

1965

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

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 COM-
PANY, a Utah corporation, on its own behalf and
on behalf of others similarly situated,

Plaintiffs - Appellant,

— Vs. —

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

Case
No. 10236

FILED

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APPELLANT'S REPLY BRIEF

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

MAR 1965

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

No. 10236
Case

APPELLANT'S REPLY BRIEF

ARGUMENT

POINT I

THAT CONTRARY TO THE COURT'S DECISION, ANY FUNERAL DIRECTOR OR EMBALMER, WHO PERFORMS FUNERAL SERVICES OR FURNISHES BURIAL FACILITIES PURSUANT TO A PRE-NEED CONTRACT OBTAINED BY SOLICITATION BY EITHER OF THE DEFENDANTS, SOLICITED OR SOLD BY AND FOR THEMSELVES, OR WHICH RESULTS TO THE BENEFIT OF A FUNERAL DIRECTOR OR EMBALMER WHO PERFORMS THE FUNERAL SERVICES OR FURNISHES THE BURIAL FACILITIES, IS GUILTY OF UNPROFESSIONAL AND UNETHICAL CON-

DUCT AS DEFINED IN SECTIONS 58-9-10
AND 58-9-22 OF THE UTAH CODE ANNO-
TATED, 1953.

The only Defendants who answered the above point of Plaintiff are the Defendants Memorial Trusts, Inc., and Memorial Gardens of the Valley, Inc. They devote several pages of their briefs to saying only that they are not agents of any Funeral Directors or Embalmers. That their contracts do not expressly make them agents, and that they operate for no single one Funeral Director or Embalmer in the State. They also make it clear that they are not Funeral Directors or Embalmers. They offer no explanation whatsoever, to help the court as to how they can accomplish the solicitation of Funeral Business for the benefit of Funeral Directors and Embalmers when the Funeral Director and Embalmer himself would violate the law if he solicited that Business personally or through an Agent. They merely complain that their right to contract is being interfered with.

The intent of the law is to correct the evil of solicitation of Funeral Business. The legislature undoubtedly anticipated that others than Funeral Directors and Embalmers might be involved in trying to solicit for the benefit of Funeral Directors and Embalmers and said solicitation was still wrong whether done directly or indirectly. Regardless of the play on words indulged in by these two defendants, what difference does it make who commits the prohibited evil for the benefit of a Funeral Director or Embalmer. What an indictment it would be of our legal system if it is illegal for a person to personally commit an illegal act yet it would be legal for

some one else to do it for him and for his benefit. It would be equally as absurd to say that a Funeral Director cannot enter into a contract with a person by solicitation of Funeral Business, yet the defendants can enter into the same contract with the same person for the benefit of the Funeral Director and the law would hold it legal. Plaintiffs submit that these Defendants have given no reasons for their position except to say, "we are not agents because we said so." Plaintiffs refer the court to their original discussion of this problem. The defendants can be nothing but agents and these contracts providing Funeral Benefits by their Solicitation are in violation of law.

ARGUMENT

POINT II.

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

Section 22-4-4 U.C.A. 1953 (1963 Supplement) was intended to protect a depositor's funds as against the day he needed them for a funeral or personally withdrew them. The same protective purpose is accomplished in Banking, Insurance and Securities Law. This section provides that every cent of this deposit plus "interest and earnings" is to be considered as a unit, and delivered on death to the original Payor only upon Surrender of the Pass Book. Said Payor may take part of said Fund, but the balance (Section 22-4-5 U.C.A. 1953) shall be held by the bank for 5 days and until a Certified Copy of the death Certificate, the pass book, and a verified statement that the Pre-need Contract has been fully performed, have all been surrendered and submitted to the bank of deposit. The balance of the funds shall then be released to the decedent's estate or the original purchaser. Any depositor may at any time withdraw his entire fund and cancel the trust deposit. If he so elects, the pre-need or any other type of contract would also be cancelled as well as the Trust Companies' obligations. But as long as the fund or any part remains, and the pre-need Obligations are in force the moneys cannot be paid out to any other persons than those specifically mentioned in the Statute. The entire purpose of the statute becomes a complete nullity if otherwise interpreted. The fund could be wasted away before its purpose was in any way accomplished. The provision that ALL PAYMENTS be deposited would have no meaning. What purpose does a statute of this type have if after ALL PAYMENTS received have been deposited, if the statute is interpreted to mean that others may later come in and

