

1988

# George K. Schoney and Erma J. Schoney, et al., v. Memorial Estates, Inc., et al. : Brief of Appellant

Utah Court of Appeals

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Arthur H. Nielsen, Joseph L. Henriod, David Swope; Nielsen and Senior; attorneys for respondents. Daniel F. Bertch; Robert J. Debry; Robert J. Debry and Associates; attorneys for appellants.

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**BRIEF**

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880630

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IN THE UTAH COURT OF APPEALS

GEORGE K. SCHONEY and  
ERMA J. SCHONEY, et al.

Plaintiffs/Appellants,

vs.

MEMORIAL ESTATES, INC.,  
et al.,

Defendants/Respondents.

APPENDIX TO  
APPELLANTS' BRIEF

Case No. 880630-CA

Category No. 14(b)

On Appeal From The Third District Court Salt Lake County

Honorable Richard Moffat

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IN THE UTAH COURT OF APPEALS

GEORGE K. SCHONEY and	)	
ERMA J. SCHONEY, et al.	)	
	)	
Plaintiffs/Appellants,	)	APPENDIX TO
	)	APPELLANTS' BRIEF
vs.	)	
	)	
MEMORIAL ESTATES, INC.,	)	Case No. 880630-CA
et al.,	)	
	)	Category No. 14(b)
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APPENDIX

- A. Plaintiffs' Fifth Amended Complaint.
- B. Mausoleum Estate Agreement.
- C. Deed for Interment Rights (Schoney).
- D. Class Certification Order (Judge Fishler).
- E. Findings of Fact and Conclusions of Law to Support Decertification (Judge Dee).
- F. Plaintiffs' Second Amended Complaint.
- G. Utah Code Ann. §22-4-1 (1971).
- H. Utah Code Ann. §8-4-2 (1955).

DATED this 21 day of February, 1989.

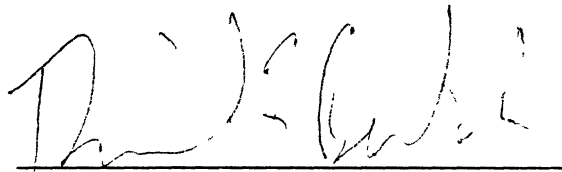
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Appellants

By:   
DANIEL F. BERTCH

CERTIFICATE OF MAILING

I certify that on the 21 day of February, 1988, true and correct copy of the foregoing APPENDIX TO APPELLANTS' BRIEF (George K. Schoney, et al. v. Memorial Estates, et al.), was mailed, postage prepaid, by depositing a copy of the same in the U.S. mail, to the following:

Arthur H. Nielsen  
Joseph L. Henriod  
David Swope  
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Salt Lake City, Utah 84111

A handwritten signature in dark ink, appearing to read "David Swope", is written over a horizontal line.

SP8-033/ek

## APPENDIX

A.	Fifth Amended Complaint.....	R1312-1342
B.	Contract.....	R10
C.	Deed to Interment Rights.....	R11
D.	Class Certification Order.....	R202-204
E.	Findings to Support Decertification.....	R1053-1056
F.	Second Amended Complaint.....	R292-308
G.	U.C.A. §22-4-1 (1971)	
H.	U.C.A. §8-4-2 (1955)	

## Exhibit A

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U.S. DEPARTMENT OF AGRICULTURE  
WASHINGTON, D. C.

Mr. P. J. Jones

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IN THE THIRD JUDICIAL DISTRICT COURT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

GEORGE K. SCHONEY and ERMA )  
J. SCHONEY for themselves and )  
all others similarly situated, )

Plaintiffs,

**vs.**

MEMORIAL ESTATES, INC. and  
MEMORIAL ESTATES CEMETERY  
DEVELOPMENT CORP. a corpora-  
tion, and JOHN DOES I through  
10, individuals,

## Defendants

PLAINTIFFS' FIFTH  
AMENDED COMPLAINT

Civil No. C82-4983

Judge Richard H. Moffat

The plaintiffs, George K. Schoney and Erma J. Schoney, complain for themselves and all others similarly situated as follows:

## DESCRIPTION OF PARTIES

1. Defendant Memorial Estates, Inc. is a corporation organized pursuant to the laws of the State of Utah, which has its principal place of business at 6500 South Redwood Road, in Murray, Utah.



2. Defendant Memorial Estates Cemetery Development Corp. is a corporation organized pursuant to the laws of the State of Utah.

3. The defendants, John Does 1 through 10, are individuals residing in Salt Lake County, as yet unknown to the plaintiffs.

4. The corporate defendants are and were at all times relevant, interrelated corporations operating under a common scheme to sell pre-need funeral contracts for burial lots, mausoleum crypts, burial services and other funeral merchandise such as grave markers and vaults. The defendant corporations are controlled through common management. Plaintiffs allege on information and belief that at all times relevant to this action, the defendants commingled corporate funds and in other ways were and are so closely related that the corporateness of one corporate defendant is not distinguishable from the other corporate defendant.

#### FIRST CAUSE OF ACTION

##### BREACH OF CONTRACT FOR DELAYED PERFORMANCE

1. In 1973, plaintiffs purchased, from defendant, a crypt in an unconstructed mausoleum.

2. Pursuant to the said purchase agreement, defendants had an obligation to construct the mausoleum one year from the completion or termination of the "Public

Relations Development Program." Alternatively, defendants had an obligation to build the mausoleum within a reasonable time.

3. Defendants did not construct any new mausoleum as required. Defendants did not construct the new mausoleum which relates to plaintiffs until after this lawsuit was filed. Had it not been for this lawsuit, defendant would not have constructed the new mausoleum.

4. Plaintiffs allege on information and belief that defendants' motive in delaying performance was to preserve capital and to save on interest costs. Plaintiffs further allege on information and belief that defendants did not begin construction at an earlier time because defendants did not segregate or preserve the deposits from plaintiffs and other class members; and that said deposits were dissipated in defendants' daily operations.

5. From time to time, plaintiffs made inquiries to determine when the mausoleum would be completed. On each occasion, defendants lulled plaintiffs by stating that the mausoleum would be completed shortly. Therefore, plaintiffs did not discover and could not reasonably have discovered the breach of contract until 1981. Furthermore, plaintiffs had no way of knowing until discovery was completed in this case, that the public relations program was terminated and that defendants' duty to perform was complete.

6. By reason of the delay in performance, plaintiffs and other class members have been damaged by the loss of interest on their deposits from the time performance was required to the date on which the new mausoleums are completed. In addition, the named plaintiffs have been forced by defendant's breach to purchase substitute mausoleum space for themselves, and their parents. Further, the named plaintiffs have suffered emotional distress and mental anxiety.

## SECOND CAUSE OF ACTION

### BREACH OF WARRANTY

7. Defendants sold crypt space in a mausoleum to plaintiffs and other class members prior to the time that such mausoleums were constructed.

8. In order to induce plaintiff and other class members to purchase mausoleum space, defendants showed plaintiffs and other class members an artist's rendering of the mausoleum which was to be constructed. That artist's rendering is attached as Exhibit A.

9. After 12 years, defendants have finally built the promised mausoleums. However, the new mausoleums are of different design and of lesser quality than the mausoleum promised in the artist's sketch attached as Exhibit A.

10. Plaintiff alleges on information and belief that the breaches of warranty alleged above were done with malice and with reckless disregard for the rights of the members of the plaintiff class in that defendants rely on the fact that class members will not normally learn of the breach of warranty until the time of death and bereavement when they are not emotionally able to complain.

11. The new mausoleums have only recently been completed or are still under construction. Therefore, plaintiffs could not reasonably have discovered the breach of warranty until 1985.

12. By reason of the breaches of warranty alleged above, plaintiffs and other class members have been damaged in that their mausoleum spaces are worth less than if the mausoleum had been built as warranted.

### THIRD CAUSE OF ACTION

#### COMMON LAW FRAUD

13. Defendants began their campaign of selling mausoleums at a time when no mausoleum had been constructed. During that time period, defendants used a form of contract which states in haec verba:

. . . The company agrees . . . to complete the mausoleum unit . . . within one year after the Public Relations Development Program on that unit is completed.

14. Thereafter, defendants constructed their first mausoleum unit at the Redwood location. The said unit has space for 128 crypts.

15. At approximately the time that defendants completed construction of the above-described mausoleum, defendants changed the form of their sales presentation and their standard contract to read in haec verba:

The undersigned seller hereby sells and the undersigned buyer buys, subject to the terms and conditions hereinafter set forth, the following described property, the delivery and condition of which are hereby acknowledged and accepted.  
[Mausoleum crypt.]

16. Defendants thereupon began assigning space in the then existing 128 crypt mausoleum to customers, and delivering to said customers deeds which state in haec verba:

Deed for Interment Rights  
. . . Memorial Estates . . . does hereby  
grant and convey to [name of class members]  
the following property . . . Estate No. \*  
Space No. \*.

In the mausoleum according to the  
maps and plats of said cemetery, on file in  
the . . . office of the recorder of deeds  
in Salt Lake County.

17. After defendant had made and assigned 128 crypts to customers, the entire, then existing, mausoleum was filled.

---

\* These spaces are filled in by defendants' staff for each contract.

However, defendants did not change their sales presentation, nor their sales contract, nor their deed. Rather, defendants began to oversell the existing mausoleum until approximately 600 crypts had been sold, assigned, and deeds issued in the 128 crypt mausoleum.

18. By reason of the foregoing representation, plaintiffs and other class members were led to believe, and did in fact believe that they owned a specific crypt in a specific existing mausoleum.

19. The customers of defendants were not aware of the true facts that the then existing 128 crypt mausoleum had been oversubscribed and over sold. If the customers had known the true facts, they would not have entered into the contracts or purchased a crypt.

20. Defendants' actions alleged above were done with malice and with reckless disregard for the rights of plaintiffs in that defendants perpetrated their fraud upon the belief that plaintiffs would not discover the fraud until the time of death and bereavement when they would not be emotionally able to complain. Defendants further calculated that their fraud would not be discovered because all customers would not die at the same time.

21. Plaintiffs did not discover and could not reasonably have discovered defendants' fraudulent conduct

until 1984. Furthermore, plaintiffs allege on information and belief that other class members are not aware of the fraud because they would not learn that the mausoleum is oversubscribed until a time of death and bereavement.

22. By reason of the foregoing acts of fraud, plaintiffs and other class members have been deprived of their purchase price, plus interest, costs, and attorney fees.

#### FOURTH CAUSE OF ACTION

##### VIOLATION OF UTAH CONSUMER SALES PRACTICES ACT

23. The sale by defendants of mausoleum space is a consumer transaction within the meaning of §13-11-3(2), Utah Code Ann.

24. Within the meaning of §13-11-4(2)(b), Utah Code Ann., defendants represented that the mausoleums to be constructed were of a particular standard, grade, style and model when they were not.

25. Within the meaning of §13-11-4(e), Utah Code Ann., the mausoleum was not supplied in accordance with the previous representations of defendant.

26. The foregoing conduct together with the other acts of defendant's alleged in other counts of this complaint, constitute deceptive practices within the meaning of §13-11-5, Utah Code Ann.

27. Plaintiffs have suffered actual loss within the meaning of §13-11-19(4), Utah Code Ann. Additionally, named plaintiffs have suffered emotional distress and mental anxiety.

