

1976 S.C. Op. Atty. Gen. 375 (S.C.A.G.), 1976 S.C. Op. Atty. Gen. No. 4515, 1976 WL 23132

Office of the Attorney General

State of South Carolina

Opinion No. 4515

November 5, 1976

*1 A by-law of a non-profit corporation permitting its members to vote by proxy is valid under South Carolina law.

TO: The Honorable O. Frank Thornton
Secretary of State

QUESTION PRESENTED:

Whether a by-law of a non-profit corporation permitting its members to vote by proxy is valid under South Carolina law in the absence of a constitutional or statutory provision specifically authorizing the adoption of such a by-law.

STATUTES, CASES, AND OTHER AUTHORITY:

1962 South Carolina Code, as amended, Sections 12–16.4, 12–758(10);

[People ex rel Chritzman v. Crossley](#), 69 Ill. 195 (1873);

[Sagnes v. Farmers Co-operative Creamery Co., et al.](#), 293 NW 365 (1940);

[State v. Tudor](#), 5 Day 329 (Conn 1812);

[Taylor v. Griswold](#), 2 Green 222 (NJ 1834);

Howard L. Oleck, Non Profit Corporations, Organizations and Associations (3rd Ed. 1974).

19 Am Jur 2d Corporations Section 669.

DISCUSSION OF THE ISSUE:

While South Carolina Courts have apparently not addressed this specific issue, other jurisdictions have recognized that the common law required that a corporation member vote in person rather than by proxy. [Sagnes v. Farmers Co-operative Creamery Co., et al.](#), 293 NW 365. In most states, by statute members of non-profit organizations may vote by proxy. In some states voting by proxy is permitted only if the articles or by-laws specifically so provide. See Olecks Non Profit Corporations Organizations and Associations, page 434. Because of this fact there are relatively few cases discussing whether such voting is allowed absent a statute. Since South Carolina has no statutory provision for voting by proxy in non-profit organizations, it is not entirely certain that by adopting by-laws permitting this method of voting, a non-profit corporation may avoid the requirements of the common law rule. However, despite this uncertainty, Section 12–758 of the 1962 South Carolina Code as amended together with a valid corporate by-law governing the subject should permit members of a non-profit corporation to vote by proxy.

An early case stating that voting by proxies could not be permitted in the absence of a statute or constitutional provision was Taylor v. Griswold, 2 Green 222 (NJ 1834). In that case, which was concerned with a business corporation, apparently no statute specifically authorized the use of proxies but one general statute did prohibit a corporation from making any by-laws repugnant to the law of the land. Griswold held that since the common law was a part of the law of the land and required voting in person, a by-law authorizing voting by proxy was repugnant thereto and consequently void under the statute.

Griswold disagreed with the views expressed in State v. Tudor, 5 Day 329 (Conn 1812) which was also concerned with a business corporation. Tudor held that a by-law of a corporation authorizing members to vote by proxy was valid and did not violate the provision of the corporation's charter authorizing it to adopt by-laws that were not contrary to the laws of the State. The case specifically limited its holding to private corporations as opposed to corporations 'instituted for the public good' but this latter classification appears to include only entities such as municipal corporations and not non-profit corporations organized for the benefit of their members. Although Tudor recognized that the common law required that voting be in person, it found that the by-law in question was valid because it was 'reasonable, and calculated to carry into effect the objects of the institution and . . . [was] . . . not contradictory to the general policy of the laws of the land.' The court reasoned that the by-law met these requirements because the legislature had permitted voting by proxy in bank incorporations thus indicating that the use of proxies was not improper.

*2 The case The People ex rel Chritzman v. Crossley, et al., 69 Ill. 195 (1873), considered both Griswold and Tudor and discussed proxy voting in a situation somewhat similar to that presented in South Carolina. In Crossley an Illinois act authorized benevolent corporations to 'make by-laws not inconsistent with the constitution and laws of this State or of the United States.' Under this law, an incorporated benevolent society amended its constitution or by-laws so as to permit voting by its members either in person or by proxy.

Crossley rejected the holding of Griswold while approving that of Tudor. The Crossley court held that the Illinois Mason's Benevolent Society was a private corporation organized for private business as was the company in Tudor. Such an analysis would indicate that a nonprofit corporation in South Carolina would probably be within the contemplation of the term private corporation in Tudor.

Crossley used reasoning similar to that in Tudor to uphold the by-law it was considering. The Crossley court said that even though a constitutional provision specifically permitting voting by proxy in elections for certain corporation directors might not apply *per se* to the incorporated benevolent society, nevertheless such language was a ' . . . constitutional expression in favor of the policy of voting by proxy in [a] private corporation.' The by-law provision in question was then found to be consistent with the constitution and laws of the State.

Although South Carolina has not specifically authorized voting by proxy for non-profit corporations, it was provided for the exercise of proxies by business corporations in Section 12-16.14 of the 1962 South Carolina Code, as amended. Just as Crossley felt that a state statute authorizing the use of proxies by members of certain corporations was a statement of public policy that would apply to the benevolent society in that case, the South Carolina legislature in passing Section 12-16.14 of the 1962 South Carolina Code has indicated by implication that the use of proxies by members of all corporations, including those that are non-profit, would not be contrary to State policy.

Even if Crossley's reasoning were not applicable to non-profit corporations in South Carolina, the only restriction on by-laws adopted by such corporations is that they 'not be inconsistent with any existing law for the management of its property or the regulation of its affairs,' Section 12-758(10) of the 1962 South Carolina Code. Providing for voting by proxy by members of non-profit corporation is not inconsistent with any provision governing those corporations. With such a broad statement of authority to pass by-laws in Section 12-758(10) and with legislative authorization of the use of proxies in Section 12-16.14, a non-profit corporations should be permitted to adopt in its by-laws a provision permitting the use of proxies by its members.

*3 A problem might be presented if a provision for voting by proxy extended not only to members but to directors as well. Some cases, most of them fairly old, have held that a trustee or a director may not vote by proxy because he may not delegate his control and management discretion.¹ However, according to one authority, statutes which do authorize voting by directors are 'sound' provided that they are confined to 'narrow, specific vote issues.'² Since South Carolina Statutes do not specifically provide for voting by proxy by directors of non-profit corporations, a by-law of such a corporation authorizing that use of proxies might be subject to challenge particularly if wide discretion in the use of them was permitted.

CONCLUSION:

A final, definitive answer to the question discussed herein could only be had through a declaratory judgment action brought pursuant to Code of Laws of South Carolina, 1962, Section 10-2002, et seq. In the absence of such guidance, it is my opinion that a by-law of a nonprofit corporation permitting its members to vote by proxy would be valid under South Carolina Law.

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Footnotes

1 Howard L. Oleck, Non-Profit Corporations, Organizations and Associations, (3rd Ed. 1974), p. 443.

2 Id. p. 444
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