by agreement, fraud or otherwise deplete and use up the whole fund. Other persons in positions similar to the defendants may not be as fair and solicitous of the depositor's interest, as the present defendants claim they might be. The law permits nothing to be taken out for commissions or otherwise. Where does the Defendant's Memorial Trusts, Inc., get the Authority to deduct anything? How do they arrive at any amount? What is to prevent them from taking all of it, if anything is permitted? If they are permitted to deduct anything at all, there is no stated limit and they could therefore take it all and destroy the purpose of the law.

Several states provide that *all* the funds be deposited and held. See quotation from the Case of *Messerli v. Monarch Memory Gardens, Inc.* (Idaho 1964), 397 Pac. 2nd 34, 42, at page 22 of this Reply Brief.

ARGUMENT

POINT III

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

UTAH AND THE REGULATIONS OF THE STATE INSURANCE DEPARTMENT OF THE STATE OF UTAH.

The Defendant Companies have raised two or three issues in their attempt to show that their contracts are not insurance and that they should not be required to be regulated and licensed by the UTAH STATE INSURANCE DEPARTMENT.

The Defendant Companies would make it appear by the Briefs that they have submitted, and especially as developed in the Brief for MEMORIAL TRUST, that the sole and only measure of an Insurance Contract is by definition. The question as to the need of a "risk" is discussed in great length and several cases are quoted. The writer would like to call to the Court's attention that the basic and much more important reason for insurance regulation is determined by much more important principles than a mere definition. It should be very obvious by the least bit of research that definitions are multiple and their applications equally multiple.

In one of the cases quoted by the Defendant MEMORIAL TRUSTS, this matter of Insurance definitions is discussed by the Court. This is a quotation from a case relied upon by the Defendant MEMORIAL TRUSTS to wit: *South Georgia Funeral Homes v. Harrison* (Ga. 1936), 188 S.E. 529, 530:

"What constitutes life insurance and the dissecting of it into its elements is a problem that holds forth no prospect of absolute solution. Various definitions have been attempted. The law, however, is not fond of definitions, and those defini-

tions are to be taken, perhaps, rather as statements of the learned men who make them, of the contract as they find it existing around them, than as strict definitions which contain every essential element without which the contract cannot exist, and which excludes everything not necessary to its being. * * * Yet it has been held by this court that the Code definition was not exhaustive, and that a contract may be one of life insurance though payable in goods or services of value. *Benevolent Burial Ass'n Inc., v. Harrison*, 181 Ga. 230, 238, 181, S.E. 529. * * * The contract on its face does not appear to be one of life insurance. The contract involved in the case out of which this contempt proceeding arose is a contract of life insurance in and of itself."

It is to be granted that because of the great number of problems that arise in this field, there is not absolute harmony in the cases, but all references agree with the fact that in all cases that have gone before the Supreme Courts involving Burial Contracts, Pre-Need Contracts, and Funeral Contracts the great majority of those cases have been held by our Supreme Courts as Insurance. This fact cannot be disputed.

A Life Insurance Contract is not one of indemnity, and, therefore, the problem of "risk" is entirely a different problem with Life Insurance Contracts than with Indemnity type of Contracts such as fire and automobile. In Section 4 of Insurance, in the 29th Vol. of *American Jurisprudence*, at Page 435, where the definition of Insurance is involved, we read as follows:

"Consequently, in the ordinary life insurance policy taken out to provide for dependents, it is a

misnomer to speak of death as a "loss" in the sense in which the burning of a building is spoken of as a "loss." Another reason why a contract of life insurance cannot be considered one of the indemnity is that life insurance on the level-premium plan combines investment with protection."

In Section 8, p. 438, of Insurance in the 29th Vol. of American Jurisprudence, we are told definitely that a majority of the cases have adopted a view that contracts for the payments for burial or funeral expenses are insurance contracts and subject to the Insurance Laws.

