

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 1610

SPONSOR: Banking and Insurance Committee and Senator Latvala

SUBJECT: Funeral and Cemetery Services

DATE: April 16, 2001 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Emrich	Deffenbaugh	BI	Favorable/CS
2.				
3.				
4.				
5.				
6.				

I. Summary:

Committee Substitute for Senate Bill 1610 makes several significant changes to the statutes regulating funeral and cemetery services by providing for the following:

- Gradually phases out the authority for funeral and cemetery businesses to purchase surety “payment” bonds as security for funds they have collected on contracts for future or “preneed” funeral and cemetery services and merchandise;
- Expands the list of financial institutions to include federal or state savings and loan associations authorized to handle trust accounts for funeral and cemetery preneed funds, as well as funds collected for cemetery care and maintenance;
- Eliminates the requirement for the Department of Banking and Finance to establish the need for a new cemetery before issuing a license for it to operate; and
- Makes changes to the statutory definitions to better reflect current funeral and cemetery practices.
- Raises the acreage requirement for new cemeteries from 15 to 30 contiguous acres and increases the number of years from 1 to 3 for cemetery management experience required for managers of new cemeteries.

This bill substantially amends the following sections of the Florida Statutes: 497.003, 497.005, 497.201, 497.237, 497.245, 497.253, 497.405, 429.425, 497.429, and 470.002. The bill repeals section 497.353(12), Florida Statutes.

II. Present Situation:

Surety Bonds and Trust Funds

To protect the financial and often emotional investment consumers make when they contract for preneed funeral and cemetery services and merchandise, the Department of Banking and Finance (department) under chapter 497, F.S., requires the establishment of trust funds or the procurement of surety bonds relating to the receipt of funds from such contracts. This chapter also establishes a methodology by which specified cemeteries must set aside a portion of the cost of their services in a trust to provide for perpetual care and maintenance of gravesites.

Current law requires all persons who may sell a preneed contract for services, merchandise or burial rights, to apply to the Bd. of Funeral and Cemetery Services (board) for a valid certificate of authority, but makes very specific exemptions for trust institutions receiving funds in trust for the sale of a preneed contract, certain qualified Florida corporations, and certain churches offering specific preneed services that are located in counties with less than 960,000 in population on July 1, 1996 (s. 497.405, F.S.). Section 497.407, F.S., requires each certificateholder to pay a one-time fee at an amount set by the board, not to exceed \$10, for each preneed contract entered into no later than 60 days after the end of each quarter. Fees are paid to the department and deposited into its Regulatory Trust Fund.

Under s. 497.417, F.S., all persons who collect funds under a preneed contract for funeral services or merchandise to deposit a prescribed amount¹ of the monies collected into a trust account. These monies may not be used as loans to certificate holders or their affiliates nor can they be used as collateral.

Section 497.429, F.S., provides that a certificateholder can establish a trust on behalf of the purchaser, but the certificateholder does not have any dominion or control over such trust or its assets until the contract has been fulfilled. It also provides for use of 10 percent of the funds collected or paid, 10 percent of liquidated damages, and for the cancellation of contracts under certain circumstances. Since earnings from the trust assets could have federal income tax implications for the purchaser, this section requires preneed contracts governed by this section to contain information relating to this tax implication.

In 1987, the Internal Revenue Service ruled (Ruling 87-127) that in certain situations where preneed contract purchasers retained some control and dominion over funds held in trust relating to their contracts, they would have to be provided with Form 1099s on an annual basis and they would be responsible for paying income tax on the earnings accrued on those funds. In response to the IRS ruling, the Florida Legislature in 1988, amended Ch. 639, F.S., which governed preneed funeral and cemetery services contracts, to provide an alternative to the trusting requirements so that the funeral or cemetery company could be responsible for the tax on those assets. The provisions of former Ch. 639, F.S., were subsequently revised under Ch. 497, F.S.

