

IN THE MATTER OF THE FUNERAL SERVICES ACT, RSA 2000, CHAPTER F-29, AS AMENDED AND RELATED REGULATIONS

AND IN THE MATTER OF A HEARING BEFORE THE ALBERTA FUNERAL SERVICES REGULATORY BOARD INTO CERTAIN CONDUCT OF MITCH THOMSON

Before:

Marlon Wombold – Chair
Peter Portlock – Vice-Chair
Kathy Bruce Kavanagh – Member
Cam Parker - Member
Cam Davis - Member

Board Administrator: Marilyn McPherson

Board Counsel Gwendolyn J. Stewart-Palmer, Shores Jardine LLP
 Paula D. Hale, Shores Jardine LLP

Those in Attendance

Wayne Konner - Investigator
Counsel - Kate. Hurlburt, Emery Jamieson LLP

Mitch Thomson

Counsel - Terrence Cody, Rowanoak Law LLP

[1] A hearing of the Alberta Funeral Services Regulatory Board (the “Board”) was held January 9, 2013, Edmonton, in the Province of Alberta to provide Mr. Thomson the opportunity to make representations to the Board on whether his 2012-2013 Funeral Director Licence and his 2012/2013 Business Manager Licence should be cancelled, suspended or conditions imposed on them.

[2] The Board derives its authority to make decisions pursuant to section 15 of the *Funeral Services Act*, R.S.A. 2000, c. F-29 (the “Act”).

BACKGROUND/PRELIMINARY MATTERS

[3] Neither party objected to the membership of the Board.

[4] At the commencement of the hearing, the Board was presented with an Agreed Facts and Exhibits Document which the Board marked as Exhibit A.

SUMMARY OF THE EVIDENCE AND SUBMISSIONS

[5] Counsel for the Investigator advised that the parties were able to reach an agreement as to the facts. Those facts are set out in the Agreed Statement of Facts submitted to the Board and which is attached to this decision. Mr. Konner did not give evidence, but was available for questions from the Board. Mr. Thomson was also available for questions from the Board.

[6] In response to Board questions, Mr. Konner indicated that on subsequent inspections, he did not notice any similar oversights to those mentioned in paragraph 10 of the Agreed Statement of Facts and Exhibits.

[7] In response to Board questions, Mr. Thomson indicated that he was licenced in 2001 at the Cook Southland Funeral home. He moved to Red Deer in 2001, and was the manager of the Parkland Funeral Home in Red Deer. In 2009, he became the managing director of Reflections Funeral Homes. He had not done a pre-need contract prior to the ones in 2009, referenced in paragraph 4 and following of the Agreed Statement of Facts and Exhibits.

[8] The funeral company had one account. All of the funds received for the pre-need contracts were placed into that one account and then later transferred to the trust account. Mr. Thomson was not aware that the funds had to be put into trust. All of the money from the contracts in question has been placed in trust.

[9] Mr. Thomson acknowledged that the contracts are on pre-need insurance forms, but indicated that the deficiency in the form of contract had been raised, but no-one had indicated a need to get the paper work corrected. Mr. Thomson indicated that after October 11, 2011, when he ceased to be employed at Reflections, he does not know what happened with the contracts.

[10] Mr. Thomson indicated Mr. Konner had advised him in June 2010 that trust money for pre-need contracts had to be deposited into trust more promptly. The reason for the delay with the 2012 contracts was that Mr. Thomson understood that the individuals wanted specific cemetery arrangements. Mr. Thomson was waiting for the response from the cemetery officials, and believed that the contract was not in place until the cemetery arrangements were completed. Mr. Cody indicated that counsel for the Investigator and counsel for Mr. Thomson disagree about whether there was a contract in place until the conditions were satisfied.

[11] Mr. Thomson stated that his partners were aware that the money from the contracts was first placed into general revenue before being transferred to the trust account.

