IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

JO ANN HOWARD AND ASSOCIATES, P.C., SPECIAL DEPUTY RECEIVER OF LINCOLN MEMORIAL LIFE INSURANCE COMPANY, MEMORIAL SERVICE LIFE INSURANCE COMPANY, AND NATIONAL PREARRANGED SERVICES, INC., ET AL.,	)	
Plaintiffs,	)	Case No. 09-CV-1252-ERW
v.	)	
J. DOUGLAS CASSITY; RANDALL K. SUTTON; BRENT D. CASSITY; J. TYLER CASSITY; RHONDA L. CASSITY; ET AL.,	)	
Defendants.	)	

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR RULINGS AS A MATTER OF LAW AS TO BENEFICIARY STATUS UNDER PRENEED TRUSTS AND INDEPENDENCE OF INVESTMENT ADVISOR UNDER MO. REV. STAT. § 436.031(2)

INTRODUCTION

The Defendant Bank Trustees owed fiduciary duties to the preneed funeral consumers, funeral homes, and NPS—the seller and grantor of the NPS preneed trusts. The NPS Trust Agreements and governing Missouri and Iowa statutes all expressly define preneed consumers as beneficiaries of the NPS preneed trusts. Consistent with the trust definitions, preneed consumers are beneficiaries of preneed trusts because the Missouri legislature mandated that trustees safeguard consumers' funds for future funeral services regardless of the viability of the seller. Courts also find that funeral homes and preneed sellers are contingent beneficiaries of preneed trusts due to their qualified interests in the trust funds.

Some Bank Trustees assert that NPS was the sole beneficiary of the NPS preneed trusts and that they owe no fiduciary duties to the preneed consumers or funeral homes.[1] In so doing, these Defendants disregard the language and intent of the Trust Agreements, Missouri and Iowa statutes, and well-settled common law. Plaintiffs ask that the Court reject the Bank Trustees' legally and logically unsupportable position and find, as a matter of law, that preneed consumers, funeral homes, and NPS were beneficiaries of the preneed trusts.

Some Bank Trustees also seek to escape their fiduciary liability by misconstruing the "independent investment advisor" provision in Mo. Rev. Stat. § 436.031(2). In enacting Chapter 436, the Missouri legislature recognized the need to protect preneed consumers' funds from preneed contract sellers. To accomplish this protection, the legislature took control of the preneed funds away from the preneed sellers and required that preneed funds be deposited in a bank trust, and be administered by a bank trustee. The legislature allowed the seller to designate an investment advisor *independent* of the seller to make certain investment decisions. Mo. Rev. Stat. § 436.031(2) (1985). The legislature, however, mandated that regardless of whether a seller appointed an independent investment advisor, "control" of the trust assets shall not be "divested from the trustee," and assets could not "be placed in any investment which would be beyond the authority of a reasonably prudent trustee to invest in." *Id.* Nothing in this provision affects a trustee's liability for its own fiduciary duty breaches, including but not limited to its failure to maintain control of the trust assets, its failure to preserve the trust assets, and its failure

[1] In its summary judgment motion filed on today's date, American Stock Transfer and Trust Company acknowledged that it owed fiduciary duties to Iowa preneed consumers. [ECF No. 1741 at 7].

to ensure that investments made by the seller's appointed investment advisor are reasonably prudent.

Although the Bank Trustees recognize that the seller-designated investment advisor must be independent, at least one Bank Trustee claims that the statute requires only that the investment advisor be independent of the trustee, and need not be independent of the seller. This position defies the text and intent of the preneed statute and would nullify the protection afforded by the statute by giving preneed contract sellers control over trust assets—precisely what the statute prohibits. Plaintiffs request that the Court rule that the investment advisor in section 436.031(2) must be independent of the preneed contract seller.

BACKGROUND

The Bank Trustees have taken the legally and logically unsupportable position that preneed consumers and funeral homes are not beneficiaries of the NPS preneed trusts. Plaintiffs expect that the Bank Trustees will seek to shed some portion of their fiduciary and other duties based on this untenable position. The Court's resolution of this fundamental issue will avoid unnecessary argument and proof at trial as the Bank Trustees concede that they did not exercise any fiduciary care towards the preneed consumers and funeral homes.

As for the investment advisor issue, National City Bank asserted an affirmative defense based on section 436.031(2) of the Missouri preneed statute, stating:

> Plaintiff's claims against National City are barred by former RSMo. §436.031.2 because NPS appointed and authorized Wulf, Bates & Murphy, Inc. to act as the independent investment advisor to the trust of which Allegiant served as trustee and because Wulf, Bates & Murphy, Inc. made all investment decisions regarding trust assets.

