



The Florida Senate

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Committee on Regulated Industries

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CEMETERY AND FUNERAL REGULATORY BOARDS

SUMMARY

This report examines the appropriate manner by which to combine the regulatory functions of the Board of Funeral Directors and Embalmers and the Board of Funeral and Cemetery Services within one agency. The report makes several staff recommendations on how to effectuate the merger of the boards, including the duplication of provisions in ch. 455, F.S., that the combined board would need to effectively administer and enforce the provisions in ch. 470, F.S., and the merger of chapters 470 and 497, F.S., into a single chapter with each profession or service placed in a separate part that corresponds to the current chapter divisions.

BACKGROUND

The Board of Funeral Directors and Embalmers within the Department of Business and Professional Regulation (DBPR) administers and enforces the provisions of ch. 470, F.S., which regulates funeral directors, embalming, and the practice of cremating human remains. The Board of Funeral and Cemetery Services within the Department of Financial Services (DFS) administers and enforces the provisions of ch. 497, F.S., which provides for the regulation of cemeteries, cremation services, cemetery companies, and preneed contracts for funeral merchandise or services.

Events over the past two years have given rise to concerns over the care exercised in the interment of human remains. National media accounts, including incidents in the State of Florida, of the improper disposal of human remains, the burial of bodies in the wrong graves, the sale of inadequate burial space, and the double sale of individual burial plots, have raised concerns in recent years about the effectiveness of funeral and cemetery regulation, and its ability to protect Florida's consumers.

SB 2238 by Senator Pruitt was filed during the 2002 Regular Session to provide, in part, for the transfer of regulatory authority over ch. 497, F.S., from the Department of Banking and Finance (DBF) to the DBPR. It required additional regulatory requirements, including stricter requirements for disinterment and reinterment of human remains, for the identification of human remains, and for burial contracts. It also prohibited the preneed sale of undeveloped cemetery property prior to the filing of a board-approved site plan. SB 2238 passed the Senate but died in messages.

A joint examination by the Office of Program Policy Analysis and Government Accountability (OPPAGA) and the Auditor General questioned the effectiveness of DBF's oversight of cemetery companies and preneed sellers, and recommended that the administration of ch. 497, F.S., be transferred to DBPR.¹

Because of these events, during the 2002-03 interim, the staff of the Senate Regulated Industries Committee conducted a review of the current state of the funeral and cemetery industries and applicable regulations. The report recommended changes to the Florida Statutes for improved regulation of the death care industry, but recommend that there should be no change in the jurisdictional scope of the two boards.

A group of industry representatives formed the Legislative Partnership Committee of 2003 (LPC03) to work towards consensus on a number of funeral and cemetery regulation issues. The LPC03 was composed of representatives of the Florida Funeral Directors' Association, Florida Funeral & Cemetery Alliance, and the Florida Morticians Association. After many discussions, the LPC03 compiled its legislative recommendations into report form. The report contained many consensus issues. The LPC03 recommended the merger of the provisions of chapters 470 and 497, F.S., into one chapter.

¹ OPPAGA Report No. 02-21, March 2002.

The Independent Funeral Directors Association of Florida, the Florida Monument Builders Association, and the Florida Funeral & Cemetery Advocacy formed a coalition called the Funeral Consumer Protection Alliance (FCPA). The FCPA proposed additional measures, including the transfer of regulatory authority over ch. 497, F.S., from the Department of Banking and Finance (now the DFS) to the DBPR. However, the FPCA did not recommend the merger of chapters 470 and 497, F.S.

The industry recommendations formed the basis for several bills introduced during the 2003 Regular Session. These bills included SB 2016 by Senator Pruitt and the similar HB 495 by Representative Brown. SB 2016 made numerous changes to ch. 497, F.S. During the course of the Regular Session, the bill was amended to include changes to ch. 470, F.S., and to combine the regulatory boards into one board housed in the Office of the Chief Financial Officer. The bill passed the Senate, but died on the House Calendar on third reading.

METHODOLOGY

Staff met with representatives from the Department of Business and Professional Regulation and the Department of Financial Services, which included representatives for the Board of Funeral Directors and Cemeteries and the Board of Funeral Directors and Embalmers. Staff also met with various professional organizations representing the funeral and cemetery industries. Staff also conferred with the Division of Statutory Revision. Staff reviewed current laws and agency rules, proposed legislation, OPPAGA reports, United States General Accounting Office reports, and other information sources.