This is also told to us in Section XIV, of Vol. I, of *Appleman*, in INSURANCE LAW AND PRACTICE, at Page 29 it reads there as follows:

"Often such associations are started by undertakers who agree to provide services. These contracts have come frequently before the Courts for construction. The almost uniform tenancy of the Courts have been to hold that they constitute life insurance."

May we again emphasize the weakness of solving these problems by trying to hang upon any one definition or upon definitions generally. Our quotation above certainly emphasizes that point, but it appears almost too elementary to say that the purpose of Insurance Laws compelling qualifications before and with Insurance Departments is for the protection of the public. Therefore, regardless of what a person may call his contract, regardless of whether it technically meets a definition or not, we are confronted with the very simple proposition that, if an individual or a company, or a group of persons take

the money of another and exercise control over it, they are required to meet regulations for the safety and protection of that individual. Without over-simplifying the matter, this is certainly the purpose of insurance regulations. There can be no dispute of the fact that the Defendant Companies are definitely in that category, and a majority of the Courts of this country have so expressed themselves to the effect that such contracts and such relationships must be regulated by Insurance Departments.

This matter has already been referred to in the Plaintiffs' Brief in a quotation from *State v. Mynette Funeral Home* case at the bottom of page 15 of the Plaintiffs' Brief. Also this matter is discussed in a quotation in the Plaintiffs' Brief beginning at the bottom of page 13 in the case of *State v. Mutual Mortuary Association, Inc.* In the case of the *Oklahoma Southwest Burial Association v. State* (Okla. 1929), 274 Pac. 642, the Court in addition to deciding that a regular Burial Contract involving merchandise and services was one of Insurance, discussed the need of protection to the individual by Insurance Regulatory measures, and stated as follows:

“In the instant case the object of the organization is one of profit to its promoters. It offered as an inducement to the public certain benefits based upon a fixed money consideration. If the consideration is not paid, then no benefits are conferred. Suppose the Association should meet with financial misfortune, and its obligations to its members fail? Suppose a large fund is collected and unwisely invested and lost to the membership and

the association is incapable of meeting funeral costs of its members?

“It clearly appears to be based on commercial purposes, and its manner of doing business constitutes an Insurance System, and that its membership is entitled to the protection of the Insurance Laws of this State.”

In the case of *Renschler v. Hogan* (Ohio 1914), 107 N.E. 758, after deciding that the Burial Contract was one of insurance the Court also discussed the matter of protection and stated as follows:

“It is an intention on one hand to receive, and on the other hand to provide a fund to pay the insured’s burial expenses. The Contract is a naked insurance contract and nothing else, and is subject to the regulation by the State Insurance Department, (the court discussed further how the individual should be bound on these matters the same as corporations and others), and then proceeded to state as follows:

“To hold otherwise would work a far-reaching hardship on the part of our population most needful of the protection of the State and lead to a return of the old “wild-cat” insurance status now happily a thing of the past.”

We submit that the Defendant Companies have no right either in law or in fact to take other people’s money, and to object to any form of regulation whatsoever, and that appears to be their contention throughout this whole case. There is a suggestion of self-imposed regulation by one or two of the Defendants, but that has never proved sufficient for the safety of the public in any field or at any time whatsoever.

Defendant MEMORIAL TRUSTS quotes certain cases which discuss certain definitions of insurance which emphasize "risk distribution." We refer to the cases beginning on page 17 of Brief of Memorial Trust, Inc., starting with the: "The United States Supreme Court case in *Melvering v. Lagierse* (1940), 312 U.S. 531 at 539; in *Re: Barr's Estate* (Cal. 1951), 231 Pac. 2nd, 876; in *Re: Smiley's Estate* (Wash. 1950), 216 Pac. 2nd 212; *South Georgina Funeral Home v. Harrison*, (Ga. 1936), 188 S.E. 529, and in *Re: Clark's Estate* (Utah 1960) 10, Utah 2nd, 427, 354 Pac. 2nd 112. These cases do not give us any assistance whatsoever in the problem before the Court. Everyone of these cases was interpreting Insurance Contracts for the purpose of taxation, and determining whether or not the proceeds on these particular policies or contracts should be taxed. These cases primarily are involved with the matter of Annuity Insurance. It is hardly necessary to call the Court's attention to the fact that Annuity Contracts have been a headache to the Courts for many years on the question as to whether or not Annuity is Life Insurance. As fast as one case is decided a new one comes up, but they invariably hold that Annuity Insurance is not Life Insurance and therefore must be taxed. Even today in our Utah Code Premium Tax is not charged on Annuity Insurance. But please note that any company writing annuities payable on death, must qualify under the Insurance laws of the state of Utah or any other state. Neither one of these cases made any decision whatsoever as to our problem, namely: Were these contracts of the type that required Insurance Commission regulation. That issue was not