[12] The parties presented a joint submission on penalty to the Board for approval. The parties handed the board proposed wording for the Board's consideration. The intention of the proposal was a suspension of all of Mr. Thomson's licences until March 31, 2013. The second part of the joint submission was that if a licence was granted to Mr. Thomson which permitted him to handle pre-need contracts, it would be a condition on that licence that he would not enter pre-need contracts for the first three months of the term of the licence.

[13] Ms. Hurlburt addressed the aggravating and mitigating factors in relation to the joint submission from the Investigator's perspective. Mr. Cody would have the opportunity to make a presentation to the Board from Mr. Thomson's perspective.

Aggravating Factors

[14] There were 3 aggravating factors at play:

a. Nature of the offence

The Investigator viewed the failure to deposit into trust as a serious error. The legislation requires money paid for pre-need contracts to be set aside and kept safe for the beneficiary. Not only must the funds be put into trust, but they must also be put into trust within the timeframe specified in the legislation.

b. Length of time it took to get the money into trust

In each case, it took at least 2 months to get the money put into trust. In the Mark Honert case, it took 11 months. This is not missing by a few business days, but was a substantial period of time.

c. Pattern of behavior

This delay in putting funds into a trust account occurred more than once. The Investigator had first brought this matter to Mr. Thomson's attention in June 2010. In the Metcalf contract, Mr. Thomson received funds in March, 2010, but the funds were not deposited until February, 2011. The Investigator sees this as a pattern of behavior when dealing with pre-need contracts.

[15] There are also 3 mitigating factors:

a. Most importantly, all of the money has now been deposited in trust. This includes the last 2 contracts for the Buekerts. The current operators have put funds into trust. None of beneficiaries have suffered any loss.

b. Mr. Thomson has indicated that for the first two pre-need contracts, he was on a learning curve and took time to get the trust account set up. For the 2 contracts for the Honerts, the delay in putting the funds into trust was due to an oversight and Mr. Konner accepted that explanation. For the Buekerts, Mr. Thomson's understanding was that the contracts did not come into effect until he could obtain cemetery plots. While there is a dispute between counsel about whether this is right or wrong, if the Board accepts Mr. Thomson's explanations, then it is open for Board to find that there was a lack of intent to do anything wrong, There was carelessness, inadvertence, and oversight which is a mitigating factor.

c. Mr. Thomson has been cooperative in this process which has prevented the need to call witnesses. This hearing is not a question about determining what the contraventions are, but about what the penalty should be.

[16] In the Investigator's view there is a public interest in imposing the penalty. All of the infractions relate to pre-need contracts. Any penalty on Mr. Thomson needs to include an aspect that protects the public from the improper handling of trust money and an aspect that sends a message to the members that it is important to follow the legislation in respect to trust money.

[17] Mr. Cody spoke on Mr. Thomson's behalf. He stated that the effect of the joint submission is that Mr. Thomson would have a six or six and a half month suspension. Although Mr. Konner does not believe that the entire period should be viewed as a suspension, the parties have agreed to a specific date, which is March 31, 2013.

[18] This length of suspension balances the need to sanction Mr. Thomson's conduct and to send the necessary message to the funeral services industry. While Mr. Thomson has been suspended, he has been unable to pursue gaining a livelihood in the industry. This should be a consideration not to work more hardship than is necessary. The second condition permits Mr. Thomson to earn a livelihood, but sends a message both to him and to the industry that it is important that trust money be carefully dealt with and if not done, there will be consequences.

[19] The Agreed Statement of Facts and Exhibits states that Reflections did not provide an accountant's report for the fiscal year 2012. The parties are not proposing that there be an additional fine or other sanction for that matter since the current operators either have or shortly will provide the accountant's report. This item is being cured.

[20] Upon questions from the Board, Ms. Hurlburt indicated that the reason for including Mr. Thomson's embalmer's licence in the suspension is to indicate to Mr. Thomson the seriousness of the matter. It is believed this will have a deterrent effect. In response to questions of the Board, Mr. Thomson acknowledged that the impact of the second condition is that no matter what date he applies for a licence which permits him to hand pre-need contracts, he will have a three month prohibition from handling pre-need contracts.