28. Plaintiffs are further entitled to a reasonable attorneys fee as provided by §13-11-19(5), Utah Code Ann.

#### FIFTH CAUSE OF ACTION

##### BREACH OF CONTRACT, UNJUST ENRICHMENT, INTERFERENCE WITH EASEMENT

29. The Mausoleum Estate Agreement provides, in part, that, " . . . The Company agrees to extend to the Purchaser and his immediate family . . . the use of a full service chapel . . . ." Additionally, this agreement creates an easement or other property interest in the chapel.

30. The promise of a chapel was an essential term of the contract in that such a chapel provides convenience, comfort, and peace prior to and at a time of bereavement.

31. The defendants converted the existing chapel at 3115 East 7800 South (Mountain View), Salt Lake City, Utah, into office space, and rented this space for that purpose from about 1977 to 1984. This chapel was built through sales proceeds from, and for the benefit of, cemetery plot and mausoleum crypt purchasers. The existence of



the chapel was to be of benefit to the entire class of plaintiffs at Mountain View Cemetery. However, by defendants' acts, it was totally unavailable for the use of plaintiffs and their families.

32. By reason of the conversion of the chapel into offices, the collection of rent therefrom, and the retention of rent proceeds, defendants have been unjustly benefited and unjustly enriched at the expense and loss of the plaintiffs.

#### SIXTH CAUSE OF ACTION

##### BREACH OF COMMON LAW TRUST

33. As early as 1972, defendants were actively selling mausoleum space on a pre-need basis under a so-called public relations development program. Under this program, plaintiffs were sold space in a mausoleum that was yet to be constructed. Defendants expressly promised to plaintiffs that the proceeds collected from these pre-need mausoleum sales would be used to construct a mausoleum unit once enough funds were received to begin construction. Completion of the program as to a mausoleum unit was promised to occur after about 50 percent of the mausoleum spaces in that unit had been sold, or after the program was abandoned

34. Plaintiffs allege, in the alternative, that if there was no express promise to hold the funds in trust, defendants nonetheless had a common law duty to hold the said funds in trust and that the said duty was an implied term of the contract between the parties.

35. Plaintiffs allege on information and belief that money collected from mausoleum sales was put into the general operating fund of the defendants' corporation and used for general business purposes. Defendants failed to preserve the money collected from mausoleum sales for mausoleum construction.

36. As a result of defendants' failure to preserve the money collected from mausoleum sales for mausoleum construction, defendants, as trustees, have been unjustly enriched by receiving interest on the trust funds during the period of the delay in construction.

#### SEVENTH CAUSE OF ACTION

##### BREACH OF STATUTORY TRUST

37. Pursuant to Sections 8-4-12 and 8-4-13, Utah Code Ann., defendants are required to deposit \$30.00 in an irrevocable endowment care trust fund for each mausoleum space sold. The required sum is payable to the trust upon full payment of the contract price. Compliance with this statute is an implied term of the contract. The funds in

this trust are to be collected for the purpose of maintenance and care of the cemetery property. These trust funds are to be invested in accordance with Section 33-2-1, Utah Code Ann., which requires the standard of care that men of prudence, discretion and intelligence exercise in the management of their own affairs.

38. Contrary to the requirements of Section 33-2-1, Utah Code Ann., defendants have substituted and maintain over 40% of the trust corpus with accounts receivable. This is money owing to defendants on sales contracts and is by its very nature noninvestable.

39. As a result of this ongoing practice, the endowment care trust fund remains over 40% uninvested and thus is not capable of the proper generation of funds for endowment care cemetery maintenance as required by law. As a result, plaintiffs and their families, who are effectively the beneficiaries of this endowment care trust fund, are damaged by the loss of available trust funds for cemetery maintenance at Memorial Estates Cemeteries; and further, plaintiffs are deprived of the peace, comfort and solitude of having an adequate endowment care trust as promised by the contract. Defendants are unjustly enriched by diverting trust funds to their own benefit.

#### EIGHTH CAUSE OF ACTION

##### INVASION OF TRUST CORPUS

40. Plaintiffs Mausoleum Estate Agreement provides that defendant shall contribute \$20.00 to "Trust A" and \$20.00 to "Trust B" (See Exhibit "B".) However, defendant has not maintained two separate trust accounts. Plaintiff alleges on information and belief that defendant has invaded the assets of Trust B and used those assets for the general operating expenses of defendant including salaries and advertising. Therefore plaintiffs have been deprived of the assets of Trust B; and further, plaintiffs have been deprived of the peace, comfort and solitude of having an adequate endowment care trust as provided by the contract, and defendant has been thereby unjustly enriched.

#### NINTH CAUSE OF ACTION

##### FAILURE TO ESTABLISH A STATUTORY TRUST

41. The sale of unconstructed mausoleum space with chapel privileges is a prearranged funeral plan within the meaning of §22-4-1, Utah Code Ann. Further, compliance with the statute is an implied term of the contract.

42. Defendants have failed to establish the 75% trust required by §22-4-1, Utah Code Ann.

43. Plaintiffs and other class members have been damaged because the trust funds have been diverted to general operating expenses, and plaintiffs have not been given the option of withdrawing their funds pursuant to §22-4-4, Utah Code Ann.

#### TENTH CAUSE OF ACTION

##### OUTRAGE AND INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

44. Defendants' advertising program is designed to promise customers a sense of peace, comfort and security through the purchase of "pre-need" mausoleum space and related services. Plaintiffs have paid money in good faith. However, defendants have failed to provide peace, comfort, and security. Defendant's knew, or should have known, that named plaintiffs were opposed to ground burial for philosophical and personal reasons. Plaintiffs agreed to a ground burial for Clinton Wheeler in 1974 in reliance on defendant's express promise that he would not be there more than several (less than six) months. Further, because of the temporary nature of the interment, his grave was not marked. However, defendants intentionally or recklessly delayed building the mausoleum for years. Moreover, with the passage of time, defendants lost track of the location. Ultimately, defendants were forced to use a long metal probe to locate the

grave. Due to the long delay, and defendants' stated intention not to build the mausoleum, plaintiffs' purchased other mausoleum space at Sunset Lawn. When plaintiff Erma Schoney's mother died, she was interred at the Sunset Lawn. Defendants intentionally refused to allow the father of plaintiff Erma Schoney to be disinterred, and reinterred at Sunset Lawn with his wife. Finally, on the morning of the funeral, defendants relented and allowed plaintiff Erma Schoney's father to be transferred. Defendants' conduct, together with the acts alleged above, has caused great turmoil and severe emotional distress to the named plaintiffs. Defendants' conduct was done willfully and in reckless disregard for their rights and sensibilities. A reasonable person should have known that defendants' conduct would cause such severe emotional distress.

#### ELEVENTH CAUSE OF ACTION

##### CLASS ALLEGATIONS\*

45. Plaintiffs are members of a class composed of persons who have entered into pre-need contracts with defendants, and have received deeds to mausoleum space.

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\*The named plaintiffs have repleaded the class allegations to preserve their objection to Judge Dee's decertification order.

Plaintiffs allege on information and belief that the class is composed of more than 1000 persons making joinder of all class members impracticable.

46. Alternatively, plaintiffs are members of a class of persons who have purchased pre-need mausoleum space at Mountain View. This class is composed of more than 120 members making joinder of all class members practicable.

47. There are questions of law and fact common to all class members. Those common questions include: whether defendants have fraudulently and deceptively received money for the construction of a mausoleum, whether the defendants have breached their warranty of quality, whether defendants have breached their contract by not constructing the promised mausoleum within the required time, whether defendants have breached an express trust, whether plaintiffs have been deprived of the chapel, and whether defendants have committed deceptive acts by conveying interment rights in a non-existent mausoleum.

48. Plaintiffs' claims are typical of the claims of other class members in that defendants sold mausoleum space through a standardized marketing scheme. All class members have purchased mausoleum space pursuant to standardized form contracts; all class members have also received the

same standard form of deed. Further, defendants have violated statutory trust obligations owed to all members of the class.

49. The prosecution of separate actions by or against individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class. Such adjudications would establish incompatible standards of conduct for the party opposing the class in that defendants must either maintain trusts for all class members or refund the money received for construction of the mausoleum to all class members. Also, defendants have acted or refused to act on grounds applicable to the whole class in renting the chapel, breaching trust obligations, delaying construction of the mausoleum and building an inferior mausoleum.

50. The questions of law and fact common to the class members predominate over any questions affecting only the named plaintiffs. Specifically, the claims of the named plaintiffs for breach of trust (Counts 6, 7, 8 and 9); rental of the chapel (Count 5); breach of warranty (Count 2); deceptive consumer sales (Count 4); fraud (Count 3) and breach of contract (Count 1) are identical in substance to that of the class members. Only the claim for intentional



infliction of emotional distress (Count 10) is unique to the named plaintiffs.

51. Because of the common marketing scheme of defendants and their failure to keep trust obligations to the class as a whole, and due to the relatively small amounts involved, a class action is superior to other available methods for a fair and efficient adjudication of the controversy.

#### PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray for judgment as follows:

1. For named plaintiffs and all others similarly situated:

- (A) For interest on their purchase price from the time when defendants should have built the mausoleum, until it was built;
- (B) For the difference in value between mausoleum space as warranted, and as built;
- (C) For the reasonable or actual rental value of the chapel during the time it was rented; in the alternative, that defendants be required to disgorge the rental income by which they have been unjustly enriched;
- (D) For an accounting of all trust funds;

(E) For an order granting all plaintiff class members the option of withdrawing their payments pursuant to U.C.A. §22-4-4/

(F) For punitive damages in an amount to be assessed at trial;

(G) For costs, interest and attorney fees.

2. For named plaintiffs, the cost of substitute space at Sunset Lawn in the approximate amount of \$13,500, damages for mental anxiety and emotional distress, and for punitive damages in an amount to be determined at trial. Also, for costs, interest and attorney fees.

3. For such other relief as is necessary to do justice and equity between the parties.

DATED this 26 day of Jan, 1988.

