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August 10, 1979

ATTORNEY GENERAL OPINION NO. 79- 171

The Honorable Fletcher Bell  
Commissioner of Insurance  
State Office Building, First Floor  
Topeka, Kansas 66612

Re: Insurance---Life and Health Insurance Guaranty Association  
---Definitions---Member Insurer

Synopsis: A burial insurance corporation is authorized to transact the business of the issuance of direct life insurance policies, within the meaning of K.S.A. 40-3003(a), and, if it is transacting such business, it shall be a member of the Kansas Life and Health Insurance Guaranty Association.

Dear Mr. Bell:

In your letter dated February 19, 1979, signed by Derek J. Shafer, Attorney, you posed the question:

Does a burial insurance policy come within the scope of K.S.A. 40-3003(a), thus allowing Sunflower Burial Insurance Company, Inc., to become a member of the Life and Health Guaranty Association?

You further state that Sunflower Burial Insurance Company, Inc., was incorporated on April 16, 1943.

K.S.A. 40-806, which was amended by the Kansas Legislature in its 1979 Session, now provides, in pertinent part:

Any corporation already organized under the laws of this state and transacting the business of burial insurance on January 1, 1961, may continue the transaction of such business as provided by the laws of this state prior to the effective date of this act, except that such corporation may write burial insurance in an amount not exceeding three thousand dollars (\$3,000) on any one life . . . (Emphasis supplied.) 1979 Session Laws of Kansas, Chapter 141, Sec. 1.

Any burial insurance corporation which organized after November 27, 1933 and before July 1, 1961, would look to the 1933 Laws of Kansas, Chapter 72, Sec. 1 (Special Session), which provided, in pertinent part:

Corporations may be organized with a paid-up capital stock of at least ten thousand dollars for the purpose of transacting the business of burial insurance, and may issue policies providing for the payment in cash of not to exceed ten per centum of their capital stock and in no event shall be issued in excess of \$1,000 on any one life . . ."(Emphasis supplied.)

The above section was amendatory of Section 40-801 in the Kansas Revised Statutes of 1923 and the supplements thereto, and was repealed in 1961 (1961 Laws of Kansas, Chapter 234, Sec. 2). However, a burial insurance corporation existing today must still look to the repealed statute to find its authority to transact business.

The Kansas Life and Health Guaranty Association is a non-profit legal entity, consisting of "member insurers" who must remain members of the association as a condition of their authority to transact insurance in Kansas. The "member insurers" are subject to assessment to provide funds to carry out the goal of the association; that is, to prevent and remedy the impairment or collapse of insurance companies, and to protect consumers from hardships incidental to such impairment or collapse. The association is organized under the Kansas Life and Health Insurance Guaranty Association Act, K.S.A. 40-3001, et seq., which defines "member insurer" in K.S.A. 40-3005(g):

"Member insurer" means any person authorized to transact in this state any kind of insurance to which this act applies under section 3 (40-3003).

In turn, Section 3 of the act, K.S.A. 40-3003, provides:

(a) This act shall apply to direct life insurance policies, health insurance policies, annuity contracts, and contracts supplemental to life and health insurance policies and annuity contracts issued by persons authorized to transact insurance in this state at any time.

(b) This act shall not apply to:

(1) Any such policies or contracts, or any part of such policies or contracts, under which the risk is borne by the policyholder;

(2) Any such policy or contract or part thereof assumed by the impaired insurer under a contract of reinsurance, other than reinsurance for which assumption certificates have been issued;

(3) Any such policy or contract issued by persons transacting business pursuant to the provisions of K.S.A. 1971 Supp. 40-202. (Emphasis supplied.)

Thus, the question of whether a burial insurance corporation shall be a member of the association may be distilled to the following question:

"Is a 'burial insurance policy' a 'life insurance policy'?"

"Life insurance" has been defined as "that kind of insurance in which the risk contemplated is the death of a particular person; upon which event . . . the insurer engaged to pay a stipulated sum to the legal representatives of such person, or to a third person having an insurable interest in such person." Black's Law Dictionary, 944 (Rev. 4th Ed. 1968). And, as "insurance that guarantees a specific sum of money to a designated beneficiary upon the death of the insured or to the insured should he live beyond a certain age." The American Heritage Dictionary of The English Language, 754. And, as "insurance providing for payment of a stipulated sum to a designated beneficiary upon death of the insured." Webster's Third New International Dictionary of the English Language Unabridged (1968).

