

Governance Best Practices For Minnesota Cemeteries and Cemetery Foundations

MN Association of Cemeteries Annual Conference

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Agenda

1. Minnesota Cemetery Law
2. Governance Structures
3. Fiduciary Duties and Related Concepts
4. Tax Exemption
5. Establishing a Cemetery Foundation

Minnesota Public Cemetery Law

- Minnesota General Statutes (1800s)
- Chapter 306: Public Cemeteries Statute
 - Current statute governing MN cemetery associations
 - Not all parts applicable to all cemeteries (depends on size, location, geography, religious status, etc.)
 - Many parts are considered outdated
- Chapter 317A: Minnesota Nonprofit Corporation Act
 - Some cemetery associations have formed under Chapter 317A, despite technical inapplicability
 - Reflects current best practices in governance for “nonprofit” corporations
- Which law(s) apply to us?
 - It might depend on your history
 - Chapters 306 and 317A in particular can be instructive as to current best practices

Cemetery Governance Structures

- Board of Trustees or Board of Directors
 - Provide oversight of the operations and strategic direction of the cemetery
 - Primary oversight body
- Board of Associates
 - Optional, broader group
 - Can be given authority such as electing Trustees, approving certain actions by the Trustees, etc.
- Officers
 - Flexible: President, Secretary, Treasurer, Superintendent, Actuary
 - 317A requires a President and Treasurer
- Advisory Bodies
 - Optional
 - Typically provide advice and recommendations to the Board

Board Meetings and Actions

- Meetings of Board of Trustees and Board of Associates
 - Remote participation is likely ok
 - Record minutes of meetings and actions
 - Level of detail
 - Written actions
 - Including via email
 - Not specifically addressed by Chapter 306
 - Unanimous approval is less likely to be challenged

Permanent Care and Improvement Fund

- Required for cemeteries larger than 10 acres or in or adjacent to a city of more than 50,000
- Optional for others
- Can be spent on care, maintenance, and improvement of cemetery or, up to 50% of the fund to build a chapel, greenhouse, or other building
- Cemeteries must allocate 20% of proceeds of lot sales and 10% of sales of mausoleum space to PCIF
- PCIF generally must have at least 3 individual trustees or a trust company serving as trustee
- Very conservative investment limitations may apply
- Limits on trustee compensation
- Cemeteries larger than 10 acres must make an annual report to the county auditor

Fiduciary Duties of Trustees

- Chapter 306 is silent on Trustee fiduciary duties
- Chapter 317A contains fiduciary duty standards for directors of nonprofit corporations
 - Highly developed statutes and case law on fiduciary duties
 - Courts will likely look to Chapter 317A as a reference as to the rules that apply to conduct of the trustees of a MN cemetery
- We will review 317A standards as illustrative of “best practices”

Duties of Trustees

Care

Loyalty

Obedience



Duties of Trustees—Care

Trustees must discharge the duties of the position with the care an ordinarily prudent person in a like position would exercise under similar circumstances.

Duty of Care

Be reasonably acquainted with matters before the Board

- Attend meetings, actively participate
- Understand the business
- Receive sufficient information
- Review and understand materials

Make reasonable inquiry

- Ask questions
- Question assumptions
- If something does not make sense, inquire

Act with common sense and informed judgment

- Use own judgment
- Balance risks and rewards of each action
- Board actions: Don't agree if you don't agree

Exercise oversight

- Keep informed about operations
- Monitor corporate activities
- Monitor finances, compare actual to budget, audits
- Committees: Authority to act or recommend

Duties of Trustees—Loyalty

A Trustee shall discharge the duties of the position in good faith, in a manner the Trustee reasonably believes to be in the best interests of the cemetery.



Duty of Loyalty

- Cannot:
 - Agree to exercise official duties for the benefit of any individual or interest other than the cemetery itself
 - Use position for own benefit
- Appropriately address Conflicts of Interest
 - Full disclosure
 - Determination of whether conflict exists
 - Person not involved in voting
 - Board determines if fair and reasonable
 - Documents basis for decision
- Conflict of Interest Policy

Duties of Trustees—Obedience

A Trustee must ensure the organization:

- Carries out its mission as established in the Articles and Bylaws**
- Has adequate policies, expertise, resources, and assistance to comply with its legal obligations**



Duty of Obedience

- Be familiar with the laws that govern the cemetery
 - Chapters 306, 317A, older MN statutes
 - Sales tax and property tax
 - FICA and income tax withholding
 - Unemployment and workers' compensation obligations
 - IRS regulations
- Ensure cemetery has adequate policies, expertise, resources to comply
- Bring in outside assistance as needed

Related Concepts: Reliance

- In discharging duties, a trustee may rely on information, opinions, & reports prepared by the following unless director has knowledge that reliance is unwarranted:
 - Employees
 - Legal counsel
 - Accountants
 - Other professionals
 - Board committees

Related Concepts: Reliance

- Experts must be competent
- If suspicions, duty of care requires that director investigates
- In order to rely, must have actually relied
 - must have had the information at the time of the decision
 - ‘backdating’ or completing professional evaluation after the fact won’t work

Related Concepts: Delegation

- Delegation is permitted (and expected)
- Trustees are not personally responsible for the acts or omissions of officers, employees or agents, if authority has been properly delegated to such individuals.
- Should keep record of extent of delegation
- Delegation must be done with care
 - Don't delegate to someone who cannot perform



Related Concepts: Exoneration

- A trustee is not liable to the corporation, any member, or any other person for *any action taken or not taken as a director*, if the trustee acted in compliance with fiduciary duties
- Volunteer trustees of tax-exempt organizations (likely including cemeteries) are immune from many forms of liability relating to their good faith actions within the scope of their responsibilities.



