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Nonprofit Q and A the common sense edition - Transcript

[Speaker 1]

Welcome to Charity Therapy, a podcast from Birken Law about building better nonprofits. I'm your host, Jess Birken.

Hi, Meghan.

[Speaker 2]

Hey, Jess.

[Speaker 1]

Hi, Jim.

[Speaker 3]

Hello, Jess.

[Speaker 1]

Thanks for being our special guest today.

[Speaker 3]

You bet. It's going to be great.

[Speaker 1]

For those who don't know, Dr. Horsepower is in the studio. My guy, Jim Hall, is a performance engine consultant and race car advisor and knows basically not too much about nonprofits, but he has a lot of common sense. So since he was visiting us at the office today, we thought we would do a little nonprofit Q&A.

And I believe you, where did you get these questions? The internet.

[Speaker 2]

Yeah, I did some internet looking and it turns out there's lots of questions about nonprofits.

[Speaker 1]

Go figure. All right, Jim, you want to be our question presenter?

[Speaker 3]

Okay. You didn't even have to ask. Just point.

[Speaker 1]

Okay. Well, why don't you get us started and we'll see what sort of insanity we've got today.

[Speaker 3]

Some of these are pretty colorful, so be ready. First one, can mom use funds from dad's church to pay personal bills? Unfortunately, somebody actually asked this question.

[Speaker 1]

All right, lay it on me.

[Speaker 3]

My father passed away six years ago and the church he ran went dormant. My sister has recently convinced my mother to take the money that's still sitting in the church's checking account to pay off personal bills. Is this legal?

Well, it sounds like my mother is trying to pay off her house before her death so she can give the house to my sister.

[Speaker 1]

Oh my God.

[Speaker 2]

That last sentence raises not even nonprofit questions.

[Speaker 3]

Right. Ethical questions.

[Speaker 1]

Yeah, this takes me back to probate court and being a judge's clerk and like the family dramas getting played out. What is wrong with this sister? Okay, short answer.

Is this legal? No.

Not legal. First of all, the first red flag in here is that the dad was running a church by himself. The church he ran went dormant.

We got problems if this gentleman died and the church is now defunct because one guy.

[Speaker 3]

Some things are not put in place.

[Speaker 1]

Yeah, like a board.

[Speaker 2]

Yeah.

[Speaker 2]

No one to check where the money's going after he's been dead for six years.

[Speaker 3]

Yeah.

[Speaker 1]

Sounds like there's some fundamental problems with the structure, governance, and financial internal controls at this church.

[Speaker 2]

So kind of everything.

[Speaker 3]

You can't do it.

[Speaker 1]

You can't do it. You cannot take, I mean, this is obvious, right? I'm surprised this person's even asking the question.

Can you take the money from the church and pay off your house? No. No.

Absolutely not. Also, if you're a religious person, on what planet would you think that this was acceptable in legal or spiritual realms?

[Speaker 3]

Somebody is watching over you.

[Speaker 1]

Good Lord. Right. No pun intended.

[Speaker 2]

So then I think the real question would be, what should they be doing with this, the funds that are just sitting in this account since the person who ran the church has died?

[Speaker 1]

Yeah yeah. So assuming this is really an actual organization, and it has a bank account. Well, okay, a couple things. First of all, there's a dissolution process that whatever state they're in, there's probably a statutory dissolution process that they should be going through. Sometimes organizations don't do that, and they just sort of like die on the vine and then the state will involuntarily dissolve you, which is not really official, but it does happen.

But more importantly, all of the funds from this public charity, religious organization, need to be transferred to a same or similar organization. So sister can't use any of this money to pay off mom's house so that she has a free house before mom dies.

So the money from the church needs to be donated to another church, ideally one that's -

[Speaker 3]

That's what I was wondering, what you would use the –

[Speaker 1]

- More charity.

[Speaker 3]

Yeah.

[Speaker 1]

It's charitable assets and it needs to be, there's a doctrine called.

[Speaker 3]

Has to stay that way.

[Speaker 1]

Psy Pre. So under this doctrine of Psy Pre, you have to dispose of your assets to a same or similarly situated nonprofit or even if you couldn't find another nonprofit that was on point, you could give it to the government, but you cannot take it and put it in your mom's mortgage payments.

[Speaker 3]

Correct.

[Speaker 1]

Under any circumstances.

[Speaker 3]

Yeah. Yeah.

[Speaker 1]

All right. So that's a good one. That was easy.

[Speaker 3]

Okay. The second question, which I think is a good question, what do we do when a donor says it will but doesn't specify use of funds?

[Speaker 1]

Say more.

