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FUNERAL BUSINESS, INCORPORATION — §4717.11 R.C. — ESTABLISHED PRIOR TO 1928 — MAY BE INCORPORATED — RULES OF BOARD OF EMBALMERS AND FUNERAL DIRECTORS CONSTRUED — DEFINITION OF WORD “FIRM” AS USED THEREIN.

SYLLABUS :

1. Section 4717.11, Revised Code, and Article XIII of the Rules and Regulations of State Board of Embalmers and Funeral Directors are not a bar to the incorporation of a funeral business, established prior to 1928, under a name containing the name of original owner, now deceased, and of present owner, where such establishment has been known by such name since 1928.

2. The use of the word “firm” in Article XIII of the Rules and Regulations of the State Board of Embalmers and Funeral Directors limits the application of the provisions therein to partnerships and this rule has no application to incorporated funeral home establishments.

Columbus, Ohio, March 31, 1959

Mr. Loren E. Hillis, Secretary-Treasurer

The Board of Embalmers and Funeral Directors of Ohio, Columbus, Ohio

Dear Sir :

I am in receipt of your letter in which my opinion is requested relative to an actual situation which, substituting the names of real parties with the consecutive letters of the alphabet, is presented as follows :

“Some prior time to 1928, A. commenced a funeral business under his own name. On June 6, 1928, he sold this business to B., remaining with said business as a salaried employee. Since June 6, 1928, the business has been conducted from the premises X. as A.-B. Funeral Home. This resulted from the purchase of good will and the right to use the name of A. A. died January 23, 1946. B. still owns and operates said funeral home on the premises X. He is a licensed funeral director but not an embalmer. The funeral home is managed by C., a licensed funeral director and embalmer. His name is prominently displayed as manager and funeral director in all advertising.

“It is now proposed to incorporate this business under the name “A. and B. Funeral Co.” The Secretary of State of Ohio has advised that there is no impediment to the use of this name. It is proposed to issue the capital stock of the corporation to B. or B’s family. C. will continue in his present capacity.

“The question presented is whether there is any obstacle or impediment to such incorporation and such name use under the laws of Ohio, particularly Section 4717.11, Revised Code, or the rules and regulations of this Board.”

As the statement of facts in the situation under consideration reveals, the funeral home with which we are concerned was established at a time when statutory provisions as to who may engage in the business of embalming and funeral directing were very broad. As far back as 1908, the law as to embalmers without mentioning funeral directors, simply stated that “any person” possessing the prescribed qualifications as to ability and character may apply for and obtain a license (99 Ohio Laws, 508, section 90). It is a matter of common knowledge that notwithstanding the fact that for a long time corporations under the law of Ohio could be formed for any purpose for which natural persons may lawfully associate themselves, *except for the practice of a profession*, (Section 1701.04, Revised

Code) many corporate funeral homes in the state were established during those years. However, when in 1933 (115 Ohio Laws, 350) Section 1335-6, General Code, was amended to read, "Any person desiring to engage in the profession or business of embalming and funeral directing or both," some doubts arose, because of the use of the term "profession", whether a corporation could legally operate a funeral home. These doubts were resolved in favor of corporate funeral homes in two cases decided in the Courts of Appeals in 1938. In *Harford v. Dagenhart*, 21 O.L.A. 308, it was held, in a decision construing a zoning ordinance of the City of Springfield, that funeral directing was not a "profession." The same conclusion was reached in *The Busse & Borgmann Co. v. Upchurch*, 60 O. App. 349, where it was held, in the third paragraph of the headnotes:

"Embalming and funeral directing not being a profession by virtue of Section 1335-1 *et seq.* General Code, (now Section 4717.02 *et seq.* Revised Code) a corporation acting through the employment of licensed embalmers and funeral directors does not violate Section 8623-3, General Code, (now Section 1701.04, Revised Code) which prohibits a corporation engaging in a profession." (Parenthetical matter added.)

Obviously, both these decisions were based on the interpretation of laws pertaining to embalmers and funeral directors enacted in 1933. However, in 1938 the Legislature amended Section 1335-6, General Code, (115 Ohio Laws, 350), by the enactment of Section 1335-6a, General Code, effective May 2, 1938. This section reads as follows:

*"On or after the passage date of this amendment no funeral home or establishment or any other place pertaining to funeral directing or the conducting of funerals shall be established in the state of Ohio under any name other than that of the licensed holder of an Ohio funeral director's license or the licensed holders of Ohio funeral directors' licenses under whose direction such establishment is operated; provided that every establishment shall display in all advertising the name of the licensed funeral director who is actually in charge of establishment. All branch establishments must display the name of the funeral director who is actually in charge. At least one licensed funeral director shall directly supervise each main establishment and at least one licensed funeral director shall supervise each branch establishment."* (Emphasis added)

Taking note of the fact that the business of funeral direction under discussion was "established" prior to 1928 under the name of A, that

ever since June 6, 1928 it has been operating under the name of A & B, and that the "place" of said funeral business has remained the same ever since June 6, 1928, does the language of the statute that "no funeral home or establishment or any other place pertaining to funeral directing or conducting of funerals shall be established in the state of Ohio under any other name than that of the licensed holder of an Ohio director's license" after that date pertain to the situation under review here? In the light of the definition of "establish" in Webster's New International Dictionary as "to make stable and firm; to fix immovably or firmly; to originate and secure permanent existence; to found," I am impelled to conclude that it does not. From this it would follow that there is no statutory impediment to the proposed corporate operation of the A & B funeral establishment.

It should be added that there is no substantial variance between Section 1335-6a, General Code, and Section 4717.11, Revised Code, the latter being the section dealing with the subject matter and in force at the present time. Section 4717.11, Revised Code, provides:

"No funeral home or establishment or any other place pertaining to funeral directing or the conducting of funerals shall be established in the state under any name other than that of the holder of a funeral director's license of this state under whose direction such establishment is operated. Every establishment shall display in all advertising the name of the licensed funeral director who actually in charge of the establishment. All branch establishments must display the name of the funeral director who is actually in charge. At least one licensed funeral director shall directly supervise each main establishment and at least one licensed funeral director shall directly supervise each branch establishment."

Whether or not the incorporation of a newly established funeral business is permissible under the provisions of Section 4717.11, Revised Code, is a question with which we need not be concerned in the context of facts under review.

I note that in Article XIII of the board's administrative rules certain provisions relative to the licensure of the several members of a "firm" who are engaged in the business of funeral direction, and the use of the names of deceased members by such a firm. This term is defined, both by conventional and by law dictionaries, to embrace only partnerships. This rule cannot, therefore, have any application in the case at hand.

It is my opinion and you are advised that :

1. Section 4717.11, Revised Code, and Article XIII of the Rules and Regulations of the State Board of Embalmers and Funeral Directors are not a bar to the incorporation of a funeral business, established prior to 1928, under a name containing the name of the original owner, now deceased, and of present owner, where such establishment has been known by such name since 1928.

2. The use of the word "firm" in Article XIII of the Rules and Regulations of the State Board of Embalmers and Funeral Directors limits the application of the provisions therein to partnerships and this rule has no application to incorporated funeral home establishments.

Respectfully,

MARK McELROY

Attorney General