4918/5622

The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

August 2, 1995

The Honorable John C. Land, III
Senator, District No. 36
Drawer G
Manning, South Carolina 29102

Re: Informal Opinion

Dear Senator Land:

You have requested an informal opinion regarding the eligibility of foreign corporations to serve as trustees under trusts created by corporate and individual citizens of South Carolina. In this instance, the foreign corporation is a trust company desiring to have one of its trust companies serve as Trustee for employee benefit trusts for South Carolina companies as well as Trustee of personal inter vivos Trusts created by residents of South Carolina.

The general law in this area may be summarized as follows:

> [e]xcept as specific statutes forbid appointment of any foreign fiduciary corporation as trustee of an inter vivos trust, there appears to be no basic public policy reason why such an appointment should not be valid, although a court, in its discretion, may refuse to make such an appointment under the circumstances of a particular case.

82 A.L.R.2d 946. ("Eligibility of foreign corporation to appointment as trustee of inter vivos trust"). The Annotation particularly references the decision of Ingalls v. Ingalls, 263 Ala. 106, 81 So.2d 610 (1955) which is described therein thusly:

> [h]olding that a national bank located in Tennessee had the same authority to act as trustee as did competing

> Tennessee state banks, the court ... said that in determining whether such a bank could validly be appointed cotrustee of a trust of property the situs of which was in Alabama, the questions to be answered were whether Tennessee law permitted Tennessee banks to act as trustee outside of that state, and whether Alabama law permitted foreign banks to act as trustees in Alabama. It was concluded that the Tennessee statute specifically granted such authority, and that a provision of the Alabama statute that courts might either remove a nonresident trustee or require him to give bond to protect the interests of the parties indicated that a nonresident was permitted to act as trustees of a trust.

Supra at 947. The same view is stated in the Restatement of Trusts § 96, 2(g) [a corporation organized under the laws of one state and having capacity to act as trustee by the law of the state has capacity to so act in another state unless it is against the policy of the latter state to allow such a corporation to act as trustee]. Accord, 76 Am.Jur.2d, Trusts, § 246; 90 C.J.S., Trusts § 208. And it is recognized in Bogert, Trusts and Trustees, § 132, that "[t]here would seem to be little doubt of the ability of state X to make a corporation of state Y a trustee of a valid trust by inter vivos acts." (emphasis in original). Thus, the answer to your question turns upon whether the laws of South Carolina in any way prohibit the appointment of an out-of-state trustee with respect to an inter vivos trust. As we have located no South Carolina case law which specifically addresses this question, an examination of the relevant statutory provisions is in order.

S.C. Code Ann. § 34-21-10 (The Trust Statute) provides as follows:

> [n]o corporation, partnership or other person shall conduct a trust business in this State without first making a written application to the State Board of Bank Control and receiving written approval from the Board. Before any such application shall be approved, the Board shall make an investigation to determine whether or not the applicant has complied with all the provisions of law, whether in the judgment of the Board the applicant is qualified to conduct such a business and whether the conduct of such business would serve the public interest, taking into consideration local circumstances and conditions at the place where such applicant proposes to do business; provided, however, that any person

> actively engaged in conducting a trust business in this State on January 1, 1972, shall not be required to make the application and receive the approval provided for herein. Provided, further, that nothing contained in this section shall prevent a natural person or a national banking association having its principal place of business in this State from qualifying and acting as trustee, executor, administrator, guardian, committee or in any other fiduciary capacity.

Clearly, nothing in this statute expressly makes any reference to any requirement that a trustee be a South Carolina chartered corporation.

S.C. Code Ann. § 34-1-70 must also be considered however. Such provision states:

> [n]o bank building and loan association savings and loan association, or savings bank may be granted a charter by the Secretary of State unless and until the Board [of Financial Institutions] has approved the application in writing. No branch bank, branch building and loan association, branch savings and loan association, or branch savings bank may be established without the approval in writing of the Board. Before any application for the incorporation of a bank, building and loan association, savings and loan association or savings bank, or the establishment of a branch thereof may be approved, the Board shall make an investigation to determine whether or not the applicants have complied with all the provisions of law, whether in the judgment of the Board they are qualified to operate the institution and whether the establishment of the bank, building and loan association, savings and loan association, or savings bank or a branch thereof, would serve the public interest, taking into consideration local circumstances and conditions at the place where it proposes to do business. A remote service unit as defined in § 34-28-30 is not considered a branch of a bank, building and loan association, savings and loan association, or a savings bank and is not subject to any of the provisions of this section applicable to branch applications. (emphasis added).

