

Arkansas Burial Association Board
Rule Committee Meeting
November 22, 2013 – 9:30am
Bail Bonds Conference Room 117
Via Teleconference 877-402-99753

Rule committee members present were: Normal Gilchrest, Steve Ballard, Bob Brooke, Auditor, Kat Hodge, Board Council, and Amy S. Goode, Executive Secretary. Committee members absent were: Melanie Posey. Also in attendance at the meeting were: Jackie Harris, Attorney for Drew County Burial Association, Dick Horne, Attorney for Drew County Interveners, Robert Eichelberger, and several members of the Drew County Burial Association.

The purpose of the meeting today was to discuss Rule 35.8.1 Dissolution of Burial Association by Insurance Companies.

Executive Secretary gave a brief synopsis of the meeting the rule committee held on October 10, 2013. Mr. Horne had emailed the Executive Secretary explaining he may not be able to on the 10th and unfortunately he was unable to attend.

Discussion started with the second plan submitted by Mr. Harris on October 24, 2013. Mr. Harris stated that the committee did address several issues that Mr. Horne had and that at the conclusion of that meeting the committee did not have any real issues with the first proposal. The committee wanted to have an "Opt-out" provision added to the proposed rule. This option was added to the 2nd draft submitted as requested. Mr. Horne did raise some objections or concerns about some of the provisions.

Ms. Hodge stated she did not think that Mr. Horne and Mr. Harris were miles apart on this rule, but the Board did have to two major issues.

1. Pro-Rata Distribution – how that would be calculated?
2. Opt-Out Provision – there was some discussion about this at the last meeting and Mr. Horne's complaint for intervention discusses the possible repercussions for individuals that receive certain assistance receiving this extra money that would be considered as income. The possible effect it could have on them.

Ms. Hodge further stated that we would like to focus where the disagreements are and that it would be helpful to the committee.

Pro-Rata Distribution

Mr. Horne stated that something that we have to come to grips with is the amount of money that's going to be paid out due to expenses. That rule says pro-rata. It legally cannot be pro-rata, because the law says that old business cannot be comingled with new business. Mr. Horne stated the table

representing the distribution was outrageous. Mr. Harris interrupted to explain that Drew County had moved away from that proposal after the last meeting.

Ms Hodge stated that at last meeting that had been addressed. The plan of liquidation will have to include how the pro-rata distribution will be done. Mr. Harris stated that you have to look at the amount paid in by the amount of time to determine the weight of each member.

Ms. Hodge inquired if that did not address the concerns Mr. Horne had about the distribution. He didn't think that it did, because if he understood a person that had not been in the association as long would stand to benefit pro-rata from all the assets. Mr. Harris explained that it was weighted. They would get same weight if it was new business only and they would get the same weight if they were included in the larger. They had to get away from the face value and look at the amount paid in by the amount time. You would determine the weight per member and then total all for each member. Then you would divide each member by the whole.

Mr. Horne reiterated that the statute says that new business and old business funds cannot be co-mingled. There was a case in 1990, that he was the attorney that represented the association against the Burial Board. The Board was intending to co-mingle the funds, but the court ruled that they could not do that. You cannot use the assets of the old business to distribute for the use of the new members.

Mr. Harris stated that he was correct what the statute said, but argued that the McEuen case did not take into account dissolution. It was for a continuing association to be sure that new business and old business was properly funded. This is a completely different issue; if Drew County were to continue to operate they would not be able to co-mingle the funds.

Ms. Hodge stated that if the amount of distribution was the concern, then why the plan couldn't include a plan of liquidation separating the old and the new business. Ms. Hodge stated she would have to read into the McEuen case, but inquired if that would not solve Mr. Horne's concern. That if the concern is the law, then separating the assets of the two would resolve that issue.

Mr. Harris stated if the committee is suggesting that this is what will make them comfortable to keep moving forward then the plan of liquidation can be separated. He stated that he did not think there would be much of a difference, but if there were a difference it would be small. He further stated that what Mr. Horne had proposed was not unreasonable. However, he reiterated that the McEuen case does not contemplate dissolution.

Mr. Horne stated that some of the policy holders have been paying into this association since the 1930's and that those policy holders should not share their money with any new business members. That was the premise of this, but there is another factor to this though; the law says that a burial association cannot pay out more than 25% in operating expense in any one year. That any amount not taken as operating expense goes back into the mortuary fund and is no longer considered operating expense.

Ms. Hodge interrupted and stated that she had three categories: pro-rata, expenses, and opting out. She wanted to be sure that the parties were satisfied with the pro-rata concern. Whether or not the McEuen case applies the pro-rata distribution will be separated between the old and new business. We need two plans of liquidation one for old business and one for new business. The pro-rata distribution will no longer be based on the face amount, but it would be based on the amount of monies paid in multiplied by the amount of time.

Mr. Brooke stated the Board has adopted rule 47 that allows the transfer of old business funds to the new business. There are associations with reserves far above their old business liability; that after the rule was adopted were allowed to transfer funds to the new business in order to make it strong. Mr. Eichelberger stated they have done that, but it's in violation of the Supreme Court ruling. If pushed they would have to reverse it.

