

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/CS/HB 473 Funeral, Cemetery, and Consumer Services

**SPONSOR(S):** Government Operations Appropriations Subcommittee; Insurance & Banking Subcommittee; Roberson and Others

**TIED BILLS:** **IDEN./SIM. BILLS:** SB 854

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Insurance & Banking Subcommittee	10 Y, 0 N, As CS	Bauer	Luczynski
2) Government Operations Appropriations Subcommittee	12 Y, 0 N, As CS	Keith	Topp
3) Regulatory Affairs Committee			

### SUMMARY ANALYSIS

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 individual and entity licenses for cemetery companies, embalmers, direct disposers, funeral directors, preneed, and others. The Act is administered jointly by the Division of Funeral, Cemetery, & Consumer Services of the Department of Financial Services (DFS) and the Board of Funeral, Cemetery & Funeral Services (Board) as coexisting "licensing authorities."

The bill makes the following changes throughout the Act:

- Creates a unitrust method as an alternative to the current net income approach for care and maintenance trusts required of cemetery companies; also creates definitions, requirements, and procedures for election, modification, and Board approval of a cemetery company's election to use the unitrust method;
- Repeals surety bonding and letters of credit as alternative forms of security for the performance of preneed contracts, and eliminates references to these alternative options throughout the Act;
- Creates definitions of "purchaser" and "beneficiary" for preneed contracts, and updates various financial and trust-related terms throughout the Act;
- Repeals a preneed licensure exemption for certain servicing agents;
- Authorizes the DFS to require email addresses from applicants and licensees for purposes of electronic notifications for official communications;
- Ensures consistent use of the defined term "legally authorized person" throughout the Act;
- Clarifies that cremated remains are not property for purposes of probate, and that division of such remains requires the legally authorized person's consent;
- Requires applicants for the embalmer apprentice program to demonstrate good character, which is currently required of other licenses under the Act;
- Clarifies the scope of funeral directing;
- Requires cemetery companies to remit unexpended monies paid on irrevocable preneed contracts to the Agency for Health Care Administration (AHCA) for deposit into the Medical Care Trust Fund after the beneficiary's final disposition;
- Clarifies the deposit duties of preneed licensees prior to becoming inactive; and
- Provides specific rulemaking authority for several existing rules and provides new rulemaking authority to administer the unitrust method.

The bill has a positive fiscal impact on state government expenditures by reducing an estimated \$20,000 in operational expenditures from the Regulatory Trust Fund within the DFS. In addition, the bill has a positive, yet indeterminate fiscal impact to the state by requiring the industry to remit unused irrevocable preneed contract funds to AHCA for deposit into the Medical Care Trust Fund. The bill does not have a fiscal impact on local governments. The fiscal impact to the private sector is indeterminate, in that the bill requires annual reporting from trustees of preneed contract funds, but the unitrust method could provide greater long-term returns for cemetery licensees' care and maintenance trusts.

The bill has an effective date of July 1, 2016.

**This document does not reflect the intent or official position of the bill sponsor or House of Representatives.**

**STORAGE NAME:** h0473b.GOAS

**DATE:** 2/1/2016

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### **Current 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”).

#### **Effect of the Bill**

The bill amends a number of provisions of the Act:

#### ***E-mail Notifications***

As required by the Act, the DFS administers a licensing system to process and track applications, renewals, and fees; the 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 the DFS.<sup>2</sup>

Sections 2, 3, and 6 of the bill amend ss. 497.141, 497.146, and 497.264, F.S., respectively, to codify the Division’s practice of requiring applicants’ and licensees’ email addresses.

#### ***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>3</sup> The Act sets the priority of legally authorized persons<sup>4</sup> as:

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<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 Nov. 20, 2015).

<sup>2</sup> s. 497.141(2) and (11), F.S. See DIVISION OF FUNERAL, CEMETERY & CONSUMER SERVICES, *Applications*, at <http://www.myfloridacfo.com/Division/funeralcemetery/Licensing/LicensingApplications.htm> (last viewed Nov. 20, 2015).

