

IN THE CHANCERY COURT OF DAVIDSON COUNTY, TENNESSEE
 20TH JUDICIAL DISTRICT
 AT NASHVILLE
 PART III

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 D.C. & M.

STATE OF TENNESSEE,)
ex rel. JULIE MIX MCPEAK, solely in her)
 official capacity as Commissioner of)
 Commerce & Insurance,)
)
 Plaintiff,)
)
 v.)
)
 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-III

RECEIVER'S STATEMENT FOR STATUS CONFERENCE ON THE TERMINATION OF
 THE RECEIVERSHIP OF GALILEE MEMORIAL GARDENS
 (THIRTEENTH INTERIM REPORT)

In light of the Court's Order Setting 12/14/18 9:00 A.M. Rule 16 Conference, and pursuant to the Order Appointing Commissioner as Receiver for Galilee Memorial Gardens Cemetery and Granting Temporary Injunction (the "Receivership Order") entered by this Court on February 21, 2014, Julie Mix McPeak, Commissioner of the Department of Commerce & Insurance, as Receiver for Galilee Memorial Gardens (the "Cemetery"), through her appointed Special Deputy Receiver, Receivership Management, Inc., hereby files this Statement for Status Conference on the

Termination of the Receivership of Galilee Memorial Gardens, a Thirteenth Interim Report, in furtherance of the wind-up of the receivership as previously ordered by this Court.

Ongoing and Completed Work at Galilee Memorial Gardens

1. Hinson Realty and Auction Company auctioned the items earlier noted (stone and vehicles) on July 12, 2018 at noon. A total of \$4,919.50 was taken at the auction. After deduction of the auctioneer's fee of \$2,000.00, left a total of \$2,919.50 paid to the receivership estate.
2. Fencing is complete to provide fencing on all four sides of the 12.537 acre cemetery, as expanded by the deed to the Receiver from the adjacent landowner in 2015. The Receiver has reached an agreement with the City of Bartlett to permit the fence along Ellis Road that extends a short way outside these boundaries.
3. Claimed stone markers were distributed to claimants during July, 2018.
4. Two dilapidated storage buildings have been torn down, the area cleaned. Two minor items of landscaping remain.
5. The receivership estate consists of the cemetery property and proceeds of the auction. All other accounts subject to the Receivership Order held no assets and have been closed.
6. Fees and expenses of the receivership as of October 31, 2018:

Fees paid to RMI for Special Deputy Receiver Fees and Administration Expenses:
\$236,055.99;

Fees and expenses paid for outside labor, improvement, maintenance, and insurance: \$193,759.37;

Legal Fees paid to Burch, Porter and Johnson: \$132,680.21;

Fees paid to David Kustoff for Special Deputy Receiver Fees and Administration Expenses: \$186,123.70.

7. Of the above total expenses of approximately \$748,619.27, \$21,450 was paid through the Improvement Care Trust Account, and the balance has been paid by the Cemetery Consumer Protection Account. As of October 31, 2018, the Cemetery Consumer Protection Fund had a balance of \$256,231.62.

Topics and Issues to be Reported at the Status Conference

Further Burials, Maintenance and Upkeep, Books and Records

1. **Further Burials.** In the conduct of this receivership, the Special Deputy does not believe there are adequate resources to rehabilitate Galilee Memorial Gardens Cemetery nor are there sufficient confirmed unsold lots to make another private cemetery company operator interested in the operation of Galilee Memorial Gardens. In fact, it continues to be the Receiver's assessment that Galilee Memorial Gardens is full, as supported by ample information on file. Based on the Ninth Interim Report and the status conference held in August 2016, and the records of the Special Deputy's findings submitted at that time, the issue of further burials –to disallow them—is believed resolved, but the Court has not made any findings or rulings on this issue.
2. **Future Maintenance and Upkeep.** Under Tenn. Code Ann. § 46-1-312(a)(7), the Receiver has all the powers of the owners and directors, and full power to deal with the property and business of the Cemetery, under the Receivership Order. The owner of every cemetery may adopt and enforce rules for the use, care, control, management, restriction and protection of the cemetery, restricting and regulating the use of all property within the cemetery and regulating the conduct of persons within the cemetery. (e.g. Tenn. Code Ann. § 46-2-101). Assuming the Court still approves the Receiver's recommendation that

no further burials should occur at Galilee Memorial Gardens because of the circumstances described in the Ninth Interim Report, the Receiver, based upon the rulings possibly from the requested status conference, will need to provide notice to communicate that restriction to the persons who had presented claims for the future use of grave sites, that the Cemetery is unable to permit exercise of those interment rights, and further cannot issue refunds due to its lack of any distributable funds. (This is a no-asset cemetery, as the Receiver found zero or negligible balances in its accounts e.g. December 2014, Third Interim Report).