decided in either one of these cases. They merely decided the simple proposition as to whether or not Annuity Insurance Proceeds should be taxed. It should interest the court to quote further from the case of in *Re: Barr's Estate*, referred to above, and submitted by the Defendant MEMORIAL TRUSTS as one of the cases upon which it relied. This case, also, decided a matter regarding the proceeds of Annuity Insurance, and merely held these proceeds should be taxed, and then the Court (p. 879) stated as follows:

“That Annuities are considered Insurance under the Insurance Codes of various States, but indicated that this does not require that Annuities be classified as Insurance under the revenue codes for taxation purposes.”

The Court then points out again that the objects of the two different statutes namely, Insurance regulation and Revenue collection are entirely different. This material is discussed at Page 879 in that case.

We think it should also be noted that wherever death is involved, or whether a Contract is based upon the contingency of death, there hardly appears to be any argument that there is no risk involved. This is the very basis of Life Insurance. Such contracts are all based upon the contingency of death. This question has arisen frequently in these Burial and Funeral Service Contracts under discussion in this case, and the Courts have frequently held that there can be absolutely no question and it would be foolish otherwise to contemplate that these Contracts were not made on contingency of death.

We refer the Court to our Plaintiffs' Brief already on file in this case in the quotations at Page 30 of the Plaintiffs' Brief. Those cases discuss the foolishness of considering that a person would buy a casket for use during his lifetime, and in other approaches makes it clear that for every reason these contracts are based upon the contingency of death, which is risk enough to make all other life insurance policies insurance contracts.

Defendant Company, MEMORIAL GARDENS OF THE VALLEY, in their Brief (p. 27) refers to the case of *Barmeier v. Oregon Physicians Service*, 243 Pac. 2nd, 1053, as proof that these Contracts and similar ones that are under discussion are not considered Insurance Contracts. This case is very similar to several other cases that have been before the Courts, and one case notably is the case of *Jordan v. Group Health Association*, 107 Federal 2nd 239. These cases all involve associations that act as a medium to get service with physicians who promise to take care of the health needs of the individual members who pay monthly dues and are entitled to the physician's help. It should be noted that these associations make no promises, have no obligations whatsoever to the members, neither guarantee nor promise any service whatsoever, and are merely in an agency capacity between the physician and the member. These cases have no relationship whatsoever to the cases before the Court. Nor do they have any similar characteristics in any way. These are Contracts for physicians' services with physicians. The Defendants all maintain they are not Funeral Directors or Embalmers, yet their

contracts provide for everything connected with a Funeral (R. 8, 9, 12 (1st Paragraph) 19, 40 rear). Even though MEMORIAL GARDENS OF THE VALLEY claim they only agree to sell caskets (R. 27), they admit to the use and sale of the contract found on page 8 of the transcript of Record. This contract provides a complete funeral. If these Defendants are not Funeral Directors or Embalmers, these complete funeral services agreed to, are not services provided to them and are therefore insurance. See *Barmeier v. Oregon Physicians Service, Supra*, and *Jordan v. Group Health Association, Supra*. The principle is simple. A physician may collect money in advance for his services but no stranger can collect money to provide for a physician — that is insurance. Defendants are selling insurance if they take money to provide any item not part of their own trade and which they have to go elsewhere to get.

