STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

February 3, 2017

Opinion No. 17-07

Mortal Remains Transport Plans under the Tennessee Prepaid Funeral Benefits Act

Question 1

Does a plan offered for a prepaid, nonrefundable fee to arrange the professional transport of a dead human body from any site of death to a licensed funeral provider – but only if the contract beneficiary's future death occurs more than seventy-five miles away from home – qualify as a "pre-need funeral contract" under the Tennessee Prepaid Funeral Benefits Act?

Opinion 1

Yes.

Question 2

If the plan described above is sold in conjunction with another contract that meets the definition of a "pre-need funeral contract," does the plan still qualify as a "pre-need funeral contract" under the Tennessee Prepaid Funeral Benefits Act?

Opinion 2

Yes. The analysis is the same whether the plan is sold alone or in conjunction with another contract that meets the definition of a "pre-need funeral contract."

ANALYSIS

The Tennessee Prepaid Funeral Benefits Act (codified at Tenn. Code Ann. §§ 62-5-401 to -417) establishes "the qualifications and procedures for registration and general regulatory requirements for the sale of prepaid funeral benefits in this state." Tenn. Code Ann. § 62-5-402. Entities and individuals who "offer or sell pre-need funeral contracts" in Tennessee must be registered with the Commissioner of Commerce and Insurance and comply with the provisions of the Act. Tenn. Code Ann. § 62-5-404. The Act is designed to ensure that sellers of pre-need funeral contracts reserve sufficient funds from the sales of these contracts so that they can provide consumers with the requisite contractual benefits when they come due. See Tenn. Code Ann. §§ 62-5-404 to -412; Tenn. Att'y Gen. Op. 12-06 (Jan. 13, 2012).

The Act defines a "pre-need funeral contract" as follows:

> (A) "Pre-need funeral contract" means 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.
>
> (B) Except as otherwise provided in § 62-5-406, "pre-need funeral contract" does not mean the furnishing of cemetery merchandise and services otherwise regulated under title 46, chapter 1, part 2.

Tenn. Code Ann. § 62-5-403(9).

You ask whether this definition would apply to a plan offered for a prepaid, nonrefundable fee to arrange the professional transport of a dead human body from any site of death to a licensed funeral provider – but only if the contract beneficiary's future death occurs more than seventy-five miles away from home. In addition to this primary contingency, you indicate that these types of plans also require an individual to immediately "activate" the plan after the contract beneficiary dies and fulfill other certain requirements before the plan provider is required to provide any contractual services.

Assuming all contractual conditions are met, the plan provider's initial responsibility is to collect the dead body and arrange the initial stages of handling the body, *e.g.*, embalming. Thereafter, the plan provider's contractual obligations typically include providing an appropriate container for transporting the body, obtaining all necessary permits and a death certificate, arranging for consular services when the death occurs in a foreign country, and transporting the body from the site of death to a licensed provider of funeral services.

This type of plan falls within the Act's definition of a "pre-need funeral contract." The statutory definition of a "pre-need funeral contract" includes "any" contract "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." The benefits offered under the plan at issue are clearly offered for this purpose. Moreover, the plan satisfies the definition's requirement that the services must not be "immediately required." The contract beneficiary is alive when the plan is purchased; the beneficiary (or someone on the beneficiary's behalf) pays for the plan "in advance." Thus, this plan falls within the ambit of "pre-need funeral contracts" for which the General Assembly has commanded that funds be entrusted or reserved until the contract beneficiary's death.

The analysis is the same whether the plan is sold alone or in conjunction with another contract that meets the definition of a "pre-need funeral contract." Accordingly, entities and

individuals who offer or sell plans of the type described herein are subject to the requirements of the Tennessee Prepaid Funeral Benefits Act, regardless of whether the plan is sold alone or in conjunction with another contract that meets the definition of a "pre-need funeral contract."

Moreover, these types of contracts are also ones of insurance. As thoroughly discussed in prior opinions, indemnity and contingency are the essential elements of insurance. *See* Tenn. Att'y Gen. Op. 10-85 (July 6, 2010); Tenn. Att'y Gen. Op. 08-159 (Oct. 8, 2008). The contract at issue clearly contains a contingency element beyond the plan provider's control: the plan provider's contractual obligations do not arise unless the contract beneficiary dies more than seventy-five miles from home. And the contract's promise of indemnity – the provision of expensive transportation arrangements when an unplanned, long-distance death occurs – appears to be the motivating factor for an individual to enter one of these types of contracts. Hence, sellers of these types of contracts are not only subject to the Tennessee Prepaid Funeral Benefits Act but also to insurance regulation.

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