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BEFORE THE BOARD OF COMMISSIONERS
FOR LINCOLN COUNTY, OREGON

In the Matter of
AN ORDINANCE PROVIDING FOR
DISPOSAL OF REMAINS OF
DECEASED INDIGENTS AT COUNTY
EXPENSE

Lincoln County Legal Counsel
ORDINANCE # 240

The board hereby ORDAINS as follows:

SECTION I:

In the event of death of any person receiving Adult and Family Services support in Lincoln County at the time of his/her death and for which no other funds are available for disposal of the remains of the deceased, the Lincoln County Health Department shall cause the remains to be disposed of by cremation a county expense except that disposal shall be by burial when there is substantial evidence that cremation would violate the deceased's religious tenets.

SECTION II:

The health department shall contract as necessary to dispose of the remains of the deceased as required in Section I.

SECTION III:

The health department shall recover the cost of disposal from any person, estate, or agency responsible therefor.

SECTION IV:

In the event the state provides funding for the disposal of the remains of the deceased Adult and Family Services recipients in any county in Oregon, the health department shall not dispose of those remains at county expense.

SECTION V:

This ordinance being necessary for the immediate preservation of the public peace, health, safety, and welfare, an emergency is declared to exist and this ordinance takes effect on its adoption.

DATED this 19th day of March, 1986.

LINCOLN COUNTY BOARD OF COMMISSIONERS

Bob Weskinen Chairman
R. D. Gantz Commissioner
Alberta Bryan Commissioner

Lincoln County Legal Counsel
Lincoln County Courthouse
225 W. Olive Street
Newport, OR 97165
Phone: 265-6611 ext 308

ADMINISTRATIVE RULES ADOPTED PURSUANT TO
LINCOLN COUNTY CODE
SECTION RELATING TO THE
DISPOSAL OF REMAINS OF DECEASED PERSONS AT COUNTY EXPENSE

1. The purpose of these rules is to provide standards by which burials and cremations may be funded pursuant to Lincoln County Code Section in conjunction with Lincoln County Funeral Directors. Funding under these rules may be allowed only with regard to funerals performed by Lincoln County funeral directors within the geographic boundaries of Lincoln County.

2. Approximately \$9,000 is anticipated to be budgeted to fund burials and cremations for the 1986-87 fiscal year. Reimbursements to funeral directors providing services will be made on a quarterly basis so that the maximum county funds available in any given quarter, regardless of the number of actual bodies disposed, will be one quarter of budgeted funds. For fiscal year 1986-87, this figure is anticipated to be \$2,250 per quarter.

3. In order for a funeral director to receive county compensation for burial or cremation for which no other funds are available, the funeral director must:

a. Provide Lincoln County Health Department with all relevant information and documents relating to the family members of the deceased, and the estate of the deceased for purposes of collection;

b. Provide a burial or cremation in consideration of the family members' wishes and the provisions of Lincoln County Code Section , providing the best possible service for the deceased;

c. Provide evidence of compliance with the above standards for payment to be made by Lincoln County on a quarterly basis;

4. Providing the funeral director has complied with the provisions of Lincoln County Code Section and these rules, at the end of each quarter, the budgeted county funds will be divided among all eligible claims in an amount not to exceed \$500 per body;

5. At the end of the fiscal year, if the funds allocated for the burials or cremations hereunder have not been expended, retroactive supplemental payments may be authorized by the county commissioners to provide further reimbursement to funeral directors in an amount not to exceed \$500 per body;

6. County payments provided under Lincoln County Code Section and these rules shall constitute the sole obligation of the county relating to reimbursement, and the county will not be responsible for any separate cemetery or other bills relating to disposition of the final remains of the deceased;

7. The health department shall make reasonable efforts to recoup burial expenses from responsible sources.

Rules on indigent burials

DR *J. P. M.* *A. G. B.*

msc *ch* *o.g.*

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Lincoln County Legal Counsel

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DEPARTMENT OF JUSTICE

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December 13, 1985

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Paul - your copy

cc Hilda

Keith Putman, Administrator
Adult and Family Services Division
417 Public Service Building
Salem, Oregon 97310

Re: Opinion Request OP-5879

Dear Mr. Putman:

You ask five questions regarding state and county liability for burial of persons who either were receiving or had applied for and were eligible for public assistance at the time of their death. The first four questions assume that there are unclaimed remains of a person who had applied for or was receiving public assistance at the time of death, that the person's estate lacked sufficient assets to cover the cost of burial, and that the cost of burial had not been paid in advance.

First, you ask whether subsequent to July 1, 1985, any state agency has any legal obligation to use public funds to pay for the disposition of such unclaimed remains. Second, you inquire whether the Adult and Family Services Division (AFS) has the authority after July 1, 1985, to pay for such disposition. Third, you ask whether counties are permitted to pay for the disposition of unclaimed remains. Fourth, you inquire whether counties are required to pay for such disposition. Your final question is whether the Emergency Board can provide funds to AFS for the purpose of paying for burials either by allocating funds to the division or by authorizing the transfer of funds between expenditure classifications within the division budget.

For the reasons that follow, we conclude that with two exceptions, no state agency has a legal duty to use public funds to pay for the burials, and that AFS has no authority to pay for the burials. Further, counties are both permitted and required to pay for the burials only under limited circumstances. We also conclude that the Emergency Board lacks legal authority to provide AFS with funds for burials.

Introduction: Public Duty to Provide for Burial

There is no obligation at common law resting upon the state or its subdivisions to furnish relief for the poor. See Multnomah County v. Luihn, 180 Or 528, 549, 178 P2d 159 (1947). Therefore, if such a duty exists it must be found in the constitution or statutes. We find no authority for the proposition that there is a constitutional right to burial. We turn, then, to statutory law.

The Nature of AFS's Duty to Provide Burial Costs

Prior to July 1, 1985, the Adult and Family Services Division paid for the expense of such funerals under two separate assistance programs. The first program, the "general assistance" program, is a state-funded program. Because it is not funded by the federal government, there are no federal statutes or regulations governing the state's operation of the program. State statutory authority to conduct burials emanates from the definition of general assistance found in ORS 411.010. In pertinent part, it reads:

"(2) 'General assistance' means assistance or service of any character provided to needy persons not otherwise provided for to the extent of such need and the availability of funds, including medical, surgical and hospital or other medical care and costs of burials of needy persons." ORS 411.010(2).
(Emphasis added.)

