

INSURANCE: Pre-arranged funeral contract described in opinion is a contract of insurance and offering of the same to the public without meeting licensing requirements of Missouri's insurance code violates Sections 375.300 and 375.310 RSMo 1949.



June 10, 1957

Honorable David L. Colson
Prosecuting Attorney
St. Francois County
Farmington, Missouri

Dear Mr. Colson:

The following opinion is rendered in reply to your request reading as follows:

"A perplexing problem has developed here in St. Francois County concerning a practice which has been carried on for many years by several funeral directors. The problem concerns the practice of pre-arranged funeral contracts sold by certain St. Francois County funeral directors.

"Please find enclosed herein a photostatic copy of one such contract, sold by the Sparks Funeral Home, accompanied by a photostatic copy of certain checks and receipts for payment on said contracts.

"It is my understanding that these contracts are a violation of the Statutes of Missouri. I would appreciate it very much if you would favor me with an early opinion as to the legality of this type of contract."

Provisions of the sample contract referred to in your letter quoted above are set out in full in order that no doubt will be entertained as to the contract provisions to which this opinion is addressed. We quote the sample contract in the following language:

Honorable David L. Colson

"\$500.00

"PREARRANGED FUNERAL SERVICE CONTRACT

"This agreement made by and between the undersigned first party, and Murphy L. Sparks and Donald P. Sparks d-b-a Sparks Funeral Home, second party, WITNESSETH:

"WHEREAS the parties hereto are desirous of making provisions for proper funeral services and the payment therefor, NOW THEREFORE in consideration of the premises and the mutual promises hereinafter expressed it is hereby agreed as follows:

"1. The first party shall and will pay to the second party the sum of Five Dollars upon the signing of this agreement and Two Dollars on the first of each and every month thereafter.

* will receive metal casket on this contract

"2. Upon the death of the first party while this agreement is in force and provided that funeral services for said first party are rendered by the second party, the second party will credit and deem paid its charges for the casket and wood box used for such services to the extent of Five Hundred Dollars if said first party is 15 years old or over at the time of death, or Two Hundred Dollars if first party is 10 years old but less than 15, or One Hundred Dollars if first party is less than 10 years old. It is expressly agreed and understood that this credit shall not apply to charges for professional services, embalming, vault, burial clothing, telephone and telegraph, hearse and flower car, death notices, flowers, opening of grave or cemetery lot.

Honorable David L. Colson

"3. The second party will provide free emergency ambulance service to transport the first party to any local hospital.

"4. Should the first party fail to make any payment when due, Sections 2 and 3 shall become inapplicable and of no force and effect, but should the first party at any time prior to his death pay all past due payments, Sections 2 and 3 shall again become applicable and of full force and effect.

"5. This agreement shall become effective upon payment of the initial payment by the first party and upon the signing of the parties hereto.

"SPARKS FUNERAL HOME..FLAT RIVER & BONNE TERRE, MO.

"IN WITNESS WHEREOF the parties hereto have hereunto set their hands this 10 day of February, 1954.

"SPARKS FUNERAL HOME, by	<u>Walter E. Jahn</u>
" <u>Everett Sparks</u>	<u>Maggie Jahn</u>
<u>Sec</u>	
<u>Second Party</u>	<u>First Party "</u>

* Underscored provision supplied by interlineation.

Section 375.300 RSMo 1949, provides:

"Any person or persons who in this state shall act as agent or solicitor for any individual, association of individuals or corporation engaged in the transaction of insurance business, without such person or persons first having obtained from the superintendent of the insurance division of this state the certificate authorizing him to act as such agent or solicitor, as required by section 375.010, or who shall act as agent or solicitor for any individual, association of individuals or corporation engaged in

Honorable David L. Colson

insurance business, before such individual, association of individuals or corporation shall have been duly authorized and licensed by the superintendent of the insurance division of this state to transact business in this state, or after such license has been suspended, revoked, or has expired, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be fined not less than ten nor more than one hundred dollars for each offense, or imprisoned in the county or city jail for not less than ten days nor more than six months, or by both such fine and imprisonment."

Section 375.310, RSMo 1949, provides in part, as follows:

"Any association of individuals, and any corporation transacting in this state any insurance business, without being authorized by the superintendent of the insurance division of this state so to do, or after the authority so to do has been suspended, revoked, or has expired, shall be liable to a penalty of two hundred and fifty dollars for each offense, * * *."

