

Opinion No. 70-92

December 9, 1970

BY: OPINION OF JAMES A. MALONEY, Attorney General

TO: Ralph F. Apodaca Superintendent of Insurance New Mexico Department of Insurance P.E.R.A. Building Santa Fe, New Mexico 87501

QUESTIONS

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1. Does the Superintendent of Insurance have jurisdiction to regulate the selling, offering for sale, dealing in or otherwise disposing of for value any contract or policy providing for the furnishing of funeral services or of personal property normally furnished in connection with funerals (excluding the merchandise and space and care covered by the Endowed Cemetery Act), when the services and property are not immediately required but are to be performed or delivered upon the death of the person for whose benefit the contract or policy is made?
2. Does the sale or offering for sale of a contract or policy for the furnishing of a casket fall within Section 58-7-1.1, N.M.S.A., 1953 Comp., when it provides that title passes to the purchaser on payment of the full purchase price; that delivery may then be requested; that an escrow relating to the current manufacturer's cost of the casket would be established in the absence of a request for delivery within 60 days after payment of the full purchase price, withdrawable for the purpose of purchasing the casket to be delivered in accordance with the instructions of the purchaser or his family; and that in the event the seller should be unable to deliver the casket a refund is available to the purchaser's heirs or personal representatives?
3. If the answer to the second question is negative, would such a contract be of the character contemplated by Section 58-7-1.1, **supra**, if it were shown in the case of any individual contract either that the exercise of the right given the purchaser to demand the casket in advance of death was highly improbable or that such right was not intended by the purchaser to be exercised until the death of the person for whose benefit the agreement was made?

CONCLUSIONS

1. Yes.
2. Yes.
3. See Analysis.

OPINION

{*158} ANALYSIS

In fine, the questions presented relate to so-called "pre-need" or "pre-arranged" funeral plans. These plans are promotional contracts providing for the furnishing of funeral services or funeral merchandise such as caskets or vaults with or without accompanying funeral services. These items and services are not immediately required by the purchaser of the contract but, in the usual course of business, are to be performed or delivered at the death of the person for whose benefit the pre-need or pre-arranged plan is granted.

Most states have regulated pre-need sales of this nature, and have done so by requiring that all funds collected under such contracts be placed in a trust account. New Mexico has chosen a different method of regulation and has embodied that regulatory plan in Section 58-7-1.1, N.M.S.A., 1953 Comp., which provides that such pre-need or pre-arranged funeral plans will be regulated by the Superintendent of Insurance in the same manner as the life insurance business generally.

The sale, offering for sale, dealing in, or otherwise disposing of for value any contract, agreement, certificate, share, right, interest or any other instrument providing for the furnishing of funeral services or of personal property, facilities and services customarily furnished in connection with funerals, excluding grave markers, burial space in any cemetery and perpetual care of such space, which services and property are not immediately required but are to be performed or delivered subsequent to and contingent upon the death of the person for whose benefit the prearranged funeral plan is made, is declared to be the transaction of insurance business, and shall be regulated and controlled by the superintendent of insurance for the protection of the public in the same manner as the business of life insurance.

The statute directs that these transactions be regulated and controlled by the Superintendent of Insurance for the protection of the public. This means paying prescribed taxes and fees and filing prescribed accountings and reports. This means being subject to investigation by the Superintendent to determine not only the question of solvency but treatment of contract holders and the methods of doing business generally. It means the licensing of agents and solicitors of such pre-need contracts and means protection against untrue, deceptive or misleading statements and practices. Perhaps most important for the protection of the public, it means the establishment of state-supervised reserves to ensure that there will be funds available to perform these contracts when demanded.

The validity of this legislation was affirmed in **State ex rel. Apocaca v. Our Chapel of Memories of N.M., Inc.**, 74 N.M. 201, 392 P.2d 347 (1964). Based on common law rules recognized in every state, it has been repeatedly determined that even in the absence of a statute similar to that quoted above, pre-need funeral contracts are contracts for insurance. **State v. Mynott**, 339 S.W.2d 26 (Tenn. 1960); **Messerli v.**

Monarch Memory Gardens, Inc., 297 P.2d 34 (Idaho 1964); **Utah Funeral Directors & Embalmers Ass'n v. Memorial Gardens**, 17 Utah 2d 227, 408 P.2d 190 (1965). Moreover, courts have been frank to state the reasons that they regard pre-need funeral contracts as requiring close regulation. The court observed in **Memorial Gardens Ass'n, Inc. v. Smith**, 16 Ill. 2d 116, 156 N.E.2d 587 (1959):

{*159} In the long interval between full receipt of the purchase price and contract performance, the opportunities for fraud are great and the risk of insolvency, with consequent inability to perform, apparent.

Similar comments may be found in **State v. Anderson**, 195 Kan. 649, 408 P.2d 864 (1965); **State ex rel. Fishback v. Globe Casket and Undertaking Co.**, 82 Wash. 124, 143 P.878 (1914). That our own state has had direct experience with the infirmities of pre-need funeral contracts may be demonstrated by reference to the **Chapel of Memories** case and to two District Court cases, **State ex rel. Apodaca v. Our Chapel of Memories, Inc.**, Santa Fe County Cause No. 32387; and **State ex rel. Apodaca v. Memorial Foundation, Inc.**, et al., Santa Fe County Cause No. 35143.

The fact that the caskets or other personal property must be delivered upon demand, and not necessarily upon the death of the party for whose benefit the contract was made, does not alter the fact that the contracts fall within Section 58-7-1.1, *supra*. In **State v. Smith Funeral Service**, 177 Tenn. 41, 145 S.W.2d 1021 (1940), the court held that certificates providing for the furnishing of caskets and clothing were insurance contracts in practical operation, and added:

It seems to us that the apparent right given to a certificate holder to demand his coffin and grave closed prior to his death is a right of such improbable exercise that it does not alter what we regard to be the real nature of the contract. The effect on the course of business will be negligible. The business in reality will continue to be that of burial insurance.

Similar expressions are found in **State ex rel. Fishback v. Globe Casket and Undertaking Co.**, *supra*, and **Memorial Gardens Ass'n Inc. v. Smith**, *supra*. In **Messerli v. Monarch Memory Gardens Inc.**, *supra*, the court noted that despite the right to demand delivery of a vault or casket *inter vivos* this demand was not likely in the usual course of business and remarked:

Clearly the undertaking of (the insuring business) under such contract or program is to sell prearranged or pre-paid funeral services or funeral merchandise to be delivered at an undetermined future time dependent upon the death of the contract party or his child.

The clearest expression, however, of the courts' attitude toward such pre-need contracts, even in the face of a provision allowing demand for the furnishing of the goods or services before need, may be found in **State v. Anderson**, *supra*:

Bare recitals of these contract provisions make it abundantly clear that the contracts, whether fully paid or not, are of the character contemplated by the statute, that is, contracts whereby the delivery of the merchandise is not immediately required. For example, the merchandise trust provision manifestly presupposes non-delivery of the merchandise. Considering the subject matter, the contracts clearly contemplate delivery of the property when actually needed **No other interpretation can reasonably be placed upon them. The remote but highly improbably exercise of the right given to the purchaser to demand his burial vault in advance of death does not change the real nature of the contract.** Here again . . . a statute will not be constructed so as to defeat its unmistakable intention. (Emphasis added.)

Thus, in conclusion, it is the opinion of this office that the first two questions must be answered in the affirmative, and we so answer them now. Those answers render consideration of the third question unnecessary.

By: Richard J. Smith

Assistant Attorney General