Parliament is a quarterly journal
focusing on the deathcare profession.

Summer 2017

TABLE OF CONTENTS

Letter from the Publisher

Has anyone heard? Apparently we have a new President! OK – simmer down. This is not about politics – and I can assure you it is not about who likes or doesn't like our POTUS. What this is about is the fact that politics do have an affect on what we do. Specifically – it can affect your business.

As an aside to the political world, and whether it is currently good or bad, I will say this; people are talking about politics more than ever. I am amazed by how many times Max and Chloe have either asked or told me about an issue in politics lately. Never in my dreams did I think I would have an in-depth conversation with my kids on the most recent tweet from our President. Oh well. It makes sense. We are being flooded by the day-to-day politics and actions of our POTUS.

In this daily talk of politics, one can easily get lost in what is happening behind the scenes because of all the attention to what is being shown to us. What am I talking about here? How about the laws and regulations that are changing as you read this? For example, this time last year, businesses across the US – deathcare included – were getting ready to implement massive changes because of a major overhaul to overtime regulations. And yet now, all of those regulations were pulled and we are back to the status quo. The point is that we have to stay on top of changes, because they are here and gone before you can sometimes even react.

So, to help everyone in deathcare, this issue is all about the changes in regulations that we may, or may not see! We can't cover everything, but hopefully this Legal and Legislative Update will give you a few things to consider. Perhaps it will shine a light on something that could affect you – or maybe it will light a fire under you to get you more involved!! As always, I truly hope you enjoy Parliament, and welcome any comments, feedback, questions, or ideas for future issues.

About the Publisher

ABOUT POUL LEMASTERS, ESQ.

Poul began his career in deathcare more than 20 years ago as a funeral director and embalmer. He quickly recognized that the growing risk and liability in deathcare along with the lack of support and resources for those in this profession made for a deadly combination. So, he decided to go to law school—and he passed!

Today, Poul uses his unique background in both deathcare and law to provide resources and counsel to other deathcare professionals. He gets calls for assistance in risk management, daily operational conflicts, form and contract reviews, valuations, and regulatory matters. Basically, all the exciting issues our profession has to offer. Poul advises several funeral home, crematory, cemetery, and trade associations across the United States. He also shares his know-how with those in the field by serving as Cremation Coordinator and Advisor for ICCFA's Cremation Education Program.

You're always welcome to call Poul to learn about proactive prevention for your business, or for some reactive counseling after you get sued.

ABOUT LEMASTERS

Lemasters is a company formed exclusively to serve the needs of the deathcare profession, including funeral homes, funeral directors, cemeteries, cemeterians, crematories, and those working in the industry. Lemasters provides various services in: Government Compliance, Policy and Procedures, Risk Management, Litigation, Valuation, Market Analysis, Buy/Sell, Forms Management, and Next of Kin Disputes.

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Lemasters provides proactive prevention and reactive counseling through education and support for the deathcare profession.

Preliminary Thoughts on how Tax Reform Might Affect the Cemetery and Funeral Industry

By Les Schneider

As Congress embarks on an effort to revamp the federal income tax system, members of the cemetery and funeral industry should be thinking about how tax reform might affect this industry. While no one at this point can predict with any degree of assurance what will happen in the tax reform arena, there are several subjects that are likely to be addressed.

First and foremost, from the perspective of the cemetery and funeral industry, both Congress and the Trump Administration have finally recognized that the bulk of the economic growth and employment in the U.S. is due to the efforts of small business. Accordingly, any tax relief should be targeted to small business. However, small businesses are typically not organized through C corporations that pay tax at the corporate rate. Instead, small businesses typically operate in the form of a pass-through entity, such as an S corporation or a partnership. These types of entities are taxed at individual tax rates. As a result, any reduction in tax rates that is directed to C corporations will not help small businesses.

Moreover, it is becoming apparent that the tax rates for individuals is unlikely to be substantially reduced, particularly in the upper brackets. Thus, tax reform under the tax system for individuals is unlikely to be of much help for small businesses. As a result, advocates of tax reform have coalesced around the idea of taxing the business income of pass-through entities at the same tax rate that is adopted for C corporations. In this regard, discussions among tax reform advocates suggest that the corporate tax rate would be lowered to somewhere between 15 and 25 percent. Accordingly, under this type of approach, small businesses would also pay tax at this same low rate, rather than the higher rate that is normally imposed on wages and other forms of compensation paid to individuals.

