



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

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MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
ANTITRUST: 296-5299

ATTORNEY GENERAL OPINION NO. 81-237

The Honorable Jack Brier
Secretary of State
Kansas State Capitol
Second Floor
Topeka, Kansas 66612

Re: Corporations -- Cemetery Corporations -- Permanent
Maintenance Fund; Accumulated Income

Synopsis: Pursuant to K.S.A. 1980 Supp. 17-1311, a cemetery corporation is required to deposit a portion of the purchase price of each burial lot in a fund, the income of which is to be used for the permanent maintenance of the cemetery. If income accrued for any one year is in excess of such maintenance costs, it may be accumulated and invested so as to produce additional income. However, it does not become part of the principal of the fund by virtue of being carried over, and, if required for maintenance costs in succeeding years, can be expended, unlike the principal which must remain in trust in perpetuity. Cited herein: K.S.A. 1980 Supp. 17-1311, 17-1312, 17-1312a.

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Dear Secretary Brier:

As Secretary of State for Kansas, you have requested the opinion of this office on a question which concerns the permanent maintenance funds which cemetery corporations are required by law to keep. Specifically, you wish to know whether the income which is produced by such a fund becomes part of the corpus of such fund if it is not spent during the year in which it is earned, but rather is left to accumulate.

The existence of such funds is mandated by K.S.A. 1980 Supp. 17-1311, which in pertinent part states:

"[A cemetery] corporation shall maintain, in a trust company, a bank within the state of Kansas or a savings and loan association incorporated under the laws of this state, a percentage of the purchase price of each burial lot hereafter sold by it, or any payment thereon, not less than fifteen percent (15%) thereof, for the permanent maintenance of the cemetery within which said burial lot lies, but the total amount so set aside shall not be less than twenty-five dollars (\$25) for each burial lot at the time of conveyance of such lot. Deposits to the permanent maintenance fund shall be made within forty-five (45) days of receipt of moneys for which deposits are required to be made.

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"The income of the said permanent maintenance fund shall be used exclusively for the maintenance of said cemetery. No part of the principal of said fund shall ever be used for any purpose except for such investment.

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"Such maintenance 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."

The power of the legislature to require such a fund be established was upheld in the case of State ex rel. Londerholm v. Anderson, 195 Kan. 649 (1965), with the court finding (at 652) that the statute was an expression of public concern with the continued maintenance of burial places, and thus being remedial in nature should therefore be liberally construed. This result was reaffirmed in State ex rel. Stephan v. Lane, 227 Kan. 379, 385 (1980).

Other relevant statutory provisions include K.S.A. 1980 Supp. 17-1312, which concerns the custody of the permanent maintenance trust fund, and which additionally provides that "no moneys, other than income from the

trust, shall be paid over to the cemetery corporation by the trustee, except upon the written permission of the secretary of state." Additionally, K.S.A. 1980 Supp. 17-1312a provides for the making of reports to the secretary of state, in part stating:

"Each cemetery corporation shall prepare and forward to the secretary of state at the time it is required to make an annual report under the Kansas general corporation code, or if no such report is required then on January 1 in each year, a statement verified by the treasurer of said corporation describing the corpus and any accumulated income on the preceding December 31, or on the last day of its fiscal year if it does not use the calendar year in its accounts, in each permanent maintenance fund established by said corporation, the cost and the market value on said date of each security then held in each such fund, and the income of and disbursements from each such fund during the calendar or fiscal year then ended." (Emphasis supplied.)

In our opinion, the phrase "accumulated income" should be given its everyday meaning, just as the court in *Anderson* refused to assign meticulous or technical meanings to the words "purchase price" and "sold." "Accumulated income" clearly refers to that revenue produced by the corpus of the fund which the cemetery corporation has not found it necessary to expend on maintenance items. Insofar as the income produced by such a fund cannot be expended for any other purpose, the existence of accumulated income is inevitable if maintenance bills do not equal the sum so produced for a particular year.

It would furthermore be our opinion that such accumulated income does not become part of the corpus of the trust fund. Under K.S.A. 17-1311, the principal from which maintenance income is derived is created solely through the deposit of a portion of the purchase price of lots, as well as through donations or bequests made to the cemetery corporation. Furthermore, the statutes appear to have anticipated the situation where both accumulated income and the principal of the trust fund exist, in that K.S.A. 1980 Supp. 17-1312a draws a distinction between the two for reporting purposes. In addition, while the statute does not preclude the re-investment of such accumulated income, it contains no provision by which such moneys may, through the passage of time, become part of the principal of the fund. Given the specific statutory commands that require income to be used "exclusively" for maintenance, while precluding the expenditure of principal, together with the public interest in seeing that money be

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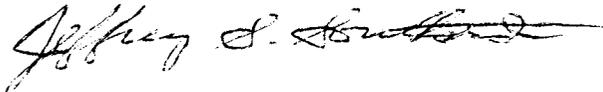
available for maintenance (Anderson, supra, at 652), we are unable to conclude that accumulated trust fund income ever changes its character into that of principal. Accordingly, it remains available for the use of the cemetery corporation in succeeding years.

In conclusion, pursuant to K.S.A. 1980 Supp. 17-1311, a cemetery corporation is required to deposit a portion of the purchase price of each burial lot in a fund, the income of which is to be used for the permanent maintenance of the cemetery. If income accrued for any one year is in excess of such maintenance costs, it may be accumulated and invested so as to produce additional income. However, it does not become part of the principal of the fund by virtue of being carried over, and, if required for maintenance costs in succeeding years, can be expended, unlike the principal, which must remain in trust in perpetuity.

Very truly yours,



ROBERT T. STEPHAN
Attorney General



Jeffrey S. Southard
Assistant Attorney General.

RTS:BJS:JSS:may