In State ex rel. Inter-Insurance Auxiliary Company v. Revelle, 165 S.W. 1084, 257 Mo. 529, 1.c. 535, the Supreme Court of Missouri spoke as follows:

"The essential elements of a contract of insurance are an agreement, oral or written, whereby for a legal consideration the promisor undertakes to indemnify the promisee if he shall suffer a specified loss."

In the case of Rogers v. Shawnee Fire Insurance Company of Topeka, Kansas, 111 S.W. 592, 132 Mo. App. 275, 1.c. 278, the Kansas City Court of Appeals used the following language in discussing the words "indemnity" and "insurance":

"Indemnity signifies to reimburse, to make good and to compensate for loss or injury. (4 Words and Phrases, p. 3539.) Insurance is defined by Bouvier, 'to be a contract by which one of the parties, called the insurer,

Honorable David L. Colson

binds himself to the other called the insured, to pay to him a sum of money, or otherwise indemnify him."

In the case of *State ex inf. v. Black*, 145 S.W. (2d) 406, 347 Mo. 19, l.c. 24, the insurance character of burial associations was alluded to in the following language:

"The insurance character of this business is recognized by the provision of the act exempting such associations from the general insurance laws."

The insurance character of burial associations is also attested by the following language found in Section 376.020, RSMo 1949, of Missouri's regular life insurance company law:

"* * * provided, that any association consisting of not more than one thousand five hundred citizens, residents of the state of Missouri, all living within the boundaries of not more than three counties in this state, said counties to be contiguous to each other, organized not for profit and solely for the purpose of assessing each of the members thereof upon the death of a member, the entire amount of said assessment, except ten cents paid by each member, to be given to a beneficiary or beneficiaries named by the deceased member in his or her certificate of membership, said certificate of membership to be issued by such association, shall not be construed to be life insurance company under the laws of this state, * * *."

At 44 C.J.S., Insurance, Sec. 27, we find the subject of burial benefit treated as follows:

"'Burial benefit' or 'funeral benefit' has been regarded as life insurance."

In the footnote to the texts of C.J.S., just quoted, we are cited to the case of *State ex rel. Reece v. Stout*, 17 Tenn. App., 65 S.W. (2d) 827, in which case the following language is found at 65 S.W. (2d) 827, l.c. 829:

Honorable David L. Colson

"Burial or funeral benefit, being determinable upon the cessation of human life, and dependent upon that contingency, constitutes life insurance. Such a contract has, however, been held void as against public policy and in restraint of trade, where, although the purpose of the association was to provide, at their death, a funeral and proper burial for the members, the association was organized on the mutual plan, the members contributing a stipulated sum weekly, and the funeral, certain funeral furnishings, and outfit were to be furnished, by and through a designated undertaker, or official undertaker."

In the case of Knight v. Finnegan (D.C. Mo.) 74 F. Supp. 900, the Court, in the course of defining life insurance, spoke as follows at 74 F. Supp. 900, l.c. 901:

"Moreover, the elements and requisites of an insurance policy are, among others, 'a risk or contingency insured against and the duration thereof.' 'A promise to pay or indemnify in a fixed or ascertainable amount.'"

Summarizing the essential provisions of the contract quoted above, it is noticed that whatever payments are made by the first party while the contract is in force will merely be credited against the agreed value of the casket to be furnished; that amounts so paid may or may not have any true relation to the agreed value of the casket, depending on the cessation of human life, which is the only way to terminate payments under the contract and still receive its full benefits; that the schedule of payments would require more than twenty years' payments to equal the value of a casket worth five hundred dollars; and that even though the first party should die three months after signing the contract the second party would, under applicable provisions of the contract, be obligated to furnish a casket worth five hundred dollars. Hence, we have present in the contract the element of "risk" essential to an insurance contract.

CONCLUSION

It is the opinion of this office that the pre-arranged funeral service contract fully described in the foregoing opinion is a contract of insurance within the meaning of the

Honorable David L. Colson

language contained in Section 375.310 RSMo 1949 and offering of the same to the public without meeting requirements of Missouri's laws relating to organization and regulation of insurance companies will cause persons so offering such contract to be subject to the penalties prescribed by Sections 375.300 and 375.310 RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

John M. Dalton
Attorney General

JLO'M:hw