



The Commonwealth of Massachusetts

Division of Registration

Leverett Saltonstall Building, Government Center

100 Cambridge Street, Boston 02202

February 9, 1996

Barbara Marshall, Chairperson
Lexington Board of Health
1625 Massachusetts Ave.
Lexington, MA 02173

Re: Issuance of Burial Permits

Dear Ms. Marshall:

This letter is in response to your Board's recent request for an advisory opinion from the Massachusetts Board of Registration in Embalming and Funeral Directing concerning whether burial permits may be issued to persons other than licensed funeral service personnel. For the reasons set forth below, it is the opinion of the Board that burial permits may not properly be issued to unlicensed laypersons.

As you may know, the Board's regulations, at 239 CMR 3.11, explicitly state that "no burial or transportation permit shall be issued to anyone other than a funeral director registered and licensed under the laws of Massachusetts". It has recently been suggested, however, that this regulation is in conflict with the provisions of Chapter 114, section 45 of the Massachusetts General Laws concerning the issuance of burial permits, and/or with the decision of the Supreme Judicial Court of Massachusetts in Wyeth v. Thomas, 200 Mass. 474, 86 N.E. 925 (1909). After a thorough review of the language, history and purpose of G.L. c. 114, s. 45 and its predecessors, and a careful reading of the Wyeth case, the Board has concluded that the above-cited regulation is not inconsistent with either.

The argument that the Board's regulation is inconsistent with G.L. c. 114, s. 45 rests on the premise that the words "or other person", as used in G.L. c. 114, s. 45, were somehow intended to authorize the issuance of burial permits to any person who applies for one. For the reasons below, the Board has concluded that the words "or other person" are used in G.L. c. 114, s. 45 to: (1) authorize issuance of burial permits to persons specifically authorized by other statutory provisions to transport, deliver or bury bodies, and (2) to make the prohibition against burying a body without a burial permit complete and comprehensive.

It is well-established that a statute's words must be accorded their plain and ordinary meaning, considered in connection with the cause of its enactment, the pre-existing state of the common and statutory law, the problem to be remedied, and the main object to be accomplished. Rambert v. Commonwealth, 389 Mass. 771, 452 N.E.2d. 222 (1983); Meunier's Case, 319 Mass. 421, 66 N.E.2d. 198 (1946). Where two or more statutes relate to the same subject matter, they are to be construed together so as to constitute a harmonious whole consistent with the legislative purpose if at all possible. See Saccone v. State Ethics Commission, 395 Mass. 326, 480 N.E.2d. 13 (1985); Casey v. Massachusetts Electric Co., 392 Mass. 876, 467 N.E.2d. 1358 (1984).

The language of G.L. c. 114, s. 45 must therefore be interpreted, to the extent reasonably possible, in a manner which makes it consistent and harmonious with other statutes relating to transportation and burial of dead bodies. Since 1830, Massachusetts has provided, by statute, for donation of the bodies of persons who die in prisons and other specific public institutions, and who must be buried at public expense, to medical schools for use in anatomical research. See G.L. c. 113, ss. 1 through 4. Beginning in 1845, the statutory law governing such donations read as follows:

“The overseers of the poor of any town, and the mayor and aldermen of any city ... shall, upon request, give permission to any regular physician, duly qualified according to law, to take the dead bodies of such persons as are required to be buried at the public expense, within their respective towns or cities, to be by him used within this Commonwealth for the advancement of anatomical science...” Acts of 1845, c. 242 (emphasis added)

The present version of G.L. c. 113, s. 1 provides that such donations are to be made to medical schools, not individual physicians, and states that the “dean or other officer” of the recipient medical school is to take the body so donated. Furthermore, G.L. c. 113, s. 1 and its predecessors have also required, since 1845, that the medical school post a bond ensuring that the body will be used for anatomical research and that the remains will be “decently buried or cremated” after the research use is completed.

A second statute, dating back to 1784, provides for delivery of the bodies of those who are convicted of first degree murder and executed to medical schools for similar anatomical research uses. The history of that statute, now G.L. c. 113, s. 6, indicates that the responsibility for delivering the body to the medical school has been assigned to the sheriff since 1804.

