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Opinion No. 13-42

Legality of Single Statewide Trust Fund for Pre-Need Funeral Trusts

QUESTION

May sellers of pre-need funeral contracts, which are funded by a trust or trusts established by the seller, combine their individual pre-need trusts with other Tennessee sellers of pre-need funeral contracts to create a single statewide funeral trust?

OPINION

No. The Tennessee Pre-Paid Funeral Benefits Act explicitly prescribes how pre-need sellers must establish and manage the trusts required for pre-need funeral contracts that are funded by a trust rather than by a prearrangement insurance policy. These statutes confer no authority for a single statewide trust to combine funds of more than one pre-need seller, nor any authority for a statewide trust.

ANALYSIS

The Tennessee Prepaid Funeral Benefits Act, codified at Tenn. Code Ann. §§ 62-5-401 to -417, (hereinafter "TPFB") governs the qualifications and procedures for registration and general regulatory requirements for the sale of prepaid funeral benefits in Tennessee. Tenn. Code Ann. § 62-5-402. *See also* Tenn. Att'y Gen. Op. 12-06 at 1-2 (Jan. 13, 2012). The TPFB contains safeguards designed to ensure that, when pre-need burial contracts are sold to consumers, sufficient funds are reserved so that any benefits provided under these contracts can be paid when due upon the death of the pre-need funeral contract beneficiary. *See* Tenn. Code Ann. §§ 62-5-404 to -412. The "beneficiary" means "the person upon whose death the pre-need funeral contract will be performed." Tenn. Code Ann. § 62-5-403(9).

This statutory framework sets forth a number of defined terms related to the selling of pre-need funeral contracts. A "pre-need funeral contract" is:

> any agreement, contract or plan requiring the payment of money in advance, whether in a lump sum or installments and whether funded by a pre-need funeral trust or prearrangement insurance policy or combination of a pre-need funeral trust and a prearrangement insurance policy, that is made or entered into with

> any person, association, partnership, firm or corporation for the final disposition of a dead human body, for funeral or burial services or for the furnishing of personal property or funeral or burial merchandise, wherein the use of the personal property or the funeral or burial merchandise or the furnishing of professional services by a funeral director or embalmer is not immediately required.

Tenn. Code Ann. § 62-5-403(8)(A). The furnishing of "cemetery merchandise and services otherwise regulated under title 46, chapter 1, part 2" is not included in the definition of pre-need funeral contract. Tenn. Code Ann. § 62-5-403(8)(B).

"Pre-need funeral funds" are "all payments of cash, or its equivalent, made to a pre-need seller or pre-need sales agent upon any pre-need funeral contract." Tenn. Code Ann. § 62-5-403(10). A "pre-need funeral trust" is defined as "funds set aside in a trust account held by a trustee to provide for a pre-need funeral contract." Tenn. Code Ann. § 62-5-403(11). Under Tenn. Code Ann. § 62-5-403(14), as of July 2011, trustees of a pre-need funeral trust are limited to "a state or national bank, federally chartered savings and loan association, state chartered trust company, or, in the reasonable discretion of the commissioner [of the Department of Commerce and Insurance] upon the terms and conditions that the commissioner may require, a securities brokerage firm licensed and in good standing with appropriate state and federal regulatory authorities."[1]

Finally, a "pre-need seller" means "a funeral establishment or other individual, firm, partnership, company, corporation, or association that has applied for and has been granted, or that engages in conduct requiring, registration to sell pre-need funeral contracts pursuant to [the TPFB]." Tenn. Code Ann. § 62-5-403(13).

