

THE LAW OFFICE OF ROBERT H. PAINE, PLLC

**MISSISSIPPI ATTORNEY
GENERAL OPINIONS ON
CEMETERY AND FUNERAL LAWS**

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INTRODUCTION

The following is a compilation of opinions of the Mississippi Attorney General that pertain to cemeteries and funeral homes in the State of Mississippi. The following is not an exhaustive list of every AG opinion dealing with cemeteries and funeral homes.

It is provided in the hopes that it will serve as a resource for those in the cemetery and/or funeral services industries and those who come in contact with those industries from time to time. It is for informational purposes only and provided as a service to the public. It is not legal advice or a substitute for legal counsel and it is not intended to create nor does it create an attorney-client relationship.

**COMPILATION OF
MISSISSIPPI ATTORNEY
GENERAL OPINIONS
ON CEMETERY AND
FUNERAL LAWS**

DOCN 000009892
DOCK 1995-0340
AUTHOR Kim Herring
DATE 19950607
RQNM Peggy Mullins
SUBJ Supervisors - Authority
SBCD 220
TEXT

Peggy G. Mullins, Esquire Attorney, Jackson County Board of Supervisors Post Office
Box 998 Pascagoula, Mississippi 39568-0998

Re: Private Family Cemeteries

Dear Mrs. Mullins:

Attorney General Mike Moore has received your letter of request and has assigned it to me for reply. Your letter states:

Section 41-43-1 of the Mississippi Code Annotated deals with regulations of cemeteries in the vicinity of hospitals and private family cemeteries. Subsection (1), dealing with location of new public or private cemeteries within five hundred (500) yards of a public or private hospital, requires written approval of the Board of Supervisors if the proposed cemetery is located outside the corporate limits or approval of the governing authorities if it is located inside the corporate limits of a municipality. Subsection (2) simply states that the board of supervisors of any county is authorized and empowered upon petition and request to do so to establish or designate the location of any private family cemeteries located outside or inside municipal corporate limits.

It would seem, based on the wording of subsection (1), that it was not the intent of the legislature to grant boards of supervisors jurisdiction within municipal corporate limits; however, as I stated no such distinction is made in subsection (2).

I would appreciate your opinion as to whether a board of supervisors has the authority to establish or designate location of a private family cemetery within municipal corporate limits in the county.

It is the opinion of this office that subsection 41-43-1(2) does not give the board of supervisors the authority to establish or designate the location of any private family cemetery within municipal corporate limits in the county.

If this office can be of any further assistance, please let us know.

Sincerely,

MIKE MOORE, ATTORNEY GENERAL
BY: Kimberly R. Herring Special Assistant Attorney General
KRH:sm

DOCN 000011007
DOCK 1996-0077
AUTH Van Gillespie
DATE 19960223
RQNM James Shannon
SUBJ Supervisors - Authority
SBCD 220
TEXT

Honorable James D. Shannon P. O. Drawer 869 Hazlehurst, MS 39083-0869

Re: Authority of Boards of Supervisors as Related to Private Family Cemeteries

Dear Mr. Shannon:

Attorney General Mike Moore has received your request for an opinion and has assigned it to me for research and reply. Your letter states as follows:

I represent the Board of Supervisors of Copiah County, Mississippi. The Board recently received a petition pursuant to Section 41-43-1(2) of the Mississippi Code of 1972, Annotated requesting approval of the establishment and designation of a certain tract of land as a private family cemetery in Copiah County, Mississippi. I have enclosed a copy of said petition for your review and reference.

Section 41-43-41 and Section 41-43-43 appear to be the only statutes addressing the establishment of private family cemeteries. These sections do not give a lot of direction on this topic. This letter is to request the Attorney General's interpretation of Section 41-43-1(2) and related issues. Does this section mean that a family may establish a private family cemetery and the Board has only the power to mandate the location or does the Board have the authority to make a determination as to whether to allow the establishment of the cemetery?