However, concern has been expressed that the foregoing type of tax regime would encourage small businesses to reduce the amount of compensation that they pay to owners of the business, which is taxed at the top individual tax rate and instead take out the profits from the business through dividends or other forms of distribution. To prevent this from happening, any tax reform proposals that deal with this issue are likely to include some type of formula that limits the amount of business profits that can be paid out to owners of the business in a form other than regular compensation.

The other major area that may be addressed in any tax reform legislation that would affect the cemetery and funeral industry is the future treatment of capital expenditures for depreciable property. Two schools of thought have formed on this subject. One school of thought, which is supported by numerous economists, is that all capital expenditures should be allowed to be deducted immediately, thus eliminating the concept of depreciation. Even if this school of thought does not prevail in any tax reform that is enacted, strong consideration would be given to raising the deduction limits on capital expenditures for small businesses.

continued on page 8

Continued... Preliminary Thoughts on how Tax Reform Might Affect the Cemetery and Funeral Industry

The other school of thought is that there needs to be a source of revenue to offset the cost of tax rate cuts and that depreciation schedules are a prime target for revenue raising. Under this school of thought, bonus depreciation would be eliminated and depreciation schedules would actually be lengthened to more closely resemble the rate of depreciation claimed by businesses for financial reporting purposes. At this point, it is difficult to predict which of these opposing approaches might prevail.

Other issues on the table for consideration under tax reform that might affect the cemetery and funeral industry are the estate tax and pension reform. On the first of these subjects, Republicans definitely favor the complete elimination of the estate tax. However, since the estate tax currently affects only estates with assets in excess of $10.5 million (for a husband and wife), Democrats view the elimination of the estate tax as a giveaway to the wealthy and are firmly opposed to this proposal. In fact, Democrats are still fuming over the deal that the Obama Administration struck with Republicans back in 2014 to raise the family exemption from the estate tax from assets of $7 million to $10.5 million, indexed for inflation.

In terms of tax incentives for retirement, nothing specific has been proposed by either political party. However, there is increasing background noise that in an effort to find revenue offsets for tax rate cuts, Congress may be pressured into accepting changes to the retirement tax system, such as eliminating traditional section 401(k) plans and substituting instead as the main retirement vehicle, a form of Roth IRA, that eliminates the immediate deduction for contributions to a retirement plan. At this point, it is too early to tell whether any changes will occur in this area.

Obviously, there are many other areas that are ripe for revision as part of tax reform. However, most of these areas are not unique to the cemetery and funeral industry, but would affect most businesses in a similar manner. Accordingly, the best advice is pay close attention to the debate over tax reform exert whatever political influence your organization has to help to steer tax reform in a favorable direction. Since Congress is particularly attuned to the concerns of small business, now is the time to remain active in the political arena.

What to Make of Washington: Are we in a brave new world, or is it really just politics as usual?

By Mary Beth McGowan

When Donald Trump was elected President last November, much of the country waited with baited breath to see what 2017 held in store. Now that we are approaching the six-month mark of the Trump Administration, we can begin to take stock of the state of our political affairs which were seemingly turned on their head.

At first, or second, or third glance, it can easily appear that the doomsday scenario many were anticipating has, in fact, materialized. We are treated to daily tweets from the President, himself, that continuously dominate the news cycle and distract from the policy agendas being pushed by his Administration and in Congress. There are regular news reports of warring factions among President Trump's top advisors. We are witnessing a very public display of contention between the President and the intelligence community. And, we are engulfed by an investigation surrounding Russian influence on the 2016 presidential election.

These are all serious issues which, at the very least, inhibit the Administration's ability to focus on policy matters and, at the very worst, could sink Donald Trump's presidency. However, they are also very much political sideshows that do not tell the entire story of what has been happening in Washington, DC since January when a Republican congress was sworn in alongside a Republican president with the shared mission of dismantling the Obama legacy.

President Trump and his executive departments and agencies have been implementing the de-regulatory agenda he promised in his campaign. What started as Executive Orders as soon as President Trump took the oath of office have more recently been borne out in official regulatory proceedings. From workplace policies to energy and environmental regulations to international trade pacts, substantive work is occurring in the Administration.

Here are just a few examples…

The Department of Labor has acted to overturn portions of the Obama Administration's Joint Employer regulation that apply to overtime and federal minimum wage. The Joint Employer action blurred the lines that dictated when one business was responsible for workplace policies at another, such as between franchisors and franchisees. Now, as before the Obama guidance, a company must have direct control of a worker to be considered the employer. Secretary of Labor Acosta also recently pledged to revise new overtime regulations set to take effect in December that would increase the number of individuals eligible for overtime.

