole power to administer the Trust Fund and responsibility to determine how the money is to be invested by the State Treasurer. This opinion withdraws an earlier Formal Attorney General Opinion, Op. Att'y. Gen. No. 99-2 (January 11, 1999) issued on the last day of the term of the prior administration, because that opinion overlooked the Colorado Constitution's delegation of investment authority to the Board and therefore improperly granted default investment power to the State Treasurer.

ANALYSIS

Background Information

In 1980, the people of the State of Colorado enacted a constitutional amendment to establish a state lottery that allocated the net proceeds to a conservation trust fund for park, recreation, and open space purposes, unless otherwise provided by statute. H.R. Con. Res. 1007, 52d Leg., 1st Reg. Sess. (Colo. 1979); Colo. Const. art. XVIII, § 2(7) (1980).

On November 3, 1992 the people voted in Amendment 8 (the “GOCO Amendment”). Colo. Const. art. XXVII (1993). The clear intent of the GOCO Amendment was to establish that the “net proceeds of every state-supervised lottery game . . . shall be guaranteed and permanently dedicated to the preservation, protection, enhancement and management of the state’s wildlife, park, river, trail and open space heritage.” *Id.* at § 1(1). See also Submission of Interrogatories on Senate bill 93-74, 852 P.2d 1, at 8 (Colo. 1993). To sufficiently earmark the lottery money, a Trust Fund for lottery proceeds was established separate from money available to the General Assembly and an independent State Board was created to administer the Trust Fund. The GOCO Amendment gave the Board independence to carry out the dedicated purposes of Amendment 8. See In re Great Outdoors Colorado Trust Fund, 913 P.2d 533, 543 (Colo. 1996). The primary author of the GOCO Amendment described to the General Assembly the autonomy and broad authority that the amendment would confer to the Board of the GOCO Trust Fund. See GOCO Ballot Initiative - Amendment No. 8, Hearing (Aug. 31, 1992) (statement of Dan Chapman, Legislative Council Staff) (“With the exception of the appointment process and confirmation of removal of members for cause and annual state audit, there are very few checks or balances as to how the board would administer and spend public funds.”). No legislative history supports interpreting the GOCO Amendment to grant the State Treasurer power to direct investments or otherwise control the Board’s administration of the Trust Fund.

Discussion of the Issue

A determination of the delegation of investment authority by the GOCO Amendment is guided by general principles of constitutional interpretation. First, the plain language is controlling. See Colorado Ass’n of Public Employees v. Lamm, 677 P.2d 1350, 1353 (Colo. 1984) (“When the language of the Constitution is plain and its meaning clear, that language must be declared and enforced as written.”). Second, constitutional interpretation must be done in a manner “to give effect to the expression of the will of the people contained in constitutional amendments adopted by them.” In re Interrogatories Propounded by Senate Concerning House Bill 1078, 189 Colo. 1, 7, 536 P.2d 308, 313 (1975). In this regard, the history of the Constitutional Amendment to designate the GOCO Trust Fund for conservation purposes by conferring its administration to an autonomous Board is relevant because any subsequent interpretation is “constrained by consideration of the state of things existing at the

time the provision was framed and adopted.” In re Great Outdoors Colorado Trust Fund, 913 P.2d at 540. See also Krutka v. Spinuzzi, 153 Colo. 115, 124, 384 P.2d 928, 933 (1963).

The Plain Language of the Colorado Constitution

The plain language of Article XXVII relevant to the Board’s authority is as follows. Article XXVII, Section 6 of the Colorado Constitution states that:

(2) The Board shall be responsible for, and shall have the power to undertake the following actions:

(a) To direct the Treasurer to disburse expendable income from the Trust Fund as the Board may determine by resolution, and otherwise to administer the Trust Fund, provided, however that the Board shall not have the power to acquire any interest in real property

....

(c) To cause to be published and distributed an annual report, to the citizens, the Governor and the General Assembly of Colorado, which will set out the Board’s progress in administering the funds appropriated to it,

....

(e) Commencing July 1, 1993, to determine what portions, if any, of moneys allocated to the Trust Fund should be invested in an interest-bearing Trust Fund account by the Treasurer of the State of Colorado, to remain in the Trust Fund and available for expenditure in future years;

....

(3) The Board shall be a political subdivision of the state . . . provided, however, that its organization, powers, revenues and expenses shall not be affected by any order or resolution of the general assembly, except as provided in this constitution. It shall not be an agency of state government, nor shall it be subject to administrative direction by any department, commission, board, bureau or agency of the state, except to the extent provided in this constitution.

Colo. Const. art. XXVII, § 6(2) and (3) (1993) (emphasis added).

