

1965

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

Utah Supreme Court

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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,

Appellant,

vs.

MEMORIAL GARDENS OF THE
VALLEY, INC., a Utah corporation;
LAKE HILLS, a Utah corporation;
MEMORIAL TRUST, INC., a Utah
corporation; AULTOREST MEMORIAL
CORPORATION, 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,

Respondents.

Case No.

10236

JAN 13 1966

Utah Supreme Court, Utah

BRIEF OF RESPONDENT, MEMORIAL GARDENS
OF THE VALLEY, INC.
APPEAL FROM THE JUDGMENT OF THE THIRD DIS-
TRICT COURT OF SALT LAKE COUNTY, UTAH. HON-
ORABLE STEWART M. HANSON, JUDGE.

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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,
Appellant,

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VALLEY, INC., a Utah corporation;
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Respondents.

BRIEF OF RESPONDENT, MEMORIAL GARDENS
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APPEAL FROM THE JUDGMENT OF THE THIRD DIS-
TRICT COURT OF SALT LAKE COUNTY, UTAH. HON-
ORABLE STEWART M. HANSON, JUDGE.

STATEMENT OF KIND OF CASE

Memorial Gardens of the Valley, Inc. agrees somewhat with the statement of the kind of case set forth in Appellant's Brief, however, there are matters upon which we feel we should comment. We

wish to point out that this Defendant-Respondent is not issuing or selling pre-need contracts through associates as stated in Appellant's Brief (A. B. 2).

We do not believe that it necessarily follows that what the various Defendant-Respondents are doing will require the various morticians and funeral directors to follow a similar plan. Much of the business of funeral directors and morticians is non-competitive by its very nature (AB-2).

As a further comment in respect to this argument of Appellant, this Respondent cannot see that there is anything wrong with making it possible for people who have lost loved ones to arrange for funeral services at a savings when, perhaps, the breadwinner of the family has been taken away.

DISPOSITION IN LOWER COURT

The case was argued before the lower Court by the Plaintiffs as stated on pages 3 and 4 of its Brief.

This Defendant in its presentation to the Court stated the following issues:

A. That the Complaint does not state facts sufficient to constitute a cause of action against Memorial Gardens of the Valley, Inc. on the grounds that there is no justiciable issue between Plaintiffs and the Defendants.

B. That the provisions of Section 22-4-1, U.C.A., 1953 (1-7) are unconstitutional and violate

the due process clauses of the Constitution of the State of Utah and the Federal Constitution.

C. That this Defendant is neither a licensed embalmer or funeral director.

D. That the "Family Security Agreement" of this Defendant is not an insurance contract.

The final decree of the lower Court (R-44, 48) sets forth the decision of the Court which decided in favor of the Defendant on constitutional grounds, but further decided that there did exist a justiciable issue between the Plaintiffs and the Defendants.

RELIEF SOUGHT ON APPEAL

This Defendant seeks a decision of this Court affirming the decision of the lower Court that the act is unconstitutional as found by the lower Court. This Respondent also seeks a ruling of this Court that there does not exist a justiciable issue between the Appellants and the Respondents.

ARGUMENT

Point 1.

MEMORIAL GARDENS OF THE VALLEY, INC. IS NEITHER A FUNERAL DIRECTOR NOR AN EMBALMER, AND ITS "FAMILY SECURITY AGREEMENT" DOES NOT VIOLATE THE PROVISIONS OF SECTIONS 58-9-10 AND 58-9-22, U. C. A. 1953.

At page 3 of Appellant's Brief it is stated that Appellant asked for a declaration "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."

This statement is not accurate as to the Respondent's position and particularly in respect to the operations of Memorial Gardens of the Valley, Inc., inasmuch as this company is not engaged either as an embalmer or as a funeral director. Memorial Gardens of the Valley, Inc., operates a cemetery.

Our "Family Service Agreement" does not provide for embalming or for the directing of a funeral. The agreement provides only for the services rendered by a cemetery, and the selling of a casket.

Sub-paragraph A-8 of the Agreement provides:

COMPLETE INTERMENT SERVICE: To provide, if enumerated as purchased, the opening and closing of graves upon the order of the Purchaser, his heirs or assigns only in the Company's Gardens. Said opening and closing of graves shall also include the use of the Memory Chapel or the chapel tent, lowering device, greens, chairs, and other equipment as is usually provided by the Company for this purpose. To record the name of the departed in the Perpetual Remembrance Book located in the Memory Chapel.

