



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

January 7, 2019

Mr. Charles G. Cooper  
Banking Commissioner  
Texas Department of Banking  
2601 North Lamar Boulevard  
Austin, Texas 78705

Opinion No. KP-0232

Re: Whether a funeral provider may infer a decedent's preferred method of disposition from the contents of a prepaid funeral contract (RQ-0234-KP)

Dear Mr. Cooper:

You ask about a funeral provider's authority to determine a decedent's preferred method of disposition from the contents of a prepaid funeral contract.<sup>1</sup> The Texas Department of Banking (the "Department") regulates prepaid funeral contracts, which are governed by chapter 154 of the Finance Code. *See* TEX. FIN. CODE §§ 154.051(a), .151(a); *see generally id.* §§ 154.001–416 (chapter 154). The current model form for prepaid funeral contracts provides for a purchaser to indicate the desired disposition of his or her remains, either burial, cremation, or other. Request Letter at 2; *see* 7 TEX. ADMIN. CODE § 25.3(b) (Tex. Dep't of Banking, Prepaid Funeral Contracts). You are concerned about older forms and nonstandard contracts that do not address the type of disposition desired. *See* Request Letter at 2. You tell us that "[w]hen a funeral provider is confronted with an older form contract, in which the purchaser has not explicitly stated his or her desired method of disposition, the funeral provider commonly infers the type of disposition from the services or merchandise purchased," such as the purchase of funeral services or merchandise more consistent with burial than with cremation. *Id.* You ask whether, when "an executed funeral contract lacks an affirmative election with respect to a type of disposition, [a funeral provider must or may] infer the decedent's election from the contents of a prepaid funeral contract." *Id.* at 1.

Courts interpreting statutes attempt to give effect to the Legislature's intent as expressed in the plain language of the text considered in the context of the entire statutory scheme. *Jaster v. Comet II Constr., Inc.*, 438 S.W.3d 556, 562 (Tex. 2014). Chapter 154 of the Finance Code and section 711.002 of the Health and Safety Code resolve your question. Under chapter 154, "[p]repaid funeral benefits" are "prearranged or prepaid funeral or cemetery services or funeral merchandise, including an alternative container, casket, or outer burial container." TEX. FIN. CODE § 154.002(9). A prepaid funeral benefits contract must obligate a funeral provider to provide the benefits as a party to the contract. *Id.* § 154.151(b)(2), (c); *see also id.* § 154.002(6) (defining

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<sup>1</sup>*See* Letter from Mr. Charles G. Cooper, Commissioner, Tex. Dep't of Banking, to Honorable Ken Paxton, Tex. Att'y Gen. at 1 (May 29, 2018), <https://www2.texasattorneygeneral.gov/opinion/requests-for-opinions-rqs> ("Request Letter").

“funeral provider” as “the person designated in a prepaid funeral benefits contract that has agreed to provide the specified prepaid funeral benefits”). The contract must “state the details of the prepaid funeral benefits to be provided.” *Id.* § 154.151(b)(3). The benefits may include prepaid funeral services and merchandise. *Id.* § 154.002(9). “Funeral services” are services sold pre-need and used to “care for and prepare a deceased human body for burial, cremation, or other final disposition[,] and . . . arrange, supervise, or conduct a funeral ceremony or the final disposition of a deceased human body.” *Id.* § 154.002(13)(A), (B). “Funeral merchandise” means goods sold pre-need for use in conjunction with funeral services. *Id.* § 154.002(12).

After the death of the beneficiary of a prepaid funeral benefits contract, the funeral provider must “deliver the contracted funeral merchandise and services and cash advance items required under the contract,” subject to the right of modification after the decedent’s death as allowed under section 154.1551. *Id.* § 154.161(a)(2)(A). Section 154.1551 allows persons with the right and responsibility to control the disposition of the beneficiary’s remains to reasonably modify some terms of the prepaid funeral benefits. *Id.* § 154.1551(a). But if the purchaser of the contract is also the beneficiary, the contract may not be modified to “change the type of disposition specified by the purchaser in the contract, whether by burial, cremation, or another alternative . . . as provided by Section 711.002(g), Health and Safety Code.” *Id.* § 154.1551(a)(2).

Section 711.002 governs the disposition of a decedent’s remains. TEX. HEALTH & SAFETY CODE § 711.002; *see generally* Tex. Att’y Gen. Op. No. JC-0279 (2000). Subsection (g) of that statute establishes the right of a person to control the disposition of his or her remains:

A person may provide written directions for the disposition, including cremation, of the person’s remains in a will, a prepaid funeral contract, or a written instrument signed and acknowledged by such person. . . . The directions may be modified or revoked only by a subsequent writing signed and acknowledged by such person.

