



STATE OF ARKANSAS
THE ATTORNEY GENERAL
DUSTIN MCDANIEL

Opinion No. 2014-074

October 9, 2014

The Honorable G. William "Bill" Booker
Chair, Arkansas Cemetery Board
201 East Markham Street, Suite 300
Little Rock, Arkansas 72201-1692

Dear Mr. Booker:

This is my opinion on your questions under the Cemetery Act for Perpetually Maintained Cemeteries (the "Act").¹

With further exceptions not relevant here,² the Act applies to all cemeteries except those that "do not and have never received more than two thousand dollars (\$2,000) *gross proceeds* in any one (1) year from the *sale* of parcels of realty to be used as human burial sites"³

¹ A.C.A. §§ 20-17-1001 to -1030 (Repl. 2005, Supp. 2013).

² See A.C.A. § 20-17-1003(a) (Repl. 2005). I assume the cemetery at issue is not owned and operated by an entity described in that subsection.

³ A.C.A. § 20-17-1003(b) (emphases added). The Act originated as Act 352 of 1977, which contained no exemption for low-revenue cemeteries. Act 819 of 1981 added the \$2,000-threshold exemption but provided that "notwithstanding the [\$2,000-threshold exemption] any cemetery which advertises as a perpetual care cemetery shall be subject to the provisions of Act 352 of 1977." That proviso regarding advertising was codified in the Arkansas Statutes Annotated. See Ark. Stat. Ann. § 82.426.3a (Supp. 1985). But it is not codified in the Arkansas Code Annotated. See A.C.A. § 20-17-1003(b) (1987, Repl. 2005). In my view the proviso likely was omitted in error and, accordingly, is still in effect. See A.C.A. § 1-2-103(a) (Repl. 2008) (regarding Code's repeal of prior law and exceptions thereto). I assume the cemetery at issue does not "advertise[] as a perpetual care cemetery," and I do not address the proviso further other than to note that in my opinion a cemetery that "advertises as a perpetual care cemetery" may not rely on the \$2,000-threshold exemption.

A cemetery subject to the Act is required *inter alia* to make deposits to a permanent maintenance fund in amounts determined by reference to its "gross proceeds from the sale" of burial plots.⁴

You describe a cemetery available for burial of anyone who lived within four miles or had a family member buried there. You say the cemetery solicits and receives donations totaling more than \$2,000 a year from families of people buried there and others, but "does not charge a set fee for burial plots," and "only receives funds on a donations basis." You say "there is no set minimum donation amount nor is the donation mandatory."

Your questions are:

- (1) Do donations accepted by cemeteries at the time of burial and thereafter constitute gross proceeds from the sale of burial plots?
- (2) Can a cemetery's practice of requesting donations for burial plots be equated to donated or discounted grave space transactions under Ark. Code Ann. § 20-17-1016(a)(3) and therefore, constitute gross proceeds from the sale of burial plots?

In my opinion, the answer to your first question is "no." Sales and donations are separate and distinct for purposes of the Act, which exempts cemeteries that make no sales. You should note, however, that a cemetery's calling a payment a donation does not necessarily make it so.⁵

In my opinion, the subsection cited in your second question does not apply to a cemetery that "only receives funds on a donations basis;" *i.e.*, a cemetery that makes no sales. It would apply to a cemetery found to have made sales over \$2,000 notwithstanding the cemetery's assertion that the payments were donations.

⁴ A.C.A. § 20-17-1016(a)(1) (Supp. 2013).

⁵ Nothing in this opinion should be read to imply that the cemetery at issue has made sales. You characterize payments made to that cemetery as donations and I have no reason to question that.

RESPONSE

Question 1 – Do donations accepted by cemeteries at the time of burial and thereafter constitute gross proceeds from the sale of burial plots?

As noted, the Act exempts cemeteries with no or only a small amount of "gross proceeds . . . from the sale" of burial plots. The legislature could have exempted just those cemeteries that receive only a small amount of money regardless of how they receive it. But it chose the words "sales" and "proceeds," the latter a word that assumes a sale.⁶ In my view, the legislature must be taken to have intended, by its use of those words, to exclude amounts received in transactions that are not sales. Donations⁷ are not sales.⁸ In my opinion, then, donations do not "constitute gross proceeds from the sale of burial plots."

