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ATTORNEY GENERAL OPINION NO. 89-52

The Honorable Ginger Barr
State Representative, Fifty-First District
State Capitol, Room 115-S
Topeka, Kansas

Re: Corporations--Cemetery Corporations--Cemetery Lots; Disposition

Public Health--Regulation of Embalmers and Funeral Directors; Funeral Establishments; Funeral Directors--Funeral Establishment Defined

Synopsis: In our opinion, based on the facts presented, the operation of a chapel at Roselawn Memorial Park Cemetery in Salina is not contrary to the judgment affirmed in Connolly v. Frobenius, 2 Kan.App.2d 18 (1978). Cited herein: K.S.A. 1988 Supp. 65-1713a; U.S. Const., First Amend.

* * *

Dear Representative Barr:

You request our opinion as to whether a chapel may be maintained on dedicated cemetery grounds. Your question relates to the injunction which was granted in Connolly v. Frobenius, 2 Kan.App.2d 18 (1978).

In the Connolly case, the owners of cemetery lots sought an injunction restraining defendants (the cemetery corporation and its president) from constructing and operating a mortuary (and other commercial development) at Roselawn Memorial Park Cemetery in Salina. The real estate in question had been

dedicated for "purposes of Sepulture," and the court restated the "general rule" that property dedicated for a particular purpose cannot be used for any other purpose. 2 Kan.App.2d at 30. After noting that courts in other states had expressed conflicting views as to whether a mortuary is a use which may properly be made of land dedicated for burial purposes, Kan.App.2d at 29, and stating that, in matters of dedication, all ambiguities must be resolved against the dedicator and in favor of the public, the court stated as follows:

> "Defendants argue that the dedication was for purposes of sepulture, by definition synonymous with burial, which has been defined as 'the act or ceremony of burial' and, by applying these definitions, a mortuary for the conduct of funeral services is clearly within the purposes of 'sepulture.'
>
> "Surely no one will argue with the fact that the services of a licensed mortician in Kansas are intimately associated with the act of burial of the dead. By the same token, it is doubtful that anyone will argue with the fact that services ordinarily provided by a mortuary in Kansas are competitive commercial enterprises, with aims and goals not solely for the enjoyment and use of the public. K.S.A. 65-1713 et seq. Where will the line be drawn? The general rules set forth on the deeds to the cemetery lots and to the crypts give no indication to the more than 6,000 purchasers that any part of the area in which they have selected lots to bury their loved one, or in which they themselves may eventually be buried, will be used for any commercial enterprise, whether it be the operation of a mortuary or buildings housing offices for collection departments, savings and loans, insurance, trust departments, or others. In fact, the record here is indicative of the contrary--that purchasers of lots and crypts in the dedicated cemetery had every reason to believe that no part of the

> dedicated area would be used for any purpose other than for human interment, and certainly not for commercial purposes." 2 Kan.App.2d at 31.

The above-quoted excerpt from the Connolly case implies that conducting a funeral service is a proper burial purpose, but that other aspects of a mortuary operation are commercial in character and are not within the process of "sepulture." The commercial aspects of a mortuary business are supplied by the court's reference to K.S.A. 65-1713a, and include the retail sale and display of funeral merchandise, preparation for burial and transportation of dead human bodies, and preparation and embalming of dead human bodies for burial or transportation.

We are informed that the proposed chapel at Roselawn Memorial Park Cemetery will not be used for any of the above-described commercial aspects of a mortuary operation. The chapel will be used for funeral or committal services related to the burial of deceased members of a lot owner's family; visitation; assembly; and other purposes related and incidental thereto. Title to the chapel property will be held by a trust which will use all income received by it to defray the costs of maintenance of Roselawn Memorial Park Cemetery.

In regard to whether the proposed use of the chapel is a proper burial purpose, we note that David v. Coventry, 65 Kan. 557, 562 (1902) cites the U.S. Supreme Court case of Close v. Greenwood Cemetery, 107 U.S. 466, 478, 1 Sup.Ct. 267, 276, 27 L.Ed. 408 (1882) for the rule that cemeteries are "not to be a mere graveyard" but an "institution as an entirety" including "the perpetual preservation of the cemetery as an ornamental and convenient place for interment and for resort by the relatives of the dead." Close went on to state at 476-478:

> "The question then recurs whether, as against Close, the corporation must be held to have been duly organized under the act of Congress of 1854.
>
> "Upon this question the facts are these: Close knew that the act of incorporation had been granted by Congress, in which he was named as one of the original associates; that the cemetery had been

dedicated and set apart by public religious ceremonies for the burial of the dead; that a pamphlet had been published, containing a full account of those ceremonies,the names of a full board of officers, including himself as president and one of the managers, and Clendenin as superintendent, and a code of by-laws, by the very first of which all lots were to be held in pursuance of the act of incorporation and to be used for the purposes of sepulture alone.

. . . .

"It is upon these representations that the purchasers of lots have acquired their title and have parted with their money; and the corporation, whose existence he, at least, cannot deny, has the right and the duty, as the representative and in behalf of all purchasers of lots, to enforce against him the obligation which he has thereby assumed.

. . . .

