

SUPERIOR COURT OF NEW JERSEY

CHAMBERS OF
FRANK M. CIUFFANI
JUDGE



MIDDLESEX COUNTY COURT HOUSE
P.O. BOX 964
NEW BRUNSWICK, NEW JERSEY 08903 - 0964

April 29, 2014

Letter Opinion

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RE: Monument Builders of NJ v. Roman Catholic Archdiocese of Newark
Docket MID-C-124-13

Dear Counsel:

The issue before the Court is whether the Archdiocese's Private Mausoleums Program and Inscription Rights (Monuments) Program are statutorily authorized.

The Archdiocese is organized under Title 16 of the New Jersey Revised Statutes, N.J.S.A. 16:15-1 et seq. Pursuant to its statutory authority, the Archdiocese owns and operates nine cemeteries and manages one. Of the ten total cemeteries, only five have remaining spaces for burial of the dead. The remaining five had their burial spaces completely purchased over the years.

In September 2006, John Schafer, of the Archdiocese met with Plaintiff John Burns, Jr., President of the Monument Builders Association and informed Burns that the Archdiocese was starting a Private Mausoleum Program. Under the Private Mausoleum Program, the Archdiocese planned to purchase private mausoleums and sell burial rights in the mausoleum to the purchaser. The Archdiocese would own the mausoleum and be responsible for maintenance, repairs and restoration. The profits generated from the program would go into a maintenance fund for the perpetual care and maintenance of the cemeteries. Burns asked Schafer whether the Archdiocese intended to sell monuments and according to Burns, Schafer assured him that the Archdiocese would not sell monuments. Schafer's recollection of the encounter is slightly different.

In 2012, the Archdiocese decided to start an Inscription Rights Program for Monuments. The Inscription Program commenced in April 2013. Under the program, the Archdiocese would purchase and own the monument and be responsible for setting and inscribing the stone. The



Archdiocese would own the monument and be responsible for maintenance, repairs and restoration. Before a customer enters into the Inscription Program Agreement, they are told the customer can purchase a monument from any other person or vendor. The Monument Builders sought injunctive relief from the Court on July 17, 2013. The Court denied their application.

The trial in this matter lasted several days with fact and expert witnesses, documentary evidence, legal memoranda and lengthy closing arguments. At the beginning of the trial, the Court observed that, given the very high probability of an appeal, the Court would allow both sides to fully develop the "record" that they felt they needed. The Court finds that the reasons offered by the Archdiocese for the institution of its private mausoleum and monument inscription program are irrelevant. The Archdiocese either is or is not authorized by statute to engage in those programs. Additionally, if the Archdiocese is authorized, then its alleged competitive advantage over the Monument Builders, is also irrelevant. If this Court's analysis is wrong, a remand to develop a "record" will not be necessary.

Similarly, what Mr. Schafer and Mr. Burns discussed in 2006, is only relevant to explain why in 2006 the Monument Builders did not file suit to stop the private mausoleum program. Mr. Schafer told Mr. Burns that the Archdiocese was not getting into the monument sale business. The Amended Complaint does not contain a count which seeks to enforce this "alleged" verbal promise. Even if this claim was before the Court, a verbal promise to restrict forever the use of land is not enforceable.

The Monument Builders rely on two cases decided by the New Jersey Supreme Court. First, in Frank v. Clover Leaf Park Cemetery Association, 29 N.J. 193 (1959), a monument seller sued a cemetery association. The Defendant was selling monuments for private profit and reserving an exclusive right of installation. The Court in Frank held that defendant's selling of monuments was ultra vires. The Court found that N.J.S.A. 8:1-1 *et seq.* did not allow for the defendant to sell monuments.

The second case is Terwilliger v. Graceland Memorial Park Association, 35 N.J. 259 (1961). The issue was whether the Defendant had the authority to participate in the marker and monument market. Defendant began to sell bronze markers and monuments to consumers in its cemetery. Plaintiff filed suit to enjoin the Defendant. The Court held the Defendant was properly enjoined by the lower court from selling bronze markers and monuments.

