

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

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

Prepared By: The Professional Staff of the Committee on Banking and Insurance

BILL: SB 854

INTRODUCER: Senator Hukill

SUBJECT: Funeral, Cemetery, and Consumer Services

DATE: January 11, 2016      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Matiyow	Knudson	BI	<b>Pre-meeting</b>
2.			RI	
3.			FP	

**I. Summary:**

SB 854 makes the following changes related to funerals and cemeteries regulated by the Department of Financial Services:

- Defines terms related to preneed contracts, care and maintenance trust funds and their proceeds.
- Adds an e-mail address as information that can be required for licensure.
- Allows the Department to use email as a means of notification.
- Provides uniformity with the use of the term “legally authorized persons.”
- Requires the Department to adopt rules regarding discipline for miscellaneous financial errors.
- Requires the Department to adopt rules allowing for the use of alternative withdrawal methods from a care and maintenance trust fund.
- Provides a consistent deposit requirement for graves, mausoleums, and columbaria.
- Clarifies that the annual report must record the fair market value of the care and maintenance trust fund.
- Removes the \$50 fee cap for transferring burial rights and allows the fee to be set by rule.
- Requires an applicant for embalmer apprentice to be of good character.
- Repeals s. 497.461, F.S., and all cross references related to surety bonding.
- Allows companies who have bonds prior to July 1, 2016, can keep them.
- Makes a technical change clarifying the duties of a funeral director.
- Repeals the servicing agent exemption from preneed licensure.
- Requires annual reporting to the Department on preneed licensees trust accounts.
- Clarifies when a preneed contract can be made irrevocable and such contracts cannot be canceled.
- Provides that prior to inactive status, a preneed licensee must deposit all preneed contract funds into the trust.

- Specifies cremated remains are not property and that any disputes among heirs shall be resolved by the courts.

## II. Present Situation:

Chapter 497, F.S., entitled the Florida Funeral, Cemetery, and Consumer Services Act (Act), provides for the regulatory oversight of the death care industry, which includes the following individual and entity licenses:<sup>1</sup>

- Brokers of burial rights;
- Cemeteries;
- Central embalming facilities;
- Cinerator facilities;
- Direct disposer and direct disposal establishments;
- Embalmers (including apprentices, interns, and by endorsement);
- Funeral directors and funeral establishments;
- Preneed, preneed branches, and preneed sales agents;
- Monument establishments and monument establishment sales agents;
- Refrigeration facilities;
- Removal services;
- Training facilities.

The Act is administered jointly by the Division of Funeral, Cemetery, & Consumer Services of the Department of Financial Services (“DFS” or “Division”) and the Board of Funeral, Cemetery & Funeral Services (“Board”).

### E-mail Notifications

The Act requires DFS to administer a licensing system to process and track applications, renewals, and fees; DFS is authorized to require specified information in its application forms, such as the applicant’s work history, criminal history, and business plans. Currently, application forms adopted by rule require the e-mail address of the applicant or licensee as a means of correspondence for DFS.

### Legally Authorized Persons & the Disposition of Human Remains

Currently, the Act sets forth the order or priority of persons (“legally authorized persons”) who are authorized to direct the disposition of human remains. The “legally authorized person” concept is similar to the Probate Code’s order of preference in appointing a personal representative over an estate.<sup>2</sup> The Act sets the priority of legally authorized persons<sup>3</sup> as:

1. A written *inter vivos*<sup>4</sup> authorization made by the deceased,

<sup>1</sup> DFS DIVISION OF FUNERAL, CEMETERY & CONSUMER SERVICES, Who We Regulate: Regulated Categories & Number of Licensees, <http://www.myfloridacfo.com/Division/FuneralCemetery/About/Whoweregulate.htm> (last viewed Jan. 6, 2016).

<sup>2</sup> s. 733.301, F.S.

<sup>3</sup> s. 497.005(39), F.S. The definition also addresses legally authorized persons when no family member exists or is available.

<sup>4</sup> An *inter vivos* authorization is one made during the life of the deceased; “between the living; from one living person to another.” See BLACK’S LAW DICTIONARY, <http://thelawdictionary.org/inter-vivos/> (last viewed Jan. 6, 2016).

2. The person designated by the decedent as authorized to direct disposition pursuant to Pub. L. No. 109-163, s. 564, as listed on the decedent's United States Department of Defense Record of Emergency Data, DD Form 93, or its successor form, if the decedent died while serving military service as described in 10 U.S.C. s. 1481(a)(1)-(8) in any branch of the United States Armed Forces, United States Reserve Forces, or National Guard.
3. The surviving spouse;
4. A son or daughter of majority age;
5. A parent;
6. A sibling of majority age;
7. A grandchild of majority age;
8. A grandparent; or
9. Another person in the next degree of kinship.