"It is argued by the learned counsel for the appellants that the estoppel and the obligation of Close cannot extend beyond the thirty acres which had been actually laid out. This argument appears to us to be fully met and answered in the able and thorough opinion of the court below, delivered by Mrs. Justice Cox, who says: 'It was held out to the lotholders, not only that the ground immediately available for burial should remain set apart for that object, but that the cemetery should be for ever under the protection of a perpetual corporation, charged with the duty of laying out and ornamenting the grounds, capable of receiving gifts and bequests, and empowered to make by-laws for the regulation of the affairs of the corporation; and the whole property was described as dedicated to the purposes of the cemetery, not necessarily that the

> whole should be laid out into lots, but that it should all belong to the institution and be available for its general objects. This was not to be a mere graveyard in which each lot-holder acquired a piece of ground in which to bury his dead, and at the same time become chargeable with the sole care of his particular lot; but the lot-holders themselves became subject to by-laws and regulations having reference to the institution as an entirety, and the perpetual preservation of the cemetery as an ornamental and convenient place for interment and for resort by the relatives of the dead.'" Glenwood Cemetery v. Close, 7 Washington Law Reporter, 214, 218 (1882).

Thus, it appears that the United States Supreme Court has determined that a dedication for the purposes of sepulture would not be limited to being "a mere graveyard".

The cases set forth above clearly indicate that the use of all cemetery ground for religious services is a matter of grave public concern and only the strictest reading of the dedication would prevent the use of the building as a chapel.

Another consideration herein would be that a strict reading of the dedication to prohibit use of the chapel by the cemeteries' lotowners in this instance, may infringe upon the constitutional rights of the lotowners.

The first Amendment to the United States Constitution states:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

This provision, applicable to the states through the fourteenth amendment, provides that church and state should be kept distinct.

The case of St. John's Evang. Lutheran Church v. Hoboken, 479 A.2d 935, (N.J. Super. L. 1983), involved the question of whether a homeless shelter on church property was a "religious use" or a violation of local zoning, and the Court there stated:

"Government is precluded under the First Amendment from 'prohibiting the free exercise' of religion. See also N.J. Const. (1947), Art. I, Sub. III.

"Religious liberty has long been one of our most cherished freedoms. In Sherbert v. Verner, 374 U.S. 398, 413, 83 S.Ct. 1790, 1799, 10 L.Ed.2d 965 (1966), Justice Stewart said, 'I am convinced that no liberty is more essential to the continued vitality of the free society which our Constitution guarantees than is the religious liberty protected by the Free Exercise Clause explicit in the First Amendment and imbedded in the Fourteenth.'

. . . .

"Courts have placed constitutional constraints upon municipal attempts to impose zoning regulations upon churches and other religious institutions. See 2 Anderson, American Law of Zoning (2d ed. 1976), Sub. 12.18 to 12.27 at 442-446. '[T]he range of religious conduct is wide, and the structures which house it are various. Religious use is not defined solely in terms of religious worships.' Id. at 458-62. Its use has been extended to education; Catholic Bishop of Chicago v. Kingery, 371 Ill. 257, 20 N.E.2d 583 (1939); a day care center, Unitarian Universalist Church v. Shorten, 63 Misc.2d 978, 314 N.Y.S.2d 66 (Sup.Ct.1970); an orphanage, University Heights v. Cleveland Jewish Orphan's Home, 20 F.2d 743 (6th Cir. 1927), cert. den. 275 U.S. 569, 48 S.Ct. 141, 72 L.Ed. 431 (1927); and a center for counseling drug users, Slevin v. Long Island Jewish Medical Center, 66 Misc.2d 312, 319 N.Y.S.2d 937 (Sup.Ct. 1971).

. . . .

> "In summary, plaintiffs have persuasively argued that housing the homeless in a church is a religious use sanctioned by centuries of scripture and practice. The zoning power may not be constitutionally used to preclude a church from exercising its religious function of providing a sanctuary for the homeless." St. John's Evang. Luth. Church v. Hoboken, 479 A.2d at 938-939 (N.J. Super L. 1983).

Only the gravest abuse, endangering paramount interests, give occasion for permissible limitation on free speech and free assembly, and hence it is the American tradition to allow the widest room for discussion, and the narrowest range for its restriction, particularly when the right is exercised in conjunction with peaceable assembly. Thomas v. Collins, Tx. 1945, 65 S.Ct. 315, 232 U.S. 516, 89 L.Ed. 430, rehearing denied 65 S.Ct. 557, 323 U.S. 819, 89 L.Ed. 630.

Any attempt to restrict free speech or free assembly must be justified by a clear public interest, threatened not doubtfully or remotely, but by clear and present danger, and the rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. Thomas v. Collins, Tx. 1945, 65 S.Ct. 315, 323 U.S. 516, 89 L.Ed. 430, rehearing denied 65 S.Ct. 557, 323 U.S. 819, 89 L.Ed. 630.

Any stricter interpretation of the dedication and injunction herein prohibiting the lotowners of the cemetery from using the chapel as a chapel may be an unconstitutional infringement upon their rights.

In accordance with the above-cited authorities, due to the fact that the property is not being used for any commercial aspects of a mortuary described in K.S.A. 65-1713a, and due to the fact that title to the chapel property is now held in a trust which requires all income from the use of the chapel to be used to defray the costs of maintenance of the cemetery, it is our opinion that the operation of a chapel at Roselawn Memorial Park Cemetery in Salina is not contrary to the

judgment affirmed in Connolly v. Frobenius, 2 Kan.App.2d 18 (1978).

Very truly yours,

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