<sup>3</sup> s. 733.301, F.S.

<sup>4</sup> s. 497.005(39), F.S. The definition also addresses legally authorized persons when no family member exists or is available.

- (1) A written *inter vivos*<sup>5</sup> authorization made by the deceased;
- (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>6</sup>

The bill amends several provisions throughout the Act to ensure consistent usage of the term "legally authorized person":

- Section 4 – s. 497.152, F.S., which subjects a licensee to disciplinary action by the DFS for various acts, including refusing to surrender custody of a dead human body, failing to obtain written permission regarding disposition of funeral merchandise, and making material misrepresentations regarding a preneed contract. The bill clarifies that these acts or omissions directed to legally authorized persons are grounds for disciplinary action.
- Section 12 – s. 497.273(4)(b), F.S., regarding the authorization to inter or entomb cremated animal remains with an inurned.
- Section 13 – s. 497.274(1), F.S., regarding the authority to waive the minimum standard adult grave space.
- Section 15 – s. 497.286(3), F.S., regarding the names of certain persons contained in a cemetery's notice to the DFS of presumptively abandoned burial rights.
- Section 18 – s. 497.381(4), F.S., regarding the prohibition of solicitation of goods and services by funeral directors and direct disposers to legally authorized persons or family.<sup>7</sup>
- Section 24 – s. 497.460, F.S., regarding the disbursement of funds paid on defaulted or unperformed preneed contracts.
- Section 30 – s. 497.601(1), F.S., regarding the scope of permissible activities of licensed direct disposers, including securing pertinent information to complete disposition and the death certificate.
- Section 31 – s. 497.607(1), F.S., regarding authorization for cremation services. In addition to clarifying the "legally authorized person" declaration of intent in subsection 1, the bill creates subsection (2) to s. 497.607, F.S., to state that cremated remains are not property for purposes of s. 731.201(32), F.S.<sup>8</sup>, and a division of such remains requires the consent of the legally authorized person approving the cremation, or if the legally authorized person is the decedent, the next available legally authorized person. The bill provides that a dispute regarding the division of cremated remains shall be resolved by a court of competent jurisdiction.

<sup>5</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 Nov. 25, 2015).

<sup>6</sup> Florida Department of Financial Services, Agency Analysis of 2016 House Bill 473, p. 2 (Nov. 23, 2015).

<sup>7</sup> The DFS noted that notwithstanding this provision, monument establishments and any other ch. 497-licensed entity should be able to contact the legally authorized person or family of the decedent, once 30 days have passed from the date of death, to offer for sale grave markers or monuments. DFS Division of Funeral, Cemetery, and Consumer Services, *HB 473 Comments & Suggestions*, p. 16 (Nov. 17, 2015), on file with the Insurance & Banking Subcommittee staff.

<sup>8</sup> Section 731.201(32), F.S., is the definition of "property" for purposes of the Florida Probate Code, and means both real and personal property or any interest in it and anything that may be the subject of ownership. By excluding cremated remains from probate property, the bill ensures that the disposition of cremated remains is subject to the order of priority of legally authorized persons.

## ***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).

According to the DFS, the alternative delivery method's reference to s. 497.461, F.S., as a source of standards and procedures for OBC manufacturers is unclear and unnecessary. The Division is not aware of any applicable standards or procedures in s. 497.461, F.S. Additionally, this alternative delivery method is not currently used by any manufacturer, and the Division has no record of any manufacturer ever seeking to use the alternative offered in s. 497.283(2)(c), F.S., or the applicable rule.<sup>9</sup> Accordingly, section 14 of the bill deletes the alternative delivery provision in s. 497.283(2)(c), F.S.

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

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

- 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. Section 16 of the bill amends s. 497.371, F.S., to provide that the DFS may not issue a license to an applicant for the embalmer license program, unless it determines that he or she is of good character and has not demonstrated a history of lack of trustworthiness or integrity in business or professional matters.

