

1964

# Utah Funeral Directors & Embalmers Association v. Memorial Gardens of the Valley, Inc. et al : Brief of Appellant

Utah Supreme Court

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# IN THE SUPREME COURT OF THE STATE OF UTAH

UTAH FUNERAL DIRECTORS & EMBALMERS  
ASSOCIATION, a Utah corporation, on behalf  
of its members, and on behalf of others similarly  
situated,

Plaintiffs - Appellant,

— Vs. —

MEMORIAL GARDENS OF THE VALLEY, INC.,  
a Utah corporation; MEMORIAL TRUSTS, INC.,  
a Utah corporation; LAKE HILLS, a Utah cor-  
poration; AULTOREST MEMORIAL CORPORA-  
TION, a Utah corporation; HAL S. BENNETT,  
DONALD HACKING and RAYMOND W. GEE,  
members of the Business Regulation Commission  
of the State of Utah; and VIRGIL L. NORTON,  
Commissioner of Insurance of the State of Utah,  
Defendants - Respondents

Case  
No. 10236

UNIVERSITY OF UTAH

APR 23 1964

## APPELLANT'S BRIEF

LAW LIBRARY

Appeal From the Judgment of the Third District Court  
for Salt Lake County, Utah  
HONORABLE STEWART M. HANSON, Judge

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Commissioner of Insurance of the State of Utah,  
Defendants - Respondents

Case  
No. 10236

## APPELLANT'S BRIEF

### STATEMENT OF KIND OF CASE

This was an action in the Lower Court seeking a Declaratory Judgment requesting that certain Business Practices of the Corporate Defendants be declared illegal; that those Business Practices involved violations of professional and ethical conduct regulations for Embalmers and Funeral Directors as provided for in Sections 58-9-10, and 22 of the Utah Code Annotated 1953; and also violations of the so-called Pre-need law as contained in Section 22-4-4, Chapter 39, Laws of Utah 1955



and as amended in Chapter 45, Laws of Utah 1957. Plaintiffs further sought a declaratory Judgment decreeing that the pre-need contracts (R. 8-12, 19-20 and 39-41) issued and sold by the Defendants, and through their associates, are insurance contracts, in consequence of which, said Contracts and the Defendants would be subject to the Insurance Regulations of the State of Utah supervising said Contracts as Insurance Contracts and said Defendants as Insurance Companies. This Court is requested to determine the issues of this case from the pleadings in the Record of the lower Court, and the copies of the pre-need contracts and affidavits, also that part of the Record which is either part of the pleadings or which has been made part of the record otherwise (R. 8-12, 19-20, 39-41 and 35).

In this case it is necessary that the Plaintiffs, and it should be of interest to the Defendants, to know the legality of the practices complained of. The corporate Defendants carry on activities which vitally affect every mortician and funeral director in the state and leave such morticians and funeral directors in a dilemma.

If in fact the practices are legal, then it is essential that the various morticians and funeral directors cooperate under one or more of the plans carried on by the defendants or a similar plan by some other company; if they fail to do so they will suffer a competitive disadvantage which will directly and detrimentally affect the business which they carry on. In fact, it is not too much to say that if the business practices carried on by the corporate defendants are legal, within the not too distant

future the vast majority of funerals conducted in the State of Utah will be conducted pursuant to financing plans instituted by one of these defendants or someone else in a similar business. Therefore, any mortician or funeral director that did not cooperate in such a plan might find it difficult to continue to exist.

On the other hand, if such plans are illegal, the Plaintiffs might well, if they cooperate in such plans, find themselves guilty of unethical conduct and find their license subject to revocation.

The Plaintiffs, therefore, seek a Construction, and a determination of the validity and legality, of the practices complained of, and the Contracts before the Court.

## DISPOSITION IN LOWER COURT

This Case was brought before the Lower Court for a Determination of the issues on a Motion for a Summary Judgment (R. 32-35) asking for a declaration:

(a) That a licensed Embalmer or Funeral Director performing services pursuant to a pre-need contract obtained by solicitation is guilty of unprofessional and unethical conduct as defined in Sections 58-9-10 and 22 of U C A 1953 and subject themselves to a possible revocation of their license.

(b) That pre-need contracts providing future funeral services such as those used by the Defendants are insurance contracts and are not legally issued unless the company issuing the same qualifies as an insurance company under the insurance laws of Utah.

(c) That pre-need contracts are in violation of law unless they provide that all the earnings and interest on monies paid in shall be held in trust until death of beneficiary and paid to no other person but the named payor as provided in Sections 22-4-1 to 22-4-7 as enacted by Chapter 39, Laws of Utah 1955 and as amended in Chapter 45, Laws of Utah 1957.

The matter was argued before the Court without introduction of further evidence. The Defendants raised the issues of, and challenged (a) the constitutionality of portions of the pre-need law in Title 22, Chapter 4, *Supra*; and (b) whether or not there was a justiciable issue between the Plaintiffs and the Defendants and before the Court and the capacity of the party Plaintiffs to sue.

The lower Court denied the Plaintiffs' motion for Summary Judgment; decided in favor of the Defendants on their claim that certain portions of the pre-need law are unconstitutional; and found in favor of the Plaintiffs declaring that the Plaintiffs had legal standing to prosecute the action and that there existed a justiciable issue between the Plaintiffs and Defendants.

The Plaintiffs respectfully refer the Court to the final decree of the lower Court as contained in the lower Court's Record on file herein (R. 44-48).

### RELIEF SOUGHT ON APPEAL

A review is hereby sought from this Honorable Court, under the Plaintiffs' rights of appeal, of the decision of



the lower Court. The Plaintiffs feel that the lower Court erred in its decisions in the particulars set out by the Plaintiffs in their Statement of Points which follow and seek a reversal of the lower Court's decision on those points.