This provision of the Agreement does not provide for embalming, for funeral clothes, for funeral

cars or for other facilities, which might be necessary for the burial of the dead. Nor does it provide for a funeral director or for other persons to assist with the funeral. We have carefully read our Agreement and fail to find language which provides for these services as is claimed by Appellant. (AB-23)

If a licensed mortician or embalmer should engage in the solicitation of future funeral services, he might then come within the provisions of Sections 59-9-10 and 22, U.C.A., 1953, which sets forth unprofessional and unethical conduct. Memorial Gardens of the Valley, Inc., however, is not within this classification as it is neither an embalmer nor a funeral director, and is engaged in the conduct and operation of a cemetery and the incidental supplies and facilities which are necessary for the interment of a body. Furthermore, if Appellants desire a decision on this matter they should bring an action against one of their own members who might be soliciting funeral services, and not against this Defendant which does not!

The Appellant in its Brief (AB-11) states that the contract of Defendant, Memorial Gardens of the Valley agrees to do every act done by a licensed funeral director and embalmer. Attention is called to the definition of the practice of embalming as found in Section 58-9-9, U.C.A., 1953, which is as follows:

Either the embalming of dead human bodies, or the preparation for transportation of human bodies, dead of a contagious or infectious disease, constitutes the practice of embalming.

The "Family Security Agreement" of the Memorial Gardens of the Valley, Inc., in no place provides for such services as set forth and defined by the above statute. It does not mention embalming either directly or by inference. We cannot agree with the statement of Plaintiff's counsel that this Defendant agrees to do every act done by a licensed embalmer.

Attention is also called to the provisions of Section 58-9-14, U.C.A., 1953, which defines a funeral director as follows:

"Funeral directors" mean and includes a person engaged in:

(a) Preparing for burial or disposal and directing and supervising the burial or disposing of dead human bodies, as a profession;

(b) Maintaining or employed in a funeral establishment devoted to the care and preparation for burial, transportation or other disposition of dead human bodies; and

(c) Who shall, in connection with his name or funeral establishment, use the words "funeral director" or "undertaker" or "mortician" or any other title implying that he is engaged as a "funeral director" as herein defined.

Nowhere within the "Family Security Agreement" of Memorial Gardens of the Valley does there appear any language which might be interpreted to include the definitions as set forth in the above quoted statute.

The operations of Memorial Gardens of the Valley, Inc. with its "Family Security Agreement" is not that of solicitation of dead human bodies as described in Appellants' Brief, page 10, but it is that of the selling of interment spaces and a casket at a time when the parties to the agreement are not beset with grief during which time they might not be in a condition to give due consideration to the financial burdens or problems which might then exist. The sale by this Respondent is at a time when the parties to the agreement are able to fully and adequately consider the financial and other problems which are necessarily involved with the burial of a loved one.

Appellant further argues (AB-12) that Defendants are violating the unprofessional conduct statute because the Defendants are "acting as agents, employees and representatives of the particular licensed funeral director and embalmer involved."

Appellant is reading into the contracts of the Defendants, and in particular into the "Family Security Agreement," of Memorial Gardens of the Valley, Inc., some language which simply is not in the agreement. Nowhere can there be found language within the agreement which states that Memorial Gardens of the Valley, Inc., is acting as an agent, employee, or representative of a particular licensed funeral director, or of any licensed funeral directors, or embalmers. There is not any evidence that this Respondent is acting as an agent by express or

implied agreement for any licensed embalmer or funeral director. We, therefore, submit that the argument of the Appellants in respect to any possible unethical conduct on the part of a licensed embalmer or funeral director is without merit in view of the contract or agreement of this Respondent and the pleadings which are before the Court. This matter came on before the Court on the Appellants' Motion For Summary Judgment. The evidence before the Court consisted of the pleadings and the contracts which are made part of the pleadings and this was the entire evidence before the Court at the time it rendered its decision.

It is contended that there is agency by ratification (AB-14). There is no agency by ratification in connection with the Memorial Gardens of the Valley "Family Security Agreement" inasmuch as there is nothing sold to the purchaser other than that which is specified in the agreement sold by Memorial Gardens of the Valley, Inc. There is nothing within the "Family Security Agreement" which controls the operations of a funeral director or embalmer, and there is nothing within the agreement which a funeral director or embalmer must or can ratify.

