

OPINION NO. 87-066**Syllabus:**

In the absence of court approval, a board of township trustees has no authority under R.C. 517.15 and R.C. 517.16 to transfer money, given by bequest to be used for the upkeep and maintenance of a designated burial lot, to a cemetery general fund to be used for capital improvements.

To: Dennis E. Barr, Hardin County Prosecuting Attorney, Kenton, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, August 20, 1987

I have before me your request for my opinion in which you inquire whether a board of township trustees may, by resolution, transfer money received by bequest to be used for the upkeep of a designated grave, to the cemetery general fund, where the money would be used for capital improvements. The proposed resolution would contain a condition that the trustees would continue to maintain the grave, in compliance with the terms of the bequest, as they have done over the past ten years. You have noted that the yearly interest on the principal bequeathed continues to grow and exceeds the amount necessary to maintain the grave.

It is well established under Ohio law that a board of township trustees, as a creature of statute, possesses only such authority as is expressly conferred by statute or necessarily implied therefrom. State ex rel. Schramm v. Ayres, 158 Ohio St. 30, 106 N.E.2d 630 (1952); Trustees of New London Township v. Miner, 26 Ohio St. 452 (1875); 1983 Op. Att'y Gen. No. 83-039; 1951 Op. Att'y Gen. No. 51-802, p. 558. Accordingly, in order for the board of township trustees to expend money given by bequest for a purpose other than that stipulated in the bequest, there must be express or implied statutory authority therefor.

R.C. Chapter 517 provides for the establishment and operation of township cemeteries. See generally R.C. 517.01 (authorizing townships to acquire lands for cemetery purposes, and to enclose, improve, and protect such lands); R.C. 517.03 (authorizing township to levy a tax to pay for the supervision and improvement of a township cemetery); R.C. 517.08 (authorizing the use of proceeds from the sale of burial lots to improve and embellish cemetery grounds); R.C. 517.11 (requiring township trustees to provide for the protection and preservation of cemeteries). R.C. 9.20 provides, generally, that a township, as well as other entities specified, "may receive by gift, devise, or bequest moneys, lands, or other properties, for their benefit or the benefit of any of those under their charge, and hold and apply the same according to the terms of the gift, devise, or bequest" (emphasis added). More specific to your inquiry concerning bequests for the care of cemetery graves, R.C. 517.15 provides:

The board of township trustees may receive by gift, devise, bequest, or otherwise, any money, securities, or other property, in trust, as a permanent fund to be held and invested by the board and its successors in office, the income therefrom to be used and expended under its direction, in the care, improvement, and beautifying of any burial lot designated and named by the person making such gift, devise, or bequest, in any township cemetery over which such board has jurisdiction. (Emphasis added.)

See generally Freeman v. Norwalk Cemetery Association, 88 Ohio App. 446, 100 N.E.2d 267 (Huron County 1950); 1951 Op. No. 802, p. 558. R.C. 517.16 further provides for the manner of investing the cemetery fund and directs that "[f]rom such income the board shall first pay the cost and expense connected with the trust, and the balance shall be expended, under its direction, in the proper care and beautification of the designated burial lot." (Emphasis added.) R.C. 517.15 and R.C. 517.16 clearly express that a gift, devise, or bequest is to be held in trust by the board of township trustees, for the benefit of the designated burial lot. Moreover, the emphasized portions of the above-named statutes indicate that the trustees are to apply the funds in accordance with the terms of the gift, devise, or bequest in order to effectuate the intent of the donor. Cf. R.C. 759.14 (when a municipal corporation maintains a public cemetery the director of public service "may receive donations by bequest, devise, deed of gift, or otherwise, or money or other property, the principal or interest of which is to be used...for any particular parts or lots therein, as the donor directs"); R.C. 1721.12 (a cemetery company or association may appropriate property, or the proceeds of property, given, granted, or devised to any of the specified purposes "according to the terms of the trust for which it was given, granted, or devised") (emphasis added). Thus, where the bequest stipulates that money be used for the perpetual care of a designated burial lot, there is no authority to use such money for other unspecified purposes. For example, in 1934 Op. Att'y Gen. No. 3237, vol. II, p. 1382, one of my predecessors concluded that where a gift of money is made for a named cemetery with no conditions attached as to the particular uses of the fund, the trustees could use the amount, in their discretion, for the upkeep and improvement of the entire cemetery. The only term of the gift limiting the trustees' discretion was the condition that the money be used for the named cemetery. See also 1965 Op. Att'y Gen. No.

65-146, p. 2-328. However, where the donor has directed that his gift be used for the maintenance of a designated burial lot, the trustees are bound to follow that direction.

This reasoning is consistent with the general principle that the testator's intention shall govern construction of a will. See Murr v. Youse, 52 Ohio L. Abs. 321, 80 N.E.2d 788 (Montgomery County 1946) (court directed that a testamentary intent to have a designated lot beautified be carried out by the expenditure of a specified amount for landscaping, planting, and any other acts of beautification); Clinton County National Bank and Trust Co. v. Todhunter, 43 Ohio App. 289, 183 N.E. 88 (Clinton County 1945) (where the express language of the testatrix illustrated a testamentary intent that a bequest to a cemetery association be used for erecting a chapel, the association was bound to use the bequest for such purpose and was barred from using it for any other purpose). An excessive gift for the upkeep and maintenance of a cemetery lot may be reduced by a court on the ground of public policy when the excess is given to a public charity. Heinlein v. Elyria Savings and Trust Co., 75 Ohio App. 353, 62 N.E.2d 284 (Lorain County 1945). However, in order to change the terms of a specific bequest, the trustees must seek court approval through application of the doctrine of cy pres. See 1951 Op. Att'y Gen. No. 817, p. 606. Independent of court action to change the terms of the bequest, the trustees may not expend the proceeds of the bequest for any purpose not specified by the testator.

Therefore, it is my opinion, and you are advised that, in the absence of court approval, a board of township trustees has no authority under R.C. 517.15 and R.C. 517.16 to transfer money, given by bequest to be used for the upkeep and maintenance of a designated burial lot, to a cemetery general fund to be used for capital improvements.