[ECF No. 1018 at 95]. As noted above, to support this defense, National City Bank (as successor to Allegiant Bank) argues that an independent investment advisor designated by the preneed seller under section 436.031(2) does not need to be independent of the preneed seller. National City Bank takes this position because independence of the investment advisor is one of several prerequisites for a trustee to be able to claim protection from liability for certain investment decisions of an independent investment advisor.

Plaintiffs do not ask the Court to resolve here the question of whether Wulf was independent of NPS. The facts to be presented at trial will establish that Wulf was not independent and thus, among several other reasons, National City Bank's reliance on section 436.031(2) is misplaced. For the Court's reference, those facts include:

1. Wulf served as financial advisor to other Cassity entities including Forever Enterprises (formerly Lincoln Heritage Corporation), Memorial, Lincoln, and PLICA and, by his own estimate, spent over 90% of his time on Cassity entities. Ex. A (Summary of Lincoln Heritage Corporation meeting minutes); Ex. B (David Wulf criminal trial testimony).

2. After being appointed investment advisor in 1988, Wulf in 1994 appointed Randall Sutton, President of NPS and Lincoln Memorial Life Insurance Company, to act as an agent on his behalf with respect to the preneed trusts. Ex. C (Acceptance of Appointment as Investment Advisor); Ex. D (Addendum). Wulf's delegation of authority to NPS included:

    - An Addendum to the investment advisor agreement authorized Sutton to "perform ministerial acts on a daily basis which would otherwise require the signatory of Wulf, Bates, & Murphy." Ex. D (Addendum).

    - Wulf and Allegiant Bank executed custody agreements seeking to transfer to NPS custody of the life insurance policies associated with the Missouri trusts and all responsibility for keeping records relating to the policies. [*E.g.*, ECF No. 1665-1 (Custody Agreement)].

- Wulf signed November 5, 1999 letters authorizing Allegiant Bank to take direction from NPS representatives to distribute cash and settle trades. [*E.g.*, ECF No. 1664-1 (Wulf Letter)].

3. Wulf used NPS and other Cassity-entity company email addresses (e.g., dwulf@n-p-s-inc.com; dwulf@forevernetwork.com), Wulf shared NPS network and email servers, and NPS used Wulf's signatory stamp and stationary. Ex. E (Email regarding patent search); Ex. F (Distribution list for Caymus Fund members); Ex. G (Deposition of David Wulf); Ex. H (Handwritten note regarding signature stamp).

4. Wulf and his partner Charles Bates received employment, health, dental, and retirement benefits through NPS affiliates. Ex. I (NPS retirement savings plan form with flex benefits listings); Ex. J (Forever Enterprises billing statement); Ex. K (United Healthcare bill); Ex. G (Deposition of David Wulf).

5. Wulf's fees for advising the insurance companies were based on a percentage of the assets held by the companies. The funds received by Lincoln from the preneed trusts resulted in more assets being reserved by Lincoln, and thus increased fees and commissions earned by Wulf through his role as Lincoln's investment manager. *See, e.g.*, Ex. L (Wulf Bates invoice to Lincoln); Ex. M (Wulf Bates invoice to Lincoln).

6. Wulf rented office space from NPS and his offices were on the fourth floor of the same St. Louis building that housed NPS, Forever Enterprises, NHE, LMS, Forever Network, Texas Forever, NPS Agency, Legacy International, and Brentwood Heritage. Ex. N (Allegiant letter to Angie Hall and David Wulf); Ex. G (Deposition of David Wulf); Ex. O (Email regarding rent).

7. Wulf's Uniform Application for Investment Advisor Registration (publicly filed with the SEC) noted:

   - "Adviser rents office and parking space from National Prearranged Services, a client of Adviser. This arrangement may raise a conflict of interest regarding the potential favorable treatment of this client."

   - "Principals of Adviser invest in Forever Enterprises, Inc., the holding company of several of Advisers clients. These investments may raise

conflicts of interest regarding the potential favorable treatment of these clients." Ex. P.

The jury will decide whether Wulf was independent of NPS. The Court, however, should decide that this is the proper inquiry and not, as National City Bank argues, that Wulf needed only to be independent of the preneed trustee.

STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 56(c), summary judgment "is proper if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *Torgerson v. City of Rochester*, 643 F.3d 1031, 1042 (8th Cir. 2011). "[S]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the federal rules as a whole, which are designed to 'secure the just, speedy and inexpensive determination of every action.'" *Union Elec. Co. v. Gen. Elec. Int'l, Inc.*, No. 04:06CV00319 ERW, 2008 WL 3411787, at *2 (E.D. Mo. Aug. 8, 2008) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)). Federal Rule of Civil Procedure 7(b)(1) also broadly allows for a request for court order by way of a written motion.

ARGUMENT

I. The Bank Trustees Owed Fiduciary Duties to the Preneed Funeral Customers, Funeral Homes, and NPS

A. The Trust Agreements Define the Future Recipients of Funeral Services as Beneficiaries of the Preneed Trusts

"Under Missouri law, as well as generally, the intention of a trust instrument is to be ascertained from reading its provisions as a whole." *Funsten v. Comm'r of Internal Rev.*, 148 F.2d 805, 808 (8th Cir. 1945).

Here, the Trust Agreements define "Beneficiary" as "the person designated in writing by the Owner of a Funeral Agreement as the person who is to be the subject of the disposition and is to *receive the funeral and/or burial services* therein described, or if no such person is designated then the Owner thereof." Ex. Q § 1.5 (emphasis added).[2] "Owner" is defined as "each person who shall execute a Funeral Agreement with the Seller for the purchase of the funeral services . . . ." *Id.* § 1.1. There can be no reasonable dispute that the recipients of funeral services are Beneficiaries of the preneed trusts created by the Trust Agreements.[3]

The Bank Trustees, however, now have taken the position in depositions and through expert witnesses that NPS is the sole beneficiary of the Preneed Trusts and that the Bank Trustees owe no fiduciary duties to the recipients of the funeral services or funeral homes. NPS is not identified as a "Beneficiary" of the preneed trusts. Rather, the Trust Agreements define "Seller" as "NATIONAL PREARRANGED SERVICES, INC." *Id.* § 1.3. NPS' role, as "Seller," was to be "engaged in the business of selling pre-need plans (hereafter 'Funeral Agreements') which require current payment of money in consideration of the agreement of providers . . . to provide funeral and burial services." *Id.* (preamble). The Bank Trustees'

[2] The various NPS preneed trust agreements contain materially indistinguishable language. Ex. Q (February 22, 1989 agreement), Ex. R (July 24, 1989 agreement), Ex. S (September 5, 2002 agreement), & Ex. T (September 5, 2002 agreement). Unless otherwise noted, the February 22, 1989 trust agreement between NPS and Mark Twain Bank provides the citation references but the analysis applies equally to the other trust agreements.

[3] Several of the Bank Trustees accepted, in their affirmative defenses, that they owed fiduciary duties to "the entity *named as the beneficiary* of the NPS Pre-Need Trusts I-V" and other trusts. [ECF No. 1018 at 94 (emphasis added); *see* ECF No. 1008 at 31; ECF No. 1141 at 55].

argument that NPS is the sole "Beneficiary" of the preneed trusts contradicts the express language of the Trust Agreements.[4]

The Court need proceed no further than the Trust Agreements' defined terms to conclude that the recipients of funeral services are Beneficiaries of the preneed trusts. Numerous other provisions, however, illustrate this fact and the duties running from the Bank Trustees to the recipients of pre-paid funeral services:

- Section 4.1 states that "[t]he Trustee shall be accountable to the Seller and *Owner* . . . ." *Id.* § 4.1 (emphasis added).

- Section 4.3 states that "the Trustee shall furnish any Owner, upon written request from the owner, with information regarding the amount of *his account* held in the Trust." Ex. R § 4.3 (emphasis added).

- If the Seller is dissolved or ceases to exist, the Trustee may directly pay either the Owners or the funeral homes. *See* Ex. Q § 4.6.

- Section 2.1 requires that "Seller shall deposit with Trustee any sums received by it *from Owners* . . . and the Owners, and the Trustee here agrees to receive *such sums* to be held in trust for the uses and purposes herein expressed . . . ." *Id.* § 2.1 (emphasis added).

- Section 2.3 provides that "[n]o *Owner* shall be deemed to have individual ownership of any asset of the Trust, but shall be deemed to have only the right to the distributions herein provided in Article III." *Id.* § 2.3 (emphasis added).

- Section 4.1 states that the Trustee "shall be accountable to the Seller and Owner only for the funds paid over to it . . . ." *Id.* § 4.1.

The recipients of funeral services sold by NPS are Beneficiaries of the preneed trusts created by the Trust Agreements.