Appellants attempt to make the act of Memorial Gardens of the Valley, Inc. in selling a "Family Security Agreement," the act by ratification of some funeral director or embalmer. This argument is without substance as there is nothing within the agreement which points to a funeral director or embalmer. The argument as set forth by the Plaintiff

is without substance and is not factually true when considered with the agreement which is part of the record, and which is the only record before the Court as far as this Respondent is concerned.

Point II.

MEMORIAL GARDENS OF THE VALLEY'S AGREEMENT PROVIDES FOR A TRUST SUFFICIENT TO PROTECT THE PUBLIC.

We agree with the Plaintiff that it is important and worthwhile to guaranty the performance of the contracts or agreements entered into by this Repondent, and the other Respondents similarly concerned. We point with pride to the provisions of the "Family Security Agreement" of this Respondent (R-8) Subsection 8 which reads as follows:

B. Guarantee of Performance: That in order to assure the performance of the delivery of merchandise and services covered by this agreement, the Company agrees that it will set aside in an irrevocable trust fund, sufficient money, based upon its present wholesale costs with reliable manufacturers, to pay for said merchandise and services when delivered. Any income or excess amounts over and above the actual costs of the merchandise and services will be paid to the Perpetual Care Trust Fund of Memorial Gardens of the Valley, Inc.

The provisions of the agreement of Memorial Gardens of the Valley, Inc., are in substantial agree-

ment with the provisions of Section 22-4-1, U.C.A., 1953. Such statutory regulation, however, must be reasonable. It is not necessary for the protection of the public to deposit the entire contract price in trust as the public is amply protected if the reasonable cost of the item which is purchased is deposited in trust, and the seller is allowed his normal selling commission or profit for services rendered in securing the agreement. It should be noted that paragraph "B" set out above provides that this Respondent agrees to set up in an irrevocable trust the money necessary and sufficient to fulfill its obligations under the agreement. We do, however, wish to point out that to require this Respondent or any other party in a similar position to deposit the full amount of the purchase price or agreement in trust is a punitive measure and will in effect prevent the Defendant from engaging in a lawful business which is for the benefit of the Defendant and also for the benefit of the public as a whole.

Point III

THE COMPLAINT DOES NOT STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION.

It is alleged by the Appellants that the business activities of the Respondents are, under the statutes, illegal, and that the agreements used by the Respondents as alleged in securing business are in part insurance contracts and securities. Appellants allege

that the use of the said agreements require that the Respondents be licensed by the Securities Commission and by the Insurance Department of the State of Utah.

The allegations of the Complaint do not make a justiciable issue between the Appellants and the Respondents of such a nature as to permit consideration by this Court. The statutes relied upon by Appellants are regulatory statutes. If the Respondents are not conforming with the law, it is the State of Utah or its agencies which should proceed against those who might be considered to be violating the law.

A declaratory action must be based on an actual controversy. The interest of the parties must be more than merely general. There must be a substantial present interest in the relief sought by the Complaint. See 174 ALR 550.

The Appellants are not entitled to a declaratory judgment which, in effect would be to advise the officials of the Business Regulation Commission and the Commissioner of Insurance as to their duties and responsibilities. If this Respondent is considered to have violated one of the regulatory statutes of the State of Utah it should be the appropriate state official who should bring an action for the final determination of such matters and not the Appellants herein. See *Lyon vs. Bateman*, 119 U. 435, 228 P.2d 819, at 439 Utah.

The type of justiciable controversy which must exist before declaratory relief can be

granted is defined in Section 8, on page 27, Anderson, Declaratory Judgments, as follows:

“A controversy, in the sense in which the word is used in the Constitution in defining judicial power, particularly of the Federal Courts, must be one that is appropriate for judicial determination as distinct from a difference or dispute of hypothetical or abstract character or from one which is academic or moot, but must be definite and concrete, touching the legal relation of the parties in adverse legal interest, and must be a real and substantial controversy admitting of specific relief through a decree conclusive in character as distinct from an opinion or advice of what the law would be on a hypothetical state of facts.”

The facts argued by Appellants are hypothetical and do not appear by the reading of the pleadings on file herein. Appellants are asking the Court to give an advisory opinion on a set of facts which are not in evidence and are hypothetical only. The United States Supreme Court has said:

The requirements for a justiciable case for controversy are no less strict in a declaratory judgment proceeding than in any other type of suit. *Alabama State Federation of Labor, Local Union No. 3, United Brotherhood of Carpenters and Joiners vs. McAdory*, 65 Supreme Court 1384, 1389.

