

Opinion No. 90

Veterans—Honorably Discharged Servicemen and Women—Nurses—Expense—Burial Expenses—County Commissioners—Duties of Payment for Burial Expenses—Social Security Act.

Held: The express provisions of Section 71-120, Revised Codes of Montana, 1947, may not be interpreted as vesting in the counties implied powers to seek repayment of funds expended for burial expenses for deceased servicemen and servicewomen. A definite and express obligation rests on the counties to pay and sustain the expense of burying those honorably discharged servicemen and women who were bona fide residents of the county at the time of death.

May 27th, 1952.

Mr. E. J. Callaghan, State Director
Veteran's Welfare Commission
Horsky Building
Helena, Montana

Dear Mr. Callaghan:

You have recently requested my official opinion as to the power of a county, after paying the burial expenses of a deceased member of the armed forces, to apply for reimbursement under the provisions of the Social Security Act.

At the outset, I call your attention to Volume 23, p. 148, Opinions of the Attorney General, in which it was said:

"The law places a duty upon the County to cause to be decently interred any deceased honorably discharged veteran qualified under the statute. It provides that the County shall see that a one hundred fifty dollar (\$150.00) burial is provided for. This is to be paid for by the County unless waived by the executor, administrator, or heirs of the decedent. It would be unreasonable and without the legislative contemplation to say that the County is obligated to pay the \$150.00 when the matter is taken care of by a claim against the Veterans administration." (Emphasis supplied)

I reaffirm the foregoing and the complete holding and reasoning in the above cited opinion. To clarify any possible misinterpretation of the above emphasized words, the opinion did not hold nor was it intended to imply that a claim could be made by the county against the Veterans Administration or any other organization.

That section of the Social Security Act to which your communication apparently had reference is found in Volume 9 A, F.C.A., Title 42, Sec. 402 (j) and reads:

"Upon the death, after August, 1950, of an individual who died a fully or currently insured individual, an amount equal to three times such individuals primary insurance amount shall be paid in a lump sum to the person, if any determined by the Administrator to be the widow or widower of the deceased and to have been living with the deceased at the time of death. If there is no such person, or if such person dies before receiving payment, then such amount shall be paid to any person or persons equitably entitled thereto, to the extent and in the proportions that he or they shall have paid the expenses of burial of such insured individual. No payment shall be made to any person under this subsection unless application therefore shall have been filed, by or on behalf of any such person (whether or not legally competent), prior to the expiration of two years after the date of death of such insured individual."

It is the rule in Montana that counties can only exercise such powers as are expressly granted by statute and only those implied powers which are necessary for the execution of those powers expressly granted (*Hersey v. Nelson*, 47 Mont. 132, 131 Pac. 30; *Franzke v. Fergus County*, 76 Mont. 150, 245 Pac. 962; *State ex rel. State Highway Commission v. District Court*, 105 Mont. 44, 69 Pac. (2d) 112).

Section 71-120, Revised Codes of Montana, 1947, reads as follows:

"Burial of Deceased Soldiers, Sailors and Marines. It shall be the duty of the board of commissioners of each county in this state to designate some proper person in the county, who shall be known as veterans' bur-

lial supervisor, preferably an honorably discharged soldier, sailor or marine, whose duty it shall be to cause to be decently interred the body of any honorably discharged person, whether male or female, and including nurses, who shall have served in any branch of the armed services of the United States and who may hereafter die. Such burial shall not be made in any burial grounds or cemetery, or in any portion of any burial grounds or cemetery, used exclusively for the burial of pauper dead; provided, (1) the expense of burial shall be the sum of one hundred fifty dollars (\$150.00), to be paid by the county commissioners of the county in which the deceased was an actual bona fide resident at the time of death, and provided (2) that the benefits hereof shall not be available in the case of any decedent whose executor, administrator or heirs waive the benefits hereof.

In the event any such honorably discharged person, male or female, who shall have served in the armed services of the United States, and who is a resident of the state of Montana, shall die while temporarily absent from the state or county of his residence, then the provisions of this act shall apply, and the burial expenses not exceeding the amount herein specified shall be paid in the same manner as above provided.

Whenever any such honorably discharged person, male or female, hereinbefore described, shall die at any public institution of the state of Montana, other than the state soldiers' home, and burial for any cause shall not be made in the county of the former residence of the deceased, the officers of said state institution, as aforesaid, shall provide the proper burial herein prescribed except that the expense of each burial shall not exceed the sum herein allowed, which expense shall be paid by the county in which the decedent resided at the time of entry into such institution, but no such burial shall be covered by any special or standing contract whereby the cost of burial is reduced below the maximum hereinbefore fixed, to the disparagement of proper interment."

The history of this section reveals that it was originally enacted as Sec-

tion 1, Chapter 39, Laws of 1903, and at that time the benefits thereunder were limited to such eligibles as "who might die without sufficient means to defray funeral expenses" and further the county, was required to look first to the nearest living relatives of the decedent to bear the expense. The Act was amended by Chapter 89, Laws of 1909, raising the allowable amount from \$50.00 to \$100.00 and by Chapter '09, Laws of 1911, which removed the requirement that the decedent must have died without sufficient means to defray funeral expenses and the requirement that resort be made to relatives for expenses. The Act was further amended by Chapter 178, Laws of 1919; Chapter 194, Laws of 1921; Chapter 181, Laws of 1931; Chapter 163, Laws of 1937; Chapter 52, Laws of 1939; and Chapter 25, Laws of 1945. It is noteworthy for the purposes of this opinion that Chapter 163, Laws of 1937, added a proviso to the effect that benefits were not to be available in the case of any decedent whose net estate as determined by the inventory and appraisal filed in the course of administration should exceed \$2,000.00. By Chapter 52, Laws of 1939, this provision was removed.

The net effect is that the Act no longer requires that the decedent have been without sufficient means or that the relatives be looked to for payment or reimbursement. Further, the Act makes no exceptions dependent upon the size of the decedent's estate or by any other criteria. It is clear that the benefits of the enactment accrue to all of those decedents who were honorably discharged men and women who had served with the armed forces and who were bona fide residents at the time of death. The payment by the county of \$150.00 for burial expenses is mandatory, unless waived by the executor, administrator or heirs of the decedent. Where the benefit is not waived, the county is obligated by specific statutory provision to pay the \$150.00 burial expense.

It is my opinion that the express provisions of Section 71-120, Revised Codes of Montana, 1947, may not be interpreted as vesting in the counties implied powers to seek repayment of funds expended for burial expenses for deceased servicemen and servicewomen. A definite and express obli-

gation rests on the counties to pay and sustain the expense of burying those honorably discharged servicemen and women who were bona fide residents of the county at the time of death.

Very truly yours,
ARNOLD H. OLSEN
Attorney General