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[4] Although the Bank Trustees are wrong in arguing that NPS is the *sole* beneficiary, their recognition that NPS is a beneficiary actually negates their argument that they owe no fiduciary duties to the Plaintiffs. Plaintiff SDR is authorized to bring claims on behalf of NPS, Lincoln, Memorial, their creditors, members, policyholders, and shareholders, and/or the public. [ECF No. 916 at ¶ 28]; TEX. INS. CODE § 443.154.

B. The Recipients of Funeral Services Are Trust Beneficiaries Under the Missouri Funeral Contracts Code and Uniform Trust Code

"In construing a statute a court's primary duty is to give effect to legislative intent as expressed in the words of the statute and to consider the words used in their plain and ordinary meaning." *Laclede Gas Co. v. Labor & Indus. Relations Comm'n of Mo.*, 657 S.W.2d 644, 650 (Mo. Ct. App. 1983) (citation omitted). "To that end our guides, among others, are: the evil the enactment means to remedy, the assumption that the legislative purpose was a reasonable one, the presumption that the law was passed for the welfare of the community, that an effective law was intended—and not an ineffective or insufficient one." *Hyde v. City of Columbia*, 637 S.W.2d 251, 262 (Mo. Ct. App. 1982) (citation and internal quotation marks omitted). "The Supreme Court has held statutes that are remedial in nature are to be liberally construed so as to effect their beneficial purpose." *Martinez v. State*, 24 S.W.3d 10, 19 (Mo. Ct. App. 2000) (citing *Abrams v. Ohio Pacific Express*, 819 S.W.2d 338, 341 (Mo. 1991)).

Prior to Chapter 436's passage in 1965, no Missouri law specifically regulated preneed funeral contracts. Preneed contracts require payment for merchandise and services years—sometimes decades—before the merchandise and services are provided. This situation creates a significant risk that unscrupulous or fiscally irresponsible sellers will be unavailable or unable to provide the contracted merchandise and services upon death of the purchaser. The legislature thus required that payments from preneed purchasers be deposited into trust so that funds would be available to pay for the contracted merchandise and services regardless of the financial status or motivation of the seller.

The Missouri preneed statute, as it existed prior to 2009 and applies here, set out definitions of the parties to preneed funeral trusts. Those definitions are consistent with the

definitions used in the Trust Agreements. "Beneficiary" is defined as "the individual who is to be the subject of the disposition and who will receive funeral services, facilities or merchandise described in a preneed contract." Mo. Rev. Stat. § 436.005(1). "Seller" is "the person who sells a preneed contract to a purchaser and who is obligated to collect and administer all payments made under such preneed contract." *Id.* § 436.005(9). "Preneed trust" is defined as a "trust established by a seller, as grantor, to receive deposits of, administer, and disburse payments received under preneed contracts by such seller, together with income thereon." *Id.* § 436.005(6).[5]

At least three other statutory provisions mention "beneficiary." In all of them the language refers to the person who will be receiving the funeral services. *See*, *e.g.*, Mo. Rev. Stat. § 436.038 (section named "Death of beneficiary outside area served by designated provider"); *id.* § 436.045 (related to timing of payment to provider for services when it "has provided alternative funeral benefits for the beneficiary pursuant to special arrangements made with the purchaser"); *id.* § 436.053(1) (repeatedly discussing "beneficiary's death" and "provided alternative funeral benefits for the beneficiary"). Numerous other statutory provisions reflect the preneed funeral consumers' position as beneficiary of the preneed trusts created specifically for their protection:

[5] The Missouri Trust Agreements state that they "shall be governed by Missouri law applicable to Prearranged Funeral Agreements" and instruct that "[a]ny provisions hereof in conflict with any statute of Missouri now or hereafter applicable to this Trust shall be considered a nullity, and this Declaration of Trust shall be construed as fully as possible in conformity with the laws of the State of Missouri." Ex. Q at art. VII. The NPS Iowa Trust Agreement produced by Bank of America recites this same language while the NPS Iowa Trust Agreement produced by Comerica Bank and Trust states that the agreement "shall be governed by Iowa law applicable to Preneed Funeral Agreements" and "construed as fully as possible in conformity with the laws of the State of Iowa." Exs. S & T.

- The preneed funeral consumer is entitled at any time to a refund from the seller of "all payments made into trust under the contract." Mo. Rev. Stat. § 436.035(1).

- If the seller is unwilling or unable to provide the refund, the consumer has the right to receive from the *trustee* "an amount equal to all deposits made into trust for the contract." *Id.* § 436.048.

- The seller may not retain more than 20% of the contract amount and must deposit the remainder into trust for the benefit of the preneed consumer. *Id.* § 436.027.

