

BEFORE THE BOARD OF FUNERAL SERVICE
DEPARTMENT OF COMMERCE
STATE OF MONTANA

IN THE MATTER OF THE PETITION FOR) DECLARATORY RULING
DECLARATORY RULING ON THE)
APPLICABILITY OF SECTION 37-19-101)
(13) AND 37-19-301, MCA, TO SEVEN)
FUNERAL HOMES' PRE-NEED FUNERAL)
ARRANGEMENT PROGRAM IN MONTANA)

TO: All interested persons:

1. On July 21, 1997, the Board of Funeral Service published a Notice of Petition for Declaratory Ruling from seven licensed funeral homes in Montana: Livingston, Malletta & Geraghty, Missoula; Squire, Simmons & Carr, Missoula; Sunset Memorial Funeral Home and Cemetery, Missoula; O'Connor Funeral Home, Great Falls; Chapel of Chimes, Great Falls; Gorder Funeral Home, Choteau; and Retz Funeral Home, Helena. The Petitioners questioned whether their pre-need funeral arrangement services, which are offered to the general public, may be offered by non-licensed persons, who are supervised by licensed morticians.

2. Petitioners noted that 37-19-101(13), MCA, states that the definition of "funeral directing" includes "supervising funerals, including the making of pre-need or at-need contractual arrangements for funerals."

3. Petitioners further noted that 37-19-301, MCA, states that the practice of funeral directing by anyone who does not hold a funeral director's license or a mortician's license issued by the department is prohibited.

4. Petitioners presented the issue to the board as the question "whether the Petitioners' pre-need program complies with Montana law to the extent that it utilizes non-licensed personnel under the direct supervision of a licensed funeral director...."

5. The Board considered the Petition at a hearing held August 19, 1997. The Board ruled that the Petitioners, or any other licensed funeral homes, funeral directors, or morticians, may NOT utilize unlicensed personnel under the direct supervision of a licensed mortician to offer, present, facilitate, sell, contract with, or otherwise participate in pre-need contractual arrangements for funerals.

6. The Board's reasoning stated that the plain reading of 37-19-101(13), the definition of "funeral directing," does not appear to allow for pre-need or at-need contractual funeral arrangements to be conducted under supervision only. Instead, this definition of "funeral directing," plus Section 37-19-301, MCA, which states the practice of funeral directing may only be done by a licensed person, requires pre-need and at-need contractual funeral arrangements to be restricted to licensed persons only.

7. Section 37-19-101(13) had been amended in 1989, but the purpose of adding the clause "including the making of pre-need or at-need contractual arrangements for funerals" was not meant to modify the word "supervision" only. The clause was to expand the definition of funeral directing, and clarify when licensed persons must conduct the activities. The purpose was not to expand the definition and therefore the practice of funeral directing to unlicensed persons, with or without any type of supervision arrangement.

8. The Board's intent in its ruling is to rule in the best interests of the public. The public is not well served, and it is not in their best interest, to allow pre-need or at-need contractual funeral arrangements to be made by unlicensed persons. The Board noted, as a safety issue, that it has jurisdiction over its own licensees only. These people may be held accountable, and their actions may be a cause for license discipline if fraud, misrepresentation, or any of a myriad of other conducts serves to cheat the consumer during the pre-need sale. This same safeguard does not exist for a consumer cheated by an unlicensed person, as the Board would be limited to a District Court injunctive action to prevent future sales. There is no recourse with the Board if unlicensed persons fail to act up to the standards of the profession in conducting their pre-need contractual funeral arrangement sales.

9. Further, the Board noted any contrary ruling allowing unlicensed persons to conduct the practice of funeral service, including their utilization to sell pre-need funeral arrangements under supervision, would be a sweeping change of interpretation for this Board. The statute has been read and interpreted by the Board as requiring licensure for all activities included under the definition of "funeral directing" for many years, back to the year it was enacted.

10. The Board specifically noted that the issue presented and ruled upon is not whether a particular funeral home, or a particular in-state or out-of-state corporation may engage in this practice. Instead, the issue and ruling are to be applied state-wide, to all funeral homes and licensed morticians and funeral directors in the state of Montana. The best interest of the consumer requires this prohibition be enforced state-wide.

11. Finally, the Board found the Petitioners' suggested statutory interpretation to be strained. The Petitioners' witness, an unlicensed funeral home employee, stated he was performing the duties and activities of a licensed funeral director for pre-need consumers, but was not allowed to conduct the same activities for at-need consumers. This contradictory position again suggested the statute should be read to require a licensed funeral director or mortician for all pre AND at-need contractual funeral arrangements.

12. The Board denied the Petition, and interprets the statutes as NOT allowing unlicensed persons to be utilized by licensed funeral homes, licensed funeral directors, or licensed morticians for the purpose of selling pre-need funeral

arrangements, whether or not the unlicensed person is supervised by a licensee of the Board.

13. Any interested parties may request judicial review of this declaratory ruling by filing a petition for judicial review in a District Court of the State of Montana within thirty (30) days of their receipt of this ruling pursuant to 2-4-501 and 2-4-702, MCA.

DATED: this Third day of September,
1997.

BOARD OF FUNERAL SERVICE

BY: David G. Fulkerson
DAVE FULKERSON, CHAIRMAN