This Office has previously concluded that "[i]n order to conduct any banking activities in this State, the banking entity must be granted a charter which is granted only after the State Board of Bank Control has approved a written application therefor." Op. Atty. Gen., April 17, 1981.

There is a "well-defined distinction" recognized in the general law between conducting banking activities and conducting a trust business or trust company. See, 9 C.J.S., Banks and Banking, § 1044. There, it is stated:

> [t]his distinction rests, for the most part, upon the differences in the purpose or character of business for which the respective types of institutions or corporations are organized and in the nature of the powers and privileges customarily conferred upon them by the provisions of their charters. It has been said that the primary and ordinary conception of a trust company is a corporation or institution organized to take and administer trusts, rather than carry on the functions of banking.

This Office has also affirmed this distinction, concluding that a corporation chartered as a trust company is not authorized to do banking. Op. Atty. Gen., June 29, 1959. See also § 34-1-10 (definition of "bank")[1]; 10 Am.Jur.2d, Banks, § 1. Comprehending the well-settled difference between banking activities and a trust company and comparing §§ 34-21-10 with 34-1-70, it thus cannot be implied that a trust company must be a chartered South Carolina corporation in order to administer an inter vivos trust.

A third statute for consideration is contained in the Probate Code, § 62-7-207. That enactment provides:

> (a) [n]o corporation created by another state of the United States or by any foreign state, kingdom, or government and no corporation created under the laws of the United States and not having a place of business in the State of South Carolina

---

[1] Statutory definitions vary for various purposes. For purposes of the relationship with the Federal Deposit Insurance Company, a "banking institution" includes a trust company. 12 U.S.C. § 1813(a)(2) provides that a "state bank" includes a "trust company", but only if it is engaged in the business of receiving deposits other than trust funds.

> shall be eligible or entitled to qualify, serve or hold title to property in this State as testamentary trustee of an estate of any person domiciled in this State at the time of his death, whether the decedent shall die testate or intestate, except, however, such foreign corporations may act as testamentary trustee in this State if .... [upon fulfillment of certain conditions].

By its specific terms, this statute deals only with service as a testamentary trustee, but does not mention inter vivos trusts.

Certain rules of statutory construction are applicable here. In seeking legislative intent it is proper to consider cognate legislation. Arkwright Mills v. Murph, 219 S.C. 438, 65 S.E.2d 665 (1951). Different statutes in pari materia, though enacted at different times and not referring to each other should be construed together as one system and explanatory of each other. Fishburne v. Fishburne, 171 S.C. 408, 172 S.E. 426 (1934). Moreover, statutes dealing with the same subject matter should always be reconciled, wherever possible so as to render all fully operable. Bell v. S.C. State Highway Dept., 204 S.C. 462, 30 S.E.2d 65 (1944). While not conclusive, it is proper in construing a statute to consider legislation dealing with the same subject matter to assist in construction. Hartford Acc. & Indem. Co. v. Lindsay, 273 S.C. 79, 254 S.E.2d 301 (1979). Implied repeals or amendments are not favored. State v. Thrift, 440 S.E.2d 341 (1994).

When reading together the three statutes, referenced above, (the "Trust" Statute, the "Bank" Statute and the "Probate Code"), it is evident that South Carolina law does not expressly prohibit the appointment of an out-of-state trust company as trustee of an inter vivos trust. For example, in the title to the Probate Code (Act No. 539 of 1986), the General Assembly enumerated the statutes which the Probate Code was designed to modify, amend or repeal. Section 34-21-10, the Trust Statute, was not listed therein. Nowhere in Chapter 21 of Title 34, the chapter entitled "Banks and Corporations Doing Business" is there any suggestion, annotation or reference that indicates that either the Legislature or the Code Commissioner thought that the Trust Statute could not stand side by side the Probate Code.

