WEST VIRGINIA CODE CHAPTER 35 ARTICLE 5B

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§35-5B-1. Definitions.

The following words and phrases as used in this article, unless a different meaning is clearly indicated by the context, have the following meanings:

(1) "Burial vault" means a protective container for a casket which is used to prevent a grave from sinking.

(2) "Cemetery" means and includes all land and appurtenances including roadways, office buildings, outbuildings and other structures used or intended to be used for or in connection with the interment of human remains. The sprinkling of ashes or their burial in a biodegradable container on church grounds or their placement in a columbarium on church property does not constitute the creation of a cemetery.

(3) "Cemetery company" or "seller" means any person, partnership, firm or corporation engaged in the business of operating a cemetery or selling property, goods or services used in connection with interring or disposing of the remains or commemorating the memory of a deceased human being, where delivery of the property or goods or performance of the service may be delayed later than one hundred twenty days after receipt of the initial payment on account of such sale. Such property, goods or services include, but are not limited to, burial vaults, mausoleum crypts, lawn crypts, memorials, marker bases and opening and closing and/or interment services, but do not include graves or incidental additions such as dates, scrolls or other supplementary matter representing not more than ten percent of the total contract price.

(4) "Commissioner" or "Tax Commissioner" means the secretary of the West Virginia Department of Tax and Revenue.

(5) "Compliance agent" means a natural person who owns or is employed by a cemetery company to assure the compliance of the cemetery company with the provisions of this article.

(6) "Cost requirement" means the total cost to the seller of the property, goods or services subject to the deposit requirements of section four of this article required by that seller's total contracts.

(7) "Delivery" means that the seller has transferred physical possession of the identified goods, has attached or installed such goods at the designated interment space or has actually furnished preneed cemetery company contract services. In the case of preneed goods which are identified with the name of the buyer or other contract beneficiary, "delivery" may also occur when: (A) The seller pays for and stores the goods at the cemetery where they are intended to be used; or (B) the seller has paid the supplier of such goods and the supplier has caused such merchandise to be manufactured and stored, has caused title to such merchandise to be transferred to the buyer or other contract beneficiary and has agreed to ship such merchandise upon his or her request.

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(8) "Grave" means a below-ground right of interment.

(9) "Interment" means the disposition of human remains by earth burial, entombment or inurnment.

(10) "Lawn crypt" means a burial receptacle, usually constructed of reinforced concrete, installed underground in quantity on gravel or tile underlay. Each crypt becomes an integral part of the given garden area and is considered real property.

(11) "Marker base" means the visible part of the base or foundation upon which the memorial, marker or monument rests and is considered personal property.

(12) "Mausoleum crypt" means a burial receptacle usually constructed of reinforced concrete and usually constructed or assembled above the ground and is considered real property.

(13) "Memorials, markers or monuments" means the object used to identify the deceased including the base and is considered personal property.

(14) "Opening and closing or interment service" means any service associated with the excavation and filling in of a grave in a manner which will not disturb or invade adjacent grave sites.

(15) "Preneed" means at any time other than either at the time of death or while death is imminent.

(16) "Preneed cemetery company contract" means a contract for the sale of real and personal property, goods or services used in connection with interring or disposing of the remains or commemorating the memory of a deceased human being, where delivery of the property or performance of the service may be delayed for more than one hundred twenty days after the receipt of initial payment on account of such sale. Such property, goods or services include, but are not limited to, burial vaults, mausoleum crypts, lawn crypts, memorials, marker bases and opening and closing and/or interment services, but do not include graves or incidental additions such as dates, scrolls or other supplementary matter representing not more than ten percent of the total contract price.

(17) "Seller's trust account" means the total specific funds deposited from all of a specific seller's contracts, plus income on such funds allotted to that seller.

(18) "Specific trust funds" means funds identified with a certain preneed cemetery company contract for personal property, goods or services.

(19) "Trustee" means any natural person, partnership or corporation, including any bank, trust company, broker-dealer, foreign state charter trust, savings and loan association or credit union which receives money in trust pursuant to any agreement or contract made pursuant to the provisions of this article.

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§35-5B-2. Information filing; fees, compliance agent.