## STATEMENT OF POINTS

### I.

THAT CONTRARY TO THE COURT'S DECISION, ANY FUNERAL DIRECTOR OR EMBALMER, WHO PERFORMS FUNERAL SERVICES OR FURNISHES BURIAL FACILITIES PURSUANT TO A PRE-NEED CONTRACT OBTAINED BY SOLICITATION BY EITHER OF THE DEFENDANTS, SOLICITED OR SOLD BY AND FOR THEMSELVES, OR WHICH RESULTS TO THE BENEFIT OF A FUNERAL DIRECTOR OR EMBALMER WHO PERFORMS THE FUNERAL SERVICES OR FURNISHES THE BURIAL FACILITIES, IS GUILTY OF UNPROFESSIONAL AND UNETHICAL CONDUCT AS DEFINED IN SECTIONS 58-9-10 AND 58-9-22 OF THE UTAH CODE ANNOTATED, 1953.

### II.

THAT CONTRARY TO THE LOWER COURT'S DECISION, THE CONTRACTS SOLD BY THE DEFENDANTS ARE ALL SUBJECT TO THE PRE-NEED LAW OF UTAH, AND THE CONTRACT USED AND ISSUED BY THE DEFENDANT, MEMORIAL TRUST, INC., IS PARTICULARLY IN VIOLATION OF THE

PRE-NEED LAW OF THE STATE OF UTAH AS CONTAINED IN SECTION 22-4-4, CHAPTER 39, LAWS OF UTAH, 1955 AND AS AMENDED IN CHAPTER 45, LAWS OF UTAH, 1957, AND THAT SAID DEFENDANTS' PRE-NEED CONTRACT PARTICULARLY PERMITS SAID DEFENDANT TO DEMAND AND RECEIVE THE EARNINGS OF THE TRUST FUNDS AND PAY SAID FUNDS TO SAID DEFENDANT CONTRARY TO THE PROVISIONS OF SAID SECTION 22-4-4 AFORESAID.

### III.

THAT CONTRARY TO THE LOWER COURT'S DECISION, THE PRE-NEED CONTRACTS, BEING SOLD BY THE DEFENDANT COMPANIES AND WHICH ARE THE SUBJECTS OF THE CONTROVERSY IN THIS CASE, ARE INSURANCE CONTRACTS AND SUBJECT TO THE INSURANCE LAWS OF THIS STATE AND THEREFORE, SUBJECT TO REGULATION BY THE UTAH STATE INSURANCE DEPARTMENT, AND THAT THE SAID DEFENDANT COMPANIES, ISSUING SAID CONTRACTS ARE ALSO SUBJECT TO THE INSURANCE LAWS OF UTAH AND THE REGULATIONS OF THE STATE INSURANCE DEPARTMENT OF THE STATE OF UTAH.

### IV.

THAT CONTRARY TO THE LOWER COURT'S DECISION, THOSE PORTIONS OF SECTIONS 22-4-1, 22-4-2, 22-4-4, 22-4-5 AND 22-4-7 OF THE PRE-NEED LAW OF THE STATE

OF UTAH, CHAPTER 39 OF THE 1955 LAWS OF UTAH AS AMENDED BY CHAPTER 45 OF THE 1957 LAWS OF UTAH AND WHICH SECTIONS ARE QUOTED IN THE LOWER COURT'S AMENDED JUDGMENT OF DISMISSAL, DATED SEPTEMBER 18, 1964 (R. 46) ARE CONSTITUTIONAL.

## ARGUMENT

### POINT I.

THAT CONTRARY TO THE COURT'S DECISION, ANY FUNERAL DIRECTOR OR EMBALMER, WHO PERFORMS FUNERAL SERVICES OR FURNISHES BURIAL FACILITIES PURSUANT TO A PRE-NEED CONTRACT OBTAINED BY SOLICITATION BY EITHER OF THE DEFENDANTS, SOLICITED OR SOLD BY AND FOR THEMSELVES, OR WHICH RESULTS TO THE BENEFIT OF A FUNERAL DIRECTOR OR EMBALMER WHO PERFORMS THE FUNERAL SERVICES OR FURNISHES THE BURIAL FACILITIES, IS GUILTY OF UNPROFESSIONAL AND UNETHICAL CONDUCT AS DEFINED IN SECTIONS 58-9-10 AND 58-9-22 OF THE UTAH CODE ANNOTATED, 1953.

Those portions of Sections 58-9-10 and 58-9-22 of the Utah Code Annotated 1953 that are pertinent to this Appeal read as follows:

58-9-10: "The words 'unprofessional conduct' as relating to embalming are hereby defined to include: \* \* \*

(7) Solicitation of dead human bodies by a *registered apprentice or licensed embalmer, or*

*their agents, assistants or employees, whether such solicitation occurs before or after death \* \* \**

(8) *Employment, directly or indirectly, of any apprentice, agent, assistant, embalmer, employee, or other person, on part or full time or on commission, for the purpose of calling upon individuals or institutions by whose influence dead human bodies may be turned over to a particular mortuary establishment, funeral director, or embalmer; provided this provision shall not be deemed to prevent and prohibit the solicitation for sale of crypts, burial lots or cremation services by a licensee or his employee.*

(9) The buying of business by the licensee, his agents, assistants or employees, or the direct or indirect payment or offer of payment of a commission by the licensee, his agents, assistants or employees for the purpose of securing business; or the direct or indirect giving or offering to give any bonus, or gift for the purpose of securing business.