The Court also said in the same case that it is without power to give advisory opinions and that it

has been its “considered practice not to decide abstract, hypothetical or contingent questions.”

Certainly the Plaintiff in this case is asking the Court to decide something which is contingent upon this Defendant doing something which is in violation of the law, and as of this time there is no evidence to support such contention.

See the Montana case of *Waite vs. Holmes*, 327 P.2d. 399, 133 Mt. 512. In that case a licensed insurance agent brought an action against the state auditor as ex-officio insurance commissioner for the State of Montana, and the Canadian Insurance Company, which he claimed was operating in the State of Montana under a void license. He desired to have the license revoked.

The Court stated on page 402, P.2d:

Stated in the form of an interrogatory, Plaintiff’s proposition may be phrased: Does Plaintiff have any right to enjoin competition which stems from a competitor operating under a void license or franchise or a right to have such competitor’s license cancelled or revoked?

The Court held that the Plaintiff did not have any such right. It stated:

Or, stated another way, the Plaintiffs had no property right which had been injured. Governed by the above rules, we can state the proposition thusly: If Plaintiff does not have a right to be free from the competition of the

Defendant, then any injury flowing from such competition is *damnum absque injuria*.

The Court further stated at page 407 P.2d:

The Plaintiffs' right of action, therefore, falls squarely within the Restatement rule*** which states that where the purpose of the statute is merely "police" regulation or supervision, then Plaintiff has no right of action.

See also the case of *Backman vs. Salt Lake County*, 13 U.2d. 412-416, 375 P.2d. 756. In commenting as to whether there was a justiciable controversy in respect to an action for a declaratory judgment the Court said:

We cannot see how there could be a true adversary proceeding under such circumstances. That is not to say that in a proper proceeding other than the type here, at which evidence might be adduced and findings made, the matter would be incontestible, — but simply that the Declaratory Judgments Act is not designed for giving advisory opinions in a non-adversary action, or to insure against feared risks. We reaffirm the language of *Lyon vs. Bateman* where we said:

"While the statutes authorizing courts to render declaratory relief should be liberally construed in order to provide prompt settlements of controversies and to stabilize uncertain legal relations, courts, nevertheless, must operate within the constitutional and statutory powers and duties imposed upon them. They are not supposed to be a forum for hearing academic contentions or rendering ad-

visory opinions. In order to maintain an action for declaratory relief, plaintiffs must show that the justiciable and jurisdictional elements requisite in ordinary actions are present, and a judgment can be rendered only in a real controversy between adverse parties. Generally, courts have held that the conditions which must exist before a declaratory judgment action can be maintained are: (1) a justiciable controversy; (2) the interests of the parties must be adverse; (3) the party seeking such relief must have a legally protectible interest in the controversy; and (4) the issues between the parties involved must be ripe for judicial determination."

Point IV

THE PROVISIONS OF SECTION 22-4-1, U.C.A., 1953 ARE UNCONSTITUTIONAL AND VIOLATE THE DUE PROCESS CLAUSES OF THE STATE AND FEDERAL CONSTITUTIONS.

The provisions of Section 22-4-1 to 7, U.C.A. 1953 (1963 Supp.) are not a valid exercise of the legislative power of the state in view of the provisions of the Constitution of the State of Utah and the Fourteenth Amendment to the Constitution of the United States, and therefore are illegal and unconstitutional.

The pre-need act when considered as a whole is an unreasonable and arbitrary restriction which results in stifling or preventing the operation of an otherwise lawful business. All of which is done under

the cloak of a statutory regulation purportedly for the protection of the public.

It is a violation of federal and state constitutional provisions to enact unreasonable and oppressive regulatory measures. The general rule of law is well-stated in 11 Am. Jur. Constitutional Law paragraph 263:

In the consideration of the relationship between the equal protection clause and the police power of the states, the principle must be kept in mind that as in the regulation of all rights secured from infringement by Federal constitutional guaranties, it is settled that the police power is subordinate to the constitutional guaranty of equality of privilege and of burden contained in this clause. Therefore, any attempted exercise of police power which results in a denial of the equal protection of the law is invalid.

