

1973 WL 26648 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

March 7, 1973

***1 Re: Will of William J. Latimer**

Dr. Robert C. Edwards
President
Clemson University
Clemson, South Carolina 29631

Dear Dr. Edwards:

You have asked whether the Board of Trustees of Clemson University can give to the Clemson University Foundation the corpus received by them as testamentary trustees under Item 5 of the Will of William J. Latimer. Item 5 of the Will provides:

‘5. All the rest, residue and remainder of my estate I will, devise and bequeath to the Board of Trustees of Clemson University, to be used as the Trustees shall determine for a useful and reasonably permanent part of or adjunct to the Clemson University Library.’

The Clemson University Foundation is a non-profit corporation whose charter authorizes it ‘to receive gifts, donations or bequest and to administer or dispose the same to the best interest of Clemson University, its students, ex-students, faculty and the State of South Carolina.’ In the opinion of this office Item 5 creates a testamentary trust for the purposes therein declared and is not an outright gift, donation or bequeath. Being a testamentary trust legal title to the trust res is in the trustees. 5 *Bowe-Parker: Page on Wills* § 40.2. It appears that the trustees have in fact accepted the trust and are now prepared to receive the corpus.

A trustee upon acceptance of a trust is bound to execute the trust in accordance with the provisions of the trust and intent of the settlor. 90 C.J.S. *Trusts* § 247. A trustee, as an incident of his office does not have the power to appoint another to the office of trustee. *Griley v. Marion Mortgage Co.*, 132 Fla. 229, 182 So. 297 (1938). Courts have treated attempts to transfer the trust to another as ineffective to relieve the trustee and as a breach of trust where no authority has been given by the trust instrument. The attempted transfer of the office of trustee is equivalent to a delegation of all his powers. Bogert, *Trusts and Trustees*, (2d ed.) § 512.

‘If a trustee fails to perform his duties redress to compel performance may be had through the Courts, and every omission or violation by a trustee of a duty which equity lays on him, whether willful or forgetful, is a breach of trust, for which he is liable.’ 90 C.J.S. *Trusts* § 247. ‘Unless express authority for that purpose is given by the instrument creating the trust, it is generally held that a trustee in whom there is vested discretionary powers involving personal confidence cannot delegate his powers and duties and shift his responsibility to other persons, or delegate duties to others which he can reasonably be required to perform personally, or which a person of ordinary prudence would not in like circumstances in the management of his own affairs employ another to perform.’ 90 C.J.S. *Trusts* § 256. Thus, a trustee being in a fiduciary relation to the beneficiary is under a duty personally to perform his duties. *Restatement (Second) of Trusts* § 171.

***2** In view of the authorities herein cited, it is the opinion of this office that Item 5 of the Will of William J. Latimer creates a testamentary trust and not an outright gift which might have been received by Clemson University Foundation, and that the Board of Trustees of Clemson University cannot give or transfer the corpus nor delegate or transfer its duties as testamentary trustee to the Clemson University Foundation.

Very truly yours,

Raymond G. Halford
Assistant Attorney General

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