ROBERT J. DEBRY & ASSOCIATES  
Attorneys for Plaintiffs

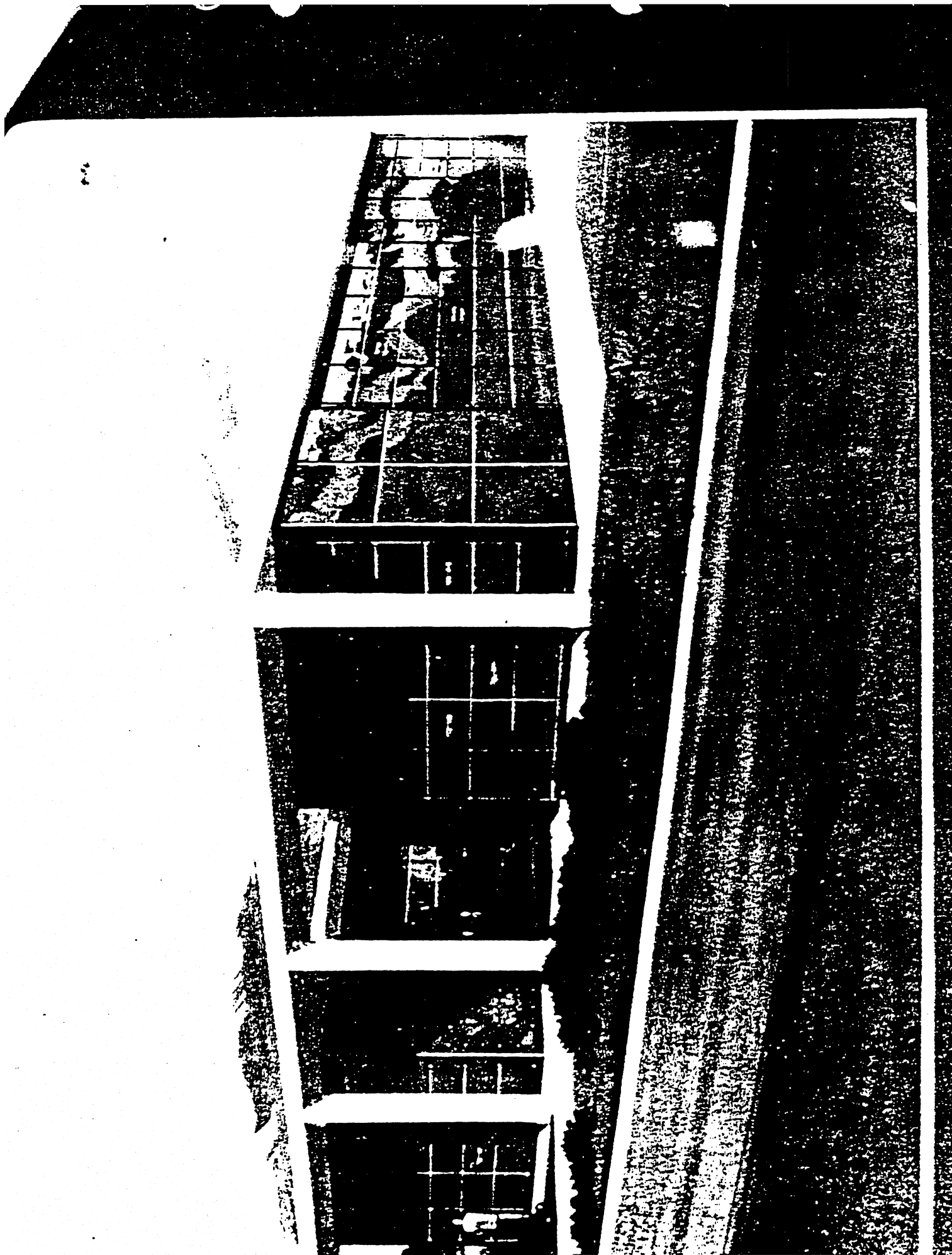
By:   
DANIEL F. BERTCH

CERTIFICATE OF ~~MAILING~~ HAND DELIVERY

I hereby certify that a true and correct copy of the foregoing FIFTH AMENDED COMPLAINT, (Schoney v. Memorial Estates, et al.) was mailed, U.S. Mail, postage prepaid, this 26 day of Jan, 1988, to the following:

Joseph L. Henriod  
Earl Jay Peck  
Stephen L. Henriod  
NIELSEN & SENIOR  
1100 Beneficial Life Tower  
36 South State Street  
Salt Lake City, Utah 84111

Anita M. Corbett



**FILMED**

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Salt Lake County, Utah

JAN 27 1988

H. Dixon Hindley, Clerk 3rd Dist. Court  
By R. Quolepas  
Deputy Clerk

DANIEL F. BERTCH - A4728  
ROBERT J. DEBRY - A0849  
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IN THE THIRD JUDICIAL DISTRICT COURT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

GEORGE K. SCHONEY and IRMA	)	
J. SCHONEY for themselves and	)	
all others similarly situated,	)	ORDER
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
MEMORIAL ESTATES, INC. and	)	
MEMORIAL ESTATES CEMETERY	)	
DEVELOPMENT CORP. a corpora-	)	Civil No. C82-4983
tion, and JOHN DOES I through	)	
10, individuals,	)	
	)	Judge Richard H. Moffat
Defendants	)	

This matter came before the court on defendant's motion to dismiss. At the hearing, plaintiff moved orally for leave to amend the complaint. The court having heard argument of counsel, and considered the written materials submitted, hereby ORDERS:

1. Defendants' motion to dismiss and for summary judgment is denied without prejudice.
2. Plaintiff's motion to amend is granted. For clarity, plaintiff is ordered to style the amended

complaint as the "Fifth Amended Complaint."

3. Plaintiff is given ten days to file and serve the Fifth Amended Complaint.

4. Defendants are given ten days to answer the complaint.

DATED this 26 day of January, 1988.

BY THE COURT:

  
HONORABLE RICHARD H. MOFFAT

Approved as to form:

By:   
NEILSEN & SENIOR

ATTEST  
H. DIXON HINDLEY  
CLERK

By   
Deputy Clerk

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing ORDER, (Schoney v. Memorial Estates, et al.) was mailed, U.S. Mail, postage prepaid, this 19<sup>th</sup> day of January, 1988, to the following:

Joseph L. Henriod  
Earl Jay Peck  
Stephen L. Henriod  
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Salt Lake City, Utah 84111

Laurie Fabiano

FILED IN JUDICIAL OFFICE  
SALT LAKE COUNTY, UTAH

FEB 4 3 05 PM '88

BY *James P. [Signature]*

DANIEL F. BERTCH - A4728  
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IN THE THIRD JUDICIAL DISTRICT COURT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

GEORGE K. SCHONEY and ERMA  
J. SCHONEY for themselves and  
all others similarly situated,

Plaintiffs,

vs.

MEMORIAL ESTATES, INC. and  
MEMORIAL ESTATES CEMETERY  
DEVELOPMENT CORP. a corpora-  
tion, and JOHN DOES I through  
10, individuals,

Defendants

REQUEST FOR PRE-TRIAL  
SCHEDULING CONFERENCE

Civil No. C82-4983

Judge Richard H. Moffat

Plaintiff moves this Court, under Utah Rule of Civil Procedure 16, for a pre-trial scheduling conference to set a trial date, discuss additional discovery, if any, and to consider any other matter helpful to resolution of the case.



Plaintiff suggests that the conference could possibly be held by telephone, to avoid unnecessary hearings.

DATED this 4th day of February, 1988.

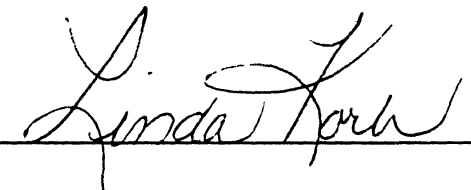
ROBERT J. DEBRY & ASSOCIATES  
Attorneys for Plaintiffs

By:   
DANIEL F. BERTCH

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing REQUEST FOR PRE-TRIAL SCHEDULING CONFERENCE, (Schoney v. Memorial Estates, et al.) was mailed, U.S. Mail, postage prepaid, this 4th day of February, 1988, to the following:

Joseph L. Henriod  
Earl Jay Peck  
Stephen L. Henriod  
NIELSEN & SENIOR  
1100 Beneficial Life Tower  
36 South State Street  
Salt Lake City, Utah 84111



**FILMED**

*Robert J. DeBry & Associates*  
*Attorneys at Law*

*The Woodlands — Suite 500*

*4001 South 700 East*

*Salt Lake City, Utah 84107*

801 262-8915

FILED IN CLERK'S OFFICE  
Salt Lake County Utah

FEB 5 1988

H. Dixon Hindley, Clerk 3rd Dist. Court  
By R. G. Notepas  
Deputy Clerk

February 4, 1988

Honorable Richard H. Moffat  
THIRD JUDICIAL DISTRICT COURT JUDGE  
240 East 400 South  
Salt Lake City, Utah 84111

C82-4983

Dear Judge Moffat:

RE: Schoney v. Memorial Estate

As you know, this case was continued due to your handling of Judge Daniels' calendar on the week of February 1, 1988. You then gave me the opportunity to amend the Complaint, and defendant will shortly answer it. Yesterday, Kathy, your clerk, kindly put myself and counsel for defendant on conference call to schedule a new trial date. It appears that defendant will need to request more discovery as a result of the amendment to the complaint. Also, the next "first-place" setting on your calendar is not until August 23, 1988.

It seems difficult to know when to set a new trial until the court indicates how much discovery by defendant, if any, will be permitted. Further, this case has had three previous first-place settings in the last 12 months cancelled. I would ask the court, if necessary, to "bump" someone else's first-place setting to a second-place setting so that we do not have to wait until late August for a trial. This is an unusual request and I do not make it lightly. However, due to the unusual delays that have plagued this case, it seems that extraordinary circumstances are present.

Another possibility would be to make an exception to allow us two or three settings, i.e. a second-place setting in April and May, and a first-place setting in August. In all probability, we would have a trial in April or May without taking the chance of a delay until the fall if we don't have a trial.

Page two  
-----

I suggest having a pre-trial scheduling conference with the court so that we can set a trial date in coordination with addressing further discovery. I enclose a formal request for that purpose. However, I think we could easily do it by telephone rather than require a formal hearing.

Respectfully,

ROBERT J. DEBRY & ASSOCIATES



DANIEL F. BERTCH

DFB/sd

cc: Jay Peck  
Stephen Henroid

**FILED**

FILED IN CLERK'S OFFICE  
Salt Lake County Utah

FEB 5 1988

H. Dixon Hindley, Clerk 3rd Dist. Court  
By K. Groves  
Deputy Clerk

DANIEL F. BERTCH - A4728  
ROBERT J. DEBRY - A0849  
ROBERT J. DEBRY & ASSOCIATES  
Attorneys for Plaintiff  
4001 South 700 East, Fifth Floor  
Salt Lake City, Utah 84107  
Telephone: (801) 262-8915

IN THE THIRD JUDICIAL DISTRICT COURT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

GEORGE K. SCHONEY and ERMA  
J. SCHONEY for themselves and  
all others similarly situated,

Plaintiffs,

vs.

MEMORIAL ESTATES, INC. and  
MEMORIAL ESTATES CEMETERY  
DEVELOPMENT CORP. a corpora-  
tion, and JOHN DOES I through  
10, individuals,

Defendants

REQUEST FOR PRE-TRIAL  
SCHEDULING CONFERENCE

Civil No. C82-4983

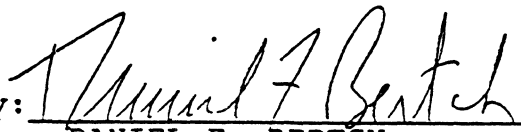
Judge Richard H. Moffat

Plaintiff moves this Court, under Utah Rule of Civil  
Procedure 16, for a pre-trial scheduling conference to set a  
trial date, discuss additional discovery, if any, and to  
consider any other matter helpful to resolution of the case.

Plaintiff suggests that the conference could possibly be held by telephone, to avoid unnecessary hearings.

DATED this 4th day of February, 1988.

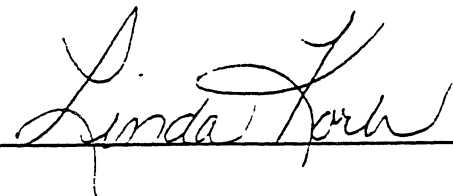
ROBERT J. DEBRY & ASSOCIATES  
Attorneys for Plaintiffs

By:   
DANIEL F. BERTCH

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing REQUEST FOR PRE-TRIAL SCHEDULING CONFERENCE, (Schoney v. Memorial Estates, et al.) was mailed, U.S. Mail, postage prepaid, this 4th day of February, 1988, to the following:

Joseph L. Henriod  
Earl Jay Peck  
Stephen L. Henriod  
NIELSEN & SENIOR  
1100 Beneficial Life Tower  
36 South State Street  
Salt Lake City, Utah 84111



FILED

FILED IN CLERK'S OFFICE  
Salt Lake County Utah

FEB 8 1988

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

By K. Grotepas  
H. Dixon Hindley, Clerk 3rd Dist. Cou  
Deputy Clerk

George K. Schoney  
Plaintiff(s),

vs.