Pursuant to that definition, if no funds are available, then burials need not be provided. As will be discussed shortly, no funds are available for burials after July 1, 1985, and therefore AFS has no duty to bury needy persons under the general assistance program.

The second program where AFS paid for burials prior to July 1, 1985, was the "old-age assistance" program. That program is operated in cooperation with the federal government. Federal statutes and regulations govern the general operation of the program. See 42 USC § 301, et seq.; 45 CFR 235.40, et seq. However, no federal statute or regulation requires the state to provide for the burial of a person receiving such assistance.

The state statute regulating the duty of AFS to pay for burials is ORS 413.029:

"In every case where the beneficiary dies and funeral expenses therefor have not been paid for in advance or the deceased leaves no real property or

money sufficient to provide a decent burial, the Adult and Family Services Division shall provide such a burial out of funds available for carrying out the purposes of this chapter." (Emphasis added.)

Again, the requirement to provide a burial is contingent on funds being available.

The legislature enacted Oregon Laws 1985, chapter 825, which appropriated funds to the Adult and Family Services Division to conduct all public assistance programs, including general assistance and old age assistance. Section 4 of that Act specifically prohibited use of any appropriated funds for burials, stating:

"Notwithstanding ORS 411.010 and 413.029, the funds appropriated by this Act shall not be used to meet the costs of burials." Or Laws 1985, ch 825.

A question arises as to whether that section is constitutional under Article IX, section 7 of the Oregon Constitution, which states:

"Laws making appropriations, for the salaries of public officers, and other current expenses of the State, shall contain provisions upon no other subject."

There is no question that Oregon Laws 1985, chapter 825 is an appropriation bill within the meaning of the constitutional provision. However, since section 4 of that bill does not appropriate money, an argument can be made that it runs afoul of Article IX, section 7. In discussing that constitutional provision, the Oregon Supreme Court stated in Burch v. Earhart, 7 Or 58, 66 (1879):

". . . The object had in view by the insertion of that section in the constitution was to prevent the introduction of such matters of legislation into appropriation bills as were not germane, and thus make these bills the vehicle of carrying through matters of doubtful expediency, such as could not be passed upon their own merits."

The overall purpose of enacting section 4 of Oregon Laws 1985, chapter 825, was to restrict or limit the use of moneys appropriated in the Act. While the section refers to ORS 411.010

and 413.029, an examination of those statutes reveals that their operation is dependent upon the availability of appropriated money. The bill section does not attempt to repeal either statute; it instead seeks to render them inoperative in this biennium by creating a condition anticipated in both statutes, i.e., a lack of money.

However, the legislature went further than merely "disappropriating" money for the general assistance or the "old-age assistance" program. It singled out a specific portion of each program, i.e., the burial portion, for the "disappropriation." Under ORS 411.010, the "general assistance" statute, the legislature singled out costs of burial from medical, surgical and hospital or other remedial care included in the definition of general assistance. While the subject of ORS 413.029 is burial of old-age assistance beneficiaries, that statute mandates that AFS provide burials out of funds available for the old-age assistance program.

It can be argued that in both statutes, the "availability of funds" relates to the overall program and not to individual components of the program. Further, the argument would continue, because the legislature did "disappropriate" money for an individual component of each program, it was attempting to pass a matter in an appropriation bill that might not have passed on its own merits. This, the argument would conclude, was the very evil that Article IX, section 7 of the Oregon Constitution was attempting to prohibit.

While this argument has some appeal, it must be kept in mind that what the legislature was doing was in fact "disappropriating" money. While it was expressing a policy choice in section 4 of the bill, that choice per se is not proscribed by the constitution. After all, every appropriation bill is the embodiment of many policy choices. The very nature of the appropriation process calls for the legislature to make policy choices of what should and should not be included in individual programs, and to make policy choices as to which programs and agencies receive what portion of the finite amount of money available to run the state.

It is well established that every legislative act is presumed to be constitutional. Adm. Vets. Affairs v. U.S. Nat. Bank, 191 Or 203, 211, 229 P2d 213 (1951). A constitutional provision relating to the subject matter of an act should be reasonably and liberally construed to sustain legislation not within the mischief aimed against in the constitutional provisions. Cf. Tompkins v. District Boundary Board, 180 Or 339, 346, 177 P2d 416 (1947) (title of legislative act must express subject matter con-

tained therein). Given those principles of construction, it is our opinion that the purpose of section 4, restriction of an appropriation, is so clearly related to the overall purpose of appropriating money that it cannot be said to offend Article IX, section 7 of the Oregon Constitution.

Given the constitutionality of the provision, it is necessary to analyze its effect upon the two public assistance programs. In the general assistance program, provision of burial services is strictly dependent on "availability of funds." ORS 411.010(2). Pursuant to Oregon Laws 1985, chapter 825, there are no funds available to AFS to meet the costs of burial. Therefore, AFS is not required to pay for the costs of burials for general assistance recipients.

The old-age assistance statute presents a slightly different question, because it requires that AFS provide burials "out of funds available for carrying out the purposes of the chapter." ORS 413.029. Since Oregon Laws 1985, chapter 825 does contain unrestricted funds for the old-age assistance program, it could be argued that AFS is required to conduct burials. This argument must fail, however, because section 4 of the Act specifically notes that "[n]otwithstanding . . . ORS 413.029, the funds appropriated by this Act shall not be used to meet the costs of burials." The language of chapter 825 has precedence over the language in ORS 413.029, because the specific statute controls the general statute. ORS 174.020.

Since the 1985 legislature under chapter 825 prohibited the use of moneys appropriated to AFS for burials under ORS 411.010 and 413.029, those statutes do not authorize or require AFS to bury public assistance applicants or recipients. No other Oregon statutes authorize AFS to bury public assistance applicants or recipients. This also has the effect of prohibiting AFS from paying for recipients' burials and then recovering the money out of recipients' estates.

