

No. 33458

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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CHARLESTON

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IN RE:

Civil Action No. : 06-P-122

PETITION FOR APPOINTMENT OF  
TRUSTEES FOR WOODLAWN CEMETERY

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APPEAL FROM THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA

HONORABLE FRED L. FOX, II, JUDGE

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BRIEF ON BEHALF OF THE APPELLEES,  
THE COURT APPOINTED TRUSTEES OF WOODLAWN CEMETERY

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TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

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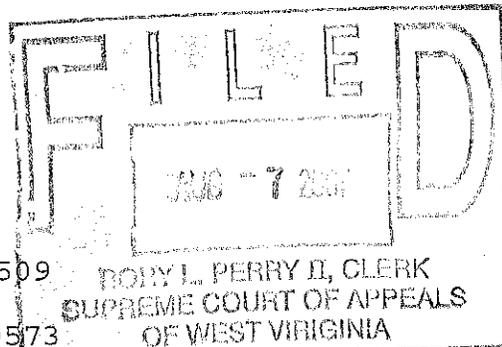


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BRIEF ON BEHALF OF THE RESPONDENTS,  
THE COURT APPOINTED TRUSTEES OF WOODLAWN CEMETERY

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TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

---

STATEMENT OF THE KIND OF PROCEEDING

AND NATURE OF THE RULING BELOW

This is an appeal from proceedings held before the Circuit Court of Marion County, West Virginia, and an Order of said Court entered on January 18, 2007, whereby the Court denied the Motion to Reconsider filed on behalf of the Appellants herein.

The case was originally instituted on September 18, 2006, when the Appellees herein, John D. Hardesty, Jr., William B. Wagner, Frank Clark, Jr., Janice Watkins Cosco, and Douglas A. Hutchinson, filed a Petition for Appointment of Trustees of the Woodlawn Cemetery located in the city of Fairmont, in Marion

County, West Virginia, pursuant to West Virginia Code §35-5-1, et seq., with the Circuit Court of Marion County, West Virginia.

After hearing and Notice as set forth in the Statement of Facts below, by Order of the Circuit Court of Marion County, West Virginia, entered on December 14, 2006, the Court granted the Petition for Appointment of Trustees for Woodlawn Cemetery, and appointed the Appellees herein as Trustees of the Woodlawn Cemetery. Subsequently, the Court appointed Board of Trustees were sworn in by the Court to oversee the care, maintenance and management of the Woodlawn Cemetery.

Thereafter, on December 29, 2006, the Appellants herein filed a motion and supporting brief requesting the Circuit Court to reconsider its Order Granting Petition for Appointment of Trustees for Woodlawn Cemetery. After consideration of the motion, brief and responsive brief, the Circuit Court denied the Motion to Reconsider by Order entered on January 18, 2007.

#### STATEMENT OF THE FACTS

On September 18, 2006, John D. Hardesty, Jr., William B. Wagner, Frank Clark, Jr., Janice Watkins Cosco, and Douglas A. Hutchinson, filed a Petition for Appointment of Trustees of the Woodlawn Cemetery located in the City of Fairmont, in Marion County, West Virginia, pursuant to West Virginia Code §35-5-1, et seq., with the Circuit Court of Marion County, West Virginia. Said Petition, set forth, inter alia, that the former Board of Directors of the Woodlawn Cemetery, as previously constituted, had ceased to

exist, and no persons were lawfully acting as the Board of Trustees of said Woodlawn Cemetery or as the authorized Board of Directors. The Appellees in the proceedings below all have relatives buried in said Woodlawn Cemetery as required by statute, and indicated their desire to take responsibility for the maintenance and upkeep of said cemetery, to be invested with legal authority to allow entry upon said cemetery property, to be appointed to and constitute the trusteeship under its incorporated name of the "Woodlawn Cemetery Company", and to be endowed with the authority to appoint other willing members, or successors to serve as part of the body of the trusteeship.

A hearing was set before the Court and Notice of the hearing on the Petition was published as a Class II legal advertisement in the Times West Virginian newspaper on October 31, 2006 and on November 7, 2006. On December 4, 2006, the hearing on the Petition was held before Judge Fred L. Fox, II, at which time the Petitioner herein, Jack L. Decker, and other persons holding themselves out as the officers and Board of Directors of Woodlawn Cemetery Company appeared personally. In addition to the witnesses of the Appellees in the case below, both Appellants Jack L. Decker and Arlene Edgell testified in open Court in opposition to the Petition.