[Speaker 3]

I've run into this kind of in a few situations, not with the donation, but a foundation gave us a grant with a statement that says they would advise us on how they wanted us to use the funds. It has been over a year, and we have still not received any direction. I have called, emailed, and even mailed a report to them.

In the report, I proposed two suggested uses for the funds. Is there a time limit on this type of restriction and what should we do if we never get an answer from the foundation?

[Speaker 1]

You got foundations writing you grants, Jim?

[Speaker 3]

I wish.

[Speaker 1]

I take it that that's like customers that never paid their bill.

[Speaker 3]

Well, sometimes you get an investor that wants to help you, and they want to help a certain area of the business and that's what they say the money is for. So you type it, type up a little agreement and they give you the money, but they didn't quite elude to the fact specifically what they wanted the funds to be used for. So you have this chunk of money sitting here in your account that you're itching to spend, but you need to hold true to the agreement.

So you're like, okay, help me out here.

[Speaker 1]

That is actually very similar. Well, yeah.

[Speaker 3]

I was surprised.

[Speaker 1]

I thought it was going to be totally random.

[Speaker 3]

Right.

[Speaker 1]

What do you think, Meghan, as the non-attorney person that still has lots of nonprofit experience?

[Speaker 2]

Lots might be a strong word, but like my instinct is like, you got to hold off for a while. Like this is not a great situation to be in, obviously.

[Speaker 3]

Right.

[Speaker 1]

Also, who makes a grant to you and doesn't tell you what it's for?

[Speaker 2]

You're in a no-win situation.

[Speaker 1]

What kind of weird foundation is this?

[Speaker 3]

Yeah.

[Speaker 1]

Hey, here's some money. Bad stuff's about to go down.

We're just going to park it at your organization. That's what it smells like to me. It's almost like, what happened?

[Speaker 2]

Yeah, I didn't even think about that.

[Speaker 1]

That you can't even reach these people later, and they didn't tell you what to do with it? What?

[Speaker 3]

So I'm wondering, Jess, since you probably run into this, let's say it's not a huge amount. I don't know, $2,000, let's say, just for a number. Can you just write them a check back and say, this isn't working, or however you'd want to word it?

[Speaker 1]

That's an interesting idea. You actually could return the money. I don't know a nonprofit on this earth that would ever want to send back grant money.

[Speaker 3]

Well.

[Speaker 1]

But yes. I mean, that's a fair way to go about it.

Be like, you guys are unprofessional. We don't want to deal with you. We don't want to be on the hook for this.

If it's not a lot of money, they've clearly already invested a lot of effort into just chasing it around, keeping it on their books. That costs them accounting time, mental stress, just having it on your to-do list of like, here's money that we don't know if we can spend.

[Speaker 3]

You can't do anything with.

[Speaker 1]

Yeah, so sending it back is absolutely an option. That's a great idea.

Assuming that they want to keep it, which I would think 99.99 point, you know, nobody wants to send back free money.

[Speaker 3]

Exactly.

[Speaker 1]

I think what they want to do is probably say that these funds are unrestricted. Like, when they say, look, we've proposed some use. Is there a time limit?

What I think they're getting at is, is there an expiration date on the restriction? Right?

[Speaker 3]

Sure.

[Speaker 1]

And I don't think that there is an expiration date. And it kind of doesn't matter how much money it is, whether it's $2,000 or $200,000. If it's restricted funds, it's restricted funds.

So the problem that, you know, the fault for this is really on this weird foundation that dumped off a check with no further instructions and hasn't responded to any correspondence, which that's a whole other problem.

[Speaker 2]

Yeah. So we got questions for them.

[Speaker 1]

Yeah.

[Speaker 3]

What would happen if the foundation dissolved or something happened and they could say, in quotes, forgot about the money they gave you and it is no longer?

[Speaker 1]

Well, and that's kind of what I'm wondering because how have they reached out this many times, sent them a report? I love that. I'm like, I hate reports and I'm going to make one just for you because maybe you'll pay attention to it if it says report on it.

They may have gone under, or it may be some sort of shady situation. You may not be able to return the money or reach anyone.

So there's a legal doctrine about making good use of money and not being forced to go through like Herculean cost and effort in order to deal with a restricted fund.

[Speaker 3]

Yeah.

[Speaker 1]

So they could always hang their hat on that. But what they would want to do is document that some of these things, yes, you can print out your email. You can't prove that they got it, though.

You can say, I mailed them a report, but was it signature receipt? Was it certified mail? So I would want them to reach out in writing on paper through a tracking number process where they can actually prove we've tried to contact them.

