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OPINION
OF
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Opinion No. 87-60

By: Jeff Foster McElroy
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To: Representative Toots Green
1019 Canyon Road
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QUESTIONS

1. What requirements have to be met for life insurance to be considered as a funding means for funeral plans rather than general life insurance under Section 59A-49-5 NMSA 1978 as amended by Session Laws 1987, Chapter 48, Section 1?

2. Does this section, as amended, require that anyone selling life insurance specifically designed to fund funeral plans be licensed not only as a life insurance agent, but also be licensed to practice funeral service?

3. Can a funeral home or other person having only a fiduciary relationship with an insured be designated a beneficiary on a life insurance policy?

ANSWERS

1. None.
2. No.
3. Yes, but see discussion.

ANALYSIS

Section 59A-49-5 NMSA 1978 (1984 Orig. Pam.) prohibits funeral practitioners and those who work for them from selling prearranged funeral plans. Session Laws 1987, Chapter 48, Section

1 amended Section 59A-49-5 to permit funeral practitioners and those who work for them to sell "life insurance specifically designed to fund funeral plans." Your first question requires us to consider whether the legislature created a new category of life insurance when it used the phrase "life insurance specifically designed to fund funeral plans."

In construing the meaning of statutes, the central concern is to determine and give effect to the legislature's intention. Smith Machinery Corp. v. Hesston, Inc. 102 N.M. 245, 246, 694 P.2d 501, 502 (1985). Absent any clear intent expressed to the contrary, statutory words are to have their ordinary and usual meanings. Perea v. Baca, 94 N.M. 624, 627, 614 P.2d 541, 544 (1980). One must read the entire act as a whole and construe each part with every other part so as to produce a harmonious whole; one must not read into the act language that is not there, particularly if the act makes sense as written. Westgate Families v. County Clerk of Inc. Los Alamos County, 100 N.M. 146, 148, 667 P.2d 453, 455 (1983).

The statute under consideration is the Prearranged Funeral Plan Regulatory Law, Sections 59A-49-1 through 59A-49-8 NMSA 1978 (1984 Original Pamphlet), which is in Chapter 59A of the New Mexico Statutes Annotated, known as the New Mexico Insurance Code. The phrase "life insurance specifically designed to fund funeral plans" is not defined in the New Mexico Insurance Code. The term "life insurance" is defined at Section 59A-7-2 NMSA 1978 (1985 Orig. Pam.) as "insurance of human lives and every insurance appertaining thereto." The term "funeral plan" is defined at Section 59A-49-4 NMSA 1978 (1985 Orig. Pam.) as follows:

A. "funeral plan" means any contract, agreement, certificate, share, membership, right or interest or other form of instrument which is sold, providing for the future delivery of one or any combination of the following:

(1) any personal property customarily furnished in connection with funerals or other services attending the disposition of human bodies after death;

(2) the use of any facilities customarily furnished in connection with funerals or other services attending the disposition of human bodies after death;

(3) any services customarily furnished in connection with funerals or other services

attending the disposition of human bodies after death; or

(4) any amount of money designated for any of the property, facilities or services mentioned in this subsection, if there is named in the instrument evidencing the prearranged funeral plan any person who furnishes or aids in the furnishing of any of such property, facilities or services or any condition or designation which designation would deprive or tend to deprive the person desiring to acquire such property, facilities or services of the advantages or competition in connection with their acquisition;

Under the rules of statutory construction, we must give undefined terms their usual and ordinary meaning. The word "designed," according to Webster's New World Dictionary, means "to intend or set apart for some purpose." The verb "to fund," according to the same source, means "to set aside a sum of money for some particular purpose." The amendment therefore allows funeral practitioners to be licensed, or otherwise authorized, to sell insurance that provides money on the death of an individual to pay for services described in 59A-49-4 NMSA 1978 (1985 Orig. Pam.).

We must read the entire act as a whole to determine whether the legislature intended the phrase "life insurance specifically designed to fund funeral plans" to be a term of art, requiring particular requirements to be set forth. We begin by noting that the purpose of the section in which the phrase is contained is to forbid funeral practitioners from selling prearranged funeral plans. The apparent purpose of the phrase containing the language under consideration is to distinguish this life insurance from prearranged funeral plans. We can not, from the phrase alone, conclude that the legislature would use this clarification of the term "prearranged funeral plan" to create an entirely new life insurance. It is unlikely that the legislature intended to regulate life insurance under the New Mexico Prearranged Funeral Plan Regulatory Law merely because the life insurance is marketed as a funeral plan. If the legislature had meant to do that, it would have defined "prearranged funeral plan" primarily in terms of its marketing, not in terms of what its contractual terms were.