During the Circuit Court proceedings on the Petition, the testimony of Aaron Hawkins, Senior Vice President and Trust Officer of WesBanco Bank, Inc., established that the former lawful Board of Directors of Woodlawn Cemetery had properly set up and funded a permanent endowment fund for the perpetual care and maintenance of

Woodlawn Cemetery in 1974 (Trial Exhibit 6). The testimony of Mr. Hawkins, and Trial Exhibits 2 and 3, further showed that since 1996 no proceeds from the sale of any burial plots had ever been deposited in the permanent endowment fund by those individuals holding themselves out as the Board of Directors of the Woodlawn Cemetery Company, as required by statute. Moreover, the testimony of Appellant Jack L. Decker established that burial plots had been sold but that he neither made any required deposits into the fund or had any intention of making such deposits from the proceeds of burial plot sales because of other obligations and the lack of funds for maintenance of the cemetery.

The testimony of Diane Parker, of the Woodlawn Preservation Society, testified to a history of the cemetery and to information obtained regarding sales of burial plots from which no monies had ever been deposited in the perpetual care fund required by statute. Mrs. Parker testified that the last known lawful Board of Directors existed in 1996 and consisted of David Nuzum, Virginia White, Bernie Stalder and Mark Trach, and that no election by the remaining two Board members of Mark Trach and Virginia White was ever held to fill the vacancies on the lawful Board. The testimony of James Mark Trach, a former Board member, evidenced that he did not recall voting Mr. Decker to the Board of Directors, supporting the Petitioner's allegations that no lawful Board of Directors had continued after the resignation or death of other members on the former Board of Directors.

During the proceedings, Appellant Jack L. Decker

testified that he had been voted to the Board and asserted that he could produce the "minutes" of the Board meeting showing his election to the Board of Directors of the Woodlawn Cemetery Company to the Court. The Circuit Court set a time for him to present the "minutes" to the Court, and took the matter under advisement. However, Mr. Decker did not present any "minutes" to the Court, within the time limits set by the Court, to show that he, or any other person allegedly constituting the present board, all of whom are family members of Mr. Decker, was ever duly or lawfully elected to the Board of Directors.

By Order of the Circuit Court of Marion County, West Virginia, entered on December 14, 2006, the Appellees herein, John D. Hardesty, Jr., William B. Wagner, Frank Clark, Jr., Janice Watkins Cosco, and Douglas A. Hutchinson, were appointed as Trustees of the Woodlawn Cemetery. The Trustees were subsequently sworn in by the Court to oversee the care, maintenance and management of the Woodlawn Cemetery.

On December 29, 2006, the Appellants in the case at bar filed a motion and supporting brief requesting the Circuit Court of Marion County, West Virginia, reconsider its Order Granting Petition for Appointment of Trustees for Woodlawn Cemetery. A brief in response to said motion was filed on behalf of the Court appointed Trustees on January 12, 2007, and by Order entered on January 18, 2007, the Circuit Court denied the Motion to Reconsider.

## POINTS AND AUTHORITIES

- I. The Circuit Court of Marion County, West Virginia, did not clearly abuse its discretion in Granting the Petition for Appointment of Trustees for Woodlawn Cemetery, and because there are and were other persons interested in the subject matter of the action whose names were unknown, proper service existed by way of publication.
  
- II. Failure to make required permanent endowment care fund deposits since 1996 constituted clear statutory violations mandating appointment of a Board of Trustees to oversee the care, maintenance and management of the Woodlawn Cemetery.
  
- III. The appointment of Trustees by the Circuit Court was necessary and proper.

## ARGUMENT

- I. The Circuit Court of Marion County, West Virginia, did not clearly abuse its discretion in Granting the Petition for Appointment of Trustees for Woodlawn Cemetery, and because there are and were other persons interested in the subject matter of the action whose names were unknown, proper service existed by way of publication.

