

# The State of South Carolina



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November 16, 1988

The Honorable Charles L. Powell  
Member, South Carolina Senate  
P. O. Box 1127  
Abbeville, SC 29620

RE: Interest on section 16-13-460 Church  
Cemetery Maintenance Fund

Dear Senator Powell:

You have asked for this Office's opinion as to whether section 16-13-460 of the Code of Laws of South Carolina (1987), which was added to Chapter 13 ("Forgery, Larceny, Embezzlement, False Pretenses and Cheats") of Title 16 ("Crimes and Offenses") by Act 115 of 1987 (H2012), requires that interest accrued by funds designated for cemetery maintenance must also be expended for that purpose.

The plain meaning of the language of section 16-13-460, its legislative history, and the doctrines and rules of general trust law would so indicate. Nor is there any legal theory which would suggest otherwise.

The section first requires that churches account separately for money they receive which is specifically designated for cemetery maintenance. It then creates a misdemeanor of knowingly permitting or allowing the "use of the fund" (emphasis added) for any other purpose.

It is obvious, if not tautological, that the "fund" referred to in the second sentence of section 16-13-460 is that created when a church deposits money paid or donated to it for cemetery maintenance into the separate account required by the first sentence. Furthermore, the legislative history of the bill, found in the entries in the Legislative Journal for January 13, March 10, 12 and 13, and May 6, 12, 13, 14 and 20, 1987, all state to "amend the 1976 Code....so as to require a church which receives money for the maintenance of its cemetery to keep the money in a separate

fund", rather than using "account for the money separately" language of the bill and the act themselves. This history thus further establishes that "account for the money separately" means to establish the separate fund for the money referred to in the second sentence.

The question presented by your opinion request then, is whether the interest or income from said moneys, from said "fund", becomes a part of said "fund".

The General Assembly is presumed to use words advisedly and within their ordinary and customary meaning and usage unless they are defined or are terms of art. Herein the terms "account for" and "fund" are not defined and their ordinary and customary meaning and usage is the same as any special meaning they might have in a financial, banking or trust context.

Under the ordinary and customary operation of our banking system any interest or income earned by a separate account or fund becomes part of that account or fund. This basic principle is stated in University of South Carolina v. Elliott, 248 S.C. 218, 149 S.E.2d 433 (1966); "the interest earned ... is simply an increment of the principal fund, making the interest the property of the party who owned the principal fund... ." 248 S.C. at 220, 149 S.E.2d at 434. See also, Annot., 5 A.L.R. 2d 257 at 263. Furthermore this attribution of income to principal is an essential if not primary reason for requiring separate accounting in general, and specifically where trust funds are involved.

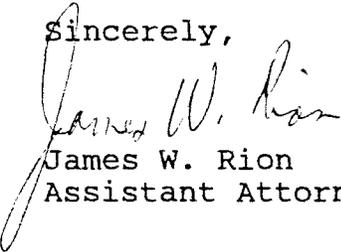
Even absent section 16-13-460, any money donated or paid a church specifically for the maintenance of a cemetery would be impressed with a trust for that purpose pursuant to general principles of trust law. Any income from such moneys impressed with a trust becomes part of such trust for such purpose. 45 Am. Jur. 2d "Interest and Usury" § 39. "Money held for use of another." A church's use of the income from money donated or paid specifically for one purpose for another would violate the church's fiduciary duty as trustee, thereof. 76 Am. Jur. 2d, Trusts, § 317. "Refraining from Personal Traffic in Trust Estate." The donor would be entitled to an accounting of the use of such money, return and proper application of any money misapplied, and an injunction enjoining the trustee from applying the money donated, or the income therefrom, for any other purpose. 76 Am. Jur. 2d, Trusts, § 511. "Income, generally and interest"; § 512, "Rents and profits"; and § 318, "Taking no benefit, advantage or bonus." Any expenditure of such funds for any purpose other than that with which they are impressed with a trust must be authorized by a court of competent jurisdiction pursuant to the principles of equitable deviation.

The Honorable Charles L. Powell  
Page 3  
November 16, 1988

Section 16-13-460 appears to be a codification of these general trust principles with respect to cemetery maintenance funds paid to churches, with the addition of a criminal penalty for breach of the fiduciary duty involved. 76 Am. Jur. 2d, Trusts, § 370. "Form of deposit; indication of trust." Indeed, the A.L.R. annotation to section 16-13-460, 47 A.L.R.2d 596, addresses the trust created when a gift is made for the maintenance of a cemetery lot. At the least, the General Assembly would be presumed to intend that the section it passes to insure that such moneys be used for the purpose they are paid would be interpreted consistent with, and not in contradiction to, or derogation of, the common law trust principles which operate to the same end.

Consequently, being cognizant of both, consistent, sets of principles and customs, the General Assembly would be presumed to intend that the interest of income on the principal of such a separate account or funds would become part of this fund, and could not be expended for other than cemetery purposes. Nor are there any indications to the contrary.

Sincerely,

  
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Assistant Attorney General

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