## ***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.

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<sup>9</sup> DFS Division of Funeral, Cemetery, and Consumer Services, *HB 473 Comments & Suggestions*, p. 14 (Nov. 17, 2015), on file with the Insurance & Banking Subcommittee staff. According to the Division, the applicable rule is 69K-7.0125, F.A.C. Section 497.283, F.S., is the only necessary authority for the rule. The only provision of 497.161, F.S., which is referred to in the rule, is 497.461(12), F.S., which reads as follows: "(12) *In lieu of the surety bond, the licensing authority may provide by rule for other forms of security or insurance.*"

Section 17 of the bill amends s. 497.372(1)(b), F.S., to remove the language stating that such services be performed “with the family or friends of the decedent or any other person responsible for such services.” This language is being removed to avoid possible conflict with “legally authorized persons.”

### ***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>10</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>11</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 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 accretions to principal, not income). This view has been largely informed by trust practices codified in other parts of Florida law.<sup>12</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>13</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>14</sup>

According to the Division, the unitrust concept as applied to cemetery C&M trusts has only been fairly recently approved for use in 3 states (Iowa, Missouri, and Tennessee).<sup>15</sup>

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<sup>10</sup> s. 497.262, F.S.

<sup>11</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.

<sup>12</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 Insurance & Banking Subcommittee staff.

<sup>13</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>14</sup> Lauren Moore, *Perpetual Care Roundtable*, AMERICAN CEMETERY, Jan. 2014, at p. 33 (on file with the Insurance & Banking Subcommittee staff).

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

- *Terminology Updates:* Sections 7 and 8 of the bill update financial and trust terms in existing C&M trust statutes.
  - Section 7 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 8 of the bill amends s. 497.267, F.S., to substitute “withdrawals” from the C&M trust fund instead of “income.”
- *Distributions from C&M Trusts/New Unitrust Option:* Section 9 of the bill creates s. 497.2675, F.S., as a comprehensive C&M trust distribution statute, which:
  - Creates definitions relating to the unitrust option:
    - Average fair market value,
    - Capital gain or capital loss,
    - Ordinary income,
    - Net ordinary income of the trust,
    - Net ordinary income trust distribution method,
    - Fair market value,
    - Income,
    - Unitrust amount and unitrust distribution,
    - Unitrust distribution percentage, and
    - Unitrust distribution method.
  - Establishes the net income approach as the “default trust distribution method” if cemetery licensee does not elect the unitrust distribution method,
  - Specifies grounds disqualifying cemeteries from receiving unitrust distributions,
  - Provides requirements and procedures for cemetery to apply to the Board to use, modify, or resume the unitrust method; Board approval criteria, duration of approval, and power to order discontinuation of the unitrust method,
  - Provides requirements for the timing of unitrust distributions,
  - Requires annual reporting by the C&M trustee, and
  - Provides rulemaking authority for the licensing authority to prescribe forms and procedures for applications to implement this section.
- *Deposit Requirements for Burial Rights Proceeds:* Currently, s. 497.268, F.S., requires each cemetery company to set aside and deposit in its C&M trust fund certain amounts or percentages from sales of burial rights, which include graves, mausoleums, columbaria, ossuary, or scattering gardens. For *burial rights*, the Act requires 10 percent of all payments to be deposited into the C&M trust fund, a \$25 deposit for *burial rights* provided without charge, and a minimum of \$25 per *grave* for every sale made after September 30, 1993. For *mausoleums or columbaria*, 10 percent of payments must be deposited into the C&M trust fund.<sup>15</sup>
  - However, because graves, mausoleums, and columbaria are all “burial rights” under the Act, Section 10 of the bill amends s. 497.268, F.S., to provide a consistent deposit requirement for these burial spaces and structures. As such, the bill requires 10 percent of all sales of burial rights to be deposited into the C&M trust fund, a \$25 minimum for

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<sup>15</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>16</sup> s. 497.005(7), F.S. A *grave space* is a space of ground in a cemetery intended to be used for the interment in the ground of human remains; a *mausoleum* is a structure or building that is substantially exposed above the ground and that is intended to be used for the entombment of human remains; and a *columbarium* is a structure or building that is substantially exposed above the ground and that is intended to be used for the inurnment of cremated remains. s. 497.005(37), (42), and (16), F.S.

each post-1993 sale of a burial right, and \$25 for each burial right provided without charge.

