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June 15, 1987

The Right Reverend Monsignor Richard O'Keefe, President
Arizona State Board of Funeral
Directors and Embalmers
1645 West Jefferson
Phoenix, Arizona 85007

Re: I87- 084 (R86-078)

Dear Monsignor O'Keefe:

You have inquired whether A.R.S. § 32-1391.05(C) and A.A.C. R4-12-554 may be interpreted to allow monies for taxes on the interest earned on monies held in a prearranged funeral trust account to be paid to the beneficiary of the trust. For the reasons that will be discussed, we conclude that the plain language of A.R.S. § 32-1391.05(C) requires release of funds to the taxing authority. A.A.C. R4-12-554 also only allows payment to the taxing authority.

In 1984, the Arizona Legislature adopted legislation regulating the sale of prearranged funeral agreements. A.R.S. §§ 32-1391 to -1391.17. Under this legislation, all monies received by a funeral establishment from the sale of a prearranged funeral agreement are to be placed in a trust account. A.R.S. § 32-1391.04. All monies placed in the trust fund, and interest earned on those monies, remain the property of the purchaser of the prearranged funeral agreement (beneficiary). A.R.S. § 32-1391.04(B)(1). The beneficiary can demand a refund of the trust funds at any time. A.R.S. § 32-1391.06. Accordingly, the beneficiary is liable for the taxes which accrue on the interest earned on the trust funds. A.R.S. § 32-1391.05(C) establishes that the accrued taxes may be paid by the financial institution holding the trust funds "from the monies in the trust account"

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In 1985, the Arizona State Board of Funeral Directors and Embalmers adopted rules which established the procedure to be followed when the accrued taxes are paid from the monies in the trust account. Specifically, A.A.C. R4-12-554 provides, in part, that

[o]n receipt of an appropriately completed statement of accrued taxes, the financial institution [holding the trust funds] shall release a portion of the trust funds equal to the accrued taxes, payable to the taxing authority, to the funeral establishment.

You have provided information indicating that, based upon their interpretations of A.R.S. § 32-1391.05(C) and A.A.C. R4-12-554, financial institutions presently are only releasing funds to the taxing authorities, i.e. the Internal Revenue Service and the Arizona Department of Revenue. As a result, you state, the tax is often paid twice, once by the beneficiary and once by the financial institution. You indicate that financial institutions will not reimburse the beneficiary for taxes paid. Rather, the beneficiary must seek a refund from the taxing authority.

In light of the foregoing, we turn to your inquiry whether A.R.S. § 32-1391.05(C) can be interpreted to allow the release of funds to the beneficiary for the payment of taxes. That provision states in pertinent part:

The funeral establishment may direct the financial institution to pay, from time to time, from the monies in the trust account, any taxes which have accrued by reason of the income earned from funds deposited in the trust account.

(Emphasis added.)

Language used in a statute should be given its ordinary, common meaning as understood by the average person. Valley National Bank of Arizona v. Educational Credit Bureau, Inc., 23 Ariz.App. 148, 150, 531 P.2d 193, 195 (1975). If the language is plain and unambiguous and can be given but one meaning which does not lead to an impossibility or absurdity, that language must be followed, even though the result may be

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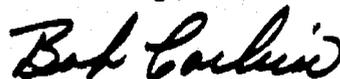
harsh, unjust, a mistaken policy. State Tax Commission v. Television Services, Inc., 108 Ariz. 236, 239, 495 P.2d 466, 469 (1972); Buggelin v. Cameron, 90 P. 324, 11 Ariz. 200 (1907). Where a statute, capable of being executed, has been enacted by the legislature in explicit language, it is presumed the legislature means what it has said. Gustafson v. Rajkovich, 76 Ariz. 280, 263 P.2d 540 (1954).

The language of A.R.S. § 32-1391.05(C) emphasized above clearly and unambiguously directs financial institutions to pay the taxes. The ordinary person would understand this to mean pay the taxing authority, not reimbursing the beneficiary taxpayer. Accordingly, we cannot construe this statute to allow reimbursement of the beneficiary/taxpayer.

The principles set out above also apply to interpretation of the Arizona State Board of Funeral Directors and Embalmer's rule, A.A.C. R4-12-544. Marlar v. State, 136 Ariz. 404, 410, 666 P.2d 504, 510 (App. 1983). The rule provides that the "financial institution shall release a portion of the trust funds equal to the accrued taxes, payable to the taxing authority, to the funeral establishment." The language used in the rule clearly and unambiguously identifies the taxing authority as the payee. Such language can only refer to an entity, such as the Internal Revenue Service or the Arizona Department of Revenue, entitled by law to levy and collect taxes. Such language does not permit a broader interpretation to cover the taxpayer. Indeed, such interpretation would bring the rule impermissibly into conflict with the statute. Ferguson v. Arizona Department of Economic Security, 122 Ariz. 290, 292, 594 P.2d 544, 546 (App. 1979).

Based on the foregoing, we conclude that A.R.S. § 32-1391.05(C) and A.A.C. R4-12-544 allow payment of accrued taxes owing on funds earned by prearranged funeral trust accounts only to a taxing authority. Reimbursement of a beneficiary who may have paid such tax is not permitted.

Sincerely,



BOB CORBIN
Attorney General

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