However, current usage of the term throughout the Act is inconsistent, leading to concerns of uncertainty and potential disputes among heirs regarding the disposition of human remains. Such disputes can also involve funeral homes and other licensees under the Act, because they receive, store, and process the remains, and are sometimes sued by the relative whose wishes regarding final disposition did not prevail.<sup>5</sup>

### **Burial Fees**

A burial right is the right to use a grave space, mausoleum, columbarium, ossuary, or scattering garden for the interment, entombment, inurnment, or other disposition of human remains or cremated remains.<sup>6</sup> While cemetery companies may collect fees for the sale of burial rights, merchandise, or services, they may only charge certain fees for the use of any burial right, merchandise, or service, such as sales tax and any interest on unpaid balances. Another permissible fee is the cost of transferring burial rights from one purchaser to another, which current law caps at \$50. The price cap has not been adjusted since the inception of this statute in 1993.

### **Sale of Personal Property or Services by Cemetery Companies**

Currently, s. 497.283, F.S., requires cemetery companies that sell personal property or services in connection with burial or commemorative services to deliver such goods or to perform such services within 120 days of receiving final payment, except for preneed contracts. "Delivery" of goods means actual delivery and installation at the time of need or at the request of the owner or owner's agent. However, subsection (2)(c) provides an alternative delivery method only for manufacturers of outer burial receptacles (OBC) who sell to cemetery companies and funeral establishments if they show evidence of "financial responsibility" as set forth in the "standards and procedures" in s. 497.461, F.S. (relating to surety bonding as an alternative to trust deposit for preneed licensees).

### **Applicants for the Embalmer Apprentice Program**

Applicants for the following licenses under the Act require demonstration of good character:

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<sup>5</sup> Florida Department of Financial Services, Agency Analysis of 2016 House Bill 473, p. 2 (Nov. 23, 2015).

<sup>6</sup> s. 497.005(7), F.S.

- Cemetery companies - s. 497.263(2)(p), F.S.
- Brokers of burial rights - s. 497.281(2)(d), F.S.
- Embalmers and embalmers by endorsement - ss. 497.368(1)(c) and 497.369(1)(d), F.S.
- Funeral directors and funeral director by endorsement - ss. 497.373(1)(c) and 497.374(1)(d), F.S.
- Funeral establishments - s. 497.380(4), F.S.
- Removal services, refrigeration services, and centralized embalming facilities - s. 497.385(1)(a) and (2)(f), F.S.
- Preneed licensees - s. 497.453(2)(f), F.S.
- Direct disposers and direct disposal establishments - ss. 497.602(3)(f) and 497.604(3)(c), F.S.
- Cinerator facilities - s. 497.606(3)(d), F.S.

However, no such requirement currently exists for applicants for the embalmer apprentice program.

### **Scope of Funeral Directing**

The Act sets forth the scope of the practice of funeral directing which may be performed only by a licensed funeral director. Currently, one of the permitted acts is planning or arranging, on an at-need basis, the details of funeral services, embalming, cremation, or other services relating to the final disposition of human remains with the decedent's family, friends, or other person responsible for such services.

### **Cemetery Companies - Care & Maintenance Trusts**

Cemetery companies that own or control cemetery lands and property are required by the Act to ensure that the grounds, structures and improvements of a cemetery are well cared for and maintained in a proper condition.<sup>7</sup> To achieve this, the Act requires cemetery companies to establish "care and maintenance (C&M) trust funds" with state or national trust companies or banks or savings and loan associations with trust powers.<sup>8</sup> In other states, these trusts are commonly known as "perpetual care trusts." Cemetery companies are required to set aside and deposit specified amounts from the sales of burial rights into their care and maintenance trust funds.

### **Net Income Trusts vs. Total Return Unitrusts**

Since 1959, the Act has required that the net income of these trust funds may only be used for the care and maintenance of the cemetery and monuments (excluding the cleaning, refinishing, repairing or replacement of monuments) and reasonable costs of administering care, maintenance, and the trust fund. This net income approach is how cemetery licensees can determine how much may be withdrawn and paid to them every year from the C&M trust fund. While the Act does not define "net income," it has been understood to include only cash received by the trust as interest or dividends from trust investments, not capital gains (which are treated as

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<sup>7</sup> s. 497.262, F.S.

