

**Texas Department of Banking**

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*Randall S. James*  
*Commissioner*

OPINION COMMITTEE

RQ-0215-JC

April 3, 2000

The Honorable John Cornyn  
Attorney General of Texas  
c/o Elizabeth Robinson  
Chair, Opinion Committee  
P.O. Box 12548  
Austin, Texas 78711-2548

FILE # ML-41356-00

I.D. # 41356

Re: Request for Attorney General Opinion: Whether §711.002(g) of the Health and Safety Code permits changes to the benefits due a decedent pursuant to a prepaid funeral benefits contract.

Dear General Cornyn:

Chapter 154 of the Texas Finance Code, which is administered by the Department of Banking, governs the sale, funding and provision of prepaid funeral services. Pursuant to Chapter 154, every agreement for the purchase of prepaid funeral benefits must be evidenced by a written contract which, among other things, sets out the details of the prepaid benefits to be provided, including a description and specifications of the materials to be used, the professional services to be performed, and the facilities to be furnished. The funeral provider who signs the contract is bound, upon the death of the contract beneficiary, to provide benefits in accordance with its terms. It is not unusual, however, for the benefits that are actually provided to differ from those specified in the contract. Texas funeral establishments often allow persons handling the disposition arrangements at the time of the contract beneficiary's death, usually family members, to "upgrade" or "downgrade" the funeral merchandise and services purchased under the contract, either by collecting further compensation for additional services or merchandise or providing a credit for merchandise and services not delivered. The latter is most likely to occur in situations in which the prepaid funeral benefits contract is paid for over a period of time and the contract beneficiary dies before the contract is paid in full.<sup>1</sup> Those responsible for the disposition of the beneficiary's remains may seek to downgrade or waive delivery of the contracted for goods and services in lieu of paying the balance.<sup>2</sup>

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<sup>1</sup>If the contract is trust-funded and the purchaser makes monthly principal and interest payments over a period of time, for example, it may not be fully funded at the time of the beneficiary's death. Similarly, all of the premiums due on an insurance-funded contract that includes an annuity or limited death benefits may not have been paid at the time of death.

<sup>2</sup>Section 154.155(c) of the Finance Code and 7 T.A.C. §§ 25.3(2) and 25.4(5) prohibit the partial cancellation of a prepaid funeral benefits contract. "Downgrades" initiated by family members have therefore been effected through cancellation of the entire contract, payment of the cancellation benefit to the purchaser's estate, and application of the

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Recent research has caused us to question whether the funeral industry practice of allowing "upgrades" and "downgrades" violates §711.002(g) of the Health & Safety Code, which permits a person to provide written directions in a prepaid funeral contract for the disposition of his remains and requires the decedent's instructions to be faithfully followed unless the contract is modified or revoked in the statutorily specified manner. We are concerned about the implications of §711.002(g) both in situations in which the decedent himself purchased and signed the prepaid funeral services contract and is its named beneficiary, and those in which the decedent did not purchase and sign the contract, but is rather the third party beneficiary of a contract purchased by someone else.

Accordingly, we respectfully request an opinion concerning the following:

- (1) To what extent does § 711.002(g) of the Health & Safety Code permit the person handling disposition arrangements for a decedent to change the funeral arrangements specified in a matured<sup>3</sup> prepaid funeral benefits contract if the decedent, as purchaser, signed the contract and is the named beneficiary?
- (2) Specifically with respect to Question 1, does it make a difference that the contract is not fully paid and has a balance due at the time of the purchaser/ beneficiary's death?
- (3) To what extent does § 711.002(g) permit the person handling disposition arrangements for a decedent or the contract purchaser to change the funeral arrangements specified in a matured prepaid funeral benefits contract if the decedent is the named beneficiary but did not purchase and sign the contract?
- (4) If the purchaser of a prepaid funeral benefits contract is the contract beneficiary, must he or she comply with the acknowledgment requirements of § 711.002(g) in order to cancel or modify the contract?

### Discussion

Section 711.002 of the Health & Safety Code relates generally to the disposition of a decedent's remains and the duty to inter. Subsection (a), which recognizes the right of a person to control the disposition of his or her remains at death, provides in pertinent part as follows:

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proceeds to a revised contract.

<sup>3</sup>"Matured" is an industry term used to describe a contract that has become performable due to the death of the beneficiary, the person who will receive the contracted funeral services.

