

**ORDER NO. 2016 - 012**

IN THE MATTER OF:	§	BEFORE THE BANKING
	§	
LAMESA MEMORIAL PARK LLC d/b/a/	§	
LAMESA MEMORIAL PARK,	§	
	§	
DEVIN LEE AVANT,	§	COMMISSIONER OF TEXAS
JOSE ELENO MORALES, JR.,	§	
BRENDA AVANT, and	§	
MICHELLE VELA	§	
	§	
LAMESA, TEXAS	§	AUSTIN, TRAVIS COUNTY, TEXAS

***EMERGENCY ORDER TO CEASE AND DESIST FROM OPERATING A PERPETUAL CARE CEMETERY WITHOUT A VALID CERTIFICATE OF AUTHORITY AND FROM VIOLATING TEXAS HEALTH AND SAFETY CODE***

On this day, the matter of Lamesa Memorial Park LLC d/b/a Lamesa Memorial Park (the Cemetery) located in Lamesa, Texas; Devin Lee Avant (Devin Avant); José Eleno Morales, Jr. (Morales); Brenda Avant; and Michelle Vela (Vela) (hereinafter jointly called Respondents), was submitted to the Banking Commissioner (Commissioner) of the State of Texas, for consideration and action.

**I. Findings of Fact**

**A. Background**

1. The Cemetery is a perpetual care cemetery (PCC) operating under certificate of authority number 292. The certificate of authority was issued October 15, 2015. The Cemetery is located at 1010 County Road 20, Lamesa, Texas 79331.
2. Devin Avant and Morales are each 50% owners of the Cemetery. They are the two managing members of the Cemetery limited liability company. Avant is the president and Morales is the vice-president of the Cemetery limited liability company.
3. Brenda Avant is the wife of Devin Avant. Vela is the fiancée of Morales.
4. The Texas Department of Banking (Department) regulates PCCs under the authority of Texas Health and Safety Code (Health Code) Chapters 711 and 712.
5. The Texas Finance Commission has issued rules governing PCCs, which are located primarily in 7 Texas Administrative Code (Administrative Code) Chapter 26.

6. PCCs are required to deposit a certain amount from each sale of a plot or interment right into a perpetual care trust fund. Health Code § 712.028. The fund income is to be used to maintain the cemetery. Health Code § 712.021(f).

B. The Cemetery's certificate of authority has expired.

7. Pursuant to Health Code § 712.0036, the certificate of authority to operate the perpetual care cemetery expired on March 1, 2016, and was to be renewed at that time.

8. Pursuant to Health Code § 712.041, the Cemetery was required to file in its office and with the Commissioner an annual statement of funds by March 1, 2016. The annual report shows the financial condition of the perpetual care fund.

9. The Cemetery submitted an Annual Statement and Renewal Application on June 28, 2016, but it was incomplete and not accepted for filing.

10. On July 6, 2016, the Department gave the Cemetery written notice that the filing was deficient and directed the Cemetery to file the necessary documents by July 20, 2016. The Cemetery did not do so.

C. Each of the owners of the Cemetery has been charged with criminal violations since obtaining the certificate of authority.

1. Jose Morales

11. On August 10, 2016, Morales was indicted by the Dawson County Grand Jury on three counts of theft of funds Morales allegedly received for the purchase of markers at the Cemetery. On August, 24, 2016, Morales was arrested and jailed in the Dawson County Jail. The persons whose funds are the subject of the indictments are E.B., D.C., and B.L.<sup>1</sup>

12. On June 13, 2016, E.B. filed a complaint with the Department stating that in December 2015 she paid \$3,046.88 for a marker that was never delivered. The Department mailed the complaint to the Cemetery. The receipt for her check is signed by Morales. As of September 12, 2016, E.B. states that the marker has not been set and she has not been contacted by the Cemetery. Pursuant to 7 Texas Administrative Code (TAC) § 26.4 the marker should have been ordered 21 days after E.B. paid for the marker and approved the design. Pursuant to that same rule, the marker should have been set within 15 days of the marker's delivery to the cemetery. Pursuant to 7 TAC § 26.12(b)(3), the Cemetery should have responded to the complaint within

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<sup>1</sup> Initials are used to preserve the privacy of the marker purchasers.

30 days of its receipt and have sent the Department a copy within 5 days of sending it to E.B. It has not.

13. On June 27, 2016, D.C. filed a complaint with the Department stating that she paid \$2,791.00 for a marker that was never delivered. The Department mailed the complaint to the Cemetery. Pursuant to 7 TAC § 26.12(b)(3), the Cemetery should have responded to the complaint within 30 days of its receipt and have sent the Department a copy within 5 days of sending it to D.C. The Department has not received a copy of any response to D.C.

## 2. Devin Avant

14. On April 16, 2016, Devin Avant was arrested and charged with possession with intent to deliver cocaine in a drug free zone. At that time, Devin Avant was still subject to an order for 10 years of community supervision from a previous drug charge.

