

IN THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA
DIVISION I

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BARBARA A. COFFE
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JUDGE

IN RE:

Case No. 06 P-122
FRED L. FOX, II

PETITION FOR APPOINTMENT OF
TRUSTEES FOR WOODLAWN CEMETERY

ORDER DENYING "MOTION OF WOODLAWN CEMETERY
COMPANY, AND ITS BOARD OF DIRECTORS, JACK LEE DECKER,
PRESIDENT, TO RECONSIDER ORDER GRANTING PETITION FOR
APPOINTMENT OF TRUSTEES FOR WOODLAWN CEMETERY"

On 29 December 2006, a "Motion of Woodlawn Cemetery Company, and Its Board of Directors, Jack Lee Decker, President, to Reconsider Order Granting Petition for Appointment of Trustees for Woodlawn Cemetery" was filed by Gregory H. Schillace, Esquire.

On 12 January 2007, a "Response to Motion to Reconsider Order Granting Petition for Appointment of Trustees for Woodlawn Cemetery" was filed by Neal Jay Hamilton, Esquire.

Having closely reviewed the motion and the response, as well as the 14 December 2006 "Order Granting 'Petition for Appointment of Trustees for Woodlawn Cemetery'", this Court is of the opinion to and does hereby **ORDER** that the "Motion of Woodlawn Cemetery Company, and Its Board of Directors, Jack Lee Decker, President, to Reconsider Order Granting Petition for Appointment of Trustees for Woodlawn Cemetery" be, and the same is, **DENIED**.

It is further **ORDERED**, again, that all records of Woodlawn Cemetery be preserved and possession be forthwith transferred from

the Board of Directors to the Board of Trustees.

The Circuit Clerk is hereby directed to provided certified copies of this Order to Neal Hamilton, Esquire, Post Office Box 509, Fairmont, West Virginia 26555-0509 and to Gregory H. Schillace, Esquire, Schillace Law Office, Huntington Bank Building, Suite 303, Post Office Box 1526, Clarksburg, West Virginia 26302-1526.

ENTER: 18 JANUARY 2007

Fred L. Fox, II

FRED L. FOX, II, CIRCUIT JUDGE

A COPY

TESTE:

Robert P. Cove
CLERK OF THE CIRCUIT CLERK
MARSHALL COUNTY, WEST VIRGINIA

FINAL ORDER

IN THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA
DIVISION I

IN RE:

Case No. 06-P-122
FRED L. FOX, II, JUDGE

PETITION FOR APPOINTMENT OF
TRUSTEES FOR WOODLAWN CEMETERY

ORDER GRANTING "PETITION FOR APPOINTMENT
OF TRUSTEES FOR WOODLAWN CEMETERY"

This case came before the Court on 04 December 2006 for hearing on the "Petition for Appointment of Trustees for Woodlawn Cemetery" filed by John D. Hardesty, Jr., William B. Wagner, Frank Clark, Jr., Janice Watkins Cosco, and Douglas A. Hutchinson (hereinafter "Petitioners") on 18 September 2006. The Petitioners were present in person and were represented by Neal J. Hamilton, Esquire. Jack L. Decker and Arlene L. Edgell appeared, acting pro se, in opposition to the petition. Notice of the petition and hearing was published in the Times West Virginian on 31 October 2006 and 07 November 2006.

After having reviewed the briefs, arguments, and evidence, and after having researched the legal issues presented, the Court is of the opinion that the "Petition for Appointment of Trustees for Woodlawn Cemetery" should be granted. In support of this ruling, the Court makes the following findings of fact and conclusions of law:

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Findings of Fact

1. The first person was buried in the Woodlawn Cemetery on 18 April 1875. The Woodlawn Cemetery Company was formed on 07 January 1887 and it was incorporated on 19 December 1935. On 14 April 2006 the Woodlawn Cemetery was entered in the National Register of Historic Places.

2. On 28 February 1974, George M. Amos, Jr. deposited a check in the amount of ten thousand dollars (\$10,000.00) into the "Woodlawn Cemetery Company Perpetual Care Trust" as required by statute. The Trust currently holds thirty-five thousand dollars (\$35,000.00) in perpetual care funds for the cemetery's care. The bank makes annual disbursements from the fund for use in maintaining the cemetery.

3. In 1996, the Board of Directors of the Woodlawn Cemetery apparently experienced a reorganization/shake-up. Then-president David Nuzum resigned as President of the Board of Directors. Jack L. Decker became a member of the Board of Directors.

4. Jack L. Decker has been instrumental in maintaining the Woodlawn Cemetery and has acted on its Board of Directors since the 1996 meeting. The current members of the Board of Directors are: Jack L. Decker,

President; Arlene L. Edgell, Vice President; Susan Brown, Secretary; and Chris Decker, Treasurer. They are all members of the same family.

5. The current Board of Directors has maintained records for the cemetery, sold burial plots, and utilized disbursements from the perpetual care fund to care for the cemetery. All of the funds from burial fees and the sale of plots under Mr. Decker's tenure has been immediately re-allocated to the maintenance and upkeep of the cemetery. Aaron Hawkins, Senior Vice President and Trust Officer at Wesbanco, testified that he received income statements and deposits from the Woodlawn Cemetery Board prior to 1996. He testified that he has not received any income statements or deposits from the Board since 1996.¹

6. J. Mark Trach testified that he was present at the 1996 meeting and does not recall voting Mr. Decker to the Board of Directors. Mr. Trach was a member of the Board of Directors at that time but had to resign due to his other commitments. The other

Mr. Hawkins testified that he received one donation as a memorial gift to the Trust in the name of a person laid to rest in Woodlawn Cemetery in 2003, which was deposited in the perpetual care fund. Mr. Hawkins also testified that one of the disbursements from the Trust was re-deposited in the Trust fund in 1999.

members of the Board of Directors at that time are now deceased.