Under the limitations of the equal protection clause, in order to justify the interposition of the authority of the state in enacting police regulations, it must appear that the interests of the public generally as distinguished from those of a particular class require such interference, for it is a rule that police power cannot be invoked to protect one class of citizens against another class unless such interference is for the real protection of society in general.

A Utah case in which the Supreme Court of Utah considered a regulatory ordinance is *Ritholz vs. City of Salt Lake* 3 U 2d 385, 285 P.2d 702 at 706.

The Court held unconstitutional an ordinance prohibiting advertising of the prices of eyeglasses on the grounds that it did not constitute a proper exercise of police power. In answer to the argument, as is here espoused, that such regulation was for the protection of the public the Court said:

It should be noted that the law cannot be made, nor could one be enforced, which would entirely protect the completely naive and gullible. In any event, if a customer desires to use ordinary care adequate protection is afforded . . .

The statutory regulations contained in the pre-need law wherein one hundred percent of all money received on pre-need contracts is required to be placed in trust is confiscatory and deprives the Defendant of its property without due process of law. The requirement of the statute prevents the Defendant from operating a legitimate business inasmuch as certain fixed expenses and the cost of acquisition of business must be paid. It discriminates against a particular mode of doing business, and inasmuch as it does not provide equal protection of the laws it is class legislation.

See the case entitled: *State vs. Memorial Gardens Development Corp.* (1957) 143 W.Va. 182, 101 SE 2d. 425, 68 ALR 2d. 1233. This case, which is the closest case in point involved a statute very similar to the Utah pre-need law, and which required all funds collected upon pre-need burial contracts to be deposited in trust accounts for the bene-

fit of policyholders and withdrawn only upon the death or demand of the insured, with the result that no money was available for operating expense or profit. The statute was held to be unconstitutional as unreasonably singling out and discriminating against an otherwise lawful business which the Court pointed out was not any more potentially fraudulent than any other merchandising business and as impairing freedom of contract by discrimination between kinds and classes of businesses. The Court in *State vs. Memorial Gardens Development Corp.* had the following to say at 68 ALR 2d 1242 relative to the effect of the one hundred percent trust fund requirements:

The statute here involved which requires impounding of all purchase money has a prohibitory rather than regulatory effect, because no one could without other types of business or finances afford to engage in such business which allowed no expenditure of the funds for operational expenses . . .

The Court also had the following to say at 68 ALR 2d. 1241-1242 relative to unfair classification or legislation and the resulting effect such legislation might have upon fair competition:

Although it may be to some degree popular to enact, and much may be said in favor of, laws protecting the unsuspecting and incompetent in their purchases gullibly made of property for future delivery and the possibility of vendors failing for one reason or another to deliver, the provisions of the two

Constitutions contemplate and provide to all citizens freedom of contract so that any legislative acts passed may not discriminate between kinds or classes of business which are considered legal. *State v. Goodwill*, 33 W. Va. 179, 10 SE 285, 6 LRA 621; *Marlow v. Ringler*, 79 W. Va. 568, 91 SE 386, LRA 1917D 619; *Koppers Coal Co. v. Compensation Commissioner*, 123 W. Va. 621, 17 SE 2d. 330. Were it not for the protection thus afforded by the Constitution any small legitimate business which could not protect itself by the vote of a majority of the legislative bodies could find itself unfairly and unjustly classified as illegal and its contracts void or its business so regulated as to destroy or impair it by reason of a simple legislative declaration to the effect that it involved a matter affecting the public morals, public health or public welfare. So the reason for the constitutional provisions, the supreme law of the land, is very obvious. It is always unfortunate to some when fair competition seriously affects one's business, but that alone affords no legitimate reason for the requisition of the competitor. Fair and legal competition is generally more wholesome and beneficial to the public than otherwise, and should not be suppressed by impairing or destructive legislation.

See also the case entitled *Memorial Trust, Inc. vs. Sam N. Beery*, decided November 14, 1960, 356 P.2d. 884, Colo. This was an action involving a regulation based upon a statute providing that all funds received from the sale of prepaid funeral benefits should be invested in trust funds without allowance for acquisition costs.

Memorial entered into agreements by which it agreed to arrange for a mortuary to provide a casket selected by the purchaser, and services incident to funerals. The contract provided that Memorial should retain 25 percent of the purchase price, and put the remaining 75 percent in trust.