15. On July 13, 2016, the 106th District Court of Dawson County, Texas issued an order modifying his community supervision, committing him to Concho Valley Male Community Corrections Facility, a Court residential treatment facility in San Angelo, Texas, for a term up to 24 months.

16. The Department has been informed that Devin Avant is currently residing at the Concho Valley treatment center.

D. The Department's examiner visited the cemetery and discovered Brenda Avant is conducting cemetery operations and there is a shortage to the perpetual care fund.

17. Pursuant to Health Code § 712.044(a), the Commissioner may examine PCCs on a periodic basis as he reasonably considers necessary or appropriate to protect the interest of plot owners and efficiently administer and enforce Health Code Chapter 712.

18. Because of the Cemetery's failure to timely renew its certificate of authority, and because the Company did not respond to phone calls, the Department sent an examiner to the Cemetery.

19. On May 24, 2016, the examiner went to the Cemetery and determined that it was being operated by Brenda Avant, the wife of co-owner Devin Avant.

20. Brenda Avant told the examiner the following:

- a. Devin Avant was arrested for drug possession in February 2016 and spent several weeks in jail. He was arrested again in April 2016 and was still in jail as of May 24, 2016.
- b. Morales was last seen regularly at the Cemetery in February or March 2016.

- c. She returned to the Cemetery on April 19, 2016 and began operating it, including presiding over burials and opening and closing of graves. She discovered that the utilities had been cut off and the office was in disarray. She posted her cell phone number at the Cemetery so that she could be reached.
  - d. She is diligently working to organize the cemetery records but she cannot locate the historical contract register.
  - e. She is not able to access the Company's post office box and all the Company's bank accounts have been closed.
  - f. She is depositing all the money she receives for Cemetery operations on a prepaid credit card.
21. The examiner reiterated to Brenda Avant the importance of making all perpetual care deposits that were due and to become due. After the visit, the examiner reconciled the PCC trust through February 2016 and determined there was a \$1,790 shortage as of December 31, 2015.
22. According to the trustee's records of the perpetual care fund, no deposits have been made from the perpetual care fund's inception on November 30, 2015, to September 9, 2016.
23. Brenda Avant has a general power of attorney from Devin Avant, but it is in his personal capacity. It is not a power of attorney from the Cemetery limited liability company.
24. On September 9, 2016, Brenda Avant informed the Department that she has the perpetual care funds on a prepaid credit card. She was directed to send the perpetual care funds to the trust and was given the trustee's contact information. She also informed the Department that the door to the cemetery office has been "kicked down," rendering the cemetery office insecure.
25. As of September 9, 2016, Brenda Avant continues to arrange for and to preside over opening and closing of graves at the Cemetery.

E. Michelle Vela is also conducting cemetery operations.

26. On September 7, 2016, Vela contacted the Department about the Cemetery. She stated that Cemetery was in poor condition.
27. On September 9, 2016, Vela sent the Department a copy of a general power of attorney from Morales. It is a personal power of attorney, not a power of attorney on behalf of the Cemetery limited liability company. Vela also sent photographs of the Cemetery office, which show it to be in poor condition.

28. Vela has informed the Department that she is staying at the cemetery office from 9 to 5 each day and conducting cemetery business, including entering into contracts with consumers for purchase of plots. She stated that she is not taking money from consumers for those contracts.

F. Violations of statutes and rules.

29. One or more of the Respondents has violated numerous statutes and rules governing perpetual care cemeteries:

- a. violation of Health Code § 712.0032 by operating the Cemetery without a certificate of authority;
- b. violation of Health Code § 712.0036 for failing to renew the certificate of authority by March 1, 2016;
- c. violation of Health Code § 712.029(c) for failing to accurately deposit required perpetual care funds no later than the 20th day after the end of the month in which the original purchase agreement was paid in full;
- d. violation of Health Code § 712.041 for failing to file in its office and with the commissioner the annual statement of funds by March 1, 2016;
- e. violation of 7 TAC § 26.4 for failure to timely order and set a marker; and
- f. violation of 7 TAC § 26.12(b)(3) for failing to send the Department a copy of responses it was obligated to send to persons making written complaints.

30. The Cemetery limited liability company is the certificate holder. The certificate holder's only authorized representatives, Devin Avant and Jose Morales, are subject to ongoing criminal proceedings. Brenda Avant and Vela each purport to have the authority to act on behalf of Devin Avant and Morales, respectively, but neither has authority to act on behalf of the certificate holder.

31. Immediate and irreparable harm is threatened to the public, plot owners, and marker purchasers because the Cemetery, Devin Avant, and Morales have taken no action to correct egregious violations. Additionally, the Cemetery no longer has a valid certificate of authority to operate a perpetual care cemetery. Despite being told in May 2016, to transmit perpetual care funds to the trustee as required by law, neither Brenda Avant nor anyone else has deposited these funds with the trustee. If the Respondents are allowed to continue to sell plots, take in funds from the public, and/or operate the Cemetery as it has been operated, the general public as well as current plot owners could be immediately and irreparably harmed.

