

# Texas Department of Banking

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RQ-0271-GA

Randall S. James  
Banking Commissioner

September 7, 2004

Via Certified Mail, Return Receipt Requested  
No. 7180 7391 1498 0739 1651

The Honorable Gregg Abbott  
Attorney General of Texas  
C/o Nancy Fuller  
Chair, Opinion Committee  
P.O. Box 12548  
Austin, Texas 78711-2548

RECEIVED  
SEP 10 2004  
OPINION COMMITTEE

FILE # MC-43923-04  
I.D. # 043923

RE: Request for Attorney General Opinion: Relationship between §711.002(g) of the Health & Safety Code and §154.1551 of the Finance Code, and §716.051 of the Health & Safety Code.

Dear Attorney General Abbott:

Chapter 154 of the Finance Code (Chapter 154) vests in the Texas Department of Banking (Department) regulatory authority over the business of selling prepaid funeral services and merchandise. A person that sells or accepts money for prepaid funeral benefits must hold a license issued by the Department and comply with applicable Texas law. Chapter 154 license holders often provide the contracted-for benefits, including cremations. A question has recently arisen regarding the relationship between statutory provisions that authorize a person to direct the disposition of his or her remains and prohibit a funeral provider from disposing of the remains in any other manner, and provisions that prohibit a funeral provider from cremating remains without written authorization from an authorizing agent. The specific provisions in question are §711.002(g) of the Health & Safety Code, pursuant to which a person may direct in a prepaid funeral contract the method of disposition, including cremation, of his or her remains at death, §154.1551 of the Finance Code, which prohibits a Chapter 154 license holder from disposing of a decedent's remains in a manner different from that specified in the contract, and §716.051 of the Health & Safety Code, which requires written authorization from a person authorized under §711.002 of the Health & Safety Code before a decedent may be cremated. The question has arisen because, in some instances, the person who is the statutorily designated authorizing agent has refused, for religious or other reasons, to execute the required form, even though the decedent has provided written directions in a prepaid funeral contract specifying disposition by cremation.<sup>1</sup>

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<sup>1</sup>The person (authorizing agent) may then make "at-need" arrangements with another funeral establishment for the decedent's burial without advising the second establishment that a prepaid funeral contract exists that directs disposition by cremation. After the burial is paid for and conducted, the person cancels the prepaid contract and receives a refund.

In order to advise Chapter 154 license holders how to proceed, the Department respectfully requests an Attorney General opinion regarding the following:

1. Does the requirement that a funeral establishment obtain a cremation authorization form signed by an authorizing agent apply if a decedent, as authorized by §711.002(g) of the Health & Safety Code, has provided written directions in a prepaid funeral contract that specify disposition by cremation?
2. If a cremation authorization form signed by an authorizing agent is required in the described circumstances, what options are available to the funeral establishment, in terms of following the decedent's directions and performing the contract, if the agent refuses to sign the form? Must the funeral establishment decline to cremate the decedent's remains until it receives a court order directing or authorizing the cremation to proceed?

#### **Discussion**

The first statute in question, §711.002 of the Health & Safety Code, relates generally to the disposition of a decedent's remains and the duty to inter. Among other things, the section establishes the right of a person to control the disposition of his or her remains at death. Pursuant to §711.002(g), a person may provide written directions for the disposition of his or her remains in a prepaid funeral contract, will or other written instrument signed and acknowledged by the person. The directions may not be modified or revoked except in accordance with a subsequent writing also signed and acknowledged by the person. If a decedent leaves instructions in accordance with subsection (g), the person who would otherwise be entitled to control the disposition of the decedent's remains under §711.002(a) must faithfully carry out the decedent's directions to the extent the decedent's estate or the person are financially able to do so. If a decedent leaves no written directions that meet the statutory requirements, the persons identified in §711.002(a), in the priority listed, have the right to control disposition. Section §711.002(i) provides that a funeral establishment is not liable for carrying out the decedent's directions.

Section 711.002 of the Health & Safety Code, as presently written, specifically identifies cremation as a method of disposition to which the section applies. However, the law has not always so provided. The section's statutory predecessor, Article 912a-20 of Vernon's Texas Civil Statutes, simply recognized that a decedent could leave directions for the disposition of his or her body.<sup>2</sup> In 1989, the legislature amended Article 912a-20 to add the specific reference to cremation, impose restrictions upon the modification or revocation of a decedent's written instructions, and mandate

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<sup>2</sup>See Acts 1945, 49<sup>th</sup> Leg., R.S., ch. 340 (H.B. 46), §20, 1945 Tex. Gen. Laws 559, 570.

that the decedent's directions be faithfully executed to the extent financially feasible.<sup>3</sup> These provisions were apparently added to insure compliance with a decedent's wishes in the event his or her family opposed cremation.

