

Memorandum

To: Funeral Directors

From: Danny R. Collins, Deputy for Regulatory Enforcement, SCDCA

Re: Irrevocable Trusts in Preneed Funeral Contracts

Date: February 20, 2009

The Department has been asked several questions about the revocability of an irrevocable contract funded by a trust. Preneed funeral contracts are governed by §§ 32-7-10 *et seq.* of the *Code of Laws of South Carolina*. Section 32-7-25 specifically allows for preneed contracts to be made irrevocable at the purchaser's option. When the purchaser elects to make the contract irrevocable, the law gives the purchaser 30 days to revoke the contract before it becomes irrevocable. Once the 30 day time period has passed the contract can no longer be revoked by the purchaser, the beneficiary or the trustee. In fact, § 32-7-30, which allows the purchaser to make a written demand for a refund of the funds paid, specifically excludes irrevocable contracts. That is, the right to demand a refund after the 30 day period does not apply to an irrevocable contract. However, if the contract is not paid in full and the purchaser fails to make the payments, the contract is voidable at the option of the provider. *S.C. Code Ann.* § 32-7-20(K).

The case law in South Carolina supports this position. As a general rule a trust cannot be revoked unless such a power is reserved in the trust agreement. *Chiles v. Chiles*, 270 S.C. 379, 242 S.E.2d 426 (1978); *Dodd v. Berlinsky, as Trustee*, 344 S.C. 172, 543 S.E.2d 237 (Ct. App. 2001). The preneed agreement provides on its face whether it is revocable or irrevocable. In certain circumstances a court of equity can modify or revoke a trust, even an irrevocable trust. A court of equity can reform a trust that does not express the intent of the settlor of the trust, but the time for examining the intent of the settlor is at the time the trust was made, not some later time because of a change in circumstances. *Chiles, supra*. Also, a court of equity can revoke a trust if it was procured through fraud, undue influence, duress or coercion, but once again, the time period to be examined is the time the trust was made, not some later time when circumstances may have changed. *Dodd, supra*. As the court said in *Chiles* "it is the court's duty to preserve, not destroy, trusts." 242 S.E.2d at 429. When the desire for the refund arises after the time the preneed contract was purchased and was funded by the trust, there usually are no legal grounds to revoke the trust.

Moreover, revoking a trust does have other legal consequences. When a trust is irrevocable, the property is out of the control of the purchaser. Since the property is not under the control of the purchaser, it cannot be used when determining the eligibility for certain government benefits, such as assisted living or Medicare benefits. If the irrevocable contract were to be revoked, then the purchaser may become ineligible for government assistance benefits. Also, the purchaser may possibly be asked to repay any benefits that have already been

received. In other words, even if a court does allow revocation of an irrevocable agreement, there may be negative legal consequences.

The law also allows a preneed funeral contract to be funded by an insurance policy. *S.C. Code Ann.* § 32-7-20(E). There are specific provisions to govern the conduct of a funeral director licensed to sell this type of insurance in the insurance code. See *S.C. Code Ann.* § 38-55-330. This statute, however, does not apply to the preneed contracts themselves. Section 32-7-25 recognizes that preneed contracts may be funded by insurance policies and allows the purchaser to cancel the contract within 30 days and receive a refund of the full premium paid, like those contracts funded by a trust. Section 32-7-30, which allows the customer to make a written request for the money paid only applies to a contract funded by a trust. Section 32-7-35 allows an irrevocable contract funded by insurance to be transferred to another funeral home, but there is no provision allowing the revocation of an irrevocable contract. Therefore, there is no reason under the governing statutes to expect that an irrevocable contract funded by insurance that has been fully paid would be treated differently than an irrevocable contract funded by a trust.

To summarize, an irrevocable contract cannot be revoked unless it comes within one of the two statutory provisions or it is revoked by a court of competent jurisdiction. Even then the court tries to preserve a trust arrangement and will only reform or revoke it if the proper showing is made by clear and convincing evidence. Therefore, a funeral home cannot release the trust funds that do not come within the statutory provisions without a proper court order allowing it to do so.