## II. Conclusions

32. Pursuant to Health Code § 712.0444, in the exercise of his regulatory power, the Commissioner may issue an emergency order that takes effect immediately if the Commissioner finds that immediate and irreparable harm is threatened to the public or a plot owner, marker purchaser, or other person whose interests are protected by Chapter 712.

33. One or more of the Respondents has violated statutes and rules governing PCCs as set forth above.

34. These violations and the reasons recited above in paragraphs 7 through 28 establish that immediate and irreparable harm is threatened and there is sufficient cause for the issuance of this cease and desist order with immediate effect.

## III. Order

In accordance with Health Code § 712.0444, and in the exercise of the regulatory power of the Texas Banking Commissioner, Respondents Devin Lee Avant, José Eleno Morales, Jr., Brenda Avant, Michelle Vela, and any of their agents and employees, are ORDERED to immediately cease and desist from the sale of any cemetery spaces or interment rights in Lamesa Memorial Park.

It is further ORDERED that the Cemetery shall cease and desist from the sale of any memorials as that term is defined in Health Code § 711.001, and that any of the Respondents who received funds for a memorial and misappropriated those funds shall repay those funds to the person from whom they were taken within two days of the effective date of this order.

It is further ORDERED that Respondents, their agents and employees, are ordered to cease and desist from all cemetery operations except as set forth in this paragraph. The Cemetery may conduct burials of persons who own plots as of the date of this order, and other persons for whom the Commissioner has given written permission. The Cemetery shall continue to maintain the property and grounds of the Cemetery. The Cemetery may set markers that have been fully paid for as of the date of this Order.

It is further ORDERED that if Respondents perform any burials or set any markers as allowed under this Order, Respondents shall ensure that all documentation that is required by the Health Code and the Administrative Code is properly completed and maintained. Respondents shall send copies of all such recorded documentation to the Texas Department of Banking within two business days of any such burials or marker setting.

It is further ORDERED that any of the Respondents with actual possession or the right to possess any perpetual care funds shall pay all funds due and owing to the perpetual care fund to the Department immediately, and in any case no later than two days after the effective date of the Order. If the Department determines that additional perpetual care funds are due, such Respondents shall pay such additional funds to the Department immediately, and in any case no later than two days of being informed of the additional amount by the Department. The Department will forward all perpetual care funds it receives to the trustee.

It is further ORDERED that any of Respondents who have possession or the right to possess records or information necessary to determine what sums are due to the perpetual care fund shall provide those records and that information to the Department within four hours of receiving actual or constructive notice of this Order.

It is further ORDERED that the Cemetery, Devin Avant, and Jose Morales shall cause a written response to be made within 30 days of the effective date of this order to E.B., D.C., and anyone else from whom the Cemetery has received a written complaint, and send a copy of the Cemetery's response to the Department, as required by 7 TAC § 26.12(b).

#### IV. Effective Dates

Pursuant to Health Code § 712.0444, this Emergency Order to Cease and Desist from Operating a Perpetual Care Cemetery Without a Valid Certificate of Authority and from Violating Texas Health and Safety Code takes effect at the time and date indicated below. The order remains in effect unless stayed by the Commissioner.

#### V. Right to hearing

Pursuant to Health Code § 712.044(c), Respondents may request in writing, not later than the 18th day after the date the Order is mailed, a hearing to show that the emergency order should be stayed.

Signed on this 13th day of September, 2016 at 9:21 a.m.

/s/ \_\_\_\_\_  
Stephanie Newberg for  
Charles G. Cooper  
Banking Commissioner of Texas

## **Certificate of Service**

This Order is served as follows:

Mr. Jose Morales  
Mr. Devin Avant  
Lamesa Memorial Park LLC  
P.O. Box 805  
Lamesa, Texas 79331

by certified mail, return receipt requested and first class mail, sent on September 13, 2016.

Mr. Jose Morales  
c/o Dawson County Sheriff  
Kent Parchman  
P.O. Box 1268  
Lamesa, Texas 79331-1268  
Fax: 806-872-9396

by certified mail, return receipt requested, first class mail, and facsimile transmission sent on September 13, 2016

Mr. Devin Avant  
Concho Valley Male Community Corrections Facility  
3262 N. Hwy 277  
San Angelo, Texas 76905

by certified mail, return receipt requested and first class mail, sent on September 13, 2016.

Ms. Brenda Avant  
108 ½ North 22nd Place  
Lamesa, Texas 79331

by certified mail, return receipt requested, and first class mail sent on September 13, 2016

Ms. Michelle Vela  
1505 North Second  
Lamesa, Texas 79331

by certified mail, return receipt requested, and first class mail sent on September 13, 2016

/s/ Deborah Loomis  
Deborah Loomis  
Deputy General Counsel  
Texas Department of Banking