

# MAINE STATE LEGISLATURE

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November 3, 1966

Dean Fisher, M. D., Commissioner

Health and Welfare

James M. Cohen, Assistant Attorney General

Prepaid Funerals

FACTS:

A 1959 Act of the Legislature established the existence of a mortuary trust for "all moneys paid during a person's lifetime to any individual, firm, association, partnership or corporation, by such person or by someone in his behalf under an agreement that services be performed or personal property be delivered in connection with the disposition of such person's body after his death..." (32 M.R.S.A. § 1401). The party receiving the funds (payee) becomes the trustee for the individual who has paid the money (hereinafter referred to as the payor).

One provision of the statutory section (op. cit.) reads as follows:

Such funds may be withdrawn if otherwise lawful by the payee on written instructions of the person who originally paid the money or his legal representative or on the death of the person for whose benefit such funds were paid, in which latter event they shall be used in accordance with the agreement.

In determining eligibility of individuals for Old Age Assistance programs the following questions have been raised relative to 32 M.R.S.A. § 1401.

QUESTION 1.

Are the prepaid funeral or burial plans under this statute revocable?

ANSWER.

Yes, unless the payor specifically makes it irrevocable.

OPINION.

The nature of the relationship between the payor and payee in a mortuary trust situation differs from that of ordinary trust relationships. Because of public necessity to protect the interest of the payor whose beneficial interest accrues only at death, the legislature created a special relationship by placing the payee in the position of a fiduciary. Since the relationship was established by statute, in the public interest, the language of the statute in the light of its intent and purposes must determine the results flowing from its use, rather than general trust principles. Under ordinary trust principles the creator of a trust would have no power to revoke unless he received such power by the instrument.

Thus, examination of language stating that "such funds may be withdrawn...on...instructions (of the payee)." is the key to the question of revocability. The limitation on such a withdrawal is that it be "otherwise lawful".

Since the legislation is an attempt to protect an individual from potential abuse, the protection should last only so long as the payor desires to prepare for or prepay his burial. Nothing in the statute either specifically or impliedly prevents the payor from changing his mind. This is not the purpose of the statute.

Whether the agreement between the payor and payee is irrevocable would depend upon the intent of the payor and the agreement between the parties at the time the money is paid for the future services. Silence in the agreement relating to withdrawal of the funds means that the money can be withdrawn at any time by the payee upon written instructions of the payor or his legal representative and returned to the payor, thus abrogating the agreement.

Contrary to an earlier opinion (1961-1962 Attorney General Rep. 55, which is not overruled) withdrawal upon instructions of the payor is not limited merely to the transfer of the funds from one banking institution to another. A revocable agreement would have to be considered as part of the assets of an individual for purposes of assistance eligibility.

It is possible, however, for the agreement to state that the payor makes it irrevocable. If this be the contractual arrangement between the parties then there can be no return of the funds to the payor.

QUESTION 2.

Can the Department of Health and Welfare set a maximum amount for prepaid burial expenses administratively?

ANSWER.

No.

OPINION.

If the agreement is revocable it is considered an asset of the estate.

If the agreement is irrevocable, it may be necessary to determine if a transfer has been made for reasonable consideration.

QUESTION 3.

Does 22 M.R.S.A. § 3453 have a limiting effect on the amount to be utilized for a prearranged burial?

ANSWER.

See Opinion.

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OPINION.

A revocable trust means the money is considered part of the estate so that the statutory maximum applies.

An irrevocable trust is not affected by the statutory maximum.

QUESTION 4.

Do life insurance policies naming funeral directors as beneficiaries fall within § 1401?

ANSWER.

No.

OPINION.

Although the insured may name a funeral director as beneficiary of the policy, this is not a prearranged funeral or burial within the meaning of 32 M.R.S.A. § 1401. A trust is created when the payor expects the payee to perform certain services, for money paid. The cashable value of an insurance policy is part of the individual's estate since there is no agreement between the payor and the insurance company that the company will perform burial services. The statute is directed at agreements between an individual seeking burial services and the party who will perform such services, with money having been paid to such party.

JMC:rhk

cc: Attorney General

/s/ James M. Cohen

James M. Cohen

Assistant Attorney General