The Environmental Protection Agency just announced it will delay by one year stringent ozone limits that were set in 2015. This regulation was acknowledged to be one of the most costly Obama-era actions because it would have penalized many regions of the country that were still struggling to comply with ozone standards set in 2008. The Department of the Interior has begun re-opening federal lands in Alaska to oil and gas exploration which was halted in 2013 and the long-stalled Dakota Access Pipeline, which provides access to crude oil, opened for business last month.

Also last month, President Trump officially notified Congress of his intent to enter into talks with Canada and Mexico in an attempt to renegotiate NAFTA. His stated goal is to extract

continued on page 12

Continued... What to Make of Washington: Are we in a brave new world, or is it really just politics as usual?

terms that are more favorable to U.S. business interests. Secretary of Commerce Ross has also signaled the Administration is open to renewing talks with the European Union to finalize the Transatlantic Trade and Investment Partnership, or TTIP, which was begun in 2013. Given President Trump's strained relationship with Europe, sitting down to agree on a trade deal would be a significant development.

Aside from the political theater impacting the Executive Branch's ability to get things done, the slow pace of filling administration jobs is an additional strain. While all of the cabinet departments have top leadership, independent agencies and mid-level bureaucratic positions remain vacant. For instance, at the Federal Trade Commission, which has some oversight of the deathcare industry through its administration of the Funeral Rule, currently only two out of five commissioners are in place and only an acting Chairman. Until at least a third commissioner is nominated by President Trump and confirmed by the U.S. Senate, the agency is unable to make any significant changes to policy.
Further down Pennsylvania Avenue, Congress is also working toward reversing Obama-era laws. After much drama surrounding repeal of the Affordable Care Act, a repeal bill was ultimately passed by the House and the Senate is drafting its own version. Since that time, the House also passed legislation rolling back many Dodd-Frank banking reforms enacted following the 2008 recession. The next major initiative Congress is seeking to tackle is a reform of the corporate and individual tax code. Their goal here is to reduce tax rates while making the federal tax structure simpler. This will be no easy feat and it remains to be seen whether President Trump and Congress will be able to get a tax bill (or any of these major initiatives) across the finish line.

What complicates the tax reform effort, and what complicates passing almost all legislation in this day and age is disagreements between Republican leaders and House conservatives and the 60-vote requirement for most Senate action. This means that despite Republican majorities in the House and Senate, legislation cannot pass without support of Democrats At this point most Republicans or Democrats appear to have little interest in pursuing bipartisan solutions.

As summer unfolds and turns to fall, all eyes will be on how this dynamic impacts the budget process. There are two major issues at play. At some point before the end of the fall, Congress will have to increase the debt ceiling or the federal government will begin defaulting on its debt. In recent years, Republicans have used the debt limit as a way to extract spending cuts, but President Trump has said he wants a clean extension which will surely aggravate conservatives. At the same time, Congress will begin drafting spending bills for the next fiscal year. The big question will be to what degree Congress adopts President Trump's proposed spending cuts. Other questions that must be answered are whether Congress and the President will be able to agree on spending levels? Will there be a veto or government shutdown? How will the manner in which the debt limit is resolved impact the appropriations process?

Over the longer term, what can Congress accomplish before the mid-term elections bog down the process even more? Congress and the President must find a way to address many of these pressing issues before the end of the year. If not, they are likely to have very few legislative accomplishments.

While these are tenuous issues, they are not new issues. The players are different, but other congresses and other presidents have faced these same challenges. It may appear we are in unchartered territory, but a closer look at the record indicates things in Washington are, so far, more closely following business as usual.

Case Analysis | ERISA Religious Exemption Expanded: SCOTUS Says Church Affiliation is Enough

By Alexander V. Batoff on June 7, 2017
Republished from HR Legalist, Michael Pepperman from Obermayer Rebmann Maxwell & Hippel LLP

This Issue of Parliament we welcome a special guest Case Analysis from the HR Legalist. The following case, just decided in June 2017, could have major implications on many levels – just one being religious cemeteries. This case shows how deathcare can – and is influenced – by much more than just what happens in deathcare.