The TPFB specifically establishes the requirements of any trust fund for pre-need funeral contracts, stating in pertinent part:

> (a) *Every pre-need seller engaged in the business of selling pre-need funeral contracts funded by a trust shall establish a pre-need funeral trust fund.* The trust fund shall be established by executing a written trust agreement with the trustee as defined in § 62-5-403; provided, that a pre-need seller may change the trustee of its trust fund by providing written notice to the commissioner no later than thirty (30) days prior to the change, along with evidence sufficient to the commissioner that the trustee will be able to comply with the requirements of this part. . . .
>
> (b) If the pre-need funeral contract purchaser chooses to fund the pre-need funeral contract by a trust deposit or deposits, the pre-need seller shall deposit all funds with the trustee, to be held in trust, within fifteen (15) calendar days of receipt. The pre-need seller, at the time of making the deposit, shall furnish to the trustee

[1] Prior to July 1, 2011, a trustee could include a certified public accountant who met defined requirements as determined by the Commissioner of the Tennessee Department of Commerce and Insurance. Tenn. Code Ann. § 65-5-403(14)(B).

> the name of each pre-need funeral contract beneficiary and the amount of payment on each for which the deposit is being made. *The trustee may establish a separate trust fund for each pre-need funeral contract or a single trust fund for all pre-need funeral contracts issued by a pre-need seller. The trust accounts shall be carried in the name of the pre-need seller, but accounting records shall be established and maintained for each individual pre-need funeral contract beneficiary showing the amounts deposited and invested, and interest, dividends, increases, and accretions earned.*

Tenn. Code Ann. § 62-5-407 (emphasis added). These provisions clearly require that the trustee must carry the trust account in the name of the pre-need seller, and the trustee may, but is not required to, establish a separate trust fund for each contract.

A single statewide trust fund would not meet the requirements established by Tenn. Code Ann. § 62-5-407. This statute provides that, at a minimum, a separate trust be established for each pre-need seller engaged in the business of selling pre-need funeral contracts funded by a trust. *Id.* Similarly the provisions concerning how a pre-need seller may change the trustee of "its trust fund" are inconsistent with the notion of a statewide trust fund for plural pre-need sellers. *Id.*

Thus, the explicit language of Tenn. Code Ann. § 62-5-407 requiring each pre-need seller to establish a trust and allowing, in subdivision (b), at most a "single trust fund for all pre-need funeral contracts issued by a pre-need seller" excludes the possibility of allowing a single trust fund to be maintained statewide by multiple pre-need sellers. Had the General Assembly intended the TPFB to allow a statewide trust, the General Assembly would have expressly included this option in the listing of allowable trust formation and deposit structures in the statutory scheme. *See Brundage v. Cumberland County,* 357 S.W.3d 361, 365 (Tenn. 2011) (stating rule of statutory construction that a court will apply the plain meaning of a statute without adopting a forced interpretation to unduly broaden the statute's scope); *Overstreet v. Commercial Steering Div.*, 256 S.W.3d 626, 633 (Tenn. 2008) (citing the canon of statutory interpretation that "to express one thing is to exclude others").

The provisions of Tenn. Code Ann. § 62-5-408 do not impact the requirement found in Tenn. Code Ann. § 62-5-407 that a trust or trusts be created by each pre-need seller. This section includes instructions to keep intact the principal and income earned on the principal in trust, imposes limitations on the uses of the trust funds, and sets investment standards for the trust. Tenn. Code Ann. §§ 62-5-408(a) & (d). At least 50% of the trust funds shall be invested in demand deposits, savings accounts, certificates of deposit, or other insured accounts of financial institutions as listed in Tenn. Code Ann. § 62-5-408(d)(1), and all the investments in the portfolio must be made in accordance with the prudent investor standard set forth in Tenn. Code Ann. § 62-5-408(d)(2). These investment criteria do not imply that the trust itself would be expanded beyond the single pre-need seller as required by Tenn. Code Ann. § 62-5-407 and do not authorize the trust to merge into a statewide trust.

Finally, the specific requirements for trusts created under the TPFB would control over any conflict between these provisions and the general provisions of trust and fiduciary law

established by Title 35 of the Tennessee Code. *See Matter of Harris*, 849 S.W.2d 334, 337 (Tenn. 1993) (stating that a statute that is specific in nature controls over a general statute).

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