We suggested this use and then give them a date certain like if we don't hear from you within 90 days or on or before this day, we're going to spend it on X. And if you object to the pizza party, it cannot be on pizza party unless pizza party is delivering your mission. But nice try, Jim.

And then they have some wiggle room there because the law says you can't just hold me hostage forever and make me because they could take them to court. And depending on how much money it is, it's probably not worth doing that. So documenting it in a letter with a deadline at least gives them the cover to say.

And if we know what this foundation was interested in, we should have some idea of what their focus areas were.

[Speaker 3]

Yeah.

[Speaker 1]

So we can make a reasonable case that we should be allowed to do what we want to do with it now. But yeah, that's a tough one because there's really not a minimum threshold. It's not like, well, all amounts under $5,000 if it's been one year.

Under no notice, there's no easy out.

[Speaker 3]

So to take the correspondence one step further, I actually, you know, I tried the certified mail. I tried.

[Speaker 1]

Oh yeah, you're a mystery investor.

[Speaker 3]

Well, I tried email, you know, email, you know, it's just the way we do stuff these days. But you still have no certainty that you're going to deliver the message. So I actually went to them.

I drove to their location, to their office, and I was able to talk to them. And they're like, oh, okay. Yeah, I had no idea.

You know, whatever.

[Speaker 1]

They're like, crazy Larry invested.

[Speaker 3]

Oh, my God. So I, you know, I, you know, went in and, oh, Jim, what are you doing here in the neighborhood? And I'm like, no, not exist.

Well, I am, but not just in the neighborhood. I came here to talk to you. Anyways, we got it all sorted out.

But I explained to him how frustrated I was that I can't use this money you gave me and I would love to. And we got it all worked out.

[Speaker 1]

Well, hopefully this nonprofit got it all worked out, too, because that's a bummer of a situation.

[Speaker 2]

I was surprised to find this situation because I feel like you hear nonprofits being like, oh, we promised to use it in this way. And now I don't want to or it's not going to work or we messed it up and spent it elsewhere.

And, you know, it's more about the burden of having to do it, let alone, like, not even knowing what.

[Speaker 1]

Right. Well, this goes to show that funders are nonprofits, too, a lot of times.

And they can also be dysfunctional, just like the rest of us out there.

[Speaker 3]

Sure.

[Speaker 1]

Delivering the missions. So, okay.

[Speaker 3]

That was a good one. Next question is another, in my opinion, a good question, because some of this stuff is new to me. Should we stop fund transfers or giving money to a for-profit studio?

And here's the follow up. I sit on a board of a 501c3 nonprofit dance group. The dancers pay a participation fee, and we fundraise to cover the balance of our costs.

We support a for-profit dance studio, and the owner sits on our board as a non-voting member. We pay some of her.

[Speaker 1]

Red alert. Keep going.

[Speaker 2]

Exactly.

[Speaker 1]

Keep going.

[Speaker 3]

I was going to say that, but.

[Speaker 1]

Yeah.

[Speaker 3]

Yeah. We pay some of her faculty, rent and other additional fees for her services. She wants us to supplement our expenses even more and has recently transferred money directly from our organization's account to her studio account.

Our treasurer is convinced that this is embezzling and is ready to revoke access to our accounts. Is she right?

[Speaker 1]

I'm just like, why are you typing this stuff on the internet? Your accounts should be frozen. Everything is wrong with this.

[Speaker 2]

Red alert.

[Speaker 1]

Red alert. Yeah. This is like, wow.

Okay. So there's a whole bunch of problems here, not the least of which is the nonprofit is supporting a for-profit and paying for expenses of the for-profit dance studio. That's a huge problem.

Number one. Huge problem. Number two is that the owner is sitting on the board, and it doesn't really matter if they're a non-voting member or not because obviously that's an important person who holds a lot of sway at the organization and this whole like, but I don't have a vote is probably just a scam to try.

Well, it's just trying to say like, oh, well.

[Speaker 3]

Yeah.

[Speaker 1]

It's not me that's deciding. I don't have a conflict because I don't have a vote on anything.

No, you've just set up this whole nonprofit to fund your for-profit dance business.

[Speaker 3]

Is it? I mean, just from the outside, is it common for a nonprofit to contribute to a for-profit?

[Speaker 1]

No. No. This is like Ghostbusters.

[Speaker 3]

Yeah.

[Speaker 1]

Like, don't cross the streams. Like, the money doesn't flow out to for-profits unless you're hiring, you know, a company to develop your website or to provide consulting and then you have a due diligence process where you get three quotes and blah, blah, blah. The flow of cash on a regular basis to this for-profit company is extremely problematic.

