

CORPORATIONS: Secretary of State may not refuse to issue certificate of incorporation because purpose of corporation might be used in violation of law; should refuse to issue certificate of incorporation to business corporation which uses word "benevolence" as part of corporate name.

December 10, 1953



Honorable Walter H. Toberman
Secretary of State
Jefferson City, Missouri

Attention: Jos. W. Mosby
Corporation Counsel

Dear Sir:

We have received your request for an opinion of this office on the following questions:

"1. May a corporation be organized under Chapter 351, R.S. Mo., 1949, to conduct the purposes as set out in Article Eight of the enclosed proposed Articles of Incorporation of 'Burks United Order of Benevolence of America, Inc.'?"

"Upon request by the Corporation Department of the Secretary of State's Office the attorneys for the above named corporation have supplied the Corporation Department with a copy of a proposed prearranged burial plan agreement, a copy of which is herewith enclosed for your use in determining the true intent of the corporation as expressed in Article Eight of the proposed Articles of Incorporation of 'Burks United Order of Benevolent of America, Inc.'"

"2. In view of the fact that Chapter 352, R.S. Mo., 1949, governs the formation of benevolent corporations and Section 351.110, R. S. Mo., 1949 provides that the corporate name shall not contain any word or phrase which indicates or implies that it is organized for any purpose other than a purpose for which corporations may be organized

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under this chapter - may the word 'benevolence' as it appears in Article One of the enclosed Articles be used in the corporate name of the corporation organized under Chapter 351?

"The opinion of the Attorney General to question No. 1 is requested in view of the fact that the proposed purpose of the above named corporation may be an invasion upon the insurance laws of this state.

"The opinion to question No. 2 is requested in view of the fact that this department has been unable to discover legislative or judicial authorization of the use of such word in the name of a business corporation."

The purposes set out in Article Eight of the proposed Articles of Incorporation of "Burks United Order of Benevolence of America, Inc.," are as follows:

"Undertaking, embalming and directing of funerals of deceased persons; the building and maintenance of a funeral chapel, and the dealing in and the selling of coffins and caskets, and all such property and goods, wares, and merchandise as are incidental to and used in the business of undertaking and for morticians, and also the buying, owing holding selling, letting, leasing, and dealing in and with real and personal property of every kind and nature and also the owing and operating of motor vehicles and such other modes or vehicles of conveyance for hire which motor vehicles or other conveyances now or maybe used in the ordinary course of the business of undertaking, embalming and funeral directing, and the selling, renting, letting, leasing of funeral motor vehicles of any kind or make for hire to other morticians, undertaking, embalmers, or other such person or persons who may have or need the use of funeral vehicles, and also entering into pre-arranged burial contracts for deceased persons, provided said contracts are not violative of any of the state insurance law or laws or any law or laws of this state and country; to give all possible moral and material aid to persons holding

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policies under the said pre-arranged burial plan; to dispense aid and provide for the mutual assistance of members of the pre-arranged burial plan; to aid in the improvement of health conditions and the ownership of better homes among its policy holder and members."

The enclosed contract provides for the purchase from the corporation of articles and services in connection with funerals. The contract also provides for payment of a sum specified therein in weekly installments. We are enclosing herewith copy of an opinion of this office dated June 7, 1949, addressed to Honorable William Lee Dodd, Prosecuting Attorney of Ripley County. In that opinion this office had under consideration a contract quite similar to that which this corporation proposes to issue. It was concluded that such contract was not illegal on its face although it might be so employed as to be an insurance contract issued without compliance with insurance laws.

Such being the nature of the contract proposed to be issued by this corporation, we feel that the Secretary of State would not be justified in refusing to issue a certificate of incorporation because of the possibility of abuse of a power which it is proposed to confer upon the corporation. The rule regarding the duty of the Secretary of State in such regard is stated in 18 C.J.S., Corporations, Section 59, page 443, as follows:

"Under some statutes, application must be made to the governor, secretary of state, or other officer for approval by him of the articles, certificate, or charter, or which provide for the filing of the articles, certificate, or charter with the secretary of state or other officer, and expressly or impliedly permit him to refuse to file the same if it is not in proper form or does not come within the statute. Under such a statute, the secretary of state or other officer, although generally a ministerial officer, is clothed with a quasi-judicial judgment, and he may and should refuse to approve articles or a certificate or charter if it is not in proper form and not in accordance with the statutory requirements; if it is for a purpose which is unauthorized by the statute or contains unauthorized provisions; if it is for an unlawful purpose

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or contains unlawful provisions; or where it plainly appears from the charter itself that the functions of the proposed corporation are impossible of performance. If, however, the proposed articles, certificate, or charter is in proper form and is for an authorized and lawful purpose, he generally is bound to approve the same, although there is an apprehension that applicants contemplate doing something in violation of the law, or may perform acts ultra vires. In such a case his duties are purely ministerial, and he cannot go outside of the application and proposed charter and determine disputed questions of fact on the evidence, but such questions must be left for the courts after the charter has been granted. * * *

(Emphasis ours.)