As the preceding history shows, the language in both of these statutes assigning the responsibility for transportation or delivery of the bodies to the medical schools to persons other than “undertakers” or “sextons” existed at the time the first version of G.L. c. 114, s. 45 was enacted in 1878. For this reason, the Board concludes that the words “or other person” were inserted into G.L. c. 114, s. 45 and its predecessors, at least in part, in order to allow those individuals who were expressly authorized by G.L. c. 113, ss. 1-4

and 6 to deliver or transport such bodies to the medical schools to obtain the permits required by G.L. c. 114, s. 45 and do so. They were not intended, however, to authorize the issuance of burial permits to anyone who might wish to obtain one.

As noted above, it is also an established rule of statutory construction that the words of a statute are to be given their “plain meaning” unless a contrary intention appears. The first sentence of G.L. c. 114, s. 45 begins as follows:

“Except as provided in section forty-four or forty-six, no undertaker or other person shall bury or otherwise dispose of a human body in a town, or remove therefrom a human body which has not been buried, until he has received a permit from the board of health or its agent appointed to issue such permits, or if there is no such board, from the clerk of the town where the person died; ...”

The clear purpose of this language is to prohibit burial or final disposition of a body without a burial permit issued by the local board of health or town clerk. Because the words “or other person” are used in the context of a sentence which prohibits burial or other final disposition without such a permit, the Board believes that the words “or other person” were necessary to make that prohibition against burial without a permit as complete and as comprehensive as possible. Furthermore, an examination of the history of G.L. c. 114, s. 45 and its predecessors indicates that the words “or other person” have been used in this same prohibitory context since at least 1888, when the statute began: “No undertaker, sexton, or other person shall bury in a city or town or remove therefrom the body of a deceased person until he has received a permit so to do from the board of health or its duly appointed agent, or, ... from the city or town clerk”.

The last sentence of the present G.L. c. 114, s. 45 does not indicate a different result. That sentence reads: “The person to whom the permit is so given and the physician certifying the cause of death shall thereafter furnish for registration any other necessary information ... which the clerk or registrar may require”. In that context, the words “the person to whom the permit is given” are intended to distinguish that individual from the “physician certifying the cause of death”, and do not imply that a non-licensed layperson may obtain the permit. The clear purpose of the sentence is to impose on both the permit recipient and the physician certifying the cause of death the obligation to furnish additional information regarding the deceased and the cause of death if necessary.

It is also important to interpret the language of G.L. c. 114, s. 45 in light of its place in the overall scheme of state regulation of the disposition of the dead. As the Supreme Judicial Court noted in Blue Hills Cemetery v. Board of Registration in Embalming and Funeral Directing, 379 Mass. 368, 398 N.E.2d. 471 (1979), G.L. c. 114, ss. 1 through 50, including section 45, are “part of a comprehensive statutory scheme” and were enacted because of “the State’s concern for the treatment afforded its dead and their families”. Blue Hills, supra, 379 Mass. 368 at 373-374. That statutory scheme is quite detailed. For example, G.L. c. 114, s. 43M requires that permanent disposition of dead bodies be made “by interment in the earth or deposit in a chamber, vault or tomb of

a cemetery ..., by deposit in a crypt of a mausoleum, or by cremation". If disposition is made in a vault or tomb which is partly above ground, that statute also requires that the portion below ground be "constructed of materials capable of withstanding extreme climatic conditions, waterproof and airtight, and capable of being sealed permanently to prevent all escape of effluvia". Disposition of a body in a manner contrary to this detailed scheme is punishable by criminal sanctions. See G.L. c. 114, s. 43N; Commonwealth v. Gallison, 384 Mass. 184, 425 N.E.2d. 276 (1981).

Perhaps the clearest statement of the purpose of this statutory scheme came from the Supreme Judicial Court in Commonwealth v. Goodrich, 95 Mass. 546 (1866). In that case, the court upheld the criminal conviction of an individual who had transported two dead human bodies to the municipal cemetery in Lawrence without having obtained appointment by the city as an undertaker because of his failure to post a required bond. The court observed:

"That this necessary duty shall be performed, especially when undertaken for hire, by suitable and trustworthy persons, and that the moving of dead bodies through the public streets of a city shall be conducted with decency and safety, are obviously matters proper for municipal regulation, and which, as well as the mode of burial, may concern the public health to no slight extent." Goodrich, *supra*, 95 Mass. 546 at 548.

