Virginia M. McInerney *Legislative Service Commission*

Am. Sub. H.B. 18*

123rd General Assembly
(As Reported by S. Insurance, Commerce and Labor)

Reps. Schuler, Allen, Buchy, Terwilleger, Taylor, Weston, Clancy, Krebs, Ogg, Cates, Roman, Willamowski, Salerno, O'Brien, Mottley, Britton, Pringle, James, Van Vyven, Jolivette, Krupinski, Verich, Corbin, Householder, Vesper, Brading, Grendell, Ferderber, Jones, Winkler

BILL SUMMARY

- Eliminates from the Real Estate Broker Law, the required licensing of limited real estate brokers, and limited real estate salesmen (restricted to selling cemetery interment rights).
- Requires cemeteries to register employee and independent contractors who sell interment rights on behalf of cemeteries.
- Expands the scope of preneed burial vault contracts regulated by law to cover not only burial vaults but also other merchandise and services in connection with the interment of human remains and changes the terminology of such contracts to "preneed cemetery merchandise and services contracts."
- Eliminates the current ban on preneed cemetery merchandise and services contracts being made irrevocable.
- Allows committees of three or more persons (in addition to credit unions, federal savings associations, and national banks) to act as custodian of moneys paid to a seller of preneed cemetery merchandise and services contracts.

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* *This analysis was prepared before the report of the Senate Insurance, Commerce & Labor Committee appeared in the Senate Journal. Note that the list of co-sponsors and the legislative history may be incomplete.*

- Alters the requirements for holding and depositing with trustees the moneys paid to a seller of a preneed cemetery merchandise and services contract.

- Allows persons who are not licensed funeral directors to sell funeral goods pursuant to a preneed funeral contract and persons other than cemetery corporations or associations to sell merchandise pursuant to a preneed cemetery merchandise and services contract as long as such sellers comply with the laws regulating such sales.

- Changes the conditions under which officers or officials having control over a cemetery may grant permission to disinter and conditions under which a probate court may order the disinterment of human remains.

- Alters certain requirements pertaining to the establishment and maintenance of cemetery endowment care funds.

- Expands the amount of land a cemetery association may hold that is exempt from execution, eminent domain, or taxation.

- Expands the powers and duties of the Division of Real Estate in the Department of Commerce and the Ohio Cemetery Dispute Resolution Commission in connection with the Cemetery Registration Law.

- Increases the penalty for maintaining or operating an unregistered cemetery.

- Specifies that contracts entered into with unregistered cemeteries for preneed merchandise or services are voidable.

- Makes a number of other changes in the collection of laws that govern the operation of cemeteries and the activities of operators of cemeteries.

- Requires the Cemetery Dispute Resolution Commission to issue a report within two years to the Governor, the President of the Senate, and the Speaker of the House of Representatives on recommended changes in law based on consumer complaints and industry problems.

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CONTENT AND OPERATION

Elimination of limited real estate brokers and limited real estate salesmen licensing

(secs. 4735.01, 4735.02, 4735.051, 4735.07, 4735.091, 4735.10, 4735.141, 4735.18, 4735.32, and 4735.57)

The Ohio Real Estate Brokers Law (Chapter 4735.), among other categories of selling agents for real property, requires the licensing of what the law terms a limited real estate broker and a limited real estate salesman. A "limited real estate broker" includes any person, partnership, corporation, or association who, for a fee or commission, engages only in the sale of cemetery interment rights. A "limited real estate salesman" is one who is associated with a licensed real estate broker or a limited real estate broker and acts on the broker's behalf in the sale of cemetery interment rights.

The bill eliminates the concept of limited real estate brokers and salesmen from the law, the licensing requirement, and all regulation of such individuals by the Real Estate Broker Law. Instead, the bill requires that, as part of the requirements imposed upon any cemetery subject to the Cemetery Registration Law (Chapter 4767.), the owner or operator of a cemetery (any cemetery except a

"family cemetery") must give the Division of Real Estate in the Department of Commerce, at the same time as the person registers or renews the cemetery registration, a list of the names and residence addresses of all persons employed or used by the cemetery to sell interment rights. The bill specifies that the furnishing of this information constitutes the "registration" of the persons to sell interment rights. A cemetery may sponsor and register any independent contractor wishing to sell interment rights, and more than one cemetery may sponsor and register the same independent contractor. Within the calendar quarter following any calendar quarter in which there is a change in the list, the cemetery owner or operator must provide the Division with a revised list (sec. 4767.031).

The bill also eliminates mention of limited real estate brokers and limited real estate salesmen throughout the Revised Code including a provision that authorizes collection agencies to take assignment of debts for collection (secs. 1111.19, 1319.12, 1345.21, 1721.21(D), 1721.211(A)). However, in this last case, the bill specifically replaces the exemption from being considered a collection agency currently granted to limited real estate brokers and limited real estate salesmen in the conduct of their business with an exemption for persons registered under the bill to sell interment rights (sec. 1319.12).