The second statutory provision, §154.1551 of the Finance Code, relating to the modification of prepaid funeral contracts after the death of the contract beneficiary, was added to Chapter 154 in 2001.<sup>4</sup> The new section was added, in part, in response to Attorney General Opinion No. JC-0279 (2000). JC-0279 interprets §711.002(g) of the Health & Safety Code to apply only to a person who purchases, signs and is the beneficiary of a prepaid funeral contract and concludes that the directions for disposition specified in the contract may not be modified or revoked except by the person in a subsequent writing that satisfies the statutory requirements.<sup>5</sup> Section 154.1551 (a)(1)(B) codifies the Attorney General's holding and essentially incorporates into Chapter 154 the restrictions imposed by §711.002(g) of the Health & Safety Code with respect to changing a decedent's chosen method of disposition. As a result of the amendment, a Chapter 154 license holder that disposes of a decedent's remains in a manner other than as directed in the decedent's prepaid contract violates §154.1551(a)(1)(B) of the Finance Code unless the decedent has authorized the modification. A change in disposition method that formerly violated only §711.002(g) of the Health & Safety Code now constitutes a violation of Chapter 154 as well, and subjects an offending Chapter 154 license holder to appropriate enforcement action and possible criminal penalties under Subchapter I of the chapter.

The third statute, §716.051 of the Health & Safety Code, was adopted in 2003 as part of new Chapter 716<sup>6</sup>, enacted to provide for the comprehensive regulation of the cremation process. The new chapter, which implemented numerous Sunset Commission recommendations, was intended, among

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<sup>3</sup>See Acts 1989, 71<sup>st</sup> Leg., R.S., ch. 208 (S.B.1010), §4, 1989 Tex. Gen. Laws 909, 914. During the same session that it amended Article 912a-20, the legislature repealed the article and replaced it with §711.002 of the Health & Safety Code as part of the codification of Texas statutes relating to health and safety. See Acts 1989, 71<sup>st</sup> Leg., R.S., ch. 678 (H.B.2136), §13(1), 1989 Tex. Gen. Laws 2230, 3165 and §1, 1989 Tex. Gen. Laws 2230, 3002-3, respectively. As enacted, §711.002 did not specifically mention cremation as a type of disposition or include the provisions regarding modification of a decedent's written directions and the duty to follow those directions. However, the legislature adopted conforming amendments in 1991. See Acts 1991, 72<sup>nd</sup> Leg., R.S., ch. 14 (S.B.404), §213, 1991 Tex. Gen. Laws 190-1. In 1993, the legislature further amended §711.002 to specify the types of documents, including a prepaid funeral contract, that satisfy the statute's "directions in writing" requirement. See Acts 1993, 73<sup>rd</sup> Leg., R.S., ch. 634 (H.B.1213), §2, 1993 Tex. Gen. Laws 2382-5.

<sup>4</sup>See Act of May 24, 2001, 77<sup>th</sup> Leg., R.S., ch. 699, §8 (S.B.314), 2001 Tex. Sess. Law Serv.1254, 1256 (Vernon).

<sup>5</sup>JC-0279 further holds that §711.002(g) applies only to directions for disposition and does not affect modifications regarding other funeral merchandise and services covered by a prepaid funeral contract. Section 154.1551 establishes standards to govern changes to these "nondisposition" prepaid benefits.

<sup>6</sup>See Act of May 8, 2003, 78<sup>th</sup> Leg., R.S., ch. 178 (H.B. 587), 2003 Tex. Gen. Laws 253.

other things, to provide a safe harbor for crematories and funeral homes that perform cremations and protect against abuses of the sort that occurred in at a Georgia crematorium in 2003.<sup>7</sup>

Section 716.051 prohibits a crematory establishment from cremating deceased human remains unless it first receives a cremation authorization form signed by an “authorizing agent.”<sup>8</sup> Section 716.001(10) defines “authorizing agent” to mean a person authorized to dispose of a decedent’s remains under §711.002 of the Health & Safety Code. Chapter 716 thus appears to require written authorization from a person listed in §711.002(a) before a crematory establishment, including a Chapter 154 license holder authorized to perform cremations under Chapter 651 of the Occupations Code, may cremate a decedent’s remains. Pursuant to §711.351, a person who cremates human remains without having received a cremation authorization form signed by an authorizing agent commits a Class B misdemeanor.

Chapters 711 and 716 are part of Title 8 of the Health & Safety Code, relating to Death and Disposition of the Body, and are located in Subtitle C, relating to Cemeteries. The background information included in the House Research Organization bill analysis related to Chapter 716 states that, “Pursuant to Section 711.002 of the Health and Safety Code, unless a decedent has left written instructions for the disposition of his or her remains, certain persons are authorized to direct the disposition.”<sup>9</sup> At the time it enacted Chapter 716, the legislature was clearly aware of the fact that a decedent could leave binding directions that his or her remains be cremated. Nevertheless, Chapter 716 does not effectively take into consideration the substance of much of §711.002(g) or address a situation in which an authorizing agent refuses to sign the required form and the decedent has directed disposition by cremation in accordance with that section.

