

STORAGE NAME: h0991s1.ccc.doc
DATE: April 10, 2001

**HOUSE OF REPRESENTATIVES
AS REVISED BY THE
COUNCIL ON COMPETITIVE COMMERCE
ANALYSIS**

BILL #: CS/HB 991
RELATING TO: Funeral and Cemetery Services
SPONSOR(S): Council for Competitive Commerce and Representative Mayfield

TIED BILL(S):

ORIGINATING COMMITTEE(S)/COUNCIL(S)/COMMITTEE(S) OF REFERENCE:

- (1) BANKING YEAS 8 NAYS 0
 - (2) GENERAL GOVERNMENT APPROPRIATIONS YEAS 14 NAYS 0
 - (3) COUNCIL ON COMPETITIVE COMMERCE YEAS 11 NAYS 0
 - (4)
 - (5)
-

I. SUMMARY:

The council substitute makes four significant changes to the statutes regulating funeral and cemetery services by:

1. Gradually phasing out the authority for funeral and cemetery businesses to purchase surety "payment" bonds as security for funds they have collected on contracts for future or "preneed" funeral and cemetery services and merchandise.
2. Expanding the list of financial institutions authorized to handle trust accounts for funeral and cemetery preneed funds, as well as funds collected for cemetery care and maintenance.
3. Eliminating the requirement for the Department of Banking and Finance to establish the need for a new cemetery before issuing a license for it to operate.
4. Making changes to the statutory definitions to better reflect current funeral and cemetery practices.

The bill would take effect July 1, 2001.

The Department of Banking and Finance estimates an insignificant fiscal impact to the department.

DIFFERENCE BETWEEN HB 991 AND CS/HB 991:

The bill repealed on July 1, 2002, the use of "payment" and "performance" surety bonds as security for any preneed contract entered into after that date. Instead, the council substitute gradually phases out the use of "payment" surety bonds as security. The CS also makes the changes described above in 2., 3., and 4.; the bill, as filed, did not include those provisions.

SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|------------------------------|-----------------------------|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

B. PRESENT SITUATION:

Surety Bonds

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

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

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

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

One of the statutorily provided alternatives to establishing a preneed contract trust fund (s. 497.423, F.S.) allows a certificate holder to petition the Department of Banking and Finance's Board of Funeral and Cemetery Services to secure a surety bond in a prescribed amount. The bond must be conditioned in a way as to secure the "faithful performance of all conditions of any preneed

contracts" the certificate holder is required to have covered by the bond. This includes refunds that are requested by consumers under certain conditions. The bond must also guarantee the financial responsibility of the company against defaults arising out of fulfilling preneed contracts. These types of surety bonds are commonly referred to as "performance bonds" because they must guaranty the performance of the service for which the preneed purchaser contracted.

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

The Department of Banking and Finance (DBF or department) reports that in excess of \$1,045,133,629 in preneed trust funds are maintained by approximately 330 certificate holders; four certificate holders, pursuant to s. 497.425, F.S., have payment-type surety bonds of approximately \$160,890,000 covering preneed contracts; and two certificate holders, pursuant to s. 497.425, F.S., have board-approved letters of credit. There are currently no companies with performance-type surety bonds held pursuant to 497.423, F.S. The department further reports that one licensee using a surety bond reorganized under Chapter 11 in July of 2000, and came out of bankruptcy in December of that year. To date, the department says that no claims against surety companies have been filed against certificate holders for failure to deliver merchandise and services upon need. Finally, the department reports that five certificate holders have failed to deposit sufficient funds in trust.

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

Financial Institutions

Several sections of Ch. 497, F.S., provide a list of acceptable financial institutions that may handle care and maintenance and preneed contract trust funds. These are currently limited to those established by a trust business authorized under Ch. 660, F.S., or with a state or national bank. This list excludes federal or state savings and loan associations. At the time that the initial statutes were written, savings and loans did not have trust powers and only as of about five years ago were national savings and loans allowed to branch into Florida.

Need Determination for New Cemeteries

Currently, an applicant for a license to establish a new cemetery must demonstrate to the department that it has specific financial means and professional expertise to establish the need for the cemetery. Under s. 497.201, F.S., the applicant must establish the exact location for the cemetery which site shall contain at least 15 contiguous acres. Further, the applicant must exhibit a net worth of \$50,000, establish a care and maintenance trust fund containing at least \$50,000, and pay an application fee of \$5,000. In turn, DBF must determine the need for a new cemetery by

considering the adequacy of existing cemeteries, both licensed and unlicensed, within the community; the solvency of the trust funds of the existing cemeteries; and, the relationship between population, rate of population growth, death rate, and the ratio of burials to deaths to meet projected need for burial spaces for the next 30 years. The DBF may waive these criteria so that each county may have at least six cemeteries operated by different licensees.

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

Statutory Definitions

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

C. EFFECT OF PROPOSED CHANGES:

See SECTION-BY-SECTION.

D. SECTION-BY-SECTION ANALYSIS:

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

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

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

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

Section 4 amends s. 497.237, F.S., to provide that in addition to state banks that operate trust departments under Ch. 660, F.S., federal and state savings and loan associations holding trust

powers in the state may establish the care and maintenance trust funds required for new cemeteries.

