

1982 WL 189225 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

March 30, 1982

*1 Mr. Eric W. Pantsari
Director
Public Charities
Department of State
State of South Carolina
Securities Division
816 Keenan Building
Columbia, S. C. 29201

Dear Eric:

In a letter to this office you questioned the legality of raffling real estate for charitable, as well as non-charitable, purposes. You also enclosed materials concerning a proposed scheme involving the Do' Mar Charitable Trust which in addition to real estate offers certain other items, such as automobiles, boats, and clothing, as prizes to be awarded pursuant to a drawing. According to such materials, Do' Mar Charitable Trust in attempting to raise funds for what is advertised as charitable purposes is planning to circulate numbered solicitation forms labelled as 'free tickets' in which donations would be requested. Such forms list various prizes to be awarded pursuant to a drawing. However, included on the form is the following disclaimer:

'All prizes to be awarded provided the minimum is donated. The minimum fund raising goal is \$1,000,000. No donations are refundable.'

Also, clearly marked on the 'free ticket' is a blank in which a participant may indicate his donation.

Pursuant to [Section 16-19-10, Code of Laws of South Carolina, 1976](#), and [Article XVII, Section 7 of the South Carolina Constitution](#), lotteries are prohibited in this State. In [Darlington Theatres v. Coker, 190 S. C. 282, 2 S.E. 2d 782 \(1939\)](#), the South Carolina Supreme Court determined that a lottery consists of three elements:

1. the offering of a prize;
2. the payment of money or other consideration for an opportunity to win the prize;
3. the awarding of the prize by chance

Therefore, any scheme involving all of the above three elements would be considered a lottery and, therefore, be illegal in this state. Furthermore, this office has previously determined that the fact that a lottery is held for charitable purposes is irrelevant. (See enclosed opinion dated October 13, 1981.)

The scheme involving the Do' Mar Charitable Trust clearly involves the first and third elements of a lottery. However, the scheme, as outlined, while purportedly designed to raise funds for charity through the acceptance of donations will, as referenced, distribute the tickets to be used in the drawing for prizes for free. Therefore, the second element of a lottery, i.e., the payment of money or other consideration for an opportunity to win a prize, is not clearly present.

While the second element involving the payment of consideration to win a prize is not clearly present, it may be argued that inasmuch as pursuant to the disclaimer, a minimum amount of one million dollars must be raised prior to any prizes being awarded, there may be a basis for construing the presence of the second element. In State ex rel. Schillberg v. Safeway Stores, Inc., 450 P. 2d 939 (1969), the Washington Supreme Court stated that:

‘. . . where the two elements of a lottery clearly exist, i.e., prize and chance, the courts will examine the details of the game minutely to see if a consideration, in whatever form, actually moves from the participants to the promoters, and to ascertain whether there is an actual loss on the one hand or a genuine gain on the other, or perhaps both a loss and a gain. But, if prize and chance are manifest, any substantial consideration, supplied in whatever form, will make it a lottery.’

*2 Furthermore, in Darlington Theatres, the Supreme Court further stated that in examining any plan to determine whether or not it constitutes a lottery, the following must be considered:

‘a plan which openly seeks to avoid the terms of a statute is a lawful one, but one which seeks to evade the statute is an unlawful one.’ 190 S.C. 282 at 299.

The circuit court in upholding the scheme examined in the Darlington Theatres case as not constituting a lottery quoted from State v. Eames, 183 A. 590, 592 the following in its opinion, such opinion being subsequently approved by the Supreme Court,

‘. . . (t)he problem presented by ‘bank night’ and similar schemes is to determine whether it is an evasion of the statute or an avoidance of it, and this question is essentially one of fact. * * * The test by which to determine the answer to this question is not to inquire into the theoretical possibilities of the scheme, but to examine it in actual practical operation. If * * * ‘the great majority of people pay for such privilege,’ then it is an evasion and as such is not to be countenanced. * * * however, free participation is a reality. * * * then, regardless of the motive which induced the defendant to give such free participation, the scheme is not within the ban of the statute. Violation is shown only when, regardless of the subtlety of the device employed, the state can prove that, as a matter of fact, the scheme in actual operation results in the payment, in the great majority of cases, of something of value for the opportunity to participate.’ 190 S.C. 282 at 294.

While, as previously stated, the element of consideration is not clearly present in the referenced scheme proposed by the Do' Mar Charitable Trust, it appears that a strong argument may be made that while a free ticket is offered, in light of the referenced disclaimer which provides that the awarding of prizes is contingent on the receipt by the Trust of one million dollars, the offering of a free ticket is merely a means to evade the prohibition in this State against lotteries. Therefore, this office is unable to approve such a scheme and would instead recommend that approval of the courts be sought prior to such a scheme being implemented.

If there are any further questions, please advise.

Sincerely,

Charles H. Richardson
Assistant Attorney General

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