The NPS preneed trusts also are governed by the Missouri Uniform Trust Code that defines "beneficiary" as "a person that: (a) has a present or future beneficial interest in a trust, vested or contingent . . . ." *Id.* § 456.1-103(3). Missouri's Uniform Trust Code further states that "[t]he common law of trusts and principles of equity supplement sections 456.101 to 456.11-1106 . . . ." *Id.* § 456.1-106. Trust treatises relied on by Missouri courts contain similar definitions of beneficiary as the Trust Agreements and Missouri trust statutes, stating: "The person for whose benefit property is held in trust is the beneficiary" and further explaining "a beneficiary" is "whom the trustee owes equitable duties to deal with the trust property for his benefit." RESTATEMENT (SECOND) OF TRUSTS § 3 & § 2 cmt. H (1959); *accord Bogert*, THE LAW OF TRUSTS AND TRUSTEES § 1 ("The *beneficiary* or *cestui que trust* is the person for whose benefit the trustee holds the trust property.") (emphasis in original).

The Bank Trustees' denial of their fiduciary duties to preneed funeral customers in favor of duties only to the seller eviscerates the protections mandated by the legislature. Trustees exist to protect those that cannot protect themselves—here, the preneed funeral consumers who have entrusted their monies for safekeeping until their deaths, or that of a loved one, potentially decades in the future.

The language, intent, and history of Missouri's remedial, preneed trust statute dictate that preneed funeral consumers are beneficiaries of the statutory, preneed trusts expressly created for their benefit and protection. The Bank Trustees owed preneed customers fiduciary duties and are liable for their knowing and intentional violations of those duties.

C. The Recipients of Funeral Services Are Trust Beneficiaries Under the Iowa Funeral Services Act

The Iowa Funeral Services Act likewise designates that recipients of funeral services are the beneficiaries of a preneed trust. "Beneficiary" is defined as "any natural person specified or included in a purchase agreement, upon whose future death cemetery merchandise, funeral merchandise, funeral services, or a combination thereof are to be provided under the purchase agreement." Iowa Code § 523A.102(2) (2002).

Other references to "beneficiary" in the statute confirm that beneficiaries of the trust are the persons who will be receiving the funeral services. When preneed funds are commingled in a single trust, the statute provides that the trustee shall "manage the trust fund for the benefit and protection of the named beneficiary." *Id.* § 523A.202(2)(d). The trustee must also keep "a detailed listing of the amount deposited in trust for each beneficiary." *Id.* § 523A.203(3).

Like the Missouri Bank Trustees, the Iowa Bank Trustees owed fiduciary duties to the funeral services recipients and are liable for their breaches.

D. Courts and Agencies Across the Country Have Found that Preneed Funeral Consumers, Funeral Homes, and Preneed Sellers Are Trust Beneficiaries

Missouri and Iowa are not alone in mandating the creation of a preneed trust to protect consumers' money. The mechanism is widely used. In a Tennessee case, funeral homes designated a bank as trustee for preneed trusts and the bank used the money to purchase improper insurance policies and "allowed the trust monies to be withdrawn by one or more

individuals, unnamed co-conspirators who stole or otherwise absconded with the trust monies." *Foshee v. Forethought Fed. Sav. Bank*, No. 09-2674-JPM-dkv, 2010 WL 2650733, at *2 (W.D. Tenn. July 1, 2010). The bank trustee argued in its motion to dismiss that the funeral services recipients were not beneficiaries under the preneed trust and thus were owed no fiduciary duty. *Id.* at *5. The court flatly rejected the bank's arguments because they "overlook the Trust Agreement provisions at issue, statutory provisions governing pre-need funeral contract services, and Tennessee trust law." *Id.* at *5, *7.

In an Illinois case, preneed contract beneficiaries sued for losses sustained by the trust because of bad investments. *Tipsword v. I.F.D.A. Servs., Inc.*, Nos. 09-390-GPM et al., 2011 WL 2470705, at *1 (S.D. Ill. June 21, 2011). In denying the bank trustee's motion to dismiss, the court concluded that the plaintiffs were the trust's beneficiaries and stated: "In addition to the duties imposed on trustees by the Funds Act, the Illinois Trusts and Trustees Act requires fiduciaries of a trust to account to trust beneficiaries." *Id.* at *1, *3 (citations omitted).

