

1965

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

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 UNION MORTUARY COMPANY, a Utah corporation, on its own behalf and on behalf of others similarly situated,

*Plaintiffs-Appellants,*

—vs.—

MEMORIAL GARDENS OF THE VALLEY, INC., a Utah corporation; MEMORIAL TRUSTS, INC., a Utah corporation; LAKE HILLS, 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,

*Defendants-Respondents.*

Case No.  
10236

## BRIEF OF DEFENDANT-RESPONDENT MEMORIAL TRUSTS, INC.

Appeal from the District Court of Salt Lake County, Utah  
Honorable Stewart M. Hanson, *Judge*

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# In the Supreme Court of the State of Utah

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*Plaintiffs-Appellants,*

—vs.—

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*Defendants-Respondents.*

Case No.  
10236

## BRIEF OF DEFENDANT-RESPONDENT MEMORIAL TRUSTS, INC.

Since the primary target of this action was defendant-respondent Memorial Trusts, Inc., herein called Memorial Trusts, this brief on its behalf will be directed primarily to the controversy between that corporation and plaintiffs-appellants, herein called plaintiffs.

### NATURE OF THE CASE

This was an action for declaratory judgment, in which plaintiffs asked the court to determine that the contracts of Memorial Trusts, for pre-arranged funeral plans, and the conduct and practices utilized in the sale thereof, were illegal because they conflicted with applicable Utah Statutes.

## DISPOSITION IN THE LOWER COURT

The trial court denied plaintiffs' motion for summary judgment, concluding that the facts failed to establish that the contracts in question were illegal or that the conduct and practices utilized in the sale thereof were in violation of law and, by its Amended Judgment of Dismissal (R. 44-48), the court granted defendants' motion to dismiss the complaint upon the further ground that certain portions of the Pre-Arranged Funeral Plan statutes, Title 22, Chapter 4, Utah Code Annotated, 1953 (1963 Supplement) are unconstitutional.

## PRELIMINARY STATEMENT

In plaintiffs' brief, each of the corporate defendants is mistakenly pictured as engaging in essentially the same business conduct, dealing in essentially the same products and services and offering prospective purchasers essentially the same pre-need contracts as are each of the others. However, a review of the contracts and practices of each readily reveals their dissimilarities. (R. 8, 12, 19-20, 35, 39-41).

Therefore, since the contracts and business practices of Memorial Trusts differ in most respects from those of the other corporate defendants, we outline in this Statement of Facts the evidence as it applies to Memorial Trusts only and upon which the lower court largely based

its Amended Judgment of Dismissal. No attempt will be made to discuss or compare the contracts or business practices of, or the law applicable to, the other corporate defendants.

## STATEMENT OF FACTS

Memorial Trusts is a Utah corporation engaged in selling to the public, in advance of need, contracts for the furnishing of specified funeral and burial services and related items of personal property at fixed and presently determinable prices which remain stable, regardless of future price increases in the industry. Sale of its contracts is made by means of advertising and personal contact upon reference from person to person. Its contracts are not sold by door-to-door solicitation. (R. 17)

Memorial Trusts is not a funeral director or embalmer nor does it carry on any activities related to such professions. Rather, it merely agrees

“to furnish a casket . . . and to cause a completed funeral to to be conducted (regardless of future price increases) and including the articles of professional services and facilities described [in the contract] below for the final rites of the funeral purchaser, such services to be performed by a mortuary selected by the Funeral Purchaser . . .” (R. 19, paragraph I).

Further, it is agreed between Memorial Trusts and the purchaser that

“Memorial Trusts, Inc., *as agent for the Funeral Purchaser* will make firm arrangements with a mortuary *selected by the funeral purchaser*. If a selected mortuary has not accepted the arrangements before the time of the death of the Funeral Purchaser, or if the Funeral Purchaser’s survivors use a mortuary other than one with which the firm arrangements have been made, then Memorial Trusts, Inc., may either make arrangements at the time of death with the mortuary used for like services or may furnish a casket of the quality described (or refund Memorial Trusts’ costs thereof) and refund the sum of \$250.00 to the survivors in lieu of the funeral services described above, or may refund all sums paid hereunder to the survivors.” (Emphasis added.) (R. 19, paragraph V).

With regard to payments made under the contract, it is provided that

“the funds to be paid hereunder and the net earnings and gains, if any, thereon (altogether constituting the price of this agreement) shall be held and disposed of in accordance with the laws of Utah, from time to time in effect, which now provide that Memorial Trusts, Inc., shall deposit such funds as trustee with a bank or trust company. The Funeral 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 Funeral Purchaser agrees upon request to make such demand personally and pay said earnings to Memorial Trusts, Inc. (Emphasis added.) (R. 19, paragraph IV).

Memorial Trusts has made no claim that funds received by it under its contracts are not subject to the entrusting provisions of the Utah pre-need law and it is conceded that all funds received by it are, in fact, placed in trust as provided by that law. (R. 35)

"The contract also provides that:

"In the event of the death of the Funeral Purchaser before the sums provided for herein are paid in full, Memorial Trusts, Inc., agrees to perform this agreement upon payment of the balance remaining due or supplemental arrangements made therefor." (R. 19, paragraph VI.)

The contract permits the purchaser to withdraw at any time all sums paid to Memorial Trusts under the contract, and thereby terminate all liabilities and obligations thereunder. (R. 19, paragraph VII). Further, even in case of a default in the payments, the purchaser, upon making a timely request, receives a credit in the amount paid toward funeral costs at a selected mortuary or toward a new Memorial Agreement (R. 19, paragraph VIII).