OVERVIEW

In a sigh of relief for faith-based healthcare providers, on Monday, June 5th, the U.S. Supreme Court held, in a decision authored by Justice Elena Kagan, that the Employee Retirement Income Security Act's religious exemption provision covers all benefit plans maintained by religious group affiliates, even if the plan is not established by the religious group itself.
Advocate Health Care Network et al. v. Stapleton et al. 581 US 2017.
The High Court's decision concerned class action lawsuits filed by 300,000 former and current employees of three religiously affiliated hospitals that ran their own pension plans. The hospitals involved were Illinois' Advocate Health Care, which is affiliated with the Evangelical Lutheran Church in American, and New Jersey's Saint Peter's Healthcare Systemand California's Dignity Health, which are both Roman Catholic related.

Had the employees prevailed, the hospitals would have been liable under ERISA for a pension funding shortfall to the tune of four billion dollars. ERISA otherwise covers most nonprofits and, in addition to minimum funding requirements creates numerous other rights and responsibilities for benefit plan participants and administrators.
Opinion at a Glance

Essentially, the Supreme Court was faced with whether a 1980 amendment to ERISA dropped the requirement that church plans must be "established and maintained . . . by a church" by expanding the definition of "church plan" to include plans "maintained by an organization . . . controlled by or associated with a church."

Breaking down the plain text of the statute, the Court reasoned that if a plan established and maintained by a church equals an exempt church plan, and a plan established and maintained by a church includes plans maintained by church-affiliated organizations, then plans maintained by church-affiliated organizations must also be exempt from ERISA requirements.

The Court was unconvinced by counterarguments that the churches themselves must establish the plans used by their affiliates in order to meet the exemption. The Court further noted that the three federal agencies tasked with administering ERISA—the Internal Revenue Service, the Department of Labor, and the Pension Benefit Guaranty Corporation—had long interpreted ERISA as covering religiously affiliated organizations like the hospitals.
Further Analysis and Future Implications

continued on page 16

Continued... ERISA Religious Exemption Expanded: SCOTUS Says Church Affiliation is Enough

Even though Monday's decision covered only three hospitals, the class actions involved 300,000 former and current employees and an alleged pension funding shortage of nearly four billion dollars. While the Supreme Court decision arguably confirmed the status quo, it could still embolden church-affiliated healthcare providers to race to the bottom by cutting benefits to boost profits. With one out of five hospital beds provided by religiously affiliated facilities, this could affect millions of American healthcare workers.

Rather than slow down the ERISA class action litigation wave against religiously affiliated healthcare providers, future litigation efforts may simply be redirected toward what qualifies as an organization controlled by or associated with a church. In addition to healthcare providers, such lawsuits could target charitable aid and relief organizations, colleges and universities, and any number of other groups with religious ties.

While the decision was joined by all justices except for Justice Neil Gorsuch, who was appointed to the Court after the case was presented at oral argument, Justice Sonia Sotomayor filed a concurring opinion that agreed with her colleagues' statutory interpretation but expressed concern over its practical implications. Justice Sotomayor observed that the three hospitals involved, which operate for-profit subsidiaries and reap billions of dollars in annual revenue, bear a striking resemblance to their ERISA-bound secular competitors. Although our current Congress probably does not share Justice Sotomayor's apprehensions, future legislators could take aim at this seeming loophole.

CONCLUSION

We at HR Legalist urge all readers, whether their organizations are overtly religious or unabashedly secular, to review their benefit plans, reach out to preferred legal counsel, and make sure that their plans pass muster under ERISA and related employee benefit laws.


EXIT

Regulatory State Trends -Cremation and Alkaline Hydrolysis What Does the Future Hold For Cremation Regulation?

By Poul Lemasters

I don't like grouping cremation with alkaline hydrolysis; but it seems that we can expect state regulatory agencies to place the two together. It appears that more and more states are going down the road to add regulations and guidelines for alkaline hydrolysis. Along with states jumping on the alkaline hydrolysis bandwagon, states are also upping the requirements for crematory operator training and certification.

The trend is real. More and more states are updating / adding / changing their rules and laws as they relate to cremation. It makes sense. Cremation is the top choice for final disposition. Cremation is also the most regulated choice of final disposition. As a result we are seeing more and more issues ranging from the common – who is the proper authorizing agent – all the way to the unique, and tragic – wrongful cremation.

In an effort to stay in front of these issues many states are taking a look at their laws and trying to make them more fitting. The results are more and more states adding training requirements. And more states broadening their regulations to allow other disposition options, such as alkaline hydrolysis.

ALKALINE HYDROLYSIS

For those keeping score at home, alkaline hydrolysis is currently approved in 11 states in the US, including: Colorado, Florida, Georgia, Idaho, Oregon, Minnesota, Kansas, Illinois, Maryland, Maine, and Wyoming. It is also approved in the Canadian Provinces of Ontario, Saskatchewan and Quebec.