58-9-22: The words "unprofessional Conduct" as they relate to this act, are hereby defined to include: \* \* \*

(c) Solicitation of funeral business by the licensee, his agents, assistants or employees, whether such solicitation occurs before or after death \* \* \*

(d) *Employment by the licensee of persons known as "capers" (cappers) or "steerers" or "solicitors" or other such persons to obtain funeral directing or embalming business.*

(e) *Employment, directly or indirectly, of any apprentice, agent, assistant, embalmer, employee or other person, on part or full time,*

or on commission, for the purpose of calling upon individuals or institutions *by whose influence dead bodies may be turned over to a particular funeral director.* \* \* \*

(f) The buying of business *by the licensee, his agents, assistants or employees, or the direct or indirect payment or offer of payment of a commission, bonus or gift by the licensee, his agents, assistants or employees for the purpose of securing business.*”  
(Emphasis added)

Regardless of the way in which it might be said, the purpose of such statutes in the various states is, to eliminate unnecessary commercialization of death; to curtail any practice that resembles competitive bids for dead bodies; and to generally denounce and label as unprofessional and unbecoming, the solicitation of dead bodies for burial except by accepted and approved methods of general advertising.

A determination of this question will decide whether or not funeral directors and embalmers are going to be permitted to raise themselves to the status of a profession, or whether they are going to be governed by the more relaxed rules of open and cut-throat competition with its many flagrant abuses and fraudulent practices. These laws have been upheld as constitutional and are supported in one form or another by most, if not all, states.

The Defendants are contending that they do not operate directly as either a Funeral Director or an Em-



balmer, and that they are not subject to the unprofessional conduct statutes herein referred to. That they are free to solicit, negotiate, sell, and perform all the commercial acts related to the solicitation of dead human bodies prohibited to funeral directors and embalmers as evidenced by the pleadings in this case and the contracts of every Defendant of record in this case. They all promise to furnish, among other things, a complete funeral, embalming and interment, either through their own facilities, or the facilities of licensed funeral directors and embalmers of the State. (R. 8, 9, 12, 19, 40 rear side) It is interesting to note the efforts of the Defendants to disengage themselves from the effect of the Statute when in actual practice they are engaging in all the essential activities of funeral directors and embalmers or *selling for themselves or selling their services* to licensed funeral directors and embalmers of the State of Utah. If they are not acting as a funeral director or an embalmer, they can't possibly escape the relationship of being either "agents, assistants, employees, cappers, steerers, solicitors, or other persons" on part or full time, or on commission, for the purpose of calling upon individuals so as to have the dead human bodies turned over to themselves or a particular funeral director even though he is later to be designated. (Sec. 58-9-10 (8) and 58-9-22 (e) U C A 1953 quoted above) The violation, and the evil, is in acts of solicitation which are intended to benefit, and do result in benefiting, licensed funeral directors contrary to the statute. The evil is not less vile, less unethical, nor less evil because it is committed by the defendants.

Note that Defendant, Memorial Gardens of the Valley (R 8) as the "Company," agrees to do every act done by a licensed funeral director and embalmer. If they were licensed as funeral directors they could not solicit. Why should they be allowed to do so for themselves or others just because they have no license.

Defendant Memorial Trusts, Inc., agree to provide *everything* that goes with a funeral. They agree that such services are "to be performed by a listed Mortuary or other Mortuary" selected by the heirs of the deceased. (R. 9) This is also the Agreement of the Defendant Aultorest Memorial Corporation, who agree to "cause a complete funeral" to be conducted at their expense. (R. 12)

Note that Defendant Lake Hills also agrees to a complete funeral but that those "funeral services can only be performed by a mortuary authorized by Lake Hills." (R. 40 rear side) Again the Defendants urge full rights to violate the unprofessional conduct statute even though they are openly and conspicuously soliciting either for themselves or licensed funeral directors. They claim immunity only because they are not licensed as funeral directors or embalmers.

If a licensed embalmer or funeral director violates the provision against solicitation, his license is subject to revocation. The question here to be determined is whether or not funeral directors and embalmers being themselves prohibited from soliciting may, through subterfuge, enjoy the fruits of solicitation. It appears that

the corporate defendants find themselves in a dilemma in regard to this matter. If in fact they are qualified themselves to render the services as embalmers or funeral directors, they certainly are in direct violation of the statute if they solicit. If they themselves are unable to render the services in question, the sale of an agreement automatically makes them subject to the insurance code, as we will discuss in a later succeeding section, but does not relieve the licensed funeral directors or embalmers with whom they do business of the obligation to observe the ethical standards of his profession. If in fact those of the corporate defendants who are not qualified to render embalming or funeral directing services have a pre-existing agreement, however informal it may be, with any licensed embalmer or funeral directors that such licensed embalmer or funeral director, or one to be named or designated later, will render the services contracted for by such Defendant, then the Defendant becomes the agent or representative of the funeral director or embalmer so concerned, and while the Defendants claim the ethical rules of the profession would not affect the Defendant sales company, it would affect the licensed embalmer or funeral director for whom they purport to act.

The Plaintiffs maintain the Defendants are all violating the unprofessional conduct statute above quoted because of their acting as agents, employees and representatives of the particular licensed funeral director and embalmer involved. That by a relationship such as this, they also jeopardize the license of the licensed funeral

director. The Defendants' case is an admission they are soliciting, but they want immunity. The Plaintiffs, in this appeal, do not contend that the Defendants are under an express contract of appointment with any licensed funeral director in the State of Utah, with arrangements for direct payments of compensation, through commissions or otherwise. The Plaintiffs do claim that that which is illegal and forbidden to be accomplished directly, cannot be legal if accomplished indirectly. The Defendants have elected to put themselves in the position of giving and providing to any licensed funeral director, who will accept benefits under, and who will agree to carry out their contracts indirectly, the full benefits of the very acts of solicitation, which the licensed funeral directors and embalmers are otherwise prohibited to practice or turn to his benefit, whether by his own acts or the acts of his agents or employees.