One of the statutorily provided alternatives to establishing a preneed contract trust fund allows a certificateholder to petition the Department of Banking and Finance's Board of Funeral and

¹ Such amounts are: 70 percent of the purchase price collected for all services sold and facilities rented and 30 percent of the purchase price collected for each item of merchandise sold.

Cemetery Services to secure a surety bond in a prescribed amount (s. 497.423, F.S.). The bond must be conditioned in a way as to secure the “faithful performance of all conditions of any preneed contracts” the certificateholder is required to have covered by the bond. This includes refunds that are requested by consumers under certain conditions. The bond must also guarantee the financial responsibility of the company against defaults arising out of fulfilling preneed contracts. These types of surety bonds are commonly referred to as “performance bonds” because they must guaranty the performance of the service for which the preneed purchaser contracted.

Another alternative to the trust requirement is provided in s. 497.425, F.S. This section of the statutes provides that certificateholders may purchase a surety bond in an amount not less than the aggregate value of outstanding liabilities on undelivered preneed contracts for merchandise and services. These bonds are to be secured annually, and coverage increased or decreased depending on changes in the outstanding liabilities. These types of bonds are commonly known as “payment bonds” because the contract purchaser can file a claim against the surety company for payment. The bond must be maintained or the certificateholders must stop selling preneed contracts. In some cases, with board approval, a certificateholder may file a letter of credit in lieu of a surety bond.

At the current time, the department reports that in excess of \$1,045,133,629 in preneed trust funds are maintained by approximately 330 certificateholders. Many of these certificateholders place their funds in s. 497.417, F.S., trust funds, while four certificateholders, pursuant to s. 497.425, F.S., have payment-type surety bonds of approximately \$160,890,000 covering preneed contracts; and two certificateholders, pursuant to s. 497.425, F.S., have board-approved letters of credit. There are currently no companies with performance-type surety bonds held pursuant to 497.423, F.S. The department further reports that one licensee using a surety bond reorganized under Chapter 11 in July of 2000, and came out of bankruptcy in December of that year. To date, the department says that no claims against surety companies have been filed against certificateholders for failure to deliver merchandise and services upon need. Finally, the department reports that five certificateholders have failed to deposit sufficient funds in trust. The department has taken disciplinary action against all of the five certificateholders.

One provision for taking funds out of trust is that the merchandise contracted for has been delivered. Section 497.337(2), F.S., provides parameters for when merchandise and services may be considered delivered. Permanent outer burial receptacles that are delivered to the cemetery company may only be considered “delivered” if they are stored in a protected environment so that they won’t deteriorate prior to the time the purchasers need them. For sales to cemetery companies and funeral establishments and only those sales, paragraph (2)(c) of s. 497.337, F.S., allows a manufacturer that has FCS board approved merchandise to elect to comply with the provisions of this section by annually submitting to the board proof of its financial responsibility, as established by the provisions in ss. 497.423, and 497.425, F.S.

Financial Institutions

Several sections of Ch. 497, F.S., provide a list of acceptable financial institutions that may handle care and maintenance and preneed contract trust funds. These are currently limited to those established by a trust business authorized under Ch. 660, F.S., or with a state or national bank. This list excludes federal or state savings and loan associations. At the time that the initial

statutes were written, savings and loans did not have trust powers and only as of about 5 years ago were national savings and loans allowed to branch into Florida.

Need Determination for New Cemeteries

Currently, an applicant for a license to establish a new cemetery must demonstrate to the department that it has specific financial means and professional expertise to establish the need for the cemetery. Under s. 497.201, F.S., the applicant must establish the exact location for the cemetery which site shall contain at least 15 contiguous acres. Further, the applicant must exhibit a net worth of \$50,000, establish a care and maintenance trust fund containing at least \$50,000, and pay an application fee of \$5,000. In turn, the department must determine the need for a new cemetery by considering the adequacy of existing cemeteries, both licensed and unlicensed, within the community; the solvency of the trust funds of the existing cemeteries; and, the relationship between population, rate of population growth, death rate, and the ratio of burials to deaths to meet projected need for burial spaces for the next 30 years. The department may waive these criteria so that each county may have at least six cemeteries operated by different licensees.