Additionally, if the Board must approve or deny the establishment of the cemetery, the Board would want to be assured that all applicable laws, rules, and regulations were followed. What state or federal agency, if any, regulates the burial of human remains? Does the Board of Supervisors have any duties or responsibilities in this regard? Would the family cemetery be subject to the Cemetery Law (Section 41-43-31 et seq) if it would not be selling lots for profit but only providing space for family members to be buried? Lastly, must the cemetery be set up as a trust as Section 41-43-3 seems to suggest?

Section 41-43-1(2) states as follows: "(2) The board of supervisors of any county is authorized and empowered, upon petition and request to do so, to establish or designate the location of any private family cemetery to be located in the county."

Section 41-43-1(2) does not give the board of supervisors the power to prevent the establishment of a private family cemetery; it merely gives the board the authority to establish or designate the location of a private family cemetery when petitioned and requested to do so.

There are State Health Department regulations on embalming deceased humans, but no state agency regulates human burial or cemeteries.

In response to your question concerning any duties of a board of supervisors in regulating burials or cemeteries, I refer you to Sections 41-43-1(1) and 19-7-39 Miss. Code Ann. (1972). Section 41-43-1(1) states as follows:

(1) No person, firm, association, or corporation shall locate a new public or private cemetery for burial of human beings within five hundred (500) yards of a public or private hospital or other medical facility wherein sick or injured persons are usually kept overnight for medical treatment and rehabilitation, without such person, firm, association, or corporation having first obtained a written order of approval from the board of supervisors if the proposed cemetery or burial ground is located outside the corporate limits of a municipality, or without such person, firm, association or corporation having first obtained a written order of approval from the governing authorities of the municipality if the proposed cemetery or burial ground is located inside the corporate limits of a municipality. Any realty used for burial purposes in violation of this subsection shall be deemed a common nuisance, and may be abated by the chancery court upon a petition filed therefor by the district attorney or county attorney, city attorney, attorney for the board of supervisors, or any person or persons aggrieved by the violation of this subsection. This subsection shall not apply to any established cemeteries or burial grounds which have human remains interred thereon.

You have also inquired as to whether a private family cemetery is subject to the Cemetery Law contained in Sections 41-43-31 - 41- 43-53 Miss. Code Ann. (1972). Section 41-43-33 Miss. Code Ann. (1972) deals with who is subject to cemetery law and states as follows:

Any person, partnership, corporation or other organization organized or engaging in business under the laws of the State of Mississippi, or wheresoever organized and doing business in the State of Mississippi, of owning, maintaining or operating a cemetery, providing lots or other interment space therein for the remains of human bodies, except such organizations and cemeteries which are affiliated with or owned by churches or religious societies, established fraternal societies, municipalities, or other political subdivisions of the State of Mississippi, shall be subject to the provisions of Sections 41-43-31 - 41-42-53.

Since Section 41-43-33 only deals with people, partnerships or corporations engaged in the cemetery business, a private family cemetery which would not be selling would not be subject to the cemetery law.

Lastly, you ask whether a private family cemetery must be set up as a trust under Section 41-43-3 Miss. Code Ann. (1972). Section 41-43-3 states that:

When any donation or bequest is made by any person, company or corporation of money or property to be used for the maintenance and preservation of any private or family cemetery or burying ground, and no trustee be appointed by such person, company or corporation, or if appointed, the trustee should die, resign or otherwise become incompetent, the chancellor, on petition of any person having, or feeling, any interest therein, may in vacation or in term-time appoint a trustee to administer the trust on such terms as he may deem proper. If a trustee shall improperly administer the trust, he may be removed by the chancellor and another appointed.

It is the opinion of this office that a private family cemetery does not have to be set up as a trust. Section 41-43-3 deals only with the situation where a donation or bequest is made to be used for the maintenance and preservation of a private or family cemetery. Furthermore, this statute merely gives the chancellor the authority to appoint a trustee if petitioned by a person having or feeling an interest therein.

Please contact this office if we may be of any further assistance.