One thing is certain, that the Pre-need Contracts of the Defendants, already referred to in this case, are not the simple contracts made between two parties where Party A assumes burdens for which he is responsible on the one hand and Party B in consideration thereof, assumes burdens for which he is responsible on the other.

It is equally as certain that even though the contracts in question purportedly are between A and B parties, these contracts do have the distinctive additional feature of providing that a third party, namely a licensed funeral director and embalmer in the State of Utah shall be the party to carry out and perform the provisions of

the pre-need contract of the defendants. At the time the Contract is consumated, both of the original parties contemplate and state in open, express terms that a licensed funeral director and embalmer shall, upon election, and if willing, be the performing party. The buyer *knows* he must look to someone beyond the Defendants (agent) to get what he has purchased. (Restatement of the Law, 2nd Edition, Agency, Section 85, p. 217.)

This is agency by ratification. In this latter situation which is the case before the Court, we find all the elements necessary to create that relationship.

The first essential to the relationship is that the Agent has no authority to bind his principal. In our cases the Defendants set out in their contracts what the funeral directors will do but this does not bind the funeral director because the inclusion of the funeral directors is unauthorized. (Sec. 208 of Agency, Vol. 2, American Jurisprudence) When the funeral director is later selected and agrees to perform, he is bound to the contract as written by the defendant and is subject to every provision in the contract and every rule applicable to the relationship of ratification by a principal.

The funeral director or embalmer, if and when he agrees to go ahead (ratify), has no right to change the terms without consent and must accept the contract terms as written. This acceptance or ratification by the funeral director makes the acts of the Defendants in selling the contract, the act of the funeral director as though the funeral director himself had created the contract



in the beginning. (See *Moses v. Arch McFarland & Sons* (Utah 1951), 119 Utah 602; 230 Pac. 2nd 571, 573; also *Yellow Jacket Boat Co. v. Little Glasses Corp.* (Okla. 1959), 338 Pac. 2nd 1105).

Any funeral director that accepts, and agrees to perform, even though he has been merely described, or listed as one of a specific group, causes his "ratification" and his obligation to perform to be equally as binding as though he had been named and identified by name. Agency law does say there must be an identification of the principal to have agency by ratification. In Restatement of the Law on Agency, 2nd Edition, Sections 85 and 87, we read as follows:

85. Subsection 1 (c) Principal Unidentified:

It is not necessary that the purported principal be identified; it is sufficient that the person acting should purport to act as agent for another, but if he describes the other by name or otherwise, only a person coming within the description so given, if any, can ratify. If the description applies to two persons equally, only the one on whose account he intends to act can ratify.

87(a)—\* \* \* If he (the acting person) identifies the purported principal, it is only the affirmation of such person which can result in ratification. \* \* \* if a partial description is given, only a person who comes within it and who was intended by the person can ratify — \* \* \*

Plaintiffs maintain the Defendants are, under these rules, agents of the funeral director or any other persons who perform under their contracts and are therefore

subject to the unprofessional conduct laws referred to on solicitation. What is further serious, such actions jeopardize the position of the funeral director and make them also violators and subject to the loss of their licenses under the provisions of the laws referred to because they become liable as if they had been in on the contract from the beginning and must take the burdens as well as benefits.

It is obvious that the Defendants are doing all they can to avoid being called agents. In reality they do purport to act for another (the funeral director). The relationship they create, with its resulting obligation and rights, determines what that relationship amounts to, rather than their explanations of what they hope they are doing, whether written or oral. In situations bordering on undisclosed principals, and situations where the acting party actually involves a third party, as in the case before the Court, but avoids calling him a principal, and tries to make it appear he is acting for himself rather than as an agent, as the Defendants are trying to do here, the majority of Courts are holding it as agency by ratification. (See *Barnett Bros. v. Lynn* (Wn. '22), 203 Pac. 389; also the classification identified as a class five in 22 Columbia Law Review, p. 467.)

## ARGUMENT

### POINT II.

THAT CONTRARY TO THE LOWER COURT'S DECISION, THE CONTRACTS SOLD BY THE DEFENDANTS ARE ALL

SUBJECT TO THE PRE-NEED LAW OF UTAH AND THE CONTRACT USED AND ISSUED BY THE DEFENDANT, MEMORIAL TRUST, INC., IS PARTICULARLY IN VIOLATION OF THE PRE-NEED LAW OF THE STATE OF UTAH, AS CONTAINED IN SECTION 22-4-4, CHAPTER 39, LAWS OF UTAH, 1955 AND AS AMENDED IN CHAPTER 45, LAWS OF UTAH, 1957, AND THAT SAID DEFENDANTS' PRE-NEED CONTRACT PARTICULARLY PERMITS SAID DEFENDANTS TO DEMAND AND RECEIVE THE EARNINGS OF THE TRUST FUNDS AND PAY SAID FUNDS TO SAID DEFENDANT CONTRARY TO THE PROVISIONS OF SAID SECTION 22-4-4 AFORESAID.