(a) *Unless a decedent has left directions in writing for the disposition of the decedent's remains as provided in Subsection (g), the following persons, in the priority listed, have the right to control the disposition...of the decedent's remains, shall inter the remains, and are liable for the reasonable cost of interment:... [Emphasis added]*

Subsection (a) thus requires a person who wishes to control the disposition of his or her remains to leave written instructions in accordance with subsection (g); otherwise, the persons listed in the statute are entitled to determine the details of the disposition. Subsection (g) provides in relevant part that:

(g) *A person may provide written directions for the disposition...of the person's remains in a will, a prepaid funeral contract, or a written instrument signed and acknowledged by such person...The directions may be modified or revoked only by a subsequent writing signed and acknowledged by such person. The person otherwise entitled to control the disposition of a decedent's remains under this section shall faithfully carry out the directions of the decedent to the extent that the decedent's estate or the person controlling the disposition are financially able to do so. [Emphasis added]*

In order to control the disposition of his or her remains, therefore, a person must leave written directions either in a will, a prepaid funeral contract, or a written instrument signed and acknowledged by such person. The plain language of the statute requires the *decedent* to provide the written directions. Moreover, the attestation requirements that apply to a will and a "written instrument", the other forms of instructions recognized by subsection (g), as well as those applicable to subsequent writings revoking or modifying the directions, suggest that a prepaid funeral contract must be *signed* by the decedent to qualify as "written directions" for purposes of §711.002.

Many prepaid funeral benefits contracts, however, are purchased for the benefit of a third party, rather than that of the purchaser, and, as explained more fully below, are not signed by the decedent. For example, children sometimes purchase contracts for their parents. The purchase of a contract by one person to provide for the funeral of another is contemplated by the law. Chapter 154 of the Texas Finance Code and the rules adopted by the department pursuant thereto recognize that the purchaser of a prepaid funeral benefits contract need not be the contract beneficiary. Section 154.301, which governs the abandonment of prepaid contracts, provides in subsection (b)(1), for example, that a contract is presumed abandoned if the seller has not known the existence and location of *the purchaser or the beneficiary* for the three preceding years, no claim or act of ownership has been asserted within the preceding three years, and *at least 60 years have elapsed since the date the purchaser executed the contract and at least 90 years have elapsed since the date of birth of the beneficiary*. Another example can be found in the department rule that requires the seller of trust-funded prepaid funeral benefits contracts to maintain a historical contract register that includes the contract purchaser's name and the *beneficiary's name, if different from the purchaser*, 7 T.A.C. §23.11(d)(1)(C) and (D).

Additionally, Chapter 154 of the Texas Finance Code and the department's rules require only that prepaid funeral benefits contracts be signed by the purchaser, the seller, and the funeral services provider, if different from the seller. Although the purchaser must designate the beneficiary upon whose death the funeral benefits will be provided, the law imposes no requirement that the beneficiary sign the contract. Indeed, the contract forms, which are approved by the department, do not include a separate place for a beneficiary's signature. A contract purchased for the benefit of someone other than the purchaser will not, as a general rule, be signed by the beneficiary.

As a practical matter, then, a number of funeral benefits contracts that specify the funeral services to which a decedent is entitled are not actually signed by the decedent. Moreover, as stated before, it has not been uncommon in the funeral services industry for funeral arrangements to be upgraded or downgraded, in consultation with the decedent's family at the time of the decedent's death, particularly in instances in which a balance is due on the contract. The legislature has never acted, however, on this seeming incongruity between the law and practice with respect to prepaid funeral benefits contracts, on the one hand, and §711.002 of the Health & Safety Code, on the other. Although §711.002(g) has been amended several times, the specific limiting language about which we are concerned has remained unchanged since it was added to the statute in 1993.

As explained previously, the department has only recently become aware of the implications of §711.002 of the Health and Safety Code. We have considered the relevant provisions of Chapter 154 of the Texas Finance Code and §711.002, as well as industry practice, and have tentatively concluded that §711.002(g) applies *only* to a matured prepaid funeral benefits contract that names the decedent as beneficiary and was actually purchased, and therefore signed, by the decedent. Such a contract constitutes "written directions for the disposition...of the person's remains in...a prepaid funeral contract..." It therefore appears that the funeral arrangements specified in a contract signed by the decedent/beneficiary must be carried out and may not be changed, either by upgrading or downgrading, except in the two circumstances recognized in subsection (g) and discussed below.