Sincerely,
MIKE MOORE, ATTORNEY GENERAL
By: Van Gillespie Special Assistant Attorney General
VG:sm

DOCN 000014045
DOCK 2000-0602
AUTH Mike Lanford
DATE 20001013
RQNM Judge Glenn Barlow
SUBJ Courts
SBCD 56
TEXT

Honorable Glenn Barlow Chancellor, 16th Chancery District P. O. Box 998 Pascagoula,
MS 39568-0998

Re: Jurisdiction of Cemetery

Dear Judge Barlow:

Attorney General Mike Moore has received your request for an opinion and has assigned it to me for research and reply. You state in your letter that you have had receivership over a cemetery in Jackson County for some three years and that the cemetery operation has been troubled from its inception. You state that members of the public had been defrauded in the operation of the cemetery; that the cemetery was started as a perpetual care cemetery but was never operated as one nor fully established as one; that the law on perpetual cemeteries has never been followed by the establishers of the cemetery; that there are many outstanding contracts for the purchase of grave sites; and, that you, as receiver, have attempted to deliver every deed that has been paid for but finances will not allow delivery of vaults and headstones which people have paid for.

You ask:

In that this cemetery was never fully established and set up as a perpetual care cemetery, does this Court have jurisdiction and the authority to dismantle the perpetual care status of this cemetery, dissolve the corporate charter and refund to the purchasers who have duly filed their paid receipts and contracts in this court by refunding whatever monies that would be available to them? Further, if the perpetual care status is terminated, would the county board of supervisors have authority to then cut the grass and maintain it?

In response, Section 41-43-38 of the cemetery law states in pertinent part at Subsection (8):

Whenever it reasonably appears to the court upon complaint filed with the chancery court . . . that (a) such cemetery is insolvent or not becoming solvent; or (b) no perpetual care trust fund has been established for such cemetery or, if established, the trust fund does not contain such funds as are required to be contained therein, the court shall order a private audit and examination of any perpetual care trust fund of such cemetery, and of all the books, records and papers employed in the transaction of such cemetery business. In the event that such audit and examination shows that the cemetery is insolvent or is

about to become insolvent, or that a sufficient trust fund is not established or being maintained for such cemetery, the court shall exercise such jurisdiction and make and issue such orders and decrees as may be necessary to correct and enforce compliance with the provisions of Section 41-43-31 - 41-43-53 and all such orders and decrees as shall be just, equitable and in the public interest, including the appointment of receivers to continue or terminate the operation of such business. (Emphasis added).

See also *Hengen v. Perpetual Care Cemeteries, Inc.*, 230 So.2d 795 (Miss. 1970) (courts of equity have inherent power to protect trusts and may order sale of trust property if such is necessary for execution of trust purposes). Based on the above authorities, our answer to your first question is Yes. However, we find no authority for the county board of supervisors to mow and maintain privately owned cemetery property.

Very truly yours,

MIKE MOORE, ATTORNEY GENERAL

By:

Mike Lanford

Deputy Attorney General

ML:sm

DOCN 000014719
DOCK 2001-0606
AUTH JOHN RUNNELS
DATE 20010928
RQNM GLENN BARLOW
SUBJ COURTS
SBCD 56
TEXT

Honorable Glenn Barlow Senior Chancellor 16th Chancery District Post Office Box 998
Pascagoula, Mississippi 39568-0998

Re: Serenity Gardens Cemetery a/k/a Serene Memorial Gardens

Dear Mr. Barlow:

Attorney General Mike Moore has received your request for an official opinion from this office and has assigned it to me for research and reply.

Your letter states in pertinent part:

Serenity Gardens Cemetery now referred to as Serene Memorial Gardens has been by my order deemed insolvent. This cemetery was established as a perpetual care cemetery, the funds for which was never carried out until the receivership some three years ago. There is approximately \$40,000 in the perpetual care trust and an undetermined amount of outstanding contracts for graves, tombstones and vaults. There is an abundance of claims arising out of those demanding the vaults and tombstones with no money to supply them. The cemetery has been offered for sale for public outcry on two unsuccessful occasions. Presently two individuals have offered to purchase the cemetery for \$50,000. The claims that we know of are in the range of \$120,000 to \$150,000 plus other future contracts that will be due on death. My question is twofold;

1. Can the Chancery Court in this insolvent situation use the perpetual care fund along with the purchase price to pay the debts of the cemetery?
2. If the sale does not go through after several attempts, if Jackson County is willing to accept the property and own it, can the court dismantle the perpetual care status and use the money to reimburse those who bought tombstones and vaults which was never delivered as well as apply the perpetual care fund to other indebtedness, thereafter leaving the maintenance and grass cutting to the county?