Municipal cemeteries specifically made subject to all provisions of the Cemetery Registration Law

(secs. 517.23, 517.24, and 759.01)

Existing law requires a municipally owned or operated cemetery to register with the Division of Real Estate pursuant to the Cemetery Registration Law. The bill specifically states such cemeteries are subject to all other provisions of that law as well as the provisions governing the disinterment of human remains from a cemetery (see "***Permission to disinter human remains from a cemetery***" below).

Division of Real Estate additional duties under Cemetery Registration Law

(secs. 4767.02 and 4767.08(A))

Currently, the Division of Real Estate administers the Cemetery Licensing Law and has specified duties in the registration of cemeteries, adoption of rules, and collection of fees. To this list of duties, the bill adds the following list of duties:

(1) Revocation without a hearing of a cemetery's registration upon receipt of notice of a cemetery owner or cemetery operator's conviction for a violation of the Endowment Care Fund Law (secs. 1721.21 and 1721.211) (see "***Regulation of endowment care funds***" below);

(2) Hire all Division personnel necessary to implement cemetery regulations;

(3) Prohibit the sale of the assets or stock of a cemetery by denying the intended purchaser a registration certificate under the Cemetery Registration Law until the Dispute Resolution Commission receives audited financial statements audited by a CPA showing to the Commission's satisfaction that all current funds in endowment care funds under the cemetery's control have been deposited and maintained as required by the Endowment Care Fund Law;

(4) Review the financial records of a cemetery upon information and belief that the cemetery may not be in compliance with the law on endowment care or preneed cemetery merchandise or services, to ensure compliance;

(5) With the Dispute Resolution Commission's advice and consent, subpoena cemetery personnel to attend hearings before the Commission;

Cemetery Dispute Resolution Commission additional duties

(secs. 4767.06(H) and 4767.08(A); Section 3 of the bill)

Currently, the Cemetery Dispute Resolution Commission has specified duties in the management and resolution of complaints regarding cemetery law. To the current list of duties, the bill adds the following duties:

(1) Render advice to the Division of Real Estate concerning subpoenaing cemetery personnel to attend hearings before the Commission;

(2) Review all proposed transfers that would transfer substantially all of the assets or stock of a cemetery, require an audit of the cemetery's funds on deposit as required under the law, and formulate an agreed plan pursuant to which the buyer and seller of the cemetery will cause those funds to be properly funded;

(3) Adopt and publish suggested maintenance guidelines for all cemeteries registered in Ohio.

(4) Within two years after the effective date of the bill, provide a written report to the Governor, the Speaker of the House of Representatives, and the President of the Senate on the effectiveness of the Ohio cemetery law that includes recommendations for modification of the Ohio cemetery law in light of consumer complaints and industry problems.

(5) Review the financial records of a cemetery upon information and belief that the cemetery may not be in compliance with the law on endowment care or preneed cemetery merchandise or services, to ensure compliance.

Preneed funeral contracts

(sec. 1111.19)

Under current law, "preneed funeral contract" means a written agreement, contract, or series of contracts to sell or otherwise provide any funeral services, funeral goods, or any combination thereof, to be used in connection with the funeral or final disposition of a dead human body, where payment is made either outright or on an installment basis, prior to the death of the person for whom the goods or services were purchased. The bill specifies that "funeral goods" includes caskets and that persons who are not licensed as funeral directors are not prohibited from selling funeral goods pursuant to a preneed funeral contract, provided all sellers follow the law regarding such sales, unless specifically exempt.

Cemetery merchandise and services contracts

(secs. 1111.19, 1151.345, 1161.59, 1733.51, and 1721.211(A), (P), and (Q))

Existing law specifically regulates "preneed burial vault" contracts which are defined as pertaining to the sale of burial vaults to be used in connection with the final disposition of a dead human body, where payment for the vault is made either outright or on an installment basis prior to the death of the person. Exempt are preneed funeral contracts covered by the Endowment Care Trust Law. The bill expands the scope of the current contract by adding the purchase of any container monument, marker, urn, or other type of merchandise customarily sold by cemeteries, or "opening and closing services" and likewise changes the terminology of such contracts to "preneed cemetery merchandise and services" contracts. Hereafter, this analysis will use the new terminology but it should be understood that when there is a discussion of existing law, the existing provision refers only to the more limited "preneed burial vault" type of contract.

The bill makes corresponding changes to the new terminology in other sections of law where the phrase "preneed burial vault" is used.

