



Charles G. Cooper
Commissioner

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OPINION COMMITTEE

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TEXAS DEPARTMENT OF BANKING

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RQ-0234-KP

The Honorable Ken Paxton
Attorney General of Texas
Office of the Attorney General
Attention Opinion Committee
P.O. Box 12548
Austin, Texas 78711-2548

RE: Request for Opinion: Modification of disposition of remains by purchaser of prepaid funeral benefits

Dear Attorney General Paxton:

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. The Department has become aware of instances in which a decedent's agent requests a method of final disposition of remains that may be interpreted as inconsistent with the method of disposition desired by the decedent. I am therefore requesting an opinion on the following question:

If an executed prepaid funeral contract lacks an affirmative election with respect to a type of disposition, must or may a funeral provider infer the decedent's election from the contents of a prepaid funeral contract?

Discussion

Health & Safety Code § 711.002 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. Such directions "may be modified or revoked only by a subsequent writing signed and acknowledged by such person." 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 the disposition.

Finance Code § 154.1551, relating to the modification of prepaid funeral contracts after the death of the contract beneficiary, was added to Chapter 154 in 2001.¹ The 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.² Section 154.1551(a)(2) 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.

Other than list the type of documents in which a person may leave written disposition directions, § 711.002(g) of the Health & Safety Code does not address the form those written directions must take to satisfy the requirements of the statute. Under § 154.1551(a)(2) of the Finance Code, a modification of a fully paid prepaid funeral contract, where the purchaser of the contract is also the beneficiary, "may not change the type of disposition **specified by the purchaser in the contract**, whether by burial, cremation, or another alternative by which the purchaser's remains attain their final resting place, as provided by Section 711.002(g), Health and Safety Code" (emphasis added). Section 154.1551(a)(2) does not clearly express the degree of specificity required regarding type of disposition, so as to constitute the "written directions for the disposition of his or her remains" envisioned under § 711.002(g) of the Health & Safety Code.

If a prepaid funeral contract purchaser affirmatively selects a type of disposition ("burial, cremation, or another alternative by which the purchaser's remains attain their final resting place") within the contract, that disposition may not be subsequently modified, except by the purchaser. On March 14, 2002, the Department adopted two model prepaid funeral contract forms, one for the sale of trust-funded prepaid funeral benefits and one for insurance-funded prepaid funeral benefits.³ The model prepaid funeral contract forms contain a set of checkboxes that allow purchasers to indicate their desired disposition: "burial," "cremation," or "other." See Figure, 7 Texas Administrative Code ("TAC") § 25.3(b). Prior to the adoption of the model prepaid funeral contract forms, a prepaid funeral contract did not have a dedicated place in which a contracting party could specify a type of disposition. While the contracting party could write on the face of the contract to specify a type of disposition, this was not often done. When a funeral provider is confronted with an older form contract, in which the purchaser has not explicitly stated his or her desired method of disposition, the funeral provider commonly infers the type of disposition from the services or merchandise purchased. For example, if an outer burial container was purchased, one could infer that burial was desired.

¹ See Acts 1989, 71st Leg., R.S., ch. 699, § 8 (S.B.314), 2001 Tex. Sess. Law Serv.1254, 1256 (Vernon).

² 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.

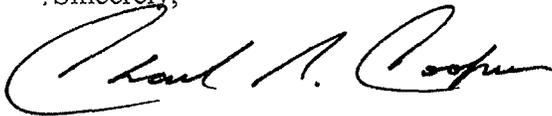
³ If a seller wishes to use a non-model contract, it must receive permission from the Department. See 7 TAC § 25.2(a). Non-model contracts must satisfy the substantive contents of 7 TAC § 25.3. and be approved by the Department.

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 disposition directions contained in a prepaid funeral contract. It would appear in the interest of the State, our citizens, and the funeral industry itself to provide clear direction as to whether a funeral provider may or must infer the type of disposition when a purchaser has not expressly stated it in a prepaid funeral contract. We appreciate your assistance in clarifying the law relevant to this sensitive issue.

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.

Thank you for your assistance. If you have any questions or if the Department can be of any assistance regarding this matter, please contact Chris W. Bell, Assistant General Counsel, at (512) 475-0439 or chris.bell@dob.texas.gov.

Sincerely,



Charles G. Cooper
Banking Commissioner

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