- *Annual Reporting for C&M Trusts*: Section 497.269, F.S., requires trustees of C&M trust funds to provide an “adequate financial report” to the DFS by April 1 every year, using forms and procedures specified by rule.
  - Section 11 of the bill amends this section to clarify that the annual report record the *fair market value* of the C&M trust fund, which is defined in new s. 497.2675(1)(f), F.S.

### ***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 funeral merchandise or service in advance. Examples of burial or funeral merchandise are caskets, outer burial containers, urns, monuments, floral arrangements, and register books. A “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>17</sup>

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>18</sup>

The bill makes the following changes to the preneed provisions of the Act:

- *Definitions*: Section 1 of the bill amends s. 497.005, F.S., to create definitions of “purchaser” and “beneficiary” for use in the context of death care service contracts between consumers and funeral homes and other preneed sellers. “Beneficiary” is defined as a natural person expressly identified in a preneed contract as the person for whom funeral merchandise or services are intended. “Purchaser” means a natural person who executes a preneed or an at-need contract for services or merchandise with a licensee.
- *Rulemaking Authority for Preneed Contracts Funded by Life Insurance*: Section 5 of the bill amends the Act’s rulemaking authority, s. 497.161, F.S., to provide authority for rules consistent with part IV of the Act (relating to preneed sales) and the Florida Insurance Code that establish conditions of use for insurance as a funding mechanism for preneed contracts. According to the Division, the intent of this change is to create clear rulemaking authority for current Board rule 69K-8.005, F.A.C., relating to preneed contracts funded by life insurance, because the current statutory authority may be subject to challenge. The rule was adopted in 1996, prior to the implementation of legislative changes to the Administrative Procedure Act that significantly restricted rulemaking to clear grants of rulemaking authority.<sup>19</sup>
- *Repeal of Servicing Agent Exemption from Preneed Licensure*: In addition to authorizing sales and advertisement of preneed contracts, a preneed license is required in order to receive any funds for payment on a preneed contract. Currently, the license requirement for receipt of funds does not apply to state or national trust companies or banks or savings and loan associations with trust powers receiving any money in trust pursuant to the sale of a preneed contract. It also does not apply to any Florida corporation acting as a servicing agent that are 100 percent owned by persons licensed under part III of the Act (funeral directing, embalming, and related services), if:
  - No stockholder holds, owns, votes, or has proxies for more than 5 percent of the issued stock of such corporation,
  - The corporation has a blanket fidelity bond, covering all employees handling the funds, in the amount of \$50,000 or more issued by a licensed insurance carrier in this state, and

<sup>17</sup> s. 497.005(56), (6), and (7), F.S.

<sup>18</sup> s. 497.452, F.S. The statute exempts certain cemeteries owned by religious institutions from preneed licensure.

<sup>19</sup> See s. 120.536, F.S. DFS Division of Funeral, Cemetery, and Consumer Services, *HB 473 Comments & Suggestions*, p. 7 (Nov. 17, 2015), on file with the Insurance & Banking Subcommittee staff.

- The corporation processes the funds directly to and from the trustee within the applicable time limits set forth in the Act.

However, this servicing agent exemption is not currently used and has been recommended for repeal by the industry. Section 19 of the bill deletes the servicing agent exemption from preneed licensure in s. 497.452(2)(c), F.S.