Memorial Estates  
Defendant(s).

ORDER FOR SCHEDULING  
CONFERENCE

CASE NO. C82-4983

This case has been assigned to Judge Richard H. Moffat.

The Court, on its own motion, hereby orders that an in-Court scheduling conference be held in the above-entitled case as follows:

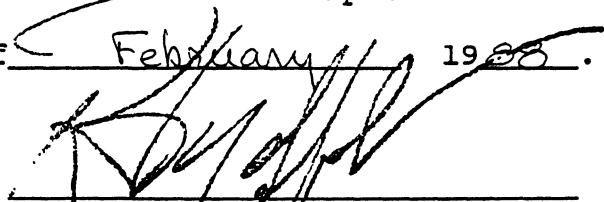
Date: February 17, 1988  
Place: Third Floor #330

Time: 9.25 a.m.  
Address: 451 South 200 East  
Salt Lake City, Utah 84111

- The following matters will be discussed:
- |                                  |                                  |
|----------------------------------|----------------------------------|
| 1. Trial dates                   | 6. Nature and complexity of case |
| 2. Discovery completion date     | 7. Final pre-trial date          |
| 3. Jury or non-jury              | 8. Special matters               |
| 4. Trial length                  | 9. Settlement status             |
| 5. Dates for dispositive motions |                                  |

If the above-referenced time and date are not possible, counsel are to contact the Court's clerk, Kathy Grotepas, at 535-5453 to arrange another date. Unavailability or non-appearance of counsel will result in pleadings being stricken and a default entered or dates being set without counsel's input.

Dated this 8th day of February 1988.

  
RICHARD H. MOFFAT  
DISTRICT COURT JUDGE

Copies mailed to parties at the addresses indicated:  
Daniel Bentch 4001 So. 700 East Fifth Floor  
SLC, Utah 84107  
Stephen Henriod 1100 Beneficial Life Tower  
36 So. State Street SLC, Utah 84111

Date: 2/8/88

Kathy Grotepas  
Court Clerk

## Exhibit B

# MEMORIAL ESTATES

## Mausoleum Crypts

### MAUSOLEUM ESTATE AGREEMENT

Upon payment of this agreement, the Purchaser will receive a deed to the exclusive right of interment in a Mausoleum Estate containing 2 spaces, described as Mausoleum Crypts to be used subject to the Rules and Regulations of the Company now or hereafter made and promulgated for the operation, care, use, control, and preservation of the mausoleum units and the improvements thereof.

The purchase price, including the total amount of the Endowment Care Trust Funds at Forty (\$40.00) Dollars per space, is the Cash price of \$ 1,390.00. The Down Payment of \$ 300.28 leaves an unpaid cash balance of \$ 1,090.00. The Finance Charge is \$ none, at the annual percentage rate of 0%. The Total Deferred payment price is \$ 1,090.00.

The Purchaser agrees to pay the total of payments in 36 equal consecutive monthly installments \$ 30.27 each, the first installment to be due and payable on the 15<sup>th</sup> day of February, 1974 and the remaining installments to be paid on the same day of each succeeding month.

In addition, the Company agrees to extend to the Purchaser and his immediate family the following benefits:

**Chapel & Improvement Use:** To provide the use of the full service chapel, the entrance area, the parking facilities, and all other convenience improvements as completed, without additional charges.

**Care & Maintenance:** To provide the care and maintenance required, in addition to that which is provided by current trust fund income, in order to maintain the entire developed section of the cemetery until such time as the trust fund income is adequate.

**Transfer to Developed Property:** To transfer the mausoleum estate, which has hereby been purchased in a semi-developed mausoleum, to a comparable developed mausoleum space without any additional cost, should a space in the mausoleum estate be needed for interment prior to development.

**Transfer to Other Memorial Estate Properties:** To allow the Purchaser at any time to present his request for transfer of the mausoleum estate to another mausoleum unit that has the same Public Relations cost wherein not more than one half (1/2) of the spaces have been previously allocated.

**Transfer to Other Persons:** To honor the request of the Purchaser to transfer his Estate or any space thereof to anyone whom he may desire upon prior written approval of the Company.

**Transfer to Other Communities:** To permit the Purchaser, if he moves to another community more than fifty miles distance from metropolitan Salt Lake City, to transfer full dollar equity into the new community, subject to the Rules and Regulations governing such transfer at the time of the transfer request.

**Purchaser's Right to Cancel:** This agreement can be cancelled by the Purchaser upon notification in writing, mailed to the Company at 55 East Stratford Avenue, Salt Lake City, before midnight on the third business day after the Purchaser has signed the agreement.

**Endowment Care Trust Funds:** To cause to be transferred, when the total amount has been received from the purchaser, (\$20.00) per space to Trust "A" and to transfer Twenty Dollars (\$20.00) per space to Trust "B". Both Trust "A" and Trust "B" have been established by the Company to provide income to be applied to endowment care. The Purchaser authorizes and directs that the contributions to Trust "B" be invested in corporate bonds of Memorial Estate Investment, Inc., a corporation created to maximize the income to be realized from this trust for endowment care, or to such other investments as are authorized in that trust.

**Design and Construction:** To complete the mausoleum unit construction proposed by the mausoleum designers, for the mausoleum unit in which the Mausoleum Estate is located, within one year from the date that the Public Relations Development Program on that unit is completed.

The agreement shall be deemed to be accepted by the Purchaser and receipt acknowledged of a legible completed copy of the agreement, which includes the disclosure statement, at the time the Purchaser signs the agreement and by the Company at the time it mails to the Purchaser its letter of acknowledgement.

Dated this 29<sup>th</sup> day of January, 1973

Witness:

Bill Nordin

Purchaser:

S.S.#529-01-3728

Sp 84115

522-463662

Birth Oct 20<sup>th</sup> 1916



## Exhibit C

# Deed For Interment Rights

## Know all men by these presents:

That Memorial Estates - Redwood, Inc., the Grantor, a corporation organized under the laws of the State of Utah, in consideration of the purchase price to it in hand paid, the receipt of which is hereby acknowledged, does hereby grant and convey to GEORGE K. & ERMA J. SCHONEY the grantee, for interment purposes only, subject to the conditions, reservations, and rules and regulations set forth and referred to herein, the following property situated in MEMORIAL ESTATES - REDWOOD, INC., an endowment care cemetery in the county of Salt Lake, State of Utah, to-wit:

Estate No. C F Space No. 4 Maus. front & rear

In the MAUSOLEUM

According to the maps and plats of said cemetery, on file in the office of the undersigned corporation and the office of the Recorder of Deeds for said Salt Lake County, Utah.

That this conveyance, and all the right, title and interest hereby conveyed in and to the property above described, is subject to all laws and ordinances, and to the following conditions, reservations, restrictions and rules and regulations, and the Grantee covenants and agrees that:

(a) No transfer, conveyance or assignment of any interest or rights acquired by Grantee shall be valid without the written consent of Grantor and being thereafter recorded on its books.

(b) No monument or other memorial, tree, plants, objects or embellishments of any kind shall be placed upon, altered or removed from the above described property by the Grantee without the written consent of Grantor. All grading, landscape work and improvements of any kind, and all care on the above-described property, shall be done, and all trees and plants of any kind shall be planted, trimmed or removed, and all interments, disinterments and removals, including all openings and closings of graves, shall be made only by Grantor with its equipment. All interments shall be made subject to the use of the type of an outer container and the type of marker as shall be designated by Grantor in its rules and regulations.

(c) Grantor, at the expense of Grantee and as a charge against the above-described property, may repair or remove any monument or other memorial which is improper or offensive or which has become dangerous or dilapidated; and may remove any tree, flower or plant, or other object or embellishment that becomes unsightly or dangerous.

(d) Grantor shall not be liable for loss or damage caused by an act of God, common enemy, thieves, vandals, strikers, malicious mischief makers, unavoidable accidents, riot or order of any military or civil authority.

(e) The enumeration herein of certain conditions, reservations, restrictions and rules and regulations shall not be considered as the only limitations, but the Grantee shall always hold all his interest and rights limited by and subject to the rules and regulations and by-laws of Grantor now existing or which may be by it hereafter adopted either by amendment, alteration or the adoption of new ones. These rules and regulations are on file for inspection in Grantor's office and are specifically referred to and herein inserted as if set forth in full.

All the above conditions, reservations, restrictions and rules and regulations are binding upon Grantee, his heirs, devisees, executors, administrators and assigns, and are enforceable only by Grantor or its successors in interest. Nothing herein contained shall be deemed to restrict the use of any other portion of the cemetery than that herein conveyed to Grantee.

IN WITNESS WHEREOF, the said Memorial Estates - Redwood, Inc., has caused this instrument to be executed in its corporate name by its duly authorized officers, and its corporate seal affixed this

24 day of January, 19 77

MEMORIAL ESTATES - REDWOOD, INC.

By [Signature]

## Exhibit D

ROBERT J. DEBRY  
ROBERT J. DEBRY & ASSOCIATES  
Attorney for Plaintiff  
965 East 4800 South, Suite 2  
Salt Lake City, Utah, 84117  
Telephone: (801) 262-8915

DEC 17 1982  
H. Dixon Hindley, Clerk 3rd Dist. Court  
By R. J. DeBry  
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY  
STATE OF UTAH

---

GEORGE K. SCHONEY and	)	
IRMA J. SCHONEY, for	)	
themselves and all others	)	
similarly situated,	)	
	)	
Plaintiffs,	)	ORDER
	)	
vs.	)	
	)	
MEMORIAL ESTATES, INC. and,	)	
MEMORIAL ESTATES CEMETERY	)	
DEVELOPMENT CORP., corpora-	)	
tion and JOHN DOES 1 through	)	
10, individuals,	)	
	)	
Defendants	)	Civil No. C 82-4983
	)	
	)	

---

Plaintiff's Motion for Class Certification was heard by the Court on December 14, 1982. Plaintiff was represented by Robert J. DeBry. Defendant was represented by David Swope. The Court has considered the memoranda and the arguments of counsel.

The Court now makes the following findings and conclusions:

1. Plaintiff alleges that defendant has sold a total of 124 crypts at their Mountain View Cemetery and an

~~This satisfies the numerosity requirement of Rule~~

23(a)(1) U.R.C.P.

2. Plaintiff alleges that all members of the class have executed identical contract forms. The standard form contract satisfies the commonality requirement of Rule 23(a)(2) U.R.C.P. Some common issues are: when is defendant required to build the mausoleums? Has defendant oversold the existing mausoleum facilities? Is defendant obligated to provide chapel space?
3. The Schoneys allege that they signed the same form contract which was signed by other class members. Therefore the Schoneys satisfy the typicality requirement of Rule 23(a)(3) U.R.C.P.
4. Defendants have stipulated that plaintiffs' counsel will fairly and adequately protect the interests of the class; and the provision of Rule 23(a)(4) U.R.C.P. is therefore satisfied.
5. The prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications which would establish incompatible standards of conduct for the defendant.
6. This case also satisfies the requirements of Rule 23(b)(3) U.R.C.P. in that common questions predominate over individual questions.