On or after July 1, 1993, no person, partnership, firm or corporation may engage in the business of operating a cemetery company in this state without having first paid an annual registration fee established by the Tax Commissioner in an amount not to exceed $400, and filing with the Tax Commissioner certain information which shall include the name and addresses of all officers, owners and directors of the cemetery company and the name of the designated compliance agent. The cemetery company shall notify the Tax Commissioner of any changes in the information required to be filed within ninety days of the date on which the change occurs. A new filing shall also be required if there is a change in the ownership of the cemetery company or if there is a change in the name of the compliance agent designated by the cemetery company. The cemetery company shall pay an additional fee as established by the commissioner in connection with the reporting of such changes, not to exceed $100. There is hereby created in the State Treasury a special account to be known as the "cemetery company account" into which all fees collected under this article shall be deposited: Provided, That amounts collected which are found from time to time to exceed funds needed for the purposes set forth in this article may be transferred to other accounts or funds and redesignated for other purposes by appropriation of the Legislature. Funds in this account shall be expended upon appropriation of the Legislature by the secretary of tax and revenue in connection with the administration of this article.

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§35-5B-3. Exemptions.

The provisions of this article do not apply to:

(1) Sales of property, goods and services subject to the provisions of article fourteen, chapter forty-seven of this code;

(2) Sales of services by perpetual care cemeteries subject to the provisions of article five-a of this chapter;

(3) Sales of property, goods and services by cemeteries owned and operated by a county, municipal corporation, by a church or by a nonstock corporation not operated for profit if the cemetery: (A) Does not compensate any officer or director except for reimbursement of reasonable expenses incurred in the performance of official duties; (B) does not sell or construct or directly or indirectly contract for the sale or construction of vaults or lawn or mausoleum crypts; and (C) uses proceeds from the sale of all graves and entombment rights for the sole purpose of defraying the direct expenses of maintaining the cemetery;

(4) Sales of property, goods and services by community cemeteries not operated for profit if the cemetery: (A) Does not compensate any officer, owner or director except for reimbursement of reasonable expenses incurred in the performance of official duties; and (B) uses the proceeds from the sale of the graves for the sole purpose of defraying the direct expenses of maintaining its facilities; and

(5) Sales of property, goods and services by family cemeteries wherein lots or spaces are not offered for public sale.

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§35-5B-4. Deposit in preneed trust required; who may serve as trustee.

(a) Each cemetery company shall deposit into an interest bearing trust fund forty percent of the receipts from the sale of property, goods or services purchased pursuant to a preneed cemetery company contract including sales of opening and closing or interment services, when the delivery thereof will be delayed more than one hundred twenty days from the initial payment on said contract. However, should the proceeds from the sale be financed through a lending institution, it shall be considered a cash sale. Deposits are required to be made by the cemetery company within thirty days after the close of the month in which said receipts are paid to it.

(b) If payment is made on an installment or deferred payment basis, the seller shall have the option of depositing into the trust fund forty percent of the amount of the principal initially, or alternatively, depositing forty percent of the principal of each payment within thirty days after the close of the month in which said receipts are paid to it.

(c) (1) The trustee of the trust fund shall be appointed by the person owning, operating, or developing a cemetery company. If the trustee is other than a bank, savings and loan or other federally insured investment banking institution, the trustee shall be approved by the Tax Commissioner. A trustee that is not a bank, savings and loan or other federally insured investment banking institution shall apply to the Tax Commissioner for approval, and the Tax Commissioner shall approve the trustee when satisfied that:

(A) The applicant employs and is directed by persons who are qualified by character, experience, and financial responsibility to care for and invest the funds of others; and

(B) The applicant will perform its duties in a proper and legal manner and the trust funds and interest of the public generally will not be jeopardized.

(2) If the trustee is other than a bank, savings and loan or other federally insured investment banking institution, the trustee shall furnish a fidelity bond with corporate surety thereon, payable to the trust established, in a sum equal to but not less than one hundred percent of the value of the principal of the trust estate at the beginning of each calendar year, which bond shall be deposited with the Tax Commissioner.

(3) If the trustee is other than a bank, savings and loan or other federally insured investment banking institution, and if it appears that an officer, director or employee of the trustee is dishonest, incompetent or reckless in the management of a trust fund required by the provisions of this article, the Tax Commissioner may bring an action in the circuit courts of this state to remove the trustee and to impound the property and business of the trustee as may be reasonably necessary to protect the trust funds.

