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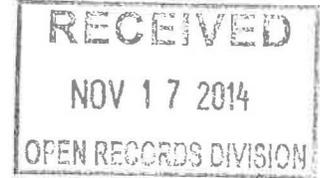
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OPINION COMMITTEE

November 10, 2014

VIA Certified Mail Return Receipt Requested
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Honorable Gregg Abbott
Attorney General of Texas
Open Records Division
P.O. Box 12548
Austin, Texas 78711-2548



RQ-1231-6A

FILE # ML-47667-14
I.D. # 47667

Re: Whether restitution funds, ordered in a criminal judgment by a statutory county court and collected by the county clerk, are funds “belonging to the county” and required to be deposited with the county treasurer or in the county treasury pursuant to Local Government Code, section 113.021.

Dear General Abbott:

Pursuant to Article IV, § 22 of the Texas Constitution and § 402.041, *et seq.* of the Texas Government Code, this opinion request is respectfully submitted to you in an effort to determine whether the county clerk is required to establish a bank account, separate from the county treasury, for the collection, retention and distribution of restitution funds collected under a criminal judgment issued by a statutory county court.

BACKGROUND

Currently, individuals ordered, pursuant to a judgment by the Atascosa County Court at Law, to make payments for criminal offenses, tender such payments to the Atascosa County Clerk’s Office. The payments made by the individuals include fines, court costs, and restitution, if applicable.

The county clerk accepts the payments, including the restitution, and deposits the payment into the fines and fees account in the county treasury. The portion of the payment to be remitted as restitution and the name of the victim are documented by the county clerk. At the conclusion of each month, the county clerk submits a request for payment to the county auditor detailing the name of each victim entitled to receive restitution and the sum amount of the restitution to be paid to that particular individual for that month. Upon approval by the county auditor, the county treasurer issues a check to each named individual entitled to restitution for the specified amount.

Please note that Atascosa County is a county with a population less than 50,000 inhabitants.

LEGAL ANALYSIS

In each criminal case presented before the court, the judge must enter a written declaration indicating the conviction or acquittal of the individual. Tex. Code of Crim. Pro. art. 42.01, § 1. The judge, subsequently, enters a sentence against the individual based on the information contained within the judgment. *Id.* The sentence reflects the punishment to be executed against the individual. *Id.* art. 42.02. Incorporated into the sentence, the court may order an individual convicted of an offense to make restitution to any victim of the offense. *Id.* art. 42.037(a). The order of restitution may require the convicted individual to make restitution directly to the victim, make restitution to a person or agency that will disburse the restitution to the victim, or make restitution to the community supervision and corrections department to be forwarded to the victim. *Id.* art. 42.037(g)(4).

Absent a more specific provision regarding the deposit of a particular fund, the procedure for proper management of public funds received by county officers is found in Chapter 113 of the Texas Local Government Code. *See generally* Tex. Loc. Gov't Code § 113.001, *et seq.*; Tex. Att'y Gen. Op. No. JC-0031 (1999) (funds that are collected by the district clerk and which “belong to the county” are governed by section 113.022). The county treasurer serves as the chief custodian of all county funds and, regardless of the source, the county treasurer is to receive all money. Tex. Loc. Gov't Code §§ 113.001 (the county treasurer shall keep and account for all county funds), 113.003 (all money belonging to the county is received by the county treasurer). Within the prescribed time restrictions, all county officials who receive county money are required, pursuant to Section 113.022, to deposit the money with the county treasurer. *Id.* §§ 113.021 (“fees, commissions, funds, and other money belonging to the county” must be deposited in the county treasurer), 113.022 (a person who receives county money must deposit the money in with the county treasurer on or before the next regular business day or, without exception, on or before the fifth regular business day after collection¹).

Funds belonging to the county and deposited in the county treasury are disbursed by the county treasurer. *Id.* § 113.041. Local Government Code section 113.042 requires, on the presentation of an order for payment drawn by a proper authority, the county treasurer's endorsement. *Id.* § 113.042(a). In a county with a county auditor, the countersignature of the county auditor is required to validate it as a proper expenditure. *Id.* § 113.043. Notably, the countersignature of the county auditor is not required for checks and warrants for jury service or “for restitution collected on behalf of an individual as authorized by law.” *Id.* Section 113.043 suggests that restitution is to be filed with the county treasurer, as the county treasurer, alone, is authorized to disburse such money.

However, Section 113.022 only applies to funds “belonging to the county.” Tex. Att'y Gen. Op. Nos. GA-0636 (2008) (absent a statute providing for an alternative disposition, fees collected by county officers must be deposited in the county treasury), JC-0031 (1999) (a specific statute regarding the disposition of a particular fund will prevail over the general statute regarding the

¹ Tex. Loc. Gov't Code § 113.022 authorizes the commissioners court, in a county with a population fewer than 50,000, to extend the date when the deposit must occur to not later than the fifteenth day after the date the money was collected.

disposition of a fund). Whether a particular sum of money “belongs to the county” is an issue resolved by analyzing the specific funds in question. Tex. Att’y Gen. Op. No. JC-0031 (1999). In a prior opinion, the Attorney General’s office addressed whether county officials may establish individual bank accounts for the funds they collect. Tex. Att’y Gen. Op. No. GA-0636 (2008). It was determined that, for funds belonging to the county, county officers were not authorized to have individual bank accounts and were required to deposit any collected funds belonging to the county into the county treasury in accordance with the law. *Id.* Nevertheless, the funds discussed in the opinion were defined as specifically excluding restitution accounts² and trust accounts. *Id.* Perhaps the specific exclusion of restitution accounts warrants the conclusion that restitution is not a fund “belonging to the county.”