The purpose and effect of the contract thus offered by Memorial Trusts is to permit the purchaser to make an unhurried, reasoned selection of the funeral and burial services and facilities which are to be used upon his death after having calmly taken into account his own desires, the prices to be paid and the effect upon his estate and upon his survivors of each of the various available alternatives.

By making his own selection and his own arrangements in advance of need, and by this means fixing the price in advance as well, a purchaser is able to spare his widow or other survivors many of the dreary and difficult tasks of arranging the numerous details of his funeral and burial. Further, and perhaps most important, a purchaser of such a contract is able, calmly and with deliberation, to select funeral arrangements within his means, secure in the knowledge that his widow and family will not, under the pressure of deep grief, succumb to the very human tendency to provide a lavish funeral service and casket as an expression of their bereavement. The purchaser, moreover, is able to pay for all or part of the funeral costs in advance, and thus relieve his survivors of this substantial financial burden.

Realistically speaking, a plan offering greater benefits and services to a funeral purchaser and his survivors, with less risk of loss, would be difficult indeed to conceive.

## ARGUMENT

### POINT I

THE LOWER COURT PROPERLY RULED THAT A FUNERAL DIRECTOR OR EMBALMER WHO PERFORMS SERVICES OR FURNISHES FACILITIES PURSUANT TO A PRE-NEED CONTRACT PREVIOUSLY SOLICITED AND SOLD BY MEMORIAL TRUSTS IS NOT GUILTY OF UNETHICAL OR UNPROFESSIONAL CONDUCT WITHIN THE MEANING OF SECTIONS 58-9-10 and 58-9-22, U.C.A., 1953, AND THEREBY SUBJECT TO REVOCATION OF LICENSE.

U.C.A., 1953, Sections 58-9-10 and 58-9-22, related to unlawful solicitation by licensed funeral directors and embalmers, provide in pertinent part as follows: (All emphasis added.)

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 \* \* \* 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.

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

(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 human 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."*

These two sections of the Funeral Directors' Act were designed to eliminate the unseemly race for dead human bodies and the many other flagrant abuses and fraudulent practices which were once so widespread in the

unregulated climate of an earlier period. See Section 58-9-13, which sets forth the policy of the law. To this end, these sections prohibit solicitation activity initiated by and for the direct benefit of a particular mortuary establishment, funeral director or embalmer, whether acting in person or through “agents, assistants or employees.” Similarly they prohibit employment of persons to steer funeral business to them and the “buying of business” by a “licensee, his agents, assistants or employees” by means of a “direct or indirect payment or offer of payment of a commission, bonus or gift.”

The activities and practices proscribed by these sections are set forth clearly and in detail. And no reasonable extension of the quoted language will support plaintiffs’ contention that a person or firm which performs embalming or funeral services, under a pre-need contract solicited by Memorial Trusts, is guilty of conduct proscribed as unprofessional by those sections of the law.

Under the contract now sold by Memorial Trusts the services contracted for are “to be performed by a Mortuary selected by the Funeral Purchaser,” provided Memorial Trusts is able to make firm arrangements with that mortuary “before the death of the Funeral Purchaser.”

Under this contract Memorial Trusts does not act as an “agent, assistant or employee” of any “particular

mortuary establishment, funeral director or embalmer." The mortuary used is selected by either the purchaser or his survivors, since the contract gives Memorial Trusts no right of mortuary selection. Once the selection is made, it then becomes the task of Memorial Trusts, "as agent for the Funeral Purchaser," to present the contract to the mortuary selected for its acceptance or rejection. However, in soliciting the contracts it acts as agent for itself only, it being at no time either employed, directed or controlled in any degree whatever by any mortuary, funeral director or embalmer.

Such a contract, and the practices followed in its sale and performance, conform to the legislative policy found in Section 58-9-13 and provide a sensible, dignified and thrifty method by which to solve, in advance of need, the universal problem of a proper funeral at a proper price.

If the Legislature had intended to prohibit sale of such contracts by organizations such as Memorial Trusts, it could easily have done so but, instead, the language employed in these statutes clearly limits their effect.

Significantly, plaintiffs' brief alleges no facts upon which it may properly be claimed that Memorial Trusts has engaged in any conduct prohibited by the statutes, nor does the record in this case contain any factual basis for a finding that a mortuary which accepts and per-

forms the obligations of a contract sold by Memorial Trusts has, by such acceptance and performance, violated the law.

The contention, made at pages 14-16 of plaintiffs' brief, that when a mortuary agrees to perform as provided in a pre-need contract, the corporate defendant which sold the contract becomes the agent by ratification of the mortuary, cannot apply to the contract of Memorial Trusts. As the cases and authorities relied upon to support that contention readily show, they deal with the wholly dissimilar situation where acts are "professed to be done" on the principal's account by "one not assuming to act for himself," but which acts the principal later ratifies.

In contrast to the foregoing, the contract of Memorial Trusts, as noted above, leaves the mortuary selection entirely in the hands of the purchaser and/or his survivors, and reserves no such right to Memorial Trusts. The arrangements with the mortuary of the purchaser's choice are then made by Memorial Trusts, not as agent of the mortuary, but, rather, "as agent for the Funeral Purchaser" (R. 19).

Certainly the purchaser himself is permitted to contact a mortuary of his choice and make such arrangements in advance of need without violating the above

statutes related to unlawful solicitation. Similarly, these same arrangements are permitted to be made by the purchaser's agent whether it be his wife, his friend, his employee or Memorial Trusts.