Utah's pre-need statute was enacted by the 1955 Legislature. The purpose of the act was to regulate the selling of funeral services and personal property used in connection with the burying of the dead prior to the time that the need for such arises, and to require the companies selling such services to place the monies received in trust. The purpose, of course, is to protect the individuals who purchase the services, and to make sure that the money to pay for the same will be available when the need arises. Section 22-4-1, U. C. A. 1953, states :

“Payments for pre-arranged funeral plans constitute trust funds — Decedent beneficiary — Trustee, — Any payment of money made to any person, firm or corporation upon any agreement or contract, or any series or combination of agreements or contracts, which has for a purpose the furnishing or performance of funeral services, under a pre-arranged funeral plan, or

the furnishing or delivery of any personal property, merchandise, or services of any nature, *but excluding cemetery lots, vaults, crypts, niches, cemetery burial privileges, and cemetery space*, in connection with the final disposition of a dead human body, for future use at a time determinable by the death of the person or persons for whose benefit any such agreement has been made and whose body or bodies are to be disposed of, such deceased person to be known in this act as the decedent beneficiary, shall be held to be trust funds, and the person, partnership, association or corporation receiving such payments is hereby declared to be a trustee thereof." (Emphasis added)

The purpose of the exemption set forth in the *italicized* words above was obviously to exempt the sale of such items as are covered by Chapter 4, Title 8, Utah Code Annotated, 1953, regarding cemeteries. It, therefore, appears that Sec. 24-4-1 was intended to include all items used in connection with the burial of the dead which are not subject to provisions of Chapter 4, Title 8. The contracts of the defendants provide for full funeral services including embalming. They also provide for caskets and other personal property used in connection with the burial of the dead. However, so long as they do not come within the category of crypts or vaults, they are clearly within the pre-need statute regardless of whether or not the individual can take delivery if he so chooses when he completes payment, but before he dies.

It cannot be overemphasized that the purpose of the pre-need law is to guarantee the presence of moneys and their preservation to the time when the funds will be



needed. Protection is afforded against insolvency of the person entrusted with the funds, against his going out of business and even his death; against fraud, theft and even arrangements of any and all kinds, legal, fraudulent or otherwise which permits said trust funds to be deleted, diverted, shared or otherwise used by others than the beneficiaries protected by the pre-need law.

The very simple fact persists that the defendants are receiving payments from others for the purposes set out in Section 22-4-1 U.C.A. 1953 as set out above. Therefore, the Plaintiffs insist that the only consistent position is, that the Defendants must deposit those collected funds in trust as provided in said pre-need law.

Defendant MEMORIAL TRUSTS, INC., does deposit their funds in trust while the others claim themselves exempt.

The objection to the Memorial Trusts contract (R. 9) under the pre-need statute is that the purchaser appoints Memorial Trusts, Inc., as its "agent to demand and receive earnings of the trust fund and to pay the same to itself in exchange for and in consideration of the agreement of Memorial Trusts, Inc., to guarantee the services and facilities above set forth regardless of future price increase." That this provision constitutes a contract of insurance will be discussed in a later section. However, it also quite clearly offends against the provisions of Sec. 22-4-4, U.C.A., 1953, which provides in part as follows:

"All payments and amounts so deposited, with all earnings and interest thereon, shall not be



withdrawn until the death of the sole or one of the beneficiaries, \* \* \*."

A provision in the contract, therefore, to the effect that Memorial Trusts, Inc., has the right to withdraw the earnings on deposit and pay it to itself, is in clear contradiction of the statute. Either the law is in effect or it isn't if its purposes are to be accomplished. Imagine someone accepting deposits of money from groups of individuals and trying to make himself exempt from the Banking, the Insurance or the Securities Laws by merely getting a waiver from the Depositor. The pre-need law is affording equal protection in its field and is entitled to equal consideration and enforcement.

## ARGUMENT

### POINT III

THAT CONTRARY TO THE LOWER COURT'S DECISION, THE PRE-NEED CONTRACTS, BEING SOLD BY THE DEFENDANT COMPANIES AND WHICH ARE THE SUBJECTS OF THE CONTROVERSY IN THIS CASE, ARE INSURANCE CONTRACTS AND SUBJECT TO THE INSURANCE LAWS OF THIS STATE AND THEREFORE, SUBJECT TO REGULATION BY THE UTAH STATE INSURANCE DEPARTMENT, AND THAT THE SAID DEFENDANT COMPANIES, ISSUING SAID CONTRACTS ARE ALSO SUBJECT TO THE INSURANCE LAWS OF UTAH AND THE REGULATIONS OF THE STATE INSURANCE DEPARTMENT OF THE STATE OF UTAH.

The Plaintiffs represent that the Defendant companies, Memorial Gardens of the Valley, Inc., Memorial Trusts, Inc., Lake Hills, and the Aultorest Memorial Corporation, are all selling insurance contracts. These contracts are being sold primarily as pre-need contracts providing for funeral benefits under such titles as benevolent funds, trust funds, and funeral benefits. The Plaintiffs maintain these contracts are all subject to the insurance laws of the State of Utah; that the sellers of such contracts should qualify and be licensed as insurance companies under the insurance laws of the state of Utah; and that such contracts should also be qualified and approved as insurance contracts as the state law provides. None of the Defendant companies listed above has qualified before, nor have any of them received permission from the Utah State Insurance Commissioner to operate as an Insurance Company.

A general proposition in all governmental control and regulation is that all states exercise regulatory control in all cases where any person, corporate or natural, takes another's money and either uses it or exercises control thereover. All of these possibilities are encompassed in and under either the banking and finance laws, the law of investments, or insurance laws. If someone takes another's money for any purpose outside the field of sales and transfers, he fails under some regulation set up for one or more of those three named categories. Any type of organization that takes over the control of another's money and tries to avoid qualifying under one of those three groups, opens the way for fraud, misuse

of funds, and other losses to the individual which is not in the public interest.

The named defendant companies are accepting, and controlling the funds of others without meeting the safeguards set up by Utah law. The Plaintiffs specifically point out that these named defendant companies are selling insurance contracts, and should, at least, be required to qualify as insurance companies.

Section 31-5-2 of the Utah Code Annotated, 1953, provides:

(1) "No insurer shall transact any insurance in this state other than as surplus lines insurer, except that authorized by a valid and existing certificate of authority issued to it by the commissioner."

Our Utah State Insurance Department is charged with the enforcement of the Insurance Laws. (Sec. 31-2-1, Utah Code Annotated, 1953.)

