

[BUSINESS]
By Gabriel Ngo

LEGAL CHECK

Legal Case
Study #5



Scenario: Peter Smith is a third-generation owner-operator of P. R. Smith & Sons Funeral Home & Crematory in northeast Florida. He's in his first few years leading his firm, following in the footsteps of his father, Mark, and uncle, John, who had followed in their father, Paul's, footsteps. Through the pandemic-heavy years of 2020 and 2021, Peter's progressive thinking and technology-forward approach allowed the family funeral home to thrive and gain market share throughout the communities they serve.

This article originally appeared in the June 2023 issue of American Funeral Director, published by Kates-Boylston Publications, and is being shared with permission. Visit www.americanfuneraldirector.com to subscribe.

Investing in a complete website re-design in 2019 is one decision Peter attributes to his early success. It transformed the website into a top-notch, “front door” virtual site that truly informs the consumer of the business’ unique designations, options, features and value proposition. The site presents the funeral home’s pricing strategically and transparently. The website also emphasized selling preneed funeral/cremation arrangements in zip codes or areas of town that the funeral home had not served much historically.

Peter has been more “aggressive” and strategic with preneed sales opportunities because consumers are more open to preplanning. However, the funeral home’s preneed program had been put in place years ago by his father, Mark, who had worked for a large consolidator, Funeral Service Corporation, for many years before returning to the family business.

While at FSC, Mark experienced firsthand some of the cash flow opportunities and benefits of FSC’s preneed sales program and implemented practically the same designs and concepts for P. R. Smith & Sons’ preneed funeral program. Florida requires a 70% deposit of funds collected for services and either, 30% of funds collected for related preneed merchandise sales or 100% of wholesale preneed merchandise costs.

Due to the retainage opportunity (collected funds from preneed sales that the funeral home could keep and not deposit into a state-watched trust for services and merchandise – 30% and 70%, respectively) that trusting appeared to offer, Mark decided trusting (rather than insurance funding) preneed funeral sales was advantageous. Plus, it provided some additional cash flow opportunities for the family firm. Since FSC seemed to be very successful with their travel protection program sales, Mark decided the same for the family funeral home. Mark and his brother, John, chose the Florida-based regional CPA firm of Taylor & Listug PC to provide accounting, tax, trust accounting and advisory services for the business.

It had been a routine Tuesday morning when Peter arrived at the funeral home. He had just parked his car when he was

approached by the sheriff and was served a notice of lawsuit. P. R. Smith & Sons was being sued by Gloria Gibson, a retired Deloitte CPA from New York, who had lived in Florida for many years and had purchased a preneed cremation contract from the funeral home.

Peter distinctly recalled speaking to Gloria about two months before when she had called the funeral home asking about how much money she would be entitled to if she canceled the preneed contract. She had been thinking about moving back to New York due to her older brother Orville’s failing health. Peter



Gabriel Ngo

answered whatever questions he could from Gloria on this phone conversation, but ultimately, he felt he had to “put his foot down” as she was becoming more contentious, insisting she had been misled and deceived. He eventually told her that all the funeral home’s preneed contracts bear the stamp “APPROVED Board of Funeral, Cemetery and Consumer Services” and that the travel protection plan contract was not considered a preneed contract by the profession.

Gloria’s lawsuit alleges the following:

That the funeral home or the preneed contract was deceptive in presenting its preneed cremation packages without clear language detailing what she was paying for between the guaranteed service and merchandise items as well as the ambiguous nature about whether the

travel protection program was part of the preneed contracts she signed.

That the funeral home or the preneed contract failed to make certain statutorily required disclosures. Namely, what amounts were to be allocated between services and merchandise and what amounts were to be refunded upon contract cancellation.

That the funeral home was in violation of the Funeral Rule by failing to deposit into a state-watched trust the funds required and, in turn, limited the refunds available under their travel protection program.

That, ultimately, Gloria would not have purchased the preneed cremation contract from the funeral home had she not been misled.