Memorial Trusts neither acts, nor assumes to act, nor has had authority to act as the agent of any mortuary. It acts only on its own behalf and on behalf of persons who purchase its contracts.

Unsupported allegations of mere legal conclusions may not be substituted for facts or evidence, especially where, as here, no attempt whatever was made by plaintiffs to introduce evidence in support of their reckless and unfounded suspicions of pre-existing agreements which did not in fact exist. The lower court properly ruled that it could not assume a violation of law merely because plaintiffs allege it, particularly where the allegation is, as in paragraph 12 of plaintiffs' complaint, base solely on *belief* and does not even reach the precarious foundation of "information and belief," and the record itself showed a full compliance with applicable statutes.

Plaintiffs' first ground of summary judgment, therefore, failed and was properly denied.

## POINT II

THE LOWER COURT PROPERLY RULED THAT THE PRE-NEED CONTRACT OF MEMORIAL TRUSTS, AS ATTACHED TO ITS ANSWER AS EXHIBIT A, WHICH PERMITS MEMORIAL TRUSTS, AS REVOCABLE AGENT OF THE PAYOR, TO WITHDRAW EARNINGS FROM TRUST DOES NOT VIOLATE THE PROVISIONS OF SECTION 22-4-4, U.C.A., 1953 (1963 Supp.)

Section 22-4-4, U.C.A., 1953 (1963 Supp.) governs withdrawal of entrusted funds and provides that:

“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 interest 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.*” (Italicized portion was not quoted in appellants’ brief, p. 19-20.)

This statute does not require that the trust earnings “can’t be withdrawn” as the plaintiffs claim, but rather that they may be released to the payor at any time, on demand and surrender of the pass book.

There can be no doubt that under the above statute the right to control the earnings and interest of the trust rests in the contract purchaser—the payor. This being so, there can be no valid objection to the provision in paragraph IV of the contract of Memorial Trusts, where in the payor

“ . . . *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 . . . to guarantee the services and facilities . . . regardless of future price increases. The Funeral Purchaser agrees upon request to make such demand personally and pay said earnings to Memorial Trusts, Inc.” (R. 19) (Emphasis added.)

Nothing in the above statute nor in general law prohibits such disposition of an individual's property right by him or under his direction. Nor does any statute or principal prohibit a person from designating an agent to act on his behalf in the manner provided in this contract.

“Any person who is *sui juris* and has capacity to affect his legal relations by the giving of consent to a delegable act or transaction, may authorize an agent to act for him with the same effect as if he were to act in person.” 3 Am. Jur. 2d 424 (Agency, Section 9).

Where, as here, the appointment as agent extends only to the earnings of the trust (and not to withdrawal of "all funds, including earnings" as alleged by plaintiffs) and where such appointment can be revoked by the payor at any time, there is no possibility that the principal fund, out of which the services and facilities provided by the contract are to be paid, will be dissipated or unavailable when required.

If Section 22-4-4 were construed to prohibit or preclude withdrawal of earnings in this manner, it would be unconstitutional as an unlawful prohibition of a lawful business under the guise of regulation and an unnecessary, arbitrary and unreasonable restraint upon the right of all persons to make contracts and deal with their own properties. The constitutional aspects of the Utah pre-need law, Sections 22-4-1 to 7, will be discussed more fully under Point IV, *infra*, but it is important here to recall that one of man's basic rights, under our system of freedom and law, is the right to acquire, use and dispose of property. As stated by the Supreme Court of Utah, in *Ritholz v. Salt Lake City Corporation* (1955), 3 Utah 2d 385, 284 P. 2d 702:

"Clearly among the rights attendant upon ownership and enjoyment of property are the rights to exchange, pledge, sell or otherwise dispose of it—rights which must be adequately protected."

It will be noted that in the brief of the defendant Commissioners, the Attorney General concedes that the Commissioners (after a thorough review of this question, following conferences with representatives of plaintiffs and of Memorial Trusts) concluded that it had no objection to the business activities of Memorial Trusts in this respect.

Plaintiffs again have alleged no fact upon which to ground their attack upon the contract of this defendant. Again, merely to allege that a contract is improper does not make it so and plaintiffs' second demand for summary judgment was therefore properly denied.

### POINT III

THE LOWER COURT PROPERLY RULED THAT THE PRE-NEED CONTRACT OF MEMORIAL TRUSTS IS NOT A CONTRACT OF "INSURANCE," SO AS TO REQUIRE SUBMISSION TO AND COMPLIANCE WITH THE UTAH STATUTES AND REGULATIONS WHICH APPLY TO INSURANCE COMPANIES.

Plaintiffs' contention that Memorial Trusts' pre-need funeral contract is a "contract of insurance," requiring Memorial Trusts to qualify as an insurance company, is not supported by either the statutory or the generally accepted definition or the basic concept of insurance and,

hence, cannot have the effect urged by plaintiffs. Moreover, as will be shown hereafter, the Utah pre-need funeral law itself negatives any such contention.

As is stated by the United States Supreme Court in *Helvering v. LeGierse* (1940), 312 U.S. 531 at 539:

“Historically and commonly insurance involves risk-shifting and risk-distributing. That life insurance is desirable from an economic and social standpoint as a device to shift and distribute risk of loss from premature death is unquestionable. That these elements of risk-shifting and risk-distributing are essential to a life insurance contract is agreed by courts and commentators.”

