

1853.

BURIAL—RECIPIENT OF AID FOR THE AGED—EXECUTOR OR ADMINISTRATOR MAY NOT PAY OUT OF ASSETS OF SUCH DECEASED RECIPIENT, SUM IN EXCESS OF TWO HUNDRED DOLLARS—SECTION 1359-7 G. C. EXCEPTION TO SECTION 10509-121 G. C.

SYLLABUS:

1. *An executor or administrator may not by reason of Section 1359-7, of the General Code, pay out of the assets of a deceased recipient's estate a sum in excess of \$200.00 for the burial of a recipient of aid for the aged.*

2. *Section 1359-7 of the General Code, is a special section covering a particular subject matter and must be read as an exception to Section 10509-121 of the General Code.*

Columbus, Ohio, February 15, 1940.

Hon. Charles L. Sherwood, Director, Department of Public Welfare,
State Office Building,
Columbus, Ohio.

Dear Sir:

This will acknowledge receipt of your request for my opinion, which reads as follows:

"The Division of Aid for the Aged has found an apparent conflict in laws between Item No. 1 of General Code 10509-121 and the first paragraph of General Code 1359-7 as amended September 6, 1939, especially with reference to the amount of the preferred claim of the funeral director.

Administrators of deceased recipients of aid have chosen to ignore G. C. 1359-7 as amended and allowed the preferred claim of the funeral director according to Item No. 1 of G. C. 10509-121. As you know, G. C. 1359-7 allows the funeral director a preferred claim against the estates of recipients in an amount not to exceed two hundred dollars whereas Item No. 1 of G. C. 10509-121 provides a funeral director with a preferred claim against estates of decedents in general in an amount not to exceed three hundred and fifty dollars. The two statutes read as follows:

'G. C. 1359-7. Upon the death of a person, the total amount of aid paid to said person and/or to his or her spouse under this act, shall be a preferred claim against the estate of such deceased person, having priority and preferred over all unsecured claims except the bill of funeral director *not exceeding two hundred dollars * * etc.*'

'G. C. 10509-121. Every executor or administrator shall proceed with diligence to pay the debts of the deceased, applying the assets in the following order:

1. Bill of funeral director *not exceeding three hundred fifty dollars, such other funeral expenses as are approved by the court * * etc.*'

The difference between three hundred fifty dollars and two hundred dollars which amounts apparently are in conflict in the above two statutes represents thousands of dollars each year to the Division of Aid for the Aged. Reimbursements to the Division would be increased thousands of dollars each year if the case law rules in favor of General Code 1359-7 as amended September 6, 1939.

Therefore, the Division of Aid for the Aged in the Department of Public Welfare of the State of Ohio respectfully re-

quests a formal opinion, with citations, on this specific question:

Does the funeral director who buries a deceased recipient of aid have a legal right to ignore G. C. 1359-7, and demand payment of his bill under G. C. 10509-121, Item No. 1?"

In construing the first section mentioned in your communication, namely, Section 1359-7, General Code, I find it necessary to trace the history of this particular section and to discuss the judicial decision rendered prior to its amendment by the Ninety-third General Assembly.

Section 1359-7, General Code, as part of the Old Age Pension Law was adopted by the lawmakers and became effective November 7, 1933, and was amended by the Legislature (116 Ohio Laws—Part 2, page 218), effective May 7, 1937, to read as follows:

"Upon the death of a person, the total amount of aid paid to said person and/or his or her spouse under this act, shall be a *preferred claim* against the estate of such deceased person.

If, upon the death of any person who had received aid under this act, or his or her spouse, it is found that he or she, or both of them, was possessed of property in excess of what is allowed by law in respect to the amount of aid granted by law, there shall be a penalty or *preferred claim* in addition to the above provided for, against the estate of such deceased person in an amount equal to the total amount of aid paid in excess of that to which the recipient was by law entitled; and it shall be the duty of the division likewise to recover the same from the estate and property so found in excess." (Emphasis mine.)