Miss. Code Ann. Section 41-43-8(8) (1982) states in part:

In the event that such audit and examination show that the cemetery is insolvent or is about to become insolvent, or that a sufficient trust fund is not established or being maintained for such cemetery, the court shall exercise such jurisdiction and make and

issue such orders and decrees as may be necessary to correct and enforce compliance with the provisions of sections 41-43-31 to 41-43-53 and all such other orders. Decrees as shall be just, equitable and in the public interest, including the appointment of receivers to continue or terminate the operation of such business. Further, Section (9) provides all the necessary expenses of any examination or audit performed or court proceedings conducted under the provisions of subsection (8) of this section shall be paid by the cemetery owner or owners or, if incorporated, its officers and directors, and in the event that a sale of any cemetery is ordered by the court, the proceeds of such sale shall first be applied to the costs expended under the provisions of subsection (8) of this section.

This office has previously opined that courts of equity have inherent powers to protect trusts and may order sales of trust property. See MS AG Op., Barlow (October 13, 2000) citing Hengen v. Perpetual Care Cemeteries, Inc. 230 So. 2d 795 (Miss. 1970). Therefore, this office is of the opinion that the court has full jurisdiction of the subject matter and can utilize the perpetual care fund together with the purchase price to pay the debts of the cemetery. Further, this office is of the opinion that the court can dismantle the perpetual care status and use the money to reimburse those who bought tombstones and vaults which were not delivered and apply the rest and remainder of the perpetual care fund to other indebtedness. Thereafter, Jackson County can accept the maintenance of the cemetery pursuant to Miss. Code Ann. Section 19-7-39 (1975).

Sincerely,

MIKE MOORE, ATTORNEY GENERAL

By:

John B. Runnels

Special Assistant Attorney General

DOCN 000015941
DOCK 2003-0588
AUTH Heather Wagner
DATE 20031121
RQNM James Nelson
SUBJ Other State Agencies
SBCD 218-C
TEXT

James O. Nelson, II Assistant Secretary of State Business Regulation and Enforcement
Post Office Box 136 Jackson, Mississippi 39201

Re: Pre-Need Cemetery and Funeral Registration Act

Dear Mr. Nelson:

Attorney General Mike Moore has received your request for an official opinion and has assigned it to me for research and response. Your letter reads as follows:

Please consider this correspondence as our request for an official opinion regarding the interpretation of Section 75-63-65(3) of the Mississippi Pre-Need Cemetery & Funeral Registration Act. You should be aware that the Mississippi State Board of Funeral Service (MSBFS) and the Secretary of State's Office (SOS) have differing interpretations of this subsection and I would encourage you to contact the MSBFS's executive director, Dolores Kenney, for that agency's point of view.

Section 75-63-65(3) provides, in part:

...No establishment or organization shall be registered to sell pre-need merchandise or services that the establishment or organization cannot lawfully provide at the time of a person's death...

The phrase "lawfully provide" is the focus of the interpretation question. Does the statute literally mean the registering establishment or organization itself must be able to provide the merchandise or service? In such case, only existing, licensed funeral homes would qualify for registration under the Act. Or, can the registering establishment or organization have a business relationship or contractual arrangement with another entity, a licensed funeral home, to provide the services?

As the SOS understands the current funeral industry practice, there are entities besides established, traditional funeral homes that are selling pre-need merchandise and services. Insurance companies sell pre-need contracts, allowing customers to pick a funeral home in the customer's area with which the insurance company has a relationship. Start-up funeral homes sell pre-need contracts to finance construction of the new funeral home. These start-ups use other licensed funeral homes with whom they have formed a business relationship to provide services in the event the customer dies before the new funeral

home is constructed and in operation. Finally, entities such as "casket stores" sell pre-need merchandise and often services, with the services provided by a related funeral home. In none of these factual situations does the registering entity, the insurance company, the start-up funeral home, or the casket store, provide all or part of the merchandise or services itself.