Typical of many state cases in which this same principle has been restated and applied are *In re Barr's Estate* (Calif., 1951), 231 P. 2d 876; *In re Smiley's Estate* (Wash., 1950), 216 P. 2d 212, and *South Georgia Funeral Homes, Inc. v. Harrison* (Ga., 1936), 188 S.E. 529. In the latter case the court applied the principle of risk-shifting and risk-distribution to pre-need funeral contracts in the following terms:

“... 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.”

The conclusions drawn above were referred to by Justice Crockett in his concurring opinion in *In re Clark's Estate* (Utah, 1960), 10 Utah 2d 427, 354 P.2d 112, in which he was joined by Justice McDonough. In that opinion he noted at page 118-119 that :

“ . . . the important and controlling fact [is] that the financing institution, Equitable, incurred no risk of loss in the event of Mr. Clark's death. It was obliged to pay nothing except to refund the payments he has made . . . plus interest thereon. . . . From the facts above discussed it seems quite unmistakable that the contract . . . does not have the characteristics to properly classify it as a contract for life insurance.

“ ‘Insurance’ is an agreement that, for a premium it receives, the insurer will pay to the beneficiary a stated sum upon the happening of a contingency such as death or other loss. It

involves risk on the part of the insurer to pay on the happening of the contingency and the spreading of the risk over the group who pay the premiums. Or, as is sometimes stated, 'insurance involves risk-shifting and risk-distributing.' ”

The concurring opinion concludes with this approving reference to a decision of the Supreme Court of New Jersey (*In Re Atkin's Estate* 18 A.2d 45) in an annuity case:

“The court placed emphasis on the fact that . . . the company assumed no risk of loss by reason of the premature death of the annuitant, and that its only risk was in case . . . [he] lived longer than expected. It reasoned in accordance with the views expressed above that because there was no risk-shifting or risk-distributing . . . but simply a return of the accumulated payments upon the death of the employee, that the fund was not life insurance. The Supreme Court of the United States similarly reasoned to the same conclusion in the case of *Helvering v. LeGierse*.”

After the *Clark* case was decided, the Utah Legislature, in 1963, changed the definition of “insurance” to include the concept of “risk.” Formerly, the statute provided that insurance was “. . . a contract whereby one undertakes to pay indemnity or pay a specified amount upon determinable contingencies,” but the 1963 amendment added the word “risk” to the last phrase,

so it now reads “. . . upon determinable *risk* contingencies,” Section 31-1-7, U.C.A., 1953, (1963, Supp.). (Emphasis added.)

The addition of the word “risk” to the statute, which plaintiffs have completely overlooked in their brief, makes even more compelling the conclusion that the risk features must be present in any contract for it to constitute insurance.

Applying the principle of the authorities above cited to the contract issued by Memorial Trusts, it is apparent that it cannot be properly classified as insurance. The following features of that contract are particularly illustrative of the point:

1. The contract price to be paid by the purchaser, although payable in installments if the purchaser chooses, is, nonetheless, fixed in amount. In the event any balance on the contract remains unpaid at the death of the purchaser or the person for whom the services are to be performed, the services contracted for will be performed only “upon payment of the balance remaining due” or upon “supplemental arrangements” being made for such payment. Thus, the contract contains no “forgiveness” feature whereby Memorial Trusts assumes a risk of incomplete payment because of premature death. The amount due Memorial Trusts under

each contract, either from the purchaser, his estate or from others, is fixed when the contract is entered into just as with any installment contract.

2. The contract is fully revocable, at any time while it is in effect, at the opinion of the purchaser, in which event *all* amounts paid by him under the contract must be refunded to him.

3. The contract requires Memorial Trusts to place in trust *all* funds received from the purchaser, it being entitled to no solicitation expenses or commissions of any kind whatever from that fund until the services contracted for have been performed. In the meantime, the earnings received from the trust constitute the compensation to Memorial Trusts for guaranteeing the services regardless of future price increases.

Thus, insofar as Memorial Trusts is concerned, each individual contract stands on its own so that all services offered by Memorial Trusts at any given time are equally available to any would-be purchaser at the same prices, regardless of the age, condition of health, financial status or moral qualifications of the purchaser or the person for whom the services are to be furnished. In this connection it is important to note that Memorial Trusts neither uses nor has need to use mortality tables, risk percentage calculations, physical examinations or

signed health application forms which are so common in the insurance field. Instead, the same services are available to all takers at the same prices.

4. By virtue of Section 22-4-5, "any balance remaining not otherwise disposed of . . . in payment for merchandise or services" as provided in the pre-need contract ". . . shall revert to and inure to the benefit of the estate of said deceased payor. . . ." thus precluding any possible "risk" as to the amount of gain, if any, on even that possible small surplus.

When and if the contract matures, Memorial Trusts is entitled to its commission and profit, and in the meantime, for so long as the contract remains in force, Memorial Trusts is entitled to the earnings from the trust. Therefore, it makes no difference as to any contract whether death comes early or late. These contracts contain none of the risk-shifting or risk-distributing features of insurance contracts. Each is a separate, self-contained unit with no risk ties to any other.

The cases and authorities cited in plaintiffs' brief as supporting their contention that pre-need contracts constitute insurance are not applicable to the contract of Memorial Trusts. Each of those cases and authorities either deals with a situation in which the risk-distributing, risk-shifting features are clearly present or they

rely upon cases in which those elements were dominant. None of them have analyzed in detail nor involved a contract such as that sold by Memorial Trusts.