- **Preneed Contract Forms:** Currently, s. 497.454, F.S., requires preneed licensees to file preneed contract forms and related forms with the DFS for approval prior to use in order to guard against misleading contracts. The licensing authority cannot approve preneed contracts unless they meet certain criteria regarding content and format, including sequential prenumbering and specific disclosure regarding the preneed licensee's ability to select trust funding or the financial responsibility alternative in s. 497.461, F.S. (surety bonding).<sup>20</sup>
  - Section 20 of the bill amends s. 497.454, F.S., to provide that the licensing authority may not approve any *electronic or paper* preneed contract that does not provide for sequential prenumbering. Additionally, because the bill repeals the financial responsibility alternative in s. 497.461, F.S., the bill also removes the licensee's method of securing preneed contract proceeds as a required disclosure.
- **Preneed Funeral Contract Consumer Protection Trust Fund:** The Act permits, in certain instances, a claim to be filed against the Florida Consumer Protection Trust Fund (FCPTF) where a purchaser has previously paid for a preneed contract, and the seller of the preneed contract subsequently goes out of business or becomes insolvent, and will not or cannot perform the preneed contract.<sup>21</sup> The FCPTF is funded by varying portions of each preneed contract, remitted by preneed licensees; all moneys deposited, along with all accumulated *income*, are immune from liens, charges, judgments, and other creditors' claims and shall be used only for the express purposes authorized by the Act.
  - Because the bill is repealing s. 497.461, F.S., regarding surety bonding, Section 21 of the bill amends s. 497.456, F.S., to remove a cross-reference to that statute. Additionally, the bill provides that the deposited moneys and accumulated *appreciation* (replacing the term "income") are to be used solely for purposes set forth by the Act.
- **Disposition of Preneed Proceeds:** The Act requires that minimum percentages of proceeds from preneed contract sales be deposited and under the control of an authorized trustee (i.e., state or national trust companies or banks or savings and loan associations with trust powers). The amounts to be deposited depend on the item sold in the contract. The statute also gives powers and duties to the trustee to invest, protect, and to distribute principal and income, subject to rule by the licensing authority. Section 22 of the bill:
  - Authorizes the Board to specify criteria, by rule, for the classification of items sold in a preneed contract,
  - Eliminates the method of determining wholesale cost, which industry has indicated is contract-driven and can result in overvaluation,
  - Replaces "principal and income" with "fair market value,"
  - Requires the trustee to submit annual reports with certain information to the DFS, as specified by rule,
  - Subjects the trustee to the prudent investor rule in s. 518.11, F.S., instead of the current SBA permissible investment statute in s. 215.47, F.S.,
  - Disallows the trustee from including life insurance policies or annuity contracts as investments or assets by or of the trust, and limits real estate assets to 25 percent of the trust,
  - Allows the trustee to allocate and divide capital gains and losses, and

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<sup>20</sup> s. 497.454, F.S.

<sup>21</sup> DFS DIVISION OF FUNERAL, CEMETERY, & CONSUMER SERVICES, *Claims Against the Consumer Protection Trust Fund*, <http://www.myfloridacfo.com/Division/FuneralCemetery/Consumers/PreneedClaims.htm> (last viewed Nov. 24, 2015). Whether such a claim will be paid, and how much will be paid on such a claim, is controlled by s. 497.456, F.S., and rule 69K-10.002, Fla. Admin. Code.