3. **Role of the Improvement Care Trust Fund** - Thereupon, continued maintenance of the Cemetery would be the main outstanding matter of concern prior to entry of an order to terminate the receivership, given the Cemetery cannot be returned to possession of its prior owners, and that it lacks assets to fulfill any obligations. Maintenance of a closed or abandoned cemetery is an express concern of the Cemetery Act, which thus proposes some remedies, chief among them, the application of earnings of the Improvement Care Trust Fund (Tenn. Code Ann. 46-1-204(e)) ("ICTF") even when a cemetery is not being operated by its owner. Tenn. Code Ann. § 46-7-101 states that the general assembly recognizes the operation of a cemetery is a public purpose, and "proper maintenance of the cemetery, whether private or public, is in the interest of the public health, safety and welfare, serving a valid public purpose."
4. The ICTF is not an asset of the cemetery company itself and cannot be subject to the debts of the cemetery company under Tenn. Code Ann. § 46-1-204(g). Therefore, prior obligations of Galilee Memorial Gardens are ineligible for payment from this fund. However, its earnings can be expended by the trustee, or by persons who approach the trustee of the ICTF to show they have performed improvement care on the cemetery, when

it is not being run by its owner. The specific terms of this process are found in Tenn. Code Ann. § 46-1-204(e)(2) and (3), as follows:

(2) The net earnings of each improvement care trust fund *shall be paid to and shall be used and expended by the owners or officers and directors of the cemetery company, or by the trustee of the improvement care trust fund while the cemetery is not being operated by its owner*, for the improvement care, as defined in § 46-1-102, of the cemetery or separate geographical location of the cemetery for which the fund was established and for no other purpose.

(3) While a cemetery for which an improvement care trust has been funded *is not being operated by its owner, the trustee may disburse net income from the trust to compensate any responsible person for work performed or expenses incurred in the improvement care of the cemetery. . . .*
(Italics added).

These provisions place the ICTF trustee in the legislatively approved default position of responsibility to promote and fund improvement care, at least as to the use of the net earnings of any duly established ICTF that is adequate.

5. **Role of Local Government** - In situations where there is a lack of a sufficient improvement care trust fund, the General Assembly has authorized in Tenn. Code Ann. § 46-2-107 that upon majority vote of the legislative body of a local government, expenditures for the maintenance of abandoned or dilapidated cemeteries may be made. But this authorization is limited to cemeteries that are not currently being maintained or have insufficient improvement care trust accounts. See § 46-2-107(b).

Tenn. Code Ann. § 46-2-107 states, in full, as follows:

(a) Notwithstanding any law to the contrary, upon a majority vote of the legislative body of the local government, the local government may draw upon its general fund and may solicit, receive, and utilize funds from all other sources, public or nonpublic, for the purpose of rehabilitating or maintaining dilapidated or abandoned cemeteries, or portions of cemeteries, subject to the limitations imposed by subsection (b). The maintenance may include:

(1) Clearing vegetation or debris as appropriate, planting and otherwise improving the premises, cutting the grass and raking and cleaning cemetery plots at reasonable intervals;

(2) Repairing and preserving the drains, water lines, roads, fences, statues, fountains and other structures;

(3) Securing, maintaining or reconstructing the necessary records of lot ownership and burials;

(4) Resetting or straightening tipped gravemarkers, monuments or memorials; or

(5) Replacing damaged gravemarkers, monuments or memorials.

(b) This section shall not be construed to authorize any local government to utilize funds to maintain cemeteries or portions of cemeteries that are presently maintained adequately or that maintain a sufficient improvement care trust fund pursuant to this chapter and chapter 1 of this title.

(c.) As used in this section, "local government" means any county, municipality, city, or other political subdivision of this state.