DECISION OF THE BOARD

[21] It is the decision of the Board that:

a. Mr. Thomson is barred from applying for or submitting an application for a renewal or issuance of any licence under the Funeral Services Act and related regulations until March 2013 at which time Mr. Thomson may, should he choose to do so, apply for one or more licences, which, if issued, will be effective April 1, 2013.

b. If a business manager licence is issued to Mr. Thomson, there will be a condition on the licence that Mr. Thomson will not sell or otherwise deal with pre-needs contracts for the first 3 months of the term of that licence regardless of the date of issuance.

c. If a funeral director licence is issued to Mr. Thomson, there will be a condition on the licence that Mr. Thomson will not sell or otherwise deal with pre-needs contracts for the first 3 months of the term of that licence regardless of the date of issuance.

d. If a pre-need salesperson licence is issued to Mr. Thomson, there will be a condition on the licence that Mr. Thomson will not sell or otherwise deal with pre-needs contracts for the first 3 months of the term of that licence regardless of the date of issuance.

REASONS FOR THE DECISION

[22] It is the jurisdiction of the Board to impose sanctions for breach of the Act and regulations. The Board has a role in protecting the public from funeral professionals who breach them.

[23] The Board has been delegated the powers of the Director under section 15 of the Act which provides:

Duties relating to licences

15(4) The Director may refuse to issue or renew a licence, may cancel or suspend a licence or may impose terms and conditions on a licence if

- (a) the applicant or licensee does not meet the requirements of this Act and the regulations with respect to the class of licence applied for or held;
- (b) the applicant or licensee or any of its employees
 - (i) fails to comply with an order of the Director under this Act or the regulations,
...
 - (v) in the Director's opinion, has contravened or is contravening this Act or the regulations,
...

or

- (c) in the Director's opinion, it is in the public interest to do so.

(5) The Director may suspend or cancel a licence

- (a) if the licensee contravenes this Act or the regulations,
- (b) for any of the reasons set out in the regulations, or
- (c) if, in the Director's opinion, it is in the public interest to suspend or cancel the licence.

(5.1) Before refusing to issue or renew a licence or suspending, cancelling or imposing terms and conditions on a licence, the Director shall give the applicant or licensee

- (a) written notice of the proposed refusal, suspension or cancellation of the licence or the proposed terms and conditions to be imposed on the licence, with reasons, and
- (b) an opportunity to make representations to the Director.

[24] Sections 7 and 8 of the Act provide for the need of a licensee to hold pre-need funds in trust.

Licensee to hold money in trust

7 A licensee who enters into a pre-need funeral services contract holds all money paid under the contract in trust for the purposes for which it has been paid until

- (a) the funeral services listed in the contract have been provided in accordance with the contract, or
- (b) the money, or any unused portion of the money, and all income earned as a result of the investment of that money have been refunded to
 - (i) the person who made the payment or payments under the contract, or
 - (ii) the person for whose benefit the contract was entered into or that person's personal representative.

Transfer of money to authorized trustee

8(1) Money held in trust by a licensee pursuant to section 7 must be transferred to an authorized trustee within the period prescribed in the regulations.

(2) The licensee may deduct an administration fee in accordance with section 6 from the money to be transferred under subsection (1) to an authorized trustee.

(3) An authorized trustee

- (a) shall deposit money received under subsection (1) in a trust fund provided by the authorized trustee by agreement with the licensee, and
- (b) may, subject to the regulations, invest the money only in accordance with the regulations.

(4) An authorized trustee shall, for the purpose of its financial records, keep the money received under each pre-need funeral services contract separate from any other money but may, for the purpose of investing the money in accordance with subsection (3)(b), combine the money received from all pre-need funeral services contracts of the same licensee.

(5) The financial records required under subsection (4) must show

- (a) the amount of principal and income held in the trust fund to the credit of each pre-need funeral services contract, and
 - (b) the name of the person for whose benefit the contract was entered into.
- (6) Money that is held in a trust fund pursuant to this section is not, while in the fund or while being transferred to or from the fund, liable to demand, seizure or detention under any legal process.