The bill allows persons other than cemetery corporations or associations to sell types of merchandise customarily sold by cemeteries pursuant to a preneed cemetery merchandise and services contract, however, all sellers of merchandise pursuant to a preneed cemetery merchandise and services contract must comply with the requirements governing such contracts, unless specifically exempt. The

bill also specifies that any contract entered into with an unregistered cemetery for preneed merchandise or services is voidable.

Irrevocability of a preneed cemetery merchandise and services contract

(sec. 1721.211(G), (I), (K), and (L))

Existing law gives to any person upon initially entering into a preneed cemetery merchandise and services contract seven days to cancel and receive a 100% refund of moneys paid under the contract. After that time period, the law allows cancellation on not less than 15 days notice and requires return generally of 60% of the moneys paid under the contract if the burial vault has not yet been delivered. The law specifically bars a contract from being made irrevocable.

The bill allows a contract to be made irrevocable whereupon the cancellation rights of the buyer are waived. Under the bill, an irrevocable contract must include a clear and conspicuous disclosure of irrevocability in the contract. Also, a person entering an irrevocable contract must sign a separate acknowledgment of the person's waiver of the right to revoke. It also stipulates that where the contract is not made irrevocable, the 15-day notice cancellation rights of the buyer are further conditioned on the merchandise not having been delivered or the services under the contract not having already been performed. The bill defines delivery of merchandise as actual delivery of the merchandise to the beneficiary or the seller (cemetery) pays for the merchandise and identifies it as being stored for the benefit of the beneficiary at a manufacturer's warehouse. In the case of performance of services, the seller (cemetery) is considered to have performed the services when the beneficiary's next of kin signs a written statement that the services have been performed or, if no next of kin can be located through reasonable diligence, when the owner or other person responsible for the operation of the cemetery signs a statement of that nature.

Custodian of preneed cemetery merchandise and services contract trusts

(sec. 1721.211(A), (B), and (C)(2))

Under existing law, generally any bank or savings and loan insured by the Federal Deposit Insurance Corporation or a credit union authorized to do business in this state may receive and hold funds under a preneed cemetery merchandise and services contract. The bill specifies that trustees of such funds must be either three or more individuals who are residents of the county in which the seller (cemetery) is located for at least one year, a licensed trust company, or a national bank or federal savings association that pledges securities in accordance with Ohio law. The bill also authorizes these trustees to invest funds held under a preneed

contract in the manner in which the Fiduciary Law allows the investment of trust funds in certain specified types of bonds and other "blue chip" types of investment instruments.

Disposition of funds paid over under a preneed cemetery merchandise and services contract

(sec. 1721.211(C), (D), and (F))

Under existing law, 60% of all payments for a preneed cemetery and merchandise contract must remain intact until the death of the person for whom the preneed contract is made and be held by an authorized trustee (***see preceding section***) but must be released to either the person for who the contract was made or to the seller (cemetery) under certain specified circumstances. The bill revises the amount that must be held intact to the greater of 110% of the seller's actual cost or 30% of the seller's retail price of the merchandise and 70% of the seller's retail price of the services to be provided under the contract.

Also, currently within 30 days of the last day of the month in which the seller (cemetery) receives final contractual payment under a preneed contract, the seller must deposit all funds with a financial institution. The bill limits the deposit to the new percentages listed above and also allows the deposit to be made with the new type of trustee consisting of a three or more person committee, a licensed trust company, or a national bank or federal savings association (***see preceding section***).

Currently, a seller of a preneed cemetery merchandise and services contract, annually, must submit to the Ohio Real Estate Commission such reports as the Commission requires. The bill eliminates this provision in favor of a requirement that the seller submit to the Division of Real Estate an affidavit, in a form the Division prescribes, that swears under oath to all of the following facts:

(1) Within the 30-day window specified by existing law, the amounts received under a preneed cemetery merchandise and services contract were deposited in an appropriate fund.

(2) The fund has not been used to collateralize or guarantee loans and has not otherwise been subjected to any consensual lien.

(3) The fund is invested in compliance with the Fiduciary Law standards governing the investment of trust funds.

(4) No moneys have been removed from the fund, except as allowed by law.

Cemetery endowment care trusts

(sec. 1721.21)

Existing law requires every cemetery operator to establish a separate endowment care fund (renamed "endowment care trust" in the bill). This law defines "cemetery" as being a burial ground, mausoleum, or columbarium. The bill adds to this any scattering ground for the spreading of cremated remains.

Existing law also requires the endowment care trust, initially, to have certain minimum amounts of moneys, or other assets placed in it and to require the operator to deposit not less than 10% of all additional moneys received from the sale of burial, entombment, or columbarium rights in the cemetery in the trust within 30 days following the month in which the operator receives the entire gross sales. The bill requires trustees other than financial institutions to be bonded by a corporate surety in an amount not less than 100% of the funds held by the trustee.

