TO BE PUBLISHED IN THE OFFICIAL REPORTS

OFFICE OF THE ATTORNEY GENERAL
State of California

GEORGE DEUKMEJIAN
Attorney General

OPINION	:	No. 82-312
of	:	JUNE 22, 1982
GEORGE DEUKMEJIAN Attorney General	:	
Victor D. Sonenberg Deputy Attorney General	:	

The CEMETERY BOARD has requested an opinion on the following question:

Do the statutes governing the operation of cemeteries permit a cemetery authority to transfer an endowment care fund to a corporation which is not a bank or trust company qualified under California law to engage in the trust business?

CONCLUSION

The statutes governing the operation of cemeteries do not permit a cemetery authority to transfer an endowment care fund to a corporation which is not a bank or trust company qualified under California law to engage in the trust business.

ANALYSIS

The present question concerns the statutory limitations upon the types of entities that may hold and manage a cemetery endowment care fund. This question arises out of a situation where a "cemetery authority" (i.e., the owner of a cemetery (Health & Saf. Code, § 7018))[1] has created a wholly owned separate corporation to hold and manage its endowment care fund. An endowment care fund is a fund established by a cemetery authority which is invested to provide income to be used only for the "care, maintenance, and embellishment" of the cemetery. (§§ 8726, 8728, 8750.) The Legislature has declared that the fund's providing of such care to a cemetery fulfills a duty to those interred there and benefits and protects the public by preventing cemeteries from becoming "places of reproach and desolation in the communities in which they are situated." (§ 8736; see 18 Ops.Cal.Atty.Gen. 272, 274 (1951).)

The initial creation of an endowment care fund is provided for by the requirement that before selling any plots the cemetery deposit in such a fund $25,000 or $35,000 if the cemetery was established after 1976. (§ 8738.1.) Additionally, the cemetery, prior to the initial sale of a plot, must deposit a specified amount in the fund, depending on the type of plot sold or disposed of. (§ 8738; see 18 Ops.Cal.Atty.Gen. 272, *supra*, at p. 274.) The cemetery also may collect from all purchasers, subsequent to its adoption of a maintenance or embellishment plan, a reasonable sum to apply to the endowment care fund. (§§ 8728, 8729.) The endowment care fund of a cemetery must be kept separate from all other funds of the cemetery. (§§ 8726, 8738.2; 28 Ops.Cal.Atty.Gen. 321, 322 (1956).)

Every cemetery authority may establish and operate an endowment care fund for its cemetery. (§ 8725.) However, an endowment care fund is mandatory with respect to every private cemetery (i.e., nonchurch or nonpublicly owned cemetery (§ 8250)) established after September 7, 1955. (§ 8739.1.)

The question who may hold such a fund is primarily governed by section 8725 which in relevant part provides that "[t]he funds may be held in the name of the cemetery authority or its directors or in the name of the trustees appointed by the cemetery authority." With respect to the appointment of such trustees, section 8731 provides:

> "The cemetery authority may appoint a board of trustees of not less than three in number as trustees of its endowment care fund. The members of the board of trustees shall hold office subject to the direction of the cemetery authority."

[1] Hereafter all section references are to the Health and Safety Code unless otherwise specified.

However, an alternative to the appointment of a board of trustees is afforded by section 8733.5 which provides:

> "In lieu of the appointment of a board of trustees of its endowment care fund, any cemetery authority may appoint as sole trustee of its endowment care fund any bank or trust company qualified under the provisions of the Bank Act of the State of California to engage in the trust business."[2]

The specific question we consider is whether under these statutes a cemetery authority may transfer the endowment care fund to a corporation which is not a bank or trust company qualified under California law to engage in the trust business.[3] As can be seen from the sections set forth above, the Legislature has specified only four types of entities as being authorized to hold an endowment care fund: (1) a cemetery authority (§ 8725); (2) its board of directors (*ibid*.);[4] (3) a board of at least three trustees appointed

---

[2] The Bank Act (Stats. 1909, ch. 76, p. 87) was repealed and superseded in 1949 by the statute enacting the Banking Code. (Stats. 1949, ch. 755, § 1, 3450, pp. 1376, 1488.) However, the Banking Code provided that it was to "be construed as restatements and continuations" of substantially similar statutes on the same subject, "and not as new enactments." (*Id*., § 2, p. 1376.) Likewise, the statute enacting the present Financial Code (Stats. 1951, ch. 364) which superseded and repealed the Banking Code (*id*., § 50001, p. 1158) also provided that it was to "be construed as restatements and continuations" of substantially similar statutes on the same subject, "and not as new enactments." (*Id*., § 2, p. 829.) Thus, in effect, the Bank Act was continued and restated in these successive statutes. The significance of such continuations is addressed by Government Code section 9604 which provides:

> "When the provisions of one statute are carried into another statute under circumstances in which they are required to be construed as restatements and continuations and not as new enactments, any reference made by any statute, charter or ordinance to such provisions shall, unless a contrary intent appears, be deemed a reference to the restatements and continuations."

