

HAGGERTY- Originator
LARSON } Concurred
NEWELL }
KENNEDY }

LAW LIBRARY

ARIZONA ATTORNEY GENERAL

June 7, 1962

Letter Opinion No. 62-63-L
R-330

REQUESTED BY: J. Fred Talley,
Commissioner
Arizona Real Estate
Department

OPINION BY: ROBERT W. PICKRELL
The Attorney General

QUESTION: Is A.R.S. §6-273 applic-
able to subdivisions
for cemetery purposes?

CONCLUSION: No.

The particular statute at issue is A.R.S. §6-273
which we set out in full herewith:

"6-273. Deposit of payments made under
prearranged funeral plan agreements;
penalty

A. Any banking corporation or association
which is a member of the federal deposit in-
surance corporation or any successor thereto
may receive and hold payments made under a
prearranged funeral plan agreement or under
any agreement providing for the final dis-
position of a dead human body as considera-
tion for the purchase of personal property
or services or both which are to be delivered
or performed subsequent to the death of the
person for whose benefit the agreement is
made.

B. All such payments when so made shall be
held by the banking institution as a trust
fund until the death of the person for whose
benefit the agreement is made and any person
receiving such payments shall cause the same
to be so deposited in such banking institu-
tion within three days of their receipt,
subject only to their release upon demand
of such person during his lifetime or to
his heirs if the personal property or ser-
vices are not provided under said agreement.
Upon being satisfied of the death of the

J. Fred Talley, Commissioner
Arizona Real Estate Department

62-63-L
June 7, 1962
Page 2

person for whose benefit such agreement was made, the banking institution shall pay over such funds to the person entitled thereto under such agreement and be relieved of any further liability on account thereof.

C. Any person who sells, offers to sell or promotes any prearranged funeral plan agreement which shall not provide for the deposits hereby required, or who shall violate any provision hereof shall be guilty of a misdemeanor. Added Laws 1957, Chp. 44, §1."

(Emphasis supplied)

There is evidently some doubt as to whether or not the above quoted statute would apply to the sale of cemetery plots. It is the opinion of this office that under the factual situation presently before us the above quoted statute has no application.

Our reasons for this are two-fold. One of the methods of determining legislative intent is to examine the legislation and to determine if it is remedial or not. If it is remedial legislation the next step is to discover what evil or wrong was sought to be remedied by the statute. It is apparent from reading the statute that there is one particular area which the legislature sought to remedy. That area is the so-called "pre-need" arrangements whereby a person enters into an agreement which provides for their casket, flowers, embalming and other normal arrangements through a funeral home. There have been some instances of unscrupulous persons who use this sales device and then leave with the money. To insure that the funds advanced for this purpose are actually protected, the legislature requires that these funds be placed in a responsible banking institution to be held in trust until they are actually needed. It is also clear that as no one knows when they will be needed there is no other method whereby the state could insure the proper use of the monies actually advanced.

However, in the area of cemetery lots an examination will show that no such protection is needed.

Cemetery lots are customarily sold by deed, just as other real property is sold. When the final contract is completed, that is when all payments are made, the purchaser receives a deed for as many lots as he bought; he has paid his money; he has received his deed. The deed may be recorded as others. This insures protection of his investment asmuch as any other real purchase and inasmuch as the seller has delivered the deed there is no reason why he should not have the benefit, that is the money which has actually been paid. It may very well be true that in some instances persons would purchase several lots for the use of all of the members of their family and there is no logical reason why this money must be held in trust once the deeds to the lot have been delivered. While it is true that a percentage, usually 10%, of the fund paid in on the purchase of the lots may be kept in trust for "perpetual care", that is far different from 100% requirement of A.R.S. §6-273.

The second reason is derived from the language of the statute itself. As the underlined phrases show the consideration for the contract to be performed by the vendor are personal property or services or both - personal property and services are referred to twice in the statute. Under a cemetery arrangement there is no personal property involved and the services, upkeep of the cemetery, are a small portion of the transaction. In the other situation described the personal property or services or both constitute the entire transaction. That is between the expenses of the flowers and casket and normal funeral director's services the entire contract has been performed.

The legislature's careful use of this phraseology would seem to indicate a clear expression under the doctrine of expressio unius that the real property transactions involved in cemetery lot purchases are not to be covered by this particular statute. In addition to this, the statute speaks only of the individual for whose benefit the agreement is made. We believe it is fairly obvious that the cemetery lots themselves can be transferred and whatever perpetual care there is would normally go with that transaction. This is obviously impossible in the case of the funeral service agreement and the release provision of

J. Fred Talley, Commissioner
Arizona Real Estate Department

62-63-1
June 7, 1962
Page 4

A.R.S. §6-273(D) would be meaningless if sought to be applied to a cemetery lot purchase.

Therefore, it is our opinion that the sale of cemetery lots with no more than the usual 10% perpetual care fund does not come within the provisions of A.R.S. §6-273 requiring deposit of such funds in a federally insured banking corporation or association.


ROBERT W. PICKRELL
The Attorney General

PMH:eh