

July 19, 2011

OFFICIAL OPINION 2011-5

The Honorable Dan J. Leonard
Indiana House of Representatives
200 W. Washington St.
Indianapolis, IN 46204

RE: Cemetery Perpetual Care Funds

Dear Representative Leonard:

You recently asked whether Cemetery Perpetual Care Funds established under Ind. Code Chpt. 23-14-48 are subject to Ind. Code Chpt. 30-2-12 (“the Uniform Management of Institutional Funds statute.”)

BRIEF ANSWER

The Uniform Management of Institutional Funds statute does not apply to a cemetery perpetual care fund for a cemetery organized and having its first burial after March 6, 1953. It would apply to a perpetual care fund established prior to that date if the fund is not administered by an outside trustee. Regardless of the date of establishment, a cemetery perpetual care fund must comply with the Indiana Uniform Prudent Investor Act (Ind. Code Chpt. 30-4-3.5).

ANALYSIS

The statutory requirements for administration of cemetery perpetual care funds vary depending on the date the fund was established. For a cemetery organized and having its first burial after March 6, 1953, Ind. Code § 23-14-48-4 and Ind. Code § 23-14-48-5 require that the cemetery owner deposit the fund in a financial institution, and designate the financial institution as trustee of the fund. Those trust funds are not subject to the Uniform Management of Institutional Funds statute. The Uniform Management of Institutional Funds statute governs endowments and other charitable funds that are managed by the institution rather than an outside trustee such as a financial institution. Prior to 2007, the statute applied only to college and university endowments, non-profit endowments valued at ten million dollars or more, and community foundations. Public Law 226-2007 expanded the scope of the statute to include “institutional funds” held by a charitable institution exclusively for charitable purposes. Ind. Code § 30-2-12-1.3 defines “charitable purpose” broadly to include “any other purpose the achievement of which benefits the community.” Although the maintenance of a cemetery is not obviously a “charitable purpose,” Ind. Code § 23-14-50-2 states that cemetery perpetual care funds established under Ind. Code Chpt. 23-14-48 are considered to be for a charitable purpose, specifically, “(1) the discharge of a duty due from the person or persons contributing to the fund to the person or persons whose remains are or will be interred in the cemetery; and (2) for the benefit and protection of the public by preserving, beautifying, and keeping cemeteries from becoming places of reproach and desolation

in the communities in which they are situated.” The second purpose in particular brings cemetery care funds under the definition of “charitable purpose” in Ind. Code § 30-2-12-1.3.

Although cemetery perpetual care funds are held for charitable purposes, the Uniform Management of Institutional Funds statute does not apply to those funds if they are held by an outside trustee. Ind. Code § 30-2-12-6(1) excludes from the definition of “institutional fund” a fund held by a trustee that is not an institution as defined in Ind. Code § 30-2-12-5. Ind. Code § 30-2-12-5 defines “institution” as follows:

- (1) A person, other than an individual, that is organized and operated exclusively for charitable purposes.
- (2) The state, including any agency or instrumentality of the state, or a unit of local government to the extent that the state or unit holds funds exclusively for charitable purposes.
- (3) A trust that has only charitable interests, including a trust:
 - (A) that previously had both charitable and noncharitable interests; and
 - (B) the noncharitable interests of which were previously terminated.

A financial institution acting as trustee of a cemetery fund is not an institution. Therefore, a cemetery perpetual care fund that is in a trust administered by a financial institution is not subject to the Uniform Management of Institutional Funds statute. The statute does not apply to any fund established after March 6, 1953, as well as funds established prior to that date if they are in a trust administered by a financial institution or other entity that is not an “institution” as defined in Ind. Code § 30-2-12-5.

A cemetery perpetual care fund established prior to March 6, 1953 could be administered by a trustee that is a non-profit entity, for example, by the cemetery or cemetery association. Such a fund would come within the scope of Ind. Code Chpt. 30-2-12, and must be administered in compliance with the terms of that statute.

Regardless of the date it was established, and regardless of the type of trustee, a cemetery perpetual care fund must comply with the Indiana Uniform Prudent Investor Act (Ind. Code Chpt. 30-4-3.5). The Indiana Uniform Prudent Investor Act governs trust administration generally, and it applies to both charitable and non-charitable trusts. It expressly applies to “a trustee or escrow agent, acting as a fiduciary of ... a perpetual care fund or an endowment care fund established under IC 23-14-48-2.” Ind. Code § 30-4-3.5-1(c). Funds established prior to March 6, 1953, and administered by a trustee that is a non-profit entity must comply with both the Uniform Management of Institutional Funds statute (Ind. Code Chpt. 30-2-12) and the Indiana Uniform Prudent Investor Act (Ind. Code Chpt. 30-4-3.5).

CONCLUSION

The Uniform Management of Institutional Funds statute applies to a cemetery perpetual care fund only if it is managed by a charitable institution, which could include only certain funds established prior to March 6, 1953. The statute would not apply to any fund established after that date, because

such a fund must be managed by a financial institution. All cemetery perpetual care funds established under Ind. Code § 23-14-48-2 must comply with the Indiana Uniform Prudent Investor Act (Ind. Code Chpt. 30-4-3.5).

Sincerely,

Gregory F. Zoeller
Attorney General

Donna Stolz Sembroski
Deputy Attorney General