Currently there are 7 more states looking to add alkaline hydrolysis to the approval list including: Alabama, California, Indiana, Nevada, Texas, Utah, and Washington. There are some common provisions in the proposed regulations that are good – and some not so good.

The first good thing is that all of the states are attempting to place alkaline hydrolysis under the appropriate authority – namely the same authority that regulates cremation. The next good thing is that out of the 7 states introducing, 6 states are adding new terms and regulation for hydrolysis. The one state not doing this is Texas, which currently is just modifying the cremation definition to include alkaline hydrolysis. I believe that if a state is going to allow hydrolysis, it should make the regulation fit the process; not simply add the process to what it currently does. This does take more time and effort, but it keeps hydrolysis its own process versus fitting – forcing - it into cremation process.

What are a couple of bad things that are coming out of these regulations? First, there are various definitions of hydrolysis. Definitions include: dissolution of human remains by placing the remains in a dissolution chamber containing water and a chemical solution that includes: Potassium hydroxide or sodium hydroxide (IN HB1041); dissolution using alkaline chemicals and agitation (NV AB205); using alkaline chemicals, heat, and sometimes agitation or pressure (UT HB0387). Why are these different definitions an issue? One of the issues with alkaline hydrolysis is that there is currently no standard process. As more and more states add hydrolysis and either expand, change, or modify the definition, it creates areas of uncertainty. And

continued on page 20

Continued...Regulatory State Trends -Cremation and Alkaline Hydrolysis

with uncertainty comes risk. And with risk comes potential liability. Let's just say it makes room for lawyers!

The other bad thing that should be noted is the general message that this sends. As a profession we are the only ones to make deathcare reverent. Our profession is charged with the task of caring for the dead – not simply disposing of the dead. The way alkaline hydrolysis is being introduced is not always the best. For example, in CA AB967, the bill is labeled as "Human Remains Disposal." This may seem like a non-issue, but if we continue to label what we do as disposal of the dead – then it won't be long before what we do is simply dispose of the dead.

CREMATION TRAINING

In another trend, many states are adding crematory operator training to the their list of regulations and requirements. This only makes senses as more and more states are finding that cremation is outnumbering any other form of disposition. States currently requiring operator certification include: Arkansas, Arizona, California, Georgia, Illinois, Kansas, Louisiana, Maine, Maryland, Mississippi, Nebraska, Nevada, New Hampshire, New York, North Carolina, South Carolina, Texas, Virginia, and West Virginia. And, Canadian Provinces in the training requirement include: British Columbia, Ontario, and Saskatchewan. Currently, there are 4 more states looking to add the crematory operator-training requirement: Alabama, Indiana, Mississippi, and Ohio.

Overall, the training requirement is a good thing. We need people that are operating crematory equipment to be trained. I have been involved with providing crematory operator training fro the past 10 years and believe everyone – yes everyone – who provides cremation should have the knowledge to operate a retort.

I also think there are a couple things that the states continue to miss when they add crematory training as a requirement. First, the training should have a time frame for how long it is good. However, most states do not set forth a time on how long the certification lasts. On behalf of ICCCFA, where I provide training, I can state that the association places a 5-year limit on the certification. I also know CANA places that same 5-year certification. More states should list the time-length for renewal purposes. While we may believe nothing changes – it does.

Another ongoing issue is that crematory operators may require certification –but most states do not license the operator. Unfortunately, I continue to see issues with operators, and without licensing requirements, many operators do not face scrutiny over their mistakes – because they are not licensed. What is tragic is that many times the licensed funeral director managing the crematory facility will face the Board for the operator's mistake. I suggest that as a profession, we look at a better way to regulate what is becoming the larger part of out profession.

Overall, we can always expect to see more changes in how we are regulated. What is ironic is that that as we add more regulations to make the process 'easier' we in fact continue to make the process more complicated. Also, as each state continues to change the way 'they' handle disposition, it makes the differences greater from state to state. I do not see a time when all states are on the same page – but I hope that we can start to agree on the general process. In the meantime, I will continue to put out fires one state at a time!

☞ About Parliament ☜

The owl has long been associated with wisdom, longevity and truth. They've appeared for centuries in old texts (and sometimes new texts) related to death and to justice.

Lemasters is a blend of two things:
deathcare and law.

The Owl has been a part of our company symbolism since our founding (the three colored circles in the logo for Lemasters are inspired by the shape of an owl's eye).

And the name of this publication?
A Parliament is what you call a group of owls.

Parliament™

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