- Eliminates the licensee's power to revest title to trust assets subject to the alternative security provisions in ss. 497.461 and 497.462(2), F.S., which are being repealed in the bill.
- *Cancellation of Preneed Contracts:* Section 497.459, F.S., provides rescission rights, disclosures, and remedies for preneed contract purchasers. Subsection (6) provides that all preneed contracts are cancelable, as long as a preneed contract does not restrict any contract purchaser or a qualified applicant or recipient of certain social benefits from making her or his contract irrevocable.
  - An irrevocable contract is written only for people who are qualified applicants for, or recipients of, supplemental security income (SSI), temporary assistance under the WAGES program or Medicaid. Once the contract is signed, it cannot be canceled and refunded. It is a means for a person or family to set aside a portion of their assets for future burial and funeral services. The amount of the irrevocable contract will not be counted as an asset when the person applies for aid,<sup>22</sup> which protects the recipient from exceeding income eligibility thresholds and becoming disqualified from the public benefits.
  - In some instances, a purchaser enters into an irrevocable preneed contract for an amount in excess of what the heirs ultimately use for burial, internment, etc., after the purchaser dies. In cases of closed estates or very small estates that do not warrant full probate administration, the funeral home is left holding the remaining funds with no clear process of disposing of the funds that originated from SSI, Medicaid, or other specified public benefit.
  - Section 23 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>23</sup>
    - This ensures that the financial eligibility for the specified public benefits remain with the person as long as they receive benefits.
    - Additionally, the bill requires unexpended monies spent on an irrevocable contract to be remitted to the Agency for Health Care Administration (AHCA) for deposit into the Medical Care Trust Fund after the beneficiary's final disposition.<sup>24</sup> This ensures that the state and federal governments recover their respective shares of the unexpended monies of the irrevocable contract.
- *Repeal of Surety Bonding & Letters of Credit as Security for Preneed Contracts:* All preneed contracts must be secured by one of the following, and must specify the method of security utilized by the company: (1) A trust account, (2) A letter of credit (LOC) or surety bonding, or (3) An individual insurance policy.

According to the DFS, trust funding and insurance funding are the long-term proven and safe methods for securing performance of preneed contracts. Since approximately 2004, there have been only two methods actually used by preneed licensees to secure performance of preneed contracts: (1) trust deposit of proceeds of the preneed contracts or (2) funding by life insurers licensed in Florida.<sup>25</sup>

Section 497.461, F.S., allows additional surety bonding, "and other forms of security or insurance." Section 497.462(2), F.S., allows letters of credit as an alternative form of security. To the best of the Division's knowledge, these alternatives have not been used in recent years, and are vague, untested, subject to abuse, unnecessary, and potentially dangerous to consumers.

<sup>22</sup> DFS DIVISION OF FUNERAL, CEMETERY & CONSUMER SERVICES, *Consumer Tips: Preneed Contracts*, at <http://www.myfloridacfo.com/Division/FuneralCemetery/Consumers/ConsumerFAQ.htm> (last viewed Nov. 25, 2015).

<sup>23</sup> Section 1 of the bill creates definitions of "purchaser" and "beneficiary" in s. 497.005, F.S.

<sup>24</sup> Section 497.005(32), F.S., defines "final disposition" as the final disposal of a dead human body by specified means, excluding cremation. AHCA administers the Medical Care Trust Fund, which consists of federal grants and is used to provide health care services to individuals eligible for Medicaid and Medicare. s. 20.425(4)(a), F.S.

<sup>25</sup> DFS Division of Funeral, Cemetery, and Consumer Services, *HB 473 Comments & Suggestions*, pp. 24-25 (Nov. 17, 2015), on file with the Insurance & Banking Subcommittee staff.

The letter of credit provision, s. 497.462(2), F.S., relates primarily to surety bonding of preneed sales. The Legislature has previously amended s. 497.462, F.S., by adding subsection (11), which effectively prohibited use of surety bonding under s. 497.462, F.S., for new preneed contracts written after December 31, 2004. It is believed that the Legislature intended to entirely prohibit use of s. 497.462(2), F.S., as to preneed contracts written after 2004, but by oversight, subsection (11) only refers to bonding.

The Division believes the LOC concept is far inferior to trust deposits and even surety bonding. The LOC concept utilizes a body of law the Division and Board have no expertise in. The idea of using a LOC to secure obligations that may not come due for decades is loaded with potential dangers in the Division's opinion. The LOC option has never been used, and deleting the concept is advisable in the Division's opinion.

As such, the Division recommends repealing these alternatives to trust deposits. Section 25 of the bill repeals s. 497.461, F.S., regarding surety bonding as an alternative to trust deposits. Section 26 of the bill contains a savings clause for surety bonds in force under this section as of July 1, 2016, but states that no additional preneed contracts shall be added under such surety bonds after July 1, 2016. Sections 27 and 28 of the bill likewise eliminate the letter of credit as an alternative to trust deposits in s. 497.462, F.S., and cross-references in s. 497.464(1), F.S.