Based on the foregoing findings it is hereby ordered that:

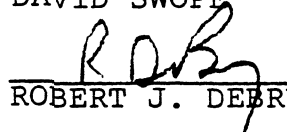
~~action.~~

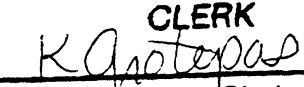
2. The class members are all those persons who have signed a standard form agreement for the purchase of mausoleum space from defendant.
3. It will not be necessary to create sub-classes at the present time.
4. The class will be certified under Rule 23(b)(1)(A), U.C.R.P. In order to give res judicata effect to the entire class, the case will not be certified under Rule 23(b)(3) U.R.C.P., Johnson v. Baton Rouge, 50 F.R.D. 295(1970).
5. Because the class is certified under Rule 23(b)(1)(A) U.R.C.P., it will not be necessary to give notice. Rule 23(c)(2) U.R.C.P.

February 10, 1983 BY THE COURT:

  
PHILIP FISHLER

  
DAVID SWOPE Approved as to form

  
ROBERT J. DEERY Approved as to form

ATTEST  
H. DIXON HINDLEY  
CLERK  
By   
Deputy Clerk

## Exhibit E

Arthur H. Nielsen (A2405)  
Joseph L. Henriod (1468)  
David M. Swope (3179)  
NIELSEN & SENIOR  
Attorneys for Defendant Memorial Estates, Inc.  
1100 Beneficial Life Tower  
36 South State Street  
Salt Lake City, Utah 84111  
Telephone: (801) 532-1900

~~Salt Lake County, Utah~~  
DEC 4 1985  
H. Dixon Hindley, Clerk 3rd Dist. Court  
By [Signature] Deputy Clerk

---

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY  
STATE OF UTAH

---

GEORGE K. SCHONEY and ERMA J.	)	
SCHONEY for themselves and all	)	FINDINGS OF FACT AND
others similarly situated,	)	CONCLUSIONS OF LAW IN
	)	SUPPORT OF THE COURT ORDER
Plaintiffs,	)	DECERTIFYING THE CLASS
	)	
vs.	)	
	)	
MEMORIAL ESTATES, INC. and	)	
MEMORIAL ESTATE CEMETERY	)	Civil No. C82-4983
DEVELOPMENT CORP., a	)	
corporation, and JOHN DOES	)	(Judge David B. Dee)
1 through 10, individuals,	)	
	)	
Defendants.	)	

---

The Court having heard Defendants' Motion to Decertify the Class on Friday, February 22, 1985, and the Court having taken the matter under advisement and having reviewed extensive memorandum submitted by counsel for the parties, and having entered its Order Decertifying the Class on June 24, 1985, and pursuant to an Order of Mandamus from the Supreme Court of the State of Utah dated September 3, 1985, requiring the Court to

001053



**the findings of fact and conclusions of law in support of its Order Decertifying the Class, the Court hereby makes the following:**

**I. FINDINGS OF FACT**

1. There are 26 Mausoleum Estate Agreements containing the same terms as those which George K. Schoney and Erma J. Schoney signed.

2. The identity of all those entering into the 26 Mausoleum Estate Agreements is known.

3. The printed Mausoleum Estate Agreement which was signed by the Schoneys was changed and that form of the agreement was no longer used after March, 1974.

4. A 128 crypt partially filled mausoleum is in existence at the Memorial Estates Redwood Road Cemetery. Said mausoleum was constructed in 1976.

5. George K. Schoney and Erma J. Schoney have not at any time requested of the Defendant to provide them the use of a chapel for their own personal needs.

6. George K. Schoney and Erma J. Schoney have not at any time requested that the Defendant provide them with mausoleum space.

7. The Court finds that questions of law or fact common to members of the class do not predominate over any questions affecting the individual named Plaintiffs and that the named Plaintiffs have failed to prove the allegations of paragraphs 1, 2, 3, and 6 of the Court's Order entered on February 10, 1983, and therefore a class action is not superior to other

~~Various methods~~ for the fair and efficient adjudication of the controversy.

## II. CONCLUSIONS OF LAW

From the foregoing Findings of Fact, the Court makes the following Conclusions of Law:

1. The named Plaintiffs have failed to prove the class is so numerous that joinder of all members is impractical since the names and addresses of individuals signing the same form of contract as the Schoneys are readily available.

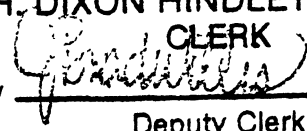
2. The claims of the named Plaintiffs are unique in that the named Plaintiffs' claims involve alleged oral representations and will require parol evidence outside of the written documents. Plaintiffs have stated that they do not intend to utilize the Defendants' mausoleum space or chapel so their claim for damages is unique. Therefore, Plaintiffs' claims do not meet the burden of 23(a)(3).

3. Named Plaintiffs have failed to prove that a class action is superior to and not just as good as other available methods for handling the controversy.

DATED this 4 day of Dec., 1985

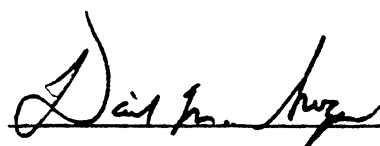
  
\_\_\_\_\_  
Judge David B. Dee

H. DIXON HINDLEY  
CLERK

By   
\_\_\_\_\_  
Deputy Clerk

CERTIFICATE OF SERVICE

I hereby certify that I caused to be hand-delivered a true copy of the foregoing Findings of Fact and Conclusions of Law in Support of the Court Order Decertifying the Class, to Robert J. Debry of Robert J. DeBry & Associates, Attorney for Plaintiffs, 965 East 4800 South, Suite 2, Salt Lake City, Utah, this 17<sup>th</sup> day of October, 1985.

\_\_\_\_\_

## Exhibit F

**FILMED**

FILED IN COURT

JUN 9 8 50 PM '83

H. DIXON CLERK

*[Signature]*  
CLERK

ROBERT J. DEBRY  
ROBERT J. DEBRY & ASSOCIATES  
Attorney for Plaintiff  
965 East 4800 South, Suite 2  
Salt Lake City, Utah, 84117  
Telephone: (801) 262-8915

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY  
STATE OF UTAH

---

GEORGE K. SCHONEY, and	)	
IRMA J. SCHONEY, for	)	
themselves and all others	)	
similarly situated,	)	
	)	
Plaintiffs,	)	SECOND AMENDED COMPLAINT
	)	
vs.	)	
	)	
MEMORIAL ESTATES, INC., and	)	
MEMORIAL ESTATES CEMETERY	)	
DEVELOPMENT CORP., corpora-	)	
tions, and JOHN DOES 1 through	)	
10, individuals,	)	
	)	
Defendants.	)	Civil No. C 82-4983
	)	
	)	

---

The plaintiffs George K. Schoney and Irma J. Schoney complain for themselves and all others similarly situated as follows:

DESCRIPTION OF PARTIES

1. Defendant Memorial Estates, Inc. is a corporation organized pursuant to the laws of the State of Utah, which has its principle place of business at 6500 South Redwood Road in Murray, Utah.

2. Defendant Memorial Estates Cemetery Development Corp. is a corporation organized pursuant to the laws of the State of

Utah, which has its principle place of business at 6500 South Redwood Road in Murray, Utah.

3. The Defendants John Doe 1 through 10, are individuals residing in Salt Lake County, as yet unknown to the plaintiffs.

4. The corporate defendants are and were at all times relevant, interrelated corporations operating under a common scheme to sell pre-need funeral contracts for burial lots, mausoleum crypts, burial services and other funeral merchandise such as grave markers and vaults. The defendant corporations are controlled through common management. Plaintiff alleges on information and belief that at all times relevant to this action the defendants co-mingled corporate funds and in other ways were and are so closely related that the corporateness of one corporate defendant is not distinguishable from the other corporate defendant.

#### COUNT I

#### TORTIOUS BAD FAITH

5. Defendants are generally engaged in the cemetery business. As a part of that business, defendants have, at all times relevant hereto maintained an aggressive "pre-need" sales program. Through this sales program, defendants sell real and personal property and cemetery services to purchasers prior to the purchaser's death and burial.

6. In 1973 and years surrounding that time, as part of the defendants' sales program, defendant approached plaintiffs, and others, representing that the defendant was prepared to build a mausoleum for interment of the plaintiffs and others.

Defendants represented that they lacked sufficient capital to complete the construction of the mausoleum and that if plaintiffs would purchase mausoleum space in advance of completion, defendants would use the money received for the construction of the mausoleum.

7. On or about January 23, 1973, as a result of the defendants' aggressive sales program, plaintiffs entered into a written contract with defendants for the purchase of two interment spaces in the mausoleum. The contract is attached hereto as Exhibit A.

8. Between January 23, 1973 and January 20, 1977, plaintiffs duly performed all of their duties and obligations under the contract at issue in this action. On or about January 20, 1977, defendants delivered to plaintiffs a "Deed for Interment Rights", attached hereto as Exhibit B.

9. Defendants have not yet begun construction of the mausoleum sold and promised to the plaintiffs.

10. Plaintiffs are presently in their late fifties. Plaintiff George K. Schoney is suffering from cancer. Over the years, plaintiffs have made frequent inquiries concerning the defendants' plan for completion of the mausoleum promised them. On each occasion defendants lulled plaintiffs with assurances that the work would soon be completed.

11. On or about March 29, 1981, plaintiffs formulated a belief that it was likely that they would die before the completion of the mausoleum promised them by the defendants.

In accord with this belief plaintiffs purchased interment space in another mausoleum not connected with the defendants.

12. Plaintiffs allege on information and belief that defendants do not intend to build the mausoleum space they sold to plaintiffs. Plaintiffs allege further on information and belief that the money paid by them for the construction of mausoleum space has been diverted by defendants for business purposes other than the building of a mausoleum, including the payment of commissions and dividends. Defendants acted with malice in diverting to other uses the money received for construction of the mausoleum.

13. Plaintiffs allege on information and belief that as early as January of 1976, the management and agents of the corporate defendants, herein referred to as John Does 1 through 10, had concluded that they would never build the mausoleum promised the plaintiffs. Despite this change of intent, defendants continued to accept plaintiffs' installment payments until January 20, 1977 when the last payment was made. Defendants acted with malice and in bad faith in not informing plaintiffs of their changed intention and in continuing to accept plaintiffs' money.

14. Plaintiffs allege on information and belief that as early as January of 1976 the defendants formed a scheme to bury deceased purchasers of mausoleum space in cheaper ordinary burial plots. Defendants acted with malice in forming the scheme described in this paragraph 14.



15. As a part of the scheme described in paragraph 14 above, defendants relied on the fact that interested persons would not be aware of the failure to construct mausoleum space until the time of death and bereavement. Defendants further relied on the fact that persons suffering under the stress created by the loss of a loved one would not be willing or able to complain about defendants' failure to construct the mausoleum. The formation and implementation of this scheme to defraud plaintiffs constitutes malice and bad faith on the part of the defendants.

16. Defendants have not made any good faith attempt to complete the mausoleum space promised the plaintiffs and have thereby breached their contractual duty of good faith.

17. As a result of defendants' bad faith, plaintiffs have lost \$1,390.00 plus interest and attorney's fees. As a further result of defendants' bad faith, defendants have been unjustly enriched in the amount of \$1,390.00 plus interest.

## COUNT II

### BREACH OF CONTRACT

18. Plaintiffs incorporate by reference the allegations contained in paragraphs 1 through 17 above.

19. More than nine years have elapsed since defendants contracted with plaintiffs for the construction of the mausoleum at issue. Defendants' failure to perform their obligations within a reasonable time is a breach of their contract with plaintiffs.

20. The time transpired since the making of the contract is sufficiently great to warrant a conclusion that defendants do not intend to build the mausoleum promised.

21. By reason of defendants' breach of contract, plaintiffs have lost \$1,390.00 plus interest. Defendants have been unjustly enriched in the amount of \$1,390.00 plus interest.