Apparently the most recent case to decide this question is *Messerli v. Monarch Memory Gardens* (Idaho), 397 P.2d 34, decided November 25, 1964. In that case the contracts under challenge permitted the purchaser to have any balance of the purchase price which remained unpaid upon his death paid from proceeds of credit life insurance, but only until the purchaser reached 65 years of age and only so long as he remained in "good health." The contract also obligated the seller to provide an interment space for any of the purchaser's four grandchildren in the event they died before reaching age 21.

The statutory definition of insurance in Idaho, Idaho Code Section 41-102, is identical to Section 31-1-7, U.C.A. 1953 (1963 Supp.).

Notwithstanding these provisions in that contract which distinguish it from and which make it more like insurance than, the contracts sold by Memorial Trusts, the Idaho court held, in a majority opinion by Justice McFadden, that the contract was not a contract of insurance but, rather, a contract for the purchase of services and merchandise, with delivery postponed until after death. The court there, in so ruling, carefully out-

lined the features which distinguish a contract of insurance and noted, as we have above, that the cases and authorities in which pre-need contracts have been held to be insurance are distinguishable from the facts of the present case which do not involve the elements of risk-shifting and risk-distributing.

Quite apart from the foregoing, the conclusion that these contracts do not constitute insurance is compelled by the pre-need funeral law itself. It will be noted that in plaintiffs' motion for summary judgment, this Court is requested to declare that any:

“... pre-need contract which guarantees funeral services at a future date at a set price regardless of increase or decrease in price is an insurance contract.” (R. 32)

This request must be compared with the language of Section 22-4-1 (1963 Supp.) which sets out the scope of activities which are governed by the Utah pre-need funeral law as follows:

“... any payment of money made to any person, firm or corporation upon any agreement or contract . . . which has for a purpose the furnishing or performance of funeral services, under a pre-arranged funeral plan . . . for future use at a time determinable by the death of the person or persons for whose benefit any such agreement has been made . . . shall be held to be trust funds. . . .”

and their receipt, deposit and use are governed by the remaining provisions of Chapter 4, Title 22.

As is readily apparent from the quoted excerpts, the plaintiffs seek to have regulated as "insurance" all of the plans, persons and practices which are necessarily already included within the scope of the pre-need funeral law. However, there is no need and no reason for qualification under, and compliance with, both the pre-need law and the insurance code at the same time. In recognition of this fact Section 22-4-6 (1963 Supp.) of the pre-need law provides:

"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."

Were all pre-need funeral contracts to be treated as insurance contracts and required to comply with the State Insurance Code, as the plaintiffs so strongly contend, the pre-need law itself would be rendered meaningless because there would remain nothing to which it would apply, in view of the exclusion contained in Section 22-4-6 for duly licensed insurance companies and associations. This simply cannot have been the intent of the Legislature, which went to the trouble of enacting a special law for a special kind of contract.

Under the construction urged by Memorial Trusts, only true insurance companies which have complied with the insurance code and which coincidentally deal in some fashion with pre-need funeral plans and arrangements would be excluded from the operation of the pre-need funeral law. Compliance with the insurance laws as an insurer is sufficient protection of the public interest without requiring compliance with the pre-need law in addition. This arrangement leaves the great majority of pre-need funeral contracts fully regulated under the pre-need funeral law, as they should be and as the Legislature obviously intended them to be.

#### POINT IV

THE LOWER COURT PROPERLY RULED THAT CERTAIN PORTIONS OF SECTIONS 22-4-1 TO 6 AND ALL OF SECTION 7, U.C.A. 1953 (1963 SUPPLEMENT), ARE UNCONSTITUTIONAL UNDER THE UNITED STATES CONSTITUTION OR THE CONSTITUTION OF UTAH.

The Utah pre-need funeral law, Section 22-4-1 to 7, U.C.A. 1953 (1963 Supp.), when considered as a whole is unconstitutional in that it:

(1) makes every "person who violates any provision" of the act guilty of a criminal violation and subject to criminal penalties, without at the same time giving notice or otherwise informing those subject to the act what conduct on their part renders them liable to its penalties;

(2) singles out and discriminates against a particular lawful business, thereby denying equal protection of the laws to Memorial Trusts and others similarly situated; and

(3) imposes unnecessary arbitrary and unreasonable prohibitory restrictions upon lawful private business transactions under the guise of regulation in the public interest.

These deficiencies will be discussed in the above order.

(1) Contained within the seven sections of the pre-need law are literally dozens of requirements with which the persons named in the act must comply. To impose punishment upon any person who violates "any provision" of the act, whether willful or not, and without regard to the nature or purpose of the violation, is violative of due process. For example, suppose the trustee should fail to furnish all "information required by the director" (Section 22-4-3) or, through oversight, omit a date or an amount on a required report? Are such acts and omissions crimes? How is a reasonable man to distinguish between criminal and non-criminal violations?

A similar situation was before the Colorado Supreme Court in *Memorial Trusts, Inc. v. Beery* (Colo. 1960), 356 P.2d 884, wherein a similar statute was declared to be unconstitutional for vagueness. In that case, as in the present one, "violations of the act (were) . . . made punishable by fine or imprisonment."

The court in that case stated at p. 888:

“The test to which the statute in question must be subjected under this record is made clear by the Supreme Court of the United States in the case of *Connally v. General Construction Co.*, 269 U.S. 385. . . .

That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law, and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.”

“The statute in the particulars hereinabove mentioned is violative of due process and is unconstitutional (under the United States and Colorado Constitutions).”

The same test is reiterated by the Supreme Court of the United States in the recent case of *Baggett v. Bullitt* (1964) ..... U.S. ...., 12 L.Ed.2d 377.