This is not to say that the Cemetery Board must accept a cemetery's characterization of a payment as a donation. Whether a payment is a donation or a sales price generally depends largely on the *payor's* intent, which is determined on a case-by-case basis by reference to all the attendant facts and circumstances.⁹ A court might – or might not – hold a payment made by the deceased's surviving spouse, at the time the burial plot is transferred, and in an amount substantially equal to the burial plot's fair market value, to involve a sale notwithstanding the cemetery's characterization of the payment as a donation. A payment made by a person related – if at all – more distantly to the deceased, not close in time to the burial plot's transfer, and unrelated in amount to the burial plot's value, would be more likely to be held a donation, in my opinion. The payor's stated intent would be relevant in any case.

⁶ "Proceeds" means "amount of money received from a sale." *Black's Law Dictionary* 1399 (10th ed. 2014). The Arkansas Supreme Court has cited *Black's* on the meaning of words and phrases defined therein but not in the law at issue. *See, e.g., Heathscott v. Raff*, 334 Ark. 249, 973 S.W.2d 799 (1998); *Sebastian Cnty. Chapter, Am. Red Cross v. Weatherford*, 311 Ark. 656, 846 S.W.2d 641 (1993).

⁷ "Donation" means "gift." *Black's* 595. "Gift" means "voluntary transfer of property to another without consideration." *Black's* 803.

⁸ "Sale" means "transfer of property or title for a price." *Black's* 1537. "Price" means "amount of money or other consideration asked for or given in exchange for something else; the cost at which something is bought or sold." *Black's* 1380.

⁹ *See, e.g., Holland v. Bonner*, 142 Ark. 214, 218 S.W. 665 (1920).

One might argue that cemeteries receiving funds over the \$2,000 threshold should be regulated even if all funds received are clearly donations. Buying a burial plot – or receiving one as a gift – is not like receiving a residential lot. In the usual case, a burial plot buyer relies on the seller to perform not just at the time of sale but in perpetuity (in maintaining the cemetery). In this sense, buying a burial plot is akin to buying an equity security. The legislature seems to have recognized the similarity, charging the State Securities Department with assisting the Board.¹⁰ In adopting the Act, the legislature sought to protect the public by subjecting cemeteries to significant regulation. How a burial plot is acquired is not necessarily relevant to the buyer’s interest in the seller’s continuing performance, and the Act protects even those who pay nothing for burial plots in regulated cemeteries.¹¹ This seems appropriate given that the choice of a loved one’s burial place may be intensely personal and significant, and have little to do with price. If two cemeteries conduct burials and receive money on similar scales, it is difficult to see from a public protection standpoint why one cemetery should be regulated and the other not.

But such an argument is unlikely to prevail under current law. The legislature used limiting language with familiar meaning (“gross proceeds . . . from . . . sale”) to describe the group of cemeteries to be regulated. And it linked required permanent maintenance fund deposits only to sales proceeds, making no provision for permanent maintenance fund deposits by a cemetery that makes no sales. While the legislature may wish to consider whether a true donations-only cemetery should be regulated under the Act, I cannot conclude that the current statutory scheme regulates it.

Question 2 – Can a cemetery’s practice of requesting donations for burial plots be equated to donated or discounted grave space transactions under Ark. Code Ann. § 20-17-1016(a)(3) and therefore, constitute gross proceeds from the sale of burial plots?

¹⁰ See A.C.A. § 20-17-1027 (Supp. 2013).

¹¹ See A.C.A. § 20-17-1016(a)(3) (discussed in my response to your second question).

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The cited subsection provides that a regulated cemetery that "gives away a grave space or sells [one] for a price less than the current market price" must refer to a "recent arms-length" sale in the same cemetery in determining the amount required to be deposited in the permanent maintenance fund with respect to the gift or discounted transaction. In other words, a regulated cemetery must make permanent maintenance fund deposits as if it had received current market price for each burial plot conveyed, regardless of the amount, if any, actually received.

But this provision applies to cemeteries subject to the Act. It is not relevant to whether a cemetery is subject to or exempt from the Act in the first place. It is also meaningless when considering a cemetery that truly makes no sales.

If, however, a cemetery were found to have made sales – notwithstanding its characterizing the payments as donations – in the threshold amount, then the provision would apply. The (regulated) cemetery would be required to refer to a recent transaction – if any – that amounted to an arms-length sale in determining the amount of the required permanent maintenance fund deposit for each burial plot conveyance (except any made at current market price).

Assistant Attorney General J. M. Barker prepared this opinion, which I approve.

Sincerely,



DUSTIN McDANIEL
Attorney General

DM:JMB/cyh