The SOS believes the statute must be read in harmony with current industry practice and with practices that continue to develop as this industry grows and changes in this State. As we understand the MSBFS's interpretation, only an existing, licensed funeral home may be registered to sell pre-need contracts in Mississippi under the Act.

Miss. Code Ann. Section 75-63-53 defines a "pre-need contract" as:

. . . any contract, agreement or any series or combination of contracts or agreements, whether funded by trust deposits or insurance, or any combination thereof, which has for a purpose the furnishing or performance of funeral services, or the furnishing or delivery of merchandise, of any nature in connection with the final disposition of a dead human body, to be furnished or delivered at a time determinable by the death of the person whose body is to be disposed of but shall not mean the furnishing of a cemetery lot, crypt, niche or mausoleum. [emphasis added.]

Miss. Code Ann. Section 73-11-51(1) provides that all persons engaging in the business of funeral service must be duly licensed by the State Board of Funeral Service. While the term "funeral services" is not defined by the Pre-need Cemetery and Funeral Registration Act, that term is defined in Section 73-11-41(h). That definition is as follows:

(h) "Practice of funeral service" means: (i) Providing shelter, care and custody of the human dead; (ii) Conducting immediate post-death activities; (iii) Preparing of the human dead by embalming or other methods for burial or other disposition; (iv) Being responsible for the transportation of the human dead, bereaved relatives and friends; (v) Making arrangements, financial or otherwise, for the providing of such services; (vi) The sale of funeral merchandise; or (vii) The practice or performance of any function of funeral directing and/or embalming as presently known, including those stipulated herein. This definition shall not include persons or corporations engaging only in the preneed sale of funeral merchandise or service. [emphasis added]

Persons who engage ONLY in the pre-need sale of funeral merchandise or services need not be licensed by the State Board of Funeral Service. Establishments or organizations selling pre-need merchandise or services must be registered with the Mississippi Secretary of State. Miss. Code Ann. Section 75-63-65. As cited in your letter of request, subsection (3) of that section provides that as a condition to being registered, the establishment or organization must be legally authorized to provide the services or merchandise at the time of a person's death. Your concern is that this requirement is being interpreted to exclude all but licensed funeral homes from selling pre-need contracts.

With regard to casket sales, the U.S. District Court for the Southern District of Mississippi struck down that portion of Mississippi law that limited sales of caskets to holders of licenses for practice of funeral services or funeral directing. *Casket Royale, Inc., v. Mississippi*, 124 F.Supp.2d 434 (S.D. Miss. 2000). Under this ruling, "casket stores" may sell caskets without the necessity of licensure by the State Board of Funeral Service. Thus, those engaging in the pre-need sale of caskets would also be entitled to deliver the casket at the time of the person's death, and thus qualify for registration under Section 75-63-65(3) of the Mississippi Pre-Need Cemetery & Funeral Registration Act. Companies engaged in the sale of insurance to cover funeral expenses are not selling funeral services or merchandise. They are simply funding the services or merchandise sold by others at the time of the person's death. There is nothing in Section 75-63-65(3) which would preclude the Secretary of State from registering an insurance company to sell pre-need insurance policies. While the *Casket Royale* case discussed above struck down as unconstitutional a portion of Mississippi's regulatory scheme with regard to the sales of caskets, it specifically recognized the State's interest in regulating the practice of funeral directing and funeral services. *Id.* at 441.

Miss. Code Ann. Sections 73-11-41 through 73-11-63 has specific provisions regarding the practice of funeral directing and/or funeral service. Section 73-11-51 provides that any person practicing or holding themselves out as practicing funeral direction or funeral services must be licensed by the State Board of Funeral Service. The statutory definition of "practice of funeral service" excludes a person engaging only in the pre-need sale of funeral merchandise or services, and we are of the opinion that this definition does not operate to exclude from licensure the person or entity who ultimately performs the funeral service pursuant to a pre-need contract. Section 75-63-65 requires that those who register to sell pre-need services or merchandise be lawfully able to provide those services or that merchandise at the time of a person's death.