While the legislature prohibited AFS from using the money appropriated to it to pay for the costs of burials, it did not prohibit AFS from performing that duty should other funds become available for that purpose. If the Emergency Board were legally able to and did make available funds to AFS for such purpose, then AFS would be required to perform burials under ORS 411.010 and 413.029. However, as discussed below, the Emergency Board lacks legal authority to make such funds available.

The Powers of the Emergency Board

There is no doubt that the Emergency Board is vested with very broad powers to allocate funds during the interim between legislative sessions when an emergency exists which affects the functions and expenditures of state agencies. 37 Op Atty Gen 130, 134 (1974). Furthermore, the authority to determine whether, under all the circumstances and facts stated, an "emergency exists" resides with the Emergency Board. 32 Op Atty Gen 304 (1965); 30 Op Atty Gen 284, 285 (1961). Finally, it is apparent from the definition of an emergency set out in the Act, that the authority granted to the Emergency Board to find an emergency exists is, for all practical purposes, unlimited. See 25 Op Atty Gen 140, 141 (1951).

ORS 291.322(1) defines "emergency" as:

". . . any catastrophe, disaster or unforeseen or unanticipated condition or circumstance, or abnormal change of conditions or circumstances, affecting the functions of a state agency and the expenditure requirements for the performance of these functions."

While it is for the Emergency Board to determine whether events surrounding the burial of indigents are an unforeseen or unanticipated condition, the words "unforeseen or unanticipated" refer to the expectations that existed as of the last regular session of the Legislative Assembly.

Assuming that the Emergency Board did choose to declare an emergency, there remains the question whether there is legal authorization to provide funds either by an allocation of funds to the agency or by a transfer of funds within the agency budget. The powers of the Emergency Board do not exceed those allowed by the Oregon Constitution and provided for by statute. Article III, section 3 of the Oregon Constitution authorizes the Legislative Assembly to establish by law a joint committee composed of both houses of the Legislative Assembly, which may exercise during the interim between sessions certain specified powers "as may be conferred upon it by law." Among the powers described in Article III, section 3 of the Oregon Constitution, the following are pertinent:

"(a) Where an emergency exists, to allocate to any state agency, out of any emergency fund that may be appropriated to the committee for that purpose, additional funds beyond the amount appropriated to the agency by the Legislative

Assembly, or funds to carry out an activity required by law for which an appropriation was not made.

". . . .

"(d) Where an emergency exists, to revise or amend the budgets of state agencies to the extent of authorizing transfers between expenditure classifications within the budget of an agency."

ORS 291.324 creates the Emergency Board and ORS 291.326(1)(a) and (d) set forth, in haec verba, the provisions of the constitution quoted above. Thus, the exercise of the statutory powers is appropriate under the Oregon Constitution. We turn, then, to the questions presented with respect to the exercise of these powers.

ORS 291.326(1)(a) authorizes the board to allocate to an agency either "additional funds beyond the amount appropriated to the agency by the Legislative Assembly," or "funds to carry out an activity required by law for which an appropriation was not made." (Emphasis added.) These two phrases are written in the disjunctive. Either funds are appropriated, or they are not. Section 4 of chapter 825, Oregon Laws 1985, makes it clear that there was no appropriation for burials. Because of the plain language of that section, there is no statutory or constitutional authorization to allocate "additional" funds to the agency.

Since there was no appropriation, the only way the Emergency Board can allocate funds for burials to AFS under ORS 291.326(1)(a) is if the funds are to carry out an activity required by law. The only statute which specifically addresses the duty of Adult and Family Services Division to bury indigents is ORS 413.029, which provides:

"In every case where the beneficiary dies and funeral expenses therefor have not been paid for in advance or the deceased leaves no real property or money sufficient to provide a decent burial, the Adult and Family Services Division shall provide such a burial out of funds available for carrying out the purposes of this chapter."
(Emphasis added.)

Because section 4, chapter 825 of Oregon Laws 1985 specifically provides that, notwithstanding ORS 411.010 and 413.029, the funds appropriated to AFS shall not be used to meet the cost of burials, there are no "funds available" from the appropriations made by the Act. It may be that there are "funds available" from

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other sources, such as federal money. However, even if such funds are available, AFS is only "required by law" to provide for the burial of indigents to the extent of such funds. Because AFS is not "required by law" to provide burials except to the extent that funds are available, the Emergency Board may not provide additional funds under ORS 291.326(1)(a).

The only other grant of power to the Emergency Board which might be applicable here is found in ORS 291.326(d), which provides that the board has power:

"Where an emergency exists, to revise or amend the budgets of state agencies to the extent of authorizing transfers between expenditure classifications within the budget of an agency."

Under this provision, if there is to be a transfer between expenditure classifications, one must find a classification that could include the expenditure requested. However, the Legislative Assembly foreclosed that possibility by enacting section 4, chapter 825 of Oregon Laws 1985. None of the funds appropriated under any expenditure classification, may be used to meet the cost of burials. Therefore, even though the Emergency Board has power to revise and amend budgets to the extent of authorizing transfers between expenditure classifications, this power is insufficient to authorize an expenditure for burial of indigents. See 37 Op Atty Gen 1125 (1976).

As explained in the above discussion, it is clear that the Emergency Board has not been granted the power either by the Oregon Constitution or by statute to provide funding for burials, given the actions of the 1985 legislature. Thus the Emergency Board can do nothing here.

An argument can be made that Oregon Laws 1985, chapter 825 cannot limit the powers of the Emergency Board. This argument is based on ORS 291.326(3), which states:

"The laws enacted by the Legislative Assembly making appropriations and limiting expenditures, or either, are not intended to limit the powers of the Emergency Board."

This statute cannot grant the Emergency Board any powers in excess of those granted by the Oregon Constitution. The powers enumerated in Article III, section 3 of the constitution require that, for the Emergency Board to act, there must be either an appropriation of funds, or, if there was no appropriation, that the activity be required by law. Since there was no

appropriation by the 1985 legislature, and the payment of burial costs is not otherwise required by law, the constitution simply does not grant the board the underlying authority to act. The statute cannot authorize board action here.

