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ATTORNEY GENERAL OPINION NO. 86-123

The Honorable Edward F. Reilly, Jr.
State Senator, Third District
430 Delaware, Box 9
Leavenworth, Kansas 66048

Re: Contracts and Promises--Funeral and Cemetery
Merchandise Agreements, Contracts and
Plans--Counselor's Commission

Synopsis: K.S.A. 1985 Supp. 16-301 regulates the payment for funeral services and burial merchandise before they are actually needed and received. It does not preclude the contracting and payment for consulting services which are rendered immediately. Thus, a seller of merchandise or services is free to immediately deliver consulting or planning services, and receive payment in a lump sum or by installments, notwithstanding the provisions of K.S.A. 16-301 et seq., if a separate contract is entered into providing for those services, and for payment. Cited herein: K.S.A. 1985 Supp. 16-301; 16-320 et seq.; 16-321.

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Dear Senator Reilly:

You request our opinion regarding the applicability of K.S.A. 16-301 et seq. to a "counselor's commission" charged by some sellers of funeral services and burial merchandise. An explanation of the counselor's commission appears in your request letter as follows:

"[The] amount is not considered to be part of the payment for services or merchandise required to be furnished by the funeral home. The commission is designated as nonrefundable and moneys paid under the contract are to be credited to payment of this commission prior to being credited to the cost [of] services to be provided under the contract."

It appears that the counselor's commission is for services rendered immediately rather than at some time in the future. This is an assumption upon which we base this opinion.

K.S.A. 1985 Supp. 16-301 provides, in part, as follows:

"Any agreement, contract or plan requiring the payment of money in a lump sum or installments which is made or entered into with any person, association, partnership, firm or corporation for the final disposition of a dead human body, or for funeral or burial services, or for the furnishing of personal property or funeral or burial merchandise, wherein the delivery of the personal property or the funeral or burial merchandise or the furnishing of professional services by a funeral director or embalmer is not immediately required, is hereby declared to be against public policy and void, unless all money paid thereunder shall be deposited in a bank, trust company or savings and loan association which is authorized to do business in this state and insured by a federal agency, or invested in a credit union which is insured with an insurer or guarantee corporation as required under K.S.A. 17-2246, and amendments thereto, all as herein provided, and subject to the terms of an agreement for the benefit of the purchaser of the agreement, contract or plan. . . ." (Emphasis added.)

The purpose of this statute was enunciated by the Kansas Supreme Court in Lakeview Gardens, Inc. v. State, ex rel. Schneider, 221 Kan. 211, 215 (1976):

"The concern of the legislature expressed by this statute emanated from the possibility for fraud which can arise from sales of burial merchandise to young persons where the purchase price is collected long in advance of any actual need for such merchandise. Because of the time lag between the time of bargaining and the time of performance requiring delivery of the merchandise there are hazards not present in ordinary retail sales. Not only do such sales present opportunities for fraud and deceit but delivery of the merchandise may become impossible of performance when a seller has suffered economic woes and has gone out of business. The purpose of requiring that purchase price payments be held in trust is to assure those who purchase preneed caskets and burial merchandise that they will have either the benefit of their purchase, the merchandise, or their money back at the time the need for the merchandise occurs.

"The legislature did not restrict all sales of caskets. It is only those sales wherein the delivery of the casket is not immediately required that fall within the restriction. An intent to restrict all preneed contracts for the sale of caskets could have been clearly expressed without reference to delivery, if such was the intent of the legislature."

The court narrowed its discussion to the sale of caskets (burial merchandise) because the facts before the court specifically involved the sale of caskets. However, at the time this case was decided K.S.A. 16-301 read virtually the same as it does currently, providing that money paid for the furnishing of professional services by a funeral director or embalmer which are not immediately required, is to be placed in deposit for future use. Thus, the reasoning of the court applies equally to both the rendering of services and the delivery of merchandise. The court in Lakeview, supra, held that the cemetery corporation's contracts for the sale of caskets did not fall within the purview of K.S.A. 16-301

because the caskets were delivered, albeit constructively, immediately upon execution of the sale contract.

The same analysis may be used in the present inquiry. A separate contract for consulting services contemplates the immediate furnishing of such services. Thus, in light of Lakeview, supra, the immediate furnishing of professional planning services would render inapplicable the trust requirements of K.S.A. 1985 Supp. 16-301. Conversely, any services to be rendered by the seller in the future are subject to the provisions of K.S.A. 1985 Supp. 16-301, and moneys paid pursuant to contracts for such services are to be placed in trust until those services are furnished.

This conclusion is not intended to allow the pre-need sellers to circumvent the trust provisions of K.S.A. 16-301 et seq. You specifically ask whether the addition of the counselor's commission to the cost of a pre-need contract is permissible under K.S.A. 16-301 et seq. In our judgment, it is permissible if all money paid under the pre-need contract is deposited in trust.

K.S.A. 1985 Supp. 16-301 provides that any agreement, contract or plan for burial merchandise or services to be delivered in the future is void unless all money paid thereunder is placed in trust. If the counselor's commission is made a part of the pre-need contract, agreement or plan which is covered by K.S.A. 16-301 et seq., then it is part of "all money" paid under the contract, agreement or plan which must be deposited. It is our opinion, therefore, that sellers may require immediate payment or installment payments for those counseling services immediately rendered, but this may not be done in the pre-need contract, unless all money is deposited in trust. For the seller to avoid trust depositing of the counseling or planning fees, there would have to be separate contracts, one for the services furnished and merchandise delivered immediately, and one for the services and merchandise to be delivered in the future. In addition, if a pre-need contract covered by K.S.A. 16-301 et seq. provides for a credit or reduced price on the total cost based on the payment of a separate counselor's commission, the commission may again become part of the "agreement, contract or plan" causing the counselor's commission to be subject to the trusting requirements.

You further ask whether, if this charge is deemed permissible, there is any limitation on the amount that may be charged. None of the statutory language in K.S.A. 16-301 et seq.

restricts the amount which may be charged for funeral or burial services and merchandise; nor do Kansas statutes restrict charges for before-need or at-need professional services and consulting. Thus, contract and consumer protection laws, as well as ethical considerations, would have to be applied, through a case-by-case analysis, to determine whether prices charged were exorbitant or unconscionable.

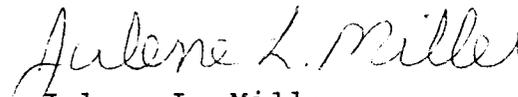
Your final question is what difference there is between a charge for immediate counseling services and the amount cemetery corporations are allowed to retain prior to beginning to trust funds under the provisions of K.S.A. 1985 Supp. 16-321(b). There is no statutory connection between the provisions of K.S.A. 16-320 et seq., which provide for trust arrangements for the sale of cemetery merchandise to be delivered in the future, and the immediate furnishing of counseling by a pre-need seller.

In conclusion, K.S.A. 1985 Supp. 16-301 regulates the payment for funeral services and merchandise before they are actually needed and received. It does not preclude the contracting and payment for consulting services which are rendered immediately. Thus, a pre-need seller is free to immediately deliver those services, and receive payment in a lump sum or by installment, notwithstanding the provisions of K.S.A. 16-301 et seq., if a separate contract is entered into providing for those services, and for payment. If the payment for consulting services is made part of the pre-need contract, then all money paid thereunder must be deposited in trust.

Very truly yours,



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Julene L. Miller
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