

BEFORE THE NEW MEXICO OFFICE OF SUPERINTENDENT OF INSURANCE

**IN THE MATTER OF THE REQUEST)
OF UNITED HERITAGE LIFE)
INSURANCE COMPANY)**

Docket No. 21-00019-COMP-PL

HEARING OFFICER'S RECOMMENDED DECISION

THIS MATTER comes before Hearing Officer Richard B. Word, appointed by the New Mexico Superintendent of Insurance ("Superintendent") following the petition of United Heritage Life Insurance Company ("UHLIC") for a declaratory ruling pursuant to Section 12-8-9 NMSA 1978 (1969) and 13.1.6.8 NMAC. UHLIC seeks a ruling by the Superintendent regarding the applicability of provisions of the Prearranged Funeral Plan Regulatory Law, NMSA 1978, Section 59A-49-1 through 8 (1984, as amended through 2018) ("PFPRL") to annuity or life insurance policies designed to fund prearranged funeral plans in New Mexico. Having considered the petition, Office of Superintendent of Insurance Staff's ("OSI Staff") response, as well as additional filings from local counsel for UHLIC and from OSI Staff, and being fully informed in the premises,

THE HEARING OFFICER FINDS AND CONCLUDES:

1. UHLIC submitted its petition by means of an email to OSI on March 26, 2021. UHLIC's petition meets the requirements to invoke the Superintendent's authority to issue a declaratory ruling under Section 12-8-9 NMSA 1978 and 13.1.6.8 NMAC.
2. The Superintendent entered an Order Setting Hearing and Appointing Hearing Officer on April 7, 2021.

3. The Order Setting Hearing and Appointed Hearing Officer, *inter alia*, appointed Richard B. Word as the Hearing Officer to conduct an informal hearing on the submission of the parties, gave OSI Staff a deadline of 21 days after entry of the Order for Staff to respond to the petition, and allowed UHLIC 21 days after Staff's response to reply.

4. OSI Staff, through counsel, filed a Motion for Extend Time to File Response on April 22, 2021, seeking an extension of time until May 3, 2021, to file its response.

5. The Hearing Officer issued an order granting OSI Staff's motion for an extension of time to file its response on April 23, 2021.

6. OSI Staff filed a response to the petition on May 3, 2021.

7. UHLIC filed a Motion to Reply Deadline on June 21, 2021. The motion was not opposed by OLC.

8. The Hearing Officer issued an order granting UHLIC's motion on June 22, 2021.

9. UHLIC filed a Reply in Support of Declaratory Ruling on June 30, 2021.

10. After reviewing the filings and determining that additional information was needed, the Hearing Officer issued an Order Re-Opening the Record to Receive Additional Information and Argument on November 1, 2021. The order requested that Petitioner provide "additional facts, including, if necessary, hypothetical facts, . . . that highlight the detailed circumstances of the sale of life insurance policies intended to fund prearranged or pre-need funeral contracts or funeral plans."

11. UHLIC, through local counsel, filed its Response to the order reopening the record on November 16, 2021.

12. OSI Staff, after receiving a short extension, filed its Response to UHLIC's Submission on December 1, 2021.

13. UHLIC's petition requested a determination by the Superintendent as to whether the provision of Section 59A-49-6 of the PFPRL requiring all money paid under a funeral plan agreement be held in trust would apply to money paid for annuity or life insurance products designed to fund such agreements. In the event that the Superintendent determines that the trust requirement of Section 59A-49-6 applies to premiums or payments for life insurance or an annuity designed to fund a funeral plan, UHLIC's petition further requested clarification whether: (1) the policy or the premiums paid must be placed into a trust; and (2) such a trust must be established with a bank or financial institution located in New Mexico, or could it be established in another state.

