

RQ-945



TEXAS HIGHER EDUCATION COORDINATING BOARD

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June 17, 1997

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Opinion Committee

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RQ-945

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Austin, Texas 78711

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Ms. Sarah Shirley
Chair, Opinion Committee
300 West 15th Street
Austin, Texas 78711

Dear Attorney General Morales and Ms. Shirley:

Legal counsel for Austin Community College has asked the Coordinating Board to submit a request for an Attorney General's Opinion concerning the application of Attorney General letter opinion LO-97-0001 to race-based endowed scholarship funds. The request arises in the context of the Fifth Circuit Court of Appeals' opinion in *Hopwood v. State of Texas*, 78 F.3d 932 (5th Cir. 1996); *cert. denied*, 116 S.Ct. 2580 (1996), and Texas Attorney General Opinion LO-97-0001, which have raised a number of questions relating to programs and policies designed to benefit minority students. In particular, there is a question regarding an endowed scholarship fund established at the Austin Community College District ("ACC") for the benefit of Hispanic students.

Background:

The Amado Peña Scholarship Fund was established in September, 1989, and consists of three separate accounts maintained by ACC: the Endowment Account, the Scholarship Account, and the Project Account. These three accounts are referred to collectively herein as "the trusts."

The trusts were established by an initial gift from Mr. Amado Peña, Jr. to ACC in 1989. No provision was made in the original gift for return of funds to the donor. Attached as Attachment "A" hereto is the September 12, 1989, letter from Mr. Peña establishing the trusts and setting forth the purpose of the gift.

Since 1989, ACC has engaged in fundraising efforts, and the corpus of the scholarship fund has increased significantly. At this time, the trusts consist of contributions from Mr. Peña as well as from a number of other private donors. Additionally, ACC has made contributions to the trusts. On three occasions, trust expenditures were paid with and debited from ACC local funds.

ACC has administered the trusts in a manner consistent with the September 12, 1989, letter from Mr. Peña. ACC students awarded Peña scholarships have been limited to Hispanic students residing within the College district, and meeting the other criteria set forth in the September 12, 1989, letter. ACC has assumed responsibility for

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COMMISSIONER
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identifying qualifying students, awarding scholarships, managing trust accounts, and as discussed above, using ACC local funds to pay certain expenditures incurred by the trusts. Scholarship recipients have been selected for the 1997 summer semester, but no funds have been disbursed to the students.

Mr. Peña has requested that the ACC return all funds in the trusts to him, as they can no longer be used to solely benefit Hispanic students, as was his original intention. Mr. Peña has established other charitable organizations, and it is anticipated that the funds, if returned, would be applied to another Peña charitable organization; presumably one of which would provide no direct benefit to either ACC students or ACC.

Discussion:

In LO-97-0001, you stated that privately donated, race restricted scholarships are impacted by the Hopwood decision and implicate a state action analysis:

[W]e can say generally that the more involved the university is in administering the program, such as choosing the scholarship recipients or managing the scholarship fund, to mention just two areas of involvement, then the higher the probability that a court would imbue the scholarship program with the color of state action. " *Conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the governmental limitations placed upon state action.*" *Evans v. Newton*, 382 U.S. at 299.

Here, the original donation was a private gift. Subsequently, public funds have supplemented funds from the original donor and other private sources, and the initial donor has retained no direct control over the funds since 1989. While Mr. Peña has participated actively in fundraising efforts for the trusts, administration of the trusts has been handled solely by ACC.

ACC believes that the September 12, 1989, document establishing the Peña Scholarship Fund creates a public charitable trust. See, eg., *Powers v. First National Bank of Corsicana*, 161 S.W.2d 273, 280-81 (Tex. Com. App. 1942, judgment adopted) [holding that establishment of scholarships to assist students creates public charity]. Texas courts have held that no particular form of words or conduct is necessary for the manifestation of an intention to create a charitable trust. Use of the words "trust" or "trustee" are not required to create a charitable trust; instead, the courts will look to and attempt to determine the intent of the settlor or testator, and whether or not a charitable purpose was intended. *Wooten v. Fitz-Gerald*, 440 S.W.2d 719, 723-24 (Tex. Civ. App. - El Paso 1969, writ ref'd n.r.e.). Where a charitable intent appears on the face of a document, courts will construe the instrument broadly to achieve a charitable purpose. *Id*; *Powers*, 161 S.W.2d at 282.

It is the understanding of ACC that public charitable trusts are favored by the courts, and will be sustained if, from the four corners of the document, a purpose can

be gathered to establish a trust for a class sufficiently definite to be legally ascertained. *Eldridge v. Marshall National Bank*, 527 S.W.2d 222, 225 (Tex. App. - Houston [14th Dist] 1975, writ ref'd n.r.e.) [upholding a will's charitable purpose in designating certain funds for a "scholarship"].