6. Galilee Memorial Gardens' ICTF does not meet all the statutory funding requirements for ICTFs, but it could partially fund a modest maintenance plan. Galilee has a substantial, though calculated as deficient, improvement care trust account that produces net earnings through the investments made by its corporate trustee, which may be applied to maintenance in future. Galilee's ICTF is held by Commercial Bank & Trust Company, as trustee, P.O. Box 1090, Paris, TN 38242. The balance in the account at last report 12/31/2017 was \$428,055 in cost basis, but about \$544,000 in market value including undistributed net income, of over \$80,000.
7. It is the purpose of the part in Tennessee's Cemetery Act establishing the ICTF "to require cemetery companies in the state to carry at all times a sufficient improvement care trust fund to maintain, keep up and beautify the cemeteries, without commercializing the operation of the cemeteries. ..." Tenn. Code Ann. § 46-1-201. Using Galilee Memorial Gardens' ICTF prior net income as a guide (income after deduction of taxes and fees),

these earnings should at least *partially fund* the type of regular grounds maintenance that is essential to keeping the cemetery in its current condition and should at least be applied to this purpose. These net earnings (reports of which can be shown to the court) have ranged from \$11,000 to 14,000 per year since 2014. This income could fund perhaps half the cost of basic seasonal mowing, edge trimming and grounds maintenance that would be required at Galilee. The purposes of the fund could be anything listed in the definition of “improvement care” in the Cemetery Act, but the condition that Galilee not permit or perform burials assists in reducing some items of expense. Tenn. Code Ann. 46-1-102.¹ The calculated deficiency of the ICTF at the inception of the receivership has not changed; however, earnings have built up (due to the consumer fund having borne all expenses of this receivership) and could be used. Therefore, monetary relief from the local government for maintenance costs may not be made available, or may not occur immediately, but under these statutes, a good solution to future maintenance could combine the responsibilities with the improvement care trust fund trustee, whereby the local government body may be designated the responsible “person” undertaking the maintenance and seeking trust funding to the extent available.

¹ The ICTF is for “improvement care” defined in the cemetery act at Tenn. Code Ann. § 46-1-102(12) and “means the continual maintenance of the cemetery grounds and graves in keeping with a properly maintained cemetery, including cutting of grass, raking and cleaning of cemetery plots at reasonable intervals, and pruning of shrubs and trees; memorial care of commodities; procuring, maintaining and keeping in workable condition the machinery, tools and equipment needed for the shop and replacing the machinery, tools and equipment when necessary; keeping in repair and preserving the drains, water lines, roads, buildings, fences and other structures, including cemetery-owned statues and embellishments of general character applicable to the cemetery as a whole or a particular area; and paying of insurance premiums and maintaining necessary records of lot ownership, burials and other necessary information and making the records available to public authorities and interested persons;”

8. **Other Remedies.** Under the provisions of Tenn. Code Ann. § 46-1-312(d), the receivership specific provision, if it appears to the Court that it is impossible to correct the deficiency in the improvement care fund maintained by the cemetery company, the Court may order the sale of the cemetery pursuant to Tenn. Code Ann. § 46-1-309 or may otherwise order termination of the use of the cemetery as provided by law (i.e. under the provisions of Tenn. Code Ann. Title 46, Chapter 4, which are for cemeteries seeking removal of several graves and repurposing cemetery land for uses other than burials). As stated, Galilee Memorial Gardens provides no reasonable prospect for sale, because it supplies no future income stream and no business may be conducted there. Also, the Receiver is not seeking any disturbance of graves, nor need the Cemetery lose its character as a burial ground, as it would remain under the care of the living to the extent of maintenance. Accordingly, the remedy of “termination” of the use of Galilee Memorial Gardens as a burial ground, at least as it found in Tenn. Code Ann. §§46-4-101--46-4-104, is not applicable or appropriate to this situation.
9. Reading all these statutes together to the extent feasible, the General Assembly has developed a basic default approach without reference to receivership if a cemetery is full and merely becoming permanently dormant. If a cemetery is abandoned or dilapidated, its operations ceased, and there is a lack of a sufficient improvement care trust, the local government has the discretion to maintain the cemetery under the terms of Tenn. Code Ann. § 46-2-107. The statutes assume the presence of some responsible person, acting with the trustee, if a sufficient ICTF does exist for the perpetual care of the cemetery.
10. **Role of Commissioner as Receiver Not Permanent.** Tenn. Code Ann. § 46-1-312 does not foresee a permanent role for the Commissioner as receiver for a closed cemetery. The

main workings of that statute expressly are directed toward rehabilitation or transformation of a cemetery business and attempts to restore trust accounts. Understanding that Galilee has an Improvement Care Trust, a discussion of the trust is necessary and is proper during the status conference.