FINDINGS

The findings of this report concern the appropriate manner by which to combine the regulatory functions of the Board of Funeral Directors and Embalmers and the Board of Funeral and Cemetery Services within one agency. The findings of this report do not concern the issue of whether the boards should be merged, or make a recommendation as to which agency should house the new board that would be formed by such a merger.

Type Two Transfers

The effective merger of two regulatory boards requires that the powers and functions of the current boards must be preserved in the new regulatory board. Chapter 20, F.S., provides for the transfer, merging, and

elimination of government entities. The merger of boards would be made by a type two transfer, as the term is defined in s. 20.06, F.S. Under a type two transfer all of the statutory powers, duties, functions, records, personnel, property, and unexpended balances of appropriations, allocations, or other funds of an existing agency are transferred to the agency into which the existing agency is merged. Through a type two transfer, the merger of the Board of Funeral Directors and Embalmers and the Board of Funeral and Cemetery Services into a combined board would preserve all of the current functions and powers of the boards. However, as discussed in this report, a type two transfer of the current boards' powers and functions must be accompanied by legislation to clarify the extent of the combined board's authority by eliminating or reconciling conflicting or inconsistent statutory provisions pertaining to the regulatory authority of the pre-merger boards.

Chapters 455 and 470, F.S.

The merger of the boards is complicated by the differences between the boards' governing statutes. Chapter 497, F.S., contains all of the relevant regulatory provisions needed by the Board of Funeral and Cemetery Services for the effective regulation of that chapter, i.e., provisions relating to administration of the board, enforcement, rulemaking, investigative authority, and disciplinary proceedings. Conversely, the Board of Funeral Directors and Embalmers must comply with provisions in ch. 455, F.S., as well as ch. 470, F.S., to complete its statutory framework. Chapter 455, F.S., sets forth the procedural and administrative framework for all of the professional boards housed under the DBPR, and pursuant to s. 455.017, F.S., the provisions of this chapter are exclusively administered by the DBPR for the regulation of professions.

With few exceptions, most of ch. 455, F.S., is directly applicable to the functions and powers of the Board of Funeral Directors and Embalmers, or to the duties and rights of the professions regulated by that board. Consequently, any merger of the two boards must account for the provisions of ch. 455, F.S., and insure that the new combined board would be, in regard to its administration of ch. 470, F.S., able to continue to perform the functions and exercise the powers currently performed and exercised by the Board of Funeral Directors and Embalmers without altering the current rights and duties of its regulated professions. The combined board must also be able to continue to perform the functions and exercise the powers currently performed and exercised by the Board of Funeral and

Cemetery Services under ch. 497, F.S., without altering the current rights and duties of its regulated services.

An Historical Model

The legislative history of the transfer of authority over medical boards from the Agency for Health Care Administration (AHCA) to the Department of Health (DOH) is instructive in the matter. In 1996, when the DOH was created, the medical boards of the AHCA were transferred to the new agency by a type two transfer. However, no provision was made in ch. 455, F.S., for certain functions necessary for the administration of the various medical boards by the DOH. The DOH could only exercise the authority that the AHCA possessed prior to the transfer. Chapter 455, F.S., provided administrative authority to the DBPR, the AHCA, or both. However, in certain instances the authority granted to DBPR under ch. 455, F.S., was not granted to AHCA, or it was unclear whether the AHCA had the authority.

Chapter 97-261, L.O.F., created the administrative authority necessary for the Department of Health (DOH) to administer the regulation of the medical professions that was transferred from the (AHCA). It created ss. 455.501 through 455.724, F.S. (1997), as part II of ch. 455, F.S. Most of these sections were copied from existing provisions in ch. 455, F.S., that were applicable to the DBPR and/or the AHCA. It designated part I of ch. 455, F.S., as only applying to the DBPR and the non-medical boards it administers. Then ch. 2000-160, L.O.F., transferred the sections that comprised part II of ch. 455, F.S., to ch. 456, F.S., and transferred the sections comprising ch. 456, F.S., to the new ch. 485, F.S.

This history presents the following lessons for the successful merger of the two boards:

- A type two transfer does not guarantee that a merged agency will be able to continue to effectively administer all the statutes within its jurisdiction.
- The provisions in ch. 455, F.S., needed for the administration of ch. 470, F.S., by the new combined board should be duplicated for the exclusive jurisdiction of the new board.

