

## Opinion No. 55-6144

April 19, 1955

**BY:** RICHARD H. ROBINSON, Attorney General

**TO:** Mr. Robert M. Fitzgerald, President, New Mexico Board of Embalmers and Funeral Directors, 910 Grand Avenue, NE, Albuquerque, New Mexico

Your request for opinion concerning an amendment to § 67-20-31, NMSA, 1953, has been received.

Section 67-20-31 now provides that it is unlawful "To require a casket to be purchased, furnished, rented or charged for where a dead human body is to be cremated." The same statute thereafter provides criminal penalties for the violation thereof.

Your inquiries in connection with the above are: 1. Is the amendment to § 67-20-31 constitutional; and 2. Does a crematory have a right to refuse a human remains that is not in a casket?

The question of constitutionality as concerns this statute is not free from all doubt. However, this office is compelled, where the constitutionality of a statute is involved, to indulge every presumption in its favor. Only where there appears a clear and palpable instance of unconstitutionality is this office free to announce that a law passed by our Legislature is for that reason void. If there be any reasonable basis for upholding its constitutionality, this office must do so. In re Santillanes, 47 N.M. 140.

Unquestionably, the statute restricts the right of a private individual to contract. A definite qualification is placed upon the use and enjoyment of his private property. In general, the right to contract freely and enjoy the fullest use of private property is guaranteed by our State and National Constitutions under due process.

Upon what grounds then may the State validly impose such restrictions upon personal and property rights? It is the police power of which the State, as the sovereign, may avail itself to protect the health, morals, safety and general welfare of the public. Legislation restricting or qualifying property rights must in some degree be based upon these considerations of public well-being.

The business of embalming and undertaking is generally regulated and that regulation is upheld upon the grounds that the health and morals of the community are thereby protected. Admittedly, this statute in question is not connected in any manner with health or morals, but there still remains as a grounds upon which to uphold this statute the legitimate concern of the Legislature in the general welfare of the public. Thus, upon this ground "the most proper business may be regulated to prevent its becoming offensive to the public sense of decency, or for any other reason injurious or dangerous, and rules for the conduct of the most necessary and common occupations are

prescribed **when from their nature they afford peculiar opportunities for imposition and fraud.**" See 2 Cooley's Constitutional Limitations, 8th Ed. 1332.

Viewed thus, it is the opinion of this office that the object of the statute in question is such as is properly the subject of regulation under the police power of the State. The statute obviously is intended to prohibit a crematory from requiring those who would avail themselves of its services to pay for a casket when from the nature of the crematory process it is unnecessary that this be done. The Legislature recognized that the case of death presents a situation where the relatives of the deceased may be easily imposed upon. In the period following death, grief and other emotion weakens those charged with the duty of proper disposal of the body. In such a state, undue advantage and imposition can easily occur. This office views this statute as requiring no more than do the ethics of this profession.

The answer to your first question is thus in the affirmative.

In connection with the second question, as stated above, an individual is privileged to exercise his own pleasure as to parties with whom he will deal. *Green v. Victor Talking Machine Co.*, 24 Fed. 2d 378, 59, A.L.R. 1091.

The balance to be struck between this principle and the exercise of the police power leads us to the following conclusion as concerns this statute. It is only when the crematory undertakes to provide the service and makes the purchase, furnishing, rental or charge for a casket a condition to that undertaking that the statute applies. If no services are performed, the statute cannot apply. Prior to the services being performed, a refusal to provide them can be based upon any reason that the crematory may have, including, in our opinion, the reason that the remains are not in a casket. However, where, in fact, this is the reason and the customer, in order to acquire the services, adheres and pays for a casket or use thereof **and the service is performed**, the statute and penalty attaches.

It should be noted that the statute does not prohibit the charging for a casket or the use thereof where the customer voluntarily asks that the same be furnished.

The answer to your second question is, therefore, as follows: A crematory has a right to refuse a human remains which is not in a casket, but if this refusal is made a condition for the services being performed and subsequently the services are performed, the penalty provided for by the statute applies.

I trust that this helps to answer your inquiries.

By Santiago E. Campos

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