11. **Books, Records, Maps, Documents.** Because Galilee Memorial Gardens will become a dormant and inoperable cemetery, the Receiver's final dispensation of the books, logs, and databases noting the likely places of burial of individuals within Galilee Memorial Gardens should be reviewed at the status conference.

Disinterment

1. A number of people have asked about having their loved ones disinterred from Galilee Memorial Gardens. The most often (but not exclusive) reason given has to do with the fact that burials are not being permitted in Galilee and therefore for loved ones who expected to be interred together (especially husbands/wives/children) to be together, the loved one buried in Galilee must be disinterred and reinterred at the new location. Galilee, being in receivership, is subject to the exclusive jurisdiction of this Court, and the Receiver has never permitted disinterments. The General Assembly has set forth legal mechanisms and responsible persons regarding disinterment activities. Such actions may not be taken without a permit issued by the Department of Health/Vital Office of Vital Records and a licensed funeral director, with additional requirements when more than one grave may be affected.
2. Due to the inconsistent recording at Galilee Memorial Gardens, and potential effects on adjacent unrelated graves, disinterment will be difficult, if not almost impossible given

family members cannot be absolutely sure of where their loved one is buried. Further, because Galilee will have no operations or staff in future, no one will be present to ensure that a funeral director does not search by digging multiple openings to find the loved one. Any disinterment could be detrimental to graves of persons buried in that area, whose identity is not certain. (Two-thirds of graves in Galilee are unmarked.) A permanent injunction against the removal of a body at Galilee would address those issues but may be overbroad on families who, through their own records, as determined by a Court, know exactly where their loved one is located. The Court must not only protect the potential rights of those families who seek to move their loved ones to another cemetery, but also the rights of those families who *do not* wish their loved ones to be disturbed in any way. Equity must find the remedy here as no statutory scheme fits well to protect both rights when multiple graves may be affected.

3. Disinterment of a dead body is not a matter of right; a disturbance of its resting place and its removal are subject to the control and direction of a court of equity and generally requires the exercise of discretion by the Court. *Estes v. Woodlawn Memorial Park Inc.*, (Tenn Ct. App. 1989), 780 S.W.2d 759, 762-763. *Estes* also notes that disinterment of a body is not favored in the law. Except in cases of necessity and for laudable purposes, it is the policy of the law that the sanctity of the grave should be maintained and that a body, once suitably buried, should remain undisturbed. A court will not ordinarily order or permit a body to be disinterred unless there is a strong showing that it is necessary and that the interests of justice require it. *Id.* In the abstract, the Receiver submits the common law preference for leaving a grave undisturbed outweighs the right of removal, and, for Galilee, this consideration is especially weighty, because the records of the cemetery do not supply

the exact location of buried bodies, and the Receiver would seek to provide the Court with a status on these matters as well.

Liquidation of Corporate Entities

4. During the receivership, the focus of activity has been on the cemetery (the property, identification of location, lots, burial rights, etc.). The Special Deputy Receiver believes it appropriate to also discuss the status of the corporate defendants who are in receivership: JM&M Services, Inc., Lambert Memorial Co., Lambert Memorials, Inc., Lambert and Sons Inc. Preliminarily, none of these corporations are in good standing with the Tennessee Secretary of State. None were found to have assets, other than the cemetery property, blank stones (sold at auction) and some etching equipment (also sold at auction).

Status Conference

Having considered the matters briefly outlined above, the Special Deputy Receiver, Office of the Attorney General and Reporter, and Tennessee Department of Commerce and Insurance respectfully submit that these are matters appropriate for the status conference as well as any other matters the Court would desire to discuss. As a result of the status conference the Receiver, the Special Deputy Receiver, and the Plaintiff would recommend the Court issue an Order or Orders setting forth a hearing as to all matters to be addressed by the parties, a motion and briefing schedule, parties to be noticed, content, form and method of notice, and, after such hearing, the Court issue its findings and final Orders closing the receivership.

Respectfully submitted,

Robert E. Moore, Jr. By Sarah Hiestand
Robert E. Moore, Jr. (BPR #012600) *with permission*

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Receiver's Statement for Status Conference on the Termination of the Receivership of Galilee Memorial Gardens (Thirteenth Interim Report) has been mailed First Class Postage prepaid to the following interested parties and attorneys requesting notice and transmitted via email this 30th day of November, 2018:

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Trustee of Trusts for Galilee Memorial Gardens

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~~ROBERT E. MOORE, JR.~~
SARAH A. HIESTAND