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The Honorable James H. Paige, III
Commissioner, Department of Banking
Capitol Complex
Charleston, West Virginia 25305

Dear Commissioner Paige:

This is in response to your letter of July 26, 1990, wherein you requested our opinion regarding your past interpretation of W. Va. Code §§ 35-5-1 et seq. and 35-5A-1 et seq. Specifically, you raise the following question:

This Department in the past has not differentiated between the "permanent endowment funds" of West Virginia Code 35-5-1 et seq. and "permanent endowment care funds" of West Virginia Code 35-5A-5. Based upon West Virginia Code 35-5A-7, which states that the provisions and requirements of Article 5A shall "take precedence over and shall supersede" any inconsistent Code provisions, it was the opinion of this Department that the trustee of a permanent endowment fund of a cemetery association must be a federally insured trust company or federally insured banking institution with fiduciary powers. This was based upon the thinking that the provisions of West Virginia Code 35-5-5 were inconsistent with those of West Virginia Code 35-5A-5.

. . . I respectfully request the opinion of your office as to whether the interpretation of West Virginia Code 35-5-1 et seq. and 35-5A-1 et seq. by this Department is correct.

First, it must be noted that while the provisions of Article 5, Chapter 35 apply to the universe of all cemeteries, the more explicit provisions of Article 5A, Chapter 35 apply only to the specific subset of cemeteries deemed to be "perpetual care cemeteries". Such "perpetual care cemeteries" are defined as:

a cemetery which advertises or represents to the public in any manner that it provides perpetual care or maintenance for burial grounds, mausoleums or columbaria and the fixtures attached thereto or which sells or offers to sell any interment right which is to be perpetually cared for or maintained.

W. Va. Code § 35-5A-1(b) (1985).

Such perpetual care cemeteries are required to establish a permanent endowment fund before selling or offering to sell any burial, entombment or columbarium rights. W. Va. Code § 35-5A-3. The trustee of such a permanent endowment fund for a perpetual care cemetery is required to be "a federally insured trust company or a federally insured banking institution with fiduciary powers authorized and qualified to exercise trust powers under and subject to the provisions of article four, chapter thirty-one-a of this code, or of the corresponding law of another state." W. Va. Code § 35-5A-5 (1990 Supp.).

If, however, a cemetery does not meet the definition of a perpetual care cemetery set out above, the requirements of W. Va. Code § 35-5A-5 would not apply and the more general provisions of W. Va. Code § 35-5-5 would determine the requirements for a permanent endowment fund. That section of the code allows the trustee of the permanent endowment fund to be "a responsible businessman or some solvent federally insured banking institution." W. Va. Code § 35-5-5 (1990 Supp.).

Though, as you state, the two Articles seem at first to be inconsistent, application of basic statutory construction rules prove otherwise. Both W. Va. Code § 35-5-5 and W. Va. Code § 35-5A-5 were amended in 1989. It must be assumed that the Legislature knew of, and intended, the differences in language relating to trustees of permanent endowment funds. The most logical reason for the stricter requirements for perpetual care cemeteries is that, by statutory definition, those cemeteries advertise or represent to the public that they provide perpetual care or maintenance, while cemeteries not falling under the provisions of Article 5A, Chapter 5 do not so advertise or represent to the public.

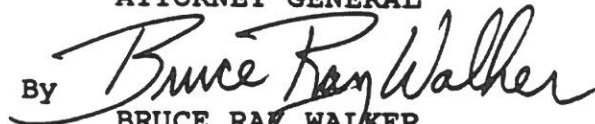
In conclusion, it is the opinion of this office that:

1. The trustee of a statutorily required permanent endowment fund for a perpetual care cemetery as defined by W. Va. Code § 35-5A-1 (b) must be a federally insured trust company or federally insured banking institution as set out in W. Va. Code § 35-5A-5.

2. If a cemetery does not meet the definition of a perpetual care cemetery contained at W. Va. Code § 35-5A-1(b) then the more general provisions of W. Va. Code § 35-5-5 apply and the trustee of any permanent endowment fund established for said cemetery may be either a "responsible business man or some solvent federally insured banking institution."

Very truly yours,

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By 
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