The Responsibility of Other State Agencies to Provide Burial Costs

The state is responsible for payment of burial expenses of recipients in two other situations. The first involves the State Board of Higher Education, through its educational institutions. The institutions are responsible for paying for the costs of burial and cremation and delivery of the ashes to a relative whenever a corpse is used for the purposes authorized by ORS 97.170. ORS 97.200. Under ORS 97.170, unclaimed bodies which are in the charge of a public officer shall be offered to the Demonstrator of Anatomy of the State Department of Higher Education. The demonstrator may authorize use of the body by an educational institution for purposes of medical instruction or the advancement of medical science.

The second situation where a state agency is responsible for payment of burial costs of a public assistance recipient involves the Children's Services Division. That agency has responsibility under ORS 97.170(4) for payment of burial or cremation expenses when the agency has guardianship of a child at the time of death, the body is unclaimed, and the agency authorizes burial.

County Authority and Responsibility for Payment of Burial Costs

We now turn to the issues of county authority and responsibility for burials. In one situation, the county is clearly liable for payment of a portion of funeral costs. Under ORS 408.730, upon the happening of certain events not relevant here, the county may be required to pay up to \$100 for the funeral expenses of an indigent war veteran and the indigent wives, widows, and minor children of the war veteran. The county has the option either of levying a tax for payment of such expenses or of paying the money out of the general funds in the county treasury. ORS 408.720.

Beyond the above-described situation, the authority of the county to pay and the requirement that it pay such costs is less clear. The most direct statement of responsibility is found in ORS 146.075(5), which states:

"(5) Expenses of burial or other disposition of an unclaimed body shall be paid by the county where the death occurs, as provided by ORS 146.100(2), in the manner provided by ORS 146.121(4)." (Emphasis added.)

To what "unclaimed body" is the statute referring? Standing alone, this subsection would appear to impose upon the counties a duty to pay for the disposition expenses of all unclaimed bodies. However, statutes which are part of the same Act must be construed together, giving effect to the manifest legislative intent and the meaning of each provision thereof, if possible. Gevurtz v. Myers, 10 Or App 491, 493, 500 P2d 730 (1972); State v. Powell, 212 Or 684, 692, 321 P2d 333 (1958). Read in the context of the other subsections of ORS 146.075 (Or Laws 1973, ch 408, § 8), it appears that the term "unclaimed body" in subsection (5) refers to unclaimed bodies which have been the subject of a death investigation of a district medical examiner. In the absence of contrary evidence of intent, we must conclude that the context limits the application of the term "unclaimed body" to those in the custody of the district medical examiner.

In this limited circumstance, then, does the county have an unconditional duty to pay for such burial expenses? Subsection (5) of ORS 146.075 states that the expenses of burial should be paid in the manner provided by ORS 146.121(4). This latter subsection states, in pertinent part:

"(4) . . . The board of county commissioners shall pay such expenses [of cremation, calcination or burial], or any proportion thereof as may be available, from county funds annually budgeted for this purpose." (Emphasis added.)

It may be argued that the emphasized words in ORS 146.121(4) convey an intent to condition the duty to pay for burial expenses upon whether or not the county has budgeted funds for this purpose. Such an argument appears superficially similar to the one made above with respect to ORS 413.029. However, in ORS 413.029, the words "out of funds available" directly conditions the words "shall provide such a burial." ORS 146.121(4), in contrast, does not address the duty to provide for burial, which is found elsewhere. ORS 146.075(5) provides that the expenses of disposition of an unclaimed body "shall be paid by the county . . . in the manner provided by ORS 146.121(4)." This language is unconditional and it is clear that the language of ORS 146.121(4), identifying the source of payment as "county funds budgeted for this purpose," was not understood to condition the duty to pay such expenses. Nevertheless, the question remains, if no such funds are budgeted, does any duty exist at all?

There is limited legislative history addressing this issue. Jack Frost, District Attorney for Linn County, testified:

"Section 19 [now ORS 146.121] deals with a problem that can be a real problem and that is the disposition of the body of a person not claimed by any next of kin -- I mean any. The current law seems to talk about taking care of it, but it seems also to require fixed conditions that aren't even announced. In other words the counties aren't supposed to assume the expense apparently unless it can be shown he's indigent. And how do you know that sometimes? The problem is he has a deceased person's body (unintelligible) and something must be done. This provides a procedure which also contemplates current law in chapter 97 for the possibility of this body being used by one of the medical training institutions. If not so -- then, that the counties shall pay the expense and the counties shall budget their funds which will be available for the paying of these expenses." (Emphasis added.) Testimony of Jack Frost (HB 2279), House Judiciary Committee, March 5, 1973, tape 10, side 1 at 1082.

However, statements by persons who are not members of the legislature have little or no significance in statutory interpretation. Henthorn v. Grand Prairie School Dist., 287 Or 683, 691, n 5, 601 P2d 1243 (1979). And, we could find no other relevant discussion of HB 2279, now codified as ORS 146.121. We conclude that it was assumed that counties would appropriate and budget funds sufficient to carry out their duties under ORS 146.121(4). However, we find no statutory or case authority which indicates that they must do so. Therefore, we conclude as we did with respect to ORS 413.029, that if the counties do not in fact budget funds sufficient to discharge their duties to pay for the disposition of bodies under ORS 146.121(4), they have no duty to do so.

There are also other circumstances where the county may have a duty to pay for the expenses of disposition of the remains of an indigent who was receiving public assistance. The district medical examiner is required to investigate and certify the cause and manner of human deaths in a number of situations set out in ORS 146.090. See, e.g., ORS 146.095(1) and 146.100(1). When that examiner conducts an investigation, then the sheriff, or in counties with populations of 400,000 or more, the medical examiner, is required to dispose of the body pursuant to ORS 97.170 to 97.210. ORS 146.121(2). In those cases, if the body is not claimed, the Demonstrator of Anatomy does not accept it, and a state agency is not responsible for burial, then the medical

examiner may order disposition of the body. ORS 146.121(3). The county is required to pay for the expenses of such burial under ORS 146.121(4). It should be noted that the same arguments discussed above regarding county liability under ORS 146.121(4) would apply with equal force here.

