

Answer by Letter (Wood)

January 21, 1970

OPINION LETTER NO. 14



Honorable Joseph Jaeger, Jr.
Director of Parks
1204 Jefferson Building
Jefferson City, Missouri 65101

Dear Mr. Jaeger:

This is in reply to your letter in which you inquire if the State Park Board can institute overnight camping at Babler State Park and if the Park Board can lease portions of Babler Park to political subdivisions of the state for public use.

The deed of August 20, 1934, from Jacob L. Babler to the State of Missouri, recorded on August 23, 1934, at Book 1313, page 22 of the St. Louis County records conveyed a fee simple determinable estate. *Donehue v. Nilges*, 266 S.W.2d 553 (Mo. 1954); *Board v. Nevada School Dist.*, 251 S.W.2d 20 (Mo. 1952). That is, the State of Missouri was given a fee simple title with certain conditions attached, the breach of which vested in the grantor or his heirs the right of re-entry and reversion of title. Included among these conditions was that the property be continually used as a public park, that it never be reconveyed to third parties other than the City of St. Louis, County of St. Louis, or both jointly, that camping or hunting never be permitted on the property, and that the property never be leased except to public park concessionaires.

The land conveyed by this deed is recited to have been 864.-723 acres in United States Surveys 1956, 909, 668, 152 and 459 in Township 45 North, Range 5 [sic; should be 3] East of St. Louis County, Missouri.

Subsequent to the above deed, various adjoining tracts of land were given to the State of Missouri by different grantors, with the result of altering the boundary of Babler State Park prior to May, 1937. In a bill approved May 21, 1937, the General Assembly

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authorized the Governor, Attorney General, and the Game and Fish Commissioner to convey all of Babler State Park to Jacob L. Babler so that Jacob L. Babler could reconvey the entire park acreage to the State of Missouri subject to the terms and conditions of a Perpetual Endowment Trust Fund agreement (Laws 1937, pp. 514-518). Pursuant to this legislative authorization the aforesaid officials, on June 23, 1937, executed a deed to the park, including those portions deeded to the state in the meantime by other grantors, back to Jacob L. Babler. This deed was recorded on June 23, 1937, at 11 a.m. in Book 1420, page 634, St. Louis County records.

On June 23, 1937, Jacob L. Babler gave a deed to the entire park property to Lloyd C. Stark, Governor of the State, Roy McKittrick, Attorney General, and Wilbur C. Buford, Game and Fish Commissioner, for the use and benefit of the State of Missouri. This deed was made subject to the terms of a Perpetual Endowment Trust Fund theretofore established on May 28, 1937 (Book 1438, page 572, St. Louis County records) by and between Jacob L. Babler, Grantor and Henry J. Babler, Richard J. Weidert, Wilbur C. Buford, Harland Bartholomew and Roy McKittrick, Trustees, reserving the right of the Endowment Fund trustees to enter into the premises of the state park and reserving also to said trustees the control and management of the state park as provided in the Endowment Fund agreement. This deed provided that in the event the Endowment Trust Fund was insufficient to meet expenses and maintenance of the park, then the trustees could--at their option--surrender possession and control of the park to the state free of the terms and conditions of the Endowment Trust Fund agreement, provided that the park would forever be known as the "Dr. Edmund A. Babler Memorial State Park." In my opinion, this 1937 deed from Jacob L. Babler vested the State of Missouri with a fee simple title to the park property. This deed was filed for record at 11:02 a.m., June 24, 1937, at Book 1476, pages 91 through 94 of the St. Louis County records.

The Perpetual Endowment Trust Fund agreement vested the trustees with the power to "direct, supervise, and manage the Dr. Edmund A. Babler Memorial State Park" and to make such rules and regulations governing the park as "in their sole judgment and discretion may be deemed advisable and necessary under the circumstances." (Article 4). The trust was irrevocable, perpetual, and not subject to termination by the grantor, but the trustees were given the option, should the income from the trust fund prove insufficient to meet expenses of maintenance of the park, of surrendering possession of the park to the state, in which event the state would be "in no wise bound by the terms of said trust thereafter" (except for the name of the park) (Article 7).

In his will executed on the 17th day of July, 1942, Jacob L. Babler bequeathed the residue of his estate to a charitable trust

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which was to continue and endure for twenty years from and after the date of his death. The trustees were designated as Richard Weidert and Henry J. Babler (testator's brother) and they were directed to use the principal and income of the trust to assist the State of Missouri in maintaining, beautifying, developing and possibly enlarging the Dr. Edmund A. Babler Memorial State Park. Jacob Babler died on May 21, 1945, and his will was admitted to probate on July 19, 1945. Richard Weidert declined trusteeship and Mercantile Trust Company National Association of St. Louis was named co-trustee to serve with Henry J. Babler. Henry J. Babler died on February 17, 1956, and Mary Anne O'Brien was named to succeed him as a co-trustee. By Laws of 1965, page 387, the Missouri State Park Board was authorized to receive all personal and real property bequeathed or devised to the State by Jacob L. Babler and to use such property solely for the "maintenance, beautification and further development or enlargement of the Dr. Edmund A. Babler Memorial State Park in St. Louis County" (Section 253.350, RSMo). We understand that the Perpetual Endowment Fund trustees surrendered possession and control of the park to the State Park Board in 1965, and such action did, under the terms of the 1937 deed, set aside all provisions of the trust except the requirement that the park be called the "Dr. Edmund A. Babler Memorial State Park." On May 6, 1968, Mary Anne O'Brien and the Mercantile Trust Company National Association, as co-trustees under the will of Jacob L. Babler, conveyed various tracts in St. Louis County to the Missouri State Park Board. (trustees deed recorded on May 8, 1968, at 3:48 p.m., Book 6323, pp. 1274 through 1289 of the St. Louis County records)

It is my opinion that the 1937 deeds conveying Babler State Park (1) from the State of Missouri to Jacob L. Babler and, (2) from Jacob L. Babler to the State of Missouri, had the effect of **eradicating** for all purposes the August 20, 1934 deed from Jacob L. Babler to the State of Missouri.