Under §711.002(g), a person's disposition directions that are set out in a prepaid funeral benefits contract may be modified or revoked by a *subsequent* writing *signed and acknowledged by the person*. Pursuant to Chapter 154 of the Texas Finance Code, the department's rules pertaining to contract cancellation and modification, and the contracts themselves, however, the purchaser of a prepaid funeral benefits contract may cancel the contract by giving written notice of cancellation, and may modify the contract by executing a written supplement or addendum that is also signed by the other parties.<sup>4</sup> There is no requirement that the written notice of cancellation or the supplement be acknowledged. Arguably, §711.002(g) requires any subsequent writing that purports to cancel

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<sup>4</sup> As noted previously, § 154.155(c) of the Finance Code prohibits the partial cancellation of a prepaid funeral benefits contract. 7 T.A.C. § 25.2(a)13, however, recognizes that contracts may be modified. The Department considers such matters as a change in the beneficiary designation, the conversion of a contract from a trust-funded to insurance-funded contract, and a revision to the payment schedule to be permissible modifications.

or modify a contract subject to its provisions to be both signed and acknowledged by the purchaser/beneficiary in order to be effective.

Section 711.002(g) also provides that the written directions set out in a prepaid funeral benefits contract signed by the decedent must be "faithfully" followed "to the extent the decedent's estate or person controlling the disposition are financially able to do so." The statute thus allows deviation from the written directions if, and then only to the extent, the decedent's estate or person controlling the disposition is financially unable to comply with the directions. The financial hardship exception is most likely to be invoked in those instances in which the contract is not paid in full at the time of the decedent/beneficiary's death. However, pursuant to 7 T.A.C. §25.2(a)(13), all prepaid funeral benefits contracts must include the statement that the contract is binding upon the parties' successors, assigns, beneficiaries, heirs and legal representatives, and §711.002 (a) and (g) seem to require that the assets of the decedent's estate *and* the financial resources of potentially liable persons be taken into consideration in evaluating financial ability to pay for the specified arrangements.<sup>5</sup> The mere fact that payments are outstanding at the time the contract matures does not appear, in and of itself, to relieve those responsible for the disposition of the decedent's remains from the obligation to faithfully follow the decedent's written instructions set out in the contract. Some showing of financial inability must be made.

It further appears that, with the possible exception discussed below, §711.002(g) does not apply to a prepaid funeral benefits contract that is not purchased, and is therefore not signed, by the decedent/beneficiary. The directions in such a contract do not represent the "written directions...for the disposition...of the person's remains in...a prepaid funeral contract...", and, as a result, the person handling the disposition of the decedent's remains is not bound by the mandate of subsection (g) to "faithfully carry out" the arrangements specified in the contract. To the extent permitted by Chapter 154 of the Texas Finance Code, the department's rules, and the prepaid funeral benefits contract, the funeral services actually provided may therefore be different from those initially specified.

We have identified one possible exception to the apparent requirement that a prepaid funeral benefits contract must actually be signed by the decedent in order to be subject to the restrictions imposed by §711.002(g). If the purchaser of the contract is acting as attorney-in-fact or agent for the decedent/beneficiary, the purchaser's written directions might be deemed to be those of the decedent and the prohibition against changing the decedent's instructions may apply in such circumstances.

The department recognizes that families or others responsible for the disposition of a decedent's remains may desire some degree of flexibility with respect to funeral arrangements. At the same time, however, we recognize the importance of honoring the prepaid funeral benefits contract a person purchases with the expectation that the disposition directions contained therein will be

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<sup>5</sup>See also *Glover v. Elliston*, 529 S.W.2d 119 (TEX. CIV. APP.—Eastland 1975, no writ).

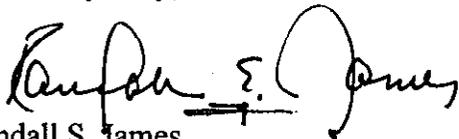
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followed upon his death. It would appear to be in the interest of the State, our citizens and the funeral industry itself to require adherence to such a contract. To do otherwise effectively deprives an individual of his right to direct and thereby control the disposition of his remains and frustrates one of the primary reasons for which he purchased the contract. We appreciate your assistance in clarifying the law relevant to this sensitive issue.

We are enclosing copies of the standard forms the department has approved for use in connection with the sale of trust-funded and insurance funded prepaid funeral benefits contracts. We understand that the Attorney General does not construe contracts in the opinion process, but believe the forms may facilitate your understanding of the issues raised by our request. Also, as I understand your procedures, the Opinion Committee welcomes legal briefing from interested parties in connection with specific opinion requests. Enclosed is a list of the persons to whom we are sending a copy of this request. I imagine that several will be interested in submitting written comments to the Committee.

If you have any questions, please contact Sarah Shirley, Assistant General Counsel, at 475-1327.

Yours very truly,



Randall S. James  
Banking Commissioner

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Enclosures