### COUNT III

#### FRAUDULENT CONVEYENCE

22. Plaintiffs incorporate by reference the allegations contained in paragraphs 1 through 21 above.

23. In 1975, defendants issued a "Deed for Interment Rights" to plaintiffs. (The deed is attached as Exhibit B.)

24. That deed purports to grant and convey, for interment purposes only, specific property.

25. In fact, the property conveyed by the deed does not exist. Defendants issued these deeds knowing that the property conveyed did not exist. This was done fraudulently for the purpose of misleading plaintiffs.

26. By reason of defendants' fraudulent conduct, defendants have become liable to plaintiffs in the sum of \$1390.00 plus interest.

### COUNT IV

#### VIOLATION OF UTAH CONSUMER SALES PRACTICES ACT

27. The sale by defendants of mausoleum space is a consumer transaction within the meaning of Section 13-11-3(2) Utah Code Annotated.

28. Defendants' failure to provide mausoleum space is a deceptive practice within the meaning of Section 13-11-4(b) and (d).

29. Defendants have continually represented to plaintiffs that the mausoleum would be built despite their knowledge or belief to the contrary. This and other practices described above are unconscienable practices within the meaning of Section 13-11-5 Utah Code Annotated.

30. Defendant has issued deeds to class members. These deeds purport to convey interment rights in an existing mausoleum. In fact, only 128 mausoleum spaces have been constructed. All other class members have received deeds and property rights to non-existent mausoleums. Said conduct by defendant is a deceptive act within the meaning of §13-11-4(e), Utah Code Annotated, 1953.

31. Plaintiffs have suffered an actual loss within the meaning of Section 13-11-19(4) Utah Code Annotated. The amount of that loss is \$1,390.00 plus interest and attorney's fees.

#### COUNT V

##### BREACH OF CONTRACT TO PROVIDE CHAPEL

32. The Mausoleum Estate Agreement provides, in part, that, ". . . The Company agrees to extend to the Purchaser and his immediate family. . . the use of a full service chapel . . ."

33. The promise of a chapel was an essential term of the contract in that such a chapel provides convenience, comfort, and peace at a time of bereavement.

34. The defendants have converted the existing chapel at 3115 East 7800 South, Salt Lake City, Utah into office space.

35. By reason of this unlawful conversion, plaintiffs have suffered the loss of use of the chapel, and defendant has been unjustly enriched by keeping the rental proceeds.

#### COUNT VI

#### BREACH OF TRUST

36. As early as 1972, defendants were actively selling mausoleum space on a pre-need basis under a so called public relations development program. Under this program, plaintiffs were sold space in a mausoleum that was yet to be constructed. Defendants represented to plaintiffs that the proceeds collected from these pre-need mausoleum sales would be used to construct a mausoleum unit once enough funds were received to begin construction. Completion of the program as to a mausoleum unit was promised to occur after about 50% of the mausoleum spaces in that unit had been sold.

37. Plaintiffs allege on information and belief that money collected from mausoleum sales was put into the general operating fund of the defendants' corporation and used for general business purposes. Defendants failed to reserve and save the money collected from mausoleum sales for mausoleum construction as indicated in the public relations development program.

38. As a result of defendant's failure to reserve and save the money collected from mausoleum sales for mausoleum construction, plaintiffs have been damaged in their not having

mausoleum space available. They are without guarantee that the necessary money will be available to construct the necessary mausoleum spaces.

#### COUNT VII

##### BREACH OF STATUTORY TRUST

39. Pursuant to Sections 8-4-82 and 8-4-83, U.C.A., defendants are required to deposit \$30.00 in an irrevocable endowment care trust fund for each mausoleum space sold. The required sum is payable to the trust upon full payment of the contract price. The funds in this trust are to be collected for the purpose of maintenance and care of the cemetery property. These trust funds are to be invested in accordance with Section 10-2-1, Utah Code Annotated, which requires the standard of care that men of prudence, discretion and intelligence exercise in the management of their own affairs.

40. Contrary to the requirements of Section 33-2-1, Utah Code Annotated, defendants have substituted and maintain over 40% of the trust corpus with accounts receivable. This is money owing to defendants on sales contracts and is by its very nature noninvestable.

41. As a result of this ongoing practice, the endowment care trust fund remains over 40% uninvested and thus is not capable of the proper generation of funds for endowment care cemetery maintenance as required by law. As a result, plaintiffs and their families who are effectively the beneficiaries of this endowment care trust fund, are damaged by the loss of available trust funds for cemetery maintenance at Memorial

Estates Cemeteries; and further, plaintiffs are deprived of the peace, comfort and solitude of having an adequate endowment care trust as promised by the contract.

COUNT VIII

INVASION OF TRUST CORPUS

42. Plaintiffs Mausoleum Estate Agreement provides that defendant shall contribute \$20.00 to "Trust A" and \$20.00 to "Trust B" (See Exhibit "A".) However, defendant has not maintained two separate trust accounts. Plaintiff alleges on information and belief that defendant has invaded the assets of trust B and used those assets for the general operating expenses of defendant including salaries and advertising. Wherefore plaintiffs have been deprived of the assets of trust B; and further, plaintiffs have been deprived of the peace, comfort and solitude of having an adequate endowment care trust as provided by the contract.

COUNT IX

FRAUD

43. Plaintiffs incorporate by reference the allegations contained in paragraphs 1 through 43, above.

44. Plaintiffs allege on information and belief that at the time Defendants induced plaintiffs to purchase space in the non-existent mausoleum, defendants knew that there was a substantial probability that the mausoleum would never be built. Defendants' representations to plaintiffs that the mausoleum would be built were made in reckless disregard for the truth or untruth of those representations.

45. On frequent occasions between January 23, 1973 (the date of contract) and January 20, 1977 (the date of Plaintiffs' last payment on the contract) Plaintiffs asked defendants about their intentions to commence construction of the promised mausoleum.

46. Each time plaintiffs inquired of defendants concerning defendants' intentions, defendants assured plaintiffs that the mausoleum would be completed. On some or all of these occasions, defendants knew that there was no plan to complete the promised mausoleum.

47. Defendants represented to plaintiffs that they would complete the promised mausoleum with the intent to deceive plaintiffs, defendants intended to persuade plaintiffs to continue to make monthly payments on the purchase of the non-existent mausoleum.

48. Plaintiffs reasonably relied on defendants' assurances that the mausoleum would be constructed. On at least one occasion defendants' salesman showed plaintiffs or plaintiffs' children the place where the mausoleum was to stand and described the preliminary construction work necessary for work to begin on the structure itself.

49. Plaintiffs have been damaged by defendants' fraudulent representations in the sum of \$1,390.00 together with costs and attorney's fees.

COUNT X

FAILURE TO ESTABLISH A STATUTORY  
TRUST

50. The sale of unconstructed mausoleum space with chapel privileges is a prearranged funeral plan within the meaning of §22-4-1, U.C.A.

51. Defendants have failed to establish the 75% trust required by §22-4-1, U.C.A.

52. Plaintiff has been damaged because the trust funds have been diverted to general operating expenses, and plaintiffs have not been given the option of withdrawing their funds pursuant to §22-4-4, U.C.A.

COUNT XI  
OUTRAGE AND INTENTIONAL INFLICTION  
OF EMOTIONAL DISTRESS

53. Defendants' advertising program is designed to promise customers a sense of peace, comfort and security through the purchase of "pre-need" mausoleum space and related services. Plaintiff has paid money in good faith. However, defendant has failed to provide peace, comfort, and security. Rather, defendant has pursued a course of tortious conduct as more fully alleged above. Defendants' conduct has caused great turmoil and emotional distress. Defendants' conduct was done willfully and in reckless disregard for plaintiff's rights.

CLASS ALLEGATIONS

54. Plaintiffs incorporate by reference the allegations contained in paragraphs 1 through 53 above.

55. Plaintiffs are members of a class composed of persons who have entered into pre-need contracts with defendants.



56. Plaintiff allege on information and belief that the class is composed of more than 500 persons making joinder of all class member impracticable.

57. There are questions of law and fact common to all class members. Those common questions include: whether defendants have fraudulently and deceptively received money for the construction of a mausoleum, whether the defendants have acted in bad faith in the performance of their contractual obligations, whether defendants have breached their contract by not constructing the promised mausoleum within a reasonable time, whether defendants have breached the express trust, whether plaintiffs have been deprived of the chapel, and whether defendants have committed deceptive acts by conveying interment rights in a non-existent mausoleum.

58. Plaintiffs' claims are typical of the claims of other class members in that defendants sold mausoleum space through a standardized marketing scheme. All class members have purchased mausoleum space pursuant to standardized form contracts all class members have also received the same standard form of deed.

59. The prosecution of separate actions by or against individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class. Such adjudications would establish incompatible standards of conduct for the party opposing the class in that defendants must either build a mausoleum for all class members or refund the money received for construction of

the mausoleum to all class members. Also, defendant must establish a chapel for all class members.

60. The questions of law and fact common to the class members predominate over any questions affecting only individual members. The class action device is superior to other available methods for the fair and efficient adjudication of this controversy.

#### PRAYER

WHEREFORE, plaintiffs pray for judgment for themselves and for all others similarly situated as follows:

1. That defendants Memorial Estates, Inc. and Memorial Estates Cemetery Development Corp. and John Does 1 through 10 be required, jointly and severally, to plaintiffs George K. Schoney and Irma J. Schoney and all others similarly situated as follows:

(A) To refund all money paid to defendants for the right of interment in the promised mausoleum.

(B) For interest on the money defendants received from plaintiffs, calculated at an annual rate of 12% from the date defendants received the money.

(C) For punitive damages in the amount of \$1,000,000.00.

(D) For a reasonable rental for loss of use of the chapel and to restore the office building to its original status as a chapel, or in the alternative, that defendants disgorge the rental income by which they have been unjustly enriched.

(E) For an accounting of all trust funds.

(F) For an order that plaintiff class members be given the option of withdrawing their payments pursuant to §22-4-4 U.C.A.

2. That the plaintiffs and all others similarly situated be awarded reasonable costs and attorney's fees in connection with the prosecution of this action.

3. For such other and further relief as the court deems just and proper under the circumstances.

DATED this 6 day of June, 1983.

ROBERT J. DEBRY & ASSOCIATES

BY: \_\_\_\_\_

  
Robert J. DeBry

## MEMORIAL ESTATES

Mausoleum Crypts

## MAUSOLEUM ESTATE AGREEMENT

Upon payment of this agreement, the Purchaser will receive a deed to the exclusive right of interment in a Mausoleum Estate containing 2 spaces, described as Mausoleum Crypts to be used subject to the Rules and Regulations of the Company now or hereafter made and promulgated for the operation, care, use, control, and preservation of the mausoleum units and the improvements thereof.

The purchase price, including the total amount of the Endowment Care Trust Funds at Forty (\$40.00) Dollars per space, is the Cash price of \$1,390.00. The Down Payment of \$300.28 leaves an unpaid cash balance of \$1,090.00. The Finance Charge is \$ none, at the annual percentage rate of 0%. The Total Deferred payment price is \$ 1,090.00.

The Purchaser agrees to pay the total of payments in 36 equal consecutive monthly installments of \$29.27 each, the first installment to be due and payable on the 1st day of February, 1974 and the remaining installments to be paid on the same day of each succeeding month.

In addition, the Company agrees to extend to the Purchaser and his immediate family the following benefits:

**Chapel & Improvement Use:** To provide the use of the full service chapel, the entrance area, the parking facilities, and all other convenience improvements as completed, without additional charges.

