

OPINION NO. 87-111

Syllabus:

Pursuant to R.C. 1107.33, a seller of a preneed funeral contract may not deduct a service charge from the payments made under the contract.

To: Gordon E. Tatman, Executive Director, Board of Embalmers and Funeral Directors of Ohio, Columbus, Ohio

By: Anthony J. Celebrezze, Jr., Attorney General, December 29, 1987

I have before me your request for my opinion concerning the deduction of service charges from payments made for preneed funeral contracts. R.C. 1107.33 regulates preneed funeral contracts; R.C. 1107.33(A) defines a "preneed funeral contract," and provides in pertinent part:

As used in this section, "preneed funeral contract" means a written agreement, contract, or series of contracts to sell or otherwise provide any funeral services, funeral goods, or any combination thereof, to be used in connection with the funeral or final [disposition] of a dead human body, where payment for these goods or services is made either outright or on an installment basis, prior to the death of the person so purchasing them or for whom they are purchased.

After the contract is executed between the purchaser and a licensed funeral director, any money paid under the contract is deposited in a financial institution pursuant to R.C. 1107.33(D). The funds and any income earned from those funds are held in an account for the beneficiary of the contract known as a "preneed funeral contract account." When the person for whose benefit the contract was made dies, the financial institution pays the funds and any accumulated interest to the person entitled to those funds under the contract. See R.C. 1107.33(H). You state in your letter that some sellers of preneed funeral contracts are deducting payment from the money received under the contract as a "service charge." I have rephrased your question as follows:

Pursuant to R.C. 1107.33(C), may the seller of a preneed funeral contract deduct a service charge from the money received under the contract?

R.C. 1107.33(C) regulates payments received under preneed funeral contracts, and provides:

One hundred per cent of all payments for funeral goods and services made under a preneed funeral contract, shall remain intact as a fund until the death of the person for whose benefit the agreement is made or until the goods or services are delivered as set forth in division (K) of this section. However, any deposit made pursuant to this section shall be released upon demand of the person for whose benefit such deposit was made or upon the demand of the seller for its share of the deposited funds and earned interest if the contract has been canceled as set forth in division (G) of this section. (Emphasis added.)

R.C. 1107.33(C) expressly forbids a deduction like the one you describe in your letter. A statute that requires "[o]ne hundred per cent of all payments for funeral goods and services made under a preneed funeral contract, [to] remain intact" must be interpreted to prevent an unauthorized deduction from those payments. Unless the contract is terminated, R.C. 1107.33(C) permits the funds paid under the contract to be disturbed in only two situations. The first situation is the death of the

person for whose benefit the contract was made; the second situation is the delivery of "goods or services...as set forth in [R.C. 1107.33](K)." R.C. 1107.33(K) provides:

For purposes of this section, the seller is deemed to have delivered funeral goods pursuant to a preneed funeral contract when:

- (1) The seller makes actual delivery of the goods to the beneficiary; or
- (2)(a) The seller receives delivery of the goods on behalf of the beneficiary; and
- (b) Such goods are stored upon the real property of a funeral home licensed in this state; and
- (c) The seller notifies the beneficiary of receipt of the goods and identifies the specific location of the goods; and
- (d) The seller at the time of the beneficiary's final payment, provides the beneficiary with evidence of ownership in the beneficiary's name showing the goods to be free and clear of any liens or other encumbrances.

From the facts you have included in your letter, I see no indication that the sellers you refer to have met the conditions of R.C. 1107.33(K). Rather, the facts indicate that the sellers have deducted a payment merely for the "service" of executing the preneed funeral service contract. R.C. 1107.33 does not authorize sellers of preneed funeral contracts to deduct payments for any services; R.C. 1107.33(C) specifically provides that all money paid for "services" shall "remain intact."

If the purchaser terminates the contract, R.C. 1107.33(G) permits the seller of the preneed funeral contract to retain some of the preneed funeral contract account for services provided only in very limited circumstances:

Any person who has entered into a preneed funeral contract may, on not less than fifteen days' notice, cancel the contract and request and receive from the seller payments made under the contract which have been deposited in a fund pursuant to divisions (C) and (D) of this section and any accruals or income thereon up to the time of cancellation; except that if a preneed funeral contract stipulates a firm or fixed or guaranteed price for services and personal property for future use at a time determined by the death of the person on behalf of whom payments are made, the person who has entered into the contract may, on not less than fifteen days' notice, cancel the contract and receive from the seller ninety per cent of the principal paid pursuant to division (C) of this section, and not less than eighty per cent of any interest paid, up to the time of cancellation, and not less than eighty per cent of any accrual or income earned while the funds have remained on deposit pursuant to divisions (C) and (D) of this section, up to the time of cancellation. (Emphasis added.)

I note, however, that R.C. 1107.33(G) does not permit the seller to receive a service charge at the time the contract is executed; rather, the seller may retain such charges only at the time the contract is terminated, and only if the preneed funeral contract stipulated a "firm or fixed or guaranteed price for services." You do not indicate in your letter that

sellers of preneed funeral contracts have been retaining funds for service charges upon termination of the contract by the purchaser; rather, you indicate that the sellers are deducting a service charge from the payments made when the contract is executed. R.C. 1107.33(G) does not authorize this type of deduction.

In R.C. 1107.33(M), the General Assembly expressly stated the intent of R.C. 1107.33:

The general assembly intends that this section be construed as a limitation upon the manner in which a person is permitted to accept funds in prepayment for funeral services to be performed in the future, or funeral goods to be used in connection with the funeral or final disposition of human remains, to the end that at all times members of the public may have an opportunity to arrange and pay for funerals for themselves and their families in advance of need while at the same time providing all possible safeguards whereunder the prepaid funds cannot be dissipated, whether intentionally or not, so as to be available for the payment of funeral services and the providing of personal property used in connection with the funeral or final disposition of dead human bodies.
(Emphasis added.)

The service charge deduction you describe would be a clear departure from this intent. The deduction would dissipate the corpus of the preneed funeral contract account, which in turn would dissipate the eventual payment to the beneficiary of the contract made pursuant to R.C. 1107.33(H). R.C. 1107.33(M) expresses the intent of the General Assembly that a person may accept funds for a preneed funeral contract only under the terms and conditions laid out in R.C. 1107.33. Withholding a service charge at the time the contract is executed therefore directly contradicts both the intent of the General Assembly and the express language of the statute.

Accordingly, it is my opinion and you are advised that pursuant to R.C. 1107.33, a seller of a preneed funeral contract may not deduct a service charge from the payments made under the contract.