- *Inactive Preneed Licensees:* If a preneed licensee elects to surrender his or her license or the licensing authority does not receive the required renewal application and fees, the licensee becomes inactive and is then prohibited from engaging in preneed sales with the public. Prior to becoming inactive, he or she must collect and deposit into trust all of the funds *paid toward* preneed contracts sold. Additionally, the licensing authority has rulemaking authority to review and investigate such inactive licensees to protect the preneed customers, including requiring the submission of unaudited or audited financial statements.
  - 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.

## B. SECTION DIRECTORY:

**Section 1.** Amends s. 497.005, F.S., relating to definitions.

**Section 2.** Amends s. 497.141, F.S., relating to licensing; application procedures.

**Section 3.** Amends s. 497.146, F.S., relating to licensing; address of record; changes; licensee responsibility.

**Section 4.** Amends 497.152, F.S., relating to disciplinary grounds.

**Section 5.** Amends s. 497.161, F.S., relating to other rulemaking provisions.

**Section 6.** Amends s. 497.264, F.S., relating to license not assignable or transferable.

**Section 7.** Amends s. 497.266, F.S., relating to care and maintenance trust fund; remedy of department for noncompliance.

**Section 8.** Amends s. 497.267, F.S., relating to disposition of income of care and maintenance trust fund; notice to purchasers and depositors.

**Section 9.** Creates s. 497.2675, F.S., relating to distributions from the care and maintenance trusts.

**Section 10.** Amends s. 497.268, F.S., relating to care and maintenance trust fund, percentage of payments for burial rights to be deposited.

**Section 11.** Amends s. 497.269, F.S., relating to care and maintenance trust fund; financial reports.

**Section 12.** Amends s. 497.273, F.S., relating to cemetery companies; authorized functions.

**Section 13.** Amends s. 497.274, F.S., relating to standards for grave spaces.

**Section 14.** Amends s. 497.283, F.S., relating to prohibition on sale of personal property or services.

**Section 15.** Amends s. 497.286, F.S., relating to owners to provide addresses; presumption of abandonment; abandonment procedures; sale of abandoned unused burial rights.

**Section 16.** Amends s. 497.371, F.S., relating to embalmers; establishment of embalmer apprentice program.

- Section 17.** Amends s. 497.372, F.S., relating to funeral directing; conduct constituting practice of funeral directing.
- Section 18.** Amends s. 497.381, F.S., relating to solicitation of goods or services.
- Section 19.** Amends s. 497.452, F.S., relating to preneed license required.
- Section 20.** Amends s. 497.454, F.S., relating to approval of preneed contract and related forms.
- Section 21.** Amends s. 497.456, F.S., relating to Preneed Funeral Contract Consumer Protection Trust Fund.
- Section 22.** Amends s. 497.458, F.S., relating to disposition of proceeds received on contracts.
- Section 23.** Amends s. 497.459, F.S., relating to cancellation of, or default on, preneed contracts.
- Section 24.** Amends s. 497.460, F.S., relating to payment of funds upon death of named beneficiary.
- Section 25.** Repeals s. 497.461, F.S., relating to surety bonding as alternative to trust deposit.
- Section 26.** Provides a savings clause for the repeal of s. 497.461, F.S.
- Section 27.** Amends s. 497.462, F.S., relating to other alternatives to deposits under s. 497.458, F.S.
- Section 28.** Amends s. 497.464, F.S., relating to alternative preneed contracts.
- Section 29.** Amends s. 497.465, F.S., relating to inactive, surrendered, and revoked preneed licensees.
- Section 30.** Amends s. 497.601, F.S., relating to direct disposition; duties.
- Section 31.** Amends s. 497.607, F.S., relating to cremation; procedure required.
- Section 32.** Provides an effective date of July 1, 2016.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

The bill's requirement that cemetery companies remit unexpended irrevocable preneed contract funds to the AHCA for deposit into the Medical Care Trust Fund after the beneficiary's final disposition has an indeterminate, yet positive impact on state government.