[25] Sections 10, 12 and 16 of the General Regulation provides as follows:

Cancellation without penalty

10 For the purposes of section 5(2) of the Act, the period within which a pre-need funeral services contract may be cancelled without charge or penalty is 30 days from the date on which the purchaser receives a copy of the contract

Transfer of money to authorized trustee

12 (1) For the purposes of section 8(1) of the Act, the period within which a licensee shall transfer money in trust to an authorized trustee is 5 business days from the date on which the cancellation period under section 10 expires.

(2) Notwithstanding subsection (1), where the cost of a pre-need funeral services contract is paid by instalments and the licensee charges an administration fee in accordance with section 6(1)(a) of the Act, the licensee

- (a) may collect that administration fee from the initial instalment payments until the full amount of the fee is satisfied, and
- (b) shall transfer each instalment payment received after the full amount of the administration fee has been satisfied to an authorized trustee within 5 business days of the date on which the payment is received.

Annual pre-need trust report

16(1) The licensee of a funeral services business that enters into pre-need funeral services contracts or holds money in trust pursuant to sections 7 and 8 of the Act shall annually provide to the Director a report of its financial affairs for the preceding year

- (a) within 120 days of its fiscal year end,
- (b) in the form set by the Director, and
- (c) completed by a public accounting firm registered under the *Regulated Accounting Profession Act*.

[26] The Board has heard the joint submissions on penalty from the parties and is prepared to accept their joint submission. The Board has considered both the aggravating and mitigating

factors identified by counsel for the investigator and the submissions made by and on behalf of Mr. Thomson.

[27] Mr. Thomson has admitted that he has failed to put the pre-needs funds into trust in accordance with the required timelines, whether through inexperience or lack of knowledge, or through oversight. The Board notes that the handling of pre-needs funds is very serious and the inappropriate handling of such funds is a serious matter for the Board and for the industry which must keep the confidence of the public in dealing with such funds.

[28] The period of suspension should serve as a denouncement by this Board of the delay by Mr. Thomson in transferring pre-needs funds to a trust account and should serve as a general deterrent to the industry. The Board notes that by virtue of paragraph 21(a), Mr. Thomson will not be permitted to earn his livelihood in his chosen field until March 31, 2013. In the Board's view, this balances the needs for regulation of funeral professionals in accordance with the Act and regulation, and Mr. Thomson's right to earn his living.

[29] Although it might be argued that the period of suspension is too lenient for such an offence, the Board has taken into consideration the mitigating factors. Mr. Thomson's cooperation with the Investigator has prevented the need for calling witnesses. The Board notes that Mr. Thomson's conduct is in breach of the timelines required for the placement of pre-needs funds into trust, but notes that all of the money is currently in trust and that none of the money was used by Mr. Thomson for his own purposes.

[30] Moreover, the Board notes that the conditions contained in paragraphs 21(b) – (d) will prevent Mr. Thomson from handling pre-needs contracts for a period of 3 months from the date of issuance of any licence which might otherwise period him from handling pre-needs contracts. This too should serve both as a punishment for Mr. Thomson and a general deterrent and in the Board's view is fair.

[31] The Board notes that the embalmer's licence is caught by the joint submission on penalty. Although the embalmer's licence does not authorize the handling of pre-needs contracts, the Board accepts the Investigator's submission that the general deterrent effect of the penalty is enhanced by the inclusion of the embalmer's licence. Also, the Board notes that Mr. Thomson has agreed to this suspension.

[32] Although the Board notes that the jointly agreed Statement of Facts and Exhibits evidences that the annual pre-needs report has not been filed, the Board accepts Mr. Thomson's evidence that he has not been employed with Reflections since October 11, 2012 and therefore has no ability to complete or submit this report on its behalf at this time. Moreover, the Board notes that the current owners have indicated they will be providing the Board with this report. Therefore, the Board will not address this aspect within this decision.

Dated at the City of Edmonton, in the Province of Alberta, this day of January, 2013.

Marlon Wombold, Board Chair