A public health officer has limited authority to dispose of bodies in cases not investigated by the medical examiner. Under ORS 97.130(2), if disposition of the remains has not been directed within ten days of the date of death, a public health officer, the special administrator or the personal representative of the estate may direct and authorize disposition of remains. The county is required to appropriate sufficient funds to the county or district board of health to finance administration of the board and operation of the health department, which presumably could include costs of disposition of indigents should the county so choose. ORS 431.510. See generally ORS 431.405 to 431.550 (powers and duties of local boards of health and health officers).

The 1985 legislature clarified the manner in which the county shall dispose of the remains. Oregon Laws 1985, chapter 704, section 1, effective September 20, 1985, added a subsection (5) to ORS 97.170, which states:

"(5) When the deceased person is one for whom the county is responsible for disposition costs, and no relatives, friends or interested persons claim the body after notification is attempted under subsection (1) of this section, and after complying with this section and subsection (2) of ORS 97.130, the county shall authorize burial or cremation of the body without the consent of persons listed in ORS 97.130, in the least costly manner that complies with law."

This is an apparent effort to reduce the overall costs to the county in those cases where the county is responsible for disposition costs.

CONCLUSION

Given our conclusions herein, we are aware that there may be circumstances in which there is no public means for disposing of an unclaimed body. To some this consequence alone may appear so absurd and inhumane as to warrant a different conclusion regardless of the language and history of the legislation. But such a conclusion would be based upon preconceptions about what public policy should be, rather than the public policy which actually is expressed in the statutes themselves. We are not

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free "to insert what has been omitted" however absurd it appears, unless the language of the statute permits it. See ORS 174.010. The ability to interpret statutes does not encompass the power to legislate. Arguments that there should be in all cases some provision for disposition of unclaimed bodies at public expense should be addressed to the Legislative Assembly or to elected county commissioners.

Very truly yours,



Larry D. Thomson
Chief Counsel
General Counsel Division

LDT:LRY:RWM:mc



DEPARTMENT OF JUSTICE

GENERAL COUNSEL DIVISION

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December 13, 1985

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*Paul -
your copy*

RC

cc Hilda

*Burial
file*

Keith Putman, Administrator
Adult and Family Services Division
417 Public Service Building
Salem, Oregon 97310

Re: Opinion Request OP-5879

Dear Mr. Putman:

You ask five questions regarding state and county liability for burial of persons who either were receiving or had applied for and were eligible for public assistance at the time of their death. The first four questions assume that there are unclaimed remains of a person who had applied for or was receiving public assistance at the time of death, that the person's estate lacked sufficient assets to cover the cost of burial, and that the cost of burial had not been paid in advance.

First, you ask whether subsequent to July 1, 1985, any state agency has any legal obligation to use public funds to pay for the disposition of such unclaimed remains. Second, you inquire whether the Adult and Family Services Division (AFS) has the authority after July 1, 1985, to pay for such disposition. Third, you ask whether counties are permitted to pay for the disposition of unclaimed remains. Fourth, you inquire whether counties are required to pay for such disposition. Your final question is whether the Emergency Board can provide funds to AFS for the purpose of paying for burials either by allocating funds to the division or by authorizing the transfer of funds between expenditure classifications within the division budget.

For the reasons that follow, we conclude that with two exceptions, no state agency has a legal duty to use public funds to pay for the burials, and that AFS has no authority to pay for the burials. Further, counties are both permitted and required to pay for the burials only under limited circumstances. We also conclude that the Emergency Board lacks legal authority to provide AFS with funds for burials.

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Introduction: Public Duty to Provide for Burial

There is no obligation at common law resting upon the state or its subdivisions to furnish relief for the poor. See Multnomah County v. Luihn, 180 Or 528, 549, 178 P2d 159 (1947). Therefore, if such a duty exists it must be found in the constitution or statutes. We find no authority for the proposition that there is a constitutional right to burial. We turn, then, to statutory law.

The Nature of AFS's Duty to Provide Burial Costs

Prior to July 1, 1985, the Adult and Family Services Division paid for the expense of such funerals under two separate assistance programs. The first program, the "general assistance" program, is a state-funded program. Because it is not funded by the federal government, there are no federal statutes or regulations governing the state's operation of the program. State statutory authority to conduct burials emanates from the definition of general assistance found in ORS 411.010. In pertinent part, it reads:

"(2) 'General assistance' means assistance or service of any character provided to needy persons not otherwise provided for to the extent of such need and the availability of funds, including medical, surgical and hospital or other medical care and costs of burials of needy persons." ORS 411.010(2).
(Emphasis added.)

Pursuant to that definition, if no funds are available, then burials need not be provided. As will be discussed shortly, no funds are available for burials after July 1, 1985, and therefore AFS has no duty to bury needy persons under the general assistance program.

The second program where AFS paid for burials prior to July 1, 1985, was the "old-age assistance" program. That program is operated in cooperation with the federal government. Federal statutes and regulations govern the general operation of the program. See 42 USC § 301, et seq.; 45 CFR 235.40, et seq. However, no federal statute or regulation requires the state to provide for the burial of a person receiving such assistance.

The state statute regulating the duty of AFS to pay for burials is ORS 413.029:

"In every case where the beneficiary dies and funeral expenses therefor have not been paid for in advance or the deceased leaves no real property or

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money sufficient to provide a decent burial, the Adult and Family Services Division shall provide such a burial out of funds available for carrying out the purposes of this chapter." (Emphasis added.)

Again, the requirement to provide a burial is contingent on funds being available.

The legislature enacted Oregon Laws 1985, chapter 825, which appropriated funds to the Adult and Family Services Division to conduct all public assistance programs, including general assistance and old age assistance. Section 4 of that Act specifically prohibited use of any appropriated funds for burials, stating:

"Notwithstanding ORS 411.010 and 413.029, the funds appropriated by this Act shall not be used to meet the costs of burials." Or Laws 1985, ch 825.

A question arises as to whether that section is constitutional under Article IX, section 7 of the Oregon Constitution, which states:

"Laws making appropriations, for the salaries of public officers, and other current expenses of the State, shall contain provisions upon no other subject."