Upon being served and reading through the suit, Peter immediately called a meeting between his father, his uncle and the funeral home’s CPA firm to learn more about how their business allocated funds. He found that it had been agreed long ago that they would abide by the “letter of the law”: a) 70% of preneeded service funds would be trusted, 30% retained; and b) not wanting to constantly have to track wholesale costs, Peter’s father and uncle had decided to trust 30% of merchandise sales amounts while retaining 70%. Peter’s father also told him that in all those years with FSC, there had never been an issue with travel protection plans, as they were treated as an addendum insurance contract that was not considered part of the preneed contract.

WHAT IS THE APPLICABLE LAW IN THIS INSTANCE?

As every state is different, with many laws and regulations “dictating” the choice that insurance funded preneed contracts are obviously the only option for funeral homes to select. However, allow me to first list and discuss the applicable Florida trust laws to preneed licensees, which P. R. Smith & Sons is in this case.

Florida Statute 497.452(1)(b) requires the preneed licensee to provide on the signature page of the written preneed contract, clearly and conspicuously in bold-faced 10-point font or larger, the following:

The words “purchase price.”

The amount to be trusted.

The amount to be refunded upon cancellation.

The amounts allocated to services, merchandise, and cash advances (yes, as a practice Florida allows for non-guaranteed items such as cash advances to be trusted 100%).

The toll-free phone number of the state department which is available for questions or complaints.

A statement that the consumer shall have thirty (30) days from the date of execution of the preneed contract to cancel the contract and receive a total refund of all moneys paid for items not used.

Based on the facts presented here in this case (which is not completely detailed) it appears the amount to be trusted, the allocation division, and the amounts to be refunded are the key elements in dispute between Gloria and the funeral home.

WHAT THE FUNERAL HOME SHOULD HAVE DONE OR CAN DO TO RESOLVE

Anyone who has read any of my prior Legal Reality Check articles has probably noticed that my advice almost always points to prevention, keeping issues away from litigation or resolving issues before the courts get involved. In this case, it appears there are no opportunities for preventative resolution. However, what were some things that Peter (or the funeral home) could have done differently that might have kept Gloria from filing suit?

While Peter should be lauded for proactively and strategically selling more preneed contracts to a more willing and open-minded consumer, it likely would have served him best to fully review and understand what his father and uncle implemented before his leading operational tenure. The facts do not state when Gloria exactly made her pre-arrangements, but her complaint call occurred during Peter's watch.

Speaking of Gloria's initial complaint conversation with Peter prior to filing suit, Peter should have acknowledged her complaints, taken notes on the details of her dissatisfaction, and offered to set an appointment time to discuss it once he “did his research.” He certainly should

not have relied on an approval stamp by the state on their preneed contracts to “put his foot down” with a complaining client.

As for the funeral home decisions made prior to Peter's leading tenure, Mark and John should not have just simply tried to copy or recreate FSC's program without deeper understanding of how it might apply to and be tailored best to fit with the funeral home's needs and advantage. Simply assuming that the travel protection program applied the same to P. R. Smith & Sons as it had worked for FSC seemingly was also a fault that might come back and hurt the funeral home in litigation.

GENERAL BEST PRACTICES

As mentioned earlier, every state has different laws and requirements for preneed funeral sales, and many states have much higher trusting/deposit requirements where the obvious and clear choice for funeral home owner/operators is insurance rather than trust as the underwriting vehicle. However, there are still some universal practices that will help keep you from experiencing a similar scenario as our P. R. Smith & Son example.

Know and clearly understand your state's preneed laws and requirements.

When selecting a third-party insurance company, third-party marketing service, or insurance product, ensure that your selected partner clearly knows and understands the preneed laws in your state.

Knowing and understanding the language that is printed on your preneed contracts as well as any language that is on the insurance policy is a must. Having an attorney and/or accountant/CPA retained to help you sort out any specific intricacies is also a great “ounce of prevention” from later litigation.

When copying, modeling or adapting someone else's “successful” preneed program as your own, please ensure that it is tailored specifically to your business' needs as well as the state regulatory requirements pertaining to you.

For further reference, there is a class action lawsuit filed by Nancy Taylor in the Southern District Court of Florida with some similar fact patterns where the initial court opinion was delivered in November 2021. •

