

IN THE CHANCERY COURT OF DAVIDSON COUNTY, TENNESSEE
TWENTIETH JUDICIAL DISTRICT
AT NASHVILLE
PART III

STATE OF TENNESSEE, *ex rel.*)
HODGEN MAINDA, solely in his)
official capacity as Commissioner of)
Commerce & Insurance,)
)
Plaintiff,)
)
vs.)
)
GALILEE MEMORIAL GARDENS,)
JM&M SERVICES, INC., LAMBERT)
MEMORIAL CO., aka LAMBERT)
MEMORIALS, INC., LAMBERT &)
SONS, INC., JEMAR LAMBERT,)
MARJE LAMBERT, and MARY H.)
LAMBERT, and ALL PERSONS)
ACTING IN CONCERT WITH THEM,)
)
Defendants.)

No. 14-102-II(III)

**SHELBY COUNTY’S RESPONSE TO THE COMMISSIONER’S MEMORANDUM OF
LAW ADDRESSING PURPORTED ESCHEATMENT OF GALILEE MEMORIAL
GARDENS AND RELATED MATTERS**

Shelby County files its Response to the Commissioner’s Memorandum of Law Addressing Purported Escheatment of Galilee Memorial Gardens (“Galilee Cemetery” or “Cemetery”) and Related Matters, and would state as follows:

INTRODUCTION

This Court requested that the Parties to this Action file briefs on the question of whether Galilee Cemetery escheats to the State now that this Court has divested ownership of the cemetery from the original owners/operators, no other persons or entities have come forward to

take ownership of the cemetery and termination of the Receivership is pending. (March 16, 2020 Order). U.S. Supreme Court jurisprudence and our State’s statutory and common law provide the answer: Galilee Cemetery will escheat to the State of Tennessee by default and operation of law when the Receivership is terminated. When real property is left with no true owner, it escheats to the State in which it lies. *Cunnius v. Reading School District*, 198 U.S. 458, 477 (1905); *Hamilton v. Brown*, 161 U.S. 256, 268 (1896); *State v. Goldberg's Unknown Heirs*, 113 Tenn. 298, 86 S.W. 717, 718–19 (1904); *Hinkle's Lessee v. Shadden*, 32 Tenn. 46 (1852); T.C.A. §§ 31-6-101 – 102; *Escheat*, Black's Law Dictionary (11th ed. 2019).

BRIEF PROCEDURAL HISTORY

Previously the Commissioner moved this Court to divest title over Galilee Cemetery from Lambert entities to the Receiver. In doing so, the Commissioner’s intent was to eventually transfer title and ownership of the Cemetery to a suitable caretaker, pursuant to Tennessee law. (Commissioner’s Memorandum, p. 6). This Court then granted the Commissioner’s request on June 12, 2019 transferring title of Galilee Cemetery to the Receiver “to bring clarity and certainty to the ownership [and] title . . . of Galilee Memorial Gardens.” (June 12, 2019 Order, p. 79, ¶ 8).

However, the Receiver has not found anyone to assume ownership, and does not believe that any future owner will emerge. (Commissioner’s Memorandum, p. 6) (“As the Court is aware, efforts to attract interest in ownership [of Galilee Cemetery] have been unsuccessful.”). Thus, once the Receivership is terminated, with the Court having divested title in Galilee Cemetery from the former operators and extinguished their future claims or interest, the cemetery will be without an heir or owner.

ANALYSIS AND ARGUMENT

Although the question faced by the Court arises out of a novel situation, the issue itself is not novel. Escheatment of real property is a foundational principle of American jurisprudence that finds its origins in the English common law, under which real property reverted to the King as the sovereign lord when the owner died without heirs.

This principle that real property with no true owner belongs to the State in which it lies has been accepted and affirmed by the U.S. Supreme Court and Tennessee courts. *See e.g. Reading School District*, 198 U.S., 477; *Goldberg's Unknown Heirs*, 86 S.W., 718–19; *Brown*, 161 U.S., 268 (concluding that property lawfully escheats to the state as long as there are no heirs and proper notice is given); *Shadden*, 32 Tenn. 46 (“[I]t is a well-established principle of American jurisprudence that when the title to land fails from defect of heirs, ‘the state steps in the place of the feudal lord, by virtue of its sovereignty, as the original and ultimate proprietor of all the lands within its jurisdiction.’”).

The Commissioner points to nothing that contradicts this principle or that provides an escheatment exception for cemeteries. Accordingly, the Commissioner’s position that Galilee Cemetery does not escheat to the State is fundamentally incorrect. Moreover, it is important that the Court decide this issue now because it directly impacts the future care and maintenance of Galilee Cemetery when the funds from the ICTF are depleted and the Commissioner’s temporary plan runs its course.

