

1965

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

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 simi-
larly 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 Commis-
sion of the State of Utah; and VIRGIL L. NOR-
TON, Commissioner of Insurance of the State
of Utah, *Defendants-Respondents.*

Case No.

10236

BRIEF OF RESPONDENTS, 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

Appeal From the Judgment of the Third District Court
for Salt Lake County, Utah
Honorable 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,

Plaintiffs-Appellant,

vs.

MEMORIAL GARDENS OF THE
VALLEY, INC., a Utah corporation;
MEMORIAL TRUSTS, INC., a Utah
corporation; LAKE HILLS, a Utah
corporation; AULTOREST MEMOR-
IAL CORPORATION; a Utah cor-
poration; HAL S. BENNETT, DON-
ALD HACKING and RAYMOND W.
GEE, members of the Business Reg-
ulation Commission of the State of
Utah; and VIRGIL L. NORTON,
Commissioner of Insurance of the
State of Utah,

Defendants-Respondents.

Case No.

10236

BRIEF OF RESPONDENTS 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

Said defendants-respondents will be referred to in this
brief as the Public Officer Defendants.

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 Pre-Arranged Funeral Plans 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.

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 Utah Code Annotated 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-Arranged Funeral Plan law in Title 22, Chapter 4, *supra*; and (b) whether or not there was a justiciable issue between the plaintiffs and the defendants 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 court is respectfully referred 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

The public officer defendants seek a clarification of the laws of the State of Utah involved in this controversy.

STATEMENT OF FACTS

The facts in this case are set forth under the heading
DISPOSITION IN THE LOWER COURT.

ARGUMENT

Inasmuch as briefs of the appellants and other respondents in this action will cover all of the points in issue, the public officer defendants, in order to avoid repetition, will limit their argument to the following points:

POINT I.

THE PROVISION IN THE CONTRACT USED BY DEFENDANT MEMORIAL TRUSTS, INC., WHICH PERMITS SAID DEFENDANT TO RECEIVE THE EARNINGS OF THE TRUST FUND ESTABLISHED PURSUANT TO SECTION 22-4-4, UTAH CODE ANNOTATED 1953, IS NOT IN VIOLATION OF SAID SECTION 22-4-4.

Section 22-4-4, Utah Code Annotated 1953, reads 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, provided that said funds plus all in-

terest and earnings shall be released to the payor originally paying said funds under the purchase agreement, and said payor shall be entitled to receive the same or any part thereof, at any time prior to the death of any beneficiary, upon demand upon said bank or trust company, and upon surrender of any pass book evidencing same."

Paragraph IV of the contract used by defendant, Memorial Trusts, Inc., provides that the funds received from the purchaser shall be placed in trust, and then contains the following provision (R. 9) :

"* * * The Memorial Purchaser hereby revocably appoints Memorial Trusts, Inc. as agent to demand and receive earnings of the trust funds 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 increases. The Memorial Purchaser agrees upon request to make such demand personally and pay said earnings to Memorial Trusts, Inc., if for any reason such earnings are not so made available to Memorial Trusts, Inc., as a part of its general funds. * * *"

The public officer defendants serving as the Business Regulation Commission of Utah have interpreted the above provision as not being in violation of Section 22-4-4. The basis for this interpretation is that Section 22-4-4 permits the purchaser to withdraw the trust funds and the interest and earning thereon at any time prior to the death of the beneficiary upon the surrender of his passbook, and there is nothing in the law which prohibits the purchaser from appointing an agent to receive said funds, particularly

since the appointment as agent is revocable. In effect, the purchaser retains control over the trust funds.

POINT II.

THERE IS UNCERTAINTY AS TO WHETHER OR NOT THE PRE-NEED CONTRACTS SOLD BY DEFENDANTS-RESPONDENTS ARE INSURANCE CONTRACTS, AND SUBJECT TO THE INSURANCE LAWS OF THE STATE OF UTAH.

There is some uncertainty in the minds of the public officer defendants as to whether the contracts of the corporate defendants should be regulated under the Pre-arranged Funeral Plans law of the State of Utah or under the State's insurance laws. Obviously there would be no need for a Pre-arranged Funeral Plans law if all pre-need contracts were subject to regulation as insurance contracts. It appears, however, that the Legislature contemplated that some contracts of this type would constitute insurance, as Section 22-4-6, Utah Code Annotated 1953, of the Pre-arranged Funeral Plans Act, reads 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.”

While there is some division of authority as to whether or not contracts for future burial expenses constitute insurance, it appears that the majority of cases hold that they are insurance contracts. It is stated in Appleman on *Insurance Law and Practice*, Vol. 1, page 29, that:

“Often a group of people will band together and provide for the regular payment from each of them of a small premium, or else provide for a small assessment from each one upon the death of any member, to pay the burial expenses of any person in that group. Often such associations are started by enterprising undertakers, who themselves often undertake to provide the necessary burial services, perhaps agreeing in advance to undertake them for a stipulated price. These contracts have come frequently before the courts for construction. The almost uniform tendency of the courts has been to hold that they constitute life insurance, and as such, the organization not having been licensed or approved by the Insurance Commissioner, the entire scheme, and, necessarily, the individual contracts, are void.”

