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January 26, 2018

ATTORNEY GENERAL OPINION NO. 2018- 6

Tamara Niles, Legal Counsel
Unified School District No. 470, Cowley County
125 W. 5th Avenue
Arkansas City, Kansas 67005

Re: Corporations—Cemetery Corporations—Definitions; Cemetery Corporation
Roads and Bridges—General Provisions—Access to Public Highway,
When; Petition; Payment of Expenses
Township and Township Officers—Public Parks and Cemeteries—Care of
Abandoned Cemeteries

Synopsis: A cemetery corporation must be the owner of the abandoned cemetery in order to initiate a proceeding under K.S.A. 2017 Supp. 17-1367. Pursuant to K.S.A. 80–916, a township board is required to provide for the care of any cemetery within its boundaries that is determined to be abandoned. By contrast, a county may provide care for an abandoned or uncared for cemetery pursuant to K.S.A. 19-3106 and 19-3107, respectively. The maintenance, upkeep, and repair of a road opened pursuant to K.S.A. 68-117 forever remains the responsibility of the owner or owners, their grantees, successors or assigns, of the land specifically benefited by the establishment of such public road, and such expense or liability never transfers to the township or other municipality in which such road is laid out and established. Cited herein: K.S.A. 2017 Supp. 17-1301c; 17-1366; 17-1367; K.S.A. 19-3106; 19-3107; 68-117; 75-704; 80-916.

* * *

Dear Ms. Niles:

As legal counsel for Unified School District No. 470, Cowley County (U.S.D. 470), you ask the Kansas Attorney General to find that Liberty Cemetery is an abandoned cemetery. Further, you ask us to “establish which entity, if any, has maintenance responsibilities for Liberty Cemetery;” and to “determine which entity, if any, has a legal responsibility to provide public access to Liberty Cemetery.”

You state that during unification of school districts in the 1960s, U.S.D. 470 received ownership of a former school property located within Silverdale Township in Cowley County. Also located on this property is Liberty Cemetery, which contains 31 graves. The last burial in Liberty Cemetery is purported to be in 1932. Unfortunately, records regarding the creation of the cemetery have not been located. You describe the cemetery as “an abandoned, landlocked parcel titled in the school district’s name that is not accessible by a roadway.” U.S.D. 470 has taken no action to maintain this parcel as a cemetery, but the U.S.D. 470 believes that Cowley County has performed some maintenance within the last 20 years by fencing the gravestones.

You also state that “[U.S.D. 470] understand[s] the Cowley County road that previously accessed the cemetery [and] traversed both Liberty Township and Silverdale Township has been informally abandoned and can no longer be driven.” The only access to the landlocked cemetery is by foot or four-wheel-drive vehicle, through grassland and/or fields owned by a private citizen. You provided us information that the private citizen/adjacent landowner allows individuals to access the cemetery through his land, so there is no issue of an access easement. Because you state there is no issue of easements, we construe your question to be limited to whether a public entity is legally required to provide public roadway access to Liberty Cemetery.

This request raises concerns between the various parties’ rights and duties relating to a cemetery. Such an undertaking requires known facts or facts determined by a finder of fact which we have not been given. Therefore, we cannot specifically opine on your questions. However, we can provide you the pertinent statutes to apply once facts become known.

Abandonment

You ask the Attorney General to find that Liberty Cemetery is abandoned. The statutory authority for the Attorney General to determine the existence of an abandoned cemetery is pursuant to the Cemetery Corporations Act (Act).¹

Under the Act, a cemetery corporation² holds title to a cemetery and is responsible for care and maintenance of that cemetery. To ensure perpetual proper care and

¹ K.S.A. 2017 Supp. 17-1301c *et seq.*

² “‘Cemetery corporation’ means any individual or entity required to maintain permanent maintenance funds under the provisions of K.S.A. 17-1312f, and amendments thereto.” K.S.A. 2017 Supp. 17-1301c(c).

maintenance of the cemetery, the cemetery corporation is required by statute to maintain a permanent maintenance fund, among other things.³ If a cemetery is deemed to be an “abandoned cemetery” under the Act, an appropriate action filed in the district court to dissolve the cemetery corporation shall be instituted by the Attorney General.⁴ Upon dissolution of the cemetery corporation, title to the property shall vest in the municipality⁵ in which the cemetery is located and any liens against such property shall be immediately quashed, null and void and unenforceable on and after January 1, 2003.⁶ All moneys from the permanent maintenance fund or investments shall be transferred to the treasurer of such municipality and shall become the property of the municipality for the care and maintenance of the cemetery.⁷