Stated another way, these two cases hold that anyone selling his own services, part of his own trade, items or services that he can personally supply because he is in that business, can collect money in advance for the sale of his services, or merchandise. That is not insurance. But if a person collects money in advance and promises to provide a service or merchandise which he must go elsewhere to get, or the promise to produce money as a benefit, is selling Insurance, the reason is very elementary. The insurance laws are there to protect the funds that have to be used to buy those services or merchandise from some one else or from which money benefits must be paid. A sale of one's own services has

never been held insurance. The case of *Jordon v. Group Health Association, Supra*, discusses this difference thoroughly and is a well-written case. A study of the contracts of the Defendants who admit they are not Funeral Directors or Embalmers show that EVERYONE procures the complete services of a Funeral Director and all the necessary merchandise of a Funeral. MEMORIAL TRUSTS, INC. admit in the third paragraph on page 9 of their brief that they will have the burden of making the arrangements for a Funeral Director. Insurance regulations will guarantee that funds are available to get a Funeral Director when needed.

This same situation was involved in the case cited by the Defendant MEMORIAL TRUSTS, INC. (p. 17) in their brief, *South Georgia Funeral Homes, Inc. v. Harrison, Supra*, where the contract was with a Funeral Home, the Court held there was no risk because they had merely paid for the value of the services to be performed by one who could supply the services.

A recent case which was decided since the original appellants' brief was pointed is a case from the Supreme Court of Idaho. It involves pre-need contracts and decides the problem of whether or not they are insurance. The Contracts involved in that case are to all intents and purposes the same as involved in the case before the Court. The case thoroughly goes into the matter of insurance, holds the Idaho Contracts are insurance and subject to the Idaho Insurance Laws. Appellant desires to refer this Court to that decision for study rather than

making extensive quotes. The case is *Messerli v. Monarch Memory Gardens, Inc., Supra*. The Idaho Case quotes from *Jordan v. Group Health Association, Supra*, and may we here repeat only part of their decision:

“That an incidental element of risk distribution or assumption may be present should not outweigh all other factors. If attention is focused only on that feature, the line between insurance or indemnity and other types of legal arrangement and economic function becomes faint, if not extinct. This is especially true when the contract is for the sale of goods or services on contingency. But obviously it was not the purpose of the insurance statutes to regulate all arrangements for assumption or distribution of risk. That view would cause them to engulf practically all contracts, particularly conditional sales and contingent service agreements. The fallacy is in looking only at the risk element, to the exclusion of all others present or their subordination to it. The question turns, not on whether risk is involved or assumed, but on whether that or something else to which it is related in the particular plan is in its principal object and purpose.”

“* * * As we have said, it is the plan as a whole, not artificially disjointed and segregated single phases of it, with which we are concerned. * * *” The appellants have not, insofar as the pleadings or evidence disclose, engaged in the general undertaking business nor have they engaged in the manufacture or sale of general burial supplies, or acquired any of the facilities therefor.

The Idaho Supreme Court had no trouble finding sufficient “Risk” to meet any insurance requirements (p. 45).

The Defendant companies have made another reference which the Plaintiffs feel should be answered:

It is claimed that the Pre-Need Law was intended to supplement all Insurance requirements. This the Plaintiffs oppose strenuously. This is also an admission, at least, so impliedly that they are dealing, and selling, with Insurance Contracts. Likewise, they are contending that the Pre-Need Law is unconstitutional which, if upheld, would leave the membership or Policy Holders completely without protection of any kind by the State.

There is nothing to indicate in the Law anywhere that the Pre-Need Law was intended to supplement any Insurance Law whatsoever. On the contrary Section 22-4-6, of the Pre-Need Law provides as follows:

“This Act shall not apply to, or effect the operations and business of duly licensed associations or companies under the Insurance Laws of the State of Utah.”

Certainly, this merely says that no Insurance Company shall be required to qualify under the Pre-Need Law, but says nothing about Pre-Need Contracts not being regulated as insurance, which certainly suggests impliedly that there is a connection, and was a connection in the minds of the legislators, namely, that there is a connection between Pre-Need Contracts, and Insurance Contracts. This Section implies this last interpretation much more than it implies that Pre-Need Contracts are not Insurance Contracts.

ARGUMENT

POINT IV.

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

Defendants MEMORIAL TRUSTS, INC. and MEMORIAL GARDENS OF THE VALLEY, INC., both submit arguments on the above point. They make no reference to any part of the Pre-Need Law that hurts them. They submit many quotations holding that unreasonable regulatory laws, and laws that are restrictive, that infringe on people's rights, that are confiscatory, and not a proper use of police power, makes such laws illegal and unconstitutional. To this we all agree. We are all against sin. But just because a law regulates a business does not make it illegal. Regulation is a well accepted, standard order of our present economy. The Defendants are objecting to all forms of Regulation.