Although Chapter 716 and §711.002 of the Health & Safety Code include provisions related to conflicts and dispute resolution, none provide an effective means for reconciling the conflict about which we ask. Section 716.006, which provides that Chapter 716 may not be construed to require a funeral director to perform any act not otherwise authorized by other law, does not appear to resolve the question. Nor do the provisions of §711.002 and Chapter 716 that address disputes.

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<sup>7</sup>See House Research Organization, Bill Analysis, Tex. H.B. 587, 78<sup>th</sup> Leg., R.S. (2003).

<sup>8</sup>Section 716.052 specifies the information that must be included on the form, including: 1) the identity of the decedent, authorizing agent, person contracting to perform the cremation services, and person or funeral home authorized to receive the cremated remains; 2) the relationship between the decedent and the authorizing agent; 3) a statement by the agent that he or she has the right to authorize the cremation and is not aware of any person with a superior or equal priority right, or, if another person has such right, the agent has made all reasonable efforts to contact such person and does not believe he or she would object; and 4) an attestation that the agent’s representations made are accurate. The authorizing agent must also declare that the remains do not contain a pacemaker or other hazardous materials, list valuables delivered with the body and how to handle them, and provides details about the permanent disposition of the remains.

<sup>9</sup>See House Research Organization, Bill Analysis, *Id.*

Section 711.002(k) authorizes a funeral establishment, in the event a dispute exists among the persons listed in subsection (a) of that section concerning their right to control disposition, to refuse to accept and dispose of a decedent's remains until it receives a court order or confirmation that the dispute has been resolved. Similarly, §716.021 provides that, until authorized by a valid court order, a funeral establishment may refuse to perform a cremation if it is aware of an outstanding dispute regarding the cremation of the remains. Although Chapter 716 does not define "dispute" for purposes of that chapter, the term most likely applies to a dispute between an authorizing agent and a person who has an equal or superior priority right, rather than a dispute arising from the agent's refusal to follow the decedent's written directions. To the extent they may apply, §711.002(k) and §716.021 provide no practical solution. The required court order is unlikely to be forthcoming - the funeral home that wishes to cremate a decedent in accordance with his or her wishes may not have the resources to initiate litigation, and family members who object to cremation have no incentive to do so.

Chapter 716 of the Health & Safety Code serves important public interests. In addition to providing generally for the oversight of establishments that perform cremations, the new chapter seeks to protect both consumers and the establishments by, among other things, insuring that a decedent's cremation is appropriately authorized and that certain arrangements have been made and information provided regarding the decedent. However, nothing in Chapter 716 or its legislative history suggests that the new chapter was intended to limit or interfere in any way with the longstanding and almost absolute right a person has under §711.002(g) of the Health & Safety Code to control the disposition of his or her remains or the obligation of the person who would otherwise control disposition to honor the decedent's wishes, or to render ineffective the further protection of a decedent's rights secured by §154.1551 of the Finance Code.

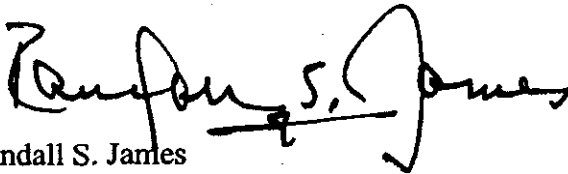
It appears to the Department that a conflict exists between §§711.002(g) and 716.051 of the Health & Safety Code in a situation in which a decedent has provided written directions in a prepaid funeral contract that specify disposition by cremation and the authorizing agent refuses to sign the required cremation authorization form. The Department respectfully submits that §716.051, which applies to cremations generally, should not be interpreted to override or interfere with the rights of a decedent specifically afforded by §711.002(g) and protected by §154.1551 of the Finance Code, and asks the Attorney General to harmonize these provisions or reconcile the conflict in a manner that gives full effect to §711.002(g) in the described circumstances.

As we understand the Attorney General's procedures, the Opinion Committee welcomes legal briefing from interested parties in connection with specific opinion requests. Enclosed is a list of 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.

The Honorable Gregg Abbott  
September 7, 2004  
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Thank you for your assistance. If you have any questions or if the Department can be of any assistance regarding this matter, please contact Sarah Shirley, Assistant General Counsel, at 475-1327 or

Sincerely,

A handwritten signature in black ink that reads "Randall S. James". The signature is written in a cursive style with a horizontal line under the first name.

Randall S. James  
Banking Commissioner

cc: Texas Funeral Service Commission  
Texas Funeral Directors Association  
Texas Cemetery Association  
Chapter 154 License Holders on Rule Review List