

VOLUME NO. 44

OPINION NO. 9

CEMETERY DISTRICTS - Authority of cemetery board of trustees to establish rules for purpose of clearing title to burial lots;
MONTANA CODE ANNOTATED - Sections 7-35-2109, 7-35-2110;
OPINIONS OF THE ATTORNEY GENERAL - 43 Op. Att'y Gen. No. 31 (1989),
27 Op. Att'y Gen. No. 31 (1957).

HELD: The board of trustees of a cemetery district has the authority to establish rules for the purpose of clearing title to burial lots.

March 6, 1991

John C. McKeon
Phillips County Attorney
P.O. Box 1279
Malta MT 59538

Dear Mr. McKeon:

You have requested my opinion on the following question:

Does the board of trustees of a cemetery district have the authority to establish rules for the purpose of clearing title to burial lots?

Prior to the formation of the Malta Cemetery District in 1957, the cemetery at Malta was operated by a cemetery association and the City of Malta. The records of the cemetery district and its predecessors have not been adequately maintained over the years, resulting in discrepancies between the record ownership and the actual ownership of some of the burial lots. The problem came to light when the heirs of a family interred in one of the lots wanted to make some improvements to the lot and discovered that the cemetery records showed ownership of the lot in another person's name. Although the cemetery district did not have any record of the transfer of ownership of this burial lot, the local funeral home had a notation in its records that such a transfer had taken place more than 40 years ago.

The bylaws of the Malta Cemetery District provide that any transfer or conveyance of a vacant cemetery lot is not effective until written evidence of the transaction has been filed with the secretary of the district. The bylaws also provide that a cemetery lot in which there has been a lawful interment is thereafter inalienable. However, the bylaws were not enacted until June 1, 1987.

Your question concerns the authority of the cemetery district to implement rules to resolve title discrepancies arising from the district's inadequate records. If such rulemaking authority does not exist, a legal proceeding in the nature of a quiet title action may need to be commenced to establish title to the burial lots.

The powers of the board of trustees of a cemetery district are set forth in section 7-35-2109, MCA. The trustees may maintain a cemetery or cemeteries within the district, hold title to property by grant, gift, devise, lease, or any other method, and perform all acts necessary or proper for the carrying out of the purposes of sections 7-35-2101 to -2125, MCA, including the selling or leasing of burial lots.

Specific rulemaking authority is provided to the trustees by section 7-35-2110, MCA, which states that the trustees "shall make proper rules for the management of the cemeteries."

In a recent Attorney General's Opinion which held that cemetery district trustees have authority to sell headstones and grave markers for use in the cemetery, I noted that the powers of local government units such as cemetery districts are to be liberally construed and include powers expressly or impliedly granted by statute. 43 Op. Att'y Gen. No. 31 (1989). The issue here is whether the authority to conform cemetery district records to reflect actual ownership of burial lots may be fairly implied from the powers granted to the trustees by statute. I conclude that the board of trustees has such authority.

It is well established that the purchaser of a cemetery lot does not acquire a fee simple interest; rather, he obtains a qualified property right or estate that is more in the nature of an easement, license, or privilege for the exclusive use of the lot for burial purposes, subject to the regulations of the owner of the cemetery grounds. See Evergreen-Washelli Memorial Park Co. v. Dept. of Revenue, 574 P.2d 735 (Wash. 1978), citing Mansker v. Astoria, 198 P. 199 (Or. 1921); Hammerstein v. Woodlawn Cemetery, 194 N.Y.S.2d 385 (N.Y. Sup. Ct. 1960); Schaefer v. West Lawn Memorial Cemetery, 352 P.2d 744 (Or. 1960); 14 Am. Jur. 2d Cemeteries § 25 (1964); 14 C.J.S. Cemeteries § 25 (1939). See also §§ 70-17-101, 70-17-102, MCA (right of burial is land burden or servitude upon land). The ordinary incidents of ownership of real property do not attach to ownership of a cemetery lot, and the rules of real estate conveyancing and devolution do not afford a safe guide for the transfer of rights in a cemetery lot. See Hammerstein, supra. As you have noted in your letter of inquiry, transfers of interests in cemetery lots are not normally recorded at the local clerk and recorder's office; such transfers, however, may be indicated in other documents, such as funeral home records.

Although the district's power to maintain and revise records of cemetery lot ownership is not expressly provided by statute, I find that such a power must be implied to give effect to the statutory authority of the district to manage and maintain the cemetery and perform all acts necessary to carry out the purposes of the cemetery. See 27 Op. Att'y Gen. No. 31 at 68 (1957). The district may adopt rules which set forth a procedure for resolving discrepancies between the cemetery's records and the actual ownership of cemetery lots. The rules may take into account other documents which indicate transfers of interests in the lots or otherwise establish ownership of the lots. The rules may also take into account statutory provisions which may have applied to the predecessor cemetery association, such as section 35-20-216, MCA (if a cemetery lot belonging to an association has been transferred to an individual proprietor and there has been an interment in the lot, that lot from the time of interment is forever inalienable), as well as general

principles of the common law pertaining to adverse possession of cemetery lots (see 3 Am. Jur. 2d Adverse Possession § 265 (1986), 2 C.J.S. Adverse Possession § 11 (1972), indicating that a cemetery lot may be acquired by adverse possession or prescription). Of course, the cemetery district may still have to initiate or participate in a legal proceeding to establish ownership of a particular lot where two or more bona fide claimants seek to exercise or confirm their rights to the exclusive use of the lot. See Gallaher v. Trustees of Cherry Hill Methodist Episcopal Church of Cherry Hill, 399 A.2d 936 (Md. Ct. Spec. App. 1979).

THEREFORE, IT IS MY OPINION:

The board of trustees of a cemetery district has the authority to establish rules for the purpose of clearing title to burial lots.

Sincerely,

MARC RACICOT
Attorney General