Recently, the department established an internal task force to review funeral and cemetery issues and one of the recommendations of that task force was to eliminate the need determination review by the department. It was felt that this regulation was anti-competitive and that market forces should be the determining factor in establishing a new cemetery.

Statutory Definitions

Burial rights as defined by Ch. 497, F.S., reference the use of graves, mausoleums, or columbarium for the interment, entombment, or inurnment of human remains. As the practice of cremation increases, an increasing variety of requests have been made for the disposition of the remains. Currently the statutes do not include definitions for these new practices.

III. Effect of Proposed Changes:

Section 1. Amends subsection (4) of s. 497.003, F.S., to remove a reference to the requirement that the Department of Banking and Finance determine the need for a new cemetery (need determination), which is being eliminated in s. 497.201, F.S. (Section 3 of this bill).

Section 2 Amends s. 497.005, F.S., by adding the definitions for *ossuary* and *scattering garden*, and including these terms in the definitions for *burial rights* and *cemetery*, to provide for the recognition of cremation as a burial right. Including these two terms under burial rights will have the effect of requiring certificateholders to place 10 percent of all funds collected from preneed contracts for these services into a care and maintenance trust fund (s. 497.245, F.S.; see Section 5, below).

An *ossuary* is a receptacle used for the communal placement of cremated human remains without benefit of an urn or any other container. It may or may not include a commemorative marker. A *scattering garden* means a location set aside, within a cemetery, which is used for the spreading or broadcasting of cremated remains. It may or may not include a commemorative marker. The definition of *preneed contract* is also revised to cover any provider that agrees to furnish funeral merchandise or service in the future. The definition of *community* is deleted because it referred to the need determination process which is removed under the provisions of the bill.

Section 3. Amends s. 497.201, F.S., to raise the acreage requirement for new cemeteries from 15 to 30 contiguous acres, and, to eliminate the requirement that the department determine the need for new cemeteries. A reference to the type of financial institutions authorized to certify the establishment of care and maintenance trust funds is conformed to a revision of that list (expanded to include federal and state savings and loan associations holding trust powers in the state) provided in s. 497.237, F.S. (Section 4 of this bill.) Finally, this section raises the number of years from 1 to 3 of cemetery management experience required for managers of new cemeteries, and provides that the parameters for that experience will be defined by Board rule.

Section 4. Amends s. 497.237, F.S., to provide that in addition to state banks that operate trust departments under Ch. 660, F.S., federal and state savings and loan associations holding trust powers in the state may establish the care and maintenance trust funds required for new cemeteries.

Section 5. Amends s. 497.245, F.S., relating to the trust fund requirements for care and maintenance of burial rights, to conform the reference to burial rights to the revised definition of such, which includes the recognition of cremation as a burial right. This revision clarifies that businesses must place in their care and maintenance trust fund 10 percent, or a minimum of \$25, of preneed funds collected for ossuary or scattering gardens.

Section 6. Amends s. 497.253, F.S., to increase from 15 to 30 contiguous acres the amount of land a licensed cemetery must dedicate to cemetery use and not divest itself of without departmental approval. This section also provides that this increase will not apply to cemeteries owning less than 30 acres that were licensed prior to July 1, 2001. An additional revision in this section removes a reference to provisions relating to need determination in the event of the sale or conveyance of cemetery property. These revisions conform s. 497.253, F.S., with the elimination of the need determination and subsequent enhancing of cemetery establishment requirements provided in s. 497.201, F.S. (Section 3 of this bill).

Section 7. Repeals subsection (12) of s. 497.353, F.S., relating to the requirement for the Department of Banking and Finance to determine the need for new cemeteries, which is being eliminated under s. 497.201, F.S. (Section 3 of this bill).

Section 8. Amends s. 497.405, F.S., to conform a reference to the list of financial institutions, expanded in section 9 of this bill, that are authorized to handle preneed contract funds.