Moreover, the fact that the Probate Code specifically prohibits a foreign corporation from serving as a testamentary trustee, except in certain instances, but does not mention inter vivos trusts, and the fact that the Trust Statute does not expressly prohibit a foreign corporation from serving as trustee, whereas the Bank Statute does provide that a charter

requirement is imposed for purposes of banking, are, in my judgment, significant. The generally recognized doctrine of expressio unius est exclusio alterius would be applicable here. The doctrine requires that the enumeration of particular things excludes the idea of something else not mentioned. Pennsylvania Nat. Mut. Cas. Ins. Co. v. Parker, 282 S.C. 546, 320 S.E.2d 458 (Ct. App. 1984). See also, § 62-3-203(e)(3) (foreign corporation not eligible to serve as personal representative of estate). In a recent opinion, this Office determined that the expression of specific requirements in a statute indicated that the General Assembly did not intend to impose other requirements. Op. Atty. Gen., January 10, 1995. Furthermore, courts have held that statutes specifically relating to testamentary gifts do not apply to inter vivos gifts. See, In Re Estate of Posey, 214 A.2d 713 (N.J. 1965) [Statute of Wills not applicable to inter vivos gifts]. The fact that the statute is silent as to inter vivos trusts cannot lead to the inference that an out-of-state trust company is rendered ineligible to serve as trustee.

Significant also is the fact that apparently at one time there existed specific statutory provisions that expressly required a trust company to be a South Carolina corporation except where the sole business of the trust within South Carolina was the lending of money on real estate therein or when the business of said foreign corporation or trust company is not the operation of a trust or banking business in South Carolina. See, 1942 S.C. Code Ann. § 7904. Sections 7878 through 7904 were repealed by 1951 Act No. 346.

In addition, Professor Coleman Karesh, long renowned as the expert of South Carolina trust law, concluded in his treatise on Trusts that "[t]here is no restriction on a foreign corporate Trustee acting under an inter vivos Trust ...." Karesh, Trusts 18 (1977). Professor Karesh apparently did not deem that the silence of the predecessor to § 62-7-207, virtually identical to its present form, constituted a prohibition as it relates to inter vivos trustees. I have recently spoken to another trust expert in this area and he is in agreement with Professor Karesh's conclusion and knows of no provision which has altered it.

Moreover, § 15-9-440(3) offers further support. That provision states that "[w]hen there is no resident Trustee, the nonresident Trustee of an inter vivos Trust shall be deemed to have consented to the service of any Summons ... when the Trust was created under laws of this state ..." (emphasis added). The statute does not limit its scope to natural persons; thus, by implication, this provision contemplates that a foreign corporation can serve as trustee for an inter vivos trust. Finally, this construction is supported by the fact that courts, with increasing frequency, have held that a statute which unreasonably discriminates between in-state and out-of-state corporations for purposes of appointment

as trustee is violative of the federal and state constitutions. See, Dunn v. N.C. Nat. Bank, 276 S.C. 202, 277 S.E.2d 143 (1981); Amer. Trust Co. v. S.C. State Bd. of Bank Control, 381 F.Supp. 313 (1974, D.C.S.C.); Munford v. MacLellan, 258 Ga. 679, 373 S.E.2d 368 (1988), citing Bogert, supra at § 132.

CONCLUSION

Applying the well-recognized rule that unless a specific statute forbids the appointment of a foreign fiduciary corporation (trust company) as trustee of an inter vivos trust, such appointment is generally not prohibited, it is my opinion that no South Carolina statute or decision prohibits that appointment.[2]

While I am of the opinion that the various statutes, discussed above, do not render an out-of-state trust company ineligible to serve as trustee of an inter vivos trust, additional comments are in order. Clearly, the General Assembly intended that a foreign corporate inter vivos trustee would be subject to regulation by the State of South Carolina. S.C. Code Ann. § 34-21-10 provides that, prior to conducting a trust business in this State", a corporation, partnership, etc. shall make a written application to the State Board of Bank Control and receive written approval. The Section further directs the Board to conduct an investigation to determine whether or not the applicant has complied with all provisions of law, whether in the judgment of the Board the applicant is qualified to conduct such business and whether the conduct of such a business would serve the public interest. In short, the trust business, like banking, is subject to pervasive control. Am. Trust Co., Inc. v. S.C. State Bd. of Bank Control, supra.

Therefore, within the parameters of law that an out-of-state corporation is not rendered ineligible to serve as inter vivos trustee simply by virtue of its status as a foreign corporation, the Board is, nevertheless, empowered to establish reasonable, non-discriminatory guidelines and/or requirements that a foreign trustee must meet. Such requirements could include, for example, those very same requirements which § 62-2-207 imposes upon testamentary trustees. Furthermore, conducting a "trust business" in South Carolina presumably constitutes "transacting business" in the State for purposes of § 33-15-101 which requires that the foreign corporations register or obtain a Certificate of Authority from the South Carolina Secretary of State as well, providing additional oversight to protect the citizens of South Carolina.

---

[2] For purposes of this letter, I assume that a "pour-over" provision in a will is not involved, wherein a trust is created thereby.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

RDC/an