There's insider dealing here with the owner of the for-profit who's on the board. It's probably an excess benefit transaction problem. Somebody is going to owe a lot of back taxes and penalties if and when this gets figured out.

So, God bless the treasurer who probably just came into this mess.

[Speaker 3]

Because the other one left.

[Speaker 1]

Right. Right. Yeah, it's absolutely not appropriate.

And the fact that the owner has the ability to single-handedly move money from the nonprofit's account to the for-profit's account, that's bad.

[Speaker 2]

No go. Red flag.

[Speaker 3]

So, something like that would need to be approved by a board or something like that, correct?

[Speaker 1]

Yeah, I mean, you should never have that low of, I mean, that's zero internal controls, right? That's just, I want to move money to my business, and I am taking it out of the nonprofit. It's not like it needed an approval.

[Speaker 3]

Yep. It needs to be a process of a few people.

[Speaker 1]

Not that even if it was approved, it would be okay.

[Speaker 3]

Right.

[Speaker 2]

But this is just like one half step from this person or a different board member saying, well, actually, I need a little extra to cover my mortgage this month.

[Speaker 3]

Could be.

[Speaker 1]

She might as well be.

[Speaker 3]

Yeah.

[Speaker 1]

Or they might as well be. Because we're covering paying the staff the rent, more fees for her individual services, and now she's asking for more money and then took more money. Yeah. I mean, it just doesn't get more shady and terrible than that.

[Speaker 3]

Correct.

[Speaker 1]

It's hugely problematic. And the biggest problem for this board member is they are the fiduciary who's on the hook for this.

[Speaker 3]

Absolutely. Yeah.

[Speaker 1]

So the treasurer and this other board member who's writing the question, they're the ones who are responsible for doing something. Yep. So they really need to take some sort of action, report up, resign under protest.

[Speaker 3]

Talk to their attorney.

[Speaker 1]

Talk to their attorney. Exactly. They should be calling for help.

[Speaker 3]

Right. Yeah.

[Speaker 1]

My number is 612-200. Yeah. I mean, seriously, they need to do something because they are the personally liable people for this problem. And now that they have figured it out.

[Speaker 3]

That was by common sense, but also an interesting situation.

[Speaker 1]

Yeah. And it's, you know, people get into this stuff and they're not joining the board because they think they're going to hop into a burning dumpster fire of private endearment, private benefit.

[Speaker 3]

Exactly.

[Speaker 1]

They just want to be involved in the dance.

[Speaker 3]

Yep. They want to help.

[Speaker 2]

Well, nine times out of 10, they're not joining the board because they're an expert on anything nonprofit either. So it's like, you know, even though it feels like common sense, if it's been that

way for how long, it's really easy for people to be like, well, that must be fine. The other board members are fine.

Even from the outside, as we are like, this is ridiculous. How did it get this far?

It's great that this board member is actually like seeking information about this and not just letting things go by.

[Speaker 1]

Yeah. And that's a really great point, Meghan, because this is the way it is, because this is the way we've always done it is often the reason for a lot of things.

[Speaker 3]

Yep.

[Speaker 1]

And it's really natural to just sort of go along to get along and not rock the boat. And so I don't think anybody should feel bad about this, but the treasurer who has access to the financials and says, uh, that's not okay. Then they need to start listening.

So that's, hopefully that's what happened. We'll never know.

[Speaker 2]

Yeah. So if you're getting the Spidey senses, like ask some questions and do some digging and don't let things.

[Speaker 3]

Listen to your treasurer.

[Speaker 1]

That's right. Listen to your treasurer. With great power comes great responsibility.

[Speaker 3]

Right.

[Speaker 1]

Well, um, I think that's a good place to end and Jim, thanks for joining us today. This was super fun.

[Speaker 3]

You're welcome. I enjoyed it.

[Speaker 1]

You'll have to come back and do more with us another day.

[Speaker 3]

I'll see you in the morning.

[Speaker 1]

All right, folks, that's our show. Be sure to follow me on Instagram or Twitter at Jess Birken. We want to hear from you.

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About the Author

Hi, I'm Jess Birken.

I'm the owner of Birken Law Office, I help nonprofits solve problems so they can quit worrying and get back to what matters most – The Mission. I'm not like most attorneys, I actually have an outgoing personality, and – like you – I like to think outside the box. Most of my clients are passionate and have an entrepreneurial spirit. I'm like that too. My goal is to help you crush it. Getting bogged down in the minutia sucks the joy out of the important stuff. My clients want to do the work – not the paperwork.

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