The primary issue before the Terwilliger Court was whether the defendant was a "public" cemetery. The Court held that:

"A cemetery, although maintained by a private corporation or individual, is a public burial ground if it is open to the use of the public for the interment of the dead. * * * The criterion is public user for cemetery purposes; not whether ownership or control is in the hands of an individual, a general business corporation, or an incorporated cemetery association."

In the matter before the Court, the Archdiocese argues that Frank and Terwilliger are inapplicable to the present case. First, the Archdiocese argues that the cemeteries involved in Frank and Terwilliger were privately owned and operated by non-religious organizations incorporated under N.J.S.A. 8:1-1 et seq. The Archdiocese is a religious organization incorporated under N.J.S.A. 16:15-1 et seq. and exempt from the New Jersey Cemetery Act, which repealed N.J.S.A. 8:1-1 et seq. This difference is significant as the Court in Frank and Terwilliger ruled under a no longer existent statute regarding non-religious cemeteries. Whereas today, the relevant statute is N.J.S.A. 16:15-1 et seq.

Second, the Archdiocese argues that the Court in Frank and Terwilliger based their ruling on the fact that the cemeteries at issue were quasi-public institutions and charitable trusts. The criterion for making this determination was the fact that the cemeteries were for public use. The Archdiocese argues that the cemeteries that the Archdiocese owns and operates are not quasi-public institutions and charitable trusts. The cemeteries are not open for public use. Instead, the cemeteries are open only to Catholics and their family members. By having this exclusivity provision, the Archdiocese argues the cemeteries are not quasi-public institutions and charitable trusts.

There is a dearth of New Jersey case law relating to cemeteries owned and operated by religious entities. The Monument Builders rely in part on Parker v. Fid. Union Trust Co., 2 N.J. Super. 362 (Ch. 1944). In Parker, one of the issues before the Chancellor was the validity of a bequest in a Will to the Greenlawn Cemetery. The Court held that the Greenlawn Cemetery, which was not a religious cemetery, was a public cemetery. The Court in its decision stated:

"In this respect public cemeteries are analogous to railroads and other public utilities. Here lots were sold to the public generally on the same plan in vogue with statutory cemetery associations and all persons had "the same measure of right for the same measure of money." The land has for more than 40 years been devoted to the purposes for which it was dedicated and I have no hesitancy in saying that this "God's acre" is as much a public cemetery as it would have been if owned and operated by a cemetery association incorporated under our statute." Ibid.

The Monument Builders refer the Court to that portion of Parker where the Chancellor uses the following quote from 14 C.J.S. page 63, par. 1:

"The law contemplates two classes of cemeteries public and private. The former class is used by the general community, or neighborhood, or church, while the latter is used only by a family or a small portion of a community."

Cases from jurisdictions outside of New Jersey that have analyzed the issue of public versus private cemeteries in the context of religious entities have held that cemeteries owned and operated by churches or other religious corporations, on land not dedicated to the public, are not "public" cemeteries.

The Supreme Court of Pennsylvania, in Bmilovich v. St. George Indep. Serbian Orthodox Church of Pittsburgh, S. Side, Pa., 191 A. 655 (Pa. 1937), rejected the contention that a religious cemetery was a "public cemetery." Id. at 657. The right of control over cemeteries maintained by churches, like all other temporalities held by religious associations, is vested, under the laws of this state, in those designated by the canons, regulations, and customs of the church society. Ibid.

