

November 16, 2017

The Honorable Bradford W. Bailey
Hardin County Prosecuting Attorney
One Courthouse Square
Suite 50
Kenton, Ohio 43326-1575

SYLLABUS:

2017-040

Pursuant to R.C. 517.10, title to a mausoleum owned by a private mausoleum association and located in the unincorporated area of a township is vested in the board of township trustees when the mausoleum was used by the public as a public cemetery and it is determined that the private mausoleum association no longer owns and cares for the mausoleum. Once title to the mausoleum vests in the board of township trustees, the board has a duty under R.C. 517.11 to care for, protect, and maintain the mausoleum that is under its jurisdiction.



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OPINION NO. 2017-040

The Honorable Bradford W. Bailey
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Dear Prosecutor Bailey:

You have requested an opinion whether the Pleasant Township Board of Trustees is vested with title to, and is responsible for maintaining, a mausoleum located in the unincorporated area of the township, title to which was held by a now defunct private mausoleum association. You have explained that on October 29, 1919, a deed was recorded that transferred ownership of real property from a husband and wife to the Trustees of the Grove Cemetery Mausoleum Association. A mausoleum was located on the real property. The last known interment in the mausoleum occurred on December 12, 1920. Since then the mausoleum has fallen into disrepair. The Grove Cemetery Mausoleum Association no longer functions and no one has been able to locate successor trustees of the Association. The real property is located in the unincorporated area of Pleasant Township and adjoins Grove Cemetery, a union cemetery.

At the outset, it is important to note that “[a] mausoleum in which members of the public are interred is a public cemetery or ground used for burial purposes within the meaning of Ohio law.” 1965 Op. Att’y Gen. No. 65-146 (syllabus, paragraph 1); *see* R.C. 1721.21(A)(2) (“[c]emetery” means any one or a combination of more than one of the following: (a) A burial ground for earth interments; (b) A mausoleum for crypt entombments; (c) A columbarium for the deposit of cremated remains; (d) A scattering ground for the spreading of cremated remains”); 2007 Op. Att’y Gen. No. 2007-005, at 2-37. Accordingly, provisions of the Ohio Revised Code that govern a board of township trustees’ authority with respect to a public cemetery apply to your question.¹ Insofar as a

¹ A “public cemetery” is a cemetery that has burial lots offered for sale to the public. 2003 Op. Att’y Gen. No. 2003-034, at 2-282 n.4. Thus, a cemetery that is owned by a private entity, and that offers lots for sale to the public generally is a “public cemetery.” *See* 1966 Op. Att’y Gen. No. 66-163, at 2-351 (“a cemetery, although privately owned, is properly classified as a “public cemetery” as distinguished from a private one, where it consists of a great number of small burial plots or sites, sold and for sale to the public” (quoting 75 A.L.R. 2d 592, section 1)). This is in contrast to a “family cemetery,” which, generally, is a cemetery used primarily for the interment of remains of people who

board of township trustees is a creature of statute and may exercise only those powers that have been conferred expressly by statute, or those implied as necessary to carry out an express power, 2003 Op. Att'y Gen. No. 2003-034, at 2-283, whether a board of township trustees has authority to maintain a mausoleum located in the unincorporated area of the township, title to which was held by a now defunct mausoleum association, is dependent upon the language of those statutes.

R.C. Chapter 517 sets forth the powers and duties of a board of township trustees with respect to the care and management of public cemeteries under the jurisdiction of the board. R.C. 517.10 is pertinent to your question and provides:

The title to, right of possession, and control of all public cemeteries located outside any municipal corporation, which have been set apart and dedicated as public cemeteries, and any grounds which have been used as such by the public, but not expressly dedicated as a cemetery, *except such as are owned or under the care of a religious or benevolent society, or an incorporated company or association, or under the control of the authorities of any municipal corporation*, shall, severally be vested in the board of township trustees. (Emphasis added.)

This section means, *inter alia*, that title to a public cemetery that is not located in the territory of a municipal corporation and that is not owned or under the care of a corporation or association, or any other entity identified in R.C. 517.10, is vested in the board of township trustees. In 1965 Op. Att'y Gen. No. 65-146, at 2-333, the Attorney General construed R.C. 517.10 and concluded that “[a]s long as [a] mausoleum is owned or under the care of an incorporated company or association, the title, right of possession, and control are not vested in the board of township trustees, and there is no authority for the expenditure of public funds for the repair and maintenance of [the] mausoleum.” Cf. 1954 Op. Att'y Gen. No. 4163, p. 423, at 425 (“my conclusion that title to the cemetery does vest in the [township] trustees [under R.C. 517.10] assumes that the cemetery is *not* within a municipal corporation and is *not* owned or under the control of any of the organizations mentioned in the statute”).

are related. See R.C. 4767.02(C) (defining a “family cemetery” as “a cemetery containing the human remains of persons, at least three-fourths of whom have a common ancestor or who are the spouse or adopted child of that common ancestor”); 2007 Op. Att'y Gen. No. 2007-005, at 2-38. At times, however, the term “private cemetery” is used to refer to a “family cemetery.” See 1966 Op. Att'y Gen. No. 66-163, at 2-351 to 2-352 (“a “private cemetery” in the sense in which it is here considered, does not mean one which is under private ownership for the sale of lots to the public, but one which is not only owned for the benefit of but also devoted to the burial of the members of a family, or relatives bound by family or similar personal ties, to the exclusion of the public” (quoting 75 A.L.R. 2d 592, section 1)); see also 2014 Op. Att'y Gen. No. 2014-041, at 2-361 n.1. For purposes of this opinion, we use the term “public cemetery” to mean a cemetery, regardless of ownership, that has lots sold or offered for sale to the public generally.