The Commissioner of Insurance brought an action for a declaratory judgment. The Court held that the regulation adopted by the Commission was a nullity and that the statute in those particulars was violative of due process and unconstitutional. The case in its holding struck down a one-hundred percent trust provision established by the regulation, which was apparently consistent with the language of the statute.

Some reasonable regulation is probably advisable, but it appears to this Defendant that the one-hundred percent trust fund regulation is so restrictive that it deprives one from engaging in business which is needed and desired by the citizens of the state.

The provisions of Section 22-4-1, U.C.A., 1953 (1-7) are, in their effect, prohibitory, although on their face appear to be only regulatory. Under the Utah statute the contract is unenforceable by the party attempting to provide funeral services at a reasonable cost. The other contracting party can withdraw his money at any time; and as required by the statute, all the money must be held in trust. The right to contract is guaranteed to each citizen

of our country by the law, if the subject of the contract is lawful and the public is not injured.

See an excellent discussion of the constitutional rights of a citizen to contract in *State vs. Gateway Mortuaries, Inc.*, 87 M o n t a n a 225, 287 P. 156, (1930), where a statute rendered void a pre-arranged funeral which was not contracted in contemplation of immediate death. The conviction of the Defendants by the lower Court was reversed by the Supreme Court of the State of Montana.

The Montana court said at page 161 Pacific:

Having found the act unreasonable, arbitrary, and violative of the provisions of the constitutions of the United States and of this state, it is our duty to declare it void and we do without hesitation.

The Respondent, Memorial Gardens of the Valley, Inc., is engaged in enabling those who do business with it to arrange for at least part of the contemplated funeral expense at a time when they give due consideration to the expenditure contemplated. This is to be distinguished from the "at-need" pressures surrounding the purchase of funeral arrangements immediately upon the death of a loved one when perhaps far more elaborate and expensive merchandise is sold than would have been purchased prior to need. Under such circumstances the purchaser can be subject to unusual pressures and hasty decisions. It is our contention that pre-need agreements are most beneficial and helpful under proper

supervision to the public as a whole. The contracting for the sale of caskets, burial space, grave memorials and for services in maintaining a cemetery on a pre-need basis fills the desires and needs of many people. It is not dishonorable or immoral.

The requirement that all of the contract price be placed in trust goes far beyond reasonable regulation under the police power. Its affect is to prohibit a useful and needed business. A life insurance company or a casualty insurance company is not required to place in its reserves one-hundred percent of all premiums collected. It is allowed a reasonable operating and acquisition allowance. The national institutions are not required to maintain a hundred percent reserve. The reasonable and responsible way to provide for performance would be to require enough funds to be set aside to buy the merchandise at manufacturer's prices; this would guaranty performance which should be the only object of any statute regulating a pre-need business.

An enlightening and persuasive case is that of *Prate Undertaking Company vs. State Board of Embalming*, 55 R.I. 454, 182 Atl. 808, 104 A.L.R. 389, (1936). In this case the Supreme Court of the State of Rhode Island had for its consideration a statute which provided for the loss of a certificate to do business as an undertaker if one "participates in a like scheme or plan wherein there is contained any agreement or provision that deprives heirs or next of kin from freedom of choice as to the type or style or price of equipment used in connection with the

funeral, or the freedom of choice as to what funeral director shall be employed." The Court had the following to say at 104 ALR 399-400:

A statute, or any part thereof, cannot be given effect, if under the guise of the police power in the public interest, but actually to bring about some object outside of the proper scope of that power, it arbitrarily or oppressively interferes with a person or property in relation to recognized guaranteed rights. No good reason has been called to our attention, and none occurs to us, which makes it necessary in the interest of the general public that an individual, if he desires, should not be free to make a contract concerning the details of his own funeral with an undertaker who is conducting a burial association scheme or burial certificate plan, or that such undertaker should not be able in like manner to enter into a binding contract with a person concerning the latter's funeral, without placing himself in a class of those not entitled to a certificate and therefore not able to do business. The clause in question seems to go beyond the general purpose of the act in its relation to the public welfare. After careful consideration, and realizing fully the seriousness of our duty in passing upon the validity of an act of the Legislature, we are of the opinion that the part of Section 13 now under consideration constitutes an unreasonable and oppressive restriction upon the liberty of contract secured by Section 1 of the Fourteenth Amendment to the United States Constitution, and that this part of the act in question is clearly and palpably in excess of legislative

power, and therefore, that it is in violation of the provisions of said Fourteenth Amendment and unconstitutional.

