

Opinion No. 60-128

July 1, 1960

BY: OPINION of HILTON A. DICKSON, JR., Attorney General

TO: Mr. Joseph B. Grant State Bank Examiner Santa Fe, New Mexico

QUESTION

QUESTION

Does the State Bank examiner have the authority to require trustees of perpetual care cemetery trust funds to obtain his permission before investing the trust funds in certain securities?

CONCLUSION

Yes.

OPINION

{*504} ANALYSIS

The Legislature placed perpetual care cemeteries under the regulation of the State Bank Examiner in 1955 when it passed Chapter 248, Laws 1955 (§ 67-25-1 et seq.). This chapter gives the Bank Examiner broad powers in regulating these cemeteries. Section 67-25-6, N.M.S.A., 1953 Compilation (P.S.), gives the Bank Examiner the responsibility for administering the Act. He must approve all forms and has continuing jurisdiction to hold hearings and issue orders when necessary. Section 67-25-7, supra, gives the Bank Examiner the power of enforcement of the Act. Section 67-25-8, supra, gives the Bank Examiner the power to promulgate rules and regulations as follows:

"The state bank examiner shall have authority to promulgate all necessary rules and regulations to effectuate the purposes of this act. . . ."

Section 67-25-1, supra, provides the purpose of the Act as follows:

{*505} "It is hereby declared to be necessary in the public interest that cemeteries or burial grounds advertising or selling 'perpetual care' or 'endowment care' in connection with the sale of cemetery lots or burial spaces be subject to sufficient regulation by the state to insure the establishment of sound business practices necessary to furnish the perpetual care or endowment care guaranteed. . . ."

It would, therefore, seem clear that if the Bank Examiner feels that a regulation should be issued requiring trustees of various funds to obtain advance permission before

investing in certain securities and that this regulation is necessary to properly protect the fund and establish a sound business practice as set forth in the statement of policy, he can properly do so.

Section 67-25-3, supra, provides that the trust funds are to be established with some bank or trust company doing business within the state. The section provides an exception to the effect that when no bank or trust company is available an individual may be appointed, but that said person must have advance approval of the Bank Examiner before investing in securities other than government securities or depositing the funds in a savings account.

We do not feel that this requirement for individuals implies that there can be no such requirement for the banks or trust companies. As we view the section, it was intended by the Legislature to require that permission be obtained from the Bank Examiner in all cases where an individual is the trustee. In these cases, the Bank Examiner has no discretion. When a bank or trust company is the trustee, we feel that the Legislature left to the discretion of the Bank Examiner the question of when to require a bank or trust company to obtain permission before investing in certain securities.

If the Bank Examiner feels that the trust funds administered by banks or trust companies need further protection than is provided by law, he may, in his discretion, issue a regulation under § 67-25-8, supra, requiring the trustee bank or trust company to obtain permission before investing in certain securities. The manner of obtaining permission and the securities made subject to the regulation is, of course, left to the Bank Examiner since he is the person responsible for administering the Act and protecting the trust funds. We are of the opinion that any reasonable regulation in this connection promulgated by him would be lawful and enforceable under the powers bestowed upon him by the Act.

By: Boston E. Witt

Assistant Attorney General