In holding that the cemetery owned and operated by the church was a private cemetery, the Supreme Court of Pennsylvania focused on the exclusion of the general public from burial in the cemetery. Ibid. The Court expressly rejected the contention that the cemetery was public, stating "the word "public" used in the church charter does not confer an unlimited right of burial to any one which cannot be denied by church authorities. . . . [T]he charter itself expressly makes the operation of the cemetery 'collateral' to the main purpose set forth, which is the 'support of the public worship of Almighty God according to the forms, principles, doctrines and usages of that body of Christian worshipers known as Serbian Orthodox Church. Ibid. (emphasis in original). This language limits the use of the cemetery to members of the Serbian Orthodox Church in good standing. Ibid. "It is quite evident if any one, irrespective of membership in the church, was permitted to assert a right of burial in this cemetery, the practical effect would be to deprive church members of the right to be interred in their own cemetery, and create religious disturbances." Ibid.

Similarly, where the legislature has devised a separate statutory scheme for public cemeteries, cemeteries operated by religious corporations are not considered to be "public cemeteries." In In re Front Street Sewer Assessment, 163 N.W. 978 (Minn. 1917), the Supreme Court of Minnesota held that a cemetery owned and operated by the Diocese of St. Paul was not a "public cemetery." Calvary Cemetery was owned and operated by the Diocese of St. Paul, a religious corporation. Id. at 978. The cemetery was used for the burial of persons of the Catholic faith, though members of other churches or nonchurch members, who are connected with families who are members of the Catholic Church, and have lots in the cemetery, are permitted burial there. Ibid. Calvary Cemetery attempted to claim it was a public cemetery so as to take advantage of a tax exemption. The Court disagreed, stating the Diocese was not a public cemetery association, so as to fall within the Minnesota statute exempting public cemetery lands and property from public taxes and assessments. Ibid.

The Court reasoned "the Legislature has seen fit to enact one set of laws for cemeteries owned and conducted by associations organized for that purpose, and another set of laws for cemeteries owned and conducted by private persons or religious corporations. And there can be no doubt that the appellant in this case comes under the second set of laws." Id. at 979. "It is hardly claimed that the Diocese of St. Paul can be called a public cemetery association. It is plainly a religious corporation with many activities other than conducting a cemetery. . . . We have already noted the statutes make a clear distinction between cemetery associations operating a public cemetery, and individuals or religious corporations that maintain cemeteries, either for profit, or for the burial of those of a particular faith." Ibid.

Historically, cemeteries have been regulated by the State of New Jersey since the mid-19th century. Most recently, the legislature passed the New Jersey Cemetery Act of 2003, N.J.S.A. 45:27-1 et seq. Pursuant to the New Jersey Cemetery Act of 2003, a cemetery established after December 1, 1971, may be owned or operated “only by a governmental entity, a religious corporation or organization or by a cemetery company” in accordance with the statute. See. N.J.S.A. 45:27-6. Additionally, a cemetery company, and any person engaged in the management, operation, or control of a cemetery company, may not directly or indirectly engage in the manufacture or sale of memorials, private mausoleums, or vaults. N.J.S.A. 45:27-16.

N.J.S.A. 45:27-2 exempts a religious organization that owns a cemetery which restricts burials to members of that religion or their families from the definition of “Cemetery Company” under the New Jersey Cemetery Act of 2003 and from regulation under such Act. Specifically, N.J.S.A. 45:27-16c, which prohibits a cemetery company from selling monuments or private mausoleums, is inapplicable to the Archdiocese because the Archdiocese is excepted under N.J.S.A. 45:27-2 from the definition of a “cemetery company”. Both of these provisions are unchanged from their predecessor statutes, N.J.S.A. 8A:1-2 (as to the definition of a cemetery company) and N.J.S.A. 8A:5-3 (as to the prohibition of a cemetery company to sell monuments and private mausoleums). Title 8A was enacted in 1971 as P.L. 1971, c. 333. The enactment in 1971 and the re-enactment in 2003 of provisions exempting religious corporations from statutory regulation clearly evidence a legislative intent, on two occasions, to permit activities of religious organizations that are proscribed for non-sectarian organizations.

In the case at bar, the Archdiocese is participating in the mausoleum and monument market through its inscription program. The consumers are an exclusive group, limited to Catholics and their family members. The cemetery is not for use of the public at large. In addition, the consumers are allowed to purchase a mausoleum or monument from any vendor or builder they so desire.