Mr. Harris still believes the distribution would be the same, but he would present two plans of liquidation for the two separate businesses.

Expenses

Mr. Horne was ready to proceed with a discussion concerning expenses. The statute requires that no more than 25% operating expense can be taken for any year. The rule specifies that in the event the entire sum equaling such twenty-five (25%) is not expended then it shall be converted to the mortuary fund at the end of such year and shall not thereafter be used for expenses. Horne furthermore stated that Mr. Harris has been working on this for at least three years and deserved to be paid for his services. Horne continued with "where they will get the funds to pay those charges when no more 25% is allowed?" Several months ago the representation was approximately \$38,000 in legal expenses; the four board members desire a percent roughly \$10,000 each. Where does that money come from? You cannot argue that because it's being dissolved that it can be paid out of these old business funds.

Mr. Harris's argument was that statute 23-78-122 Disposition of Collections says that 75% of the collections of any burial association or society shall be solely for the payment of benefits provided by membership certificates and shall not be used for the payment of operating expenses. The association will not be paying anymore benefits; they will be distributing the assets. The disposition of collections, they will not be being taking anymore collections. There is no statute or rule governing the voluntary dissolution of a burial association Mr. Horne continues to apply the existing law, but they will not be continuing, so there will not be a need to collect the money for the payment of the benefits.

Ms. Hodge followed Mr. Horne's argument. Board Rule 4 refers to expenses. In no event shall the expenses exceed 25% in any year. Would your attorney's fees not be expenses under this rule? Mr. Harris still stated that these rules were for the continuing operation of a burial association. It's no longer going to be an operating association. It's unreasonable to ask anyone to put in the time to go through this to get only 25%. The fee rate would not be what it is, if they had not had to go through all of these steps. There are going to be expenses involved with the winding up of any business.

Mr. Horne stated that if the Board approves or rules otherwise they will go to the Supreme Court. He stated he would not accept this.

Ms. Hodge followed Mr. Harris's argument. Once this association is dissolved and the association puts forth a plan of liquidation, which explains how they will pay their expenses and distribute their property, but once it's dissolved it's dissolved. What Mr. Harris is saying that once we get this plan of liquidation the association will cease to exist. It does not have expenses it has debts that it owes; one of them will be his attorney's fees or your attorney fees. Mr. Horne argued his fees would be an expense. Once you have that order of dissolution you can't say the laws just don't apply. Mr. Harris argued there was no law to apply.

Mr. Eichelberger addressed the issues Mr. Harris raised concerning the assumption by an insurance company and expenses incurred. He stated that he has been a part of several assumptions and that the insurance company has to pay any expenses out of their own pocket. All the assets of the association are placed into a fund for those members. None of the assets are used for expenses. The assets belong to the certificate holders. Ballard stated that when an insurance company assumes they are continuing; with dissolution they are not continuing. The dissolution is completely different than continuing with insurance. Harris continued that assumption rule provides for the insurance company to pay the expenses. In this case, there is no insurance company.

Ms. Hodge stated that if we don't limit the expenses to 25% what's going to stop another from billing and consuming up all the assets of the association as fees. How do we protect the members from not having to pay? She continued further that she was not sure if the expense rule applies, but if the Board is going to pass a rule it has to be a rule of general applicability. What's the Board do or how does the rule address a situation that if a burial association has a million of assets, but they are billed a million dollars. Mr. Harris stated that it would have to be discussed at the time of client consultation and a contract is established. Once we get the rule, then no one else will have to go through a three year process. The rule allows for the process to be complete in 90 days.

Mr. Gilchrest stated that this is a rare case and not sure that all our rules will apply. Settle one item at time.

Opt-out Provision

The Board did discuss and Ms. Hodge had visited with Mr. Horne, which those members that fall under the old business category have the potential to suffer negative consequences or repercussions if they participate in this dissolution. We did address at the last meeting, the opt-out provision and Mr. Harris did submit another proposal. It does allow for the members that have negative consequences to opt-out and move their certificate to another association. Ms. Hodge thought this might require additional rules. It was discussed at the last meeting, the service area and members not having an option to move

their certificate to another association. Mr. Horne's complaint for intervention addressed concerns about those on Medicaid and Medicare.

Mr. Harris stated that if you're 65 and under and you're receiving social security benefits the maximum annual income is \$15,120.00. The Board's Rule 35.2, Paragraph g.2 you can opt out of the assumption and it makes no provisions for social security retirement, Medicaid, or Medicare. He felt that was unfair, but they did contact all of the members explaining the repercussions of receiving the distribution.

Mr. Eichelberger stated that the concern is those on SSI in a nursing home receiving a \$5000 payment they would be immediately be kicked out of nursing home, because you're only allowed \$2,000 income if you're on Medicaid. Hodge inquired under the assumption, for those that opt-out what has happened? They have had very few or have never had any opt-out.

