

# 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 204

SPONSOR: Banking and Insurance Committee and Senator Crist

SUBJECT: Recording the Purchase of Burial Rights

DATE: January 7, 2004      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Emrich</u>	<u>Deffenbaugh</u>	<u>BI</u>	<u>Favorable/CS</u>
2.	_____	_____	<u>RI</u>	_____
3.	_____	_____	<u>JU</u>	_____
4.	_____	_____	<u>FT</u>	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

**I. Summary:**

Committee Substitute for Senate Bill 204 provides that any person who purchases a burial right, belowground crypt, grave space, mausoleum, columbarium, ossuary, or scattering garden for the disposition of human remains may, at his or her option, permanently record the purchase of such burial right with the clerk of the court in the county where the burial right is located. The purpose of the recordation is for public notification and to establish a permanent official record in the county; however, such recordation does not create any priority of interest or ownership rights as to the purchaser who records such burial rights. The bill would apply to all cemeteries in the state which sell burial rights.

This bill creates section 497.310 and amends section 497.003 of the Florida Statutes.

**II. Present Situation:**

**Funeral and Cemetery Services**

*Background* -- Chapter 497, F.S., provides for the regulation of funeral and cemetery services by the Department of Financial Services (DFS) and the Board of Funeral and Cemetery Services (board) created within the department for that purpose.<sup>1</sup> The board administers and enforces the provisions of the law which is designed to protect purchasers of burial rights, and preneed funeral and burial merchandise and services.

<sup>1</sup> Section 497.101, F.S. Creates the Board of Funeral and Cemetery Services. Note that funeral directors and direct disposers [cremation] are separately licensed and regulated by the Department of Business and Professional Regulation under ch. 470, F.S.

All persons operating cemeteries must be licensed by DFS pursuant to ch. 497, F.S., unless specifically exempted.<sup>2</sup> According to representatives with the board, there are 171<sup>3</sup> licensed cemeteries in Florida and between 2,000 and 3,000 cemeteries which are exempt from licensure requirements under the law. Pursuant to ch. 497, F.S., there are eight exemptions from the provisions relating to licensed cemeteries which are for certain church, community, fraternal, county, municipal, and family cemeteries.<sup>4</sup> Board officials state that many of these exempt cemeteries do sell burial rights to purchasers including county, municipal, and religious institution-owned cemeteries. However, community, fraternal, and family-owned cemeteries do not sell burial rights. All licensed cemeteries, including exempt cemeteries, are subject to provisions in the chapter relating to burial record keeping, solicitation practices, illegal tying arrangements, discrimination, and abandoned cemeteries.<sup>5</sup> Additionally, exempted cemeteries of more than 5 acres are required to submit to investigation and mediation procedures by the DFS in the event of a consumer complaint.

To operate in this state, a cemetery company must have a site containing 30 contiguous acres, a net worth of at least \$50,000, pay an initial application fee of \$5,000, and an annual license fee based on the cemetery's annual gross sales.<sup>6</sup> The 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 grave sites.

Chapter 497, F.S., also regulates the sale of preneed contracts of funeral and burial merchandise and services, for which a separate certificate of authority is required for any funeral home or cemetery that sells such contracts.<sup>7</sup> Preneed contracts do not pertain to the sale of burial rights, but apply to preneed sales of merchandise and services. The fee for an application for a certificate of authority is \$500, and must be accompanied by an annual statement containing financial and other information. Annual renewal fees to maintain a certificate of authority are based on the number of preneed contract sales.

*Purchase of a burial right* -- Cemetery companies are authorized to perform the function of the "exclusive initial preneed and at-need sale of interment or burial rights in earth, mausoleum,

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<sup>2</sup> Section 497.201, F.S. A "cemetery" is defined to mean a place dedicated to and used for the permanent interment of human remains. A cemetery may contain land or earth interment; mausoleum, vault, or crypt interment; a columbarium, ossuary, scattering garden, or other structure or place used or intended to be used for the interment or disposition of cremated human remains; or any combination of one or more of such structures or places. A "columbarium" is a structure within a cemetery which is substantially exposed above the ground and which is intended to be used for the inurnment of cremated human remains. A "mausoleum" is a structure within a cemetery which is substantially exposed above the ground and is intended to be used for the entombment of human remains. An "ossuary" is a receptacle used for the communal placement of cremated human remains without benefit of an urn or other container. A "scattering garden" is a location within a cemetery which is used for the spreading of cremated remains.

<sup>3</sup> Three of the large multi-state cemetery companies own over one-half of the 171 licensed cemeteries: Service Corp. International (SCI) owns 49; Stewart owns 21; and, Alderwoods owns 17 cemeteries, according to a representative with the board. The remaining 84 cemeteries are owned by small companies.