While statutes address the procedures for the collection and disposition of monies by the county clerk, none appear to directly address the proper retention and distribution of restitution funds. Section 25.0008 of the Government Code requires the county clerk to collect fees and pay them into the county treasury. Tex. Gov’t Code § 25.0008 (discussing statutory county court fees). The term “fee” is not defined by Section 25.0008, and there is no indication that restitution was intended to be included within the meaning of the term. *See generally* Tex. Gov’t Code, § 25.0001, *et seq.*

Like Section 25.0008, Section 133.052, Local Government Code, requires a county officer that collects a fee to deposit that fee in the county treasury. Tex. Loc. Gov’t Code § 133.052(b) (standardizing the collection and remittance of criminal and civil fees to the comptroller). Section 133.002 defines “fee” as a criminal or civil fee listed within Sections 133.003 or 133.004. *Id.* § 133.002. However, neither 133.003 nor 133.004 lists restitution as an authorized fee to be collected and paid into the county treasury. *Id.* §§ 133.003 (listing the criminal fees to include the consolidated fee, time-payment fee, peace officer services fee, statutory county court costs, administrative fee for failure to appear, overweight vehicle fines, jury reimbursement fee, court related purposes fee, and the indigent defense fee), 133.004.

Likewise, the clerk is required, with other enumerated duties, to collect “fines and jury fees” and pay them into the county treasury. Tex. Gov’t Code § 51.402(c) (describing the duties and powers of the clerk of a county court). Although restitution and a fine serve to punish an offender for an offense committed, as opposed to compensating the court for costs associated with prosecution, there appears no language causing one to believe the term fine incorporates restitution. *Weir v. State*, 278 S.W.3d 364, 366-67 (Tex. Crim. App. 2009) (comparing the punitive nature of restitution to that of a fine and distinguishing both from court costs); *see* Tex. Gov’t Code §§ 51.401-.404. A reading of Section 42.037 of the Code of Criminal Procedure would appear to confirm the distinction between a fine and restitution. Section 42.037(g)(4) specifically states that “*in addition to an assessed fine,*” a court may order restitution to be paid to the victim of the offense. Tex. Code Crim. Pro. Art. 42.037(g)(4).

² Letter from Honorable Jeb McNew, Montague County Attorney, to Honorable Gregg Abbott, Attorney General of Texas, at 2 (Dec. 17, 2007).

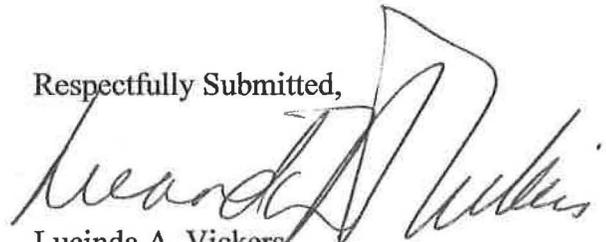
Section 32.41 of the Penal Code expressly permits the issuer of a dishonored check to make restitution to the justice of the peace, with consent from the justice of the peace. Tex. Pen. Code § 32.41(e) (a person may make restitution on a bad check or sight order through the prosecutor's office or, with the consent of the justice of the peace, through the court). The restitution payments may be made payable to the justice of the peace or to the holder of the dishonored check. Tex. Att'y Gen. Op. No. DM-396 (1996). Regardless, restitution paid by individuals prosecuted for tendering dishonored checks and collected by a justice of the peace has been determined not to belong to the county. *Id.* The restitution collected for dishonored checks are not required to be deposited with the county treasurer or in the county treasury, because the restitution "merely passes through the court" to the holder of the dishonored check. *Id.* The proper ownership of the restitution remains in the holder of the dishonored check. *Id.*

Restitution paid pursuant to a judgment issued by a county court at law would appear to warrant a similar analysis. Restitution is paid to the county clerk, as ordered in a judgment, to be forwarded to the victim in accordance with the law. Tex. Code Crim. Pro. art. 42.037(g)(4). Like a justice of the peace, the county clerk merely serves as a collection point for the money, through which the restitution passes to the victim of the offense. If such a comparison holds true, restitution is not money belonging to the county and would properly be held by the county clerk in a separate restitution account.

QUESTION PRESENTED

1. Does restitution paid by a defendant, as part of a statutory county court judgment, to a county official, such as a county clerk, constitute money "belonging to the county" pursuant to section 113.021, Local Government Code.

Respectfully Submitted,



Lucinda A. Vickers
Atascosa County Attorney