

Order No. 2013-003
Docket No. BE-12-12-215

IN THE MATTER OF	§	BEFORE THE BANKING
JAMES E. LISTER,	§	
INDIVIDUALLY AND DBA	§	COMMISSIONER OF TEXAS
JAMES E. LISTER'S FUNERAL HOME,	§	
KILGORE, TEXAS	§	AUSTIN, TRAVIS COUNTY, TEXAS

FINAL ORDER

On this 6th day of February, 2013, came on to be considered Docket No. BE-12-12-215, In the Matter of James E. Lister, Individually and dba James E. Lister's Funeral Home, Kilgore, Texas.

After reviewing the administrative record and the Proposal for Decision issued by the Administrative Law Judge on December 5, 2012, I have determined that the findings of fact and conclusions of law are supported by the evidence of record and applicable law.

I, therefore, ADOPT the Proposal for Decision, including specifically the findings of fact and conclusions of law that are set forth in the Proposal for Decision and incorporate in this order the findings of fact and conclusions of law therein as if set out in full in this Order.

Based on the record and the findings of fact and conclusions of law, I conclude that the following are justified and appropriate under the factors required law: (1) that James E. Lister, Individually and dba James E. Lister's Funeral Home should be required to pay restitution in the amount of \$3,000.00; (2) that an administrative penalty in the amount of \$2,000.00 should be assessed against James E. Lister, Individually and dba James E. Lister's Funeral Home; and, (3) that costs of this proceeding in the amount of \$60.00 should be paid by James E. Lister, Individually and dba James E. Lister's Funeral Home.

It is, therefore, ORDERED that restitution the amount of \$3,000.00 be and is hereby DEMANDED of James E. Lister, Individually and dba James E. Lister's Funeral Home.

It is, further, ORDERED that an administrative penalty in the amount of \$2,000.00 be and is hereby ASSESSED against respondent James E. Lister, Individually and dba James E. Lister's Funeral Home.

It is further ORDERED that the costs of this proceeding in the amount of \$60.00 be and are hereby ASSESSED against James E. Lister, Individually and dba James E. Lister's Funeral Home.

James E. Lister, Individually and dba James E. Lister's Funeral Home, is hereby ORDERED to pay to the Texas Department of Banking (1) restitution in the amount of \$3,000.00, (2) an administrative penalty in the amount of \$2,000.00, and (3) costs of this proceeding in the amount of \$60.00.

All relief that was requested but not granted or otherwise disposed of herein is denied.

SIGNED and ENTERED this 6th day of February, 2013.

/s/ Charles G. Cooper
Charles G. Cooper, Commissioner
Texas Department of Banking

IN THE MATTER OF	§	BEFORE THE BANKING
JAMES E. LISTER,	§	
INDIVIDUALLY AND DBA	§	COMMISSIONER OF TEXAS
JAMES E. LISTER'S FUNERAL HOME,	§	
KILGORE, TEXAS	§	AUSTIN, TRAVIS COUNTY, TEXAS

PROPOSAL FOR DECISION

This Proposal for Decision is issued following consideration of the record consisting of testimony and documentary evidence that were received at hearing on November 28, 2012.

STATEMENT OF THE CASE

This is an enforcement action concerning prepaid funeral services, which the staff of the Department of Banking initiated. Department staff alleges the respondent, James E. Lister, Individually and dba James E Lister's Funeral Home, in Kilgore, Texas, violated the *Texas Finance Code* (1) by engaging in the sale of a Prepaid Funeral Benefits Contract (PFBC) to an individual without a permit, in violation of *Texas Finance Code* Section 154.101; and, (2) by failing to timely deposit the proceeds from the sale of a PFBC in trust or to submit such proceeds to a licensed insurance company as premiums, in violation of *Texas Finance Code* Sections 154.253 and 154.203.

DISCUSSION

SUMMARY OF THE PROCEEDING

Notice of hearing was timely served on the respondent, Mr. James E. Lister. Mr. Lister did not appear at the hearing. In a letter to the Department requesting a continuance of the hearing, Mr. Lister acknowledged that he sold a Prepaid Funeral Benefits Contract and failed to put the proceeds in an account.

Department staff, represented by Robert Giddings, presented evidence of violations consisting of documents and testimony from Jesse Saucillo. The evidence shows that the respondent did not have a permit to sell Prepaid Funeral Benefits Contracts to the public; that the respondent sold a Prepaid Funeral Benefits Contract to an individual in the year 2000; that the individual paid \$3,000.00 for the Prepaid Funeral Benefits Contract; and, that the respondent did not deposit the proceeds in trust or with a licensed insurance company as an insurance premium. The evidence also shows that James E. Lister's Funeral Home is no longer in business, that funeral services under the Prepaid Funeral Benefits Contract were not provided after the buyer's death, and that the money that was paid for the sale of the Prepaid Funeral Benefits Contract was not returned to the buyer's estate or her heirs or descendants. The evidence further shows that the Department of Banking notified James E. Lister of the violation and demanded that he correct the violation, but that he did not correct the violation within 31 days after receiving the notice. The Administrative Law Judge concludes that the respondent committed violations of the law and recommends an order requiring restitution, assessing an administrative penalty, and requiring payment of the costs of hearing.

APPLICABLE LAW

Finance Code Chapter 154 - Prepaid Funeral Services

Chapter 154 of the Finance Code sets forth the law for the sale of prepaid funeral services and has the following stated purpose: (1) limit the manner in which a person may accept funds in prepayment of funeral services to be performed in the future; (2) provide a regulatory framework to give the public an opportunity to arrange and pay for funerals in

advance of need; and, (3) provide all safeguards to protect the prepaid funds and to assure that the funds will be available to pay for prearranged funeral services.