A contract is to be determined from its nature and effect, not by the terminology used to characterize it. The Kansas Supreme Court has chosen a functional approach to defining what a life insurance policy is. For the purpose of determining whether a party was engaged in the transaction of a mutual life insurance business, or not, the court considered the nature and character of its organization and the kind of business it did in fact transact. Endowment and Benevolent Association v. The State, 35 Kan. 253, 255, 256 (1886). Similarly, a policy that was termed an accident and health policy, but provided benefits for accidental death, was held by the court to be governed by the rules applicable to life insurance cases. Geigler v. Mutual H. & A. Ass'n, 159 Kan. 452, 454 (1945). Quoting from a California case, the Supreme Court of Kansas defined "life insurance" to be

simply an undertaking on the part of the insurer that either at the death of the assured, whenever that event may occur, or on his death, if that shall happen within a specified term, or before attaining a certain age, as the case may be, there shall be paid a stipulated sum. Endowment, supra, at 263.

Other jurisdictions have had occasion to consider whether "burial insurance" is "life insurance." In State v. Stout, 65 S.W.2d 827, 829, 17 Tenn.App. 10 (1933) a burial or funeral benefit, being determinable upon cessation of human life, and dependent on that contingency, was held to constitute "life insurance." In State v. Globe Casket & Undertaking Co., 143 P. 878, 879, 82 Wash. 124, L.R.A. 195B 976 (1914), a corporation organized to sell contracts, by which it agreed to furnish funerals and all necessary accessories to persons with whom it contracted, was said to be engaged in writing life insurance, although no beneficiary of the promise was named; the beneficiary being the person who would otherwise be obligated to pay the expenses of the burial. In Peterson v. Smith, 196 So. 505, 188 Miss. 659 (1940), the court, quoting from 1 Joyce on Insurance 87 (2d Ed.), found that burial insurance is a valid contract based on a legal consideration whereby the obligor undertakes to furnish the obligee or one of the latter's near relatives at death a burial reasonably worth a fixed sum, and that it constituted "life insurance." And, contracts issued by burial companies and associations were held to be life insurance contracts and subject to regulation by the state, in Cosmopolitan Life Insurance Co. v. Northington, 300 S.W.2d 911, 917, 201 Tenn. 541 (1957). Contra: South Georgia Funeral Homes v. Harrison, 188 S.E. 529, 183 Ga. 379 (1936).

A concise definition of a "life insurance policy" would be "an agreement to pay a certain sum of money on the death of the insured." Words and Phrases, "Life Insurance." Thus, using the functional approach of the Kansas Supreme Court, it is our opinion that a burial insurance policy that contains an agreement to pay a certain sum of money on the death of the insured can be considered a "life insurance policy" within the meaning of K.S.A. 40-3003(a).

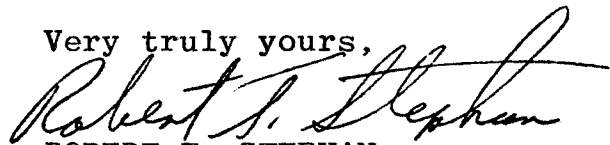
This is evident because of K.S.A. 44-3004, which provides that "(t)his act shall be liberally construed to effect the purpose under section 2 (40-3002) which shall constitute an aid and guide to interpretation." K.S.A. 40-3002 provides, in pertinent part:

The purpose of this act is to protect policyowners, insureds, beneficiaries, annuitants, payees, and assignees of life insurance policies, health insurance policies, annuity contracts, and supplemental contracts, subject to certain limitations, against failure in the performance of contractual obligations due to the impairment of the insurer issuing such policies or contracts . . . (Emphasis supplied.)

To liberally construe the term "direct life insurance policies," as used in K.S.A. 40-3003(a), it would include burial insurance policies, since that broad definition will give effect to the purpose of the act. We fail to see how there is any difference, other than the fact that burial insurance policies have a \$3,000 limit, between the consequences of a failure of a standard life insurance company and the consequences of a failure of a burial insurance corporation. Ideally, if both are included in the act, more policyowners will be protected.

In our opinion, as long as a burial insurance corporation is authorized to transact insurance in this state, and as long as a burial insurance corporation continues to transact the kind of burial insurance that performs the same function as other life insurance, and as long as the policies or contracts do not fit within the three exemptions of K.S.A. 44-3003(b), then a burial insurance corporation is a "member insurer," and shall be and remain a member of the association.

Very truly yours,



ROBERT T. STEPHAN  
Attorney General of Kansas



Reid Stacey  
Assistant Attorney General