

99-078

PROFESSIONS AND OCCUPATIONS: FUNERAL SERVICES – PRENEED FUNERAL CONTRACTS.

Funeral director, residing or doing business within Commonwealth, may establish irrevocable trust for purpose of holding payment pursuant to preneed funeral contract so that Medicaid applicant may qualify for resource exclusion.

Mr. Dennis G. Smith
Director, Department of Medical Assistance Services
March 31, 2000

You ask whether § 54.1-2820(A)(7) of the *Code of Virginia* permits a funeral director to establish an irrevocable trust for a Medicaid applicant for the purpose of holding payment made pursuant to a preneed funeral contract so that the applicant may qualify for a resource exclusion under regulations of the Department of Medical Assistance Services.

Section 54.1-2820(A) provides:

It shall be unlawful for any person residing or doing business within this Commonwealth, to make, either directly or indirectly by any means, a preneed funeral contract unless the contract:

* * *

7. Provides that any person who makes payment under the contract may terminate the agreement at any time prior to the furnishing of the services or supplies contracted for; if the purchaser terminates the contract within thirty days of execution, the purchaser shall be refunded all consideration paid or delivered, together with any interest or income accrued thereon; if the purchaser terminates the contract after thirty days, the purchaser shall be refunded any amounts required to be deposited under § 54.1-2822, together with any interest or income accrued thereon; however, nothing herein shall prohibit the creation of an irrevocable inter vivos trust which may be established by any person residing or doing business within this Commonwealth for the purpose of paying the grantor's funeral and burial expenses[.]

A 1997 opinion of the Attorney General concludes that it is a violation of § 54.1-2820(A)(7) for a funeral director to establish an irrevocable trust for a Medicaid applicant for the purpose of holding payment pursuant to a preneed funeral contract in order to qualify the applicant for a resource exclusion.¹ The 1998 Session of the General Assembly added to § 54.1-2820(A)(7) the phrase "however, nothing herein shall prohibit the creation of an irrevocable inter vivos trust for the purpose of paying the grantor's funeral and burial expenses."² Furthermore, the 1999 Session of the General Assembly

inserted in § 54.1-2820(A)(7) the phrase "which may be established by any person residing or doing business within this Commonwealth" after the term "irrevocable inter vivos trust."³ When the legislature intends to include broader language, it so states by the use of that language.⁴

A rule of statutory construction requires the presumption that, in amending or enacting statutes, the General Assembly had full knowledge of the existing law and the construction placed upon it by the Attorney General, and intended to change the then-existing law.⁵ Furthermore, when new provisions are added to existing legislation by an amendatory act, a presumption normally arises that a change in the law was intended.⁶ In addition, when the legislature amends existing statutes following issuance of an opinion of the Attorney General, it is presumed that the legislature acted purposefully with the intent to change existing law.⁷

Several other principles of statutory construction are also applicable to this matter: "If the language of a statute is plain and unambiguous, and its meaning perfectly clear and definite, effect must be given to it."⁸ It is unnecessary to resort to any rules of statutory construction when the language of a statute is unambiguous.⁹ In such situations, the statute's plain meaning and intent govern. In addition, when a statute creates a specific grant of authority, the authority exists only to the extent specifically granted in the statute.¹⁰

The 1998 and 1999 Sessions of the General Assembly added plain and unambiguous language to § 54.1-2820(A)(7) that qualifies the general limitation placed on preneed funeral contracts. The law clearly was changed by the 1998 and 1999 Sessions of the General Assembly. It, therefore, is my opinion that § 54.1-2820(A)(7) permits a funeral director, residing or doing business within the Commonwealth, to establish an irrevocable trust for a Medicaid applicant for the purpose of holding payment made pursuant to a preneed funeral contract, in order that a Medicaid applicant may qualify for a resource exclusion under Medicaid law and regulations without violating the laws regulating preneed funeral contracts.

¹1997 Op. Va. Att'y Gen. 160, 162.

²1998 Va. Acts ch. 738, at 1786, 1786.

³1999 Va. Acts ch. 819, at 1494, 1494.

⁴See *Klarfeld v. Salsbury*, 233 Va. 277, 284-85, 355 S.E.2d 319, 323 (1987).

⁵See *Richmond v. Sutherland*, 114 Va. 688, 693, 77 S.E. 470, 472 (1913); Op. Va. Att'y Gen.: 1995 at 130, 131 (General Assembly, in amending statute, had full knowledge of existing law and construction placed upon it by courts, and intended to change then existing law); 1996 at 51, 52 (General Assembly, in repealing one statute and enacting another, had full knowledge of existing law

and construction placed upon it by Attorney General, and intended to change then-existing law).

⁶Wisniewski v. Johnson, 223 Va. 141, 144, 286 S.E.2d 223, 224-25 (1982); see also Op. Va. Att'y Gen.: 1996 at 61, 61; 1990 at 156, 157; 1986-1987 at 272, 273.

⁷See, e.g., Cape Henry v. Natl. Gypsum, 229 Va. 596, 602, 331 S.E.2d 476, 480 (1985) (legislature's awareness of court decisions in considering recodification of statute).

⁸Temple v. City of Petersburg, 182 Va. 418, 423, 29 S.E.2d 357, 358 (1944); see also 1993 Op. Va. Att'y Gen. 256, 257.

⁹See Ambrogi v. Koontz, 224 Va. 381, 297 S.E.2d 660 (1982); 1993 Op. Va. Att'y Gen. 99, 100.

¹⁰See Tate v. Ogg, 170 Va. 95, 103, 195 S.E. 496, 499 (1938); 2A Norman J. Singer, Sutherland Statutory Construction § 47.23 (5th ed. 1992 & Supp. 1999) ("*Expressio unius est exclusio alterius.*").