The Petition for Appointment of Trustees for the Woodlawn Cemetery located in the City of Fairmont, in Marion County, West Virginia, was properly made pursuant to West Virginia Code §35-5-1,

et seq. In support of their Petition, the Appellees alleged that the former Board of Directors of the Woodlawn Cemetery, ceased to exist, and no persons were lawfully acting as the authorized Board of Directors. J. Mark Trach, a former Board member, testified that he did not recall voting Mr. Decker to the Board of Directors, and further, no minutes of the meeting evidencing Mr. Decker's proper election to the Board were ever presented to Court and/or copied to counsel within the time limits set by the Court.

Since the lawful Board of Directors as it existed in 1996 of David Nuzum, Virginia White, Bernie Stalder and Mark Trach, no proof was presented to evidence any election was ever held by the remaining two Board members of Mark Trach and Virginia White to fill the vacancies on the lawful Board. As a result what was once a public non-profit corporation established to create a public cemetery in 1885, and which, in 1996, had a Board of Directors consisting of various community members, has now become a closely-held family owned business, in which all of the Board of Directors are family members, operating without evidence of being duly elected and without compliance with the state laws requiring deposits of permanent endowment fund monies.

The evidence adduced in the Trial Court showed that in 1996, when then Board President, David Nuzum resigned, there were only two members of the Board lawfully remaining: Virginia White, now deceased, and Mark Trach, who testified that he did not remember voting Jack Decker to the Board. No proof whatsoever has been offered to exhibit that Appellant Mr. Decker or any other

family member who has continued to operate as the Board of Directors were ever duly or lawfully elected. In fact, there is no lawful Board of Directors to remove; the lawful Board ceased to exist by way of resignation or death.

Pursuant to West Virginia Rules of Civil Procedure, Rule 4(e)(1)(E) Notice of the Petition and hearing regarding the same was published as a Class II legal advertisement in the Times West Virginian newspaper on October 31, 2006 and on November 7, 2006, regarding the hearing on the Petition held before Circuit Court of Marion County Judge Fred L. Fox, II, on December 4, 2006. This notice was calculated to provide notice to all of the various unknown persons who would have an interest in the subject matter of the proceeding to appoint Trustees to oversee the maintenance and care of the Woodlawn Cemetery. Moreover, at the hearing on the Petition, Appellant Jack L. Decker, and other persons holding themselves out as the officers and Board of Directors of Woodlawn Cemetery Company appeared personally, and in addition to the witnesses of the Appellees in the case below, both Appellants Jack L. Decker and Arlene Edgell testified in open Court in opposition to the Petition.

II. Failure to make required permanent endowment care fund deposits since 1996 constitutes clear statutory violations mandating appointment of a Board of Trustees to oversee the care, maintenance and management of the Woodlawn Cemetery.

West Virginia Code §35-5A-2 mandates that:

No person shall operate or continue to operate a perpetual care cemetery in West Virginia unless a permanent endowment fund has been established, maintained

and administered as required by this article.

West Virginia Code §35-5A-4, mandates 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, 1973, 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 lot...

West Virginia Code §35-5A-3, mandates that:

No person operating an established perpetual care cemetery... shall continue to operate such cemetery without...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.

A "Person" for the purpose of these statutory sections is defined in West Virginia Code §35-5A-1(a) to mean "any corporation, company, partnership, individual, association or other entity owning or operating a cemetery for the disposition of human remains", so it is clearly applicable to the situation at bar.

The undisputed testimony of Aaron Hawkins, Senior Vice President and Trust Officer of WesBanco Bank, Inc., established that the former lawful Board of Directors of Woodlawn Cemetery properly established and funded a permanent endowment fund for the perpetual care and maintenance of Woodlawn Cemetery in 1974 (Trial Exhibit 6). The testimony of Mr. Hawkins, and Trial Exhibits 2 and 3, further showed that since 1996 no proceeds from the sale of any burial plots had ever been deposited in the permanent endowment fund by those individuals holding themselves out as the Board of Directors of the Woodlawn Cemetery Company, as required by statute.

Moreover, the testimony of Mr. Decker himself clearly showed that burial plots had been sold but that he neither made any required deposits into the fund or has any intention of making such deposits from the proceeds of burial plot sales because of other obligations and the lack of funds for maintenance of the cemetery.