The peculiar position of the Defendants, objecting to the Regulations provided in the Pre-Need Law, is that they are neither Funeral Directors nor Embalmers. This law was intended as a means of protecting *all funds* of a

person who wanted to save for his Funeral Costs. The bank that holds those funds is allowed to put the funds out at interest and account for *the net earnings only*. (Section 22-4-2 U.C.A. 1953.) This law was never intended to serve as a source of income to strangers like the defendants. Such an interpretation continually kills the purpose of our Pre-Need Law, to-wit, to save 100% of the depositor's funds. It seems very presumptuous that a stranger should be allowed to have the law declared unconstitutional because he cannot make any money out of it. (See arguments on pp. 19-22 *Memorial Gardens, Inc. Brief*.)

These defendants further object to the law on the ground that regulations to control people who take the money of others is "Confiscatory" and is "Class Legislation." That argument wipes out all the laws relating to Banking, Insurance Companies, and Securities. Funds collected from people under the Pre-Need Laws need protection equally as effective as in any other field. Banks and Insurance Companies always end up paying more than was put in because of the right to invest as provided for banks in the Utah Pre-Need Law. A sample of the type of cases used by Defendants to support their position, is the case of *Prate Undertaking Company v. State Board of Embalming* (pp. 22-23 of Memorial Gardens Brief). The law in question in that case was held to prevent Funeral Directors and Embalmers from contracting to supply a funeral. This is not even suggested in the Utah Pre-Need Law nor in our Case before this Court.

Our Utah Pre-Need Law does not even hint at such a regulation. It leaves Funeral Directors and persons entirely free to contract. The *Prate Case* has no point to make in this discussion. The other cases also merely repeat accepted principles but not one reference is made to any evil of our Pre-Need Law. Respondents merely allege that it is “regulatory” and “Stifling on the respondents herein,” but there is no showing that it in any way hurts the parties intended to benefit by it.

The Briefs of Defendants use numerous cases upon which they rely, and from which they quote to this Court some very pertinent generalizations as to what constitutes denial of equal protection, prohibitory restrictions and many other evils, but those cases involve statutes, occupations, and conditions *other than Pre-Need Funeral Contracts*, and on problems entirely different than the case before the Court.

May we direct this Court’s attention to a case decided by our sister state of Idaho since the appellants’ brief was written. It is the case of *Messerli v. Monarch Memory Gardens, Inc.* (1964) 397 Pac. 2nd 34. This case is the last expression of a great majority of the Courts in the United States on the problems before the Court, i. e., Pre-Need statutes and contracts. In the Idaho case, to all intents and purposes, the exact contracts were involved, and statutes that differ very little, if any, from the material provisions of our Utah Pre-Need Law. It would be necessary to quote the entire case to give to this Court all the arguments and holdings of the Idaho Court. Therefore, may we refer this court to that case

and merely quote a few paragraphs from the Idaho decision :

It is universally recognized that the enactment of statutes having for their object the prevention of fraud and deceit is within the police power of the state. 16 C.J.S. Constitutional Law § 187 page 924. A broad discretion is necessarily vested in the legislature to determine not only what the interests of the public welfare required, but what measures are necessary to secure such interests. It must be conceded, and this court has stated, that a regulation abridging or restricting the freedom of contract or regulating the right to engage in any lawful business in a lawful manner must be reasonable and must reasonably tend to accomplish or promote the protection and welfare of the public.

The concern is not whether the legislative action affects contracts incidentally, or directly or indirectly, but whether the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end.

When we consider that the contract payments are to be made within a short period of time as compared to the average lapse of time until performance of the "pre-need" contracts; that during the long interval between full receipt of the purchase price and contract performance, the possibilities for fraud are great and risk of insolvency, with consequent inability to perform are inherent, it is then that the wisdom of the legislation becomes apparent.

Appellants have recognized the need of some protection for the purchaser by including in their form of contract certain indefinite provisions relative to setting aside a trust fund. However,

these allusory provisions perhaps furnish purchaser appeal, but fail to provide the protection which the legislature deems the situation warrants.