There is no question that Oregon Laws 1985, chapter 825 is an appropriation bill within the meaning of the constitutional provision. However, since section 4 of that bill does not appropriate money, an argument can be made that it runs afoul of Article IX, section 7. In discussing that constitutional provision, the Oregon Supreme Court stated in Burch v. Earhart, 7 Or 58, 66 (1879):

". . . The object had in view by the insertion of that section in the constitution was to prevent the introduction of such matters of legislation into appropriation bills as were not germane, and thus make these bills the vehicle of carrying through matters of doubtful expediency, such as could not be passed upon their own merits."

The overall purpose of enacting section 4 of Oregon Laws 1985, chapter 825, was to restrict or limit the use of moneys appropriated in the Act. While the section refers to ORS 411.010

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and 413.029, an examination of those statutes reveals that their operation is dependent upon the availability of appropriated money. The bill section does not attempt to repeal either statute; it instead seeks to render them inoperative in this biennium by creating a condition anticipated in both statutes, i.e., a lack of money.

However, the legislature went further than merely "disappropriating" money for the general assistance or the "old-age assistance" program. It singled out a specific portion of each program, i.e., the burial portion, for the "disappropriation." Under ORS 411.010, the "general assistance" statute, the legislature singled out costs of burial from medical, surgical and hospital or other remedial care included in the definition of general assistance. While the subject of ORS 413.029 is burial of old-age assistance beneficiaries, that statute mandates that AFS provide burials out of funds available for the old-age assistance program.

It can be argued that in both statutes, the "availability of funds" relates to the overall program and not to individual components of the program. Further, the argument would continue, because the legislature did "disappropriate" money for an individual component of each program, it was attempting to pass a matter in an appropriation bill that might not have passed on its own merits. This, the argument would conclude, was the very evil that Article IX, section 7 of the Oregon Constitution was attempting to prohibit.

While this argument has some appeal, it must be kept in mind that what the legislature was doing was in fact "disappropriating" money. While it was expressing a policy choice in section 4 of the bill, that choice per se is not proscribed by the constitution. After all, every appropriation bill is the embodiment of many policy choices. The very nature of the appropriation process calls for the legislature to make policy choices of what should and should not be included in individual programs, and to make policy choices as to which programs and agencies receive what portion of the finite amount of money available to run the state.

It is well established that every legislative act is presumed to be constitutional. Adm. Vets. Affairs v. U.S. Nat. Bank, 191 Or 203, 211, 229 P2d 213 (1951). A constitutional provision relating to the subject matter of an act should be reasonably and liberally construed to sustain legislation not within the mischief aimed against in the constitutional provisions. Cf. Tompkins v. District Boundary Board, 180 Or 339, 346, 177 P2d 416 (1947) (title of legislative act must express subject matter con-

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tained therein). Given those principles of construction, it is our opinion that the purpose of section 4, restriction of an appropriation, is so clearly related to the overall purpose of appropriating money that it cannot be said to offend Article IX, section 7 of the Oregon Constitution.

Given the constitutionality of the provision, it is necessary to analyze its effect upon the two public assistance programs. In the general assistance program, provision of burial services is strictly dependent on "availability of funds." ORS 411.010(2). Pursuant to Oregon Laws 1985, chapter 825, there are no funds available to AFS to meet the costs of burial. Therefore, AFS is not required to pay for the costs of burials for general assistance recipients.

The old-age assistance statute presents a slightly different question, because it requires that AFS provide burials "out of funds available for carrying out the purposes of the chapter." ORS 413.029. Since Oregon Laws 1985, chapter 825 does contain unrestricted funds for the old-age assistance program, it could be argued that AFS is required to conduct burials. This argument must fail, however, because section 4 of the Act specifically notes that "[n]otwithstanding . . . ORS 413.029, the funds appropriated by this Act shall not be used to meet the costs of burials." The language of chapter 825 has precedence over the language in ORS 413.029, because the specific statute controls the general statute. ORS 174.020.

Since the 1985 legislature under chapter 825 prohibited the use of moneys appropriated to AFS for burials under ORS 411.010 and 413.029, those statutes do not authorize or require AFS to bury public assistance applicants or recipients. No other Oregon statutes authorize AFS to bury public assistance applicants or recipients. This also has the effect of prohibiting AFS from paying for recipients' burials and then recovering the money out of recipients' estates.

While the legislature prohibited AFS from using the money appropriated to it to pay for the costs of burials, it did not prohibit AFS from performing that duty should other funds become available for that purpose. If the Emergency Board were legally able to and did make available funds to AFS for such purpose, then AFS would be required to perform burials under ORS 411.010 and 413.029. However, as discussed below, the Emergency Board lacks legal authority to make such funds available.

The Powers of the Emergency Board

There is no doubt that the Emergency Board is vested with very broad powers to allocate funds during the interim between legislative sessions when an emergency exists which affects the functions and expenditures of state agencies. 37 Op Atty Gen 130, 134 (1974). Furthermore, the authority to determine whether, under all the circumstances and facts stated, an "emergency exists" resides with the Emergency Board. 32 Op Atty Gen 304 (1965); 30 Op Atty Gen 284, 285 (1961). Finally, it is apparent from the definition of an emergency set out in the Act, that the authority granted to the Emergency Board to find an emergency exists is, for all practical purposes, unlimited. See 25 Op Atty Gen 140, 141 (1951).

ORS 291.322(1) defines "emergency" as:

". . . any catastrophe, disaster or unforeseen or unanticipated condition or circumstance, or abnormal change of conditions or circumstances, affecting the functions of a state agency and the expenditure requirements for the performance of these functions."

While it is for the Emergency Board to determine whether events surrounding the burial of indigents are an unforeseen or unanticipated condition, the words "unforeseen or unanticipated" refer to the expectations that existed as of the last regular session of the Legislative Assembly.

