

Texas Department of Banking

Robert L. Bacon
Interim Banking Commissioner

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OPINION COMMITTEE

The Honorable Greg Abbott
Attorney General of Texas
c/o Nancy Fuller
Chair, Opinions Committee
P.O. Box 12548
Austin, Texas 78711-2548

FILE # ML-45930-08

I.D. # 45930

RE: Request for Attorney General Opinion: Authority of Agent under Statutory Durable Power of Attorney to Change or Cancel a Prepaid Funeral Contract

Dear Attorney General Abbott:

Chapter 154, *Finance Code* (Chapter 154), vests in the Texas Department of Banking (Department) regulatory authority over the business of selling prepaid funeral services and merchandise. A person that sells or accepts money for prepaid funeral benefits must hold a license issued by the Department and comply with applicable Texas law. Chapter 154 license holders often provide the contracted-for benefits.

A question has arisen regarding the relationship between statutory provisions that authorize a person to direct the disposition of his or her remains, and the powers granted an agent or attorney in fact under a statutory durable power of attorney. The question involves the situation in which a person has purchased and fully paid for a prepaid funeral contract that specifies the method of disposition of the person's remains, and has also executed a statutory durable power of attorney. The person then becomes disabled, i.e., the person's ability to manage property or business affairs is impaired. Prior to the person's death, the agent instructs the funeral provider to change the method of disposition specified by the person in the prepaid contract. If questioned, the agent may threaten to cancel the contract and make arrangements with another funeral home.

In order to advise Chapter 154 license holders how to proceed in the circumstances described above, the Department respectfully requests an Attorney General opinion regarding the following:

1. May the agent under a statutory durable power of attorney change the method of disposition, e.g., from burial to cremation, specified by the purchaser/principal in a prepaid funeral contract?
2. If the agent under a statutory durable power of attorney cancels a prepaid funeral contract purchased by the principal, does this also cancel the principal's written directive regarding disposition?

The Department has not administratively construed the statutes at issue.

A. Applicable Statutes

1. *Health and Safety Code—Disposition of Remains*

Section 711.002 of the *Health & Safety Code* relates generally to the disposition of a decedent's remains and the duty to inter. Among other things, the section establishes the right of a person to control the disposition of his or her remains at death. *Health & Safety Code* § 711.002(g). Pursuant to § 711.002(g), a person may provide written directions for the disposition of his or her remains in a prepaid funeral contract, will, or other written instrument signed and acknowledged by the person. The directions may not be modified or revoked except in accordance with a subsequent writing also signed and acknowledged by the person. Id. If a decedent leaves instructions as provided for in subsection (g), the person who would otherwise be entitled to control the disposition of the person's remains under § 711.002(a) must faithfully carry out the decedent's instructions to the extent the decedent's estate or the person are financially able to do so. Id.

If a decedent leaves no written directions that meet the requirements of subsection (g), the persons identified in § 711.002(a), in the priority listed, have the right to control disposition. The first person so authorized is the person "designated in a written instrument signed by the decedent." The written instrument must be in substantially the form as the § 711.002(b) form for "Appointment of Agent to Control Disposition of Remains," and the appointment becomes effective upon the death of the principal. Section 711.002(b).

2. *Finance Code—Modification of Prepaid Funeral Contracts*

Finance Code § 154.1551(a)(1)(B), which relates to the modification of prepaid funeral contracts after the death of the contract beneficiary, stipulates that a prepaid funeral contract may not be modified to change the method of disposition specified by the purchaser and thereby incorporates into Chapter 154 the restrictions imposed by *Health & Safety Code* § 711.002(g) with respect to honoring a decedent's disposition directions. A change in the disposition method that violates § 711.002(g) also violates Chapter 154, subjecting an offending Chapter 154 license holder to appropriate enforcement action and possible criminal penalties under Subchapter I of Chapter 154. Although § 154.1551(a)(1)(B) relates to changes made after the death of the contract purchaser and is, therefore, not directly relevant to the situation set out previously, § 154.1551(a)(1)(B) evidences the public policy and intent of the Legislature to protect the right of a person to choose and control the method of disposition of his or her remains.

3. *Probate Code—Statutory Durable Power of Attorney Act*

Chapter 12 of the *Probate Code*, the "Durable Power of Attorney Act," establishes the means by which a person (the principal) can grant broad powers to an agent under a power of attorney that survives the principal's subsequent disability or incapacity. *Probate Code* §§ 485 through 489 set out the "rules" that apply to the durable power of attorney. Section 489B provides in

subsection (a) that the agent is a fiduciary and in subsection (j) that "the rights set out in this section and chapter are cumulative of other rights or remedies the principal may have at common law or other applicable statutes and not in derogation of those rights."

Section 490(a) provides a "statutory durable power of attorney" form that a person may use to grant an agent powers "with respect to a person's property and financial matters." *Probate Code* § 490(a) states, in pertinent part, as follows:

(a) The following form is known as a "statutory durable power of attorney." A person may use a statutory durable power of attorney to grant an attorney in fact or agent powers with respect to a person's property and financial matters....