The Appellants in the case at bar argue that the permanent endowment fund of the Woodlawn Cemetery presently contains in excess of \$35,000.00, and that the Board of Directors of Woodlawn Cemetery Company was in full compliance with the spirit and purpose of Article 5a of Chapter 35 of the West Virginia Code in that the statute only requires "\$10,000.00 on deposit to be in full compliance". The argument is incorrect. West Virginia Code §35-5A-3 clearly states that "No person operating an established perpetual care cemetery... shall continue to operate such cemetery without...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. (Bold added) Those deposits, as set forth in the second paragraph of West Virginia Code §35-5A-3, mandate that "No person shall operate or continue to operate any perpetual care cemetery in the State.... 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 lot..." and requires those continuing deposits to be paid "within thirty days following the month in which the entire gross proceeds of the sale were received". (Bold added)

It is clear from the testimony and evidence adduced at the hearing that none of the current funds in the Permanent Endowment fund have been placed there from the sales of burial plots at Woodlawn Cemetery by those presently holding themselves out as the acting Board of Directors of Woodlawn Cemetery Company, as required by statute. Furthermore, as evidenced by Trial Exhibit 8, even though those persons acting as the Board have never made any contribution toward the permanent endowment fund, Mr. Decker sought to have the permanent endowment fund terminated and the balance paid over to the Woodlawn Cemetery.

III. The appointment of Trustees was necessary and proper

The testimony adduced before the Trial Court showed that on December 16, 1885, the Woodlawn Cemetery Company was established as a public cemetery and organized as a non-profit corporation under a certificate of incorporation issued under the laws of West Virginia. A cemetery is a "public cemetery" where it is open under reasonable regulations, to the use of the public for the burial of the dead. Woodlawn Cemetery is a perpetual care cemetery as evidenced, inter alia, by the establishment in 1974 of the "Woodlawn Cemetery Perpetual Care Trust" (Trial Exhibit 6). The Petition for Appointment of Trustees for the Woodlawn Cemetery located in the City of Fairmont, in Marion County, West Virginia, was properly made pursuant to West Virginia Code §35-5-1, et seq. The assertion that West Virginia Code §35-5-1, et seq., was misapplied in granting the Petition in this matter is unfounded.

The case of Concerned Loved Ones and Lot Owners Association v. Pence, 181 W.Va. 649, 383 S.E.2d 831 (1989), involved West Virginia Code §35-5-2, and held that section did not require owners of a public cemetery to give notice to lot owners before selling unimproved real estate because it was a private, "for profit" corporation. The ruling specifically only applied to Section 2 (§35-5-2) regarding the sale of part of the cemetery, which is not the issue in this case. Moreover, in that case, the "for profit corporation" (Beverly Hills Memorial Garden, Inc.) was repeatedly referred to as a cemetery "association", which provides additional credence to the validity of this Court's action in granting the Petition for Appointment of Trustees under West Virginia Code §35-5-1, in the instant case. The facts of the case at bar are also distinguishable from the appointment of Trustees which was subsequently reversed by this Court in the case of McCartney v. Lester, 207 W.Va. 449, 533 S.E.2d 675, in that Woodlawn Cemetery is a public cemetery providing a resting place for over 14,000 people.

The five persons appointed by this Court as Trustees of the Woodlawn Cemetery all have relatives buried in said Woodlawn Cemetery as required by statute, meet the other statutory requirements, and have actively undertaken the responsibility for the maintenance, upkeep, preservation and protection of said cemetery property.

#### CONCLUSION

For all the foregoing reasons it is respectfully requested that this Court deny the petition for appeal in the

instant case and affirm the rulings of the Circuit Court of Marion County, West Virginia. Alternatively, it is respectfully requested that this Court remand the case to the Circuit Court for the taking of additional testimony and discovery.

RESPECTFULLY SUBMITTED:

The Court Appointed Trustees of Woodlawn Cemetery, Appellees,

By Counsel



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Appellees

CERTIFICATE OF SERVICE

I do hereby certify that on the 6<sup>th</sup> day of August, 2007, I served the foregoing BRIEF ON BEHALF OF THE APPELLEES, THE COURT APPOINTED TRUSTEES OF WOODLAWN CEMETERY, upon the opposing party by sending a true and accurate copy thereof to their counsel of record, Gregory H. Schillace, at his office address of:

Gregory H. Schillace, Esq.  
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by United States mail, first class, postage prepaid.



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