Assuming that the Emergency Board did choose to declare an emergency, there remains the question whether there is legal authorization to provide funds either by an allocation of funds to the agency or by a transfer of funds within the agency budget. The powers of the Emergency Board do not exceed those allowed by the Oregon Constitution and provided for by statute. Article III, section 3 of the Oregon Constitution authorizes the Legislative Assembly to establish by law a joint committee composed of both houses of the Legislative Assembly, which may exercise during the interim between sessions certain specified powers "as may be conferred upon it by law." Among the powers described in Article III, section 3 of the Oregon Constitution, the following are pertinent:

"(a) Where an emergency exists, to allocate to any state agency, out of any emergency fund that may be appropriated to the committee for that purpose, additional funds beyond the amount appropriated to the agency by the Legislative

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Assembly, or funds to carry out an activity required by law for which an appropriation was not made.

". . . .

"(d) Where an emergency exists, to revise or amend the budgets of state agencies to the extent of authorizing transfers between expenditure classifications within the budget of an agency."

ORS 291.324 creates the Emergency Board and ORS 291.326(1)(a) and (d) set forth, in haec verba, the provisions of the constitution quoted above. Thus, the exercise of the statutory powers is appropriate under the Oregon Constitution. We turn, then, to the questions presented with respect to the exercise of these powers.

ORS 291.326(1)(a) authorizes the board to allocate to an agency either "additional funds beyond the amount appropriated to the agency by the Legislative Assembly," or "funds to carry out an activity required by law for which an appropriation was not made." (Emphasis added.) These two phrases are written in the disjunctive. Either funds are appropriated, or they are not. Section 4 of chapter 825, Oregon Laws 1985, makes it clear that there was no appropriation for burials. Because of the plain language of that section, there is no statutory or constitutional authorization to allocate "additional" funds to the agency.

Since there was no appropriation, the only way the Emergency Board can allocate funds for burials to AFS under ORS 291.326(1)(a) is if the funds are to carry out an activity required by law. The only statute which specifically addresses the duty of Adult and Family Services Division to bury indigents is ORS 413.029, which provides:

"In every case where the beneficiary dies and funeral expenses therefor have not been paid for in advance or the deceased leaves no real property or money sufficient to provide a decent burial, the Adult and Family Services Division shall provide such a burial out of funds available for carrying out the purposes of this chapter."
(Emphasis added.)

Because section 4, chapter 825 of Oregon Laws 1985 specifically provides that, notwithstanding ORS 411.010 and 413.029, the funds appropriated to AFS shall not be used to meet the cost of burials, there are no "funds available" from the appropriations made by the Act. It may be that there are "funds available" from

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other sources, such as federal money. However, even if such funds are available, AFS is only "required by law" to provide for the burial of indigents to the extent of such funds. Because AFS is not "required by law" to provide burials except to the extent that funds are available, the Emergency Board may not provide additional funds under ORS 291.326(1)(a).

The only other grant of power to the Emergency Board which might be applicable here is found in ORS 291.326(d), which provides that the board has power:

"Where an emergency exists, to revise or amend the budgets of state agencies to the extent of authorizing transfers between expenditure classifications within the budget of an agency."

Under this provision, if there is to be a transfer between expenditure classifications, one must find a classification that could include the expenditure requested. However, the Legislative Assembly foreclosed that possibility by enacting section 4, chapter 825 of Oregon Laws 1985. None of the funds appropriated under any expenditure classification, may be used to meet the cost of burials. Therefore, even though the Emergency Board has power to revise and amend budgets to the extent of authorizing transfers between expenditure classifications, this power is insufficient to authorize an expenditure for burial of indigents. See 37 Op Atty Gen 1125 (1976).

As explained in the above discussion, it is clear that the Emergency Board has not been granted the power either by the Oregon Constitution or by statute to provide funding for burials, given the actions of the 1985 legislature. Thus the Emergency Board can do nothing here.

An argument can be made that Oregon Laws 1985, chapter 825 cannot limit the powers of the Emergency Board. This argument is based on ORS 291.326(3), which states:

"The laws enacted by the Legislative Assembly making appropriations and limiting expenditures, or either, are not intended to limit the powers of the Emergency Board."

This statute cannot grant the Emergency Board any powers in excess of those granted by the Oregon Constitution. The powers enumerated in Article III, section 3 of the constitution require that, for the Emergency Board to act, there must be either an appropriation of funds, or, if there was no appropriation, that the activity be required by law. Since there was no

appropriation by the 1985 legislature, and the payment of burial costs is not otherwise required by law, the constitution simply does not grant the board the underlying authority to act. The statute cannot authorize board action here.

The Responsibility of Other State Agencies to Provide Burial Costs

The state is responsible for payment of burial expenses of recipients in two other situations. The first involves the State Board of Higher Education, through its educational institutions. The institutions are responsible for paying for the costs of burial and cremation and delivery of the ashes to a relative whenever a corpse is used for the purposes authorized by ORS 97.170. ORS 97.200. Under ORS 97.170, unclaimed bodies which are in the charge of a public officer shall be offered to the Demonstrator of Anatomy of the State Department of Higher Education. The demonstrator may authorize use of the body by an educational institution for purposes of medical instruction or the advancement of medical science.

The second situation where a state agency is responsible for payment of burial costs of a public assistance recipient involves the Children's Services Division. That agency has responsibility under ORS 97.170(4) for payment of burial or cremation expenses when the agency has guardianship of a child at the time of death, the body is unclaimed, and the agency authorizes burial.

County Authority and Responsibility for Payment of Burial Costs

We now turn to the issues of county authority and responsibility for burials. In one situation, the county is clearly liable for payment of a portion of funeral costs. Under ORS 408.730, upon the happening of certain events not relevant here, the county may be required to pay up to \$100 for the funeral expenses of an indigent war veteran and the indigent wives, widows, and minor children of the war veteran. The county has the option either of levying a tax for payment of such expenses or of paying the money out of the general funds in the county treasury. ORS 408.720.

Beyond the above-described situation, the authority of the county to pay and the requirement that it pay such costs is less clear. The most direct statement of responsibility is found in ORS 146.075(5), which states:

"(5) Expenses of burial or other disposition of an unclaimed body shall be paid by the county where the death occurs, as provided by ORS 146.100(2), in the manner provided by ORS 146.121(4)." (Emphasis added.)