Beyond the instructive decisions by federal courts in neighboring Tennessee and Illinois, numerous other jurisdictions have found funeral services recipients to be beneficiaries of preneed trusts. *See, e.g.*, *Stevens v. Stevens*, 505 S.E.2d 674, 677 (W. Va. 1998) (defining beneficiary as person receiving funeral services; "Preneed funeral contracts may be canceled prior to the death of the beneficiary.") (citation omitted); *N.C. Bd. of Mortuary Sci. v. Crown Mem'l Park, LLC*, 590 S.E.2d 467, 470 n.3 (N.C. Ct. App. 2004) ("Beneficiary is intended to refer to the person for whose death the services and products are to be provided."); *State v. Ludvigson*, 482 N.W.2d 419, 422 (Iowa 1992) (describing beneficiary as person receiving funeral services or products); *Commonwealth v. Doane Beal & Ames, Inc.*, No. 94-1022 8 REK, 1994 WL 117068, at *2 (D. Mass.

Feb. 15, 1994) (same); *Utah Funeral Directors & Embalmers Ass'n v. Mem'l Gardens of the Valley, Inc.*, 408 P.2d 190, 194 (Utah 1965) (same); *Guar. Nat'l Ins. Co. v. Denver Roller, Inc.*, 854 S.W.2d 312, 317 (Ark. 1993) (same).

The Internal Revenue Service in analyzing preneed funeral trusts likewise treats the funeral services' recipients as the beneficiaries of the trust. *See, e.g.*, *Perry Funeral Home, Inc. v. Comm'r of Internal Rev.*, 86 T.C.M. (CCH) 713, at *6 (T.C. 2003) ("[T]he trustee will manage and administer those funds for the benefit of a named beneficiary and use those funds to pay for funeral goods and/or services to be furnished to that named beneficiary.") (citation omitted); I.R.S. Notice 98-6, 1998-1 L.B. 337 ("A pre-need funeral trust arises from an arrangement where funeral merchandise or services are purchased from a seller to benefit a specified beneficiary before the beneficiary's death. . . . Under state law, such amounts (or a portion thereof) are required to be held in trust during the beneficiary's lifetime and are paid to the seller upon the beneficiary's death.").

Courts further have concluded that funeral homes are contingent beneficiaries of preneed trusts. A California appellate court analyzed the state's preneed funeral statute and found that although the statute's plain language "clearly intended the person for whom the merchandise and services are to be provided as the primary beneficiary of the trust," the statute "does not preclude the mortuary or 'funeral director' from being a beneficiary as to the remainder, and the fact that the trust may be revoked prior to the furnishing of the merchandise and services only renders the interest of the mortuary or 'funeral director' contingent." *IFS Indus., Inc. v. Stephens*, 205 Cal. Rptr. 915, 922 (Cal. Ct. App. 1984).

A Pennsylvania court found that both the funeral home and customer were trust beneficiaries, reasoning "[t]he regulations specify that the money given by the customer to [the funeral home] must be placed in escrow or trust in a *banking institution*, thereby making the banking institution the trustee, not [the funeral home], and the trust is both for the benefit of [the funeral home] and the customer." *Bean v. Dep't of State*, 855 A.2d 148, 155 (Pa. Commw. Ct. 2004) (emphasis in original); *see also D.O. McComb & Sons, Inc. v. Feller Funeral Home, Inc.*, 720 N.E.2d 454, 455 (Ind. Ct. App. 1999) (describing the funeral home as "the pre-need funeral insurance policy beneficiary"). Likewise, the United States Tax Court has held that the funeral homes and preneed services companies, like NPS, are contingent beneficiaries of a preneed trust. *See McCormac v. Comm'r of Internal Rev.*, 67 T.C. 955, 962 (T.C. 1977) ("[T]he residuary beneficiaries of the trust were the mortuaries by whom the funerals were to be performed in the future. But, in the meantime, any increment from the investment of the principal not called on for funerals was [preneed services company's]."").

Under the Trust Agreements, the Missouri Funeral Contract Code, the Missouri Uniform Trust Code, the Iowa Funeral Services Act, and common law, the person designated to receive the future funeral services is the primary beneficiary of a preneed trust. Common law further establishes that the funeral homes and NPS were contingent beneficiaries because of their interest in the trusts. The Bank Trustees owed fiduciary duties and obligations to the future recipients of funeral services, the funeral homes, and NPS, and may not avoid such duties in their attempt to avoid the liabilities flowing from their multiple breaches of those duties.

