



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

July 29, 1981

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751

ATTORNEY GENERAL OPINION NO. 81-183

William H. Pringle
Barton County Attorney
Barton County Courthouse
Great Bend, Kansas 67530

Re: Corporation--Cemeteries--Responsibility of
Municipality to Maintain Abandoned Cemeteries

Synopsis: Upon a finding by a district court that a cemetery is "abandoned," as defined by K.S.A. 1980 Supp. 17-1366(a), the cemetery corporation holding title to same is dissolved, with title vesting in the municipality in which the cemetery is located. The obligation on the part of the municipality to care for and maintain the property thereafter is a continuing one, and may not be contracted away, nor may the municipality divest itself of title to the property. Cited herein: K.S.A. 1980 Supp. 17-1366, 17-1367, 17-1368, 19-101a(a), 19-211.

*

*

*

Dear Mr. Pringle:

As County Attorney for Barton County, you request our opinion on a statute which relates to the maintenance by a county of a cemetery which has been determined to be abandoned. Specifically, you wish to know whether the responsibility to care for and maintain the property is a perpetual one, or whether a county may, through the sale of the property, divest itself of such a duty.

William H. Pringle
Page Two
July 29, 1981

You inform us that the cemetery in question, Golden Belt Memorial Park, was the subject of an action in the District Court of Barton County in 1977, State ex rel. v. Belcher. As a final result of that action, title to the cemetery was vested in Barton County, pursuant to K.S.A. 1980 Supp. 17-1366 et seq. The initial section of that act provides in pertinent part:

"As used in this act: (a) 'Abandoned cemetery' means any cemetery owned by a corporation, as defined in K.S.A. 1980 Supp. 17-1312f, in which, for a period of at least one year, there has been a failure to cut grass or weeds or care for graves, grave markers, walls, fences, driveways and buildings or for which proper records have not been maintained and annual reports made to the secretary of state pursuant to the provisions of K.S.A. 17-1312a et seq., and amendments thereto; and

"(b) 'municipality' means the cemetery district in which all or any portion of an abandoned cemetery is located. If no portion of such cemetery is located within a cemetery district, the term shall mean the city in which all or any portion of an abandoned cemetery is located unless such cemetery is not within the corporate limits of a city, in which case such term shall mean the county in which such cemetery is located." K.S.A. 1980 Supp. 17-1366.

We also note the following relevant provisions of K.S.A. 1980 Supp. 17-1367:

"Whenever the attorney general determines the existence of an abandoned cemetery in this state, the attorney general shall immediately proceed to dissolve the cemetery corporation owning the same. Upon the dissolution of such corporation, title to all property owned by the cemetery corporation shall vest in the municipality in which the cemetery is located Upon the transfer of such property and funds, the governing body of such municipality shall care for and maintain such cemetery with any moneys of the cemetery corporation including the principal of and income from the permanent maintenance fund and, if such moneys are insufficient to properly maintain such cemetery, with funds of the municipality."

William H. Pringle
Page Three
July 29, 1981

Also of pertinence is K.S.A. 1980 Supp. 17-1368, which states:

"Any municipality required, pursuant to this act, to care for and maintain a cemetery may contract with any individual, firm, corporation or association for the care and maintenance thereof or for the sale of unsold burial lots and the opening and closing of graves, but no such contract or any other agreement entered into by such municipality shall be deemed to relieve such municipality of the duties and responsibilities imposed under the provisions of this act."

The constitutionality of this act was upheld in the case of State ex rel. Stephan v. Lane, et al., 228 Kan. 379 (1980), which overturned a district court holding which found the statutes to constitute an uncompensated "taking" under the 14th Amendment to the United States Constitution. In its holding, the Supreme Court stated:

"A cemetery corporation which has abandoned its responsibility for the cemetery property is no longer fulfilling its responsibility and forfeits its position of trust. Due to the important public interest in a cemetery, the State has seen fit to provide a procedure for the appointment of a successor trustee. Because ordinary rules of property ownership do not apply to cemeteries, and management of a cemetery corporation is similar to a trust, the title to cemetery property held by a cemetery corporation does not represent the same property interest normally associated with title to real property." 228 Kan. at 388. (Emphasis added.)

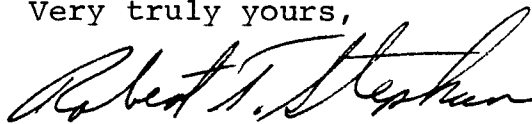
In the instant case, it is Barton County which has been given the role of "successor trustee" for the cemetery. In our opinion, the court correctly described the intent of the legislature in using such a phrase to describe the status of the municipality after it has taken title to the property. The act is explicit in imposing a continuing duty of maintenance which may not be avoided, although certain aspects of the operation and upkeep may be contracted away (K.S.A. 1980 Supp. 17-1368). Additionally, while the municipality is authorized to expend moneys from the cemetery's permanent maintenance fund, it is required to expend its own funds if the former proves to be insufficient (K.S.A. 1980 Supp. 17-1367).

William H. Pringle
Page Four
July 29, 1981

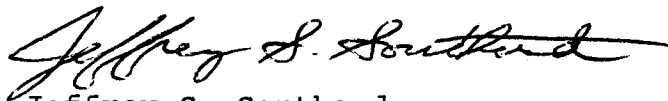
You inquire whether a county such as Barton may eliminate its duty as successor trustee by selling the property to a cemetery corporation pursuant to its general authority over county property. (K.S.A. 1980 Supp. 19-211.) In view of the above, we would conclude it may not, but rather must continue in the role which the legislature has seen fit to impose upon it. Nor do we find such a result to be an unfair one, for it must be remembered that any Kansas county, including Barton, exists only for public purposes connected with the administration of state government. Board of County Commissioners v. Lewis, 204 Kan. 188, 191 (1969). Put another way, a county is merely part of the governmental machinery employed in carrying on the affairs of the state. Harling v. Wyandotte County Comm'rs, 110 Kan. 542 (1922). While county home rule has expanded a county's power to act in local matters, such power does not extend to acts of the legislature which are of uniform application, as is the case here (K.S.A. 1980 Supp. 19-101a(a), First). Given the legislature's continuing interest in maintaining cemeteries (State ex rel. Stephan v. Lane, supra at 384-86), and in the absence of any language which would indicate or even imply that a county may relieve itself of the duty imposed by this act, we are not prepared to so conclude.

In conclusion, upon a finding by a district court that a cemetery is "abandoned," as defined by K.S.A. 1980 Supp. 17-1366(a), the cemetery corporation holding title to same is dissolved, with title vesting in the municipality in which the cemetery is located. The obligation on the part of the municipality to care for and maintain the property thereafter is a continuing one, and may not be contracted away, nor may the municipality divest itself of title to the property.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Jeffrey S. Southard
Assistant Attorney General

RTS:BJS:JSS:jm