Existing law requires that all income from the endowment trust be used only for the maintenance, supervision, improvement, and preservation of the cemetery and its facilities. The bill relaxes the restriction to require that only the dividend and interest income derived from the endowment trust be so used.

As additional requirements placed on the maintenance of an endowment care trust, the bill requires a cemetery operator to file an affidavit with the Division of Real Estate, in a form the Division prescribes, certifying under oath to all of the following facts:

(1) The cemetery has deposited prior to the 30-day deadline specified by law, the amounts required by the law in the cemetery's endowment care trust.

(2) Only dividend and interest income have been withdrawn from the trust and only for the allowed cemetery maintenance purposes specified in law.

(3) All principal and capital gains have remained in the trust.

(4) The trust has not been used to collateralize or guarantee loans and has not otherwise been subjected to any consensual lien.

(5) The trust is invested in compliance with investing standards set forth in law.

Cemetery associations--land holdings and types of facilities

(secs. 1721.01 and 1721.06)

Under existing law, a company or association incorporated for cemetery purposes may hold not more than 640 acres of land that is exempt from execution (i.e., the taking or sale of property to satisfy a legal judgment against the owner), eminent domain proceedings, or taxation. The bill broadens the amount of land the cemetery association may hold that remains exempt from such proceedings by stipulating that the association may have multiple locations where land is held and each location remains exempt if the total land at a specific location is 640 or less acres. The bill also specifies that the Cemetery Association Law does not authorize the exemption of real property used for a funeral home or any other activity not permitted to be conducted by a cemetery association exempt from federal taxation.

The existing Cemetery Association Law requires a cemetery association, after paying for its land, to apply all receipts and income exclusively to laying out, preserving, protecting, and embellishing the cemetery and avenues within it, paying necessary expenses, and to the erection of necessary buildings. The bill broadens the permissible expenditures to include "appropriate" buildings which the bill stipulates can include, but not be limited to, crematory facilities, funeral homes, and other buildings intended to produce income for the cemetery company or association.

Payment of funeral director claims against a decedent's estate

(sec. 2117.25)

One part of Ohio probate law governs the making of claims against the estate of a deceased individual and requires the executor or administrator of an estate to pay legitimate claims in a set order of priority. Included in the list are the claims up to $2,000 for the cost of funeral and burial expenses. If, however, the decedent, during his or her lifetime, has purchased an irrevocable preneed funeral contract, then the estate of the decedent is not liable for the $2,000 funeral expense, as stipulated in the law.

The bill deletes this later qualification. It also limits the existing $2,000 debt ceiling to funeral expenses including that portion of the funeral director's bill allocated to cemetery expenses that have been paid to the cemetery by the funeral director. For the purposes of this new allowable claim against a decedent's estate, the bill limits the claim to expenses involved in the purchase of a place of

interment, monuments or other markers, the outer burial container, the urn, and for the cost of opening and closing the place of interment.

Permission to disinter human remains from a cemetery

(secs. 517.23 and 517.24)

Existing law requires boards of township trustees, the trustee or directors of a cemetery association or other officers having control and management of a cemetery, under specified circumstances, to disinter or grant permission to disinter human remains located in a cemetery. The bill adds officers of a municipal corporation having control and management of a municipal cemetery to the list for all purposes of the law on disinterment, reinterment, or correction of errors in interment of human remains.

If a surviving spouse of the decedent makes application to the above listed officials, the bill requires the officials to act within 30 days of receipt of such application. If a court issues an order for disinterment because application was made to the court instead of to the officers of the cemetery, the bill requires that the officers or officials in control of the cemetery be given at least 30 days to comply with the order.

Existing law specifies that when disinterment is pursuant to application made to a probate court by a person other than a surviving spouse, notice of the application must be sent by certified mail to any surviving spouse, and to any legatees and devisees under the decedent's will, or to persons who would be entitled to inherit if the decedent died intestate. The bill requires similar notice to the officers or officials controlling cemeteries as mentioned above.

The bill restricts the probate court's discretion in the matter of whether or not to grant permission to disinter human remains to "good cause shown." It further requires the court not to grant permission unless it finds a "compelling reason to issue (the order)."

Currently, the court may not grant permission if disinterment would be against the decedent's religious beliefs. The bill adds as a bar to granting permission to disinter if disinterment is against the decedent's "ascertainable desires."

Penalties

(sec. 4767.99)

The bill increases the penalty for maintaining or operating an unregistered cemetery from a fourth degree misdemeanor (not more than 30 days imprisonment and not more than a $250 fine) to a third degree misdemeanor (not more than 60 days imprisonment and not more than a $500 fine).

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	01-20-99	p. 87
Reported, H. Commerce & Labor	05-12-99	p. 643
Passed House (94-0)	05-18-99	p. 672
Reported, S. Insurance, Commerce & Labor	---	---

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