I. GALILEE CEMETERY WILL ESCHEAT TO THE STATE UNDER TENNESSEE ESCHEATMENT LAWS

Tennessee statutory law specifically addresses escheatment of real property, expressly holding that property, when left with no owner, escheats to the State. Tennessee Code Annotated §§ 31-6-101 – 102 reads in relevant part:

If a decedent, whether or not domiciled in this state, leaves no one to take the decedent's estate or any portion of the estate by the decedent's will and no one other than a government or governmental subdivision or agency to take the decedent's estate or a portion of the estate by intestate succession, under the laws of this state or any other jurisdiction, the estate escheats as of the time of the decedent's death in accordance with this chapter.

* * *

Real property located in this state escheats to this state[.]”

Id. (emphasis added).

The Commissioner agrees, stating: “[i]n Tennessee, the escheatment of real property to the State is authorized in certain limited situations. Generally, escheatment of real property located in the State occurs when an owner dies with no living heirs[.]” (Commissioner’s Memorandum, p. 3). In this case, the Court has divested ownership of Galilee Cemetery from the operators. This fact combined with the fact that the Receiver has not found anyone to assume ownership of the Cemetery “leaves no one to take [over the ownership of Galilee Cemetery].” T.C.A. § 31-6-101. This situation – where there is no one to take ownership – is the exact situation contemplated by these statutes. Thus, the Court should find that pursuant to T.C.A. §§ 31-6-101 – 102, Galilee Cemetery escheats to the State once the Receivership is terminated.

II. TENNESSEE’S UNIFORM UNCLAIMED PROPERTY ACT DOES NOT APPLY TO GALILEE CEMETERY

Despite agreeing that real property escheats to the State, the Commissioner attempts to shift the Court’s focus to other laws, such as the Uniform Unclaimed Property Act, that admittedly do not address escheatment of *real* property, but rather only apply to *tangible and intangible property*, which is commonly understood to mean *personal property*. See T.C.A. §§ 66-29-101, §66-29-102(24), § 66-29-109, § 30-2-702, and § 31-6-107. Because these statutes do not address real property, they are inapplicable and irrelevant to the issue before the Court.

Nonetheless, the Commissioner claims that real property cannot escheat to the State because the statutes he relies on have a “limited definition of ‘tangible property’ that can

escheat[.]” and Galilee Cemetery is not included in that limited list. (Commissioner’s Memorandum, p. 4). But, this argument completely disregards T.C.A. §§ 31-6-101 – 102 that *do* call for the escheatment of real property. Because these statutes directly and expressly address the escheatment of real property, and the Uniform Unclaimed Property Act relied on by the Commissioner does not, the Commissioner’s focus is misplaced and his argument is without merit.

In addition, because the Court divested ownership from the previous owners it is as if Galilee Cemetery has been *abandoned* rather than *unclaimed*. As Judge Posner recognized in *Cerajeski v. Zoeller*, 735 F.3d 577, 581 (7th Cir. 2013), there is an important yet overlooked distinction between ‘abandoned’ property and ‘unclaimed’ property. Abandonment, Posner explained, is the “voluntary relinquishment or renunciation of a property right, or an ownership vacuum resulting from the owner’s death without heirs or a valid will. It means that the owner gives up all claims to the property, thus pitching it back into the public domain, where it is available for reappropriation.” *Id.* (citations omitted).

Unclaimed property, however, does not arise out of a voluntary relinquishment. Rather, it arises out of the situation where an owner has forgotten about the property or has not affirmatively taken action with respect to the property. *Id.* Posner went on to explain that states’ rights over abandoned property are much greater than their rights over unclaimed property, precisely because the owner’s rights in abandoned property have been relinquished. *Id.* Accordingly, the Uniform Unclaimed Property Act is inapplicable to the question before the Court.

III. THERE IS NOTHING IN THE TENNESSEE CEMETERY ACT THAT PROHIBITS THE ESCHEATMENT OF GALILEE CEMETERY TO THE STATE

As part of his opposition to escheatment, the Commissioner points out that the Tennessee Cemetery Act does not expressly address the issue of escheatment of an abandoned cemetery. Of course, it is equally true that nothing in the Tennessee Cemetery Act prohibits a cemetery from escheating to the State under these circumstances, and the Commissioner cites no law to the contrary. The Act, however, does charge the Commissioner with “administrating and enforcing” the statute. T.C.A. § 46-1-301. In interpreting the Act, courts should “give consideration to the purpose, objective and spirit behind the legislation[,]” when “the language of the statute does not speak to the precise issue[.]” *Lipscomb v. Doe*, 32 S.W.3d 840, 845 (Tenn. 2000) (quoting *Dorrier v. Dark*, 537 S.W.2d 888, 892 (Tenn.1976)). Thus, making the Commissioner – and the State through the Commissioner – ultimately responsible for cemeteries in Tennessee.

