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September 27, 1985

ATTORNEY GENERAL OPINION NO. 85- 134

The Honorable Jack Brier
Secretary of State
State Capitol Building, 2nd Floor
Topeka, Kansas 66612

Re: Contracts and Promises -- Funeral Agreements,
Contracts and Plans; Cemetery Merchandise Contracts
-- Cemetery Merchandise; Defined

Synopsis: Under definitions contained in the Cemetery Merchandise Act, K.S.A. 1984 Supp. 16-320 et seq., "cemetery merchandise" is defined to include a number of specific items of personal property as well as "all merchandise commonly sold or used in cemeteries." K.S.A. 1984 Supp. 16-320(a). While caskets are not specifically mentioned, neither are they excluded (as are certain types of real property and intangible rights), and so are included under the general category of "merchandise commonly sold or used in cemeteries." Accordingly, cemetery corporations may enter into contracts for the pre-need sale of caskets under the terms of K.S.A. 1984 Supp. 16-320 et seq. Cited herein: K.S.A. 1984 Supp. ~~16-301~~; 16-302; 16-303; K.S.A. 16-308; K.S.A. 1984 Supp. 16-320; 16-321; 16-322; 16-329; 16-330; 16-333.

* * *

Dear Mr. Brier:

As Secretary of State for Kansas, you request our opinion on a question concerning a provision contained in the Cemetery Merchandise Act, K.S.A. 1984 Supp. 16-320 et seq. As enacted in 1982, the act provides for the pre-need sale of

items of "cemetery merchandise," as that term is defined by K.S.A. 1984 Supp. 16-320(a). Such items may be sold on a pre-need basis by a cemetery corporation, provided certain specific requirements are met concerning investment of the proceeds of the sale, record keeping, annual reporting of the merchandise trust account, and audits by your office. As the state official with oversight of such sales, you accordingly seek our opinion on whether caskets fall within the scope of the definition of cemetery merchandise contained in the act.

In 1953, K.S.A. 1984 Supp. 16-301 et seq. (the Pre-need Funeral Law) was enacted to require anyone who sold funeral or burial merchandise, which was not immediately delivered to the purchaser, to deposit in trust 100% of the sales proceeds and trust earnings. The Pre-need Funeral Law was held to apply to burial vaults and markers by the case of State ex rel. v. Anderson, 195 Kan. 649 (1965), and was also construed to cover cemeteries. In 1973, however, K.S.A. 1984 Supp. 16-301 was amended to remove markers, crypts, niches, lots, spaces and other items and intangible rights connected with graves. Accordingly, prior to 1982, markers were subject to no trust provisions at all, while caskets and vaults could be sold pre-need only under the provisions of K.S.A. 1984 Supp. 16-301 et seq. or under the narrow holding of State ex rel. v. Lakeview Gardens, Inc., 221 Kan. 211 (1976) (caskets could be sold pre-need without trust if delivered and stored for purchaser).

Since 1982, the Cemetery Merchandise Act has provided cemetery corporations with a method of selling pre-need merchandise which, while similar to that found for funeral homes at K.S.A. 1984 Supp. 16-301 et seq. is different in several important respects. As noted above, under the provisions of K.S.A. 1984 Supp. 16-301 et seq., "funeral or burial merchandise" is specifically defined to include caskets [K.S.A. 1984 Supp. 16-301]. K.S.A. 1984 Supp. 16-302 provides that 100% of the money paid for such pre-need merchandise must be deposited in a financial institution, while K.S.A. 1984 Supp. 16-303 prohibits any withdrawal until either the death of the person for whom the funds were deposited or a demand for withdrawal by the purchaser, at which time the contract terminates. In contrast, cemetery merchandise sold pre-need pursuant to K.S.A. 1984 Supp. 16-320 et seq. must be funded only at 110% of the wholesale price of the item, with the cemetery permitted to keep both the first 35% of the amount paid on the contract and any amounts received which are in excess of the "minimum funding requirement" (i.e. the 110% amount). K.S.A. 1984 Supp. 16-321. Further, sales made

under the Cemetery Merchandise Act are exempt from the requirements of the Pre-Need Funeral Law. K.S.A. 1984 Supp. 16-333.

The definition of "cemetery merchandise" found at K.S.A. 1984 Supp. 16-321(a) provides the basis for your inquiry. There, it is stated:

"'Cemetery merchandise' means burial vaults, grave liners, grave boxes, urns, memorials, markers, vases, memorial vases, tombstones, lawn crypts, niches and mausoleum spaces and all merchandise commonly sold or used in cemeteries. Grave lots, grave spaces; burial or interment rights; and developed or existing lawn crypts, mausoleum spaces or niches are not cemetery merchandise."
(Emphasis added.)