- The duplicated provisions from ch. 455, F.S., should be assigned to a chapter, or a separate part of a chapter, that is exclusively administered by the new combined board.

Preserving the Boards' Powers and Authority

CS/SB 2016 and HB 495 with CS attempted to resolve the issue of preserving the combined board's authority by providing that the new board would enforce the provisions of chapters 470 and 497, F.S., and would have the authority to enforce any provision of ch. 455, F.S., that would be *necessary* to continue to enforce the provisions of ch. 470, F.S.² As demonstrated by the transfer of the medical boards from the AHCA to the DOH, this approach may be problematic because it may fail to give sufficient notice as to which provisions of ch. 455, F.S., would apply to the new board or to the ch. 470, F.S., professions. For example, s. 455.02, F.S., which permits members of the armed forces who are in active duty to remain in good standing, is relevant to licensees and registrants under ch. 470, but its necessity for the enforcement of the chapter is questionable.

Section 455.2226, F.S., which requires funeral directors and embalmers to receive instruction regarding HIV and AIDS, is the only provision in ch. 455, F.S., that is directly and exclusively relevant to an occupation regulated by the Board of Funeral Directors and Embalmers. Accordingly, this provision should be transferred to a chapter or part of a chapter under the exclusive jurisdiction of the combined board.

The merger of the boards must be accomplished in a manner that assures that the combined board is also able to continue to perform the functions and exercise the powers currently performed and exercised by the Board of Funeral Directors and Embalmers without altering the current rights and duties of the professions regulated by that board. The provisions of ch. 455, F.S., relating to discipline³ and the administration of continuing education requirements⁴ provide the procedural frame-work for the substantive continuing education and the disciplinary provisions in ch. 470, F.S. These provisions do not have counterparts in ch. 497, F.S., and failure to duplicate and transfer these provisions for the exclusive administration of the

² Section 7 of CS/SB 2016 and section 12 of CS amendment to HB 0495.

³ Sections. 455.2255 through 455.2277, F.S.

⁴ Section ss. 455.212 through 455.2125, F.S., and ss. 455.2177 through 455.2179, F.S.

combined board could adversely affect the current rights and duties of the professions regulated under ch. 470, F.S.

However, it remains an open question whether the combined board should continue to comply with provisions in ch. 455, F.S., that do not directly relate to the administration of a provision in ch. 470, F.S. For example, s. 455.204, F.S., requires the Board of Funeral Directors and Embalmers to develop and implement a long-term policy planning and monitoring process for its regulated professions. Chapter 497, F.S., does not have a comparable provision. This provision may be good policy, but it is not clear whether it is necessary for the enforcement of ch. 470, F.S., by a combined board that may be placed under a department other than DBPR. A determination would also have to be made whether the provision should be relevant to the administration of ch. 497, F.S., by the combined board.

Consider also s. 455.2285, F.S., which requires the DBPR to make a report to the President of the Senate and Speaker of the House each year regarding the enforcement and disciplinary statistics for each profession. If the combined board is not housed in the DBPR, a legislative determination would need to be made as to whether the combined board, or the department in which the combined board is created, must develop and implement a planning and monitoring process for the ch. 470, F.S., professions, the ch. 497, professions and services, or both, or must make an annual report comparable to that required by s. 455.2285, F.S.

Chapters 455 and 497, F.S., also differ significantly in the administration of fees. Chapter 497, F.S., establishes exact fees for its licensees and registrants.⁵ However, ch. 470, F.S., establishes maximum fee amounts for its professions,⁶ and s. 455. 219, F.S.,

authorizes the Board of Funeral Directors and Embalmers to set the actual fee amount. Section 455.219(1), F.S., authorizes the board's waiver of license renewal fees, and s. 455.219(2), F.S, authorizes the Board of Funeral Directors and Embalmers to assess and collect a one-time fee from each licensee, whether active or inactive, to eliminate any cash deficit or to maintain financial integrity. Section 455.219, F.S., also contains detailed provisions for the management of expenses in the DBPR regulatory trust fund, including the maintaining of specified reports.⁷ Section 455.219, F.S., also sets a maximum fee for a duplicative license,⁸ and sets a maximum fee certification of a public record.⁹ Chapter 497, F.S., has no comparable provisions for the Board of Funeral and Cemetery Services. Section 497.525, F.S., merely provides that fees and penalties collected shall be deposited in the department's regulatory trust fund. A merger of the boards would require that a determination be made as to which, if any, of the provisions of ch. 455, F.S., relating to the administration of fees should apply to the combined board for its administration of the ch. 470, F.S., professions, or should become applicable to the combined board's administration of all the professions and services under its jurisdiction.