Our opinion is that the registering establishment or organization may have a contractual arrangement with another entity to provide the services. The Secretary of State may enact regulations requiring sellers of pre-need services to insure their future ability to provide the services.

If our office may be of further assistance, please advise.

Sincerely,

MIKE MOORE, ATTORNEY GENERAL

By:

Heather P. Wagner
Assistant Attorney General

DOCN 000008621
DOCK 1989-018
AUTH Gloria J. Green
DATE 19890224
RQNM Mr. Daniel R. Price
SUBJ Bd. of Funeral Services-Authority
SBCD 218-C
TEXT

Mr. Daniel R. Price Mississippi State Board of Funeral Service 802 North State Street,
Suite 401 Jackson, Mississippi 39236

Dear Mr. Price:

Attorney General Mike Moore has received your request for an opinion and has assigned it to she undersigned for research and reply. Your letter states the following.

On behalf of the Mississippi State Board of Funeral Service, I would like to request of you a written opinion on the following subject:

Under the enabling act of the Mississippi State Board of Funeral Service, 73-11-41 et. seq., does the Board or its designee have the authority to investigate and/or inspect a place or premise devoted to or used in the immediate post-death activities of custody, shelter, care, preparation and/or embalming for final disposition of the body; or used for religious services or other rites or ceremonies associated with the final disposition of human dead; or maintained for the convenience and comfort of the bereaved and the community for viewing or other services in connection with the human dead, and as the office or place for carrying on the profession of funeral service and/or funeral directing?

Miss. Code Annotated 73-11-41 to -63 (Supp. 1988), particularly 73-11-41(c), define the place or premise described in your request as a funeral establishment. These statutory sections provide for the licensing and regulation of funeral establishments. Pertinent statutory provisions set forth the following requirements:

73-11-51(4): To be licensed as a funeral establishment, a place or premise must be used for immediate post-death activities, whether such is a custody, shelter, care, preparation and/or embalming room, adequate casket-vault selection room, holding facilities or proper room or rooms in which rites and ceremonies may be held....

73-11-55: (1) No person shall conduct, maintain, manage or operate a funeral establishment unless a license for each such establishment has been issued by the board and is conspicuously displayed in such funeral establishment.... (2) No license to operate a funeral establishment shall be issued by the board unless such funeral establishment has a person licensed for the practice of funeral service or funeral directing in charge full time....

In 1 Am. Jur. 2d Administrative Law 85, 87 (1962), it is stated that: Investigatory or inquisitorial powers, power to inspect, or to secure or to require the disclosure of information by means of accounts, records, reports, statements, testimony of witnesses, production of documents, or otherwise, are conferred on practically all administrative agencies. Among the investigatory or inquisitorial powers conferred upon administrative agencies is the power, for specific purposes, to enter premises and inspect or examine such premises or things or operations therein,...The power to inspect may be implied as well as expressed....

To the same effect, see 73 CJS Public Administration Law and Procedures 77 (1983).

Further, 53 CJS Licenses 46 N. 12 (1983) states that: As a member of a regulated business a licensee impliedly consents to inspection at any and all reasonable times and places by obtaining a license. See also, *United States v. Mississippi Power & Light Co.*, 638 F.2d 899 (5th Cir. 1981), cert. denied, 454 U.S. 892, 102 St.Ct. 387, 70 L.Ed 2d 206 (1981).

The Supreme Court of Mississippi has recognized that "[a]dministrative boards may be vested with the power to determine whether the facts or conditions comprehended by a licensing statute exists". *Geiger v. Ms. State Board of Cosmetology*, 246 Miss. 542, 151 So.2d 189, 191 (1963); *Davis v. Sheppard*, 243 Miss. 519, 139 So.2d 668, 670 (1962). The Mississippi State Legislature has charged the Board of Funeral Service with the responsibility of licensing and regulating funeral establishments. The Board is vested with subpoena power (73-11-49(6)) and with the authority to sanction its licensees for the acts of commission or omission specified in 73-11-57. By the aforesaid 73-11-57, the Board is authorized to hold hearings, and to "compel the attendance of witnesses and the production of books, records and documents, issue subpoenas therefor,... and to do all things necessary to properly conduct such hearings". The board is further empowered, by 73-11-47(7), to make such reasonable rules and regulations as may be necessary to carry out the provisions of 73-11-41 to -63.

