

June 12, 2014

Maine Cemetery Association
c/o Debbie Allen Grover
Town of North Yarmouth
10 Village Square RD
North Yarmouth, ME 04097

Re: Cemetery Law questions

Dear Debbie:

I am writing to respond to the questions you posed in an email to me at the end of April, and from Steve Burrill. We have done some legal research and discussed these issues further with you. This letter provides our thoughts and advice based on our research and discussions.

1. Is perpetual care refundable if the buyer sells the lot back to the Cemetery Association?

13 M.R.S. § 1306 provides that at least 30% of the proceeds generated by the sale of lots must be deposited into a perpetual care fund and places certain restrictions on the use of those funds. It does not, however, state whether such funds, once incorporated into the corpus of the perpetual care fund, can be removed and refunded to a lot owner who sells a lot back to the cemetery. The intent of this statute is to create a fund dedicated to perpetual cemetery maintenance, as it specifically requires that “the income from the cemetery perpetual care fund must be devoted to maintenance of the cemetery.” *Id.*

A general rule of statutory construction is that unless something is forbidden, it is permissible. In this case, the statute does not prohibit a refund of the proceeds of lot sales allocated to the perpetual care fund. So one may argue that refund of perpetual care funds is consistent with the policy goal that those who own and who eventually come to be interred in the lots should be responsible for its maintenance through the income generated by the perpetual care fund. When one owner of a lot sells it back to the cemetery, the cemetery will, in turn, sell it to another person, which will contribute to the perpetual care fund. Accordingly, refunding money to someone who no longer owns a lot, and the replenishing of the fund with the resale of the lot, will not impair the functioning of the fund.

On the other hand, the State may take the position that the statute was intended to dedicate the monies allocated to the perpetual care fund forever, and there can be no refund of this money. Moreover, determining the amount of the refund may be problematic as many years

may have passed since the sale, and those funds may have been used already for cemetery care purposes.

Based on the above analysis, the safest course of action under this statute is to leave the perpetual care fund intact, but to consider this contribution in setting the price paid by the cemetery for lots repurchased from lot owners.

For future lot sales, the lot sale contract can specifically provide that 30% of the cost of every lot sold is allocated to a perpetual care fund and that that amount is not refundable to the buyer in the event he chooses to sell his lot back. This solution would avoid the question going forward and would allow cemeteries to keep those monies in their funds for the better maintenance of their cemeteries. The resale of the lot to a new owner would again contribute 30% of the sale price to the perpetual care fund.

For lots that have been sold, the cemetery can compensate the lot owner for the portion of the original sale price that was contributed to the perpetual care fund. Conversely, if a cemetery wants to grow the perpetual care fund, it can limit the purchase price of the lot to some amount, citing the statutory requirement to maintain a perpetual care fund.

We also note that the statute does not limit the requirement to deposit proceeds into the perpetual care fund to sale of lots by the cemetery. So a cemetery may require that the resale of a lot to the cemetery or to another person must also contribute the required amount to the perpetual care fund.

If the Cemetery Association wants to clarify this statute, we can assist you with introducing legislation next year to address this issue.

2. Do perpetual care funds need to be in a separate account? In other words, can the funds received from the sale of lots and perpetual care be placed in the same account to earn more interest as long as someone keeps a record of how much of the total is perpetual care funds.

Yes, the perpetual care fund must be kept separate from other funds. 13 M.R.S. § 1306 requires that a cemetery perpetual care fund be established and that at least 30 % of the proceeds received from the sale of lots and plots be deposited "in the fund." *Id.* This language indicates the Legislature's intent that the perpetual care fund be set apart from the rest of the proceeds generated by the sale of cemetery lots. This intention is reinforced by the statutory language that the perpetual care fund be kept distinct from any "permanent care and improvement fund" set up under 13 M.R.S. § 1348 which serves a similar purpose with respect to mausoleums. In addition, the legislative intent is supported by the exception to the requirement to create a perpetual care fund when "[t]he sale of a cemetery lot or plot that is subject to a contract for the perpetual care of the lot or plot or for general cemetery maintenance is exempt. . .as long as the contract requires that at least 30% of the proceeds from the sale of the lot or plot *be set aside* with the income from those funds to be used for cemetery maintenance".

It is also important to note that because the statute requires that “at least 30%” of the proceeds of lot and plot sales be deposited into the perpetual care fund, the State could take the position that monies combined with the required 30% are also a part of the perpetual care fund and are, therefore, subject to the same statutory restrictions. Thus, if 100% of the proceeds were deposited in a single account it is likely that the entirety would be subject to the restrictions on perpetual care accounts.

3. Can only the interest made on perpetual care funds be used for the maintenance and care of the cemetery or can a cemetery use some of the principal of the perpetual care towards maintenance and care of the cemetery?

The answer to this question is not clear in the statutes, but the better argument is that invading principal will defeat the legislative purpose of a perpetual fund. 13 M.R.S. § 1306 specifically provides that the income from the cemetery perpetual care fund must be devoted to maintenance of the cemetery. The statute does not specifically state how the principal amount of the fund must be used. Yet the purpose of the fund is to perpetually generate some funds to care for the cemetery. So if a cemetery expends the principal, the Legislature’s purpose would be thwarted.

On the other hand, one may argue that the overarching legislative goal for the fund is to adequately care for cemeteries. So if occasionally the maintenance needs of the cemetery require that some portion of the principal of the fund be expended, the cemetery should be free to do that in order to serve this broader purpose.

In sum, if the principal is used occasionally and with restraint, it will further the goal of ensuring that cemeteries are properly maintained; but if done without restriction, it will hinder the statute’s purpose of ensuring that maintenance funds be available for the long term. Stepping back, it appears that the general concern motivating this question, is that the perpetual care funds are not generating enough revenue for Members to keep up with their maintenance costs. A review of how this problem is handled in other states may be useful to putting together a strategy for seeking changes here.

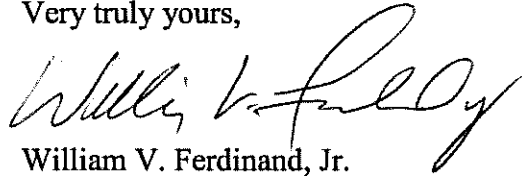
4. Does Title 13, Section 1341 limit the construction of columbaria to Cemeteries only? Members have heard that some churches are looking into constructing a columbarium on the church grounds for general use by church members.

The statute contains, at subparagraph(3), an exception to the rule that a columbarium may only be erected in a cemetery that is at least five acres in size and which has been in use for burial for two years. The exception says that “This section does not apply to a structure containing crypts erected or controlled by a church or religious society used for the remains of the clergy or dignitaries of the church or religious society.” 13 M.R.S. § 1341. Thus, I view the exception as limited to permitting columbaria operated by churches for the remains of clergy and "dignitaries". Churches are not permitted to construct and offer columbaria to regular church members or the general public.

You had also forwarded a question from Dana Ryder about merging cemetery associations. I spoke with Dana about his specific situation, and he will consult his own counsel to implement his plan.

Please contact me or Ryan Dumais if you require further information or advice.

Very truly yours,

A handwritten signature in black ink, appearing to read "William V. Ferdinand, Jr.", written in a cursive style.

William V. Ferdinand, Jr.