<sup>4</sup> Section 497.003, F.S.

<sup>5</sup> Section 497.003(2), F.S.

<sup>6</sup> Section 497.201 and 497.213, F.S.

<sup>7</sup> Section 497.405, F.S. Includes those entities exempt from licensure as a cemetery company under s. 497.003, F.S., but makes specific exemptions for trust institutions receiving funds in trust for the sale of a preneed contract, certain qualified Florida corporations, and certain religious institution-owned cemeteries offering specific preneed services that are located in counties with a population of at least 960,000 persons on July 1, 1996.

crypt, niche, or columbarium interment,” however, nothing can limit the right of a person owning interment or burial rights to sell those rights to third parties, *subject to* the transfer of title by the cemetery company.<sup>8</sup> According to representatives with the board, cemeteries provide consumers with a contract for the purchase of a burial right, grave space, mausoleum, columbarium, ossuary, or other place intended for the disposition of human remains. Some cemeteries also choose to provide a deed and warranty of perpetual care,<sup>9</sup> or a letter acknowledging the sale of the burial right specifying the location of the plot, lot, section and space.

Although there is nothing in the law requiring a cemetery company to specifically maintain burial ownership records, there is a current administrative rule requiring companies to make available “lot ownership records” to DFS.<sup>10</sup> Further, ch. 497, F.S., requires cemetery companies to keep all financial records of the company and make such records available at reasonable times for examination by DFS.<sup>11</sup> Additionally, the records of every burial in the cemetery must be kept,<sup>12</sup> and s. 497.103(4), F.S., authorizes the DFS to examine the financial affairs of any cemetery company and any preneed sales certificateholder.

Representatives with the board state that its penalty structure varies depending on the severity of the violation by the cemetery company and the amount of harm caused to consumers. Penalties range from a Notice of Noncompliance to administrative action which can lead to a fine, suspension, or revocation of a cemetery’s license.<sup>13</sup> Also, DFS may recover reasonable and justifiable costs if its investigation results in judicial or administrative disciplinary action.

### **Clerks of Courts**

Clerks of the circuit courts are elected pursuant to the provisions of Section 1 of Article VIII of the Florida Constitution.<sup>14</sup> The duties of the clerks are provided for in ch. 28, F.S., and include the responsibility of being the official recorder of all instruments and documents to be recorded in the county.<sup>15</sup> The clerk must keep a register of recorded instruments called “Official Records,” which includes the time and date of filing, the filing number of the recorded instrument, the kind of instrument, and the names of the parties to the instrument. The clerk shall maintain a general

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<sup>8</sup> Section 497.305, F.S. Cemetery companies are authorized to charge a fee up to \$50 to transfer burial rights from one purchaser to another under s. 497.313, F.S.

<sup>9</sup> Cemeteries no longer convey a “fee simple absolute” (the conveyance of an estate limited absolutely to a person and his or her heirs) in a burial site to a purchaser as they did prior to the late 1950’s. Instead, cemeteries convey what is essentially a “right to use” deed in a burial site. The “right to use” deed began to be used after the Legislature enacted a law in 1959 requiring cemeteries to establish a care and maintenance trust fund for the future care and maintenance of cemeteries (Ch. 59-363, L.O.F.).

<sup>10</sup> Rule 3F-6.005, Fla. Administrative Code.

<sup>11</sup> Section 497.309, F.S. All burial records and all contracts under the jurisdiction of the board, which have not been audited by DFS, must be filed and kept in a secure manner pursuant to Rule 3F-6.004, Fla. Administrative Code. Further, written contracts on all sales must be made between the company and the purchaser, which contracts shall state the sales price, terms and other pertinent information relative to the transaction under Rule 3F-6.0054, Fla. Administrative Code. Also, s. 497.103(4), F.S., authorizes the DFS to examine the financial affairs of any cemetery company and any preneed sales certificateholder. The department may recover reasonable and justifiable costs if the investigation results in judicial or administrative disciplinary action.

<sup>12</sup> Section 497.309, F.S.

<sup>13</sup> Section 497.131, F.S.

<sup>14</sup> Section 34.031, F.S. The clerk of the circuit court shall be the clerk of the county court unless otherwise provided by law.

<sup>15</sup> Section 28.222, F.S.

alphabetical index, direct and inverse, of all instruments filed for record which must be available at each office where official records may be filed.

Charges for services provided by the clerk as to recording documents and instruments are set forth in s. 28.24, F.S. Specifically, the fee for recording, indexing, and filing any instrument not more than 14 inches by 8 1/2 inches is \$5 for the first page and \$4 for each additional page or fraction thereof.