In *State v. Musser* (Utah 1950), 118 Utah 537, 223 P.2d 193, the Utah Supreme Court voided and held un-

constitutionally vague a statute which made it a criminal offense for two or more persons to conspire "to commit any act injurious . . . to public morals. . . ." And in *State v. Packard* (Utah 1952), 122 Utah 369, 250 P.2d 561, the Court held unconstitutional a statute which prescribed criminal penalties for failure to register with the Industrial Commission before "commencing employment with any person, firm or corporation whose employees are out on a labor strike called by a national recognized union." In that case the Utah court set out the standards which a statute must meet to withstand an attack on the ground that it is vague and uncertain.

"The limitations of language are such that neither absolute exactitude of expression nor complete precision of meaning are to be expected, and such standard cannot be required. On the other hand there is no disagreement among the courts that where a rule is set up, the violation of which subjects one to criminal punishment, the restrictions upon conduct should be prescribed with sufficient certainty, so that persons of ordinary intelligence, desiring to obey the law, may know how to govern themselves in conformity with it, and that no one should be compelled at the peril of life, liberty or property, to speculate as to the meaning of penal statutes.

"Concerning the question of uncertainty or vagueness of statutes, the authorities seem to be in accord with the test a statute must need to be valid is: It must be sufficiently definite (a) to inform persons of ordinary intelligence, who would be law abiding, what their conduct must be to

conform to its requirements ; (b) to advise a defendant accused of violating it just what constitutes the offense with which he is charged, and (c) to be susceptible of uniform interpretation and application by those charged with responsibility of applying and enforcing it."

It is submitted that the pre-need law, insofar as it prescribes criminal penalties for violations of its terms, meets none of the tests set forth in the *Packard* case. The act states that any person who violates "*any provision*" of the act is guilty of a criminal offense. Yet the act requires, as to each and every pre-need contract that comes within its terms, compliance with a complex system which involves entrusting of funds and submission of reports within prescribed periods of time over the entire life of the contract which may encompass many years' time. As to reports, there is no determinable limit upon the phrase "all information required by the director."

Certainly no one would argue that every single act, duty and responsibility involved in this complicated scheme, such as dotting of the i's and crossing of the t's in the required reports might subject a person to the criminal penalty unless done correctly, on time and to the extent and with the detail required by the director, whose requirements might change as often as men change their minds. If such were the case, the statute would surely be declared void as an unreasonable exercise of the police power. Yet the statute draws no line excluding

these insignificant acts or omissions from its operation or defining the nature and extent of the information which a director might require. No person governed by the statute can act, except at his peril, if the penalty provision is to be uniformly enforced. Moreover, no person charged with its enforcement could possibly give it uniform interpretation and application. As the United States Supreme Court stated in *Manley v. The State of Georgia*, 279 U.S. 1, 73 L.Ed. 575, 578 in striking down as unconstitutional a statute which provided criminal penalties for certain conduct of officers of a bank, "the statute does not specify the elements of the offense."

In contrast, to the Utah provision, the Idaho statute, Idaho Code Section 54-1120, upheld in *Messerli v. Monarch Memory Gardens, Inc.*, *supra*, provides that only "willful" violations of the act are criminal offenses.

(2) It is a well-established principle of law that a lawful business may not be unreasonably singled out for unduly stringent or oppressive restriction under the guise of regulation without violating the state and federal constitutional provisions which guarantee equal protection of the laws. Thus in *State v. Memorial Gardens Development Corp.* (W. Va. 1957), 101 S.E. 2d 425, 68 A.L.R. 2d 1233, the court held unconstitutional and void as singling out and discriminating against an otherwise lawful business and as discriminating between kinds and classes of businesses, a statute very similar to the

Utah pre-need law with which the present case is concerned. That statute required that all funds collected upon pre-need burial contracts be deposited in trust accounts for the benefit of policyholders and withdrawn only upon the death or demand of the purchaser, with the result that no money was available to the trustor for operating expense or profit. The court noted that:

“Many frauds are perpetrated in daily business transactions and redress therefor is civilly and criminally available to the victim. But fraud is not necessarily or reasonably imputable to the business of selling personal property or agreeing to perform services whether at present or in the future. If such were the law, every merchant could be regulated in the simple sale of his goods. . . . While it may be true that the defendant’s business is not that simple, yet the quantity or extent of business conducted or the time of performance element should not be the criterion by which legality is determined.”

As the Utah Supreme Court has stated in *Wallberg v. Utah Public Welfare Commission* (Utah, 1949), 115 Utah 242, 203 P.2d 935, 940:

“The law is well established that the legislature has authority, within constitutional limitations, to make classifications when and *only when* the classifications rests upon some ground of difference having a fair and substantial relation to the subject of the legislation.

\* \* \*

“To be unconstitutional, the discrimination must be unreasonable and arbitrary.”

As is pointed out in the *Memorial Gardens* case, *supra*, there is no reasonable basis upon which the oppressive control and regulation imposed by the Utah pre-need law can be justifiably imposed upon pre-need funeral contracts when no other similar merchandising activity is subjected to such a stifling degree of control. The furnishing of funeral services is as old as civilization and as necessary as life itself. There is no rational basis upon which the activity of providing payment for those services in advance of need should be singled out and so severely restricted.