Section 154.101 requires that a person must have a permit to sell a Prepaid Funeral Benefits Contract.

Section 154.253 requires for the sale of a trust-funded Prepaid Funeral Benefits Contract that the funds received from the sale must be deposited in trust. Section 154.203 requires for the sale of an insurance-funded Prepaid Funeral Benefits Contract that the funds received from the sale be paid to the insurance company as premiums for the contract.

**Finance Code Sections 154.411 and 154.406
Restitution and Administrative Penalties**

Section 154.411 provides that the commissioner may issue an order to a person requiring restitution if, after notice and opportunity for hearing, the commissioner finds that the person failed to deposit money in accordance with Subchapter F, or misappropriated, converted, or illegally withheld or failed or refused to pay on demand money entrusted to the person that belongs to the beneficiary under a prepaid funeral benefits contract.

Section 154.406 provides, in pertinent part, that after notice and opportunity for hearing, the commissioner may impose an administrative penalty on a person who: (1) violates Chapter 154 or a final order of the commissioner or rule of the commission and does not correct the violation before the 31st day after the date the person receives written notice of the violation from the department; or (2) engages in a pattern of violations, as determined by the commissioner. Under Section 154.406, the amount of the penalty for each violation may not exceed \$1,000 for each day the violation occurs and in determining the amount of the

penalty, the commissioner shall consider the seriousness of the violation, the person's history of violations, and the person's good faith in attempting to comply with the chapter.

ANALYSIS BY THE ADMINISTRATIVE LAW JUDGE

An Order of Restitution and Assessment of An Administrative Penalty Is Authorized Under the Law Applied to the Facts

The evidence proves the occurrence of violations of the laws regulating the sale of prepaid funeral services, as charged by the staff, and supports an order requiring restitution and assessing an administrative penalty.

The Commissioner Has Discretion To Determine the Amount of Penalty

Section 154.406 (c) provides that, in determining the amount of the penalty, the commissioner shall consider the seriousness of the violation, the person's history of violations, and the person's good faith in attempting to comply with this chapter. The staff asks for a penalty in the amount of \$2,000.00. A penalty in that amount is justified by the statute, which authorizes a penalty not to exceed \$1,000.00 for each day of each violation.

FINDINGS OF FACT

1. Proper notice of hearing was timely given to the respondent, James E. Lister, Individually and dba James E. Lister's Funeral Home, which was located in Kilgore, Texas.
2. James E. Lister, respondent herein, was the owner and operator of James E. Lister's Funeral Home in Kilgore, Texas, during the year 2000, which is the pertinent time in this case.
3. James E. Lister sold a Prepaid Funeral Benefits Contract to LMB in the year 2000 and collected \$3,000.00 from her for the sale of the contract.
4. James E. Lister did not deposit the \$3,000.00 in a trust for a trust-funded contract or pay the \$3,000.00 to an insurance company for an insurance-funded contract.

5. James E. Lister's Funeral Home is no longer in business.
6. James E. Lister or James E. Lister's Funeral Home Funeral did not provide or cause to be provided funeral services to the buyer of the Prepaid Funeral Benefits Contract after her death and did not return the money that was paid for the sale of the Prepaid Funeral Benefits Contract was to the buyer's estate or her descendants.
7. The Department of Banking notified James E. Lister of the violation and demanded that he correct the violation, but he did not correct the violation within 31 days after receiving the notice.
8. The Department of Banking paid \$60,00 for service of the notice of the hearing in this case.

CONCLUSIONS OF LAW

1. The Commissioner of Banking has jurisdiction to enforce provisions of the *Texas Finance Code* concerning the business prepaid funeral benefits contracts and, specifically, with respect to the actions of James E. Lister, Individually and dba James E. Lister's Funeral Home, m Kilgore, Texas, which are charged in this docket.

2. James E. Lister, Individually and dba James E. Lister's Funeral Home, violated the *Texas Finance Code* by selling a Prepaid Funeral Services Contract to a consumer without having a permit that authorized such a sale.

3. James E. Lister, Individually and dba James E. Lister's Funeral Home, violated the *Texas Finance Code* by failing to deposit the proceeds from the sale of a Prepaid Funeral Services Contract in a trust or pay the proceeds of the sale to an insurance company.

4. James E. Lister, Individually and dba James E. Lister's Funeral Home, violated the *Texas Finance Code* by failing to provide funeral services to the individual after her death or to return the proceeds of the sale to the decedent's estate or her heirs or descendants.

5. The Commissioner of Banking has the authority to order restitution by James E. Lister, Individually and dba James E Lister's Funeral Home, in the amount of \$3,000.00.

6. The Commissioner of Banking, in his discretion, has the authority to assess an administrative penalty against James E. Lister, Individually and dba James E Lister's Funeral Home, in an amount not to exceed \$1,000 for each day of each violation.

7. An administrative penalty in the amount up to \$2,000.00 is supported by the evidence and is reasonable under the provisions of Texas Finance Code Section 154.

8. The Commissioner of Banking has the authority to assess the costs of this proceeding against James E. Lister, Individually and dba James E Lister's Funeral Home, in the amount of \$60.00.

RECOMMENDATION

Under the applicable provisions of Finance Code Chapter 154, the evidence supports and the Administrative Law Judge recommends an order against James E. Lister, Individually and dba James E Lister's Funeral Home, that (1) requires restitution in the amount of \$3,000.00; (2) assesses an administrative penalty in the amount of \$2,000.00; and, (3) requires payment of costs in the amount of \$60.00.

Respectfully submitted,

/s/ Donald N. Walker
Donald N. Walker
Administrative Law Judge

SIGNED: December 5, 2012