

ORDER NO. 2011 - 018
Docket No. BE-10-306

IN THE MATTER OF:	§	BEFORE THE BANKING
	§	
WAYNE F. BROWN,	§	
FORMER FUNERAL DIRECTOR	§	COMMISSIONER OF TEXAS
IN CHARGE OF	§	
FOSTER & BROWN FUNERAL	§	
HOME, INC.	§	
	§	
ATHENS, TEXAS	§	AUSTIN, TRAVIS COUNTY, TEXAS

AGREED ORDER

On this day, the matter of Wayne F. Brown, former Funeral Director in Charge of Foster & Brown Funeral Home, Inc., Athens, Texas (“Respondent”) was submitted to me, Charles G. Cooper, Banking Commissioner (“Commissioner”) for consideration and action. Respondent and the Texas Department of Banking (“Department”) have entered into an agreement and jointly request the Commissioner to dispose of this matter pursuant to *Texas Government Code* § 2001.056. Respondent and the Department agree that the Commissioner may make the following Findings of Fact and Conclusions of Law and enter this Agreed Order (“Order”) and agree to the terms of the Order.

I. Findings of Fact

The Commissioner makes the following Findings of Fact:

1. Respondent acknowledges that the Commissioner has jurisdiction over this matter pursuant to *Texas Finance Code*, Chapter 154 and *Texas Government Code* §§ 2001.171 et seq.
2. Respondent was the Funeral Director in charge at the Foster & Brown Funeral Home (“Foster Brown”) located at 402 E. Tyler Street, Athens, Texas, beginning September 1998 until March 2003, when he resigned. A funeral director in charge is licensed by the

Texas Funeral Service Commission and has the overall responsibility for the management of the funeral home in compliance with Texas law regulating the operation of a funeral home.

3. During the time Respondent was the Funeral Director in charge at Foster Brown, the funeral home held Prepaid Funeral Benefits Permit No. 130, initially issued by the Texas Department under *Texas Finance Code*, Chapter 154 on March 5, 1965.

4. Pursuant to *Texas Finance Code* § 154.160, Respondent was a designated agent for Prepaid Funeral Benefits Permit No. 130 from September 1987 to March 2003. A designated agent is considered to be a fiduciary and is responsible for the deposit of money collected under Prepaid Funeral Benefits Contracts (“PFBC”).

5. Respondent was the Secretary/Treasurer of Foster Brown from January 20, 1988 to March 2003, when he resigned. Respondent, Wayne F. Brown, was listed on the signature card for the trust accounts kept by two banks for the trust funds received from the sale of PFBCs.

6. In Respondent’s multiple capacities as Funeral Director in Charge, Designated Agent for Prepaid Funeral Benefits Permit No. 130, Secretary/Treasurer for the corporation that owned Foster Brown, and holder of signature authority on the trust fund accounts, Respondent had management control and responsibility for the daily operations of the funeral home and was responsible for the failure to properly place in trust funds received from the sale of PFBC received by Foster Brown.

7. Foster Brown, including Prepaid Funeral Benefits Permit No. 130, was sold in February 2005, to John Brent Gordon and the name of the funeral home was changed to Gordon Foster Brown Funeral Home (“Gordon Foster Brown”).

8. Gordon Foster Brown went out of business in November 2009. The Department cancelled Permit No. 130, and obtained possession of the PFBCs and related trust funds.

9. A review of the seized PFBC records by the Department revealed nine of the PFBCs were signed by the Respondent and that funds received by Respondent from the sale of these PFBCs to the public were not always placed in trust or submitted to a licensed insurance company as insurance premiums in accordance with *Texas Finance Code*, Chapter 154, §§ 154.203 or 154.253. The following table lists the nine contracts for which payments were not properly placed in trust or submitted to a licensed insurance company as insurance premiums in accordance with *Texas Finance Code*, Chapter 154, §§ 154.203 or 154.253.

Contract Date	Contract#	Contract Selling Price	Amounts Not Trused
4/1/93	510	\$3,633.00	\$1,207.48
8/3/94	580	\$4,113.00	\$416.81
4/20/99	746	\$2,900.00	\$828.13
5/20/99	749	\$5,330.00	\$2,718.47
5/30/00	781	\$4,395.00	\$1,266.60
7/25/00	784	\$4,680.25	\$899.58
11/7/00	788	\$1,195.00	\$64.38
6/10/01	790	\$5,520.00	\$4,221.76
12/18/01	-	\$5,606.00	\$4,045.00
TOTAL			\$15,668.21

10. The review of the seized PFBC records by the Department also revealed that funds from the sale of sixteen PFBCs to the public received by funeral home employees, acting under the supervision of the Respondent as funeral director in charge and

designated agent, were not always placed in trust or submitted to a licensed insurance company as insurance premiums in accordance with *Texas Finance Code*, Chapter 154, §§ 154.203 or 154.253. The following chart summarizes these additional PFBC records reviewed by the Department.

Contract Date	Contract#	Contract Selling Price	Amounts Not Trused
7/17/91	435	\$896.00	\$846.24
10/8/91	448	\$3,574.00	\$1,003.05
6/10/92	476	\$3,602.00	\$366.10
3/10/94	552	\$4,000.00	\$850.86
4/11/96	652	\$6,085.00	\$2,151.20
4/11/96	653	\$6,990.00	\$2,953.78
4/30/96	655	\$4,359.00	\$801.05
6/15/96	661	\$6,410.00	\$2,919.80
6/15/96	662	\$6,410.00	\$2,819.94
1/30/97	683	\$4,788.00	\$463.24
1/31/97	-	\$5,780.00	\$5,202.00
1/31/97	-	\$5,780.00	\$5,202.00
3/6/97	693	\$5,475.00	\$822.93
6/30/97	701	\$4,590.00	\$704.37
6/9/98	727	\$4,540.00	\$406.84
6/9/98	728	\$4,540.00	\$406.84
			\$27,920.24

11. Respondent and funeral home employees acting under Respondent's supervision and control misappropriated or converted funds that belong to a beneficiary under a PFBC in violation of *Texas Finance Code*, Chapter 154, §§ 154.160, 154.203, and 154.253, and 7 TAC, Chapter 25.