14. UHLIC's petition did not provide critical factual details regarding the circumstances surrounding the contemplated sale of its life insurance policies to be used to fund funeral expenses, and in particular details regarding who would sell the policies, where they would be sold, and whether or not the policies restricted the payment or proceeds of the policy to a particular funeral service provider. However, in the response to the Hearing Officer's order re-opening the record, UHLIC's local counsel provided the information necessary for the Superintendent to issue a ruling on the petition. UHLIC's responsive filing states:

- A. ULIC's independent life agents will be licensed and authorized to sell life insurance policies.
- B. Those agents may or may not be a person who works or owns an interest in a business which sells or furnishes any of the property, facilities or services furnished in connection with funerals or other services relating to the disposition of human remains of deceased persons ("funeral services").
- C. Where a UHLIC life insurance agent works at or owns an interest in a funeral services provider, the agent will be instructed that UHLIC life insurance products alone may be sold, but pre-need funeral contracts or pre-arrangements may not.

- D. Where a UHLIC agent elects to sell both pre-need funeral contracts or prearrangements and UHLIC's life insurance product they will be instructed by that they may not work at or own an interest in a funeral services provider.
- E. UHLIC policies sold in New Mexico will not name a specific funeral services provider as a beneficiary and proceeds under such policies may not be assigned to a specific funeral services provider.
- F. Pre-need funeral contracts or prearrangements sold by UHLIC agents also may not name a specific funeral services provider.
- G. In order to maintain a consumer's ability to choose a provider following the death of the insured, these policies and agreements typically list the beneficiary or assignee as "Any Funeral Service Provider, As Its Interests May Appear".
- H. The policies and funeral contracts contemplate that only the amount of the policy proceeds expended by the funeral services provider ultimately utilized would be payable as that provider's interest. Such payment under a UHLIC life insurance policy would be made after the submission of a claim by the provider for the actual submission of merchandise and services pursuant to a pre-need funeral contract or prearrangement.

UHLIC Response to Order Opening Record, pp. 2-3.

15. A determination of the questions in UHLIC's petition must be based on an analysis of the text of the PFPRL. The stated purpose of the PFPRL is to protect consumers against fraud, deceit and the inability to perform contract obligations in connection with prearranged funeral plans. Section 59A-49-2. The PFPRL states: "The superintendent shall regulate and control, in the same manner and with the same powers as he regulates the business of life insurance, the granting, sale or offering for sale of prearranged funeral plans." Section 59A-49-3.

16. UHLIC's principal question is whether the requirement found in Section 6 of the PFPRL that funds received from a consumer in connection with the sale of a funeral plan be held in trust would apply to life insurance or annuity products designed to fund funeral-related expenses. The complete text of 59A-49-6 provides:

59A-49-6. Trust fund; accounting; deposit, reserves and premium tax.

A. In all cases where funeral plans are sold, all money paid, directly or indirectly, under such agreement, or under any agreement collateral thereto, shall be held in trust for the purpose for which it was paid until the obligation is fulfilled according to its terms; provided, however, that any payment made pursuant to this section shall be released upon death of the person for whose benefit such payment was made, and no payments so made shall be subject to forfeiture. Accruals of interest upon this money shall be subject to the same trust.

B. All funds received as herein provided shall be placed in trust with a trustee pursuant to an agreement executed by the depositor and trustee that shall provide that the trustee shall hold the same in trust for the purposes for which deposited; that the trustee shall pay the same to the depositor upon the filing of a certified copy of the death certificate or other satisfactory evidence of the death of the beneficiary; and that the beneficiary or the beneficiary's duly appointed guardian may, in writing, demand the return of the money, together with accrued interest, if any, less cost incurred in the operation of such trust, and the depositor shall be entitled to receive such money from the trustee for payment to the beneficiary upon delivery of such written demand to the trustee. The payment of such funds and accumulated interest, pursuant to the terms of the Prearranged Funeral Plan Regulatory Law and the agreement herein referred to, shall relieve the trustee of any further liabilities with regard to such funds or interest thereon.