**Care & Maintenance:** To provide the care and maintenance required, in addition to that which is provided by current trust fund income, in order to maintain the entire developed section of the cemetery until such time as the trust fund income is adequate.

**Transfer to Developed Property:** To transfer the mausoleum estate which has hereby been purchased in a semi-developed mausoleum, to a comparable developed mausoleum space without any additional cost, should a space in the mausoleum estate be needed for interment prior to development.

**Transfer to Other Memorial Estate Properties:** To allow the Purchaser, at any time to present his request for transfer of the mausoleum estate to another mausoleum unit that has the same Public Relations and wherein not more than one half (1/2) of the spaces have been previously allowed.

**Transfer to Other Persons:** To honor the request of the Purchaser to transfer his Estate or any space thereof to anyone whom he may desire upon prior written approval of the Company.

**Transfer to Other Communities:** To permit the Purchaser, if he moves to another community more than fifty miles distance from metropolitan Salt Lake City, to transfer full dollar equity into the new community, subject to the Rules and Regulations governing such transfer at the time of the transfer request.

**Purchaser's Right to Cancel:** This agreement can be cancelled by the Purchaser upon notification in writing, mailed to the Company at 55 East Stratford Avenue, Salt Lake City before midnight on the third business day after the Purchaser has signed the agreement.

**Endowment Care Trust Funds:** To cause to be transferred, when the total amount has been received from the purchaser, (\$20.00) per space to Trust "A" and to transfer Twenty Dollars (\$20.00) per space to Trust "B". Both Trust "A" and Trust "B" have been established by the Company to provide income to be applied to endowment care. The Purchaser authorizes and directs that the contributions to Trust "B" be invested in corporate bonds of Memorial Estate Investment, Inc., a corporation created to maximize the income to be realized from this trust for endowment care, or to such other investments as are authorized in that trust.

**Design and Construction:** To complete the mausoleum unit construction proposed by the mausoleum designers, for the mausoleum unit in which the Mausoleum Estate is located, within one year from the date that the Public Relations Development Program on that unit is completed.

The agreement shall be deemed to be accepted by the Purchaser and receipt acknowledged of a legible completed copy of the agreement, which includes the disclosure statement, at the time the Purchaser signs the agreement and by the Company at the time it mails to the Purchaser its letter of acknowledgement.

Dated this 29th day of January, 1973

Exhibit B

# Deed For Interment Rights

Know all men by these presents:

That Memorial Estates-Redwood, Inc., the Grantor, a corporation organized under the laws of the State of Utah, in consideration of the purchase price to it in hand paid, the receipt of which is hereby acknowledged, does hereby grant and convey to GEORGE K. & ERMA J. SCHONLY the grantee, for interment purposes only, subject to the conditions, reservations, and rules and regulations set forth and referred to herein, the following property situated in MEMORIAL ESTATES-REDWOOD, INC., an endowment care cemetery in the county of Salt Lake, State of Utah, to-wit:

Estate No. C F Space No. 11 Maus. front & rear

In the MAUSOLIUM

According to the maps and plats of said cemetery, on file in the office of the undersigned corporation and the office of the Recorder of Deeds for said Salt Lake County, Utah.

That this conveyance, and all the right, title and interest hereby conveyed in and to the property above described, is subject to all laws and ordinances, and to the following conditions, reservations, restrictions and rules and regulations, and the Grantee covenants and agrees that:

(a) No transfer, conveyance or assignment of any interest or rights acquired by Grantee shall be valid without the written consent of Grantor and being thereafter recorded on its books.

(b) No monument or other memorial, tree, plants, objects or embellishments of any kind shall be placed upon, altered or removed from the above described property by the Grantee without the written consent of Grantor. All grading, landscape work and improvements of any kind, and all care on the above-described property, shall be done, and all trees and plants of any kind shall be planted, trimmed or removed, and all interments, disinterments and removals, including all openings and closings of graves, shall be made only by Grantor with its equipment. All interments shall be made subject to the use of the type of an outer container and the type of marker as shall be designated by Grantor in its rules and regulations.

(c) Grantor, at the expense of Grantee and as a charge against the above-described property, may repair or remove any monument or other memorial which is improper or offensive or which has become dangerous or dilapidated; and may remove any tree, flower or plant, or other object or embellishment that becomes unsightly or dangerous.

(d) Grantor shall not be liable for loss or damage caused by an act of God, common enemy, thieves, vandals, strikers, malicious mischief makers, unavoidable accidents, riot or order of any military or civil authority.

(e) The enumeration herein of certain conditions, reservations, restrictions and rules and regulations shall not be considered as the only limitations, but the Grantee shall always hold all his interest and rights limited by and subject to the rules and regulations and by-laws of Grantor now existing or which may be by it hereafter adopted either by amendment, alteration or the adoption of new ones. These rules and regulations are on file for inspection in Grantor's office and are specifically referred to and herein inserted as if set forth in full.

All the above conditions, reservations, restrictions and rules and regulations are binding upon Grantee, his heirs, devisees, executors, administrators and assigns, and are enforceable only by Grantor or its successors in interest. Nothing herein contained shall be deemed to restrict the use of any other portion of the cemetery than that herein conveyed to Grantee.

IN WITNESS WHEREOF, the said Memorial Estates-Redwood, Inc., has caused this instrument to be executed in its corporate name by its duly authorized officers, and its corporate seal affixed this

21 day of January, 1977

MEMORIAL ESTATES-REDWOOD, INC.

## Exhibit G

## FIDUCIARIES AND TRUSTS

### CHAPTER 45

S. B. No. 153

(Passed March 10, 1971. In effect May 11, 1971)

#### PREARRANGED FUNERAL PLANS

**An Act Amending Section 22-4-1, Utah Code Annotated 1953, as Enacted by Chapter 39, Laws of Utah 1955, as Amended by Chapter 41, Laws of Utah 1967; Relating to Prearranged Funeral Plans; Providing That Personal Property and Services Are Covered by the Chapter When Conveyed or Delivered at Any Time.**

*Be it enacted by the Legislature of the State of Utah:*

#### Section 1. Section amended.

Section 22-4-1, Utah Code Annotated 1953, as enacted by Chapter 39, Laws of Utah 1955, as amended by Chapter 41, Laws of Utah 1967, is amended to read:

#### **22-4-1. Percentage of funds or collateral held for prearranged funeral plans to be held in trust funds in the state of Utah.**

At least 75% of any payment of money made to any person, firm or corporation upon any agreement or contract, or any series or combination of agreements or contracts, including 75% of all money paid directly or indirectly and 75% of all securities delivered under such agreement or under any agreement collateral thereto such as membership fees, dues, participation arrangements, and sales commissions, which has for a purpose the furnishing or performing of funeral services, under a prearranged funeral plan, or the furnishing or delivery of any personal property, merchandise, or services of any nature to be conveyed or delivered at any time, but excluding cemetery lots, vaults, mausoleum crypts, niches, cemetery burial privileges, and cemetery space, in connection with the final disposition of a dead human body, for future use at a time determinable by the death of the person or persons for whose benefit any such agreement has been made and whose body or bodies are to be disposed of, such deceased person to be known in this act as the decedent beneficiary, shall be held in trust funds, and that trust shall be maintained in the State of Utah and held intact until the contract for which it was paid is fulfilled according to its terms, and the person, partnership, association or corporation receiving the payments is hereby declared to be a trustee thereof. Any withdrawal of trust funds shall be determined by the agreement or contract and shall be released according to the provision of section 22-4-4 of this act.

Approved March 18, 1971.

## FISH AND GAME

### CHAPTER 46

H. B. No. 145

(Passed March 10, 1971. In effect May 11, 1971)

## Exhibit H



the policy is payable to the borrower or any member of his family, even though the customary mortgagee clause is attached or the licensee is co-assured, *provided* that such insurance is sold at lawful rates through insurance agents or brokers duly licensed by the state insurance commissioner of Utah.

(c) The licensee shall not require the purchasing of insurance from the licensee as a condition precedent to the making of the loan and shall not decline existing insurance where such existing insurance is provided by an insurance company duly licensed by this state. If a borrower procures insurance by or through a licensee, the licensee shall deliver to the borrower, or if there are two or more borrowers to one of them within 15 days after the making of the loan, an executed copy of the insurance policy or certificate of insurance. The provisions of section 7-10-16 (b) shall not be construed to amend the statutes of this state relating to insurance or to effect the authority of the insurance commissioner of Utah in granting, revoking, or renewing licenses.

**7-10-18. Loans Made Outside State Which Do Not Comply With Provisions Herein Contained—Enforcement.**

No loan made outside this state in the amount or of the value of \$600.00 or less for which a greater rate of interest, consideration, or charges than is permitted by section 7-10-13 has been charged, contracted for, or received shall be enforced in this state and every person in any wise participating therein in this state shall be subject to the provisions of this act, *provided* that the foregoing shall not apply to loans legally made in any state under and in accordance with a regulatory small loan law similar in principle to this act.

Approved March 14, 1955.

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## **CEMETERIES**

### **CHAPTER 11**

H. B. NO. 266

(Passed March 8, 1955. In effect May 10, 1955.)

#### **DONATIONS FOR CARE**

**An Act Relating to the Operation of Cemeteries, Mausoleums, and Columbariums in the State of Utah, and Providing for the Setting Aside of Funds for the Endowment, Care and Maintenance Thereof; for Regulatory Measures Pertaining to the Control and Investment of Said Funds and the Sale of Burial Space Therein; Providing for the Supervision Thereof by the Director of Registration, Department of Business Regulation; the Establishment of a Cemetery Board and Setting Up of Its Powers and Duties; Providing for the Assessment of Examination and Annual Fees and the Creation of a Cemetery Fund Therefrom; Providing for the Licensing and Regulation of Cemeteries, Mausoleums and Columbariums; and for Penalties for Violations of the Act.**

*Be it enacted by the Legislature of the State of Utah:*

**Section 1. Definitions.**

Any person, firm or corporation engaged in the business, in the State of Utah, of the ownership, maintenance or operation of a cemetery; mausoleum for crypt or vault interments; columbarium for permanent cinerary interments; or any other place providing lots or other interment space therein for the remains of human bodies, except such organizations which are churches or religious or established fraternal societies, or incorporated cities or towns or other political subdivisions of the State of Utah owning, maintaining or operating cemeteries, shall be subject to the provisions of this chapter. The terms "Cemetery" or "Cemetery authority," when used in this act, shall include any and all places or establishments used for interment and referred to in this section.

**Section 2. "Endowment" and "Non-Endowment Care"**

All such persons, firms or corporations, subject to the provisions of this chapter shall be, for the purposes hereof, designated either as operators of "Endowment care cemeteries" or "Non-Endowment care cemeteries," which words and phrases shall have the following meanings ascribed to them:

(a) "Endowment Care Cemetery." Where the owners and operators or promoters of a cemetery represent to the public that they will, and that pursuant thereto, funds are collected for the purpose of caring for, maintaining, and embellishing said cemetery properties so as to preserve them from becoming unkept, and places of reproach and desolation in the communities in which they are located. An endowment care cemetery shall hereafter have deposited in its endowment care fund at the time of or not later than completion of the initial sale not less than the following amounts for plots or space, sold or disposed of:

- (1) Fifty cents a square foot for each grave.
- (2) Five Dollars for each niche.
- (3) Thirty Dollars for each crypt.

Any endowment care cemetery hereafter established shall also have deposited in its endowment care fund the additional sum of \$25,000.00 before disposing of any plot or space or making any sale thereof.