Therefore, it is the opinion of this office that in order to carry out its statutorily prescribed functions, the Board may conduct reasonable inspections and investigations of premises operating under a license from said Board. Please be advised, however, that the permissible inspections authorized by the Board under the statutes are extremely limited in scope, and the statutes should be carefully reviewed and followed in conducting inspections and/or investigations.

If you have further questions, please contact this office.

Sincerely,

Mike Moore Attorney General

By: Gloria J. Green Special Assistant Attorney General
GJG:clm

DOCN 000005224
DOCK 1991-0462
AUTH Larry Stroud
DATE 19910710
RQNM Debbi Dayton
SUBJ CoronersRanger
SBCD 047
TEXT

Ms. Debbi Dayton Medical Examiner Assistant P. O. Box 958 Jackson, MS 39205-0958

Re: Disposition of Human Dead

Dear Ms. Dayton:

Attorney General Mike Moore has received your letter and has assigned it to me for reply. A copy of your letter is attached for reference.

Our state statutes on funeral service are found at Section 73-11- 33 et seq. of the Mississippi Code of 1972. These sections define the practice of funeral service as among other things the "practice of preparing of the human dead by embalming or other methods for burial or other disposition." Section 73-11-41(f) of the Mississippi Code of 1972. Our statutes do not require embalming and do not require that the heirs of a deceased utilize the services of a funeral director; but, if a third party is engaged by the family to prepare the body by embalming or other methods for burial or other disposition then the third party must have a funeral service license.

You ask if a holder of a funeral service license or director's license could be liable for loss of the license under Section 73-11-57(1)(g) of the Mississippi Code of 1972, which deals with permitting an unlicensed person to make arrangements for a funeral or disposition. We cannot definitively answer this question in the absence of specific facts, but we do note that the body is the property of the heirs and absent the state's need for the body for some legitimate purpose the medical examiner should release the body to the heirs, or their designees. If the heirs utilize an unlicensed person to dispose of the body, the medical examiner would not be in violation of Section 73-11-57(1)(g) of the Mississippi Code of 1972. The medical examiner is under no duty to transport a body for the heirs.

Very truly yours,

MIKE MOORE, ATTORNEY GENERAL

By: Larry J. Stroud Special Assistant Attorney General LJS:mfd Enclosure

DOCN 000015673
DOCK 2003-0298
AUTH Onetta Whitley
DATE 20030618
RQNM Dolores Killebrew-Kenney
SUBJ Other State Agencies
SBCD 218
TEXT

Dolores Killebrew-Kenney Mississippi State Board of Funeral Service 7 River Bend Place, Suite B Flowood, Mississippi 39232-7624

Dear Ms. Kenney:

Attorney General Mike Moore has received your request for an Official Attorney General's Opinion and has forwarded the same to me for a reply. In your request you state:

During the 2002 Legislative Session, the Mississippi Legislature amended Chapter 11 of Title 73 of the Mississippi Code of 1972 (hereinafter referred to as the Law). Specifically, the legislature passed Section 73-11-69 of the law to expand the regulatory authority of the State Board of Funeral Service (Board) to include the licensure and regulation of crematories.

Presently there are eight (8) crematories in the State of Mississippi. Seven (7) of these are currently operated by licensees of the State Board of Funeral Service (Board), one of the seven is a cemetery crematory. Of the eight (8), one (1) crematory is not operated by a licensee of the Board, but is a cemetery crematory.