<sup>8</sup> The appointments of these institutional trustees are subject to the approval of the licensing authority. These trustees are subject to investment limitations and annual financial reporting requirements in the Act.

accretions to principal, not income). This view has been largely informed by trust practices codified in other parts of Florida law.<sup>9</sup> As such, cemetery owners have an economic incentive to invest their C&M trust funds to maximize payments of current interest or cash dividends (e.g., government securities and corporate bonds), as opposed to investing in items that provide capital appreciation (e.g., corporate stocks). This approach typically results in erosion of trust principal as a result of inflation and may negatively affect the trust's long-term growth. Currently, the Act does not expressly dictate the relative mix of income-producing versus capital appreciation investments for C&M trusts, but only speaks to permissible investments that are also allowable for the State Board of Administration (SBA).<sup>10</sup>

Another type of trust, known as the “total return trust,” has attracted some interest among trust practitioners for C&M or perpetual care funds. As the name implies, the total return trust allows the trustee to focus on the total return, and to maximize growth of both income and principal by accounting for both income and capital appreciation. One type of total return trust is the unitrust. With the unitrust, the trustee distributes a percentage of the trust based on the fair market value of its assets, regardless of income earned or the original amount invested in the trust. As opposed to withdrawing only income, the unitrust allows cemeteries to withdraw a percentage, no less than 3 percent and no more than 5 percent, of the total fair market value of the trust for annual care and maintenance. Typically, a unitrust:

- Produces a return of 2 to 4 percent greater than an income trust,
- Allows cemetery operators to receive larger distributions (on average and over time),
- Grows principal at a greater rate than an income trust, and
- Shows exactly how much funds will be available for withdrawal in advance, which is important for budgeting purposes.<sup>11</sup>

According to the Division, the unitrust concept as applied to cemetery C&M trusts has been recently approved for use in 3 states (Iowa, Missouri, and Tennessee).<sup>12</sup>

### **Preneed Contracts**

A “preneed contract” is any arrangement or method, of which the provider of funeral merchandise or service has actual knowledge, whereby any person agrees to sell burial merchandise or burial service in advance. Examples of “burial merchandise” are caskets, outer burial containers, urns, monuments, floral arrangements, and register books, and “burial service” includes any service offered or provided in connection with the final disposition, memorialization, interment, entombment, inurnment, or other disposition of human remains or cremated remains.<sup>13</sup>

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<sup>9</sup> DFS DIVISION OF FUNERAL, CEMETERY, AND CONSUMER SERVICES, *Unitrust Concept for Cemetery Care & Maintenance Trust Funds: Background and Analysis (“DFS Unitrust Analysis”)*, p. 3 (Nov. 18, 2015), on file with the Committee on Banking and Insurance.

<sup>10</sup> *Id.* See ss. 497.266(4) and 497.458(5)(a), F.S., and permissible investment statute for the SBA, s. 215.47(1), F.S.

<sup>11</sup> Lauren Moore, *Perpetual Care Roundtable*, AMERICAN CEMETERY, Jan. 2014, at p. 33 (on file with the Committee on Banking and Insurance).

<sup>12</sup> *DFS Unitrust Analysis*, pp. 1, 7-9. Cemetery unitrusts may be used in Iowa beginning in 2016, while they have been authorized in Missouri in 2009 and in Tennessee in 2006. It appears unitrusts have largely been used in the long-term higher education and charitable foundation endowment trusts.

<sup>13</sup> s. 497.005(56), (6), and (7), F.S.

Preneed sales are governed by part IV of the Act, which requires sellers of funeral merchandise or service to obtain a preneed license and also be licensed as a funeral establishment, cemetery company, direct disposal establishment, or monument establishment.<sup>14</sup>

### III. Effect of Proposed Changes:

#### Care & Maintenance Trusts

The bill amends the Act to accommodate unitrusts as an alternative option to the current net income approach for C&M trusts.

Sections 4 and 5 of the bill update financial and trust terms in existing C&M trust statutes.

- Section 4 of the bill amends s. 497.266, F.S., to substitute “assets” for “corpus” and provides that withdrawals and transfers of such assets must be in accordance with the new C&M distribution statute, s. 497.2675, F.S. Additionally, the bill provides that the trustee may distribute “withdrawals” from the trust instead of “principal and income.”
- Section 5 of the bill amends s. 497.267, F.S., to substitute “withdrawals” from the C&M trust fund instead of “income.”