Under Section 351.060, RSMo 1949, the Secretary of State is required to issue a certificate of incorporation if he "finds that the articles of association conform to law." We do not believe that this would authorize his refusal to approve articles of incorporation on the grounds that powers conferred therein might be abused when such power is not on its face contrary law.

As for your second question, Section 351.110(2), RSMo 1949, provides:

"The corporate name

* * * * *

"(2) Shall not contain any word or phrase which indicates or implies that it is organized for any purpose other than a purpose for which corporations may be organized under this chapter;

* * * * *

Section 351.020, RSMo 1949, provides:

"Corporations for profit except banking insurance, railroad corporations, building and loan associations, saving banks and safe deposit companies, credit unions, mortgage loan companies, union stations,

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trust companies and exposition companies may be organized under this chapter for any lawful purpose or purposes."

Chapter 352, RSMo 1949, provides for the organization of benevolent associations or corporations. Section 352.010, RSMo 1949, provides:

"Any number of persons not less than three, who shall have associated themselves by articles of agreement in writing, as a society, company, association or organization formed for benevolent, religious, scientific, fraternal-beneficial, or educational purposes, may be consolidated and united into a corporation. Such articles of agreement may be organic regulations, or a constitution, or other form of association, and any corporate name, not already assumed by another corporation, may be chosen as the title of the corporation; provided, always, that the purpose and scope of the association be clearly and fully set forth."

Section 352.050, RSMo 1949, provides:

"No association, society or company formed for manufacturing, agricultural or business purposes of any kind, or for pecuniary profit in any form, nor any corporation having a capital stock divided into shares, shall be incorporated under this chapter; provided, that any company formed to erect a building for the exclusive use of a society within the purview of this article, without pecuniary consideration from such society, may become a body corporate under this chapter notwithstanding it has a capital stock in shares, and may receive subscriptions to such stock, to be paid in real estate, in money, property or services rendered to such company."

Under these statutes a wholly different method of organization and operation of profit and not for profit corporations is prescribed. Section 351.020, supra, deals with corporations organized for profit. The corporation here involved is proposed

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to be organized under Chapter 351, RSMo 1949, dealing with corporations organized for profit. However, the use of the word "benevolence" in its corporate name definitely connotes an organization for nonprofit purposes. The term is defined in 10 C.J.S., page 341, as follows:

"BENEVOLENCE. According to the etymology and original usage, the word means generally the wishing or willing well to others. The term has been specifically defined as meaning the desire to alleviate suffering or promote happiness; the disposition to promote the moral well-being of man and so increase his happiness; the disposition to seek the well-being or comfort of others; kindness of heart; love to mankind; moral good will to all sentient beings; also, as any act of kindness; the doing of a kind or helpful action toward another, under no obligation except an ethical one; well doing. While sometimes synonymous with 'charity' it covers more ground than charity, * * *"

In view of the meaning of the term "benevolence," we are of the opinion that Section 351.110(2), supra, prohibits the use of such word as a part of the name of a corporation organized for profit under Chapter 351, RSMo 1949. The possibility of misleading the public by the use of such word by a business corporation is obvious, and it is our opinion that the prevention of such misleading effect is the purpose of Section 351.110.

"Statutory regulations as to the name which may be adopted by a corporation must be observed and on failure to comply with such regulations a certificate of incorporation of the filing thereof may and should be refused." 18 C.J.S., Corporations, Section 167, page 563. See State ex rel. Hutchinson v. McGrath, 92 Mo. 355, 5 S.W. 29.

CONCLUSION

Therefore, it is the opinion of this office that:

1. The Secretary of State cannot refuse to issue a certificate of incorporation to a corporation which proposes to engage in the sale of prearranged funerals, it not appearing on the face of said articles of incorporation or the contract which the

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corporation proposes to issue that said corporation will operate in such a manner as will be in violation of the laws of this state; and

2. The Secretary of State should refuse to issue a certificate of incorporation under the general and business corporation act (Chapter 351, RSMo 1949) to a corporation organized for profit which has the word "benevolence" as part of its corporate name.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Robert R. Welborn.

Yours very truly,

JOHN M. DALTON
Attorney General

RRW: ml
Enc.