7. The Petitioners each have family members buried in the Woodlawn Cemetery, per the statutory requirements.

Conclusions of Law

1. West Virginia Code § 35-5-1 provides that:

Where any conveyance, dedication or devise was made of land for burial grounds, to any church, religious sect, society, congregation or denomination, or to any benevolent, fraternal, patriotic, literary, temperance, or charitable society, order, lodge or association, that has dissolved or become extinct in the county and vicinity where such burial grounds are situated, and the trustees of same have removed or died, the circuit court of such county, upon the application of five or more persons having relatives buried in such burial grounds, shall appoint five trustees, who for the time being and their successors shall be invested with all the powers necessary to promote and carry out the object and purpose named in such conveyance, dedication or devise.

The Code provides that:

There is hereby authorized the creation of permanent endowment funds for cemetery associations to be known as "permanent endowment funds," the income from which is to annually spent by such cemetery associations, or their successors, in beautifying and maintaining cemeteries owned or controlled by such associations. The "permanent endowment funds" are to be created by depositing in such funds all permanent funds derived from all sources set apart by the board of directors of such associations, and by donations, gifts and bequests made to such

cemetery associations for such purpose.

W.Va. Code § 35-5-3:

2. The West Virginia Legislature established regulations for the operation of perpetual care cemeteries. The Legislature was clear that:

No person operating an established perpetual care cemetery in West Virginia on or before the first day of July, one thousand nine hundred seventy-three, shall continue to operate such cemetery without creating a permanent endowment fund and making regular deposits to such fund as required in section four [§ 35-5A-4] of this article and entrusting the administration of such fund as required in section five [§ 35-5A-5] of this article.

W.Va. Code § 35-5A-3 (in part). West Virginia Code

§ 35-5A-4 provides that:

No person shall operate or continue to operate any perpetual care cemetery in the State of West Virginia after the first day of July, one thousand nine hundred seventy-three, without placing into a permanent endowment care fund ten dollars or ten percent of the gross sales proceeds, whichever is greater, received from the sale of any burial right or lot and not less than five percent of the gross sales proceeds from the sale of any entombment right or columbarium right. This sum shall be placed in the permanent endowment care fund not later than thirty days following the month in which the entire gross sales proceeds are received.

3. It is clear that the funds from the sale of burial plots was not placed in the permanent endowment fund as directed by statute. The Board members

originally entrusted with perpetuation of the perpetual care cemetery have resigned or passed away. The members of the current Board of Directors have somewhat effectively managed the upkeep of the Woodlawn Cemetery; however, they have not fulfilled the requirements of a Board of Trustees as required by state law.

4. It is this Court's opinion that the appointment of a Board of Trustees will better serve the families who have loved ones buried in the cemetery, as well as the whole community. A Board of Trustees will be able to apply for more grant money, organize additional fund-raising activities and manage the development of this historical landmark, while effectuating the statutory requirements for a perpetual care cemetery. This Court is not unmindful of the valuable services provided in the past by Mr. Decker and the current Board of Directors with regard to the day-to-day upkeep and operations of the Woodlawn Cemetery, and would point out that perhaps an agreement could be reached whereby Mr. Decker would continue to provide these services under the guidance of the Board of Trustees.

Accordingly, for the reasons set forth in the foregoing, the Court is of the opinion to, and does, hereby **ORDER** that the "Petition for Appointment of Trustees for Woodlawn Cemetery" be, and the same is, hereby, **GRANTED**. Petitioners John D. Hardesty, Jr., William B. Wagner, Frank Clark, Jr., Janice Watkins Cosco, and Douglas A. Hutchinson are hereby **APPOINTED** as Trustees of the Woodlawn Cemetery. It is further **ORDERED** that all records of Woodlawn Cemetery be preserved and possession be forthwith transferred from the Board of Directors to the Board of Trustees.

The Circuit Clerk of Marion County is directed to provide certified copies of this "Order Granting 'Petition for Appointment of Trustees for Woodlawn Cemetery'" to Neal Jay Hamilton, Esquire, at Post Office Box 509, Fairmont, West Virginia 26554; William B. Wagner at Post Office Box 1217, Greenwich, Connecticut 06836-1217; John D. Hardesty, Jr. at 517 Longmarsh Road, Berryville, Virginia 22611; Frank Clark, Jr. at Post Office Box 181, Fairmont, West Virginia 26555-0181; Janice Watkins Cosco at Route 4, Box 496, Fairmont, West Virginia 26554; Douglas A. Hutchinson at 801 Coleman Avenue, Fairmont, West Virginia 26554; Jack L. Decker, at 216 ½ Maplewood Drive, Fairmont, West Virginia 26554; Arlene L. Edgell, at 127 Fifth Street, Bridgeport, West Virginia 26330; Susan Brown, at Post Office Box 77, Arthurdale, West Virginia

26520; and Chris Brown at Mary Lou Retton Drive, Fairmont, West Virginia, 26554.

ENTERED: 14 DECEMBER 2006

Fred L. Fox, II

FRED L. FOX, II, CIRCUIT JUDGE

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TESTE:

Barbara P. Love
CLERK OF THE CIRCUIT CLERK
MARION COUNTY, WEST VIRGINIA