You have informed us that the mausoleum at issue in your letter is located outside the territory of a municipal corporation and is not being cared for by the Grove Cemetery Mausoleum Association. Consequently, whether the Pleasant Township Board of Trustees holds title to the mausoleum under R.C. 517.10 depends upon whether the mausoleum is “owned or under the care of” the now defunct Grove Cemetery Mausoleum Association. A similar issue was discussed in 1999 Op. Att’y Gen. No. 99-047. In that opinion, the Attorney General addressed several questions about a cemetery that had been operated by a church that was no longer functioning. *Id.* at 2-294. The Attorney General concluded that pursuant to R.C. 517.10, “if a church ceases to function, its cemetery becomes the property of the township without action on the part of either party.” 1999 Op. Att’y Gen. No. 99-047, at 2-295.

Several years earlier in 1928 Op. Att’y Gen. No. 2446, vol. III, p. 1929, at 1929, the Attorney General addressed whether a board of township trustees may acquire a cemetery, title to which was held by a religious society that was no longer in existence and no one living in the vicinity of the cemetery was a member of the society. The Attorney General advised that title to the cemetery vested in the board of township trustees, reasoning that the cemetery was not subject to the ownership or control of a religious society because, at that time, the religious society was not in existence, and thus, could not exercise ownership or control of the cemetery. *Id.* at 1930 to 1931. The Attorney General cited favorably *Miller v. Riddle*, 227 Ill. 53, 81 N.E. 48 (1907), for the proposition that “[i]f there has been no collective body associated together, acting as a society, for such a period of time that an inference of abandonment necessarily follows, the society must be regarded as dissolved even though there has been no formal dissolution by agreement of the members.” 1928 Op. Att’y Gen. No. 2446, vol. III, p. 1929, at 1930. The Attorney General further noted that General Code sections 3451 (the predecessor of R.C. 517.10) and 3453 (the predecessor of R.C. 517.11) “evince a clear legislative intention that any tract or parcel of land in a township dedicated as public burial grounds, or used by the public as such, should be cared for by some responsible authority[.]” 1928 Op. Att’y Gen. No. 2446, vol. III, p. 1929, at 1930.

The analyses and conclusions of 1999 Op. Att’y Gen. No. 99-047 and 1928 Op. Att’y Gen. No. 2446, vol. III, p. 1929 are consistent with *State ex rel. Petro v. Cincinnati*, 1st Dist. No. C-060186, 2007-Ohio-1858, 2007 Ohio App. LEXIS 1683, at ¶¶ 1-4, which considered whether a city was responsible for caring for cemetery grounds that were owned by a private, nonprofit corporation. In *State ex rel. Petro v. Cincinnati*, the President of Wesleyan Cemetery of Cincinnati, a charitable trust whose corporate officers were also trustees, was convicted of theft and sentenced to prison for expending the assets of the endowment-care fund for his personal expenses. *Id.* at ¶ 4. While under the President’s care, the cemetery grounds had been neglected and had fallen into “disarray.” *Id.* Relying upon R.C. 759.08,² the court concluded that insofar as the cemetery’s trustees had abandoned

² R.C. 759.08 provides:

The title to and right of possession of public cemeteries and burial grounds located within a municipal corporation and set apart and dedicated as public cemeteries or burial grounds, and grounds used as such by the public but not

their responsibilities of caring for the cemetery, title to the cemetery was vested in the municipal corporation in which the cemetery was located. *State ex rel. Petro v. Cincinnati* at ¶ 29-30. The appellate court noted the following facts, as found by the trial court, to support the conclusion that the cemetery was not owned or under the care of an incorporated company or association for the purposes of R.C. 759.08:

Here, the trial court determined that Wesleyan was a public cemetery, that it was not owned or under the care of a religious or benevolent society, and that it was no longer owned by or under the care of a corporation. The court determined that Wesleyan had been abandoned, that its trustees had resigned, and that no corporate assets or corporate entity remained.

These findings were amply supported by the record. Testimony at trial indicated that Wesleyan had been open to the public, and that any member of the public could purchase burial lots or graves at Wesleyan.

Moreover, in the 2005 settlement agreement executed by the city and the other parties, the parties stipulated that Wesleyan's officers and trustees had failed to maintain the cemetery, and that, as a result, the cemetery grounds were in disarray and had become a place for criminal activity. And the parties recognized the necessity of "a final resolution regarding the future management of Wesleyan."