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To what "unclaimed body" is the statute referring? Standing alone, this subsection would appear to impose upon the counties a duty to pay for the disposition expenses of all unclaimed bodies. However, statutes which are part of the same Act must be construed together, giving effect to the manifest legislative intent and the meaning of each provision thereof, if possible. Gevurtz v. Myers, 10 Or App 491, 493, 500 P2d 730 (1972); State v. Powell, 212 Or 684, 692, 321 P2d 333 (1958). Read in the context of the other subsections of ORS 146.075 (Or Laws 1973, ch 408, § 8), it appears that the term "unclaimed body" in subsection (5) refers to unclaimed bodies which have been the subject of a death investigation of a district medical examiner. In the absence of contrary evidence of intent, we must conclude that the context limits the application of the term "unclaimed body" to those in the custody of the district medical examiner.

In this limited circumstance, then, does the county have an unconditional duty to pay for such burial expenses? Subsection (5) of ORS 146.075 states that the expenses of burial should be paid in the manner provided by ORS 146.121(4). This latter subsection states, in pertinent part:

"(4) . . . The board of county commissioners shall pay such expenses [of cremation, calcination or burial], or any proportion thereof as may be available, from county funds annually budgeted for this purpose." (Emphasis added.)

It may be argued that the emphasized words in ORS 146.121(4) convey an intent to condition the duty to pay for burial expenses upon whether or not the county has budgeted funds for this purpose. Such an argument appears superficially similar to the one made above with respect to ORS 413.029. However, in ORS 413.029, the words "out of funds available" directly conditions the words "shall provide such a burial." ORS 146.121(4), in contrast, does not address the duty to provide for burial, which is found elsewhere. ORS 146.075(5) provides that the expenses of disposition of an unclaimed body "shall be paid by the county . . . in the manner provided by ORS 146.121(4)." This language is unconditional and it is clear that the language of ORS 146.121(4), identifying the source of payment as "county funds budgeted for this purpose," was not understood to condition the duty to pay such expenses. Nevertheless, the question remains, if no such funds are budgeted, does any duty exist at all?

There is limited legislative history addressing this issue. Jack Frost, District Attorney for Linn County, testified:

"Section 19 [now ORS 146.121] deals with a problem that can be a real problem and that is the disposition of the body of a person not claimed by any next of kin -- I mean any. The current law seems to talk about taking care of it, but it seems also to require fixed conditions that aren't even announced. In other words the counties aren't supposed to assume the expense apparently unless it can be shown he's indigent. And how do you know that sometimes? The problem is he has a deceased person's body (unintelligible) and something must be done. This provides a procedure which also contemplates current law in chapter 97 for the possibility of this body being used by one of the medical training institutions. If not so -- then, that the counties shall pay the expense and the counties shall budget their funds which will be available for the paying of these expenses."

(Emphasis added.) Testimony of Jack Frost (HB 2279), House Judiciary Committee, March 5, 1973, tape 10, side 1 at 1082.

However, statements by persons who are not members of the legislature have little or no significance in statutory interpretation. Henthorn v. Grand Prairie School Dist., 287 Or 683, 691, n 5, 601 P2d 1243 (1979). And, we could find no other relevant discussion of HB 2279, now codified as ORS 146.121. We conclude that it was assumed that counties would appropriate and budget funds sufficient to carry out their duties under ORS 146.121(4). However, we find no statutory or case authority which indicates that they must do so. Therefore, we conclude as we did with respect to ORS 413.029, that if the counties do not in fact budget funds sufficient to discharge their duties to pay for the disposition of bodies under ORS 146.121(4), they have no duty to do so.

There are also other circumstances where the county may have a duty to pay for the expenses of disposition of the remains of an indigent who was receiving public assistance. The district medical examiner is required to investigate and certify the cause and manner of human deaths in a number of situations set out in ORS 146.090. See, e.g., ORS 146.095(1) and 146.100(1). When that examiner conducts an investigation, then the sheriff, or in counties with populations of 400,000 or more, the medical examiner, is required to dispose of the body pursuant to ORS 97.170 to 97.210. ORS 146.121(2). In those cases, if the body is not claimed, the Demonstrator of Anatomy does not accept it, and a state agency is not responsible for burial, then the medical

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examiner may order disposition of the body. ORS 146.121(3). The county is required to pay for the expenses of such burial under ORS 146.121(4). It should be noted that the same arguments discussed above regarding county liability under ORS 146.121(4) would apply with equal force here.

A public health officer has limited authority to dispose of bodies in cases not investigated by the medical examiner. Under ORS 97.130(2), if disposition of the remains has not been directed within ten days of the date of death, a public health officer, the special administrator or the personal representative of the estate may direct and authorize disposition of remains. The county is required to appropriate sufficient funds to the county or district board of health to finance administration of the board and operation of the health department, which presumably could include costs of disposition of indigents should the county so choose. ORS 431.510. See generally ORS 431.405 to 431.550 (powers and duties of local boards of health and health officers).

The 1985 legislature clarified the manner in which the county shall dispose of the remains. Oregon Laws 1985, chapter 704, section 1, effective September 20, 1985, added a subsection (5) to ORS 97.170, which states:

"(5) When the deceased person is one for whom the county is responsible for disposition costs, and no relatives, friends or interested persons claim the body after notification is attempted under subsection (1) of this section, and after complying with this section and subsection (2) of ORS 97.130, the county shall authorize burial or cremation of the body without the consent of persons listed in ORS 97.130, in the least costly manner that complies with law."

This is an apparent effort to reduce the overall costs to the county in those cases where the county is responsible for disposition costs.

CONCLUSION

Given our conclusions herein, we are aware that there may be circumstances in which there is no public means for disposing of an unclaimed body. To some this consequence alone may appear so absurd and inhumane as to warrant a different conclusion regardless of the language and history of the legislation. But such a conclusion would be based upon preconceptions about what public policy should be, rather than the public policy which actually is expressed in the statutes themselves. We are not

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free "to insert what has been omitted" however absurd it appears, unless the language of the statute permits it. See ORS 174.010. The ability to interpret statutes does not encompass the power to legislate. Arguments that there should be in all cases some provision for disposition of unclaimed bodies at public expense should be addressed to the Legislative Assembly or to elected county commissioners.

Very truly yours,



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