The Treasurer’s duties according to the language of Article XXVII are limited. The Treasurer is to distribute net lottery proceeds according to specific directions of Article XXVII and to “deposit all remaining Net Proceeds, if any, in trust for the Board of the Trust Fund.” Id. at § 3(1)(a)(III). Additionally, the Treasurer is to follow the Board’s disbursement and administration directives per the language of Article XXVII, Section 6 quoted above. Id. at § 6.

Interpreting the Plain Language

Article XXVII, Section 6(2), confers the ultimate authority to direct the administration of the Trust Fund to the Board. The language requires the Board “to direct the Treasurer” to both “disburse expendable income” and “otherwise . . . administer the fund.” Id. at § 6(2)(a). The plain language of Section 6(2)(a) places the power to direct the administration of the Trust Fund with the Board, not the State Treasurer.

Section 6(2)(c) provides that the GOCO Board is responsible for publishing an annual report “which will set out the Board’s progress in administering the funds appropriated to it” Id. (emphasis added). It would be incongruous to explicitly require the Board to prepare a report on its progress in administering the funds if the Treasurer were responsible for administering the funds. Cf. Colo. Const. art. X, § 12(1) and (2) (1974) (setting forth the Treasurer’s default responsibilities and requiring the Treasurer to submit a written report to the Governor at the end of each quarter of the fiscal year for those funds which the Treasurer is vested with investment authority). Accordingly, the language of Article XXVII, Section 6(2) places the authority to administer the Trust Fund with the Board, while the Treasurer’s role is simply to carry out the Board’s directions.

The Colorado Supreme Court has evaluated the necessary duties to be performed when “administering” a trust. See People v. Wright, 698 P.2d 1317 (Colo. 1985). The elements of the professional administration of a trust accepted by the court include: segregating the funds, maintaining accurate records, generating periodic accounting, and making investments independent of personal interest. See id. at 1320. According to the common legal definition, “[t]o ‘administer’ trusts is to manage, direct or superintend affairs of such trusts.” Black’s Law Dictionary, 435 (6th ed. 1991). Furthermore, the Colorado statute establishing “State Funds - Investment Funds” provides that the board of a trust is “empowered to invest the funds.” § 24-75-701(2), 7 C.R.S. (1998). Administrators of trusts in Colorado are generally viewed as trustees having fiduciary power “to invest and reinvest assets of the estate or trust, as provided by law.” § 15-1-804(1)(e), 5 C.R.S. (1998). Article XXVII, Section 6 of the Colorado Constitution explicitly grants the sole power and responsibility to administer the GOCO Trust Fund to the Board. In Colorado, the duty for the Board to administer the trust necessarily includes management and investment authority.

According to Section 6(2)(e), the Board also “shall be responsible for, and shall have the power to . . . determine what portions, if any, of moneys allocated to the Trust Fund should be invested in an interest-bearing Trust Fund account by the Treasurer of the State of Colorado, to remain in the Trust Fund and available for expenditure in future years;” Colo. Const. art. XXVII, § 6(2)(e) (1993) (emphasis added). Implicit in determining the amount of investment money available in the future is the ability to designate the specific investment vehicles that will match and meet the expenditure demands of an effective grant program - especially the long-term and variable mortgage payments potentially involved in land acquisition. If the Treasurer had the authority to select investment vehicles, those

choices could impinge on the Board's authority to allocate Trust Fund moneys between present spending and investments for future expenditures. Just as the State Treasurer is to follow the disbursal directives given by the Board of the GOCO Trust Fund, the remaining money is to be invested by the Treasurer according only to the directives of the GOCO Board per Section 6(2)(a). *Id.* at § 6(2).

Interpreting the Intent

As described above, the language of Article XXVII of the Colorado Constitution reflects the intent of the drafters to protect the GOCO Trust Fund by restricting its management to the Board and should be given credence. See In re Great Outdoors Colorado Trust Fund, 913 P.2d at 542. (“[T]echnical construction should not be applied so as to defeat the objectives sought to be accomplished by the voters.”). Article XXVII, Section 4, “Funds to remain inviolate,” states that: “[a]ll moneys deposited in the Trust Fund shall remain in trust for the purposes set forth in this article, and no part thereof shall be used or appropriated for any other purpose, nor made subject to any other tax, charge, fee or restriction.” Colo. Const. art. XXVII, § 4 (1993) (emphasis added). Article XXVII, Section 6 explicitly confers the power to direct the administration or otherwise administer the Trust Fund to the Board. *Id.* at § 6(2)(a). The Board is also given the authority “to determine what portions, if any, of moneys allocated to the Trust Fund should be invested.” *Id.* at § 6(2)(e). The GOCO Trust Fund is further insulated from outside control because it “shall not be subject to administrative direction by any department, commission, board, bureau or agency of the state” *Id.* at § 6(3). If the State Treasurer (an agency of the state) were to be able to direct the investment of the GOCO Trust Fund, thereby hampering the Board's ability to effectively administer the GOCO program, the plain language as well as the intent of Article XXVII of the Colorado Constitution would be violated.

