

HALE COUNTY ATTORNEY'S OFFICE

RECEIVED
AUG 25 2000
OPINION COMMITTEE

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PLAINVIEW, TEXAS 79072
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Copy to
Stephen Rowles
IRG
To JRG

Chris D. Prentice
Hale County Attorney

Debbie Farley
Administrative Assistant

RQ-0275-JC

FILE # ML-41590-00

August 24, 2000

I.D. # 41590

Office of the Attorney General of Texas
ATTN: Elizabeth Robinson, Chair
Opinion Committee
Post Office Box 12548
Austin, Texas 78711-2548

VIA FAX TRANSMISSION
FAX NO. 512-472-6538

RE: Request for Attorney General Opinion on whether a Commissioner may use county property to open and close each and every new grave in a private cemetery located within his precinct at no charge to the recipients of the service.

Dear Opinion Committee:

Recent events in Hale County prompt me to request an Attorney General Opinion from your committee regarding a request for Attorney General Opinion on whether a Commissioner may use county property to open and close each and every new grave in a private cemetery located within his precinct at no charge to the recipients of the service. Based on the research I have performed and reviewed, I believe that this practice is unlawful; therefore, I have advised the Commissioner to cease the grave-digging practice. Because of the publicity this matter has received in the media, I need your legally binding opinion.

HISTORY. I just learned of this free grave opening and closing practice in July of this year. As soon as it was brought to my attention, I immediately met with the Commissioner of Precinct #2 and asked if this practice was in fact taking place. He not only confirmed the information, but he indicated that it had been going on for over 50 years. I told him to cease the practice immediately. He requested a letter to give him this instruction in writing. I provided the letter. A copy of that letter is attached hereto as Exhibit A for your reference.

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It appears that the property for the cemetery was given for that purpose early in the century with the stipulation that people would not be charged for their plots. The Petersburg now charges \$40 for each plot and an annual maintenance fee of \$15 for each plot, as I understand it. The free grave digging started, as the story goes, when all graves were dug by hand. County employees even then would do the majority of the digging.

Apparently, from what I have been able to learn, a County employee, after receiving instructions from the Commissioner, takes the County backhoe to the local cemetery, spends about 30 minutes or so opening a grave, and later returns after the funeral and takes about 30 more minutes or so to close the grave. This same process has been used for the opening and closing of all graves in this cemetery for many years.

LEGAL RESEARCH PERFORMED. As I read Article III, §52 of the Texas Constitution, Subsection (a) seems to clearly prohibit a County from expending public funds or other things of value for a private purpose. This would include using county equipment and employees for the opening and closing of graves in a private cemetery. In Attorney General Letter Opinion No. 89-005, it states:

"County funds may only be spent for public purposes, and a county must insure that it receives adequate consideration for its expenditures. Tex. Const. Art III, §52; Attorney General Opinion JM-516 (1988)."

In addition to this opinion, caselaw has addressed the use of county assets for private purposes. In *Godley v. Duval County, et al*, 361 S.W.2d 629, (Tex.Civ.App. – San Antonio 1962), it states:

"The County Commissioners are not authorized to permit the use of county labor, materials or equipment for other than public use. *Ex parte Conger, Tex.*, 357 S.W.2d 740; *Rowan v. Pickett, Tex.Civ.App.*, 237 S.W.2d 734."

In another Attorney General Opinion, JM-1155, it was stated: "While individual commissioners have substantial influence over these matters, they do not have any authority to bind the county for the most part." This same position is expounded upon in Attorney General Opinion No. 892. It is clear from opinions and caselaw that an individual commissioner has very limited authority separate and apart from the Commissioners Court as a whole.

Additional research reveals that a County may have an obligation to "maintain" a cemetery under certain circumstances and conditions. The Texas Health & Safety code, §713.028 authorizes "for purposes of historical preservation or public health, safety, or welfare, a commissioners court may use public funds, county employees, and county equipment to maintain a cemetery that has a grave marker more than 50 years old. This section does not apply to a perpetual care cemetery or a cemetery maintained by a religious or fraternal organization."