We submit that the Utah pre-need statute has as its real purpose under the cloak of purported public interest, the stifling of the business activities of the Respondents herein. Although some reasonable regulation might be desirable the present statutes are not in the public's good.

Point V

THE AGREEMENT IS NOT AN INSURANCE CONTRACT.

It is urged by Appellants that the "Agreement" of this Respondent is an insurance contract and therefore should come under the supervision of the insurance department. This contention is not supported by our definition of insurance.

Section 35-1-7, U.C.A., 1953, is as follows:

Insurance is a contract whereby one undertakes to indemnify another or pay or allow a specified or ascertainable amount or benefit upon determinable risk contingencies.

See the case of *South Georgia Funeral Homes, Inc. vs. Harrison*, Georgia 1936, 188 SE 529, in which case the Court discussed the principle of risk as it related to pre-need funeral contracts as follows:

The contract now being sold by the defendant and by reason of the sale of which this contempt proceeding arose, is one wherein the defendant corporation, for a fixed and definite sum in hand paid or payable in installments, agrees to render and perform or cause to be rendered and performed for the purchaser or any one of his family, certain funeral services. . . . While the performance of the contract is contingent upon death, this in and of itself does not make it a contract of life insurance, nor does the fact that the fixed sum is payable in installments. There is nothing in the contract itself nor is there any evidence to show that the amount paid by a purchaser is less than the value of the funeral services contracted to be performed, or that there is any element of risk involved, either on the part of the purchaser or the defendant corporation. The contract on its face does not appear to be one of life insurance.

Examination of the "Family Security Agreement" of this Respondent will show that it cannot be classified as an insurance contract.

The Agreement requires that the one purchasing the casket or burial space must pay a fixed and definite price. The price is the same regardless of the age of the contracting party or the condition of his health. There is no forgiveness feature by which Memorial Gardens of the Valley, Inc. would assume or forgive the balance which might be due upon the contract upon the death of the purchaser.

The Agreement does not contemplate that delivery should be made after death, but the agreement

sets out that upon receipt of the full sum and upon the request of the purchaser, his heirs or assigns, it agrees to convey the contemplated property or merchandise.

Even under the provisions of the pre-need law, with which we do not agree, the agreement may be revoked at any time by the purchaser and, in that event, all amounts paid by him under the contract must be refunded.

Another feature which distinguishes the agreement from an insurance contract is that the purchaser shall have the right "at any time to sell or transfer his interest herein, as evidenced by an interment deed or bill of sale which is to be issued." Such a provision is certainly not the provision of an insurance contract.

The agreement also provides that there shall be placed in a trust, sufficient money based upon wholesale costs to pay for the merchandise and services when delivered.

There was no intent on the part of the legislature to place the control of the cemetery or mortuary business or the sale of caskets or other burial supplies under the control of the insurance commissioner when the statutes referred to were enacted. There is no reference in the insurance code to such contracts or agreements although the insurance code was devised and adopted by the 1963 session of the legislature.

The pre-need statute in effect negates the thought that such agreements are insurance contracts. Section 22-4-6, U.C.A. 1953, 1963 Supplement, which is a part of the pre-need law, is as follows:

This act shall not apply to or affect the operations and business of duly licensed associations or companies under the insurance laws of the State of Utah.

The legislature recognized that there were organizations which were under the insurance laws but it would appear that it felt that the pre-need arrangements were different and that they should come under the provisions of the special pre-need statute. The statute was tailored for those situations in which individuals might wish to arrange for and pay for at least part of the cost of a funeral prior to the actual need.

See the case entitled *Barveler vs. Oregon Physician's Service*, 194 Ore. 659, 243 P.2d 1050 (1952) in which case the Court found the hospital association not subject to the provisions of the general insurance code inasmuch as hospital associations were covered under a separate statute. Such is the case here.

CONCLUSION

There exists no justiciable issue between the Plaintiff and Memorial Gardens of the Valley, Inc.

The "Family Security Agreement" is not an insurance policy and does not come under the jurisdiction of the Insurance Department of the State of Utah. The pre-need law passed by the legislature is unconstitutional and void. It is an attempt to stifle and prevent a legitimate and much needed service to the public.

The Court should affirm the decision of the lower Court and declare Section 22-4-1 to 7, U.C.A., (1963 Sup.) unconstitutional and void.

Respectfully submitted

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