The contracts of the Defendant companies on file in this case (R. 8-12, 19, 20, 39-41), and which were either submitted, or have been admitted as being used, by the said Defendant companies, vary in some minor respects as to the benefits promised, but the Plaintiffs desire to point out certain pertinent similarities common in all of the contracts involved herein. All of these contracts promise to deliver, at some unknown future date, certain funeral merchandise as yet unidentified, and funeral services at the time a death occurs, or on demand, which can

only be interpreted as also after death. We later desire to point out the law in reference to this matter. All contracts on file herein being issued by the Defendant companies agree to furnish caskets, clothing, embalming services, funeral services, transportation, and grave services, including vaults in most contracts. Every contract involved herein agrees to obtain the services of another funeral director, or any of certain listed funeral directors to perform the funeral services. All of these contracts provide for refunds upon demand.

Defendant, Memorial Gardens of the Valley, Inc., also agrees to provide endowment care and bronze tablets or memorials (R. 8).

Defendant, Memorial Trusts, Inc., further agreed to provide plastic surgery when necessary and musicians (R. 19). This Defendant also specifically provides for an appointment from the purchaser so that said Defendant company can act as an agent to receive and hold monies for the benefit of the purchaser to be used in providing the funeral benefits when death occurs (R. 9 and 19). This makes the contract strongly and definitely a contract of insurance.

In substance, these Defendant companies agree to *take* and *hold*, or in other ways keep control of the funds of another until death occurs, and the benefits are needed for a funeral. We submit that these are the elements of life insurance.

There are innumerable Supreme Court decisions holding these types of contracts as insurance contracts.



The Plaintiffs desire to point out specifically that in all of these Supreme Court cases no distinction is made between, and it makes no difference to the Courts, whether these contracts are sold by and through a funeral director, or whether by and through an association, agency, or a company which is separate and operates apart from one or more funeral directors.

Section 31-1-7 of the Utah Code Annotated, 1953, defines Insurance as follows:

“Definition of Insurance — Insurance is a contract whereby one undertakes to pay indemnity, or pay a specified amount, upon determinable contingencies.”

Insurance is further defined in 44 C. J. S. under Insurance, Sec. 1, page 471, as follows:

“\* \* \* Insurance denotes a contract by which one party for a compensation \* \* \* assumes particular risks of the other party, and promises to pay to him, or his nominee a certain, or ascertainable sum of money on a specified contingency; an agreement by which one party for a consideration promises to pay money, or its equivalent, or do some act of value to the insured, on the destruction or injury of something in which the latter has an interest.”

See also 29 *Am. Jur.* on Insurance, Section 3, page 433.

In the case of *State* (by the Attorney General) v. *Mutual Mortuary Association, Inc.* (Tenn. 1933), 61 S.W. 2d 664, an association was involved writing contracts promising a complete burial at one of several listed



prices. The Court in that case listed and followed numerous cases from several jurisdictions and said:

“As to the first contention, we think the business is clearly insurance. The contract evidenced by the certificate has all of the elements of a life insurance contract. It is an agreement to perform a service which can become obligatory only on the death of the certificate holder. While no beneficiary of the promisee is named, in reality one exists, and may be ascertained with as much certainty as if directly and specifically named. It is the person who would otherwise be obligated to pay the expenses of the burial. This may be the heir of the estate of the decedent, his relatives, or the state; but, whoever such person may be, he is relieved of his obligation to the extent of the value of the service agreed to be performed by the terms of the certificate. There is, therefore, a promise by one person to perform a valuable service on the death of another, a valuable consideration paid for the promise, and a person to whom the benefit of the promise will inure. Had the ordinary insurance nomenclature been used to designate the person making the promise, the person to whom the promise is made, the person who will receive the benefit of the promise, and the consideration paid for the promise, no one would question that it was an insurance contract. But a contract is to be determined from its nature and effect, not by the terminology used to characterize it. Here is an “insurer” an “insured,” a “premium,” and a “beneficiary,” and we think the contract nothing else than a plain, ordinary insurance contract.”

“Our statutes, which provide for the regulation and oversight of insurance companies and their agents were designed to protect policyholders

against fraud, imposition, insolvency, and misappropriation of funds. Industrial policies especially are frequently issued to persons who are poor, illiterate, improvident, and unable to protect themselves.”

In the case of *Sisson*, by the Attorney General, v. *Prata Undertaking Company* (Rhode Island, 1928), 141 Atl. 76. The Defendant was selling contracts providing for complete funeral services including furnishings, materials, casket and other funeral necessities, all for a regular payment of money. The Court in that case held that the contract was an insurance contract, and stated:

“Burial Insurance is a contract based upon a legal consideration whereby the obligor undertakes to furnish the obligee, or his near relatives, at death, a burial reasonably worth a fixed sum.”

Please note that in all of these cases already quoted, and to be quoted, the sellers of these contracts have called them by various names, such as: “leases,” “options,” “benevolent funds,” “discount contracts,” “trusts,” “notes,” and other titles to which the Courts have paid no attention as pointed out in the case above from Tennessee. The Courts are not concerned with the contracts’ names if the elements of insurance are present.

In *State* (by the State Insurance Commissioner) v. *Stout* (Tenn. 1933), 65 S.W. 2d 827, 829, the defendant who was operating a burial society wrote contracts providing for funeral benefits, funeral furnishings, and a complete funeral outfit to be furnished by and through designated undertakers. The Court also held this as an

insurance contract subjecting the company to qualify under the State Insurance laws, and held as follows:

“\* \* \* It is also declared that the business which the society or company is actually carrying on, and not the mere form of the organization, is the test for determining whether an insurer is a benefit society or insurance company so as to be within a statute applying to insurance companies. Again, that the status of an association or society is fixed by the character of the business transacted, and not by the mere formal workings of the organization. So it has been said that the rights of persons claiming under a contract must be fixed thereby without regard to the character of the society. And, if the prevalent purpose be that of insurance, the existence of benevolent or charitable features does not affect the legal status of an insurance company.”