(3) The most serious constitutional violation perpetrated by the pre-need law is its unreasonable and arbitrary restriction of a lawful business, amounting to a prohibition, under the guise of regulation in the public interest. The distinction between illegal prohibition of a business and its lawful regulation in the public interest has been clearly pointed out in numerous cases, including decisions of the United States Supreme Court and the Supreme Court of Utah. As these cases show, the restrictions contained within the Utah pre-need law amount to an unconstitutional prohibition of the sale of pre-need contracts rather than their lawful regulation.

In *New State Ice Co. v. Leibmann* (1932), 285 U.S. 261, 76 L.Ed. 747, it is stated:

“Plainly, a regulation which has the effect of denying or unreasonably curtailing the common right to engage in a lawful private business, such as that under review, cannot be upheld consistent with the 14th Amendment. Under that amendment, nothing is more clearly settled than that it is beyond the power of a state, ‘under the guise of protecting the public, arbitrarily [to] interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them.’ ”

“. . . the principle is embedded in our constitutional system that there are certain essentials of liberty with which the state is not entitled to dispense in the interest of experiments.”

Similarly, in *Wolff Packing Co. v. Court of Industrial Relations* (1924), 267 U.S. 550, 69 L.Ed. 785, the Court observed:

“. . . While there is no such thing as absolute freedom of contract, and it is subject to a variety of restraints, they must not be arbitrary or unreasonable. Freedom is the general rule and restraint the exception. The legislative authority to abridge can be justified only in exceptional circumstances. . . .” ‘The established doctrine is that this liberty (of contract and right of property) may not be interfered with under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect.’ ”

In *Baltimore and O.S.W.R. Company v. Voigt* (1899), 176 U.S. 498, 44 L.Ed. 560, the court quoted a leading English case as follows :

“It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred, shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider — you are not lightly to interfere with this freedom of contract.”

The same court said in *Adams v. Tanner* (1916), 244 U.S. 590, 61 L.Ed. 1336 :

“Certainly there is no profession, possibly no business, which does not proffer peculiar opportunities for reprehensible practices; and as to every one of them, no doubt, some can be found quite ready earnestly to maintain that its suppression would be in the public interest. Skillfully directed agitation might also bring about apparent condemnation of any one of them by the public. Happily for all, the fundamental guarantees of the constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked.”

And, it is stated in *Tyson & Bra. v. Banton*, 273 U.S. 418, 71 L.Ed. 718:

“It is not permissible to enact a law which in effect spreads an all-inclusive net for the feet of everybody upon the chance that, while the innocent will surely be entangled in its meshes, some wrong-doers also may be caught.”

The above principles were recognized by the Supreme Court of Utah in *Ritholz v. City of Salt Lake* (Utah, 1955), 3 Utah 2d 385, 284 P.2d 702 at 706, wherein an ordinance which prohibited advertising of the prices of eyeglasses was held unconstitutional. 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. . . .

“There are also other considerations to be taken into account as against the contention made by the city that the ordinance would tend to insure better quality of eyeglasses and conserve public health. One of these is that the basic theory underlying our system of government, its laws and our entire social system, is that all persons shall enjoy the highest possible degree of individual freedom consistent with the same degree of liberty in others, which theory this restriction upon plaintiffs’ business runs counter to. Another is the effect which free competition . . . has upon busi-

ness. Such freedom in competition has proved very beneficial to our economy and our standard of living. Its stimulus has resulted in producing ever more efficient methods by which the American people have been furnished more and better services and higher quality merchandise. They have proved themselves sufficiently good judges of the quality of products that those who excel in furnishing superior ones succeed and continue to improve, while others fail.

“The very element of competition through price advertising may well have beneficial effects upon the quality of the product sold which would offset any possible slight detriment to health that may be hazarded if such advertising were curtailed. . . . We are of the opinion that it (the ordinance) does not have any such substantial bearing on public health as to justify this extension of the police power into the regulation of private business and the violation of the right to freely advertise and sell one’s property. We do not believe that the constitutional rights involved should be swept away on any such tenuous ground . . . the evil sought to be corrected by the ordinance is a business evil. The ordinance has no relation to public health and is an unlawful interference with private business. It is also parallel with the principle espoused by this Court in the case of *Salt Lake City v. Reveue*, in which we decreed the ordinance fixing opening and closing hours of barber shops to have no substantial relationship to public health. . . .”

In *State v. Memorial Gardens Development Corp.*, cited *supra*, a statute nearly identical to the Utah pre-

need law was declared to be unconstitutional as being prohibitory rather than regulatory, the court there stating:

Although plaintiff claims that the public dealing with defendant could be defrauded, such possibility should not destroy the right to contract. Fear or suspicion that one will commit fraud or resort to fraudulent practices can be leveled at any one at any time engaged in any lawful business, but we hardly see where that should be the basis for either regulation or prohibition of legitimate business. The state cannot possibly protect all its citizens against possible loss on contracts which parties make.

\* \* \*

“The statute here involved which requires impounding of all purchase money has 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.”

Similarly, in *State v. Gateway Mortuaries* (Mont. 1930), 287 Pac. 156, the court held void and unconstitutional a statute which prohibited written contracts for personal services in connection with burial of human bodies, when not made in contemplation of immediate death. The court noted that the mere possibility of fraud was insufficient ground for prohibiting a lawful business. Said the court:

“The moving impulse is not to regulate business; it is to prohibit written contracts relating to the very essentials of the business, *except under circumstances practically prohibitive. . . to the general run of mankind.*” (Emphasis added.)

