STATE OF NEBRASKA
Office of the Attorney General
2115 STATE CAPITOL BUILDING
LINCOLN, NEBRASKA 68509-8920
(402) 471-2682
TDD (402) 471-2682
CAPITOL FAX (402) 471-3297
1235 K ST. FAX (402) 471-4725

DON STENBERG
ATTORNEY GENERAL

L. STEVEN GRASZ
SAM GRIMMINGER
DEPUTY ATTORNEYS GENERAL

#93092
NO.
STATE OF NEBRASKA
OFFICIAL
OCT 28 1993
DEPT. OF JUSTICE

DATE: October 25, 1993

SUBJECT: Propriety of placement of unclaimed property received by the State under the Uniform Disposition of Unclaimed Property Act into the General Fund of the State of Nebraska in light of Article VII, Section 7 of the Nebraska Constitution

REQUESTED BY: Dawn E. Rockey
Nebraska State Treasurer

WRITTEN BY: Don Stenberg, Attorney General
Dale A. Comer, Assistant Attorney General

The Nebraska Uniform Disposition of Unclaimed Property Act (the Act) can be found at *Neb. Rev. Stat. §§* 69-1301 to 69-1329 (1990). The Act generally provides that certain types of property such as utility deposits, interest payments, bank account balances, and the contents of safe deposit boxes held for private individuals by entities such as corporations, banks, utilities and life insurance companies must be remitted to the Nebraska State Treasurer if they remain unclaimed by their true owners for a certain period of years. Under the Act, the Treasurer holds the property for the true owners, and those individuals may claim their property at any time upon a proper showing of ownership. Needless to say, much of this property received from banks, corporations and other entities remains unclaimed and is held by the State Treasurer and used by the State.

Prior to 1992, Section 69-1317 of the Act provided that any unclaimed property held by the State Treasurer in excess of $50,000 should be transferred annually to the Permanent School Fund established by Article VII, Section 7 of the Nebraska Constitution. However, at a Special Session of the Nebraska Legislature held in October of 1992, Section 69-1317 (b) (2) was amended to read as follows:

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> On or after October 6, 1992, the State Treasurer shall periodically transfer any balance in excess of an amount not to exceed five hundred thousand dollars from the separate trust fund [holding unclaimed property] to the General Fund no less frequently than on or before November 1 and May 1 of each year, except that the total amount of all such transfers shall not exceed five million dollars.

Apparently, a previous opinion of this office came to your attention which indicated that it was improper to transfer unclaimed property under the Act to the State General Fund instead of the Permanent School Fund. You therefore asked for our opinion as to whether you can make the transfers required by the amended Section 69-1317 (b) (2) in light of Article VII, Section 7 of the State Constitution. You also asked what should be done about previous transfers of unclaimed property to the General Fund under Section 69-1317 (b) (2). For the reasons discussed below, we believe that you can make transfers of unclaimed property to the General Fund as required by Section 69-1317 (b) (2). As a result, your previous transfers of funds under that statute were proper.

Article VII, Section 7 of the Nebraska Constitution provides, as is pertinent here:

> The following are hereby declared to be perpetual funds for common school purposes of which the annual interest or income only can be appropriated, to wit: . . . Fourth. The net proceeds of lands and other property and effects that may come to this state, by escheat or forfeiture, or from unclaimed dividends, or distributive shares of the estates of deceased persons.

This language has essentially been a part of the Nebraska Constitution since 1875, albeit the number of the particular constitutional section containing the language and the arrangement of the language itself has changed periodically.

In 1975-76 Rep. Att'y Gen. 182 (Opinion No. 129, dated October 1, 1975), we stated that the true owners of funds under the Act had a responsibility to make their whereabouts known and/or make claim on the holder of the funds in question for restoration of their money or other property. In the event that such a claim was not made, we stated that those true owners forfeited their rights to the funds in question. On this basis, we concluded that unclaimed property held by the State Treasurer involved "forfeitures" which must be placed in the Permanent School Fund under Article VII, Section 7 of the Nebraska Constitution.