ACC can find no legal authority to support return of the funds to the donor. For example, in *Blocker v. State*, the Houston Court of Appeals construed an *inter vivos* grant to a non-profit corporation established by the donor for the purpose of teaching music and allied arts to youth of the state. There, the court held that once the transfer was made, the "charitable identity" of the donation was "permanently and irrevocably established" 718 S.W.2d 409, 411 (Tex. App. - Houston [1st Dist] 1986). Subsequent to the death of the donor, the directors of the corporation proposed to dissolve the corporation, finding that it could no longer serve its intended charitable purpose due to insufficient resources. The directors then attempted to return any remaining funds to the estate of the original donor. The court noted that the initial donation was made without limitation requiring return of funds. The directors were, therefore, prohibited from returning the funds to the estate of the donor. *Id.*, at 415. A similar result was reached in *Scott v. Sterett*, where the Dallas Court of Appeals held that property held in charitable trust would not revert to the donor when the purpose of the charitable trust could no longer be accomplished. 234 S.W.2d 917 (Tex. Civ. App. - Dallas 1950, no writ).

ACC understands that the Texas Attorney General is an interested party in any action relating to the modification or dissolution of a charitable trust. *Powers*, 161 S.W.2d at 284; Texas Property Code §115.011(c). ACC believes that it lacks legal authority to negotiate with Mr. Peña individually as to the disposition of the trusts without the involvement of the Texas Attorney General. Certainly, the College could institute an action in Travis County District Court against the Attorney General, asking the court to construe the trusts under the equitable doctrine of *cy pres*. Texas Property Code §112.054; *Blocker*, 718 S.W.2d at 411, n.1; *Baywood Country Club v. Estep*, 929 S.W.2d 532, 538, n.5 (Tex. App. - Houston [1st Dist. 1996, no writ). However, ACC is seeking an Attorney General Opinion in this instance since the question involves clarification of LO-97-0001 and involves a matter of statewide interest for other institutions of higher education that may be grappling with the same issue.

Therefore, I respectfully request an Attorney General Opinion responding to the following questions:

- (1) May ACC continue to administer the Amado Peña, Jr. Scholarship Fund in a manner consistent with the intent of the original donor, as evidenced by the September 12, 1989, letter from Mr. Peña?
- (2) If ACC is precluded from administering the trusts in a manner consistent with the intent of the original donor, may ACC administer the trusts in a manner to be determined by the board of trustees of the college district?

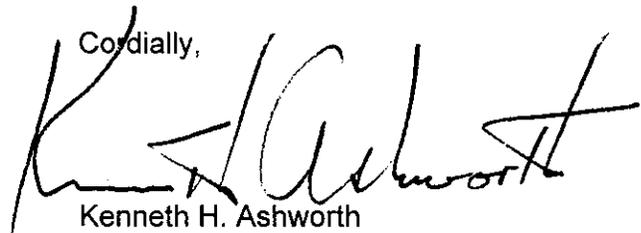
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(3) May ACC return all or part of the trusts' corpus to the initial private donor? If so, may ACC deduct from the amount returned to the original donor amounts donated by other sources, as well as an amount equal to those expenses incurred by ACC on behalf of the trusts?

(4) May ACC distribute funds to students who were awarded Peña scholarships for the summer 1997 semester in accordance with the scholarship guidelines?

Thank you for your assistance.

Cordially,

A handwritten signature in black ink, appearing to read "Kenneth H. Ashworth". The signature is written in a cursive style with a large initial "K".

Kenneth H. Ashworth

cc: Dr. Richard W. Fonte, President, Austin Community College
Ms. Sara Hardner Leon

Attachment A



el taller, inc.

Amado M. Peña Jr.
gallery · studio · fine art publishing

723 E. Sixth Street Austin, Texas 78701 512/473-8693

September 12, 1989

Dr. Dan Angel, President
Austin Community College
P. O. Box 140526
Austin, Texas 78714

RE: Amado Peña Scholarship Fund

Dr. Angel:

I submit for your files the following requirements for the Amado Peña Scholarship Fund.

Student applying for funds must:

1. Be Hispanic;
2. Be a resident of ACC's legal district (i.e. those living in the taxing district);
3. Show financial need (i.e., qualify for financial aid based on federal guidelines);
4. Maintain a grade point average of 2.0 (C average) if already enrolled in ACC or has prior college experience (if student is entering ACC with no prior college experience there will be no required grade point average);
5. Apply scholarships funds only to tuition, fees, and book costs.

Should you have questions please contact my agent Tibby Wilcox.

Sincerely,

Amado M. Peña, Jr.

AMP:ggf

cc: Mike DeVault
Tibby Wilcox

Copied from Audit 9/1/03

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