Section 6 of the bill creates s. 497.2675, F.S., as a comprehensive C&M trust distribution statute, which:

- Requires the Board and Department to adopt rules related to the withdrawals from C&M trust accounts in accordance with ss. 497.267 and 497.268, F.S., the rules must include:
  - Reporting requirements for a cemetery licensed under this chapter, including the requirement that specific reports be made on forms designed and approved by the board by rule.
  - Rules to address a cemetery licensed under this chapter whose pro rata share of the fair market value of the trust has not grown over a 3-year average, including limiting withdrawals from the care and maintenance trust fund, and any exceptions approved by the board.
- Each cemetery company licensed under this chapter shall elect one of the two methods for withdrawals from the cemetery company’s care and maintenance trust fund.
  - Net income withdrawal method.—Net income may be withdrawn from the trust, as earned, on a monthly basis.
  - Total return withdrawal method.—The licensee shall multiply the average fair market value of its pro rata share of the trust by the total return withdrawal percentage and may withdraw one-fourth of that amount at least quarterly beginning the first quarter of the new trust year. The initial total return withdrawal percentage elected by the licensee may not increase the total return withdrawal percentage for that quarter. For purposes of this paragraph, “average fair market value” means, in relation to a trust, the average of the fair market value of each asset held by the trust at the beginning of the current year and in each of the 2 previous years, or for the entire term of the trust if there are less than 2 previous years, and adjusted as follows:

<sup>14</sup> s. 497.452, F.S. The statute exempts certain cemeteries owned by religious institutions from preneed licensure.

1. If assets are added to the trust during the years used to determine the average, the amount of each addition is added to all years in which such addition is not included.
  2. If assets are distributed from the trust during the years used to determine the average, other than in satisfaction of the unitrust amount, as defined in s. 738.1041, the amount of each distribution is subtracted from all other years in which such distribution is not included.
- Without regard to the withdrawal method selected, taxes on capital gains, if any, must be paid from the trust principal.

Section 8 of the bill amends s. 497.269, F.S., to clarify that the annual report must record the fair market value of the C&M trust fund.

### **Burial Fees**

Section 7 of the bill amends s. 497.268, F.S., to provide a consistent deposit requirement for graves, mausoleums, and columbaria which are all “burial rights” under the Act. Clarifies that 10 percent of all sales of burial rights is to be deposited into the C&M trust fund, and a \$25 minimum is to be deposited for each post-1993 sale of a burial right, and \$25 for each burial right provided without charge.

Section 11 of the bill deletes the \$50 fee cap for transferring burial rights and allows the fee to be set by rule.

### **Preneed Contracts**

Section 17 of the bill repeals the Servicing Agent Exemption from Preneed Licensure. This exemption is not currently used and has been recommended for repeal by the industry.

Section 18 of the bill adds “electronic or paper” preneed contracts and removes a cross-reference to s. 497.461, F.S., which is being repealed in section 23 of the bill.

Section 20 of the bill eliminates the method of determining wholesale cost of a preneed contract. The Department has concerns this would decrease the amounts currently being deposited into the trust.

Replaces “principal and income” with “fair market value,” allows the trustee to allocate and divide capital gains and losses and removes a cross-reference to s. 497.461, F.S., which is being repealed in section 23 of the bill.

Section 21 of the bill amends s. 497.459(6), F.S., to provide that preneed contracts cannot restrict any purchaser who is also the beneficiary and qualified applicant/recipient of benefit funds from making her or his contract irrevocable. Additionally, the bill clarifies that a preneed contract made irrevocable pursuant to this section cannot be canceled during the life or after the death of the contract purchaser or beneficiary.<sup>15</sup>

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<sup>15</sup> Section 1 of the bill creates definitions of “purchaser” and “beneficiary” in s. 497.005, F.S.

Section 23 of the bill repeals s. 497.461, F.S., relating to the use of surety bonds instead of depositing into the trust moneys collected on preneed licensure sales. The use of surety bonds is not widely utilized within the industry.

Section 24 of the bill clarifies the repeal of s. 497.461, F.S., does not affect preneed licensees who have elected to maintain a surety bond in lieu of depositing funds into a trust as of July 1, 2016.

Section 25 of the bill eliminates the letter of credit as an alternative to trust deposits as it primarily relates to the use of surety bonds that are being repealed in section 23 of the bill.

Section 26 of the bill removes regulatory exemptions for certain preneed contracts subjecting all contracts to the Act. The sections also removes a cross-reference to s. 497.461, F.S., which is being repealed in section 23 of the bill.

Section 27 of the bill amends s. 497.465, F.S., to provide that prior to inactive status, the licensee must deposit into the trust all of the funds received from preneed contracts. This change is intended to clarify that the licensee cannot retain any of the funds and must put them into the trust account in their entirety. Additionally, the bill removes the qualifier “unaudited or audited” from financial statements.