We note that this language has existed in the statute since it was enacted in 1982 as part of House Bill No. 2818 (L. 1982, ch. 96, §1). Prior to action by the House Local Government Committee, the word "similar" appeared in the underscored portion where the word "all" now appears. This action was taken by the House committee, and was not altered during the bill's subsequent passage through the legislature.

It should also be noted that while caskets are not mentioned in the list of items which are defined as cemetery merchandise, the items which are specifically excluded are all either interests in real estate or intangible rights. In this respect, the definition is similar to a provision found in the Pre-need Funeral Law at K.S.A. 1984 Supp. 16-301, where certain items are specifically included (caskets and vaults) while others are specifically excluded (tombstones, lots, crypts, etc.). Unfortunately for the purposes of statutory construction, while some items are excluded by both acts (such as grave lots, spaces, niches), others are included in both (vaults), with both acts containing general "catch-all" provisions which arguably may contain other items which are not specifically enumerated.

Since caskets are not specifically included or excluded by K.S.A. 1984 Supp. 16-321(a), we are faced with determining whether they are "merchandise commonly sold or used in cemeteries." By inserting this phrase, the legislature has indicated that there are items not specifically set forth

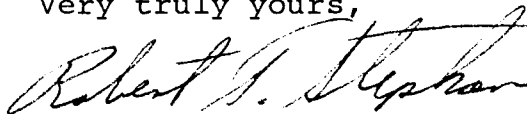
which are nonetheless to be considered as cemetery merchandise. While it may be argued that caskets are not commonly "sold" by cemeteries, caskets are universally "used" in cemeteries, and the statute by its terms does not restrict the source of the caskets to funeral directors, cemetery owners or anyone else.

The fundamental purpose of statutory construction is to determine and give effect to the intent of the legislature, when that intent can be determined from the language of the statute. Szoboszlay v. Glessner, 233 Kan. 475 (1983). In our opinion, both K.S.A. 1984 Supp. 16-301 et seq., and K.S.A. 1984 Supp. 16-320 et seq., indicate an intent to be inclusive in their scope and application. As noted above, K.S.A. 1984 Supp. 16-321(a) defines "cemetery merchandise" to include "all merchandise commonly sold or used in cemeteries." K.S.A. 1984 Supp. 16-301 likewise states that "funeral or burial merchandise" includes certain enumerated items, plus "all other articles of merchandise incidental to a funeral service." Kansas courts have held as a matter of course that where statutes contain an enumeration of certain things to which the act applies and also a general expression concerning application of the act, the general expression may be given effect if the context shows that the enumeration was not intended to be exclusive. Kansas Commission on Civil Rights v. Sears, Roebuck and Company, 216 Kan. 306 (1975); Johnson v. General Motors Corporation, 199 Kan. 720 (1967). Such is the case in both of the acts in question here, where the legislature set forth a list of items and included a general statement as well.

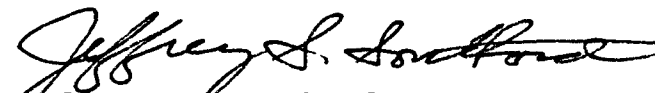
As a result of the statutory framework now in place, a consumer may purchase a casket on a pre-need basis from either a funeral home or a cemetery, although the requirements placed on the two businesses are different. In examining the legislative history behind K.S.A. 1984 Supp. 16-320 et seq., we have been unable to determine why a distinction was made between funeral homes and cemeteries regarding sales of the same item, including both vaults and caskets. However, like a court, it is not the function of this office to question the propriety, wisdom or necessity of otherwise valid legislative acts, since it is the legislature and the legislature alone which determines whether a statute is in the public interest. City of Baxter Springs v. Bryant, 226 Kan. 383, 386 (1979). Creating parity between the two industries is clearly a policy decision which is in the hands of the legislature. In any event, the public is protected through the trust mechanism under either act.

In conclusion, under definitions contained in the Cemetery Merchandise Act, K.S.A. 1984 Supp. 16-320 et seq., "cemetery merchandise" is defined to include a number of specific items of personal property as well as "all merchandise commonly sold or used in cemeteries." K.S.A. 1984 Supp. 16-320(a). While caskets are not specifically mentioned, neither are they excluded (as are certain types of real property and intangible rights), and so are included under the general category of "merchandise commonly sold or used in cemeteries." Accordingly, cemetery corporations may enter into contracts for the prepaid sale of caskets under the terms of K.S.A. 1984 Supp. 16-320 et seq.

Very truly yours,



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RTS:JSS:crw