Accordingly, reference in section 8733.5 to the now-repealed Bank Act must be deemed to refer to the pertinent provisions of that act as restated and continued in the Financial Code. (See *Valley Electric Co*. v. *Slagle* (1956) 142 Cal.App.2d 81, 83-84; and see 3 Ops.Cal.Atty.Gen. 168, 169 (1944).)

[3] We note that a cemetery authority must itself be a corporation (§ 8252) and that a cemetery authority may hold an endowment care fund (§ 8725). We thus assume that the question refers to a transfer to a corporation other than the cemetery authority.

[4] The ability of the directors of a cemetery authority to act as the board of trustees of the endowment care fund has been substantially restricted by the enactment in 1976 of the present section 8732 (Stats. 1976, ch. 729, § 6, p. 1753) which provides that not more than one member of the fund's board of trustees "may have a proprietary interest in the cemetery authority."

by the cemetery authority (*ibid*., § 8731); and (4) a qualified bank or trust company as sole corporate trustee (§ 8733.5). Thus the only corporation, other than the cemetery authority itself, specified in the legislative enumeration of entities authorized to hold the endowment care fund is a qualified bank or trust company.[5] The section authorizing such sole corporate trustees, section 8733.5, was enacted in 1941 (Stats. 1941, ch. 176, § 1, p. 1220), ten years after the Legislature specified the other entities authorized to hold endowment care funds. (Stats. 1931, ch. 1148, § 16, p. 2442.) Thus in an unpublished opinion issued by this office before the enactment of section 8733.5, it was concluded that an endowment care fund could not be turned over to a corporate trustee even if it was a trust company. As that opinion stated: "Apparently the statute had in mind that the board of trustees was to be a deliberative body and that individuals as distinguished from corporate entities were to serve thereupon." (Atty.Gen. unpub. op., L.B. 184, p. 176 (Jan. 27, 1940).)

Thus in subsequently providing that "[i]n lieu of the appointment of a board of trustees of its endowment care fund" the cemetery authority could appoint as sole trustee a bank or trust company legally qualified to be in the trust business (§ 8733.5), the Legislature was instituting an exception to the requirement that the fund be held by a board of trustees or by the cemetery authority itself. Since that exception is confined to corporations qualified to be in the trust business, it would be inappropriate for us to construe the provision to encompass corporations not so qualified and thus enlarge the exception. As was stated in *Harris* v. *Alcoholic Beverage Control Appeals Board* (1962) 201 Cal.App.2d 567, 571: "An exception to a statute is to be narrowly construed. [Citation omitted.] When a statute specifies an exception, no others may be added under the guise of judicial construction." (*Accord*, *Lacabanne Properties, Inc.* v. *Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 189.)

Nevertheless, it has been urged that when a cemetery authority transfers an endowment care fund to a corporation it wholly owns, it is complying with the statute even though the corporation is not qualified as a trust company. The reasoning is that the statute expressly allows a cemetery authority to hold an endowment care fund (§ 8725) and that by transferring the fund to its wholly owned corporation the cemetery authority is, in effect, holding the fund. It is our opinion, however, that the indirect holding of an endowment care fund under such circumstances is not countenanced by the statute.

By providing that a cemetery authority could transfer an endowment care fund to a board of trustees which it appointed (§§ 8725, 8731) and which held office subject to its direction (§ 8731), the Legislature has expressly demonstrated its awareness of the possibility of the cemetery authority's transferring the fund to a separate entity which it

[5] Under California law banks and trust companies must be corporations. (Fin. Code, §§ 102, 107, 1501; Ins. Code, § 12392; 34 Ops.Cal.Atty.Gen. 27, 28 (1959).)

created and controlled as opposed to its direct holding of the fund. But in expressly specifying that such separate entity be a board of trustees with at least three members, unless it was a bank or trust company qualified to engage in the trust business (§ 8733.5), the clear implication is that the Legislature intended to preclude transfers to entities of a type it did not specify whether or not such entities are wholly owned by a cemetery authority.

> ". . . '"In the grants [of powers] and in the regulation of the mode of exercise, there is an implied negative; an implication that no other than the expressly granted power passes by the grant; that it is to be exercised only in the prescribed mode . . . ."'" (*Wildlife Aliv*e v. *Chickering* (1976) 18 Cal.3d 190, 196.)

See also *Garson* v. *Juarique* (1979) 99 Cal.App.3d 769, 774:

> "Since the ordinance in question expressly mentioned several particular means . . . [of compliance] yet omitted to mention the possibility of compliance through other conceivable means . . . an inference arises that the means enumerated were intended to be exclusive."

And see *Kirby* v. *Alcoholic Bev. etc. App. Bd*. (1969) 3 Cal.App.3d 209, 221.

Consequently, in construing the statute which explicitly specifies those entities which may hold an endowment care fund, we decline to interpose an additional alternative which was not specified by the Legislature. As stated in *Cemetery Board* v. *Telophase Society of America* (1978) 87 Cal.App.3d 847, 858: "It is well established that it is not the proper function of the courts to supply legislative omissions from a statute in an attempt to make it conform to a presumed intention of the Legislature not expressed in the statutory language."

We therefore conclude that an endowment care fund cannot be transferred to a corporation that is not a bank or trust company qualified under California law to engage in the trust business.

*****