### **Email**

Section 2 of the bill includes an email address as information the Department can require for licensure and allows the Department to use email as a means of notification.

### **Embalmer Apprentice Applicants**

Section 14 of the bill requires an applicant for the embalmer apprentice program be of good character and has not demonstrated a history of lack of trustworthiness or integrity in business or professional matters.

### **Cremated Remains**

Section 29 of the bill adds the term “legally authorized” and clarifies the legally authorized person’s declaration of intent as to the cremation procedure. Specifies cremated remains are not property, any disputes among heirs shall be resolved by the courts.

### **Definitions**

Section 1 of the bill defines the following terms as they relate to preneed contracts:

- “Beneficiary” means a natural person expressly identified in a preneed contract as the person for whom funeral merchandise or services are intended.
- “Capital gain” or “capital loss” means a change in the value of a capital asset, such as investment or real estate, which gives the asset a different worth than the purchase price. The gain or loss is not realized until the asset is sold.

- “Fair market value” means the fair market value of assets held by a trust as of a specific date, assuming all assets of the trust are sold on that specific date.
- “Income” means earnings on trust assets, including interest, dividends, and other income earned on the principal.
- “Net income” means, in relation to a trust, ordinary income minus any income distributions for items such as trust expenses. For purposes of this subsection, “ordinary income” means, in relation to a trust, any earnings on trust assets, including interest and dividends received on property derived from the use of the trust principal, but does not include capital gains or capital losses.
- “Purchaser” means a natural person who has executed a preneed contract with or seeks to need funeral merchandise or services from a licensee.
- “Total return withdrawal percentage” means a percentage, not to exceed 5 percent, of the fair market value of a trust.

### **Technical Changes**

Section 3 of the bill makes a technical change that replaces the term “his or her representative or legal guardian” with “a legally authorized person.”

Sections 9 and 10 of the bill make technical changes that replace terms “decedent or other” and “family or next of kin” with “legally authorized person.”

Section 12 of the bill removes a cross-reference to s. 497.461, F.S., which is being repealed in the bill.

Section 13 of the bill makes a technical change that adds the term “or legally authorized person.”

Section 15 of the bill makes a technical change clarifying the duties of a funeral director.

Section 16 of the bill makes a technical change that replaces the term “next of kin of a deceased person” with “legally authorized person.”

Section 19 of the bill removes a cross-reference to s. 497.461, F.S., which is being repealed in

Section 23 of the bill replaces “income” with the term “appreciation.”

Section 22 of the bill makes a technical change that adds the terms “fair market value” and “legally authorized person.”

Section 28 of the bill makes a technical change that replaces the term “the decedent’s next of kin” with “legally authorized person.”

### **Effective Date**

Section 30 of the bill states this act shall take effect July 1, 2016.

**IV. Constitutional Issues:**

## A. Municipality/County Mandates Restrictions:

None.

## B. Public Records/Open Meetings Issues:

None.

## C. Trust Funds Restrictions:

None.

**V. Fiscal Impact Statement:**

## A. Tax/Fee Issues:

None.

## B. Private Sector Impact:

The unitrust proposal may provide a benefit to cemetery licensees in the form of increased annual distributions to licensed cemeteries to defray cemetery care and maintenance expenses; however, the Division states there is too little experience among other state funeral and cemetery regulators with the concept to make specific projections.

The requirement for annual trustee reports to DFS may increase costs to the approximately 370 preneed licensees in the state. The costs would be in the form of increased fees charged by preneed trustees to preneed licensees. DFS believes the cost will be relatively insignificant, because the trustees already have and provide the information to the preneed licensees. DFS believes the recurring cost might be in the range of \$250 per licensee per year.<sup>16</sup>

## C. Government Sector Impact:

The Department will need to develop new rules to administer the changes in various sections of the bill.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

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<sup>16</sup> Florida Department of Financial Services, Agency Analysis of 2016 Senate Bill 854 (Nov. 30, 2015).

**VIII. Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 497.005, 497.141, 497.152, 497.266, 497.267, 497.268, 497.269, 497.273, 497.274, 497.277, 497.283, 497.286, 497.371, 497.372, 497.381, 497.452, 497.454, 497.456, 497.458, 497.459, 497.460, 497.462, 497.464, 497.465, 497.601, 497.607

This bill creates section 497.2675 of the Florida Statutes.

This bill repeals section 497.461 of the Florida Statutes.

**IX. Additional Information:****A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

**B. Amendments:**

None.