#### 2. Expenditures:

According to the DFS, the bill will not result in increased costs. However, the bill has the potential to reduce some operational costs to the DFS, particularly the provisions relating to use of email for license renewal and other communications with licensees. The DFS projects an estimated recurring savings to be in the range of \$20,000 per year.<sup>26</sup>

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

#### 1. Revenues:

None.

#### 2. Expenditures:

None.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

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. Also, the unitrust measure allows for less judicious use of the care and maintenance trust because funds may be spent based on fair market value as opposed to net income.

<sup>26</sup> Florida Department of Financial Services, Agency Analysis of 2016 House Bill 473, p.3 (Dec. 11, 2015).

The requirement for annual trustee reports to the 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. The DFS believes the cost will be relatively insignificant, because the trustees already have and provide the information to the preneed licensees. The DFS believes the recurring cost might be in the range of \$250 per licensee per year.<sup>27</sup>

D. FISCAL COMMENTS:

None.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to affect county or municipal governments

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill authorizes the licensing authorities to adopt new rules regarding several aspects of the Act. In some instances, the bill merely provides clearer statutory authority for existing rules:

- Forms and procedures, including electronic reporting of data required relating to changes in licensees' information;
- Rules that are not inconsistent with part IV of the Act and the Insurance Code establishing conditions of use for insurance as a funding mechanism for preneed contracts;
- Timeframes for cemetery licensees to change their care and maintenance trust distribution method;
- Forms and procedures for applications and to implement the new unitrust statute, s. 497.2675, F.S.;
- Rules specifying criteria for the classification of items sold in a preneed contract as services, merchandise, or cash advances; and
- Rules relating to the format and content of annual reports filed by trustees of preneed trust accounts, starting April 1, 2018.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Section 9 of the bill creates a definition of "fair market value" and "capital gain or loss," along with other new definitions in new s. 497.2675, F.S. These new definitions "apply [specifically] for purposes of care and maintenance trusts" (lines 322-323). However, "fair market value" appears in the bill in contexts other than C&M trusts, such as preneed contract funds that must be held in trust (see lines 912, 923, 943, and 1038). Similarly, "capital gains and losses" appears in a preneed statute (line 975). To ensure that "fair market value" and "capital gains and losses" are used consistently throughout the Act, these terms should be moved to the general definitions section, s. 497.005, F.S.

### V. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On December 2, 2015, the Insurance & Banking Subcommittee adopted a proposed committee substitute and reported the bill favorably as a committee substitute. The committee substitute differs from the bill as filed by adopting the Senate companion, SB 854, in addition to the following changes that:

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<sup>27</sup> *Id.*

- Revised the definition of “purchaser”;
- Included email notification requirements in two other provisions of the Act, ss. 497.146 and 497.264, F.S.;
- Moved unitrust-related definitions to the new unitrust statute, s. 497.2675, F.S., and included more detailed procedures and regulatory requirements for using the unitrust method;
- Authorized rulemaking for the Board to specify criteria for: burial rights transfer fees, the classification of items sold in a preneed contract;
- Clarified that trustees of preneed contract funds may not invest in life insurance policies or annuity contracts, and limited investments in real estate to 25% of the trust’s assets;
- Required cemetery companies to remit unexpended monies paid on irrevocable preneed contracts to AHCA for deposit into the Medical Care Trust Fund after the beneficiary’s final disposition;
- Clarified the savings clause for the repeal of the surety bonding alternative for preneed licenses (section 27 of the committee substitute);
- Removed section 28 of the bill as filed, which created an escheat procedure for certain preneed trust funds; and
- Clarified the cremation procedure statute, s. 497.607, F.S., to allow for a legally authorized person’s declaration of intent and to specify that cremated remains are not property.

On January 28, 2016, the Government Operations Appropriations Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment removed a section of the bill relating to fee’s associated with the transferal of burial rights.

This analysis is drafted to the committee substitute as amended and passed by the Government Operations Appropriations Subcommittee.