In a more recent case, *State* (by the State Insurance Commissioner) v. *Mynatt Funeral Home* (Tenn. 1960), 339 S.W. 2d 26 the Defendant funeral home agreed to furnish all necessary merchandise and funeral services on demand, or on death. The Court held this contract to be one of insurance, and pointed specifically, commenting on the fact that in twenty years of activity the Defendant had issued 35,000 contracts, and allowing a \$500.00 benefit on each, calculated that under a discount provision the Company would have a liability of \$8,750,000.00. Then the Court said as follows:

“It is evident that with this tremendous potential liability, there should either be adequate provision for substantial reserves, or the laws of the State should make it impossible for such a situation to exist.”

The Plaintiff feels that it would be burdensome to the Court to quote any further cases, but many others, could be given. Each one of the cases referred to in this Brief cites many other cases from several jurisdictions. The Plaintiff would, however, like to refer the Court to the following cases where complete burial equipment and funeral services were promised. They were held insurance contracts in every case; See:

*Capitol Hill Burial Association v. Oliver*  
(Okla. 1939), 91 P. 2d 673

*Guardian Burial Association v. Rodgers*  
(Tex. 1942), 163 S.W. 2d 851

*Kenton & Campbell Benevolent Burial Association*  
*v. Goodpastor* (Ky. 1946), 200 S.W. 2d 120

*Renschler v. The State*, by the Attorney General  
(Ohio, 1914), 107 N.E. 748

*State v. Globe Casket and Undertaking Company*  
(Wash. 1914), 143 Pac. 878

Many further cases are also accumulated and to be found in 63 A.L.R. 723; 100 A.L.R. 1453, and 119 A.L.R. 1243.

The Contracts of the Defendant Companies now before the Court make no special, or any reference to death. These Contracts either provide specially, or, at least, imply that the goods and services can be demanded at any time. This type of provision has been a problem with the Courts and has been discussed in many cases. May we refer you to a couple of such cases, and the decisions of the Courts.

In the case of *South Georgia Funeral Home v. Harrison* (Ga. 1936), 184 S.E. 875. The Funeral Home was selling Option Contracts agreeing to provide "caskets," "vaults," "clothing," and other merchandise. \* \* \* "services of an Undertaker," "ambulance," and "hearse services."

The Court held this a Contract of Insurance, and said:

"While the exercise of the Option is not expressly made contingent upon the death of any of them, the merchandise and the services may be bought only for the use of, or in connection with the "Optionees" their minor children, or dependents. As a general proposition, we cannot conceive of what use a casket, (burial clothes, funeral directions, etc.) would be to a living person not engaged in the business of buying and selling such commodities. Burial merchandise, and funeral services are peculiar commodities; they are presumably used only in connection with, or for use of, a person who has departed from life."

Therefore, the Court held the contingency of death was sufficiently operational and held it insurance, and not to be sold unless the company became licensed as an Insurance Company.

In the case of *State, by the Attorney General, v. The Smith Funeral Service* (Tenn. 1940), 145 S.W. 2d 1021, the Defendant funeral director had a charter from the State to operate a funeral parlor, and to operate an undertaking business, and to operate a cemetery. They proceeded to sell contracts providing for caskets, a



hearse, funeral clothes, and other funeral benefits. They had no death provisions as we have in our contracts before the Court. This company, also, manufactured and sold caskets outright. Demand could also be made at any time for the benefits of the Contract. The Court held these Contracts insurance, and held that they could not be sold in the State of Tennessee unless the Defendant qualified as an insurance company, and, otherwise, met the insurance laws of the State. The Court proceeded and said as follows:

“As suggested by the chancellor, only a rare and eccentric individual would in person, or through an agent purchase for himself a coffin and grave clothes before he died. Human nature is such that the individual revolts at acquiring and possessing during his lifetime such gruesome tokens of his end. A person not abnormal would not have such things around him during his lifetime.

Even though the Contracts *could* be matured before death the Court said further:

“We are further of the opinion that the Defendant (Funeral Home) never contemplated in the issuance of these Contracts that they would be matured until the certificate holders died. \* \* \* furnish hearse service \* \* \* handle details incident to a funeral, very plainly show that the Defendant (Funeral Home) was contracting in reverence to death.”

It is very obvious that the discussions on the Defendants' pre-need contracts, whether under Point III on the Plaintiffs' claim that they are insurance, or whether under Point IV supporting the constitutionality of the pre-

need law, that many arguments and decisions would overlap. May we point out that in a couple of citations being used primarily to discuss Point IV on the constitutionality of pre-need contracts, the opportunity is taken by the courts to also point out that pre-need contracts are basically insurance contracts. This Court is referred to the preliminary discussion contained on pages 1251 and 1252 of 68 A.L.R. 2nd, which will be specifically referred to later. The Court's attention is also called to a discussion of this matter in the case of *West Virginia v. Memorial Gardens Development Corporation* (W. Va. 1957), 101 S.E. 2nd 425, 437-438 (Post) where numerous authorities are referred to holding pre-need and burial contracts as insurance contracts and subject to regulation under insurance laws.

## ARGUMENT

### POINT IV.

THAT CONTRARY TO THE LOWER COURT'S DECISION, THOSE PORTIONS OF SECTIONS 22-4-1, 22-4-2, 22-4-3, 22-4-4, 22-4-5 and 22-4-7 of THE PRE-NEED LAW OF THE STATE OF UTAH, CHAPTER 39 OF THE 1955 LAWS OF UTAH AS AMENDED BY CHAPTER 45 OF THE 1957 LAWS OF UTAH AND WHICH SECTIONS ARE QUOTED IN THE LOWER COURT'S AMENDED JUDGMENT OF DISMISSAL, DATED SEPTEMBER 18, 1964 (R. 46) ARE CONSTITUTIONAL.