Numerous states require that all funds collected under contracts as described in I. C. 54-1117 be deposited and held in trust. Some include the interest accruals. Other states require that the greater percentage of the funds be placed in trust. We think unquestionably the legislature, by enacting this statute, had in mind the protection of the public and the prevention of fraud.

The Idaho case refers also to the case of *Reserve Vault Corporation v. Jones*, 234 Ark. 1011, 356 S.W. 2nd, 225 (1962). This case also involves the same problem as our case to-wit, the application of these rules to Pre-Need Laws, and may it be noted it also went to the Arkansas Supreme Court on a writ seeking a declaratory judgment. This case answers the problems of the Confiscation and Arbitrary Regulation raised by the Defendants and as they apply to a Pre-Need Law. Both the Idaho and Arkansas cases follow the cases of *Memorial Gardens Association, Inc. v. Smith*, 156 N.E. 2nd 578 and *Falkner v. Memorial Gardens Association*, 298 S.W. 2nd 934 referred to in appellants' original brief. The Idaho Supreme Court winds up its discussion on the question of Constitutionality with this conclusion on page 42:

“Although a few statutes somewhat comparable but containing distinctive features and different regulatory provisions than the ones here being considered have been declared void, we are satisfied that the great weight of authority, with which we agree, is contrary to appellants' contention

and we conclude that the statute here involved (I. C. 54-1117) is constitutional.

ARGUMENT

POINT V

THE APPELLANTS' BRIEF DOES STATE FACTS SUFFICIENT TO CONSTI- TUTE A CAUSE OF ACTION.

Defendant Memorial Gardens of the Valley, Inc., is the only Defendant who saw fit to raise this question. It is discussed on pp. 10-15 of their Brief. They merely quote the law on the issue as to whether or not the problem before the Court is "hypothetical or abstract" or whether an "advisory opinion" is being sought.

The Plaintiffs' Complaint alleges that these Pre-Need Contracts of Defendants are being sold or are intended for sale (R. 2) that Defendants are soliciting and selling contracts to furnish funeral services (R. 4) that the Plaintiffs would be compelled to participate in activities that are of doubtful legality in order to meet the competition created by the Defendants' activities, and the Defendants' public officers have indicated uncertainty as to the position which should be taken on the legality of these activities (R. 5); the Complaint further alleges that a decision as to the legality or illegality of these contracts being sold is of vital importance to the financial welfare of the Plaintiffs as well as the Defendants and other companies. All Defendants admit they are selling their respective Pre-Need Contracts: see on behalf of Memorial

Trusts, Inc., their answer to paragraphs 2, 5 and 8 of Plaintiffs' Complaints (R. 13, 15, 16), they also admit selling such contracts on pages 3 and 4 of their Brief.

On behalf of Memorial Gardens of the Valley, Inc., they admit they sell caskets, which is subject to the Pre-Need Law (R. 26); and in paragraph 7 of their answer (R. 27) admit they sell the contract attached to Plaintiffs' Complaint (R. 8). It is to be noted this contract under "Items Covered" in the contract, everything to a complete funeral is included.

On behalf of Defendants Lake Hills, they admit selling the contract (R. 36 and 40) produced by them on court order. (See Rear side of R. 40.)

Defendants Autorest Memorial Corporation defaulted and made no denials of the Plaintiffs' allegations that they are selling a contract with a complete funeral (R. 12).

This action is seeking a Declaratory Judgment based on a Motion for Summary Judgment which would be based upon the pleadings (R. 32-33). See Rule 56 U.R.C.P.

Appellant submits there is a real and genuine issue involved herein. It is not seeking advice only. Their Contracts *are* being sold as admitted in the pleadings. The rights of Parties *are* at stake and there are real controversial issues involved. The jeopardy of the Plaintiffs is genuine and pending and the problem is not merely

a moot question. The Plaintiffs can suffer injury if the present condition of further sales is allowed to continue and if the issues raised herein are left undecided.

CONCLUSION

The Plaintiff-Appellants request the Honorable Court to reverse the decision of the lower court as prayed for by the Plaintiff-Appellants in their original Brief and to affirm the lower court decision that the Plaintiff-Appellants had stated a cause of action in their Complaint and that a Justiciable issue exists.

Respectfully submitted,

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