In the annotation on the subject in 63 A. L. R., page 723, it is stated :

“While the authorities are not agreed as to whether or not a contract for payment of burial expenses is in the nature of an insurance contract, the majority of the cases answer this question in the affirmative, and regard the contract as one of insurance. * * *”

Section 31-1-7, Utah Code Annotated 1953, defines insurance 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.”

As pointed out on pages 22 and 23 of appellants’ brief, all of the contracts of defendants contain certain similari-

ties. They promise to deliver, at some unknown future date, or on demand, certain funeral merchandise as yet unidentified, and funeral services at the time death occurs.

From the foregoing definition of insurance, it appears that the contracts of defendants contain the elements described in the definition, except possibly the element of "spreading the risk over the group," which Justice Crockett said was a necessary element of insurance in his concurring opinion in *In re Clark's Estate*, 10 U. 2d 427, 354 P. 2d 112, 119. Also see *Helvering, Commissioner of Internal Revenue v. LeGierse et al., Executors*, 312 U. S. 531, 539, 61 S. Ct. 646, in which the United States Supreme Court said:

"Historically and commonly insurance involves risk-shifting and risk-distributing. * * *"

It is noted that the contracts of defendants provide that if the purchaser dies before having paid his contract in full, the full purchase price must be paid, or arrangements made for its payment, before the merchandise or services contracted for are furnished. Thus, there is no sharing of risk as there is in the usual insurance contract. There is, however, an element of risk in that the defendants do promise to furnish the merchandise and services contracted for at the contract price, regardless of possible future price increases.

There are a number of cases in which the contention has been made that the benefits of the contract may be taken before the death of the purchaser and are, therefore, not contingent upon death. In *South Georgia Funeral*

Homes, Inc., et al. v. Harrison, 184 S. E. 875, the defendant, sold option contracts in which he agreed, for the sum of \$12.00 per year, to sell the optionee certain articles of merchandise and funeral services at a special cash price. The contract also provided that it could be renewed and extended by mutual consent of the parties from time to time at the rate of \$1.00 per month, and that the optionees were not bound to exercise the option but were free to purchase the merchandise and services elsewhere. In holding that the contract was a contract of insurance, the court said:

“The option contract is an agreement on the part of the ‘optionor’ to sell certain enumerated articles and services ‘for the use of, or in connection with, said optionees and their minor children and other dependents, any or all of them.’ While the exercise of the option is not expressly made contingent upon the death of any of them, the merchandise and 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 direction, 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 the use of, a person who has departed life. For these reasons we are of the opinion that the exercise of the option is contingent upon the death of the ‘optionees,’ their minor children or dependents.

“The option contract provides that the ‘optionee’ upon the exercise of the option shall have the right to buy from the ‘optionor’ certain merchandise and services at cost plus certain additional

charges. This reduction in price is a benefit or something of value to the 'optionee.' Under the rulings in *Benevolent Burial Association v. Harrison*, 181 S. E. 829, section 56-901 of the Code of 1933, which provides that 'a life insurance policy is a contract by which the insurer, for a stipulated sum, engages to pay a certain amount of money if another shall die within the time limited by the policy. The life may be that of the insured or of another in the continuance of whose life the insured has an interest,' is not exhaustive as to the medium of payment. 'Nor is it essential that loss, damage, or expense indemnified against necessarily be paid to the contractee. It may constitute insurance if it be for his benefit and a contract on which he, in case of a breach thereof, may assert a cause of action. * * *' From these rulings it follows that the option contract is an insurance contract upon the life of the 'optionee,' his minor children and dependents."

See also *State v. Mynatt* (Tenn. 1960) 339 S. W. 2d 26; *State v. Smith Funeral Service* (Tenn. 1940) 145 S. W. 2d 1021.

In the case of *State v. Globe Casket & Undertaking Co.*, 143 Pac. 878, the Supreme Court of Washington said:

"* * * Its business is confined solely to the sale of the certificates named in its articles, and the performance, through the agency of others, of the obligations assumed thereby. These certificates are in two forms. In the one the corporation agrees, on the death of the holder, 'to take charge of the burial of said holder, and provide the necessary furnishing and materials therefor to the value of one hundred (\$100) dollars, as follows: One black broadcloth, white or colored plush casket; one out-

side box for casket; one hearse; two carriages; one burial robe; necessary embalming; necessary accessories; and services of funeral director.' The other is similar in form, with the exception that it does not name the value of the furnishings, and provides that the corporation will take charge of the funeral of the holder 'on the surrender of this receipt,' and will furnish the hearse and two carriages in places only where they are obtainable. Sales of the certificates are made through the agency of solicitors on the installment plan. * * *

"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 promise 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 estate of the decedent, his relatives, or the state. * * *"

For similar holdings, see *Sisson v. Prata Undertaking Company*, (R. I. 1928) 141 A. 76; *State v. Stout* (Tenn. 1933) 65 S. W. 2d 827; *Renschler v. State* (Ohio 1914) 107 N. E. 758. Annotations and additional case citations on the subject are contained in 63 A. L. R. 711, 723; 68 A. L. R. 1525; 100 A. L. R. 1449; 119 A. L. R. 1241.