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

Section 6 amends s. 497.253, F.S., to increase from 15 to 30 contiguous acres the amount of land a licensed cemetery must dedicate to cemetery use and not divest itself of without departmental approval. This section also provides that this increase will not apply to cemeteries owning less than 30 acres that were licensed prior to July 1, 2001. One additional revision in this section removes a reference to provisions relating to need determination in the event of the sale or conveyance of cemetery property. These revisions conform s. 497.253, F.S., with the elimination of the need determination and subsequent enhancing of cemetery start-up requirements provided in s. 297.201, F.S. (Section 3 of this bill).

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

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

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

This section also revises subsection (5) of s. 497.417, F.S., relating to the authority given to a preneed funeral and cemetery services contract seller/certificate holder to revest in itself title to trust assets or its pro rata share of such assets if it has procured a surety bond under s. 497.423, F.S., or s. 497.425, F.S. The reference to the bonding provisions in s. 497.425, F.S., is conformed to mirror the limitations this bill makes on that bonding authority. Effectively, this would limit the ability of certificate holders to revest in themselves title to trust funds to only those trust funds they have already secured by bonds as of the effective date of this bill (7/1/01) unless the company can be identified as currently securing \$100,000,000 in bonds. Such a company would have its authority limited to funds it currently has bonded and those relating to contracts entered into through December 31, 2004. Certificate holders' funds that are residing in trusts as of July 1, 2001, must remain there. These provisions leave open certain alternatives for the purpose of compliance with federal income tax requirements.

Section 10 amends s. 497.425, F.S., to revise the authority given to certificate holders to procure payment-type surety bonds in lieu of holding the prescribed preneed contract funds in trust. The revision allows certain certificate holders to continue to use the alternative authorized under s. 497.425, F.S., of securing funds by bond rather than by trust, only on contracts written prior to July 1, 2001, but relates only to those funds not held in trust as of July 1, 2001. A specific provision is made for a certificate holder that is authorized to do business in Florida and that currently has \$100,000,000 secured by bonds. This particular certificate holder is allowed to use this alternative of securing funds by bond rather than by trust, on contracts written prior to December 31, 2004, but relates only to those funds not held in trust as of July 1, 2001. In summary, this revision provides

two cutoff dates after which the bonding alternative in section 497.425 can no longer be used, holds harmless the bonding arrangements currently utilized by certificate holders, and does not allow those certificate holders to secure any other funds currently being held in trust as of the effective date of the bill.

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

Section 12 provides that this act will take effect July 1, 2001.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

See Fiscal Comments, below

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

N/A

2. Expenditures:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

As reported by the Department of Banking and Finance, four funeral and cemetery service companies have procured annual "payment" surety bonds under s. 497.425, F.S., one of which has a total bonded liability of \$100,000,000. The gradual phase out of the bonding alternative in s. 497.425, F.S., should not cause undue financial hardship on certificate holders.

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

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

D. FISCAL COMMENTS:

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

III. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority the counties or municipalities have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

IV. COMMENTS:

A. CONSTITUTIONAL ISSUES:

None found.

B. RULE-MAKING AUTHORITY:

N/A

C. OTHER COMMENTS:

N/A

V. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On March 20, 2001, the Committee on Banking adopted a strike everything amendment with title that:

Allows certain certificate holders under Chapter 497, to continue to use the alternative authorized under Section 497.425, of securing funds by bond rather than by trust, on contracts written prior to July 1, 2001, but relates only to those funds not held in trust as of July 1, 2001.

Allows other certificate holders (as specifically identified by the amendment) to use this alternative of securing funds by bond rather than by trust, on contracts written prior to December 31, 2004, but relates only to those funds not held in trust as of July 1, 2001.

In essence this amendment provides two cutoff dates after which the bonding alternative in section 497.425 can no longer be used, holds harmless the bonding arrangements currently utilized by certificate holders, and does not allow those certificate holders to secure any other funds currently being held in trust as of the effective date of the bill.

The Council Substitute:

1. Absorbs the amendment by the Committee on Banking, with technical changes.
2. Expands the list of financial institutions to include federal and state savings and loans as being authorized to certify the establishment of preneed trust funds. The CS differs from the original bill in that it does not repeal the bonding alternatives but revises one of the alternatives by gradually phasing it out.

3. Eliminates the requirements for the determination of need for new cemeteries.
4. Expands the statutory definition of "preneed contracts" and adds definitions of "ossuary" and "scattering gardens" to reflect current practices.

VI. SIGNATURES:

COMMITTEE ON BANKING:

Prepared by:

Susan F. Cutchins

Staff Director:

Susan F. Cutchins

AS REVISED BY THE COMMITTEE ON GENERAL GOVERNMENT APPROPRIATIONS:

Prepared by:

Juliette Noble

Staff Director:

Lynn Dixon

AS FURTHER REVISED BY THE COUNCIL ON COMPETITIVE COMMERCE:

Prepared by:

Rebecca Everhart

Staff Director:

Hubert Bohannon

AS FURTHER REVISED BY THE COUNCIL ON COMPETITIVE COMMERCE:

Prepared by:

Rebecca R. Everhart

Council Director:

Hubert "Bo" Bohannon