



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 82-253

The Honorable Ronald R. Hein
State Senator, Twentieth District
6031 West 24th Terrace
Topeka, Kansas 66614

Re: Corporations -- Cemetery Corporations -- Permanent
Maintenance Fund; Permissible Uses of Income Pro-
duced Therefrom

Synopsis: Pursuant to K.S.A. 17-1311, a cemetery corporation
is required to deposit a portion (15%) of the pur-
chase price of each burial lot in a trust fund,
income from which is to be used solely for the
permanent maintenance of the cemetery. "Mainten-
ance" includes those expenditures which relate to
the physical upkeep of the cemetery grounds, a
fact made explicit by the legislature in an amend-
ment to the statute in 1978. However, a deter-
mination whether a specific item of expenditure
is maintenance-related is a question of fact which
may only be determined by a court. Cited herein:
K.S.A. 17-1311, L. 1978, ch. 76, sec. 1.

* * *

Dear Senator Hein:

As State Senator for the Twentieth District, you have requested
our opinion on a question regarding the use of income pro-
duced by permanent maintenance trust funds established under
provisions of Kansas cemetery statutes. Specifically, you
inquire what maintenance costs may properly be paid by the
income from such funds, and, if such moneys have been impro-
perly used, what steps should be taken to restore them.

In your letter to us, you indicate that your request is
prompted by a situation which has arisen concerning the

transfer of moneys from a permanent maintenance trust fund for the construction of a mausoleum. Rather than pay the fund back, the cemetery paid a number of expenses from its own, nontrust funds and then set these amounts off against the total due the fund. This was done under the theory that, as the expenses paid were maintenance ones that would otherwise be paid by the fund, their direct payment by the cemetery eliminated what would otherwise be a transfer of checks from the cemetery to the fund and vice versa.

Your inquiry focuses on the types of expenses which were set off by the cemetery as being maintenance-related, i.e., are they in fact items which should be properly paid out of income generated by the fund? In that only a few of the charges were set off in full, you also question whether the percentages used for the rest are proper. Finally, in the event that items were incorrectly charged back as maintenance-related, you wish to know whether they should now be paid back to the trust fund, either as principal or income, and whether interest is due on such amounts.

Initially, it would be helpful to determine whether any standards exist for determining which expenses incurred in the operation of a cemetery may be paid by permanent maintenance trust fund income. Pursuant to an amendment made in 1978 (L. 1978, ch. 76, §1), K.S.A. 17-1311 now states that:

"Such maintenance [of the cemetery] shall include, but not be limited to, mowing, road maintenance and landscaping, but shall not include administrative costs, expense of audits or the portion of any capital expense for equipment used to maintain portions of a cemetery not sold for burial purposes or in use for grave sites."

Prior to the date of this amendment, the statute was silent as to what was meant by "maintenance." In recognition of this, the office of the secretary of state, as the agency who audits the use of such funds, requested an opinion of this office in 1975. In Attorney General Opinion No. 75-261, the following analysis was made:

"While the word 'maintain' or 'maintenance' has no precise legal significance in the construction of statutes, its meaning varies with the subject matter of the law and the purposes to be accomplished. Although the term is not specifically defined by this statute, nor anywhere in the remainder of Chapter 17, Article 13, of the Kansas Statutes, the conclusion holds that the Legislature intended the word

'maintenance' to encompass those expenditures which relate directly to the upkeep of the cemetery. The apparent purpose of the permanent maintenance fund is to assure each purchaser that his plot or grave, whether it be for himself or family would be permanently preserved and maintained in a manner commensurate with public expectations. By necessity, the operation of a cemetery corporation involves corporate expenses apart from those which directly relate to the physical upkeep of the cemetery realty. It is unconceivable [sic] that the Legislature designed the permanent maintenance fund with the intent that all necessary corporate expenses would be derived from this fund. Theoretically, eighty-five percent (85%) of the purchase price of each plot is available to the cemetery corporation to meet non-maintenance related expenditures. For these reasons, it is the opinion of this office that the word 'maintenance' includes only those expenditures which directly relate to the physical upkeep of cemetery grounds. Examples of these expenditures include, but are not limited to, the following: mowing, landscaping, repair, construction of avenues of ingress and egress, painting, tombstone repair and like expenses."

We affirm the reasoning and conclusions reached therein, and believe them capable of application here. However, while some of the expenses charged off on the list you enclosed would appear to be non-maintenance related (e.g. telephone, building depreciation, insurance), without a factual background as to the actual make-up of each item, it is impossible to say what, if any, charges were improperly assessed to the fund. In essence, such determinations are questions of fact which may only be made by a court, sitting as a finder of fact, and not by this office. See, e.g., Behrmann v. Public Employees Relations Board, 225 Kan. 435 (1979).

In the event that such a finder of fact determined that money was still owed to the fund by the cemetery, due to one or more items incorrectly designated as maintenance-related, it could order such amounts to be redeposited. The character of these deposits would remain the same as when they were initially withdrawn (i.e., from trust fund principle or accumulated income). In either event, a court could order that interest be paid in an amount equal to what would otherwise have been generated had the trust fund remained intact. This result would be consonant with State ex rel. Londerholm v. Anderson, 195 Kan. 649 (1965). There, it was held (at

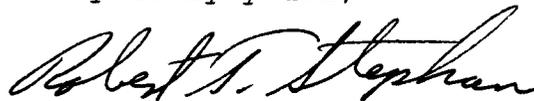
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page 652) that as K.S.A. 17-1311 was an expression of public concern with the continued maintenance of burial places, it is remedial in nature, and therefore should be liberally construed.

Finally, we would express the opinion that while the statute as it now reads is clearly an improvement over what existed prior to 1978, further delineations of what are permissible maintenance expenses might be in order. This could be done through a further amendment to the statute, or through the promulgation of rules and regulations by the secretary of state. In that the latter office does not now have such authority under K.S.A. 17-1308 et seq., either alternative would require action by the legislature.

In conclusion, pursuant to K.S.A. 17-1311, a cemetery corporation is required to deposit a portion (15%) of the purchase price of each burial lot in a trust fund, income from which is to be used solely for the permanent maintenance of the cemetery. "Maintenance" includes those expenditures which relate to the physical upkeep of the cemetery grounds, a fact made explicit by the legislature in an amendment to the statute in 1978. However, a determination whether a specific item of expenditure is maintenance-related is a question of fact which may only be determined by a court.

Very truly yours,



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RTS:BJS:JSS:hle