Although the Utah Legislature, by enacting the pre-need law, seemingly declared pre-need contracts to be legitimate and useful, nevertheless it condemned them by the oppressive and unreasonable control to which it subjected them. In this respect the Utah pre-need law is similar to that stricken down as an unconstitutional prohibition in *Gardon Spot Market, Inc. v. Byrne* (Mont., 1962), 378 P.2d 220.

As pointed out above, there is no inherent characteristic of pre-need funeral contracts which makes them more subject to fraud or overreaching than numerous other merchandising enterprises. Yet these contracts are subjected to far more stringent controls than are imposed upon any other merchandising activity in Utah. Especially restrictive is the requirement that all funds paid on such contracts, including all commissions and profit to the seller, be placed in trust until the death of the purchaser, which in many cases does not occur until many years after the contract becomes operative. Similarly restrictive is the provision which permits the purchaser to withdraw impounded trust funds at any time without paying any of the expense of administration of sales.

These restrictions, in practical effect, serve to prohibit the selling of these contracts except by persons and concerns with large reserves and, even then, only under great financial handicap. And the addition of the all-inclusive penalty provision makes this activity even yet more prohibitory and precarious.

The extent to which the Utah pre-need law circumscribes and prohibits a person from dealing with and disposing of his own property becomes apparent when it is realized that it is absolutely and categorically prohibits a person from making a present, binding commitment of his own money for the future disposition of his own body. Thus, a person is unable under the act to set aside out of his own reach and the reach of his creditors even a small amount of his present income or savings to provide for a decent burial when he dies, so as to avoid having to depend upon charity or upon surviving relatives in the event financial reverses or ill health deplete his assets before his death. By the terms of the statute all sums paid by him, though in trust, belong to him and can be withdrawn by him at any time. The act creates a simple debtor-creditor relationship between the purchaser and the bank and the seller has no claim upon the money until the purchaser's death. Thus the purchaser is not immune from the vicissitudes of fortune which may require that he take out and use the resources which are available to him. And, so long as he is able to reach the funds without restriction they

are also subject to being taken away by his creditors. Indeed, even a transfer to his son upon the son's promise to use the funds for the father's burial would fall within the scope and control of the Utah pre-need law so as to require the son to entrust all sums so received and, at the same time, subject them to the tides of fortune and health as noted above. Certainly this degree of control cannot be justified on the pretext of "protecting" the citizens' best interests.

If the Utah pre-need law is considered as a whole, and its many restrictive features carefully analyzed, it becomes apparent that it was conceived and initiated by established concerns of which plaintiffs are representatives, who were and are interested in perpetuating existing conditions which permit them to exercise a virtual monopoly over the funeral business in Utah without fear of competition from concerns such as Memorial Trusts which seek to offer the purchaser a valuable service at reasonable prices.

Because of the severe restrictions imposed by the pre-need law, numerous persons, who would otherwise be able to plan their funeral needs and pay for them over a period of time in an atmosphere conducive to rational deliberation, are required instead to pass these problems on to their survivors who, under the influence of grief and the pressure of time, cannot calmly and quietly select those funeral arrangements which they can afford.

Instead, while in deepest mourning and in profound shock, they agree to pay sums far beyond their means, in a vain effort to compensate in death for what they may have failed to provide the deceased in life. In this, they are smoothly supported by the expensive suggestions of the sympathetic and knowledgeable funeral director, whose gentle pressure results in contracts for services and merchandise far beyond the means and budget of the bereaved.

Such practices have furnished the basis for numerous recent magazine articles and books. An authoritative survey and analysis of the problem, in which the prevalence of the practice is discussed at some length, is contained in the May, 1963 *Stanford Law Review*, page 425, with the article: "Pre-Arrangement: Mitigating the Undertaker's Bargaining Advantage."

## CONCLUSION

The contracts and practices of Memorial Trusts conform to the law and no one who accepts and performs such contracts is guilty of improper conduct.

Memorial Trusts is not in the insurance business and is not required to be regulated as an insurer, since its contract does not contain the statutory or decisional elements of insurance.

The pre-need concept is a valuable development in a business and profession which all must inevitably patronize. This development, however, is being slowly and effectively strangled in its infancy by an arbitrary, vague and unconstitutional enactment of the Utah Legislature — the Pre-Arranged Funeral Plan Law.

It is therefore clear that plaintiffs' motion for summary judgment was properly denied by the lower court and this Court should declare unconstitutional and void those portions of the Utah pre-need law, Sections 22-4-1 to 7, U.C.A., (1963 Supp.) which provide: (All emphasis added.)

1. (Section 22-4-1) "*Any* payment of money made to *any* person . . . for . . . 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 . . . in connection with the final disposition of a dead human body, for future use . . . shall be held to be trust funds. . . ."

2. (Section 22-4-2) "All such trust funds shall be deposited in the name of the trustee, as trustee . . . and shall be held in trust, subject to the provisions of this act."

3. (Section 22-4-3) "All such reports (required by the act) shall set forth in detail the information contained in the records required to be kept by the trustee aforesaid, plus any other information required by the director.

4. (Section 22-4-4) “*All payments and amounts so deposited, with all earnings and interest thereon, shall not be withdrawn . . . provided that said funds plus all interest and earnings shall be released to the payor originally paying said funds . . . at any time prior to the death of any beneficiary upon demand upon said bank or trust company. . . .*”

5. All of Section 22-4-7.

By so doing, Memorial Trusts and other reputable concerns will be able to provide a sensible pre-need plan for the public while at the same time putting an end to the undesirable practices which plaintiffs in their selfish interest, seek to perpetuate by this suit.

Respectfully submitted,

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