(b) "Non-Endowment care cemeteries." Where the owners and operators or promoters of a cemetery collect funds only for sales of property, merchandise or services and collect no funds for, and make no agreements, representations, or promises as an endowment-care cemetery as defined herein.

(c) An endowment care cemetery shall file in its principal office a written report which shall be available to any plot owner, and which shall state the amount of the principal of the endowment care fund and the total amount invested in lawful investments, and the amount of cash on hand which shall show the true financial condition of the trust.

(d) Any cemetery authority may place its property under endowment care, and establish, maintain and operate an irreducible

endowment care fund. Endowment care and special care funds may be invested separately or commingled for investment and where commingled the income therefrom shall be divided between the funds in the proportion that each contributed to the sum invested. The funds may be held in the name of the cemetery authority or its directors or in the name of the trustees appointed by the cemetery authority.

(e) Endowment care funds shall be kept invested in accordance with the provisions of 33-2-1, Utah Code Annotated 1953.

(f) The directors of the cemetery authority may be the trustees of its endowment care fund. When the fund is in the care of the directors as a board of trustees the secretary of the cemetery authority shall act as its secretary and keep a true record of all its proceedings. The investments of the endowment care fund may be held in the name of the cemetery authority. In lieu of a board of trustees a cemetery authority may appoint as sole trustee any bank or trust company qualified to engage in trust business, and the bank or trust company may accept the fund as trustee. No sum in excess of five per cent of the income derived from the fund in any year shall be paid as compensation to the trustees for their services.

(g) The income from the endowment care fund shall be used solely for the general care, maintenance and embellishment of the cemetery, and shall be applied in such manner as the cemetery authority may from time to time determine to be for the best interest of the cemetery.

### **Section 3. Trust Fund and Its Regulation**

The initial endowment care fund established for any cemetery shall remain in an irrevocable trust fund until such time as this fund has reached fifty thousand dollars (\$50,000.00), when it may be withdrawn at the rate of one thousand dollars (\$1,000.00) from the original twenty-five thousand dollars (\$25,000.00) for each additional three thousand dollars (\$3,000.99) added to the fund, until all of the original twenty-five thousand dollars (\$25,000.00) has been withdrawn.

### **Section 4. Cemetery Board—Duties—Terms of Office**

(a) There is hereby established under the Commission of the Department of Business Regulation, Department of Registration, a representative committee for cemetery operators, officers and owners and directors of cemeteries to be known as the cemetery board. Said cemetery board shall have the same duties, rights and powers and shall be subject to all provisions, set out in Chapter One of Title 58, U. C. A. 1953 applicable to representative committees generally in other trades and professions and not in conflict herewith. Said cemetery board shall consist of five members, who shall be designated by the Director of Registration as provided in Section 58-1-6 U. C. A. 1953. In designating members of such committee he shall be required to accept recommendations by members who are executives of endowment care cemeteries within the state by members in the cemetery business, and organizations representing endowment care ceme-

teries as in this act defined. The names of all persons so designated shall be submitted to the Governor for confirmation or rejection. The terms of the members first appointed shall expire: Two April 1, 1956, two April 1, 1957, and one April 1, 1958. Thereafter appointments shall be for three years.

(b) Not more than three members of the board shall be appointed only from persons who have had immediately preceding their appointment a minimum of two consecutive years' experience in this state in the active administrative management of a cemetery corporation or of a cemetery or as member of the board of directors thereof for this period and shall at the time of their appointment have the actual and full authority of a president, general manager, vice president, secretary, treasurer, or owner, but they shall hold office only so long as they continue in such active, actual and authoritative capacities. The two-year consecutive period shall be exclusive of time spent in the armed services.

(c) Each member of the board shall receive no compensation for his services, but shall receive his necessary traveling and other expenses. The board shall elect annually from among its members, a chairman and vice-chairman.

(d) The board shall meet at least twice a year or at such other times as it may designate. The board may meet at any place within the state. It shall submit to the director necessary rules and regulations for the administration and enforcement of, and prescribe the form of statements and reports provided for in this act. Said rules and regulations shall be, when adopted by the Department of Registration, endorsed as a part of its duties and functions.

#### **Section 5. Enforcement and Examination—Expense Thereof.**

The board shall examine persons relative to the administration and enforcement of this act and shall examine the endowment care fund of a cemetery authority:

(a) Whenever it deems necessary, but at least once every three years.

(b) Whenever the cemetery authority in charge of endowment care funds fails to file the report required by this act.

(c) Whenever it is requested by a verified petition signed by twenty-five lot owners alleging that the endowment care funds are not in compliance with this act, in which case the examination shall be at the expense of the petitioners.

(d) The expense of the examination as provided in subdivisions (a) and (b) shall not exceed \$25.00 per day for each examiner engaged in the examination. Whenever the examination requires more than two days, it shall be paid by the cemetery authorities. Such examination shall be privately conducted in the principal office of the cemetery authority.

**Section 6. Access to Books and Records—Inspection—Reports—Certificate of Authority—Examinations—Charges—Revocation of Certificates—Cemetery Fund.**

(a) In making such examination the board (1) shall have free access to the books and records relating to the endowment care fund, their collection and investment and the number of graves, crypts and niches under endowment care, (2) shall inspect and examine the endowment care funds to determine their condition and the existence of the investments, (3) shall ascertain if the cemetery authority has complied with all the laws applicable to endowment care fund.

(b) Each cemetery authority in charge of cemetery endowment care funds shall file with the board annually on or before the 30th day of June, a written report on forms prescribed by the board setting forth: (1) the number of square feet of grave space and the number of crypts and niches sold or disposed of under endowment care:

(1) By specific periods as set forth in the form prescribed.

(2) The amount collected and deposited in the endowment care fund segregated as to the amounts for crypts, niches and grave space by specific periods as set forth either on accrual or cash basis at the option of the cemetery authority.

(3) A statement showing separately the total amount of endowment care funds invested in each of the investments authorized by law and the amount of cash on hand not invested, which statement shall actually show the financial condition of the funds. The report shall be verified by the president or vice-president and one other officer of the cemetery corporation and shall be certified by the accountant, auditor or person preparing the same.

(c) The board shall examine the reports filed with it as to their compliance with the requirements of the law. Applications in writing for a certificate of authority shall be made by all cemetery authorities, whether operating as endowment or non-endowment care fund cemeteries, to the Department of Registration accompanied by the regulatory charge provided for in this title. Such application must show that the cemetery authority owns or is actively operating a cemetery which is subject to the provisions of this title.

(d) Such applications shall be referred to the board, who may require such proof as it deems advisable concerning the compliance by such applicants to all the laws, rules, regulations, ordinances and orders applicable to it. Any cemetery authority who shall fail to pay the regulatory charges provided for under this act shall be referred to the board for its investigation and report.

(e) The board shall conduct examinations at the request of the director or upon their own motion to ascertain the qualifications, fitness and compliance under the terms of this act and shall submit to the director in writing their findings and conclusions.

(f) With any recommendation of the cemetery board to the director to revoke or refuse a certificate to any cemetery authority or any annual renewal thereof, it shall be the duty of the board to

submit therewith in writing its findings, reasons and conclusions. It shall be the duty of the board to make reports to the director of conduct or conditions existing on the part of a certificate holder justifying revocation or suspension of his or its right to a certificate. All provisions of Title 58, U. C. A. 1953, applicable to reports, investigations and examinations by the director; the revocation and suspension of licenses; rights to, and methods of calling and conducting, and all rights and powers relative to, hearings before the department; and the rules of procedure and appeal as set forth in said title, shall apply to all requirements of this act.

(g) The regulatory charges for cemetery certificates at all periods of the fiscal year are the same as provided in this act. All regulatory charges are payable at the time of the filing of the application and in advance of the issuance of the certificates. All certificates shall be issued for the fiscal year and shall expire at midnight the 30th day of January of each fiscal year. Failure to pay the regulatory charge prior to January 1, 1956, and prior to the first day of February for any succeeding year automatically shall suspend the certificate of authority. Such certificate may be restored upon payment to the Department of Registration of all prescribed charges.

(h) Every cemetery authority, including both endowment and non-endowment care fund cemeteries, shall pay for each cemetery operated by it, an annual regulatory charge not to exceed \$25.00 to be fixed by the department, which charges shall be deposited in the cemetery fund. Upon payment of said charges and compliance with the act, the department shall issue a certificate of authority.

(i) It shall be a misdemeanor for any cemetery authority to make any interment without a valid, subsisting and non-suspended certificate of authority. Each interment shall be a separate violation.

(j) Upon violation of any of the provisions of this act, the director may revoke or suspend the certificate of authority of any cemetery authority.

(k) There shall be in the office of the State Treasurer a fund to be known and designated as the cemetery fund. All regulatory fees and annual license charges collected under the provisions of this act, and in the absence of other provisions to the contrary, shall be paid at least once a month to the State Treasurer to be credited to a special fund to be known as the cemetery fund. All monies credited to the cemetery fund shall be used by the Department of Registration only to carry out the provisions of this act.

#### **Section 7. "Endowment-Care" Defined**

Any such person, firm or corporation, subject to the provisions of this chapter, who or which was engaged in the business of operating a cemetery as defined in this chapter, prior to the effective date hereof, shall be considered as operating an endowment care cemetery if said person, firm or corporation shall at all time subsequent to the effective date of this chapter comply with the requirements of an endowment care cemetery as set forth and required by the provisions of this act.

**Section 8. Adequate Posting, Advertising of Non-Endowment Plot**

In the office or offices of each non-endowment care cemetery where sales are conducted shall be posted in a conspicuous place, a legible sign stating: "This is a non-endowment care cemetery." The lettering of this sign shall be of suitable size so it is easily read at a distance of fifty feet. Each non-endowment care cemetery shall also have printed or stamped at the head of all its contracts, deeds, statements, letterheads and advertising material, the legend: "This is a non-endowment care cemetery," and shall not sell any lot or interment space therein unless the purchaser thereof is informed that the cemetery is a non-endowment care cemetery.

**Section 9. Change From Non-endowment to Endowment Care Cemetery.**

Any non-endowment care cemetery after the effective date of this chapter may become an endowment care cemetery by placing in the endowment care trust fund twenty-five thousand dollars (\$25,000.00) or five thousand dollars (\$5,000.00) per acre of all property sold, whichever is the greater, and shall comply with the requirements for an endowment care cemetery as provided in this act.

**Section 10. Violations—Misdemeanor.**

It shall be unlawful for any person to sell or offer to sell a cemetery plot upon the promise, representation or inducement of resale at a financial profit. A violation of this section is a misdemeanor and each violation shall constitute a separate offense.

**Section 11. Penalty.**

Any cemetery, person, firm or corporation violating any of the provisions of this chapter, shall, upon conviction, be punishable by a fine of not less than three hundred dollars (\$300.00) nor more than one thousand dollars (\$1,000.00) or, if a person, by said fine or by imprisonment in the county jail not exceeding one year or by both fine and imprisonment.

Approved March 10, 1955.

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**CITIES AND TOWNS****CHAPTER 12**

S. B. NO. 61.

(Passed March 1, 1955. In effect May 10, 1955.)

**MUNICIPAL GOVERNMENT**

**An Act Amending Section 10-6-6, Utah Code Annotated 1953, to Provide That the Governing Body of a Municipality May Prescribe by Ordinance Residential Qualifications of Appointive Officers.**

*Be it enacted by the Legislature of the State of Utah:*

Section 10-6-6, Utah Code Annotated 1953, is amended to read: