

MAINE STATE LEGISLATURE

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STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA

February 14, 1966

Honorable John H. Reed
Governor of Maine
State House
Augusta, Maine

Dear Governor Reed:

I wish to acknowledge your letter of January 31st inquiring concerning the eligibility of Gordon Drew to serve as a member of the Maine State Liquor Commission. I believe I sent you a copy of an opinion I rendered on January 4th to the Chairman of the Executive Council in which I advised the Council that in my opinion Mr. Drew was ineligible because of the provisions of Section 52, M.R.S.A., Title 28, and the fact that Mr. Drew was an officer and stockholder of Lewiston-Gorham Raceways, Inc. I enclose a copy of that opinion herewith.

I have now been forwarded by Attorney Joseph B. Campbell a copy of a Trust Agreement entered into on January 25, 1966, between Mr. Drew and Depositors Trust Company by virtue of which Mr. Drew has transferred to Depositors Trust Company, as trustee, all of the stock of Lewiston-Gorham Raceways, Inc. which he owns. Mr. Drew has also delivered to me certificates indicating that he has resigned as Treasurer and Director of Lewiston-Gorham Raceways, Inc. and as Treasurer and Director of Central Maine Fair Association.

Your letter now asks whether these actions on the part of Mr. Drew have removed the objections which I outlined to his appointment. I have made an extensive study of this question in view of the importance of the situation and am compelled to the same conclusion which I have reached in my opinion of January 4th. I pointed out therein that there might still be a question as to Mr. Drew's indirect interest in the sale of liquor because of the provision for revocation and return of the stock to him at the completion of any service as a member of the Commission. The Trust Agreement which was executed provides that the trustee shall accumulate the income and add it to the principal of the trust. While it states that the trust

is irrevocable and not subject to amendment, paragraph 7 thereof reads as follows:

"This trust shall terminate in six months from the date hereof if, within such period, the Settlor shall not have been appointed a member of the State Liquor Commission. If the Settlor is appointed a member of said Commission within such period, the trust shall terminate one year after the date on which he shall cease to be a member. Upon termination of the trust as aforesaid, the Trustee shall pay and distribute the fund and all accumulation of income therefrom to the Settlor if then living, otherwise to his legal representative."

Obviously, this is merely a postponement of whatever benefits accrue to Mr. Drew as an owner of the stock in Lewiston-Gorham Raceways, Inc.

In recent years there has been considerable interest in conflicts of interest generally, and much has been written by legal writers on this subject. Most of the interest stems from the publicity surrounding Defense Department appointees in the Federal Government; particularly Defense Secretary Charles Wilson and Secretary McNamara. These have been mentioned as parallels to this Drew case as has President Johnson's trust agreements with certain of his properties. However, there is a very important distinction. Under federal law at the time of Wilson's appointment, as is true now, there was no prohibition, as such, against owning stock in any company. The Senate Armed Services Committee as a matter of public policy, without any statutory guide lines, has required major appointees, including both Mr. Wilson and Mr. McNamara, to completely divest themselves of their stock holdings in companies doing business with the Pentagon; and as you can see, they have applied their policy with bipartisan effect. An article in the Summer 1965 Boston University Law Review indicates that there was no legislation involved but only the congressional surveillance of the advise and consent power. I emphasize that a complete disposal of the stock was required. In discussing trust devices, this same article points out that the availability of the trust device (in discussing a Massachusetts conflict of interest law) would seem to defeat the purpose of their law which is to prevent a public employee from being in a position to act in his public capacity with respect to a contract in which he has a personal interest.

In considering how the courts have construed the meaning of an indirect interest in these situations, an article in 47 Virginia Law Review 1044 has this to say:

"Indirectness as used by the courts is either a remoteness in time or in relationship. The former has caused the courts relatively little problem for a mere postponement of the financial benefit until the resignation of office or later is not such a guise that it cannot easily be penetrated."

The New York courts, in Yonkers Bus Co. v. Maltbie, 260 Appellate Division 893, in construing direct and indirect interests said that an indirect interest may include an interest the fruition of which is postponed or implicit, as well as one which is immediate and in stated terms.

The same Virginia Law Review article cited above states that the underlying rule forbidding public officials from having an indirect interest in government transactions is a broad public policy that a public official occupies a position of absolute loyalty to the public and should be free from any consideration which would affect his judgment as an official. The article also quotes the Wall Street Journal of January 15, 1965 as indicating that various trust plans of high government officials are not likely to affect the policy of the Senate Armed Services Committee.

There are also extensive articles on the conflicts of interest situation in volume 36 Southern California Law Review 186; volume 13, Rutgers Law Review 666; 24 Federal Bar Journal 239; and 76 Harvard Law Review 1113.

Our own Maine court in Tuscan v. Smith, 130 Maine 45, said:

"In determining whether or not a contract such as this is against public policy and illegal the court is not concerned with the technical relationships of the parties, but will look behind the veil which enshrouds the matter to discern the vital facts."

...

"The question really is whether the town officer by reason of his interest is placed in a situation of temptation to serve his own personal interests to the prejudice of the interests of those for whom the law authorized and required him to act in the premises as an official."

Honorable John H. Reed

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In view of all the foregoing which, as I pointed out, deal mostly with general public policy, as distinguished from a specific statutory requirement such as we have in our Liquor Commission Law, I must conclude that Mr. Drew still has an indirect interest within the meaning of our statute which renders him ineligible for appointment to the Liquor Commission. The net effect of the trust is merely to postpone the benefits of his ownership and association with Lewiston-Gorham Raceways, Inc. and his appointment would violate both the letter and the spirit of this statute which obviously is grounded in the broad public policy as our court has stated in Tuscan v. Smith, that he who holds a public office is in a position of public trust. I do not believe that anything short of a complete divestment of his stock interests could make Mr. Drew eligible for this appointment.

Yours respectfully,



Richard J. Dubord
Attorney General

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Enclosure