

Advisory Opinion- September 14, 2011

In an email dated August 1, 2011, Mr. Larry Stegall Executive Director for NCFDA requested the Board's opinion on when a consumer has an irrevocable preneed contract for a traditional service, but upon death the family wishes direct cremation and a refund of the balance on deposit.

The determining factor is whether the preneed contract can be used as a disposition document under N.C. Gen. Stat. § 130A-420(a)(1). A preneed contract will be considered the highest priority of written documents other than final disposition documents used by the military.

When the preneed contract was purchased and signed by the preneed contract beneficiary, the type of disposition generally must be honored unless the survivors obtain a court order. A law change in 2007 allowed the purchaser to restrict future changes to the contract by family members after death. N.C. Gen. Stat. §90-210.63A(b) allows a preneed contract purchaser to specify in writing particular people who can make changes to the goods and services selected. A person may specify that the arrangements selected cannot be changed without an order from the Clerk of Superior Court finding that the change is in the best interest of the estate of the deceased. For example, a clerk of superior court could find it in the best interest of the estate to allow cremation rather than burial if the preneed contract was not fully funded and the estate would have to pay the balance. A fully funded preneed contract for burial may be harder to change.

The intent to use a preneed contract as a disposition document can usually be determined by the last Preneed Statement of Goods and Services Selected (SGSS) executed by the preneed contract beneficiary. A SGSS that has an immediate burial or a traditional service is sufficient to establish the purchaser's intent to be buried. A SGSS that has a direct cremation or cremation charges with a funeral or memorial service is sufficient to establish the purchaser's intent to be cremated. If the intent of the purchaser is ambiguous, the preneed contract cannot be used as a disposition document. For example, a SGSS that shows purchase of a casket or alternative container without other services would be invalid, but a SGSS that shows purchase of an outer burial container would show intent to be buried. Each determination would be made on the facts of each case, and licensees presented with ambiguous cases should either have the family obtain a court order or obtain additional authorization permission from the next-of-kin.

A second scenario involves an individual who purchases a preneed contract for another individual. If the person purchasing the preneed contract does so under a written designation specified by N.C. Gen. Stat. § 130A-420, such as a health care power of attorney, that individual can make preneed arrangements binding unless the preneed contract beneficiary revokes the authority and the corresponding arrangements.

A third scenario is an individual who purchases a preneed contract for another individual but without legal authority to direct disposition of the other individual's body. In the absence of other written documents meeting the requirements of N.C. Gen. Stat. § 130A-420(a), then the arrangements selected are not binding and the individual(s) in the priority order listed under

paragraph (b) of can choose final disposition just as if the preneed contract had never been executed.

For all trust contracts and insurance contracts that have the estate as the contingent beneficiary, refunds are handled in accordance with GS 90-210.64(d), which states “when the balance of a preneed funeral fund is one hundred dollars (\$100.00) or less and is payable to the estate of a deceased preneed funeral contract beneficiary and there has been no representative of the estate appointed, the balance due may be paid directly to a beneficiary or to the beneficiaries of the estate. If the balance of a preneed funeral fund exceeds one hundred dollars (\$100.00) or is not payable to the estate, the balance must be paid into the office of the clerk of superior court in the county where probate proceedings could be filed for the deceased preneed funeral contract beneficiary.” For insurance contracts with a contingent beneficiary, the overage is paid according to the terms of the policy.