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Of course, most any cemetery in Texas has at least one grave marker that is more than 50 years old; therefore, the issue comes down to the meaning of maintain. The generally accepted definition of maintain is:

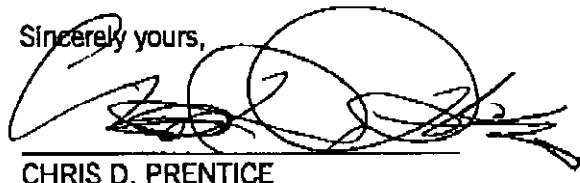
"to keep in an existing state (as of repair, efficiency, or validity);
preserve from failure or decline (one's health or machinery)"
from Webster's New Collegiate Dictionary, (1977)

It would appear that §713.028 would apply to cemeteries that have no other source of maintenance. In the instant circumstance, each plot that is purchased has an initial \$40 fee and an annual \$15 maintenance fee. None of this money is paid to the County. Additionally, according to the best of my knowledge, the Commissioner's Court has never authorized this use of County labor and equipment; therefore, the grave digging was an authorized use of County labor and equipment.

It is understood that the Commissioner's Court could make a finding that the opening and closing of graves in this cemetery or any other cemetery in the county serves as a legitimate use of public funds or assets for a private purpose. However, without such findings, these practices are forbidden under state law.

Please respond to this request as soon as possible. This issue has drawn a great deal of attention from the local, state and national media. An expedited response would be greatly appreciated by this office and the Commissioner's Court.

Sincerely yours,



CHRIS D. PRENTICE
HALE COUNTY ATTORNEY

Enc: as indicated above
Cc: Honorable Bill Hollars, County Judge
Hale Commissioners

HALE COUNTY ATTORNEY'S OFFICE

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FILE # ML-41590-00
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Chris D. Prentice
Hale County Attorney

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Debbie Farley
Administrative Assistant

AUG 28 2000

OPINION COMM

August 28, 2000

Office of the Attorney General of Texas
ATTN: Elizabeth Robinson, Chair
Opinion Committee
Post Office Box 12548
Austin, Texas 78711-2548

VIA FAX TRANSMISSION
FAX NO. 512-472-6538

RE: Request for Attorney General Opinion on whether a Commissioner may use county property to open and close each and every new grave in a private cemetery located within his precinct at no charge to the recipients of the service.

Dear Opinion Committee:

I was informed today that one item of information in my Opinion Request of Friday, August 25, 2000 was in error. That paragraph reads as follows:

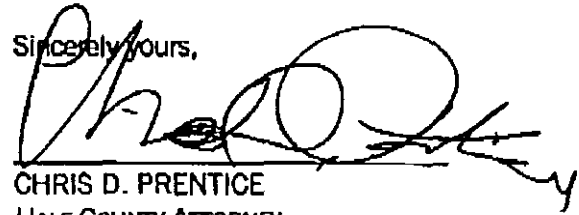
"It would appear that \$713.028 would apply to cemeteries that have no other source of maintenance. In the instant circumstance, each plot that is purchased has an initial \$40 fee and an annual \$15 maintenance fee. None of this money is paid to the County. Additionally, according to the best of my knowledge, the Commissioner's Court has never authorized this use of County labor and equipment; therefore, the grave digging was an authorized use of County labor and equipment."

I have been told that there is no annual maintenance fee of \$15.00 or any other amount. All other information in my Request is accurate to the best of my knowledge.

Please respond to this request as soon as possible. This issue has drawn a great deal of attention from the local, state and national media. An expedited response would be greatly appreciated by this office and the Commissioner's Court.

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Sincerely yours,

A handwritten signature in black ink, appearing to read "Chris D. Prentice", written over a horizontal line.

CHRIS D. PRENTICE
HALE COUNTY ATTORNEY

Cc: Honorable Bill Hollars, County Judge
Hale County Commissioners