Although ch. 497, F.S., does not regulate the operators of cemeteries, the chapter does provide for the regulation of persons engaged in preneed sales.¹⁰ Section 497.405 through 497.531, F.S., sets forth preneed licensure requirements, and provides enforcement and disciplinary requirements and authority relevant to preneed sales.¹¹ The regulatory authority of the Board of Funeral and Cemetery Services in ch. 497 for preneed sales would be preserved for the combined board by maintaining the current structure of ss. 497.405 through 497.531, F.S. Consequently, the provisions in ch. 455, F.S., that relate directly to the licensing of¹², disciplinary

⁵ See 497.201, F.S., which sets a license application fee for cemetery companies, s. 497.209, F.S., which sets an investigation fee, s. 497.213, F.S., which sets annual license fees for cemetery companies, s. 497.361, F.S., which sets a registration fee for monument establishments, and s. 497.407, F.S, which sets fees for the preneed sales certificate of authority.

⁶ See for example: ss. 470.006, 470.007, and 470.008, F.S., which set application, registration, and license fee limits for embalmers; ss. 470.009, 470.011, and 470.012, F.S., which set maximum application, examination, licensure and registration fees for funeral directors; and s. 470.017 and 470.018, F.S., which set registration and renewal fees for direct disposers.

⁷ Sections 455.219(3), and (4), F.S.

⁸ Section 455.219(5), F.S.

⁹ Section 455.455.219(6), F.S.

¹⁰ Section 497.405 F.S., provides that a certificate of authority is needed for persons making preneed sales, and s. 497.439, F.S., provides for the registration of preneed sales agents.

¹¹ Sections 497.405 through 497.441, F.S., sets forth the requirements for preneed sales. Sections 497.443 through 497.531, F.S., establishes the board's enforcement provisions, including penalties and civil remedies.

¹² Sections 455.213 through 455.2175, F.S, pertaining to professional licensure and examination procedures.

procedures for¹³, and continuing education requirements for the professions¹⁴ would not conflict with comparable provisions in ch. 497, F.S., relating to preneed sales.

Merger of Powers and Authority

As discussed previously, there are several provisions in chapters 455, 470, and 497, F.S., which are limited in application, i.e., are not applicable to all of the professions and services under the proposed jurisdiction of the combined board. However, there are several provisions in these chapters that upon merger of the boards can be applicable to all of the professions and services.

The combined board would necessarily require uniform provisions relating to its organization, meetings, and compensation of its members. The combined board would also require uniform provisions for several of its regulatory powers.

Sections 455.223 and 497.123, F.S., provide the current boards' the authority to administer oaths and issue subpoenas during their investigations, but s. 497.123, F.S., grants the Board of Funeral and Cemetery services more extensive authority to issue subpoenas duces tecum and for their enforcement.¹⁵

Chapters 455, 470, and 497, F.S., share several other substantially similar provisions relating to each board's regulatory authority. For example, the boards' mediation provisions in ss. 455.2235 and 497.119, F.S., the authority to issue citations in ss. 455.224 and 497.121, F.S., are also substantially similar. The combined board could also rely upon a single provision for the disciplinary procedures applicable to all the professions and services under the jurisdiction of the combined board because the current boards' authority for disciplinary proceedings in ss. 455.225 and 497.131, F.S., are substantially similar.

The current boards' rule making provisions are also substantially similar.¹⁶ The boards' provisions relating to disciplinary proceedings are also substantially similar. Having a single source of rulemaking authority and a single framework for disciplinary proceedings would eliminate any potential confusion as

to the applicable law, or its interpretation by the combined board.

The boards' provisions relating to legal and investigative services in ss. 455.221 and 497.117, F.S., are also substantially similar, except that s. 455.221(3), F.S., provides sovereign immunity protection for persons under contract with the DBPR to review materials, make site visits, or provide expert testimony. Chapter 497, F.S., does not have a comparable provision. If the boards are merged, a determination would have to be made as to whether such a provision should be applicable to investigations and proceedings relating to ch. 497, F.S., services and professions.