12. On December 15, 2010, an Order to Cease and Desist Activity was issued by the Department against Respondent from engaging in the sale of prepaid funeral

benefit contracts unless Respondent is acting under the authority of a valid permit issued by the Department pursuant to Chapter 154, *Texas Finance Code*, and Respondent timely submits the collected funds as insurance premiums or deposits the funds in trust, as applicable, as required by Chapter 154, *Texas Finance Code*.

II. CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Commissioner makes the following Conclusions of Law:

1. The Commissioner has the authority to issue this Order and to assess restitution pursuant to *Texas Finance Code* § 154.411.

2. The Commissioner has the authority to issue this Order and to assess penalties pursuant to *Texas Finance Code* §§ 154.406 and 154.406.

3. Respondent has agreed to pay restitution in the amount of Forty-Three Thousand Five Hundred Eighty-Eight 45/100 Dollars (\$43,588.45).

4. Respondent has agreed to pay an administrative penalty in the amount of Twenty-Five Thousand Dollars (\$25,000.00).

5. Any violation of the Order to Cease and Desist Activity, Order No. 2010-066, in the future could subject Respondent to additional regulatory or enforcement actions authorized by *Texas Finance Code* §§ 154.401 to 154.414. Nothing in this Order diminishes the regulatory or enforcement powers of the Department, the Commissioner, or the Finance Commission of Texas under *Texas Finance Code*, Chapters 35 and 154, or other applicable law.

6. For purposes of this proceeding, Respondent knowingly and voluntarily waives:

a) Service upon Respondent of this Order;

- b) The right to present defenses to the allegations;
- c) Notice and hearing prior to imposition of an administrative penalty and an order for restitution;
- d) The filing of proposed findings of fact and conclusions of law;
- e) The issuance of a proposal for decision by an administrative law judge;
- f) The filing of exceptions and briefs with respect to such proposal for decision;
- g) Any review of this Order by the Texas Finance Commission; and
- h) Judicial review of this Order as provided by *Texas Government Code* §§ 2001.171 et seq., and any other challenge to the validity of this Order.

7. Nothing in this Agreed Order shall be deemed to diminish or restrict the regulatory or enforcement power of the Texas Funeral Services Commission to take further action in this matter.

III. Order

WHEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, the Commissioner **ORDERS** that this matter is hereby resolved in accordance with the following terms:

1. Respondent is **ORDERED** to comply with the provisions of Commissioner's Order No. 2010-066 issued December 15, 2010, that ordered Respondent to cease and desist from engaging in the sale of any prepaid funeral benefit contracts unless Respondent is acting under the authority of a valid permit issued by the Department pursuant to Chapter 154, *Texas Finance Code*, and Respondent timely submits the collected funds as insurance premiums or deposits the funds in trust, as applicable, as required by Chapter 154, *Texas Finance Code*.

2. Respondent is **ORDERED** to pay restitution in the amount of Forty-Three Thousand Five Hundred Eighty-Eight 45/100 Dollars (\$43,588.45) and an administrative penalty in the amount of Twenty-Five Thousand Dollars (\$25,000.00) for violations of *Texas Finance Code*, §§ 154.160, 154.203, and 154.253, and 7 *Texas Administrative Code*, Chapter 25. The schedule for payment for restitution and the administrative penalty for the total amount of Sixty-Eight Thousand Five Hundred Eight-Eight and 45/100 Dollars (\$68,588.45) shall be as follows:

- a. Twenty Thousand Dollars (\$20,000) is due and payable on May 10, 2011.
- b. The remainder Forty-Eight Thousand Five Hundred Eighty-Eight and 45/100 Dollars (\$48,588.45) to be paid:
 - i. In 24 monthly installments of Seven Hundred Fifty Dollars (\$750) per month beginning on June 1, 2011 and continuing through June 1, 2013; and
 - ii. payment of the balance of Thirty Thousand Five Hundred Eighty-Eight and 54/100 Dollars (\$30,588.54) to be paid in 29 monthly installments of One Thousand Dollars (\$1,000), beginning July 1, 2013, per month with the 30th payment to be One Thousand Five Hundred Eighty-Eight and 54/100 Dollars (\$1,588.54).
- c. Failure to make a monthly payment by the 5th of the month shall cause the due date of the unpaid balance to be accelerated and immediately due and payable.

d. Failure to pay the accelerated balance within thirty (30) days after receiving notice of default and acceleration from the Department will result in the referral of this matter to the Office of the Attorney General for collection.

3. This Order does not restrict the Department with respect to any enforcement action or other recourse regarding any other past, current, or future violations by Respondent that come to the attention of the Department.

4. This Order against Respondent is effective on the date signed by the Commissioner, and subject to its terms, Respondent may not appeal.

The effective date of this Order is the date the Order is signed by the Commissioner.

Signed this 11th day of April 2011

/s/Charles G. Cooper
Charles G. Cooper
Texas Banking Commissioner

AGREED AND APPROVED AS TO FORM AND SUBSTANCE:

By: /s/Wayne F. Brown
Wayne F. Brown

April 5, 2011
Date

APPROVED AS TO FORM:

Texas Department of Banking

By: /s/Robert Giddings
Robert Giddings
Assistant General Counsel

April 8, 2011
Date