Since we issued our Opinion No. 129 in 1975, the Nebraska Supreme Court decided the case of ***State of Nebraska ex rel. Marsh v. Nebraska State Board of Agriculture***, 217 Neb. 622, 350 N.W.2d 535 (1984). That case involved the issue of whether unclaimed winning horse race tickets were unclaimed property under the Unclaimed Property Act. In the course of its opinion, the court stated:

> Both parties agree that the State's rights under the UDUPA [Uniform Disposition of Unclaimed Property Act] ***are strictly derivative, and therefore the uniform act is distinct from escheat laws*** and the State acquires no greater property right than the owner. The State may assert the rights of the owner, ***but it has only a custodial interest in property delivered to it under the Act.***

Id. at 627, 628, 350 N.W.2d at 539 (emphasis added). The ***Marsh*** case makes it apparent that property held by the State under the Act is different from property which comes to the state by escheat because, in the latter instance, title to the property, usually land, actually vests in the State. ***See also Semrad v. Semrad***, 170 Neb. 911, 104 N.W.2d 338 (1960); ***Neb. Rev. Stat. §*** 76-401 (1990). We also believe that the ***Marsh*** case makes it apparent that property held under the Act does not involve a forfeiture to the state since the state's only interest in such property is custodial, i.e., the true owners of unclaimed property never forfeit their rights to that property, it is held for them by the State Treasurer. As a result, we do not believe that unclaimed property held by the State Treasurer falls under the provisions of Article VII, Section 7 of the Nebraska Constitution dealing with escheats and forfeitures, and such unclaimed property need not be placed in the Permanent School Fund on that basis. To the extent that our earlier opinion, prepared prior to the ***Marsh*** case suggests otherwise, it is in error.

Article VII, Section 7 also requires that unclaimed dividends and distributive shares of the estates of deceased persons must be placed in the Permanent School Fund, and you inquired as to whether those categories of property listed in the constitution include unclaimed property held under the Act. Again, we do not believe that those categories include the unclaimed property remitted to you.

We were able to find no Nebraska cases which offered any guidance as to the meaning of "unclaimed dividends" or "distributive shares of the estate of deceased persons" in the context of Article VII, Section 7. However, it does appear that a constitutional provision must be construed as a whole, and no part will be rejected as meaningless or surplusage, if such can be

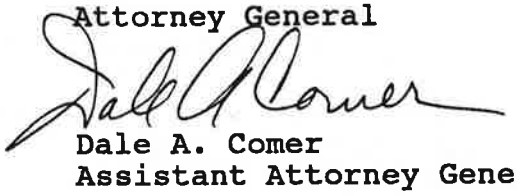
avoided. ***State ex rel. State Rway. Commission v. Ramsay***, 151 Neb. 333, 37 N.W.2d 502 (1949). In addition, words of similar import in a constitution which are used in association with each other should be construed in the same general sense. 16 C.J.S. ***Constitutional Law*** § 26.

We now believe that the terms "escheat" and "forfeiture" as they are used in Article VII, Section 7 refer to instances where title to property vests in the State. Since words used in association with each other in a constitutional phrase must be construed in the same general sense, we believe that "unclaimed dividends" and "distributive shares of deceased persons" as they are used in Article VII, Section 7 must also refer to instances when title to those types of property vests in the State. However, as noted above, the ***Marsh*** case indicates that unclaimed property held under the Act is held in a custodial sense, in distinct contrast to escheat. As a result, it appears to us that unclaimed property held under the Act, because of the custodial nature of the taking, cannot constitute "unclaimed dividends" or "distributive shares of the estates of deceased persons" which have "come to this state" under Article VII, Section 7. In essence, such unclaimed property is really not the State's money. Therefore, we do not believe that Article VII, Section 7 requires unclaimed property under the Act to be placed in the Permanent School Fund, and it can be placed in the General Fund as provided by the current version of Section 69-1317 (b) (2).

Since we have concluded that transfers of unclaimed property to the General Fund under the Act are proper, there is no need for us to respond to your second question concerning how such transfers might be corrected, and we will not do so.

Sincerely yours,

DON STENBERG
Attorney General



Dale A. Comer
Assistant Attorney General

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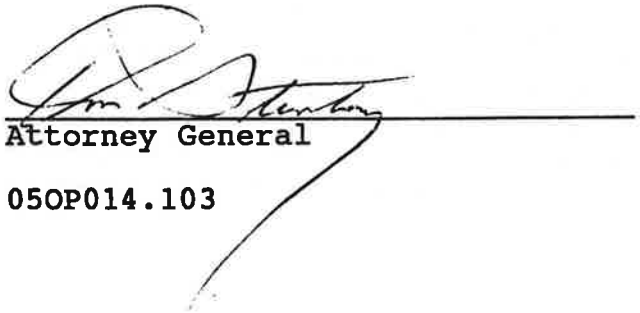

Attorney General

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