

2018

A PERSON LICENSED AS A REAL ESTATE BROKER OR REAL ESTATE SALES MAN WHO IS ENGAGING IN THE SALE OF CEMETERY LOTS ARE SUBJECT TO PROVISIONS OF CHAPTER 4735., R.C.

SYLLABUS:

A person licensed as a real estate broker or real estate salesman under Chapter 4735., Revised Code, who is engaging in the sale of cemetery lots on a commission basis, is subject to the provisions of said Chapter 4735. in the sale of such lots.

Columbus, Ohio, February 23, 1961

Hon. John W. Bush, Director, Department of Commerce
State House, Columbus 16, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“Are licensed real estate brokers or salesmen, who are employed on a commission basis, subject to provisions of Section

4735.01 to 4735.23, inclusive, of the Revised Code of Ohio, in the event they are employed as agents for the sale of cemetery lots owned by cemetery association?"

Whether a real estate broker or salesman is subject to the provisions of Sections 4735.01 to 4735.23, inclusive, Revised Code, in selling a cemetery lot on a commission basis, depends upon whether the person concerned is acting as a real estate broker or real estate salesman in such a situation. Pertinent in this regard is Section 4735.01, Revised Code, which defines "real estate broker," "real estate," and "real estate salesman" as follows:

"As used in sections 4735.01 to 4735.23, inclusive, of the Revised Code:

"(A) 'Real estate broker' includes any person, * * * who for another and for a fee, commission, or other valuable consideration, * * * sells, * * * leases, or negotiates the sale, * * * rental, or leasing of, * * * any *real estate*, or the improvements thereon; * * *.

"(B) 'Real estate' includes leaseholds as well as *any and every interest or estate in land*, whether corporeal or incorporeal, whether freehold or nonfreehold, and whether said land is situated in this state or elsewhere.

"(C) 'Real estate salesman' means any person associated with a licensed real estate broker to do or to deal in any acts or transactions set out or comprehended by the definition of a real estate broker as set forth in this section, for compensation or otherwise.

"Any person, partnership, association, or corporation, who, for another, in consideration of compensation by fee, commission, salary, or otherwise, or with the intention or in the expectation or upon the promise of receiving or collecting a fee, does, offers or attempts or agrees to engage in any single act or transaction contained in the definition of a real estate broker in this section, whether said act be an incidental part of a transaction, or the entire transaction, shall be constituted a real estate broker or real estate salesman under sections 4735.01 to 4735.23, inclusive, of the Revised Code. (Emphasis added)

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It is well settled that one who purchases a cemetery lot, even though it has been conveyed by a deed in fee simple absolute, does not acquire a fee simple title thereto but only in an easement or license which is the right to the exclusive use of the lot for burial purposes for so long as the

ground remains a cemetery. While there is a conflict among authorities as to whether the owner of a burial lot is an owner of an easement or license, the majority rule in Ohio holds that it is an easement. *Smiley, et al, v. Bartlett, et al.*, 6 C.C., 234; *Fraser v. Lee*, 8 Ohio App., 235, 7 Ohio Jurisprudence, 31. If it is an easement, then it is certainly an interest in real property, because an easement is an interest in land. 19 Ohio Jurisprudence, 59, 27 Corpus Juris, 195.

Further, ownership of a burial lot is a right which may be conveyed and, upon the death of the owner, whatever right or title which he possessed inures to the heirs. *Fraser v. Lee, supra*. As was stated in the case of *Sherrard v. Henry*, 88 West Virginia, 315:

“While the right which one acquires in a cemetery lot is rather in the nature of a perpetual easement, subject to be controlled by the state in the exercise of its police power, it is such a valuable right as a court of equity will protect, and the same character of adverse possession that will confer title to real estate will suffice to confer such right.

“* * * there is no doubt but that one who acquires a cemetery lot has some interest therein. He does not acquire the fee to the land. His interest is more in the nature of a perpetual easement, and it is likewise true that the exercise of this right is subject to the police power of the state. * * *

“It seems to be quite as well established that this right may be acquired by adverse possession, as any other interest in real estate may be acquired. * * *”

Under division (B) of Section 4735.01, *supra*, it is specifically stated that “real estate” includes “any and every interest or estate in land.” Also, it will be noted that direct reference to the sales of cemetery lots is made in two sections of Chapter 4735., Revised Code, thereby definitely showing the intention of the legislature to consider the sale of a cemetery lot as coming within Sections 4735.01 to 4735.23, *supra*.

Section 4735.22, Revised Code, provides :

“No person who sells, or causes to be sold, any cemetery lot shall promise or guarantee, or authorize or permit any person to promise or guarantee, future profits from the resale or repurchase of such real estate.”

Section 4735.23, Revised Code, provides :

“Selling commissions for the sale of any cemetery lot may be paid in such reasonable amounts as may be fixed by the board of trustees of the cemetery company or association.”

In view of the above, therefore, I am constrained to conclude that the purchaser of a cemetery lot acquires an interest or estate in land which is "real estate" within the definition of division (B) of Section 4735.01, *supra*; and it follows that a person selling a cemetery lot on a commission basis is selling real estate within the purview of Section 4735.01, *supra*, and is subject to the provisions of Sections 4735.01 to 4735.23, inclusive, Revised Code.

Accordingly, it is my opinion and you are advised that a person licensed as a real estate broker or real estate salesman under Chapter 4735., Revised Code, who is engaging in the sale of cemetery lots on a commission basis, is subject to the provisions of said Chapter 4735. in the sale of such lots.

Respectfully,

MARK McELROY

Attorney General