As used in the Act, “‘abandoned cemetery’ means:

(1) Any cemetery owned by a corporation, as defined in K.S.A. 17-1312f, and amendments thereto, 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

(2) any cemetery owned by a corporation, as defined in K.S.A. 17-1312f, and amendments thereto, in which for a period of 180 days, proper records have not been maintained and annual or quarterly reports have not been made to the secretary of state, pursuant to the provisions of K.S.A. 17-1312a et seq., and amendments thereto.”⁸

In your request letter, you assume that “some sort of cemetery corporation must have owned and maintained the cemetery at one point in history” but you were uncertain when. Ownership of the cemetery is a critical fact because it determines which statute applies. For example, if the facts establish that a cemetery corporation abandoned the cemetery, K.S.A. 2017 Supp. 17-1367 could be applied and the cemetery property would vest in the

³ “‘Permanent maintenance fund’ means a certificate of deposit, a business savings account, or an irrevocable trust fund whose proceeds are derived from not less than the funding requirement as defined in subsection (e).” K.S.A. 2017 Supp. 17-1301c(h). Subsection (e) provides, “[f]unding requirement’ means that portion of the purchase price equal to 15% of the purchase price, but not less than \$25, of a burial lot; 10% of the purchase price, but not less than \$100 per community mausoleum crypt; or 5% of the purchase price, but not less than \$50 for each garden mausoleum crypt or niche set aside in the permanent maintenance fund.” K.S.A. 2017 Supp. 17-1301c(e).

⁴ K.S.A. 2017 Supp. 17-1367.

⁵ “‘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. 2017 Supp. 17-1366(b).

⁶ K.S.A. 2017 Supp. 17-1367. We note that this statute was found unconstitutional *as applied* in *State ex rel. Six v. Mike W. Graham & Assocs., LLC*, 42 Kan. App. 2d 1030, 1041 (2009). The Court of Appeals found the statute was unconstitutionally applied retroactively to defeat Appellant’s preexisting lien rights, thus infringing upon due process of law in the case at bar.

⁷ K.S.A. 2017 Supp. 17-1367.

⁸ K.S.A. 2017 Supp. 17-1366(a).

municipality, which you state in your correspondence is the County. If the facts established that the term “cemetery corporation” is used generically and is actually meant to describe a private township cemetery association organized under the laws of Kansas as a nonprofit corporation, and such “cemetery corporation” abandoned the cemetery, K.S.A. 80-934 could be applied and the cemetery property would vest in the township.⁹ If the cemetery is not owned by a cemetery corporation, K.S.A. 2017 Supp. 17-1367 would not apply.

Because a cemetery corporation must be the owner of the abandoned cemetery in order to initiate a proceeding under K.S.A. 2017 Supp. 17-1367, and it is not known whether a cemetery corporation holds the title to Liberty Cemetery, we cannot apply the Act to your first question.

Maintenance

You ask us to establish which entity, if any, has maintenance responsibilities for Liberty Cemetery. You listed U.S.D. 470, Cowley County, Silverdale Township or adjacent landowners as entities that may have maintenance responsibilities for Liberty Cemetery. U.S.D. 470 is the owner of the land upon which Liberty Cemetery is located. However, we did not find any Kansas statutes imposing a duty of maintenance on a landowner who has no connection to the cemetery other than owning the land. It may be that the deed conveying the land has restrictive covenants in it that imposes a duty of maintenance, but such a review is outside the scope of this written opinion. Also, we did not find any statutes imposing a duty of maintenance on an adjacent landowner who has no connection to the cemetery other than owning the adjacent property.

There is a statute that provides for the expenditure of public moneys for the care of *abandoned* cemeteries by townships. K.S.A. 80-916 *requires* a township board to care for abandoned cemeteries within its boundaries. The statute provides:

From and after the passage of this act it shall be the duty of the township board of any township within the state of Kansas in which there is situated an abandoned cemetery to provide for the care of such cemetery and to provide for the proper and seasonable cutting of all weeds and grass therein at least twice each year; and for such purposes such township board shall appropriate and expend not more than \$500 per year for each such cemetery.

⁹ K.S.A. 80-934 provides, “Any private township cemetery association organized under the laws of Kansas as a nonprofit corporation which has failed to operate and maintain its cemetery for a period of more than ten (10) years and which has been maintained by the township under the provisions of K.S.A. 80-916 for a period of at least five (5) years may be declared abandoned and extinct by order of the district court of the county in which the cemetery is located and the title to the cemetery property of such association vested in the township in the manner hereinafter provided.”

This statute was enacted in 1917 and contained the language imposing the duty of the township board to care for abandoned cemeteries.¹⁰ The statute was amended to change the amount a township board was authorized to spend on the cutting of all weeds and grass.¹¹ Otherwise, the statute has continuously imposed the duty on the township board to care for abandoned cemeteries within the boundaries of the township, up to the statutory amount. This statute does not contain language requiring a finding of ownership of the abandoned cemetery. The Legislature, with the use of plain language, imposed a duty on the township for the basic care of an abandoned cemetery.

There also is a statute that provides for the expenditure of public moneys for the care of abandoned or uncared for cemeteries and burial places by counties. K.S.A. 19-3106 authorizes a county to levy a tax to care for a cemetery or a burial place that has at least 3 human bodies that have been interred and that has been *uncared for and abandoned* for at least 5 years.

Another statute, K.S.A.19-3107, authorizes a county to levy a tax to care for cemetery or burial place that has at least 10 human bodies that have been interred and that has been *uncared for*, for at least 5 years.

Both K.S.A. 19-3106 and 19-3107 *authorize but do not require* the board of county commissioners to levy a tax to provide care for an uncared for or abandoned cemetery in the county. These statutes do not impose a duty on the counties to care for such cemeteries. Therefore, counties cannot be made to expend public moneys on the maintenance of such cemeteries, but counties have discretion to expend public moneys on such cemeteries. These statutes do not contain language requiring a finding of ownership by a cemetery corporation, other corporation, municipality or other entity. The only requirement is a qualifying abandoned or uncared for cemetery that is in need of maintenance.

Whether Liberty Cemetery is “abandoned” under K.S.A. 80-916 or K.S.A. 19-3106, or “uncared for” under K.S.A.19-3107 is a factual matter,¹² so we will not opine on this question. We only opine on questions of law.¹³ However, we can conclude that, pursuant to K.S.A. 80–916, a township board is required to provide for the care of any cemetery within its boundaries that is determined to be abandoned; and a county may provide care for an abandoned or uncared for cemetery pursuant to K.S.A. 19-3106 and 19-3107, respectively.

Public Road Access

You ask for the Attorney General’s opinion on “whether any public entity has a legal requirement to provide public access, and if so, which entity has a legal responsibility to

¹⁰ L. 1917, Ch. 84, §1.

¹¹ L. 1917, Ch. 84, §1 authorized \$10.00 per year; L. 1919, Ch. 105, § 1 authorized \$50.00 per year; and L. 1982, Ch. 72, § 14 authorizes \$500 per year.

¹² See *State ex rel. Stephan v. Lane*, 228 Kan. at 390, 391; *Campbell v. City of Kansas*, 13 S.W. at 901.

¹³ See K.S.A. 75-704.

do so.” Because you stated there was no access easement question,¹⁴ we construe your question to be limited to whether a public entity is legally required to provide public roadway access to Liberty Cemetery.

The general rule for access to a public highway by a landlocked property is found in K.S.A. 68-117. The statute provides that, upon the proper presentation of a petition setting forth the use and purposes of such proposed road, the board of county commissioners “shall proceed in accordance with the provisions of K.S.A. 68-101 to 68-110, both sections inclusive, and K.S.A. 68-115 and 68-116” to lay out such road. Further, K.S.A. 68-117 provides that:

[T]he owner or owners, their grantees, successors or assigns, of the land specifically benefited by the establishment of such public road, shall forthwith pay all expenses of establishing said road, including all damages, if any should be held or allowed and thereafter forever maintain and keep the same in repair and without any expense or liability to the township or other municipality in which such road is so laid out and established.

Whether the “Cowley County road” that previously accessed the Liberty Cemetery was a road opened pursuant to petition as set forth in K.S.A. 68-117 is a question of fact, so we will not opine on the question. However, we can conclude that the maintenance, upkeep, and repair of a road opened pursuant to K.S.A. 68-117 forever remains the responsibility of the owner or owners, their grantees, successors or assigns, of the land specifically benefited by the establishment of such public road, and such expense or liability never transfers to the township or other municipality in which such road is laid out and established.

Sincerely,

Derek Schmidt
Kansas Attorney General

Athena E. Andaya
Deputy Attorney General

DS:AA:sb

¹⁴ Even if there was an issue, it is likely a court would find the existence of an implied easement by necessity that would allow relatives of individuals buried in Liberty Cemetery to access the gravesites. See *Stroda v. Joice Holdings*, 288 Kan. 718, 724–27 (2009).