### **“Double Selling” of Burial Rights**

According to the sponsor, it is important for consumers to have the right to permanently record the purchase of their burial site with the county clerk. Such a public record would help heirs of a deceased individual locate the burial site in cases where the deceased left no burial records. Furthermore, given the recent events pertaining to the double selling of the same burial lots involving Menorah Gardens in Broward County and Florida Memorial Gardens in Brevard County, it is important for consumers to have the option to permanently record their lot in case the cemetery company sells their lot twice or loses their lot ownership records.<sup>16</sup> Also, small independent cemeteries could lose burial lot records if such cemeteries are bought out by larger companies, according to the sponsor. Currently, there is no specific statutory authority for a county clerk to record documents pertaining to the purchase of a burial right.

However, the mere recording with the clerk of the burial documents by the purchaser does not give such documents any effect as to who is the original purchaser of the burial site. For example, if the original purchaser *does not record* the burial documents and the cemetery resells the same lot to a second purchaser, who *does record* the burial documents, the records with the cemetery company will prevail as to who is the original, and rightful, owner.<sup>17</sup> Further, unlike the recording of a conveyance of real property,<sup>18</sup> the recording of burial documents does not give a purchaser any “priority rights” as to subsequent purchasers. Under current law, no conveyance, transfer, or mortgage of real property is good and effectual in law or equity against subsequent purchasers, unless it is recorded by the clerk of the court.

### **III. Effect of Proposed Changes:**

**Section 1.** Creates s. 497.310, F.S., relating to recording the purchase of burial rights to provide that any person who purchases a burial right, belowground crypt, grave space, mausoleum, columbarium, ossuary, or scattering garden for the interment, entombment, inurnment, or other disposition of human remains may, at his or her option, permanently record the purchase of such burial right with the clerk of the court in the county where the burial right is

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<sup>16</sup> In December 2001, relatives of those buried in Menorah Gardens filed suit alleging the cemetery recklessly or intentionally removed or disturbed human remains, discarding them in nearby woods or burying other remains in the same plots. In December 2003, the world’s largest funeral services firm, Service Corporation International (SCI), which owns two Menorah Gardens cemeteries, agreed to pay \$100 million to settle part of the Menorah Gardens class-action lawsuit. Further, SCI settled with the DFS and the Florida Attorney General for \$14 million which was used to pay restitution to victims and fines. In the case of Florida Memorial Gardens, a cemetery owned by SCI, the late Senator Howard Futch had to be reburied after the cemetery mistakenly sold an adjacent plot meant for his wife. The DFS is currently considering administrative action against SCI.

<sup>17</sup> Section 497.305, F.S. Cemeteries are charged with the exclusive interment, entombment, or inurnment of human remains.

<sup>18</sup> Section 695.01, F.S.

located. The purpose of such recordation is for public notification and to establish a permanent record in the county; however, the recordation does not create any priority of interest or ownership. It further mandates that the clerk record the evidence of the purchase of such burial right upon receiving payment by the purchaser of a service charge as provided by law.

**Section 2.** Amends s. 497.003, F.S., to provide that s. 497.310 (Section 1, above) applies to all cemeteries in the state. The bill is narrowed to apply only to cemeteries which “sell” burial rights.

**Section 3.** Provides that the act shall take effect July 1, 2004.

As noted above under the Present Situation Section, the effect of this bill would be to enable friends or relatives of a deceased individual to locate the burial site in the official records of the county in cases where the deceased left no burial records. The bill further clarifies that the recording of burial rights does not create any priority of interest or ownership rights as to the purchaser who records his or her burial rights. The bill would apply to all cemeteries licensed in the state by DFS as well as county, municipal, and religious-owned cemeteries which sell burial rights, but would not apply to those cemeteries which do not sell burial rights like fraternal, community or family-owned cemeteries.

#### **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:**

See Private and Government Sector Impacts below.

##### **B. Private Sector Impact:**

A person who records documents pertaining to the purchase of his or her burial rights with the county clerk may benefit because such records could help heirs of the deceased person locate the burial lot in the case where the deceased left no burial records.

Individuals who decide to record the purchase of their burial rights with the Clerk of the Court will have to pay a nominal fee of \$5 per page (and \$4 for each additional page)

under this bill. It is difficult to estimate the number of persons who will record their burial right documents since the recording provisions are optional.

**C. Government Sector Impact:**

This bill will have an indeterminate fiscal and workload impact on the clerks because there is no way to determine the number of people who will record the purchase of their burial rights. According to representatives with the board, they do not keep information pertaining to the annual number of burial rights sold. However, according to vital statistical information for Florida, 169,112 people died in Florida during calendar year 2002 and 63,022 people were buried in the state.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Amendments:**

None.

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

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