The corporate Defendants have attacked Utah's pre-need law as being unconstitutional on the ground that it is not a valid exercise of the police power. There are

cases holding as the Defendants urge that such statutes are invalid, however, the substantial numerical weight of authority upholds such statutes as being proper and necessary to protect the public against abuses arising from the sale of services and personal property to be delivered at a future date long after they may be completely paid for. The danger to the public from permitting the unregulated sale of funeral services far ahead of the time they are going to be performed is obvious. It would be an open invitation to fraud. Furthermore, in the case of even the most ethical and honest of companies, their financial stability cannot be presumed for the indefinite future. Regulation of this type of activity appears to be in the public interest fully as much as is regulation of banks or insurance companies.

The constitutionality of pre-need laws has been tested in several cases in several different states. The statutes in most, if not all, of these states were substantially the same as the Utah statute (Chapter 39, Laws of Utah 1955, and as amended in Chapter 45, Laws of Utah 1957). The states have not been uniform in their decisions.

A statute similar to our Utah statute was involved in the case of *Memorial Gardens Association, Inc. v. Smith* (Ill. 1959), 156 N.E. 2nd 578. The Court discusses generally the need of regulation to protect depositors, where no immediate sale is involved but performance in the future is involved, and security provided for by law is proper regulation. The Court upheld the constitutionality of the pre-need law and stated:

“The enactment of Statutes having for their object the prevention of fraud, deceit, cheating and imposition is within the Police power of a State.”

The State of Texas also upheld the constitutionality of a pre-need statute similar to Utah's in the case of *Falkner v. Memorial Gardens Association*, (Texas 1957), 298 S.W. 2nd 934. It held it was regulatory only and not prohibitive or against public policy.

One of the main, if not the main case relied upon by the Defendants in the lower Court was the case of *State of West Virginia v. Memorial Gardens Development Corporation*. (W. Va. 1958), 101 S.E. 2nd 425; 68 A.L.R. 2nd 1233. It held a Statute also similar to our Utah Statute as unconstitutional. It is really disturbing to find that after several pages of discussion the West Virginia Court said:

“Purchasers of property or services can ascertain, if they so desire, the reputation of the sellers and their financial condition, and if they do not, it is not the fault of the State, if any loss to them should ensue” (Page 431).

The Court then went farther and argued that parties should be left to themselves in making contracts, and that “even though it was popular to enact laws protecting the unsuspecting and incompetent in their purchases gullibly made,” (page 431), very, very few classes of business should be regulated and sales of funeral contracts least of all. The dissenting opinion in the West Virginia case is extremely well written. It elaborates on the matter just referred to by the Plaintiffs as to what classes of

business should be regulated and, contrary to the main opinion, the dissenting opinion shows how extensive regulation of business has become, and how well accepted and advisable it is. The Texas Court in the case of *Falkner v. Memorial Gardens Association*, supra, cites and follows the dissenting opinion in the West Virginia case and says:

“\* \* \* There was a vigorous dissent from the opinion which we believe contains the better reasoning and is more in accord with the general Judicial precedent upon the question.”

The Supreme Court of the State of Colorado has also ruled their pre-need law unconstitutional in the case of *Memorial Trusts, Inc., v. Berry* (Colo. 1960), 356 Pac. 2nd 884.

The cases on this question are collected in 68 A.L.R. 2nd 1251-55. The West Virginia case is also in this A.L.R. citation on pages 1233-1251.

## SUMMARY

The Plaintiffs respectfully request this Honorable Court to reverse the decision of the lower Court declaring:

(1) Any funeral director or embalmer, who performs funeral services or furnishes burial facilities pursuant to a pre-need contract obtained by solicitation by any of the Defendants, solicited or sold by and for themselves, or which results to the benefit of a funeral di-



rector or embalmer who performs the funeral services or furnishes the burial facilities causes said Defendants to become his agent and is guilty of unprofessional and unethical conduct as defined in Sections 58-9-10 and 58-9-22 of the Utah Code Annotated, 1953.

(2) That contracts sold by the Defendants are all subject to the pre-need law of Utah, and the Contract used and issued by the Defendant Memorial Trust, Inc., is particularly in violation of the pre-need law of the State of Utah as contained in Section 22-4-4, Chapter 39, Laws of Utah, 1955, and as amended in Chapter 45, Laws of Utah, 1957, and that said Defendants' pre-need contract particularly permits said Defendant to demand and receive the earnings of the Trust Funds and pay said funds to said Defendant contrary to the provisions of Section 22-4-4 aforesaid.

(3) That the pre-need contracts, being sold by the Defendant companies and which are the subjects of controversy in this case, are insurance contracts and subject to the insurance laws of this State and therefore, subject to regulation by the Utah State Insurance Department, and that the said Defendant companies, issuing said Contracts are also subject as Insurance Companies to the Insurance Laws of Utah and the regulations of the State Insurance Department of the State of Utah. If this Honorable Court finds as requested in Point III, it is then conceded that the Defendants thereby made subject to the Insurance laws and regulations, would not be subject to the pre-need law as requested in Point II.

(4) That those portions of Sections 22-4-1, 22-4-2, 22-4-3, 22-4-4, 22-4-5 and 22-4-7 of the Pre-need Law of the State of Utah, Chapter 39 of the 1955 Laws of Utah as amended by Chapter 45 of the 1957 Laws of Utah and which sections are quoted in the Lower Courts Amended Judgment of Dismissal, dated September 18, 1964 (R. 46) are constitutional.

Respectfully submitted,

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