Section 9. Amends s. 497.417, F.S., to provide that in addition to state banks that operate trust departments under Ch. 660, F.S., federal and state savings and loan associations holding trust powers in the state may establish the trust funds required for licensees that offer preneed contracts. This conforms the treatment of this trust fund requirement to that of the care and maintenance trust fund requirements revised in section 4 of this bill.

This section also revises subsection (5) of s. 497.417, F.S., relating to the authority given to a preneed funeral and cemetery services contract seller/certificateholder to revest in itself title to trust assets or its pro rata share of such assets if it has procured a surety bond under s. 497.423,

F.S., or s. 497.425, F.S. The reference to the bonding provisions in s. 497.425, F.S., is conformed to mirror the limitations this bill makes on that bonding authority. Effectively, this would limit the ability of certificateholders to revest in themselves title to trust funds to only those trust funds they have already secured by bonds as of the effective date of this bill (7/1/01) unless the company can be identified as currently securing \$100,000,000 in bonds. Such a company would have its authority limited to funds it currently has bonded and those relating to contracts entered into through December 31, 2004. Certificateholders' funds that are residing in trusts as of July 1, 2001, must remain there. These provisions leave open certain alternatives for the purpose of compliance with federal income tax requirements.

Section 10. Amends s. 497.425, F.S., to revise the authority given to certificateholders who procure payment-type surety bonds in lieu of holding the prescribed preneed contract funds in trust. The revision allows certain certificateholders to continue to use these payment-type surety funds authorized under s. 497.425, F.S., to secure funds by bond rather than by trust, but only on contracts written before July 1, 2001, and only as to funds not held in trust as of July 1, 2001. A specific provision is made for a certificateholder that is authorized to do business in Florida and that currently has \$100,000,000 secured by bonds. This particular certificateholder is allowed to use the payment-type surety bond alternative of securing funds, on contracts written prior to December 31, 2004, but relates only to those funds not held in trust as of July 1, 2001. In summary, this provision provides two cutoff dates after which the payment-type surety bonding alternative in s. 497.425 can no longer be used, holds harmless the bonding arrangements currently utilized by certificateholders, and does not allow those certificateholders to secure any other funds currently being held in trust as of the effective date of the bill.

Section 11. Amends s. 497.429, F.S., to conform a reference to the list of financial institutions authorized to certify the establishment of preneed trust funds expanded in section 9 of this bill.

Section 12. Amends s. 470.002, F.S., to revise the definition of *legally authorized person*, to exclude a spouse who has been arrested for committing against the deceased an act of violence. This would provide that in such circumstances, the spouse would not be authorized to direct a funeral director or direct disposer how the deceased body should be disposed.

Section 13. Provides an effective date of July 1, 2001.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

As reported by the Department of Banking and Finance, there are four funeral and cemetery service companies which have procured annual “payment-type” surety bonds under s. 497.425, F.S., one of which has a total bonding liability of \$100,000,000. The gradual phasing out of this bonding alternative should not cause undue financial hardship on these certificateholders.

Furthermore, according to representatives with the department, the phasing out of payment-type surety bonds should not cause preneed contract purchasers to be responsible for the tax on trust assets pursuant to the 1987 IRS Ruling (87-127). There are alternatives currently available under law which do not have such tax ramifications: performance surety bonds (s. 497.423, F.S.) and letters of credit (s. 497.425, F.S.).

The department estimates funeral and cemetery companies will have to deposit an additional \$10,200 annually into their care and maintenance trust fund due to the changes in s. 497.245, F.S.

The minimum acreage to establish a new cemetery will increase from 15 acres to 30 acres. A cost to the private sector cannot be assessed since the number of potential applicants is unknown, as well as the cost of land in the unknown locations.

C. Government Sector Impact:

According to the Department of Banking and Finance, the cost savings to the department resulting from the elimination of the determination of need requirement is difficult to quantify because it receives so few applications to organize a new cemetery. Potential legal fees will be saved when the department does not have to defend a decision it issues regarding an application to establish a new cemetery.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