The amendment's legislative history further supports our construction. We understand that the amendment, when originally proposed during the most recent legislative session as House Bill 402, contained the language that funeral practitioners "may be licensed or otherwise authorized to sell other types of insurance,

including funeral insurance, life insurance, or burial insurance." A later proposed amendment would have added to the end of that sentence "or prearranged funeral plan funded by insurance." It is clear from the language finally adopted that the legislature was seeking a way for funeral practitioners to be licensed to sell life insurance, the proceeds of which would be intended to fund a funeral plan. Given that a life insurance policy specifically designed to fund funeral plans does not exist in the industry we find it all the more unlikely that the legislature intended to refer to a term of art in this amendment to the statute. For all the reasons above, we conclude that the legislature did not intend to create a new category of life insurance when it used the phrase "life insurance specifically designed to fund funeral plans" so as to distinguish such a plan from life insurance policies generally.

Your second question requires us to consider whether one who sells life insurance policies specifically designed to fund funeral plans must be licensed to practice funeral service. One may not engage in the practice of funeral service in New Mexico unless the State Board of Thanatopractice of the State of New Mexico has granted permission. Section 61-29A-10 NMSA 1978 (1983 Repl. Pam.). The practice of funeral service is defined as

Engaging in providing shelter, care and custody of human dead; in the practice of preparing human dead by embalming or other methods for burial or other disposition; in transportation of human dead, bereaved relatives and friends; in making arrangements at or prior to need, financial or otherwise, for the providing of such services or the sale of funeral merchandise, whether for present or future use; or, in general, engaging in the practice or performing any functions of funeral directing or embalming as presently known, including those stipulated in the Thanatopractice License Law.

Section 61-29A-3 NMSA 1978 (1983 Repl. Pam.). We believe this definition does not include the act of selling life insurance specifically designed to fund funeral plans.

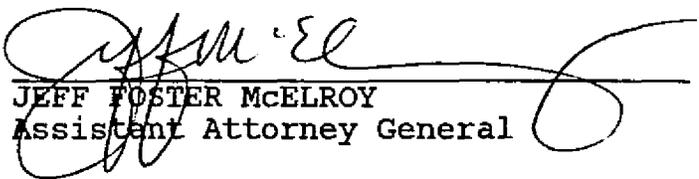
Anyone licensed to sell life insurance may also sell life insurance specifically designed to fund funeral plans. The amendment does not create a separate life insurance policy that only funeral practitioners may sell. Anyone licensed, or otherwise authorized, to sell life insurance, including funeral practitioners who also are licensed to sell life insurance, may sell life insurance specifically designed to fund funeral plans without being licensed to practice funeral service.

Finally, we consider your last question whether a funeral home or other person having only a fiduciary relationship with an insured may be designated as a beneficiary on a life insurance policy. The owner of an insurance policy on the owner's own life can name any beneficiary, including a funeral home or mortuary, provided that the owner is of competent legal capacity and the owner exercises his full and free discretion in naming the beneficiary. Section 59A-18-4A NMSA 1978 (1984 Orig. Pam.). If a person purchases life insurance on another person's life however, then the beneficiary must be the person whose life is being insured, that person's personal representative, or a person who has an insurable interest as defined in Section 59-18-4C NMSA 1978 (1984 Orig. Pam.). An insurable interest generally encompasses ties to another economically or through love and affection.

If the seller of life insurance specifically designed to fund funeral plans is a funeral practitioner who is also the policy's beneficiary, the seller must be sure to conduct the sale in a way that does not deprive or tend to deprive a person desiring to acquire funeral services of the advantages of competition in their acquisition. For instance, a funeral practitioner could not represent that his particular funeral establishment must be the beneficiary of life insurance specifically designed to fund funeral plans sold by him or that the funds generated by the policy can be used only at his establishment. Such practice would cause the life insurance to become a "funeral plan" under paragraph A(4) of Section 59A-49-4 NMSA 1978 (1984 Orig. Pam.), which a funeral practitioner is forbidden to prearrange.



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