My predecessor in Opinion No. 2111 reported in Opinions of the Attorney General for the year 1938, Volume 1, page 581, placed the following construction upon the then existing section:

"Pursuant to Section 1359-7, G. C., a claim of the Division of Aid for the Aged in the Department of Public Welfare of the State of Ohio for old age assistance given the deceased recipient thereof is a preferred claim against the estate of such deceased recipient. Such preferred claim is prior to all claims specifically set forth in Section 10509-121, G. C."

However, the Court of Appeals for the Second Judicial District in an opinion rendered on February 2, 1939, and reported in 29 Ohio Law Abstract, page 284, in the case of Bush vs. Cleaver, at page 288 held as follows:

"The words 'preferred claim,' unless something in the context to the contrary, should be given its ordinary and usual meaning. The common acceptation of the claim is a claim that is preferred over general claims. The words standing alone may never be given a construction through which the preferred claim would take preference over secured claims or other claims declared to have a preference. The section providing order of payment in effect creates preferences and under this section the order of preference is provided. The State's claim in the instant case is not provided for except that we adopt the principle of law that preferred claims are ahead of general claims and hence should be paid before claims falling under paragraphs 6 and 7 of Section 10509-121."

Following this decision, the 93rd General Assembly passed Amended Section 1359-7, General Code (118 O. L., H. B. 5) which now reads as follows:

"Upon the death of a person, the total amount of aid paid to said person and/or to his or her spouse under this act, shall be a preferred claim against the estate of such deceased person, having priority and preference over all unsecured claims except the bill of funeral director not exceeding two hundred dollars, the expense of the last sickness and those of administration, and the allowance made to the widow and children for their support for twelve months.

If, upon the death of any person who had received aid under this act, or his or her spouse, it is found that he or she, or both of them, was possessed of property in excess of what is allowed by law in respect to the amount of aid granted, there shall be a penalty or preferred claim in addition to, and with same preference and priority as, that above provided for, against the estate of such deceased person in an amount equal to the total amount of aid paid in excess of that to which the recipient was by law entitled; and it shall be the duty of the Division likewise to recover the same from the estate and property so found in excess."

The presumption is that every amendment of a statute is made to effect some purpose. 37 Ohio Jurisprudence, 768. Taking into consideration what was designed to be accomplished in amending this section, the question now remaining is whether the context may thus serve to engraft an exception by implication to dispose of an apparent conflict between Section 1359-7 and section 10509-121. It is a rule of statutory construction (Lewis' Sutherland Statutory Construction, Volume 2, page 661) that:

"Where there is an act or provision which is general, and applicable to a multitude of subjects, and there is also another act or

provision which is particular and applicable to one of these subjects and inconsistent with the general act, they are not necessarily so inconsistent that both cannot stand, though contained in the same act, or though the general law were an independent enactment. The general act would operate according to its terms on all the subjects embraced therein, except the particular one which is the subject of the special act. This would be deemed an exception."

Since both statutes under consideration deal with the administration of estates, the case of *State ex rel. Stettler vs. Zangerle*, Auditor, 100 O. S., 415, can be said to bear directly on the question. It is stated in the syllabus:

"A special statute covering a particular subject matter must be read as an exception to a statute covering the same and other subjects in general terms."

The same principle has been applied in numerous other decisions of the Supreme Court, among which may be mentioned:

Northwestern Ohio Natural Gas Company vs.
City of Tiffin, 59 O. S., 420;
Perkins vs. Bright, 109 O. S., 14;
Flury vs. Central Publishing Co., 118 O. S., 154;
State ex rel. Elliott vs. Connor, 123 O. S., 310.

In another analysis of your question I find the rule stated in 37 Ohio Jurisprudence, at page 420, to this effect:

"The rule generally as to two irreconcilably conflicting sections of a code is that that section should prevail which is derived from a source that can be considered as the last expression of the law-making power in enacting separate statutes upon the same subject."

In view of the foregoing, it is my opinion that in the distribution of the assets of an estate against which the Division of Aid for the Aged has a preferred claim for aid and assistance paid the decedent or his or her spouse, the administrator or executor is limited by reason of Section 1359-7 of the General Code, to the sum of \$200.00 in payment of a funeral director's bill for burying the deceased.

Respectfully,

THOMAS J. HERBERT,
Attorney General.