Best Practices and Common Trouble Areas

- Know your key annual filings and actions
 - Annual renewal with MN Secretary of State (317A only)
 - Administrative dissolution
 - Form 990 with IRS
 - Provide to Board prior to filing
 - Form 990-N and auto-revocation
 - MN Attorney General registration
 - Only required if you have a 501(c)(3) cemetery foundation
 - Conflict of Interest disclosures
 - Annual report to county auditor regarding PCIF



Best Practices and Common Trouble Areas

- Keep mission front and center
 - Watch for mission drift
 - Activities unrelated to or broader than the organization's mission
 - Might not be permitted for a cemetery association
 - Can generate UBTI (taxable)
 - Can jeopardize tax-exempt status if more than insubstantial amount (for c3s)
 - 501(c)(13) says nonprofit cemetery companies cannot engage in any business not necessarily incident to burial or cremation
 - Periodic review of exempt status
 - Read Form 1024 (if applicable)
 - Some room for natural growth of mission

Tax Exemption for Cemeteries

- Internal Revenue Code Section 501(c)(13)
 - Provides for exemption from federal income tax for cemetery associations
 - Net income exempt from tax each year
- How to obtain 501(c)(13) tax-exempt status
 - “Self-declaring” exempt status
 - Form 1024 exemption application
 - Receive IRS Determination Letter
- Annual Filing of IRS Form 990
 - Form 990-N “postcard” ok if gross receipts normally \$50,000 or less
- Property Tax Exemption
 - Cemeteries are automatically exempt from property tax in Minnesota

Is a Cemetery Foundation Right for Us?

- What is a Cemetery Foundation?
 - Separate 501(c)(3) organization
 - Sole mission is to support charitable endeavors related to its affiliated cemetery
- Why form a Cemetery Foundation?
 - Can help support fundraising with individual and institutional donors
 - Contributions to a 501(c)(13) cemetery are deductible under Code Section 170(c)(5)
 - However, detailed IRS history regarding deductibility of bequests vs inter vivos gifts to 501(c)(13) orgs
 - Some deductible, some not, some limitations on deductibility based on donor's AGI
 - Private foundations and community foundations may require grantees to be 501(c)(3) organizations
 - Donors are comfortable giving to 501(c)(3) organizations
 - Many donors, accountants, and estate administrators are not familiar with gifts to 501(c)(13) cemetery associations
 - Can greatly benefit capital campaigns, seeking large bequests from donors, or other significant fundraising campaigns
 - Funds can be held and used for purposes similar to PCIF funds without PCIF investment restrictions
 - Liability protection of assets, endowment

Cemetery Foundations: Funds Flow

- What can a Cemetery Foundation fund?
 - Broad range of activities by the Cemetery
 - Educational activities
 - Maintaining monuments, headstones, and markers of historical or architectural significance
 - Educational materials – tour maps, brochures
 - Materials on the history of the cemetery
 - Learning activities with local schools
 - Strategic plan for the cemetery
 - Events, tours, workshops open to the public to promote cemetery's cultural, historic, and natural resources
 - Preservation, Restoration, and Beautification
 - Restoring abandoned or deteriorating graves
 - Care and replacement of trees, flowers, shrubbery, and lawns
 - Funds for tree maintenance
 - Erosion control
 - Maintaining public spaces

Relationship of Foundation and the Cemetery

- Respecting Corporate Formalities
 - Important to treat Cemetery and Foundation as two separate organizations
 - Maintains liability shield
 - Separate board meetings, minutes, financials, bank accounts
- Governance of the Foundation
 - Foundation can have same or different Trustees and officers
 - If same persons, they wear two “hats”
- Shared Space and Services Agreement
 - Describes how Cemetery and Foundation share space and staff
 - OK for all space and staff to stay with the Cemetery and be provided to the Foundation
 - Can charge a fee or provide at no charge to the Foundation

Relationship of Foundation and the Cemetery (cont.)

- How does the Foundation transfer funds to the Cemetery?
 - Should be structured as arms'-length transfers
 - Made as grants from the Foundation to the Cemetery for charitable purposes
 - Foundation Board approves periodic grant distributions to fund specific cemetery activities
 - Foundation can pay for activities directly
 - May pay third party vendors
- Consider alternatives:
 - Fiscal sponsorship
 - Related org
 - Community foundation
 - Beneficiary fund at a community foundation

Questions?

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