Statutory Revision

A merger of the boards raises the issue of how to organize the boards' statutory provisions. The merger of chapters 470 and 497, F.S., into a single chapter is not required by the merger of the two boards. Staff discussed the issues raised by the merger of the boards, including the possible merger of the chapters 470 and 497, F.S., with the Division of Statutory Revision (the division), and with the Funeral and Cemetery Alliance of Florida and the Independent Funeral Directors of Florida. There are two possible approaches to organizing the current boards' statutory provisions. One approach is to maintain the regulation of the professions and services within their current chapters. Another approach is to divide a consolidated chapter into parts reflecting the current regulatory distinctions among the professions and services.

Based upon staff's discussions with the division, staff concludes that transferring the provisions in ch. 470, F.S., into ch. 497, F.S., or visa versa, may cause confusion or inconvenience to some of the persons or industries regulated through the transferred chapter. However, consolidation of all the provisions on the subject of Florida's funeral and cemetery industries into one chapter presents the benefit of making it easier for Florida's consumers by placing all of the applicable law in one location. This is the principle reason cited by the Funeral and Cemetery Alliance of Florida and the Independent Funeral Directors of Florida for why chapters 470 and 497, F.S., should be consolidated. However, Independent Funeral Directors of Florida's representatives expressed the concern that if the chapters were merged, care should be taken to assure that the current rights and duties of the ch. 470, F.S., professions would not be altered by the merger. In its discussions with staff, the Funeral and Cemetery Alliance of Florida representative also expressed the

¹³ See relevant provisions of ch. 455, F.S., in footnote 3.

¹⁴ See relevant provisions of ch. 455, F.S., in footnote 2.

¹⁵ See ss. 497.123(2) and (3), F.S.

¹⁶ Sections 455.211, 470.005, 470.0085, and 497.103, and 497.115, F.S.

belief that some practitioners may face some initial confusion, but that a reorganization of the statutes would benefit practitioners by requiring them to re-familiarize themselves with the relevant statutes.

License Management System

The DBPR has implemented a computerized management information system that integrates customer support, complaint management, investigation, examination, and licensing services. This system was developed by Accenture, Ltd., which also serves as the department's contract consultant for the continued maintenance and implementation of the system. This system serves over 3,500 licensees and registrants of the Board of Funeral Directors and Embalmers.

In the event of a merger of the two boards within a department other than the DBPR, the DBPR contends that the administrative support services related to the ch. 470, F.S., professions should continue to be performed by the DBPR under the Accenture contract. In support of this position, the DBPR further contends that that would be more cost effective than developing a new system, and that the state would not have to incur additional costs relating to the transfer of computer data from the DBPR to another department, which data would first have to be converted to the new system.

The DFS believes that it should have the option to perform all the services currently being administered by the DBPR for the ch. 470, F.S., professions.

The successful merger of the boards into a department other than the DBPR would require sufficient funding to implement a license management system for the new board and to facilitate the transfer of records, including computerized data. To the extent that the data systems may differ, additional funding and personnel may be needed to convert the computer data to the system utilized by the department of the combined board. The creation of the combined board within the DBPR may also require additional resources in order to accommodate the comparable integration of data into the department's data system.

RECOMMENDATIONS

Staff recommends that, should the Senate take action to merge the Board of Funeral Directors and Embalmers and the Board of Funeral and Cemetery Services, the Senate consider the following means by which to achieve that goal:

- Provide for a type two merger of the boards pursuant to s. 20.06, F.S.
- If the boards are merged into a department other than the DBPR, duplicate the provisions in ch. 455, F.S., for the combined board to effectively administer and enforce the provisions in ch. 470, F.S.
- Merge chapters 470 and 497, F.S., into a single chapter with each profession or service placed in a separate part that corresponds to the current chapter divisions.
- Combine into one part of the new combined chapter all of the powers and functions needed by the combined board for the administration of all the professions and services within its jurisdiction, including organization of the board, rulemaking authority, disciplinary procedures, and powers to administer oaths, take depositions, and issue subpoenas.
- The combined board's power to issue subpoenas, including subpoenas duces tecum, and to administer oaths should be identical for all the professions and services under its jurisdiction, and should utilize the more extensive authority found in s. 497.123, F.S.
- Provide the department that will house the combined board with sufficient resources to facilitate the transfer and/or integration of records and computerized data into its license management system.