Under the agreement, Wesleyan's corporate entity was to be dissolved and its assets relinquished.

State ex rel. Petro v. Cincinnati at ¶ 25-28. Although the court in *State ex rel Petro v. Cincinnati* construed R.C. 759.08, the court's analysis and holding may be applied to the analogous provisions of R.C. 517.10.

In light of the holding in *State ex rel. Petro v. Cincinnati* and the analyses and conclusions of 1999 Op. Att'y Gen. No. 99-047 and 1928 Op. Att'y Gen. No. 2446, vol. III, p. 1929, when a public cemetery that is located in the unincorporated area of a township and that was owned and cared for by a private corporation or association has fallen into disrepair as a result of the absence or neglect of the association's trustees, the cemetery may be deemed to no longer be "owned or under the care of" the corporation or association for the purpose of R.C. 517.10.³ As a public cemetery that is outside any

dedicated, except those owned or under the care of a religious or benevolent society, or an incorporated company or association, are hereby vested in the municipal corporation in which such cemetery or burial ground is located.

³ In paragraph 4 of the syllabus of 1965 Op. Att'y Gen. No. 65-146, the Attorney General stated "[a] board of township trustees has neither the authority nor duty to expend public funds to repair a public mausoleum which is located in the unincorporated area of the township where such mausoleum is owned by or is under the care of an incorporated company or association." In that opinion, the company that owned the mausoleum was "in existence, and ... the mausoleum [was] still technically under the control of such organization." *Id.* at 2-333. The mausoleum had been left in a "poor state of

municipal corporation and not owned by or under the care of any of the entities identified in R.C. 517.10, title to the cemetery vests in the board of township trustees. Once title to the public cemetery vests in the board of township trustees, the board has a duty to maintain, protect, and care for the public cemetery that is under its jurisdiction. R.C. 517.11 provides:

The board of township trustees shall provide for the protection and preservation of cemeteries under its jurisdiction, and shall prohibit interments therein when new grounds have been procured for township cemeteries or burial grounds....

The board may enclose cemeteries under its jurisdiction with a substantial fence or hedge, and shall keep any such fence or hedge in good repair. It may re-erect any fallen tombstones, regardless of the cause of the falling, in such cemeteries. The board, as it considers necessary, may purchase, maintain, and improve entombments, including mausoleums, columbariums, and other interment rights. The board may levy a tax to meet any costs incurred for these purposes, not to exceed one-half mill in any one year, upon all the taxable property of the township.

Whether title to the mausoleum that was owned by the Grove Cemetery Mausoleum Association is vested in the Pleasant Township Board of Trustees pursuant to R.C. 517.10 depends upon the satisfaction of several conditions. First, the mausoleum shall be located outside of any municipal corporation and shall have been used by the public as a public cemetery. In addition, the mausoleum shall not be "owned or under the care of" any of the entities delineated in R.C. 517.10. Whether the absence of any trustees or successor trustees of the Grove Cemetery Mausoleum Association, and the neglected condition of the mausoleum as a result of the absence of any trustees or successor trustees, is sufficient to conclude that the private mausoleum association no longer owns and cares for the mausoleum is a determination that requires knowledge of facts that are beyond the scope of an Attorney General opinion. Local officials are in the best position to determine those facts. Therefore, we conclude that pursuant to R.C. 517.10, title to a mausoleum located in the unincorporated area of a township may be vested in the board of township trustees, provided that the mausoleum was used by the public as a public cemetery and, as a result of the absence of any trustees or successor trustees of the association, it is determined that the private mausoleum association no longer owns and cares for the mausoleum. Once title to the mausoleum vests in the board of township trustees, the board has a duty under R.C. 517.11 to care for, protect, and maintain the mausoleum that is under its jurisdiction.⁴

repair[,]” not because the company was no longer in existence, but because moneys that had been placed in trust for the repair and maintenance of the mausoleum had been exhausted. *Id.* at 2-330. That situation is distinguishable from the circumstances described in your letter.

⁴ If the mausoleum constitutes an abandoned cemetery under R.C. 517.21, the Pleasant Township Board of Trustees may order that the abandoned mausoleum be discontinued and provide for the removal and reinterment of the remains in a cemetery that is open for public use in the vicinity.

The Honorable Bradford W. Bailey

- 6 -

Based upon the foregoing, it is my opinion, and you are hereby advised that pursuant to R.C. 517.10, title to a mausoleum owned by a private mausoleum association and located in the unincorporated area of a township is vested in the board of township trustees when the mausoleum was used by the public as a public cemetery and it is determined that the private mausoleum association no longer owns and cares for the mausoleum. Once title to the mausoleum vests in the board of township trustees, the board has a duty under R.C. 517.11 to care for, protect, and maintain the mausoleum that is under its jurisdiction.

Very respectfully yours,



MICHAEL DEWINE
Ohio Attorney General

See 1953 Op. Att'y Gen. No. 2978, p. 374, at 379 (defining "abandoned" for the purposes of R.C. 517.21 and its predecessor, G.C. 3465).