Mr. Harris still argued that they have placed an opt-out provision as asked in the dissolution. He argued there was no difference.

Mr. Horne stated that it was our duty to be sure these people understand what could happen to them; they could lose their Medicaid coverage. Make sure these people know what they are getting into, if they take this lump sum payment. Mr. Harris has informed the members all by letter of the possible ramifications. He continued to state this was not required of the assumption rule. Ms. Hodge stated that the reason that we need the opt-out provision in this rule is because with the assumption rule there are two options. Also with the assumption rule, if a policyholder did not want to suffer the repercussions of the distribution, they have that option of converting to insurance. Without the opt-out provision they have no other choice.

Mr. Ballard said they should read the notification that is sent. It is their responsibility, and continued that we cannot hold the responsibility to make sure everyone understands what is going on if they are sent communications and do not read it. Mr. Horne agreed that it was not the Board's responsibility to make sure that every reads and understands the plan. He argued that we are not sure what they know or what has been done, since there is no rule in place. We just need to make certain each member is communicated with, but we do not have to call on each one. Mr. Harris stated he had no objections to that and that communications have been sent out.

Can we identify individuals that are in a nursing home? We do have a moral liability to be sure that it is communicated. Mr. Harris stated that those that own the policies may be paying for someone in a nursing home. Ballard continued if there were any that could be identified to address them. Mr. Horne stated that if the rule is adopted that even if Drew County has already done some of these things, that they should be required to if necessary do them again. Mr. Harris stated they could provide the information that has been sent, that step has been taken. He does agree that it does need to be included in the rule.

Mr. Harris stated that they have been at every meeting to be sure they are doing everything the Board has required. Mr. Horne reiterated that until there was a rule in place to follow on dissolution, that this is the first time the Board has been approached with this issue. You're not proceeding under a rule now that has legally been passed by the Board. Mr. Harris stated the Board could ratify the process we have been through.

Mr. Horne stated that there is case in the Pulaski County Circuit Court that Mr. Harris filed seeking dissolution under the Arkansas Unincorporated Association Act. That hearing is to take place Monday, December 2, 2013.

Ms. Hodge went back over the 2nd plan submitted by Mr. Harris. She had made some notes and thought that under

- 35.8.1. a c) could be expanded to identify those adversely affected. Should probably be added to 35.8.4
- Then in 35.8.2 b 2 define pro-rata distribution that it will be the premium paid in multiplied by the time in the association to determine weight of each member and that define the pro-rata distribution for old and new business.
- 35.8.3 a – The plan of Liquidations – Board recommends it should have the exact plan of liquidation not a generic plan. What the weight is for each member, so that the Board can see and they have a responsibility to those members to know. Also add to the last paragraph that the Board has 60 days to approve or disapprove.
- 35.8.4 – add c) shall include a specific plan of liquidation based on that pro-rata weighted share.
- 35.8.5 – b 1. Include in the anticipated amount to be received. Each member receives a specific letter explaining the specific amount.
- 35.8.5.1 – Do we need to pass a corresponding rule for members wishing to opt-out. Have the option to transfer within a 100 mile radius. However, do we have the authority to require an association to accept the transfer? What's going to transfer to other association? Mr. Ballard stated that the funds could be held with one association, but when the member dies that would be paid to wherever that member wants to go. Eichelberger stated: "what assets do they carry with them? If they receive \$2,000 and transfer to another association, but then they are only going to get \$500." Mr. Harris stated we could talk around all kinds of scenarios, but you cannot create a rule to please everyone.
- 35.8.7. – When will it be paid?

Mr. Jones member of the Drew County stated that at some of the earlier meetings of the Drew County Burial members voted to dissolve and use the funds to buy a single premium paid up policy. If they did not want to do that then they could opt – out to receive funds, but it would be counted as income. Many members have been paying for 20 – 30 years and have paid in more than the face amount and would not get more than the face amount yet they are required to continue to pay in order to keep. So the option was to take the time that I have been in plus the amount I have paid in and get a policy that I will never have to pay for again. That policy would go wherever they wanted to go. Mr. Harris stated

that if they decide to opt-out or take the single-premium policy it would still be counted as income. However, they have moved away from that. That was early on when insurance companies were involved proposing assumption. To keep from the ramification of receiving the funds the opt-out provision allows for them to keep the face amount of certificate and premiums they have paid to be transferred with it.

Ballard stated that the policy holder needs to be able to use whomever they want or have planned to all their life. Part of the agreement of the opt-out should include the association accepting the certificate allows those members to go to any funeral home and get their face amount. The new association would hold the certificate and premiums for the member, so that they would not suffer any consequences of receiving income and they will still be able to use the servicing funeral home they have always planned to use.

Other concerns were raised, but the Board will have the authority to approve or disapprove. Mr. Horne again stated that the Drew County would need to perhaps repeat some processes to follow the rule created. Mr. Harris stated that certainly anything that had not been done that was required by this rule or did not comply will be done. Once they get clearance they will get into compliance and the Board will make that determination.

It was a productive meeting and it was adjourned.