HENRY MCMASTER
ATTORNEY GENERAL

January 11, 2010

The Honorable Nikki Randhawa Haley
Member, House of Representatives
320-D Blatt Building
Columbia, South Carolina 29211

Dear Representative Haley:

In a letter to this office you requested an opinion regarding a dispute between a nonprofit organization recognized as a charitable trust in this State, STARR, and a particular individual. The issue revolves around certain equipment donated to STARR by that individual where the individual who gave the equipment is now claiming that the equipment does not "legally belong" to STARR.

As recognized by the State Supreme Court in Epworth Children's Home v. Beasley, 365 S.C. 157, 616 S.E.2d 710 (2005), quoting S.C. Code Ann. § 1-7-130, the Attorney General is given the responsibility of assuring that a charitable trust is properly administered. However, in responding to your request for an opinion, this office has repeatedly stated that an opinion of this office cannot determine facts, noting that the determination of facts is beyond the scope of an opinion of this office. See: Ops. Atty. Gen. dated November 12, 2008; March 19, 2008; October 8, 2007. Therefore, any factual dispute as to whether certain equipment "legally belongs" to a nonprofit, charitable trust is beyond the scope of this opinion. While this office cannot make factual determinations in this instance, certain indicia that could be considered in making any such determination is, for example, whether an individual transferring the equipment did any acts typically utilized with respect to charitable gifts, such as claiming a charitable tax deduction, when the equipment was transferred to what I am assuming is a recognized 501(C)(3) organization. Also, of course, any documentation involved in the transfer and whether such documentation contained any wording that would allow for a reversion of property would also have to be considered.

While we cannot determine the particular facts regarding the equipment transfer in this instance, to be of assistance, I will outline certain basic principles regarding the laws of charitable trusts in South Carolina. As recognized by the Supreme Court in South Carolina Department of Mental Health v. McMaster, 372 S.C. 175, 180, 642 S.E.2d 552, 555 (2007), a charitable trust is defined as

> ...[a] fiduciary relationship with respect to property arising as a result of a manifestation of an intention to create it, and subjecting the person by whom the property is held to equitable duties to deal with property for a charitable purpose...The settlor must manifest an intention to create a charitable trust. It is not necessary that any particular words or conduct be manifest to create a trust, and it is possible to create a trust without using the words "trust" or "trustee".

The Supreme Court also stated in Colin McK. Grant Home v. Medlock, 292 S.C. 466, 470, 349 S.E.2d 655, 657 (Ct.App. 1986) that charitable trusts "...are entitled to peculiar favor; the courts will construe them to give them effect, if possible, to carry out the general intention of the donor."

Moreover, "...properties conveyed to a public charity are...impressed with a charitable trust." South Carolina Department of Mental Health, supra at 372 S.C.182, 642 S.E.2d 555. The Texas Attorney General in an opinion dated August 4, 1983 recognized that as to donations to charitable organizations, "...a valid donation requires the donor to divest himself or herself of title and control of the gift without expectation of its return...A charitable deduction, therefore, does not become a donation until it has been transferred to the particular charity." As similarly recognized by the Kentucky Attorney General in an opinion dated December 4, 1987,

> [w]hatever is done or given gratuitously in relief of the public burdens, or for the advancement of the public good, is a purely public charity. Where the public is the beneficiary, the charity is public, and where no private or pecuniary return is reserved to the giver or to any particular person, but all the benefit resulting from the gift or act goes to the public, it is a purely public charity; the word "purely" being equivalent to "wholly." (emphasis added).

In its decision in Adult Student Housing, Inc. v. State of Washington et al., 705 P.2d 793 at 797 (Wash. Ct. App. 1985), the Washington Court of Appeals stated that "[t]he term "charity" in itself implies gift in some form; it implies the bestowal of goods or money, the rendition of services, or the awarding of privileges, free to the recipient, without gainful return or the anticipation of gainful return to the donors...." It has also been recognized that if any general charitable intent is indicated, the courts will generally deny any right of reverter. 38 A.L.R. 44.

As to any responsibilities of the Starr organization in this instance as to the property transferred, as stated at 15 Am. Jur. 2d Charities § 93,

> [g]enerally speaking, the trustees of a charitable trust are under the duty of caring for and managing the property of the trust, and trust funds should be carefully guarded and protected, to the end that the charitable intent of the testator will be carried out and the trust property not depleted by being used for purposes not intended by the testator. In a charitable trust, the obligation of the trustee is to apply the trust res for some form of public benefit and the persons who receive its advantages from the

> administration of the trust do so because they are conduits through whom the social gains flow, and not necessarily because they have a property interest in the trust assets. A charitable trust is a fiduciary relationship with respect to property, arising as a result of a manifestation of an intention to create it, and subjecting the person by whom the property is held to equitable duties to deal with the property for a charitable purpose. (emphasis added).

Therefore, the STARR organization would have a duty to protect any property given to it, and to willingly transfer back property which was given for a charitable purpose could constitute a breach of its fiduciary responsibilities with respect to such property.

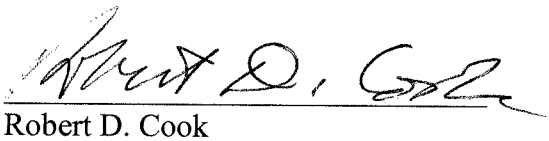
With kind regards, I am,

Very truly yours,

Henry McMaster
Attorney General

By: Charles H. Richardson
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
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