In conclusion, the public officer defendants are uncertain as to whether or not the pre-need contracts involved in this matter are insurance contracts and subject to regulation under the insurance laws of the State. It appears

to said defendants, however, despite many decisions to the contrary, that said contracts lack a sharing of the type of risk necessary to constitute insurance. It further appears to said defendants that if said contracts provided that the merchandise and services contracted for would be furnished to the purchaser without payment in full of the contract price if the purchaser should die prior to having paid the complete price, that such a "sharing of the risk" element would be present as to make such contracts insurance contracts.

POINT III.

THAT THE PREARRANGED FUNERAL PLANS ACT (SECTIONS 22-4-1, 22-4-2, 22-4-3, 22-4-4, 22-4-5 and 22-4-7, UTAH CODE ANNOTATED 1953) IS CONSTITUTIONAL.

The corporate defendant-respondents contend that the Pre-arranged Funeral Plans law (Sections 22-4-1 through 22-4-7, Utah Code Annotated 1953) is unconstitutional in that it violates Article I, Sections 1 and 7, of the Constitution of Utah, and the Fourteenth Amendment of the Constitution of the United States. The public officer defendants maintain that said Act is constitutional and within the police power of the State.

The Pre-arranged Funeral Plans law provides, among other things, that all funds received in payment of contracts for the furnishing in the future of funeral services of merchandise in connection with the funeral are trust funds which must be deposited in a bank or trust company.

Such funds, however, may be released, including any earnings or interest, to the payor originally paying said funds under the purchase agreement. (Section 22-4-4, Utah Code Annotated 1953, *supra*). It is apparently the position of the other defendant-respondents that these requirements attempt to prohibit or confiscate their business under the guise of regulation.

The question of the constitutionality of statutes similar to Utah's Pre-Arranged Funeral Plans law has come before the courts several times in recent years, and it appears that the majority of decisions have sustained their constitutionality. Rather than set forth in this brief the lengthy arguments and reasoning found in these cases, the court's attention is directed to the case of *Reserve Vault Corporation, et al., v. Clint Jones, et al.*, 356 S. W. 2d 225, which was decided in 1962 by the Supreme Court of Arkansas, and which reviews completely the constitutional questions pertaining to prearranged funeral plan laws. This case also quotes extensively from the frequently cited cases of *Memorial Gardens Association, Inc., v. Smith* (Ill. 1959) 156 N. E. 2d 587, and *Falkner v. Memorial Gardens Association* (Tex. 1957) 298 S. W. 2d 934. It also quotes from the excellent dissenting opinion found in *State v. Memorial Gardens Development Company* (W. Va. 1958) 101 S. E. 2d 425, 68 A. L. R. 2d 1233, which case held unconstitutional a statute similar to Utah's.

One of the arguments advanced for upholding statutes similar to Utah's Pre-Arranged Funeral Plans Act as a proper exercise of the police power of the State is the possi-

bility of fraud in prearranged funeral contracts. This possibility is graphically illustrated by the following quotation from *State v. Mynatt* (Tenn. 1960) 339 S. W. 2d 26:

“A very important reason for the enactment of such legislation as we have is shown by the case before us. The defendant concedes that during the last 20 years he has issued some 35,000 of these contracts, and the record does not show how many of the contracts are now in force and effect, but it is obvious that the potential liability is tremendous.

“Let us assume that all 35,000 contracts are now in force and effect and that the personal representatives of each contract should demand a \$500 funeral. The value of 35,000 funerals would amount to \$17,500,000. Of this sum the defendant, by reason of the 50% discount provision, would be liable for \$8,750,000.”

CONCLUSION

The public officer defendants-respondents respectfully submit that the Pre-arranged Funeral Plans law of the State of Utah does not prevent a purchaser of a pre-need funeral contract from appointing the seller as his agent to withdraw and keep the interest or earnings from the funds held in trust under the provision of Section 22-4-4, Utah Code Annotated 1953; that it appears to said defendants that the pre-need contracts involved in this controversy are not insurance contracts and are not subject to regulation by the Utah Commissioner of Insurance; and that the Pre-arranged Funeral Plans law (Sections 22-4-1 through 22-4-7, Utah Code Annotated 1953) is constitutional.

Respectfully submitted,

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