The following form is not exclusive, and other forms of power of attorney may be used.

STATUTORY DURABLE POWER OF ATTORNEY

NOTICE: THE POWERS GRANTED BY THIS DOCUMENT ARE BROAD AND SWEEPING... THIS DOCUMENT DOES NOT AUTHORIZE ANYONE TO MAKE MEDICAL AND OTHER HEALTH-CARE DECISIONS FOR YOU....

I, _____ (insert your name and address), appoint _____ (insert the name and address of the person appointed) as my agent (attorney-in-fact) to act for me in any lawful way with respect to all of the following powers except for a power that I have crossed out below.

TO WITHHOLD A POWER, YOU MUST CROSS OUT EACH POWER WITHHELD. Real property transactions; Tangible personal property transactions; Stock and bond transactions; Commodity and option transactions; Banking and other financial institutions transactions; Business operating transactions; Insurance and annuity transactions; Estate, trust, and other beneficiary transactions; Claims and litigation; Personal and family maintenance; Benefits from social security, Medicare, Medicaid, or other governmental programs or civil or military service; Retirement plan transactions; Tax matters.

Probate Code § 490(a).

B. Analysis

1. Proposed Answer to Question 1:

The Department submits that the holder of a statutory durable power of attorney does not have the power to change the method of disposition specified by the purchaser of a prepaid funeral contract.

- a. The purchaser's right to control the disposition of her remains survives her execution of a statutory durable power of attorney.**

The power to modify disposition is not included within the powers of an agent under a statutory durable power of attorney. *Probate Code* § 490(a). The agent is given the power to modify or rescind contracts (§ 491(3)) and also the right to "in general, do any other lawful act that the principal may do with respect to a transaction" (§ 491(11)). However, the Statutory Durable Power of Attorney Act protects the principal's right to control the disposition of his or her remains.

Probate Code § 489B(j) stipulates that, "The rights set out in this section and chapter are cumulative of any other rights or remedies the principal may have at common law or other applicable statutes and not in derogation of those rights." In this case, the principal also has rights as the decedent under *Finance Code* § 154.1551(a)(1)(B) and *Health & Safety Code* § 711.002(g). *Finance Code* § 154.1551(a)(1)(B) stipulates that a contract regarding disposition of remains may not be modified. (See discussion above at section A(2)). *Health & Safety Code* § 711.002(g) provides that when a person has left written directions regarding his or her disposition, these directions may be modified or revoked only by a subsequent writing signed and acknowledged by such person. (See discussion above at section A(1)).

Finance Code § 154.1551 is titled "Modification at Time of Funeral." The agent under a statutory durable power of attorney may argue that the modification or rescission in the situation under consideration does not occur at the time of a funeral, and thus, § 154.1551(a)(1)(B) is inapplicable to situations involving a durable power of attorney.

Section 154.1551 was added to Chapter 154 in 2001. The new section was added, in part, in response to Attorney General Opinion No. JC-0279 (2000). JC-0279 interpreted § 711.002(g) of the *Health & Safety Code* to apply only to a person who purchased, signed, and was the beneficiary of a prepaid funeral contract and concluded that the directions for disposition specified in the contract may not be modified or revoked except by the person in a subsequent writing that satisfied the statutory requirements. Section 154.1551(a)(1)(B) codified the Attorney General's holding and essentially incorporated into Chapter 154 the restrictions imposed by § 711.002(g) of the *Health & Safety Code* with respect to changing a decedent's chosen method of disposition. As a result of the amendment, a Chapter 154 license holder that disposes of a decedent's remains in a manner other than as directed in the decedent's prepaid funeral contract violates § 154.1551(a)(1)(B) of the *Finance Code* unless the decedent authorized

the modification. The offending Chapter 154 license holder is subject to appropriate enforcement action and possible criminal penalties under Subchapter I of the chapter.

The language of Chapter 154 supports the construction that the agent under a statutory durable power of attorney cannot change the manner of disposition. Section 154.001(2) states that one purpose of Chapter 154 is "to provide a regulatory framework to give the public an opportunity to arrange and pay for funerals in advance of need..." Section 154.1551(a)(1)(B) should not be construed to negate the disposition directions of an incapacitated person when it would honor the same directions after death.¹

b. An agent under a statutory durable power of attorney has a fiduciary duty to his principal which prohibits him from changing his principal's decision regarding disposition.

Probate Code § 489B(a) states that the attorney in fact or agent is a fiduciary. *Accord, Plummer v. Estate of Plummer*, 51 S.W.3d 840, 842 (Tex.App.—Texarkana 2001, pet. denied). A fiduciary duty is violated if an agent does not obey the lawful directions of its principal. *GMAC v. Crenshaw*, 986 S.W.2d 632, 636 (Tex. App.—El Paso 1998, pet. denied). In this case, the principal has left directions for disposition in her prepaid funeral contract as allowed by *Health & Safety Code* § 711.002. Therefore, if an agent used his statutory durable power of attorney to change the method of disposition specified in his principal's prepaid funeral contract, he would violate his fiduciary duty to the principal.

