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**MORTUARY SCIENCE: Practitioner of**

**CONSTITUTIONAL LAW: Due Process, Police Power, Trade Regulation.**

Section 10(3)(e) and the part of § 12 of 1949 PA 268, prohibiting funeral plans or programs offering reduced prices exceed the police power to legislate in the interest of public health, safety, morals and general welfare and are, therefore, unconstitutional.

Opinion No. 4759

February 26, 1973.

Ms. Lorraine Beebe  
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You have requested the opinion of this office on the constitutionality of Section 10(3)(e) of the Embalming and Funeral Directing Act, 1949 PA 268; MCLA 338.870(3)(e); MSA 14.509(10)(3)(e), which provides for the denial, suspension or revocation of a license to a holder:

“Participating in any cooperative plan, group plan, project or program whereby any person, firm, corporation, group or voluntary or other association of persons offers to sell or sells, solicits or represents, advertises or publishes that members of, participants in, or purchasers under such plan, project or program will be entitled to or shall receive reduced rates in the purchase of any funeral or any part thereof or funeral merchandise or related services;

“For the purpose of this subsection, participation by any person licensed hereunder shall include allowing or permitting, directly or indirectly, the use of the name of the persons licensed under this act or the name of the funeral establishment, in connection with said plan, or otherwise being identified therewith as the person who, or establishment which will or may conduct such funeral or supply funeral merchandise or related services under such a plan, subject or program.”

and part of Section (12) which reads:

“No person, firm, group, corporation or voluntary or other association shall offer to sell, sell, represent, advertise or publish that they are sponsoring, selling, promoting or endorsing any cooperative plan or group plan, project or program whereby members of or participants in or purchasers under such plan, project or program will be entitled to, or shall receive reduced rates in the purchase of any funeral or any part thereof or funeral merchandise or related services.”

These sections of 1949 PA 268, are part of an elaborate system of regulatory provisions establishing minimum levels of competence and sanitation in the practice of mortuary science.

The sections quoted above, prohibit plans or programs whereby participants may be entitled to reduced rates in the purchase of any funeral or any part thereof or funeral merchandise or related services. No further restraints on prices are imposed. Reduced prices may be offered so long

as they are not pursuant to a pre-arranged plan. Pre-arranged plans are not prohibited so long as no price reduction is offered. Only the combination of both features is condemned.

It cannot be disputed that the practice of mortuary science is a matter of considerable public interest and therefore subject to public control. *Wetherby v City of Jackson*, 264 Mich 146 (1933), 89 ALR 2d, 1338. Authority is found in the police power to legislate in the interest of public health, safety, morals and the general welfare.

In the exercise of this power, the legislature has considerable discretion. However, it is not without limitations. Even where it is permissible to completely suppress an enterprise, its regulation is subject to the mandates of due process of law. Mich Const, Art 1, Section 17, *People v Sperry & Hutchinson Co*, 197 Mich 532 (1917); *Parkes v Judge of Recorder's Court*, 236 Mich 460 (1926).

The Court in *Parkes v Judge of Recorder's Court*, *supra*, set out the test by which enactments under the police power must be evaluated, as follows:

"There are two very important essentials to a reasonable and proper exercise of police power. They are *first*, that it must be for the public welfare, and *second*, that the measures adopted must have relation to the purpose sought to be accomplished."

*Eanes v City of Detroit*, 279 Mich 531 (1937), illustrates this constitutional limit on the exercise of the police power. The City of Detroit had enacted an ordinance regulating the hours of operation of barber shops. In reviewing the ordinance, the Court recognized the susceptibility of the barbering profession to the police power by quoting with approval *Patton v City of Bellingham*, 179 Wash 566, 572 (38 Pac [2d] 364, 98 ALR 1076), as follows:

"The occupation of barbering is a lawful business, and so far from being an obnoxious one, it is now considered well-nigh indispensable. It may be conceded, as we have already conceded, that its relation to the public is such as to render it amenable to proper regulation, to the end that the public may be protected against the spread of communicable diseases and unsanitary practices."

However, the Court cited and approved cases from various jurisdictions representing the weight of authority and reasoning to conclude that regulation of the hours of operation bears no reasonable relation to the purpose sought to be accomplished, protection of the public health and general welfare. As a result, the enactment fell outside the constitutional confines of the police power.

Similar restraints on the exercise of the police power are found in *People v Sperry & Hutchinson Co*, *supra*; *Parkes v Judge of Recorder's Court*, *supra*; *Shakespeare Co v Lippman's Tool Shop Sporting Goods Co*, 334 Mich 109 (1952); *Chaddock v Day*, 75 Mich 527 (1889); and *Levy v City of Pontiac*, 331 Mich 100 (1951).

If low or varying prices by a practitioner of mortuary science are attended by evils, this provision cannot be said to have rationally addressed those evils. In the same sense, if funeral arrangements made pursuant to a pre-

arranged plan or program are detrimental to the public health or welfare, that detriment persists. Just what there is in the practice prohibited, differing from the practice authorized, that makes it inimical to the public welfare, does not appear.

The only practical effect of these provisions is to prohibit individuals from combining to purchase funeral services in advance of their need. Such arrangements would in no way threaten the public health and welfare. As a result, there is no relationship between this prohibition of price reductions and the State's legitimate interest in licensing the professions of embalming and funeral directing to protect the public welfare.

Applying the reasoning of the above cited authorities, it is my opinion that 1949 PA 268, Section 10(3)(e) and the part of Section 12, quoted above, prohibit a business practice having no detrimental effect on the public health, safety, morals or general welfare and as such are unconstitutional, in violation of Article 1, Section 17 of the Constitution of the State of Michigan (1963).

FRANK J. KELLEY,  
*Attorney General.*

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**CONSTITUTIONAL LAW:** Statutory classification based upon population.

The statutory provision authorizing county boards of commissioners in counties containing a population of more than 180,000 and less than 250,000 to appoint a warden to have full charge of the county jail is unconstitutional because there is no reasonable relationship to the population classification designated therein and the object to be achieved.

Opinion No. 4762

March 12, 1973.

Mr. Donald A. Burge  
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Your request for opinion cites 1851 PA 156, § 2, as last amended by 1927 PA 310, MCLA 46.2; MSA 5.322. Sub-section (a) which was added by said amendment provides:

"The board of supervisors in any county containing a population of not less than one hundred eighty thousand [180,000] nor more than two hundred fifty thousand [250,000] according to the last United States census may, by a majority vote of members-elect at any regular or legally called special meeting thereof, provide by resolution for the appointment of a warden or other official and the necessary deputies and assistants to have full charge and control of the county jail and the prisoners therein, under the supervision of the board of supervisors. The board shall fix the salary or compensation and pre-