" . . . It will be remembered that Henry C. Page conveyed by warranty deed to Charles E. Page in 1863, and afterwards by warranty deed to Emma S. Page in 1869. Both of those deeds conveyed an indefeasible estate in fee-simple absolute. Afterwards, in September 1893, Emma reconveyed to Henry, and in December Charles reconveyed to Henry. In this way Henry became again seised and possessed of an indefeasible estate in fee-simple absolute. . . ." (Wilson v. Fisher, 72 S.W. 665 (Mo. 1903) 1.c. 669)

Since the deed of June 23, 1937, from the duly authorized officers of the State of Missouri to Jacob L. Babler restored an indefeasible

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fee estate in Jacob Babler of the property theretofore conveyed by him to the State of Missouri, his subsequent deed of June 23, 1937, to the State of Missouri vested in the State of Missouri a fee simple estate to all of the property previously conveyed by him in 1934, but without the conditions and limitations, and especially the possibility of reverter, contained in the 1934 deed.

Applying a slightly different principle of law, the same result is reached because the possessor of a possibility of reverter (Jacob L. Babler) may divest himself of such by releasing it to the tenant in fee simple determinable (The State of Missouri). The release has the effect of turning the fee simple determinable into a fee simple absolute (Smith v. School District No. 6 of Jefferson County, 250 S.W.2d 795 (Mo. 1952); 28 Am. Jur. 2d, Section 185, pp. 325, 326). The conveyance on June 23, 1937, by Jacob Babler to the State of Missouri could be considered such a release, thereby extinguishing the conditions subsequent and the possibility of reverter that had been contained in the 1934 deed. This deed of June 23, 1937, in my opinion, vested a fee simple absolute title to the property previously conveyed by Jacob Babler in 1934, notwithstanding that it was given subject to the terms of the Perpetual Endowment Trust Fund agreement of May 27, 1937. This is so because of the absence in this latter deed of language creating a condition subsequent or providing for a re-entry or a reversion of the title in the event of non-compliance with the terms of the Perpetual Endowment Trust Fund. (Duncan v. Academy of the Sisters of the Sacred Heart at St. Joseph, Missouri, 350 S.W.2d 814 (Mo. 1961); Chouteau v. City of St. Louis, 55 S.W.2d 299 (Mo. en banc 1932)).

Although Jacob Babler made no express mention in his will of the Perpetual Endowment Trust Fund, it would appear from his statement that he had previously "given and deeded to the State of Missouri, a large tract . . . as a public park," (from Item 15 of the Will) that he recognized the continued validity of the Endowment Trust. Consequently, he apparently intended that the trustees of the testamentary trust created by the will would manage properties, both real and personal, separate and apart from the properties previously given to the State of Missouri subject to the control and management of the Perpetual Endowment Fund trustees. Therefore, the deed from Mercantile Trust Company National Association and Mary Anne O'Brien, to the State Park Board upon the expiration of the testamentary trust would not have affected the property conveyed to the state in 1937 and thus could not have effected a surrender of the possession and control vested in the Perpetual Endowment Fund trustees. However, as pointed out above the Perpetual Endowment Fund trustees did surrender possession and control of the park property to the State Park Board in 1965; and the State Park Board now has full possession, control, and management of the park property acquired in 1937. All of that part of the State Park which was deeded to

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the Missouri State Park Board by the Mercantile Trust Company National Association and Mary Anne O'Brien in 1968, to the extent that such property is separate and distinct from that conveyed to the state in 1937, would certainly be free and clear of the restrictions of the 1937 deed.

In view of the foregoing and in answer to your first question, I am of the opinion that there is no restriction on overnight camping applicable to the lands in the present Dr. Edmund A. Babler Memorial State Park which were conveyed to the State Park Board by Mercantile Trust Company National Association and Mary Anne O'Brien, trustees, on May 6, 1968. There is no specific camping prohibition in the 1937 deed to the state and to the extent the lands conveyed thereby remained subject to the general control of the Perpetual Endowment Fund trustees, such control expired when the Perpetual Endowment Fund trustees surrendered possession to the State Park Board in 1965. Consequently, there is nothing to interfere with the Park Board's use of 1937 land for camping.

As to your second question, whether or not the State Park Board may lease portions of the Babler State Park to political subdivisions of this state for public use, it is my opinion that the Park Board may so do so because the General Assembly has authorized the Board "to convey such lands or interest therein and [to use] the proceeds of such sale" for the maintenance, beautification and further development or enlargement of the Babler Park (Section 253.350-2, RSMo). (State ex rel. St. Louis County v. Evans, 139 S.W.2d 967, 969 (Mo. en banc 1940); Warner v. Fry, 228 S.W.2d 729, 730 (Mo. 1950)).

Furthermore, Section 1 of House Bill No. 711, 73rd General Assembly (Section 253.350-1, RSMo) provides that the Endowment Fund shall be composed of both real and personal property given to the state for the benefit of Babler Park by the will of Jacob L. Babler or otherwise. Section 2 of House Bill No. 711 (Section 253.360-1, RSMo) provides that "All income, interest, rights or rent earned through the operation of the fund shall also be credited to the fund" thus manifesting a legislative intent that the Park Board may in its discretion lease real property belonging to the fund and use such rental income toward the "maintenance, beautification, and further development or enlargement" of the park (Section 253.350-1, RSMo).

Yours very truly,

JOHN C. DANFORTH
Attorney General