C. Each seller of funeral plans shall submit such accounting or accountings of all money collected or received on account of or in connection with the sale of funeral plans and of all money deposited or withdrawn from a trustee, as the superintendent may reasonably direct, by regulation or order.

D. Funds collected and placed in trust pursuant to this section shall not be used as the basis for the calculation of the capital and surplus, general deposits and fees otherwise required under Section 59A-5-16 NMSA 1978.

17. Section 59A-49-4 of the PFPRL provides the following definition of "funeral plan":

A. "funeral plan" means any contract, agreement, certificate, share, membership, right or interest or other form of instrument which is sold, providing for the future delivery of one or any combination of the following:

(1) any personal property customarily furnished in connection with funerals or other services attending the disposition of human bodies after death;

(2) the use of any facilities customarily furnished in connection with funerals or other services attending the disposition of human bodies after death;

(3) any services customarily furnished in connection with funerals or other services attending the disposition of human bodies after death; or

(4) any amount of money designated for any of the property, facilities or services mentioned in this subsection, if there is named in the instrument evidencing the prearranged funeral plan any person who furnishes or aids in the furnishing of any of such property, facilities or services or any condition or designation which designation would deprive or tend to deprive the person desiring to acquire such property, facilities or services of the advantages of competition in connection with their acquisition;

18. Under this definition, it is possible for a life insurance contract funding a prearranged funeral plan to be a “funeral plan” under the PFPRL if the life insurance contract provides for the future delivery of money designated for funeral services by a designated person or imposes a condition that would deprive or tend to deprive the consumer of the advantages of competition in connection with obtaining funeral services.

19. UHLIC’s response to the order reopening the record sets forth how any life insurance plan designed to fund funeral-related costs offered by it in New Mexico would be drafted so as not to come under the definition of funeral plan in 59A-49-4(A)(4). *UHLIC Response to Order Opening Record*, pp. 3-5.

20. In its responses, OSI Staff argues that the language of 59A-49-6(A) is unambiguous and requires that money paid for life insurance used to fund to be held in trust. In particular, OSI Staff asserts that the language “all money paid, directly or indirectly. . . shall be held in trust” applies to money paid to a life insurance company for a life insurance policy designed to fund a pre-need funeral plan. *Staff Response to UHLIC Petition*, p. 2; *Legal Counsel’s Response to UHLIC’s Submission*, p. 1-2. OSI Staff also argues that Section 6(A)’s trust requirement applies to life insurance policies designed to fund funeral plans because such policies are an agreement collateral to the funeral plan agreement. *Legal Counsel’s Response to UHLIC’s Submission*, p. 1.

21. UHLIC points to the clear distinction between a “funeral plan” which is always subject to the requirements of Section 59A-49-6, and a “preneed funeral contract or prearrangement” under 13.9.5 NMAC. *UHLIC Response to Order Opening Record*, p. 4. 13.9.5.7(G) NMAC states that “‘preneed funeral contract or prearrangement’ means an agreement by or for an individual before that individual’s death relating to the purchase or provision of specific funeral or cemetery merchandise or services.” As UHLIC’s response highlights, a preneed funeral contract or prearrangement may constitute a funeral plan if it “either (a) [names] any person who furnishes or aids in the furnishing of any such properties, facilities, or services, or (b) [specifies] any condition /designation which would deprive the person of the advantages of competition in connection with the acquisition of the preneed funeral contract or prearrangement. Accordingly, UHLIC argues, a preneed funeral contract or prearrangement and any life insurance policy funding such a contract or prearrangement that neither does nor results (a) nor (b) will not constitute and should not be deemed a funeral plan.

22. UHLIC asserts that it does not permit its life insurance contracts to identify a funeral services provider as a beneficiary or assignee. *UHLIC Response to Order Opening Record*, pp. 3,7.