Additionally, a statutory durable power of attorney should not be used as an opportunity for financial gain on the part of the agent or attorney in fact. In some cases, an agent who has been granted a statutory durable power of attorney has instructed the provider of funeral services to change the method of disposition from burial to cremation, which usually costs less. By changing the method of disposition, the agent in some cases is using the statutory durable power of attorney for personal financial gain, which is an additional breach of his fiduciary duty. *Hawthorne v. Guenther*, 917 S.W.2d 924, 934 (Tex. App.—Beaumont 1996, writ denied).

2. Proposed Answer to Question 2:

The Department submits that the agent under a statutory durable power of attorney may cancel a prepaid funeral contract purchased by the principal/beneficiary, but may not make funeral arrangements that change the manner of disposition specified in the contract.

As discussed above in relation to Question 1, the agent may not change the manner of disposition. However, assuming he is acting in accordance with his fiduciary duties and

¹ Note that our response would be different if the facts were different from those stated. If the prepaid funeral contract were purchased by an agent under a statutory durable power of attorney, we believe the agent would have the ability to change the manner of disposition. See, *Carruth v. SCI Texas Funeral Services, Inc.*, 221 S.W.3d 134, 138 (Tex.App.—Houston [1st Dist.] 2006, no pet.).

assuming the purchaser has not irrevocably waived his or her right to cancel the contract,² he may cancel the contract. *Probate Code* § 491(3). He has this power under his authority with respect to personal and family maintenance. *Probate Code* § 490. That power is construed in *Probate Code* § 501. The agent is empowered to “perform the acts necessary to maintain the customary standard of living of the principal [and his family]” (§ 501(1)), and to “pay necessary medical, dental, and surgical care, hospitalization, and custodial care for [these individuals] (§ 501(3)). The agent may decide he should cancel the contract in order to obtain a refund to be used for the maintenance of the principal.³ Additionally, the agent may need to cancel the contract in order to allow his principal to qualify for Medicaid.

After cancellation there would no longer be an enforceable prepaid funeral contract. Nevertheless, the principal’s directions for disposition were made in accordance with *Health and Safety Code* § 711.002(g), and they remain effective. Because the person is now incapacitated, they cannot be modified.

Although the situation under consideration involves a living, incapacitated purchaser, the Department believes it is useful to explain what happens once the purchaser dies. A statutory durable power of attorney expires upon the principal’s death. *Cleveland v. Williams*, 29 Tex. 204, 213 (1867). Therefore, once the principal dies, there is no agent, and only the *Finance Code* and the *Health and Safety Code* govern the situation. *Health & Safety Code* § 711.002(g) establishes that a person may provide directions for the disposition of his remains in a prepaid funeral contract and that the person otherwise entitled to control the disposition of a decedent’s remains shall faithfully carry out the directions of the decedent to the extent that the decedent’s estate or the person controlling the disposition is financially able to do so. Therefore, if a fully paid contract is still in existence, the person otherwise entitled to control the disposition must see that the decedent’s directions in the contract regarding disposition are followed. See also, *Finance Code* §§ 154.1551(a)(1)(B) and (c); *Carruth v. SCI Texas Funeral Services, Inc.*, 221 S.W.3d 134 (Tex.App.—Houston [1st Dist.] 2006, no pet.)(holding that written instructions in a prepaid funeral contract take priority over any other person’s right to control the disposition of the remains); Attorney General Opinion No. JC-0279 (2000) (discussed above); and, Attorney General Opinion No. GA-0310 (2005) (concluding that a decedent’s specified disposition by cremation in a prepaid funeral contract controls the disposition and a cremation authorization form is not required).

Conclusion

If the purchaser of a prepaid funeral contract has provided directions for her disposition in that contract, the principal/purchaser’s agent under a statutory durable power of attorney cannot change the disposition. If the purchaser has not waived her right of cancellation, the agent has the power to cancel the contract, but he does not have the power to change the disposition even post-cancellation. Once the principal dies, the person entitled to control the disposition is required to dispose of the principal’s remains as directed by the principal. If there is a fully paid

² See *Finance Code* § 154.156.

³ See *Finance Code* § 154.155 regarding amounts refundable on cancellation.

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contract in existence, or if the estate or that person has sufficient funds, that person must honor the decedent's wishes regarding disposition.

As we understand the Attorney General's procedures, the Opinion Committee welcomes legal briefing from interested parties in connection with specific opinion requests. Below is a list of persons and groups to whom we are sending a copy of this request. These persons and groups may be interested in submitting written comments to the Committee.

Thank you for your assistance. If you have any questions or if the Department can be of any assistance regarding this matter, please contact Deborah Loomis, Assistant General Counsel, at 475-1319 or deborah.loomis@banking.state.tx.us.

Sincerely,



Robert L. Bacon
Interim Banking Commissioner

cc: Texas Funeral Service Commission
Texas Funeral Directors Association
Texas Cemetery Association
Chapter 154 License Holders on Rule Review List
Mr. Porter Loring, III
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