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OFFICIAL OPINION NO. 4

March 20, 1957

Mr. Bernard M. Sleeth
Secretary-Treasurer, State Board of Embalmers
and Funeral Directors
406 South Harrison Street
Shelbyville, Indiana

Dear Mr. Sleeth:

Your letter of February 18, 1957, has been received, requesting an Official Opinion on the following questions:

“(1) Is it lawful to extend to funeral establishments which were established before the date our 1939 statute was effective, privileges regarding transfer of all or part of the firm title to later owners which are denied to firms established after 1939?”

“(2) If your answer to question #1 above is in the negative, would this in any way affect the recent Official Opinion No. 51 dated December 7, 1956, which you rendered to us and which sets forth certain instructions regarding usage of the name of unlicensed personnel?”

The Acts of 1939, Ch. 165, Sec. 6, as amended by the Acts of 1949, Ch. 38, Sec. 4, Burns' (1951 Repl.), Section 63-722, provides in part as follows:

“On and after the effective date of this act, no funeral home establishment, or any other place pertaining to funeral directing or the conducting of funerals, shall be established and operated for that purpose, in the State of Indiana, under any name which does not disclose the surname of one or more holders of an Indiana funeral director's license and under whose active direction and management such establishment is operated. Natural persons only shall be eligible to apply for and receive a funeral director's license and no person shall hereafter be granted an initial funeral director's license to operate as a funeral director of more than one [1] establishment at one [1] time; but may operate part time at more than one [1] place when each such place is at all times also operated by one [1] or more other

persons either so licensed or employed by such license-holders so licensed and present there.

“When more than one [1] person proposes to engage in the funeral directing business as partners, it shall be necessary for one [1] of such persons to secure a license under this act to operate as a funeral director, except however that no silent partner or any partner not so licensed shall hold himself out through advertising or otherwise as being a licensee.

“In the case of any funeral home, mortuary or establishment, which has been licensed under any other act, prior to the effective date of this act, to operate under a firm, trade or corporate name, its owner shall be permitted to continue the use of such name and be authorized to transfer or retransfer, sell and re-sell such funeral home, mortuary or establishment to any Indiana licensed funeral director or directors, and to include as part of the consideration for such transfer or retransfer, sale or re-sale, the continued use of such firm, trade or corporate name, or any portion thereof, which the purchaser or transferee may so desire to use. All such transfers, with complete information, shall be reported to the board thirty [30] days prior to purchase or transfer.

“It shall be unlawful for any individual or individuals, so licensed, to engage in such business, in any manner, under any name other than that authorized by this act and which name and address must be at all times registered with the board.

“An individual licensed as a funeral director is limited in his operations as such, to the place or places designated in the records of the board as the location of his business, and also to the name so registered and under which the business is conducted. In the event that the individual ceases to operate or to hold himself out as operating at the designated place or places and under the name registered with the board, his funeral director's license shall thereupon terminate upon an order to such effect by the board. The individual or individuals, so licensed and conducting any such busi-

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ness shall be required to apply to the board, on forms prescribed by the board, for any change in the designated place or places of operation, or in the name of such business.”

A comparison of the pertinent part of the provision relative to the right to continue the use of a firm name and to include the same as a part of the consideration on a transfer or sale of such business establishment, as contained in the third rhetorical paragraph of the above quoted section of the statute, with the last provision as contained in the Acts of 1939, Ch. 165, Sec. 6, shows that they are practically identical with the provisions as re-enacted by the Acts of 1949, Ch. 38, Sec. 4.

Under such circumstances, said provision of said statute retains the same meaning it had at the time of its enactment in 1939. For the reason that the mere amendment of a section of an existing statute, in which certain language of the prior statute is merely re-enacted, together with other changes regarding matters not particularly affecting the language so re-enacted, does not change such re-enacted provision's original meaning.

Thompson *et al.* v. Mossburg *et al.* (1923), 193 Ind. 566, 139 N. E. 307;

Huff v. Fetch (1923), 194 Ind. 570, 577, 143 N. E. 705;

1942 O. A. G., page 41;

1949 O. A. G., pages 107, 108, No. 25;

1949 O. A. G., pages 141, 143, No. 38;

1953 O. A. G., pages 228, 231, No. 48.

In answer to your first question, I am, therefore, of the opinion that the provision relative to the right to continue the use of a firm name of a funeral directing establishment, above referred to, applies only to those established prior to the taking effect of the Acts of 1939, Ch. 165; that said exceptions are legal and in the nature of a “grandfather clause,” exempting certain persons then engaged in business from the provisions of the new statute. On this question, attention is called to the following cases upholding the Medical Act and the Podiatry Act:

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Indiana State Board of Medical Registration & Examination v. Pickard (1931), 93 Ind. App. 171, 177 N. E. 870;

Crum v. State Board of Medical Registration & Examination (1941), 219 Ind. 191, 37 N. E. (2d) 65;

Indiana State Board of Medical Registration & Examination v. Suelean (1942), 219 Ind. 321, 37 N. E. (2d) 935.

The foregoing obviates the necessity of any answer to your second question.

Certain references are made in your letter to partnerships, which are not specifically referred to in your questions. It is believed those matters are sufficiently covered by a prior Opinion of this office, found in 1949 O. A. G., page 364, No. 96.

OFFICIAL OPINION NO. 5

March 27, 1957

Mr. Norval L. Martin
Executive Secretary, Indiana State Teachers'
Retirement Fund
145 West Washington St.
Indianapolis, Indiana

Dear Mr. Martin:

Your predecessor, B. W. Johnson, requested the following Official Opinion. His letter reads as follows:

“Your official opinion is requested wherein a teacher has named his spouse as his co-annuitant previous to the enactment of Chapter 329, Acts of 1955, and said teacher has had 20 or more years of active service, and said teacher died while in active service under Chapter 329, Acts of 1955.

“Does the co-annuitant (spouse) have the right to take a cash settlement of said teacher’s account in lieu of the co-annuitant benefits; and continue to maintain the Old-Age and Survivors Insurance benefit rights earned as a teacher and granted to her under Section 17 (d) of Chapter 329, Acts of 1955?”