23. The parties offer and the Hearing Officer can find no authorities interpreting Section 6(A). Despite the assertion of OSI Staff to the contrary, the Hearing Officer recognizes a degree of ambiguity in the first sentence of Section 6(A) of the PFPRL, which states: “In all cases where funeral plans are sold, all money paid, directly or indirectly, under such agreement, or under any agreement collateral thereto, shall be held in trust, . . .” (emphasis added). OSI Staff contend that this language would encompass premiums paid for the life insurance products in question, because either 1) money paid for premiums on such policies is money paid indirectly on a funeral plan, or

2) such life insurance plans constitute an agreement collateral to a funeral plan. UHLIC argues that premiums paid on such life insurance plans are not indirect payments on a funeral plan and that the life insurance contract is not an agreement collateral to the funeral plan. UHLIC further argues that OSI Staff's expansive interpretation of Section 6(A) premium payments to be held in trust would effectively render life insurance policies designed to fund funeral expenses unprofitable and thus unavailable.

24. In interpreting Section 6(A), the Hearing Officer is guided by the understanding that funeral plans and preneed funeral contracts or arrangements can lawfully be funded by life insurance policies. This understanding is supported by Section 59A-49-5, 13.9.5.11 NMAC (detailing disclosures that must be made prior to accepting premium payments for life insurance policy to fund a preneed funeral contract or prearrangement); and N.M.A.G. Op. No. 87-60 (September 29, 1978). The Hearing Officer interprets the trust requirements of Section 6(A) to apply to payments made to the seller of funeral services detailed in the pre-need contract or funeral plan, or their agent, and not to a life insurance company offering life insurance policies designed to fund such contract or plan, where such insurance policies do not otherwise fall under the definition of "funeral plan". One if not the major consumer harm the PFPRL addresses is the potential loss or misuse of funds paid directly to a funeral services provider under a funeral plan, such as when that provider either goes out of business or otherwise fails to provide the agreed upon goods and services. The Hearing Officer agrees with UHLIC that OSI Staff's broad interpretation of Section 6(A) to require insurance premiums on life insurance products designed to fund funeral expenses would so limit the insurer's ability to invest premiums as to make these insurance policies unprofitable or insufficiently profitable, with the result of such policies not being offered in New Mexico. This result would conflict with the apparent intent of the legislature to regulate, not

prohibit or otherwise make unavailable, life insurance plans used for such purposes. See 59A-49-5(A) (recognizing that a person working in a business providing funeral services “may be licensed or otherwise authorized to sell life insurance specifically designed to fund funeral plans.”) OSI Staff’s position is also inconsistent with the longstanding policy of the OSI to regulate life insurance policies designed to fund a preneed funeral contract or prearrangement, as evidenced by 13.9.5.7(G) NMAC (2004) and 13.9.5.11 NMAC (2004).

25. The Hearing Officer finds that the trust fund requirements of Section 59A-46-6 do not apply to life insurance policies sold for the purpose of funding expenses related to the provision of funeral services or merchandise unless such policies otherwise fall under the definition of “funeral plan” in Section 59(A)-49-4. Because the trust fund requirements do not apply, the Hearing Officer concludes it is not necessary to address UHLIC’s specific questions regarding what must be placed in the trust and where the trust must be located.

WHEREFORE, in light of the findings and conclusions above, the Hearing Officer **RECOMMENDS** that the Superintendent should sign an Order declaring that: (1) a life insurance policy to fund preneed funeral services that meets the definition of “funeral plan” in 59A-49-4 is required to place premium payments received under the policy in a trust account; and 2) a life insurance policy designed to fund a preneed contract or funeral plan that does not meet the definition of “funeral plan” in 59A-49-4 is not subject to the trust requirements under Section 59A-49-6(A).

A copy of this Hearing Officer’s Recommended Decision should be sent to all persons on the attached Certificate of Service.

ISSUED at Santa Fe, New Mexico this 19th day of July, 2022.

OFFICE OF SUPERINTENDENT OF INSURANCE



Richard B. Word, Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused delivery of a true and correct copy of the *Hearing Officer's Recommended Decision* to the following parties and individuals, as indicated below, this 19th day of July, 2022.

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