Consistency with Colorado Law

Interpreting Article XXVII of the Colorado Constitution as providing investment authority to the GOCO Board does not conflict with the Constitution's delegation of authority to the Treasurer, because the plain language does not “authorize what the other forbids or forbid what the other authorizes.” Submission of Interrogatories on Senate Bill 93-74, 852 P.2d at 8 (quoting In re Interrogatories Propounded by Senate Concerning House Bill 1078, 189 Colo. at 7, 536 P.2d at 313 (describing the test for the existence of constitutional conflicts). See also Colo. Const. art. X, § 12(1) (1974) (setting forth that “[t]he general assembly may provide by law for the safekeeping and management of the public funds in the custody of the State Treasurer, but, notwithstanding any such provision, the State Treasurer and his sureties shall be responsible therefor.”).

The Colorado Supreme Court has uniformly permitted divestiture of investment control from the State Treasurer if so provided by a statute or the Constitution. For example, the Court in Stong v. Industrial Commission, 71 Colo. 133, 204 P. 892 (1922) allowed the

Industrial Commission of the State of Colorado to direct the Treasurer to invest in specific investments because the Commission had the statutory authority to do so. The Court held that the plain language of Article X, Section 12 of the Colorado Constitution permitted the allocation of responsibility to choose specific investments to be conferred to an entity other than the Treasurer. Id. at 136, 893. See also People ex rel. Miller v. Higgins, 69 Colo. 79, 80, 85, 168 P. 740, 742 (1917) (supporting the legislative provision “that the school funds of the state shall be invested as directed by the state board of land commissioners” and finding that “[t]he claim that the State Treasurer alone may invest the fund has no support in the Constitution.”). Prior Colorado Attorney General Opinions (with the exception of the one being withdrawn) also support the position that constitutionally segregated funds such as the GOCO Trust Fund, while being held by the State Treasurer, are custodial and therefore may be administered and invested by an entity other than the State Treasurer.¹

SUMMARY

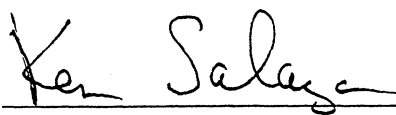
The plain language of the Colorado Constitution provides the investment authority of the GOCO Trust Fund to the State Board of the GOCO Trust Fund, not the State Treasurer. See Dempsey v. Romer, 825 P.2d 44, 51 (Colo. 1992) (stating that “if language of a constitutional provision conveys a clear and definite meaning . . . any construction of such language must give full effect to that meaning.”). Article XXVII of the Colorado Constitution directly confers the responsibility and the power to administer and direct the investment of the GOCO Trust Fund to the Board.

The earlier Formal Attorney General Opinion, Op. Att’y Gen. No. 99-2 (January 11, 1999), is withdrawn.

¹ See Op. Att’y Gen. (Nov. 16, 1982) (establishing four general principles for determining if a fund is custodial. The GOCO Trust Fund meets these precisely. It is 1) raised by a lottery, 2) designated specifically for conservation purposes, 3) separate from money available for expenditure by the General Assembly, and 4) administered by a entity separate from the State Treasurer). See also Op. Att’y Gen. No. 90-6 (Apr. 11, 1990) (exempting University of Colorado funds set up by the Constitution from statutes restricting the board’s administrative abilities). See also Op. Att’y Gen. No. 94-2 (Feb. 9, 1994) (finding that the University of Colorado funds, could be collected, disbursed, and managed - which included investment authority - exclusively by the University Treasurer as provided by the Colorado Constitution, free of the State Treasurer’s investment restrictions).

This issue concerning the custodial nature of the GOCO Trust Fund may become relevant should the State Treasurer fail to execute specific investments as determined by the GOCO Board. See Stong, 204 P. at 892 (granting mandamus to the Industrial Commission of the State of Colorado directing the State Treasurer to make investments of the custodial fund as so directed by the Commission). A statute or constitutional provision assigning administration of money held by the State Treasurer to another entity (as directed by Amendment XXVII) does not violate the Treasurer’s authority over state moneys when the funds are custodial and is a constitutional delegation of power. See id.

Issued this 30th day of July, 1999.

A handwritten signature in black ink that reads "Ken Salazar". The signature is written in a cursive style with a horizontal line underneath it.

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