The court went on to say:

"Nor does there seem to us to be anything unreasonable in the regulation which prohibits any person, unless appointed as an undertaker, or otherwise authorized by the board of health, from moving from any house or other place in the city to any place of burial, the body of a deceased person". Goodrich, 95 Mass. 546, at 548-549.

The Board notes that this case continues to be good law, undisturbed by the Supreme Judicial Court's later ruling in Wyeth v. Thomas. It is therefore clear that the language and history of G.L. c. 114, s. 45, as well as the relationship between that section and related statutes concerning disposition of human remains for anatomical research purposes, support both the Board's interpretation of G.L. c. 114, s. 45 and the Board's own regulation prohibiting the issuance of burial permits to unlicensed laypersons.

It has been asserted that the Supreme Judicial Court, in Wyeth v. Thomas, ruled that a regulation which requires one to be a licensed funeral director in order to obtain a burial permit is unconstitutional. However, a close reading of the case indicates that it cannot properly be read that broadly. In Wyeth, the plaintiff challenged a decision by the city of Cambridge to deny him a new license as an undertaker, as well as the burial permit he sought, on the grounds that he had not obtained registration with the state as an embalmer (emphasis added). The facts of the case clearly establish that the plaintiff had, in fact, previously been granted appointments as an undertaker by the city, and that he

had served as an undertaker for a number of years. Wyeth v. Thomas, 200 Mass. 474, at 476-477 (1909). The court's opinion makes it clear that the decision rested on the conclusion that there was no reasonable basis for requiring one to be an embalmer in order to obtain a license as an undertaker or procure the necessary burial permits. The question of whether one could be required to be an undertaker or funeral director in order to obtain a burial permit was not presented in Wyeth. Instead, the case stands for the much narrower proposition that the Board could not usurp the power of the Legislature to mandate that all undertakers or funeral directors be qualified first as embalmers. This ruling was later rendered meaningless by the Legislature's subsequent amendment of the Board's licensing statute to require all funeral directors to be registered embalmers first.

For these reasons, the Board concludes that 239 CMR 3.11 is not inconsistent with either G.L. c. 114, s. 45 or the Wyeth decision, and that burial permits therefore should not be issued to unlicensed laypersons.

In closing, the Board notes that there are also persuasive public policy reasons why burial permits should not be issued to unlicensed laypersons. In upholding a lower court decision to issue an injunction against the operation of an entity which stored and cremated bodies without a funeral establishment license, the Florida Supreme Court recently observed:

“The public health and welfare requires that dead bodies be disposed of in such manner as to prevent spread of disease and other conditions offensive to surviving relatives and friends and the public at large ...”

“The legislative intent is to require that human corpses be handled and disposed of by persons highly skilled in the professional care of human remains. This need increases as population density increases. Informal disposition of human corpses has been common in the past, but is generally unacceptable today.” Telophase Society of Florida v. State Board of Funeral Directors, 334 So.2d. 563 (1976) at 566.

As previously noted, the Massachusetts Supreme Judicial Court, in the Blue Hills case, observed that similar considerations underlie the comprehensive statutory scheme for regulation of burials and funerals here.

The Board is currently in the process of revising those provisions of its regulations relating to the precautions to be taken during removal, transportation, preparation and burial of dead bodies. In the course of that process, the Board has consulted with representatives of the Department of Public Health and the Occupational Safety and Health Administration regarding what precautions are necessary at each stage. DPH has recommended that funeral service personnel use universal precautions throughout the processes of removal, transportation and preparation for burial, in order to minimize the risks of transmission of bloodborne infections, and OSHA has advised the Board that funeral service personnel are expected to comply with the federal Bloodborne Pathogens Standard (29 CFR 1910.1030). In addition, while DPH has indicated that the

risk of transmission of disease during the actual burial of a body is probably low, improper or untimely burial may lead to offensive odors and conditions which are undesirable. The present restrictions exist to protect the public from the risks posed by those who, not out of some sinister motive, but due to lack of sufficient education, knowledge and training, might not handle, prepare or bury a body properly.

Should you have any further questions or concerns about this issue, please do not hesitate to contact the Board.

Respectfully yours,



William T. McDonald, Jr.

Chairman

Board of Registration in Embalming
and Funeral Directing

cc: James Anliot, Esq.
Anne Collins, Esq.
David Hofstetter, Esq.
Byron Blanchard