The Court finds that because Archdiocese’s cemeteries are restricted to members of the Catholic Church and their immediate families, the Archdiocese’s cemeteries are not available to the general public and therefore are not “public cemeteries”. The decision of the New Jersey legislature on two separate occasions, in 1971 and 2003, to exempt religious cemeteries from its regulatory scheme is further evidence that religious cemeteries are not public cemeteries.

The Supreme Court in Frank set the “template” for the Court’s analysis. The Court defined the issue which it had to decide as follows:

“In our view, the fundamental problem present is whether defendant has the authority to engage in the business of sale and installation of bronze memorials.* * * does the sale of memorials exceed the authority granted by the statutory franchise?”

First, the Court must determine if there is express statutory authority. Without express authority, the Frank Court held that the Court should not “imply” authority because:

“factors of preferred economic position and ease of access to prospective customers in promoting sales, in our judgment, make necessary, a strict construction of the statute and the charter emanating therefrom in appraising **the claim of implied power** to engage in the activity in competition with private business.” (Emphasis added)

If the Archdiocese has the express statutory authority, the Court does not apply the above analysis.

Roman Catholic organizations that have not obtained a certificate of authority for the cemetery are instead subject to N.J.S.A. 16:15-1 et seq. The Archdiocese, pursuant to that statute enacted in 1908, have the power to:

“Acquire, purchase, receive, erect, have, hold and use leases, legacies, devises, donations, moneys, goods and chattels of all kinds, church edifices, schoolhouses, college buildings, seminaries, parsonages, sisters' houses, hospitals, orphan asylums, reformatories and all other kinds of religious, ecclesiastical, educational and charitable institutions, and the lands whereon the same are, or may be erected, and cemeteries or burying places and any lands, **tenements and hereditaments** suitable for any or all of said purposes, in any place or places in any such diocese; and the same or any part thereof, to lease, **sell**, grant, assign, demise, alien and dispose of.” N.J.S.A. 16:15-11. (Emphasis added)

In addition to the powers set forth in N.J.S.A. 16:15-11 which governs a Roman Catholic Religious Corporation, N.J.S.A. 16:1-4 sets forth the general statutory powers applicable for all religious societies and congregations. This section provides that every religious society or congregation incorporated by virtue of any law of the state of New Jersey can:

f. Acquire, purchase, receive, have and hold and take by devise, bequest or gift without limit, real and personal property of all kinds, church edifices, schoolhouses, college buildings, parsonages, sisters' houses, hospitals, orphan asylums, and all other kinds of religious, ecclesiastical, educational and charitable institutions, and the lands whereon the same are or may be erected, and cemeteries or burial places, and any real estate suitable for any or all of said purposes;

g. Lease, grant, sell and dispose of all or any part of such property; (Emphasis added)

N.J.S.A. 16:1-4 (f), (g).

Both statutes clearly give the power to religious institutions, in general, and to the Roman Catholic Church, in particular, (1) to acquire and purchase "personal property of all kinds" and "goods and chattels of all kinds", respectively, and (2) to lease, grant, sell and dispose of all or any part of such property" and "lease, sell, grant, assign, demise and dispose of..." such property or "any part thereof", respectively.

Black's Law Dictionary defines "tenement" as follows:

"This term in its common acceptance, is only applied to houses and other buildings, but in its original, proper, and legal sense, it signifies everything that may be *holden*, provided it be of a permanent nature, whether it be of a substantial and sensible, or of an insubstantial, ideal, kind."

As explained in American Jurisprudence, Second Edition:

"Hereditaments" is the largest and most comprehensive word of the phrase "land, tenants, and hereditaments", and is almost as comprehensive as "property", because it embraces anything capable of being inherited, whether corporeal, incorporeal, real, personal, or mixed".