II. Section 436.031(2) and the Trust Agreements Require that the Investment Advisor Be Independent of NPS—the Seller of Funeral Services and Grantor of the Preneed Trusts

"In interpreting statutes [the court] must both strive to implement the policy of the legislature, and also harmonize all provisions of the statute." *Care & Treatment of Schottel v. State*, 159 S.W.3d 836, 842 (Mo. 2005) (quoting *20th & Main Redevelopment P'ship v. Kelley*, 774 S.W.2d 139, 141 (Mo. 1989)). "[T]he law favors constructions which harmonize with reason, and which tend to avoid unjust, absurd, unreasonable or confiscatory results, or oppression." *State ex rel. Stern Bros. & Co. v. Stilley*, 337 S.W.2d 934, 939 (Mo. 1960) (citation omitted). "The legislature will not be presumed to have enacted a meaningless section." *State ex rel. Am. Med. Int'l, Inc. v. Sweeney*, 845 S.W.2d 648, 652 (Mo. Ct. App. 1992) (citing *Staley v. Staley v. Mo. Dir. of Rev.*, 623 S.W.2d 246, 250 (Mo. 1981)).

> [Where] the statute is remedial . . . it should be construed so as to meet the cases which are clearly within the spirit or reason of the law, or within the evil which it was designed to remedy, provided such interpretation is not inconsistent with the language used . . . resolving all reasonable doubts in favor of applicability of the statute to the particular case.

State ex rel. LeFevre v. Stubbs, 642 S.W.2d 103, 106 (Mo. 1982) (alterations in original; citation omitted).

The Missouri legislature sought to safeguard preneed deposits by requiring that sellers deposit payments into a preneed trust, thus eliminating the seller's control over the preneed funds. *See* Mo. Rev. Stat. § 436.007(4) (requiring all preneed contracts to identify the trust into which contract payments shall be deposited); § 436.021(2) (requiring all sellers of preneed contract to establish a preneed trust); § 436.031(1) ("The trustee shall accept all deposits made to it by the seller of a preneed contract and shall hold, administer, and distribute such deposits, in trust, as trust principal, pursuant to the provisions of 436.005 to 436.071.").

The legislature also prohibited preneed sellers from making investment decisions, instead vesting such authority with preneed trustees (or independent investment advisors in limited circumstances), stating: "All property held in a preneed trust, including principal and undistributed income, shall be invested and reinvested by the trustee thereof." *Id.* § 436.031. The legislature imposed standards and duties on the Trustee, requiring that "The *Trustee* shall exercise such judgment and care under circumstances then prevailing which men of ordinary prudence, discretion, and intelligence exercise in the management of their own affairs . . . ." *Id.* (emphasis added). The Trust Agreements likewise provide:

- "Trustee shall hold, protect and conserve the Trust corpus through the management, investment and reinvestment of the Trust property . . . ." Ex. Q at § 3.1.
- "[T]he Trustee shall exercise such judgment and care which men of ordinary prudence exercise in the management of their own affairs with regard to the permanent disposition of their funds." *Id.* § 4.2(a).
- The Trustee is "[t]o perform any and all other acts in its judgment as a fiduciary necessary or appropriate for the proper advantageous management, investment and distribution of the Trust." *Id.* § 4.2(f).

The legislature required such protections because the preneed seller has a self-interest to maximize investment returns (and thus take greater risk with the preneed funds) because the seller receives all income generated by the investment of preneed trust funds. Mo. Rev. Stat. § 436.031(3) ("The seller of a preneed contract shall be entitled to all income, including, without limitation, interest, dividends, and capital gains . . . generated by the investment of preneed trust property . . . ."). The legislature thus designated one of two entities to have power over preneed trust investments—the trustee or independent investment advisor. If the seller cannot appoint

an independent investment advisor (because the trust is less than $250,000) or chooses not to, the trustee is statutorily required to have exclusive control over investment decisions.

To further protect consumers, the legislature required that in the event a preneed seller designated an investment advisor to make investment decisions—rather than the preneed trustee—the investment advisor must be both qualified and *independent of the preneed seller*. The applicable version of the Missouri Funeral Contracts Code states:

> A preneed trust agreement may provide that when the principal and interest in a preneed trust exceeds two hundred fifty thousand dollars, investment decisions regarding the principal and undistributed income may be made by a federally registered or Missouri-registered *independent* qualified investment advisor *designated by the seller* who established the trust; provided, that title to all investment assets shall remain with the trustee and be kept by the trustee to be liquidated upon request of the advisor of the seller. In no case shall control of said assets be divested from the trustee nor shall said assets be placed in any investment which would be beyond the authority of a reasonably prudent trustee to invest in. The trustee shall be relieved of all liability regarding investment decisions made by such qualified investment advisor.

