



SECRETARY OF STATE
Division of Securities and Business Regulation

POLICY STATEMENT

TO: Staff of the Securities and Business Regulation Division

FROM: J. Steven Parker
Director, Securities and Business Regulation Division

RE: Use of Life Insurance Policies to Fund the Purchase of Preneed Funeral Services and Merchandise

DATE: November 1, 2002

I. Introduction

A practice has developed among funeral homes whereby the funeral home will require a customer to purchase a life insurance policy in order to fund the purchase of preneed funeral services or merchandise. There are some variations on the arrangement. The policy premium can be an up-front single premium, or it may be payable in monthly or other regular installments. Typically, the death benefit of the policy will appreciate over time. The policy may be owned by the customer or ownership may be assigned, either revocably or irrevocably, to the funeral home or to a life insurance trust. The beneficiary is usually a spouse or relative, but the funeral home may require assignment of the death benefit to it. The assignment of benefit can be unconditional or conditioned upon the funeral home providing the funeral services and merchandise. If the latter condition applies to the assignment of benefits, the customer (or policyowner) will have a right to cancel the contract at any time and thereby revoke the assignment. Through the use of this arrangement, the funeral home avoids accepting preneed funds and establishing a preneed escrow account.

Questions have been presented to the Securities and Business Regulation Division (hereinafter "the Division) regarding this practice, including:

- (1) whether it violates O.C.G.A. § 10-14-7 (a) (1);

(2) whether the funeral director which utilizes this funding method exclusively must register as a preneed dealer pursuant to O.C.G.A. § 10-14-4 (a) (3); and

(3) whether the amount of the insurance benefit which exceeds the contracted-for price at the time of death must be refunded to the customer's representative.

This policy statement sets forth the Division's informal interpretation of the Cemetery and Funeral Services Act of 2000, O.C.G.A. § 10-14-1, et seq. ("the Act") as it relates to the questions presented above.

II. Discussion

(A). Applicability of O.C.G.A. § 10-14-7 (a)(1)

O.C.G.A. § 10-14-7 (a)(1) provides:

Each preneed dealer which sells burial or funeral merchandise on a preneed basis or preneed burial or funeral services shall establish and maintain a preneed escrow account.

With limited exceptions, the same Code Section also requires a preneed dealer to deposit 100% of the sales price of funeral services and merchandise into the escrow account. O.C.G.A. § 10-14-7 (a) (2) & (a) (3).

A person is a preneed dealer if he engages in the retail business of selling funeral services or merchandise that is "not delivered at the time of sale." O.C.G.A. § 10-14-3 (31). Therefore, the question at hand is whether the time of sale is the time of payment of premium or the time of distribution of the death benefit to the funeral home. Because the time of "sale" is defined as the time at which merchandise or services are disposed of "for value," the answer to the question turns upon whether the payment of premium constitutes the exchange of value. See O.C.G.A. § 10-14-3 (33). Whether the sale or disposition is "for value" depends upon whether the consumer has paid money to the provider or has relinquished any substantial rights relating to the use or control of money or other property to the funeral director or a third party at the funeral director's behest. See Savannah Bank & Trust Co. v. Wolff, 191 Ga. 111, 11 S.E. 2d 766 (1940); Carr v. Rawlings, 158 Ga. 619, 123 S.E. 2d 875 (1924).

Applying this test, a customer who, after paying the premium, makes an irrevocable assignment of full or partial ownership of the policy in favor of the funeral home or makes an irrevocable or unconditional assignment of the death benefit has relinquished sufficient control over the use of funds so as to constitute the rendering of value. In such a case (hereinafter referred to as a "Dealer-Owned Policy"), the funeral home would be required to hold the policy in escrow and account for the value of the policy to the Secretary in accordance with the escrow reporting requirements of the Act.

The present policy statement addresses only the applicability of the preneed provisions of the Act to the Dealer-Owned Policy, not the permissibility of the Dealer-Owned Policy arrangement in general. The Commissioner of Insurance for the State of Georgia has previously held the Dealer-Owned Policy arrangement to violate the "freedom of choice" provisions of O.C.G.A. § 33-1-10, et seq. See Consent Order entered on March 6, 1987 in In Re: United Family Life Ins. Co., Case No. 85-1C. Because the Act provides, in Section 2 (c), that "[n]othing herein is intended to . . . change the state of the law prior to July 1, 2000, with respect to prohibiting or restricting the sale or purchase of life insurance as a funding vehicle for preneed contracts under this chapter," the Dealer-Owned Policy arrangement may violate the freedom of choice provisions cited above.

On the other hand, the Commissioner of Insurance has specifically approved a limited practice whereby the insurance policy is owned by the customer or the customer's designee not affiliated with the funeral home, the death benefit is conditionally assigned to the funeral home, and the contract for provision of services or merchandise is fully cancelable. See Letter from the Commissioner of Insurance dated July 21, 1997. This arrangement (hereinafter referred to as a "Customer-Owned Policy") will not be deemed by the Division to be for value in the absence of other factors. In such a case, the customer's continuing unfettered control over the policy negates the necessity of subjecting the funds to the escrow or reporting requirements of the Act. A requirement by the funeral home that a revocable or conditional assignment of benefits be made does not alone render the transaction one for value, as long as the circumstances surrounding the manner in which the requirement is communicated to the customer do not impair the customer's right to revoke the assignment.

All premiums should be paid directly to the insurance salesperson or company. If a funeral home takes possession of insurance premiums, that will be considered a preneed sale.

(B). Necessity of Registration as Pre-Need Dealer

It follows from the discussion above that a funeral home which uses Customer-Owned Policies as its exclusive method of funding funeral services or merchandise is not required to register as a preneed dealer pursuant to O.C.G.A. § 10-14-4 (a) (3).

(C). Refunds

In the case of a Dealer-Owned Policy, refunds would have to be made upon request in compliance with O.C.G.A. § 10-14-17 (a) (3) and Secretary of State Rule 590-3-4-.06, without regard to whether all or part of the premium may be nonrefundable or whether the policy can be surrendered for an amount of cash sufficient to meet the amount required to be refunded.

(D). Use of Death Benefits at Time of Need.

Whether a Dealer-Owned or Customer-Owned Policy is being utilized, the contract should always specify how the policy benefits will be applied or used at the time of need. The failure of the contract to do so may, depending on the circumstances, constitute a deceptive practice within the meaning of O.C.G.A. § 10-14-17 (b).

In the case of a Customer-Owned Policy, the death benefit belongs to the beneficiary unless the beneficiary or other authorized family member elects to utilize the services of the funeral home to whom the conditional assignment is made and the funeral home in fact provides the agreed-upon merchandise and services. After the occurrence of both of those conditions, the funeral home is entitled to receive from the death benefit such amount as the parties may by contract agree, whether that be the entire amount of the death benefit or some lesser amount such as the at-need price of the funeral service or merchandise.

The Division expresses no opinion whether the retention of the entire death benefit by the funeral home may violate the freedom of choice provisions of the Georgia Insurance Code. However, the only practice specifically approved to date by the Commissioner of Insurance calls for remitting the amount of the death benefit that exceeds the at-need price of the merchandise and services to the primary beneficiary.

This policy statement is issued pursuant to Secretary of State Rule 590-4-1-.03(3) and is effective immediately.