Attempting to draw a negative inference, the Commissioner cites to § 46-2-103. The Commissioner claims this section of the Act is the only place in Title 46 that addresses escheatment. The Statute, however, only contemplates the situation where the cemetery has a lawful and known owner and addresses disposition of *vacant plots only*:

In order to facilitate a more efficient and economical system for caring for and maintaining and improving *cemeteries owned and operated by municipalities, corporations and associations* within the state of Tennessee, it is provided that after March 21, 1955, *all vacant cemetery lots and grave spaces owned by any person dying intestate without issue and leaving no known relatives* entitled by the law of descent to the cemetery lots and grave spaces *shall escheat to the municipalities, corporations, associations or other owners* of a cemetery where vacant lots and grave spaces exist, owned by any person dying testate without devising the vacant cemetery lots or grave spaces, and leaving no lawful heirs, as the case may be, entitled by law to take the vacant cemetery lots or grave spaces, or where the devisees or heirs are incapable of taking the vacant cemetery lots or grave spaces and where there are no lawful heirs, as the case may be.

Id. (emphasis added).

Critically, there are no vacant plots at Galilee Cemetery and no owner exists. (Commissioner's Memorandum, p. 6). Even if our issue involved vacant cemetery plots, nothing in the Act prevents the State from being the "or other owners" described in this section of the Act. More importantly, this section of the Act does not address the question of whether Galilee Cemetery escheats to the State under the present circumstance. Accordingly, section 46-2-103 is inapplicable to the question before this Court.

IV. THE COURT'S DECISION REGARDING TITLE AND OWNERSHIP OF GALILEE CEMETERY IS NECESSARY FOR ITS FUTURE CARE AND MAINTENANCE¹

The Commissioner has successfully created a temporary plan of care and maintenance over Galilee Cemetery, which the County commends. For the basic maintenance of the Cemetery, Red and Blue, LLC will assume responsibility. However, Red and Blue, LLC has only agreed to maintain the Cemetery by using the limited funds generated from Galilee Cemetery's Improvement Care Trust Fund ("ICTF"). Red and Blue, LLC is not assuming title or ownership over the Cemetery, and thus, when the funds from the ICTF are depleted, which is inevitable, the issue of Galilee's care and maintenance will be before this Court again.² It is readily apparent that the funds in the ICTF will not last forever, and this is precisely why the issues of title and escheatment are crucial for determining the future of Galilee Cemetery.

¹ The Commissioner points to this Court's June 20, 2013 Final Order in the case of *McPeak etc. v. Bookwalter Cemetery*, Davidson Ch. No. 10-1426-III, in support of its argument that the Court does not need to address the issue of title before it terminates the receivership. The Commissioner correctly points out the *Bookwalter* case was procedurally different than the present case. The fundamental difference is that Shelby County has raised the issue of who will own and have title to Galilee Cemetery once the Receivership is terminated – an issue not raised in *Bookwalter*. Accordingly, the *Bookwalter* decision is unpersuasive here.

² Although the Commissioner argues that the "ICTF will shoulder the financial burden of providing improvement care services for the cemetery grounds in the future[.]" the Commissioner also admits that there are "existing financial deficiencies" in the ICTF, "which cannot be remedied due to a lack of available assets[.]" (Commissioner's Memorandum, pp. 4-6).

The Commissioner's argument that the Cemetery Act "looks to" the County to assume the indefinite and costly maintenance of Galilee mischaracterizes the Act. It is clear that Tennessee law *requires* the State (through the Commissioner of Commerce and Insurance, the Office of the Secretary of State, and other State entities) to actively exercise certain responsibility over cemeteries and only *permits or allows* local governments to voluntarily contribute to a cemetery's care and maintenance by majority vote of their legislative body. *See e.g.* T.C.A. §§ 46-1-101, *et al*; T.C.A. §§ 46-1-301 – 313 (assigning the Commissioner as the responsible party of enforcing this chapter, and to act as Receiver for abandoned and mismanaged cemeteries when necessary); T.C.A. §§ 46-1-214 – 216 (proscribing the responsibility of receiving and reviewing cemetery trust accounts and financial reports to the Commissioner).

Moreover, the County already voluntarily assumes responsibility over four (4) other cemeteries. This is a costly burden – to add the care and maintenance of another cemetery may not be economically feasible, and this is precisely why the County cannot readily assume responsibility over Galilee Cemetery. With no owner of Galilee, the Court's decision on the ownership and escheatment question at this time is necessary and further fulfills the purpose of the Cemetery Act, providing Galilee Cemetery the benefit of establishing an owner to be responsible over it when the ICTF funds are depleted and Red and Blue, LLC's contractual obligations expire.

CONCLUSION

For the reasons stated above, Shelby County respectfully requests that this Honorable Court find that Galilee Cemetery will escheat to the State of Tennessee upon the termination of the Receivership.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing has been mailed First Class postage prepaid to the following interested persons and attorneys requesting notice and transmitted via email if indicated this 6th day of May, 2020:

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