

VOLUME NO. 37

OPINION NO. 178

CONTRACTS - Disposition of a body; compliance with trust requirements of section 86-701, R.C.M. 1947; DEATH - Contracts for the disposition of a body; prearranged funeral plans; FUNERALS - Prearranged funeral plans; pre-need purchase of funeral services and casket; FUNERAL DIRECTORS AND EMBALMERS - Sale of prearranged funeral plans by; money paid for prearranged funeral plans held in trust by; REVISED CODES OF MONTANA, 1947 - Section 86-701.

HELD: All money paid under a prearranged funeral plan contract, including money allocated to a casket which under the contract may be delivered at the seller's option prior to the time its use is required, must be held in trust as provided in section 86-701, R.C.M. 1947.

12 December 1978

Timothy J. Meloy, Esq.
Board of Morticians
Department of Professional and
Occupational Licensing
LaLonde Building
Helena, Montana 59601

Dear Mr. Meloy:

You have requested my opinion on the following questions concerning section 86-701, R.C.M. 1947:

1. Must all money paid under a prearranged funeral plan contract, including money allocated to a casket which under the contract may be delivered at the seller's option prior to the time its use is required, be held in trust until funeral services are needed or the money paid is refunded?
2. If all such money paid need not be held in trust, is it entirely within the discretion of the seller to determine the amount allocated to the casket sold under a prearranged funeral plan contract, or is that amount subject to some fair market value restriction?

Section 86-701, R.C.M. 1947, as amended, provides:

In all cases when, prior to his death, a person, or someone in his behalf, makes a contract for the final disposition of his body, under which contract, pursuant to a prearranged funeral plan, personal property will be delivered upon his death or the professional services of a funeral director, embalmer, cemetery firm, or mausoleum-columbarium corporation will then be furnished, all money paid under such contract shall be held in trust for the purpose for which it was paid until the obligation is fulfilled according to its terms or, by mutual consent of both parties to the contract, said money is refunded to the proper party. Accruals of interest upon this money are subject to this same trust. Such a trust is not necessary for that part of the contract that involves the sale of a cemetery lot if title is passed at the time the cemetery firm receives payment for the cemetery lot. (Emphasis added.)

Section 86-701, enacted in 1953, was amended in 1977 to provide for the protection of persons dealing with cemetery or mausoleum-columbarium corporations and to except the sale of cemetery lots where title passes. Laws of Mont. (1977), ch. 454, sec. 1. As amended, section 86-701 seeks to insure the performance of contractual obligations by sellers of prearranged funeral plans and to guarantee that purchasers of those plans receive what they have paid for when it is needed.

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2. If all such money paid need not be held in trust, is it entirely within the discretion of the seller to determine the amount allocated to the casket sold under a prearranged funeral plan contract, or is that amount subject to some fair market value restriction?

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Your questions relate to a prearranged funeral plan now being offered. Under that plan the contract price for purchase of a casket and future professional funeral services is allocated in part to the casket and in part to professional services. The contract states that all money applicable to professional services shall be deposited in a trust account until such services are rendered. This provision complies with section 86-701, R.C.M. 1947. However, the contract goes on to provide that each payment applicable to the casket shall be deposited in a separate trust account only until such time as the seller chooses to deliver the casket, and that if the seller delivers the casket before its use is required the seller will store it without charge until needed. This provision does not comply with section 86-701, R.C.M. 1947.

The Montana Supreme Court has long held that the intent of the Legislature, which must first be determined from the plain meaning of the words used, is controlling in statutory construction. Dunphy v. Anaconda Co., 151 Mont. 76, 79, 80, 438 P.2d 660 (1968); Security Bank & Trust Co. v. Conners, 170 Mont. 59, 66, 550 P.2d 1313 (1976).

By its terms, section 86-701, R.C.M. 1947, provides that when a person makes a contract for the final disposition of his body under which personal property will be delivered or professional services will be furnished at his death, all money paid under such a contract shall be held in trust until the obligation is fulfilled or the money refunded by mutual consent of both parties. Significantly, the Legislature expressly provided that the trust requirement is inapplicable to the sale of a cemetery lot if title is passed at the time payment is received but did not exclude from the trust requirement any other part of a contract for the final disposition of a body. In the absence of legislative approval, pre-death delivery of a casket purchased under a prearranged funeral plan does not take the casket purchase out of the trust requirement.

Courts in other states, construing statutes similar to section 86-701, R.C.M. 1947, have held that contract payments attributable to property which will be used at the beneficiary's funeral must be held in trust even though the beneficiary may, under the contract, become entitled to that property before his death. Utah Funeral Dir. & Emb. Ass'n. v. Memorial Gardens, 408 P.2d 190 (Utah, 1965); Messerli v. Monarch Memorial Gardens, Inc., 397 P.2d 34 (Idaho, 1964). As the Illinois Appellate Court stated in People ex rel.

Lindberg v. Memorial Consultants, Inc., 366 N.E.2d 127, 130 (1977):

[T]he provisions for delivery upon request do not change the character of defendant's contracts. These sales agreements are for the purpose of furnishing burial merchandise for future use at a time determinable by the death of a person to be buried, and as such are governed by the statute.

Section 86-701, R.C.M. 1947, is unambiguous in requiring that all money paid under a contract which provides for a prearranged funeral plan is to be held in trust until the obligation is fulfilled or the money is refunded to the proper party. The seller has no other option. Whether a contract allocates payments to each of several items or services or to a complete package thereof, the money received must be held in trust in accordance with section 86-701. The provision regarding the casket sale in the prearranged funeral plan contract you question does not comply with this trust requirement and is therefore void. McManus v. Fulton, 85 Mont. 170, 179, 278 P. 126 (1929). Since I have concluded all money paid under a prearranged funeral contract must be held in trust as provided in section 86-701, R.C.M 1947, it is unnecessary to consider whether a seller's determination of the amount allocated to a casket is subject to a fair market value restriction.

THEREFORE, IT IS MY OPINION:

All money paid under a prearranged funeral plan contract, including money allocated to a casket which under the contract may be delivered at the seller's option prior to the time its use is required, must be held in trust as provided in section 86-701, R.C.M 1947.

Very truly yours,

MIKE GREELY
Attorney General