Mo. Rev. Stat. § 436.031(2) (emphasis added).[6] Section 436.031(2) thus makes clear that the trustee still has statutory obligations even if the seller designates an independent investment advisor, including that: (1) title to all investment assets shall remain with the trustee; (2) control of the trust assets shall not be divested from the trustee; and (3) assets may not be placed in any investment beyond the authority of a reasonably prudent trustee.

If, and only if, (1) a qualified investment advisor, independent of the seller, (2) makes an investment decision, *and* (3) that investment is "reasonably prudent," *and* (4) the trustee

[6] The Trust Agreements state: "The Trustee shall have the exclusive management and control of the Trust and its funds; provided that when the principal and interest of this pre-need trust exceeds $250,000, the *Seller at its discretion may appoint an independent qualified investment advisor* so long as the requirements of Missouri law are met, and the Trustee shall have no liability for any investment decision made by such investment advisor." Ex. Q § 2.2 (emphasis added).

maintains control of the assets, then "[t]he trustee shall be relieved of all liability regarding investment decisions made by such qualified investment advisor." *Id.* This limitation of liability, by its plain terms, does not apply to trustee liability arising from any trustee breach of duty. The trustee's fiduciary duties remain intact and the Defendant Bank Trustees remain liable for damages caused by their actions or omissions that constitute breaches of their fiduciary and other duties.

The statute and Trust Agreements grant the "seller," and only the seller, the authority to designate an independent investment advisor. The statute and Trust Agreements, by their plain language and intent, thus contemplate that independence *must be from the entity choosing the investment advisor*—the seller—particularly where the legislature has prohibited the seller from having control over trust funds.

At least one Bank Trustee, National City Bank, however, argues that an investment advisor need not be independent of the preneed seller but only of the trustee. National City Bank's position is devoid of textual support, violates the intent of the legislature, and would nullify the protections afforded Missouri consumers through the preneed statute.

National City Bank's argument, if accepted, would mean a seller of preneed funeral contracts could control funds held in a trust by appointing an agent as the "independent" investment advisor charged with making investment decisions for the trust funds. The practical effect of applying this statutory interpretation would be to render the protections of the preneed trust—and the accompanying duties owed by the trustee to the beneficiaries—a nullity. Had the legislature intended such a result, it would not have mandated that preneed contract funds be held in a trust under the control of the trustee and payable regardless of the future viability of the

seller. It instead would have allowed preneed sellers to invest or otherwise exploit the preneed funds at their whim. *See Staley*, 623 S.W.2d at 250 ("The legislature may not be charged with having done a meaningless act.").

Finally, Webster's Dictionary defines independent as "not influenced or controlled by others; not subject to another's authority or jurisdiction; not depending upon something else for existence, operation, etc.; not relying on another or others for aid or support." WEBSTER'S DESK DICTIONARY 460 (1983).[7] Applying this plain and ordinary meaning, to be an "independent qualified investment advisor," the investment advisor must be free of the influence, control, or authority of any third party, including the preneed seller. There is nothing in the statutory text limiting the word "independent" to the relationship between the investment advisor and the trustee. A plain reading of the statute requires that to be independent, the investment advisor must be free of the influence of all parties, including most importantly, the preneed seller.

There is no support in either the statute or the Trust Agreements for National City Bank's position that an investment advisor need only be independent of the trustee and not the preneed seller. Plaintiffs thus request that the Court find, as a matter of law, that an "independent" investment advisor must be independent of the seller of preneed funeral contracts and grantor of the preneed trust, here NPS.

[7] "Under traditional rules of construction, undefined words are given their plain and ordinary meaning as found in the dictionary in order to ascertain the intent of lawmakers." *Asbury v. Lombardi*, 846 S.W.2d 196, 201 (Mo. 1993).

CONCLUSION

Plaintiffs respectfully request that the Court find that: (1) the recipients of funeral services under the preneed contracts, funeral homes, and NPS are beneficiaries of the NPS preneed trusts; and (2) the designated "independent" investment advisor must be independent of the seller of preneed funeral contracts and grantor of the preneed trust.

Dated this 15th day of October, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on October 15, 2014, the foregoing **PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR RULINGS AS A MATTER OF LAW AS TO BENEFICIARY STATUS UNDER PRENEED TRUSTS AND INDEPENDENCE OF INVESTMENT ADVISOR UNDER MO. REV. STAT. § 436.031(2)** was filed electronically with the Clerk of Court and served by operation of the Court's electronic filing system upon all counsel of record in this case participating in Electronic Case Filing.

I further certify that on October 15, 2014, the foregoing was sent by United States Postal Service or by electronic means, as indicated below, to the following non-participants in Electronic Case Filing:

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