

Opinion No. 31

Cemetery District—Burial of the Dead—Section 9-201, et seq. RCM, 1947

Held: A Public Cemetery District created by Section 9-201, et seq., RCM, 1947, as amended by Chapter 4, Laws of 1955, may inter the dead or authorize private enterprise to conduct this task.

September 9, 1957

Mr. John L. McKeon
County Attorney
Anaconda, Montana

Dear Mr. McKeon:

You have requested my opinion whether a public cemetery district created by Section 9-201, et seq., RCM, 1947, as amended by

Chapter 4, Laws of 1955, must open and close graves or may authorize private enterprise to perform this task.

There is no express statutory provision in the above sections that requires a cemetery district to inter the dead. Nor is there any statute which prohibits the district from authorizing private enterprise to perform this work. It is a familiar principle of law that every power necessary to execute the power expressly granted is necessarily implied. See, *Panchot v. Leet*, 50 Mont. 314, 320, 146 Pac. 927. In this instance it must be determined whether the opening and closing of graves is a power that must be implied to give effect to the cemetery district.

Statutory provisions creating and regulating cemeteries are an exercise of the police power to protect public health. See, *Moritz v. United Brethren Church of States Island*, 199 N. E. 29, 32, 269 N. Y. 125; *Foster v. Mayor of City of Beverly*, 53 N. E. (2d) 693, 696, 315 Mass. 567. In *Mansher v. City of Oregon*, 198 Pac. 199, 205, 100 Ore. 435, the court stated: "The right of burial is usually deemed to be subject to reasonable rules and regulations promulgated by the proprietor of the cemetery." Similarly, cases have uniformly held that a city may promulgate rules and regulations for the management of a municipal cemetery. See, *Roanoke Cemetery Co. v. Goodwin*, 44 S. E. 486, 101 Va. 605; *City Council of Augusta v. Brandenburg*, 91 S. E. 496, 146 Ga. 459; *Ritchey v. City Corporate of Canton*, 46 Ill. App. 185, 187; *Ex parte Adlof*, 215 S. W. 225, 86 Tex. Crim. Rep. 13. The cited cases sustained the proposition that a city may limit the persons who can open and close graves.

Section 9-207, RCM, 1947, provides in part that the trustees ". . . shall adopt by-laws for the government and management of the district." Section 9-208, RCM, 1947, empowers the trustees to "perform all acts necessary or proper for the carrying out of the purposes of this act . . ." These sections authorize the trustees to promulgate regulations which promote and are beneficial to the cemetery district.

The trustees can establish a standard of burial which must be complied with before a person is interred. This will insure a proper burial for the deceased and avoid subsequent care and maintenance caused by improper burials. The purpose of the cemetery district act is not rendered ineffective when the interment of the dead is done by private enterprise and not by the cemetery district. There is nothing to indicate that a cemetery district can inter the dead better than private enterprise. Neither the courts nor the attorney general can substitute their judgment for the business acumen of the cemetery trustees. This is especially true where the statute is silent as to who must open and close graves. As stated in *State v. Lensman*, 108 Mont. 118, 128, 88 Pac. (2d) 63:

" . . . when an official duty is imposed and no mode of exercise is prescribed, the one who is required to perform such duty may adopt any mode reasonably suitable to carry the duty imposed into effect."

The trustees have the duty of governing and managing the district and may determine by whom the dead are interred.

It is therefore my opinion that a public cemetery district created by Section 9-201, et seq., RCM, 1947, as amended by Chapter 4, Laws of 1955, may inter the dead or authorize private enterprise to conduct this task.

Very truly yours,
FORREST H. ANDERSON
Attorney General