TEX. HEALTH & SAFETY CODE § 711.002(g). If a decedent does not leave written directions concerning disposition, then persons designated in subsection (a) of the statute, in the priority listed, have the “right to control the disposition, including cremation, of the decedent’s remains.” *Id.* § 711.002(a). Subsection (a) lists first “the person designated in a written instrument signed by the decedent” followed by certain relatives of the decedent and duly qualified executors or administrators of the decedent’s estate. *Id.* § 711.002(a)(1)–(7). The person who has the right to control disposition under subsection (a) has the duty to “faithfully carry out the directions of the decedent to the extent that the decedent’s estate or the person controlling the disposition are financially able to do so.” *Id.* § 711.002(g).

A funeral provider under a prepaid funeral contract “who fails to honor the contract is liable for the additional expenses incurred in the disposition of the decedent’s remains as a result of the breach of contract.” *Id.* Subsection 711.002(i) limits a funeral services provider’s liability only when carrying out (1) a decedent’s written directions, or (2) the written “directions of any person who represents that the person is entitled to control the disposition of the decedent’s remains.” *Id.* § 711.002(i). A person may leave written directions for disposition of remains in the person’s will,

a prepaid funeral contract, or a signed and acknowledged instrument other than a prepaid funeral contract. *Id.* § 711.002(a), (g).

Thus, a funeral provider that is a party to a prepaid funeral benefits contract must carry out its terms, but also must honor written directions by the decedent or authorized designated person about the disposition of remains. A person may specify written directions in a will or other signed and acknowledged writing rather than in a prepaid funeral benefits contract, or may not leave written directions at all. No law requires a person purchasing a prepaid funeral benefits contract to include written instructions in the contract. *Id.*; TEX. FIN. CODE §§ 154.151 (stating the required form of the contract), .161 (stating responsibilities of the funeral provider). Accordingly, upon the death of a beneficiary of a prepaid funeral benefits contract, the funeral provider who is a party to the contract must determine whether, as a matter of contract construction, the contract contains the beneficiary's written directions for disposition of his or her remains.

Contract construction is ordinarily a question of law subject to de novo review by the courts. *MCI Telecomms. Corp. v. Tex. Utils. Elec. Co.*, 995 S.W.2d 647, 650 (Tex. 1999). In construing any contract, courts attempt to ascertain and give effect to the parties' "intentions . . . as expressed in the writing itself." *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 333 (Tex. 2011). The language of a contract must be considered in the context of the contract as a whole, and words are given their plain, common meaning. *Plains Expl. & Prod. Co. v. Torch Energy Advisors Inc.*, 473 S.W.3d 296, 305 (Tex. 2015). Although chapter 711 of the Health and Safety Code does not define "written directions," the word "direction" commonly means an "explicit instruction." WEBSTER'S THIRD NEW INT'L DICTIONARY 640 (2002).<sup>2</sup> Language of purchase is not explicit instruction for the disposition of remains required by subsection 711.002(g) of the Health and Safety Code. *See* TEX. HEALTH & SAFETY CODE § 711.002(g); *see also* TEX. FIN. CODE § 154.1551(a)(2) (prohibiting modifications that "change the type of disposition specified by the purchaser in the contract"). Under the statutes, leaving written directions about the type of disposition has legal consequences that bind the beneficiary and the beneficiary's survivors unless the instructions are "modified or revoked [in] a subsequent writing signed and acknowledged by" the beneficiary. TEX. HEALTH & SAFETY CODE § 711.002(g). While a beneficiary's purchase of *merchandise and services* might reflect the beneficiary's thinking at the time of the contract, it does not comply with the statutory requirement that the beneficiary provide binding directions about the type of *disposition*. If a prepaid funeral benefits contract does not expressly address the disposition of the beneficiary's remains, a funeral provider may not deprive persons listed in section 711.002(a) of their right to control disposition when the beneficiary does not leave written directions. *See id.* § 711.002(a). A funeral provider's inference drawn from a statement of the purchases made in a prepaid funeral benefits contract does not satisfy the statutory requirement of written directions specifying the disposition of the beneficiary's remains. *Id.* § 711.002(g); TEX. FIN. CODE § 154.1551(a)(2).

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<sup>2</sup>*See also* NEW OXFORD AM. DICTIONARY 492 (3d ed. 2010) (defining "directions" as "instructions . . . about how to do something"); AM. HERITAGE COLL. DICTIONARY 401 (4th ed. 2002) (defining "direction" as "[a]n instruction or series of instructions for doing or finding something[;] [o]ften used in the plural").

S U M M A R Y

If a prepaid funeral benefits contract lacks an affirmative election regarding the disposition of the contract beneficiary's remains, a funeral provider's inference from the purchases made in the contract does not satisfy the statutory requirement for written directions that specify the disposition of the decedent's remains under subsection 711.002(g) of the Health and Safety Code and subsection 154.1551(a)(2) of the Finance Code.

Very truly yours,



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