There appears to be a conflict between the recently enacted Section 73-11-69 and the preexisting, yet unrepealed, Section 73-11-63. Section 73-11-69 provides for the regulation of crematories and Section 73-11-63 specifically exempts "cemetery crematories" from regulation by the Board. We request your opinion on the following: first, is there an actual conflict between 73-11-63 and 73-11-69, and second if a conflict exists, how should it be resolved. If the latter, Section 73-11-69, is preempted by the former, Section 73-11-63, should Section 73-11-63 be disregarded in part or in its entirety. Or do the statutes distinguish between cemetery crematories and those not associated with cemeteries for purposes of regulation.

The response to your request turns on the rules of statutory construction. The rules of statutory construction dictate that the interpretation of a statute by the agency charged with enforcing it is entitled to deference by the courts unless that interpretation is repugnant to the plain meaning of the statute. *Ricks v. Mississippi State Department of Health*, 719 So.2d 173, 179 (Miss. 1998). The rules of construction further provide that when two statutes encompass the same subject matter, one being general and the other specific, the latter will control, *McCrary v. State*, 210 So.2d 877, 977-88 (Miss.1968),

citing 1 Sutherland, Statutory Construction Section 2022 (3rd ed. 1943), one caveat being that statutes on the same subject, although in apparent conflict, should, if possible be construed in harmony with each other, to give effect to each. Lamar County School Board v. Saul, 359 So.2d 350, 353. Where the words or provisions of a statute differ from those of a previous statute on the same subject, they are presumably intended to have a different construction or meaning, and to denote an intention to change the law. Stidham v. State, 750 So.2d 1238. In construing and interpreting these statutes in order to resolve the conflict, the words in the statutes should be given their plain, usual and ordinary meaning, and the object is to determine the legislative intent. Mississippi State Tax Commission v. Columbia Gulf Transmission Co., 161 So.2d 173. In determining legislative intent, whatever the legislature says in the text of the statute is considered the best evidence of the legislative intent. Mississippi Gaming Commission v. Imperial Palace of Mississippi, Inc. 751 So.2d 1025.

Because these statutes, when giving the words their plain and ordinary meaning, may be read together in a manner which gives effect to each, it is the opinion of this office that no conflict exists and the Mississippi State Board of Funeral Services does not have regulatory authority over cemetery crematories.

Sincerely,

Onetta Starling Whitley

Deputy Attorney General

DOCN 000005650
DOCK 1992-0092
AUTH Larry Stroud
DATE 19920226
RQNM Hugh Tedder
SUBJ Coroners
SBCD 47
TEXT

Honorable Hugh W. Tedder Coroner, Adams County Medical Arts Building Natchez, MS
39120

Re: Disinternment by Family

Dear Dr. Tedder:

Attorney General Mike Moore has received your letter and has assigned it to me for reply. In your letter you state:

Recently a local funeral home contacted me seeking permission to move remains to another location. The State Medical Examiner Office does not think it comes under the jurisdiction of the coroner but is between the funeral home and the interested party. The local District Attorney has attempted to find some statute concerning same. This concerns a family requesting a disinterment of a relative and interment elsewhere. The only thing I know is when remains are found due to excavation, grave robbing, etc., the coroner is called. This could lead to mass movement if any party decided upon it without regulation.

I would like to know who has authority and/or what the law is in this particular situation. The funeral home is continually calling for me to give them a statement so they can move the remains.

Our code sections 41-61-51 et seq. of the Mississippi Code of 1972 sets forth the jurisdiction of the State Medical Examiner and the County Medical Examiner and County Medical Examiner Investigator. Unless a death affects the public interest as described in the statutes a coroner has no jurisdiction.

Specifically as to disinternment of bodies, Section 41-61-67 of the Mississippi Code of 1972 provides that when no investigation has been performed or further investigation is needed the coroner may seek a circuit judge's order to exhume the body. However, from your letter we gather this is not the case. Our law does not require the coroner's permission when a family desires to move a deceased family member. The family's property right in the body is tempered by the investigative and police power of the state, but if the state's interest is not present then the family is free to move the body without the state's permission.

Very truly yours,

MIKE MOORE, ATTORNEY GENERAL

By: Larry J. Stroud Special Assistant Attorney General LJS:mfd