



STATE OF ARKANSAS
OFFICE OF THE ATTORNEY GENERAL
JUSTICE BUILDING, LITTLE ROCK 72201

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STEVE CLARK
ATTORNEY GENERAL

OPINION NO. 85-27

January 29, 1985

Ms. Beverly Bassett
Securities Commissioner
One Capitol Mall - Suite 4B-206
Little Rock, Arkansas 72201

Dear Ms. Bassett:

This office acknowledges receipt of your predecessor's request for an opinion regarding proposed amendments to the Prepaid Funeral Expense Law, Act 78 of 1961, as amended. This law is compiled at Ark. Stat. Ann. §67-1701 et seq (1980 Repl. and 1983 Cum. Supp.).

Your question is whether the following proposed language is operable to prevent the income and principal from being subjected to attachment, garnishment, execution, or from becoming part of the "estate in bankruptcy" ?

The proposed amendment to paragraph 5 of Act 78 of 1961, as amended by Act 604 of 1983 (compiled at Ark. Stat. Ann. §67-1706 (1983 Cum. Supp.)), would read:

All Contract Proceeds held in trust pursuant to the provisions of this Act, and all income derived therefrom, shall be exempt from attachment, garnishment, execution, and claims of creditors, receivers or trustees in bankruptcy, nor shall said Trust Fund be seized, taken, appropriated or applied to pay any debt or liability of the Seller by any legal or equitable process or by operation of law. Upon the Seller filing bankruptcy, or upon becoming insolvent, the Securities Commissioner shall be notified by the Seller within ten (10) days of such. Upon receipt of notification, the Securities Commission shall notify the Trustee(s) of the Trust Fund, and all income earned thereafter said date shall be held in trust by Trustee, and disbursed only upon the direction of the Securities Commissioner.

Before addressing your question, we will discuss the operation of prepaid funeral plans. Consumers wishing to plan ahead

enter contracts with organizations, normally funeral homes, which organizations guarantee to provide certain funeral goods and services when the need arises. The proceeds received from the consumer by the seller are deposited with a trustee which is normally a bank or savings and loan institution.

The purpose of the trust arrangement is to assure that money will be available to the seller to provide the agreed service and merchandise at the time of the buyer's death. Upon the death of the buyer, the trustee disburses the contract proceeds to the seller.

The Act provides that the income earned on the trust principal is the property of the selling organization. The trustee is empowered to pay the interest to the seller.

Under current law all monies and investments held by the trustee are subject to attachment and garnishment by the seller's creditors. The declaration of the proposed legislation that would exempt the trust principal and interest from attachment, garnishment, and execution would not be effective against debts of the seller which came into being before the effective date of the legislation. Otherwise the proposed legislation would have the effect of interfering with the right of contract and thus be violative of Article I Section 10 of the United States Constitution. W. B. Worthen Co. v. Thomas, 292 U.S. 426 (1934).

The proposed section also seeks to prevent the trust principal and income from becoming part of the bankruptcy estate should the seller or trustee become subject to the bankruptcy courts. In this regard the proposed legislation lacks efficacy. Even exempt property is included in the property of the estate under the Bankruptcy Code of 1978. 11 U.S.C. §541. Re Grimes, 6 BR 943, 3 CBCLd 332 (BC DC Kan., 1980).

That portion of the proposed legislation which would divest the seller of his interest in the trust and income upon the filing of bankruptcy would not prevent the seller's interest from becoming property of the bankruptcy estate. Section 541(c) of the Bankruptcy Code of 1978; 11 U.S.C. §541(c).

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In summation, it appears that the proposed language, if adopted, will exempt trust principal and income from attachment, garnishment, and execution for debts arising after the effective date of the amendment. The proposed legislation will not prevent the trust principal and income from being included in the bankruptcy estate.

The foregoing opinion, which I hereby approve, was prepared by Assistant Attorney General Arnold M. Jochums.

Sincerely,


STEVE CLARK
Attorney General

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