"Hereditaments" includes anything capable of being inherited, whether corporeal (tangible), incorporeal (intangible), real, personal or mixed. Ballentine's Law Dictionary, 42 Am J1st Prop § 17 (2010). Corporeal hereditaments are physical objects, while incorporeal hereditaments are not the subject of sensation, can neither be seen nor handled, are only creatures of the mind and exist only in contemplation. 2-14 Thompson on Real Property, Thomas Editions § 14.04. Examples of incorporeal hereditaments include fishing rights, boating rights, or easements of light and air.

The Court in Whitlock v. Greacen, 48 N.J. Eq. 359 (Ch. 1891), in distinguishing corporeal hereditaments from incorporeal hereditaments also stated that

"Corporeal hereditaments are confined to land...and that incorporeal hereditaments comprise certain inheritable rights, which are not, strictly speaking, of a corporeal nature, or land, although they are, by their own nature or use, annexed to corporeal inheritances, and are rights issuing out of them or concern them"

Id. at 360.

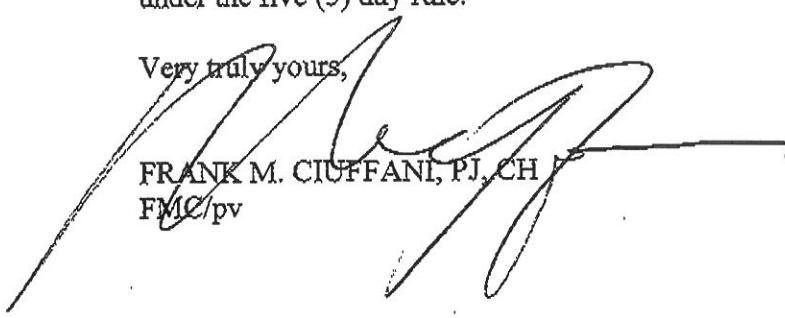
The inclusion of the term "hereditaments" in the granting powers regarding a Roman Catholic religious corporation under N.J.S.A. 16:15-11 and the authority granted therein relative to its cemeteries is of critical importance. The use of the term "hereditaments" expands the corporate powers well beyond the authority to simply hold and use lands for cemetery purposes.

The definitions above reveal that the use of the words "tenements" and "hereditaments" is meant to encompass a broad range of property including lands and all heritable property of a substantial and permanent nature upon those lands as well as heritable property of an intangible nature that does not fall within the classification of a corporeal hereditament. The private mausoleums and monuments purchased by the Archdiocese are installed on the land and owned by the Archdiocese. These private mausoleums and monuments are no different than the buildings erected upon the Archdiocese's cemeteries and are encompassed within the broad common law definition of hereditaments suitable for "any and all" purposes of having, holding and using the "cemeteries or burying places". Further, the rights associated with these private mausoleums and monuments which are sold by the Archdiocese to purchasers and inherited in the same manner as the rights to a burial plot, also constitute hereditaments of the Archdiocese. As such, the acquisition, installation and ownership of the private mausoleums and monuments in the Archdiocese's cemeteries for the sale of inscription rights is not ultra vires, but squarely within the powers granted to the Archdiocese under N.J.S.A. 16:15-11. Accordingly, the Court finds that the purchase of monuments and private mausoleums, with the sale of inscription rights thereon, lie within the Church's statutory powers.

The statutory scheme excludes regulation of religious cemeteries as long as use of the cemeteries is limited to members of that religion. During the trial, the Monument Builders established that members of the Coptic religion were allowed by the Archdiocese to be buried in one of its cemeteries. The Court finds that this fact does not invalidate the program. The program must, however, be limited to members of the Roman Catholic Church. While Coptics are, according to Mr. Schafer, in "communion" with Catholics, the Court makes no finding based on this record whether they are Roman Catholics.

Mr. Woodward shall prepare a proposed form of judgment consistent with this decision under the five (5) day rule.

Very truly yours,



FRANK M. CIUFFANI, P.J., CH J
FMC/pv