

Opinion No. 38-2018

July 29, 1938

BY: FRANK H. PATTON, Attorney General,

TO: Honorable Clyde Tingley Governor of New Mexico Santa Fe, New Mexico

{*257} This is to acknowledge receipt of your communication requesting an opinion relative to the legality of the lottery or drawing held in connection with the proposed Carrie Tingley Crippled Children's Hospital Fair.

From information furnished by attorneys advising the Harriman Institute and from correspondence submitted to this office, we assume that the following constitutes the proposal:

1. The Harriman Institute is to promote and conduct a fair in the City of Albuquerque known as the Carrie Tingley Crippled Children's Hospital Fair. We assume for the purpose of this opinion that this will be a legitimate fair with proper displays as the term is commonly and legally understood.

2. Lottery or chance tickets are to be sold for \$ 1.00 each, the proceeds of which are to be applied as follows:

(a) 40% of the proceeds will be placed in a trust fund and the money in this fund will be used exclusively for the purpose of creating various cash prizes to be distributed to the person holding the lucky number.

(b) 25% of the amount received will be placed in another trust fund. This money will be used exclusively for the purpose of paying expenses of the fair. For example, as stated in the letter of Mrs. Harriman to the Board of Directors of the Hospital, it is to be used to cover the expenses of printing and selling tickets, advertising and other incidental expenses of the fair itself. It is to be pooled with other incomes from the fair, such as that from concessions, and if there is any surplus, it is to be paid to the hospital. If the expenses of the fair exceed 25%, the balance is to be paid by Mrs. Harriman.

(c) 35% of the proceeds are to be placed in a trust fund for the hospital.

The above plan presents a question of whether or not it falls within the exemption set out in Section 35-3808, New Mexico Statutes Annotated, 1929 Compilation, which reads as follows:

"The provisions of the five preceding sections shall be construed to apply to every device or devices and only to such device or devices as are commonly called or known as lottery, although designated or called by any other name, but shall not be construed to apply to any sale or drawing of any prize at any fair held in this state for the benefit of

any church, public library or religious society, situate or being in this state, or for charitable purposes, when all the proceeds of such fair shall be expended in this state for the benefit of such church, public {258} library, religious society, or charitable purposes."

As we construe the above section, in order to fall within the four corners of exemption, the drawing must be held at a fair conducted for the benefit of some church, public library, religious society or for charitable purposes, and all of the proceeds of such fair, whatever the term may mean, must be expended for the benefit of the societies above named, or for charitable purposes.

We direct your attention at the outset that "proceeds" means proceeds of the fair. If a drawing or lottery is conducted at the fair, we think it only naturally follows that it would be considered part of the proceeds of the fair itself. At the outset this brings us to the question of the meaning of the phrase "all the proceeds". Counsel for the Harriman Institute have ably and persuasively argued that this means the net proceeds after deducting necessary and incidental expenses. They have cited voluminous authority, one case, *Commonwealth vs. Alexander*, 70 N. E. 1017, which is directly in point. However, in the *Alexander* case the term "proceeds" alone was used in the statute defining the exemption. In our statute the term "all the proceeds" is used. Whether this makes an appreciable difference we will not now try to determine, but call your attention to the following definition found in *Corpus Juris* to the effect that the term "proceeds" has a varied meaning, depending upon the circumstances and the sense in which it is used, and also wish to state that numerous cases cited therein have defined the term as meaning the gross proceeds.

"PROCEEDS. Not a word of any fixed or definite meaning, but of varying and loose significance, employed with different meanings, of equivocal import and great generality." 50 C. J. 427.

However, we think it unnecessary at this time to determine whether or not the term "proceeds" as used in Section 35-3803 means gross or net proceeds. The above exemption provision was doubtless enacted to permit drawings for church bazaars and fairs where the object of the bazaar or fair was charitable.

We cannot convince ourselves that the Legislature contemplated the promotion of a lottery similar to the proposal presented with the fair being merely incidental. To the contrary, we think that its obvious design was to allow a drawing where it was merely incidental and a part of the general entertainment at some bazaar or fair where the members of the church or organization contributed the prize, such as cakes, pies and blankets, and all of the proceeds of the drawing, together with other revenues of the fair, went into a common pot for the benefit of such institution or society. We do not believe that we would have to go so far as to hold that such institution could not pay for a hall or for lights or for help, but rely upon the proposition of what can be considered as necessary and incidental expenses of a fair.

In this case 40% of the money received from the sale of tickets is to be put up as a prize. Apparently the sponsors of this project hope to raise an enormous sum, for on the back of one of the lottery tickets we find that they hold out to distribute 250 prizes of \$ 500. each, making a total of \$ 125,000; 100 prizes of \$ 1,000. each, making a total of \$ 100,000; 5 prizes of \$ 10,000. each, making a total of \$ 50,000; 4 prizes of \$ 12,500. each, making a total of \$ 50,000.; 3 prizes of \$ 25,000. each, making a total of \$ 75,000; 2 grand prizes of \$ 50,000. each, a total of \$ 100,000., and a grand total of a half million dollars in prizes alone.

It may be that the Legislature in enacting Section 35-3808, supra, {259} meant to include the cost of the prizes as part of the expenses of the fair. However, in the face of the enormous amount above quoted, we are unable to convince ourselves that such was the case. It can hardly be conceived that \$ 500,000. could properly be considered as a necessary or incidental expense of conducting any fair for charitable purposes.

This presents an entirely different situation from that where some person donates an object or sum of money which is to be used as a prize. In this case the prize itself is to come out of the proceeds of the lottery.

As stated above, the proceeds of the lottery must necessarily be considered part of the proceeds of the fair if the drawing or lottery is to be permissible under the exemption. That the sponsors themselves do not consider the prize money as legitimate part of the expenses of the fair itself is evidenced by the letter from Mrs. Harriman to the Hospital Board relative to the proposal. We direct your particular attention to the last paragraph on the first page listing the probable expenses of the fair, and to the fact the 40% for the prize money is not budgeted in their proposal as an expense of conducting the fair. Thus the proposal presented here is that of a lottery with the fair being merely incidental, and not a fair with a drawing for prizes being merely incidental to other activities conducted therein. We do not think that we can ignore the realities of the case and assume otherwise.

In conclusion we wish to say that the question presented is close and in the absence of a construction of the exemption provision by our Supreme Court the same is subject to two interpretations. However, for reasons above stated, we are of the opinion that the Harriman proposal does not fall within the exemption provision and that the plan should be disapproved.

By: RICHARD E. MANSON,

Asst Atty. Gen.