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§35-5B-5. Requirements for preneed cemetery company contracts.

A preneed cemetery company contract shall:

(1) Be written in clear understandable language and printed in easy-to-read type, size and style;

(2) Include the name and address of the seller, the contract buyer and the person for whom the contract is bought if other than the contract buyer;

(3) Contain a complete description of the property, goods or services bought, including an itemization of the retail price of the property, goods or services bought and, specifically, the retail price of the monument, marker, installation, foundation, opening and closing of the grave site, and any other charges. Failure to provide this information is a violation of subsection (f), section one hundred two, article six, chapter forty-six-a of this code, relating to unfair methods of competition and unfair or deceptive acts or practices;

(4) Clearly disclose whether the price of the property, goods or services bought is guaranteed;

(5) Provide that if the particular property, goods or services specified in the contract are unavailable at the time of delivery, the seller shall furnish property, goods or services similar in size and style and equal in quality of material and workmanship, and that the representative of the deceased has the right to reasonably choose the property, goods or services to be substituted; and

(6) Be executed in duplicate and a signed copy given to the buyer.

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§35-5B-6. Identification of funds.

Any funds deposited in the trust account as required by section four of this article shall be identified in the records of the seller by the contract number and by the name of the buyer. The trustee may commingle the deposits in any preneed trust account for the purposes of the management thereof and the investment of funds therein.

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§35-5B-7. Corpus of trust account and income to remain in preneed trust account; exception.

The corpus of the trust account shall remain intact until the property or goods are delivered or services performed as specified in the contract: Provided, That the net income from the preneed trust account may be used to pay any appropriate trustee and Auditor fees, commissions and costs. The net income from the preneed trust account, after payment of any appropriate trustee and Auditor fees, commissions and costs, shall remain in the account and be reinvested and compounded. Any trustee fees, commissions and costs in excess of income shall be paid by the cemetery company and not from the trust. However, the trustee shall, as of the close of the cemetery company's fiscal year, upon the written assurance to the trustee by a certified public accountant employed by the seller, return to the seller any income in the seller's account which, when added to the corpus of the trust account is in excess of the current cost requirements for all undelivered property, goods or services included in the seller's preneed cemetery company contracts including all outstanding preneed cemetery company contracts entered into prior to July 1, 1993. The seller's cost requirements shall be based upon wholesale cost and certified in its records by a sworn affidavit by the compliance agent and shall be determined by the seller as of the close of the cemetery company's fiscal year.

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§35-5B-8. Disbursement of trust funds upon performance of contract; mausoleum construction required.

(a) Upon performance of the preneed cemetery company contract, the seller shall certify to the trustee by affidavit the amount of specific funds in the trust, identified with the contract performed, which the trustee shall pay to the seller. The seller may in its records itemize the property, goods or services and the consideration paid or to be paid therefor, to which the deposit requirements of this article apply. In such case the seller may, upon certification to the trustee of performance or delivery of such property, goods or services and of the amount of specific trust funds identified in its records with such items, request disbursement of that portion of the specific funds deposited pursuant to the contract, which the trustee shall pay to the seller.

(b) If the preneed contract provides for two or more persons, the seller may, at its option, designate in its records the consideration paid for each individual in the preneed cemetery company contract. In such case, upon performance of that portion of the contract identified with a particular individual, the seller may request, by certification in the manner described above, the disbursement of trust funds applicable to that portion of the contract, which the trustee shall pay to the seller.

(c) Any cemetery company that sells space in an unconstructed mausoleum must commence construction within seven years from the date of the first sale or when eighty percent of the spaces in the original mausoleum plan are sold, whichever occurs first.

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§35-5B-9. Seller required to keep records.

Each seller of a preneed cemetery company contract shall record and keep detailed accounts of all contracts and transactions regarding preneed cemetery company contracts and the records shall be subject to examination by the Tax Commissioner.

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§35-5B-10. Financial report and written assurance required.

(a) The cemetery company shall report the following information to the Tax Commissioner within four months following the close of the cemetery company's fiscal year:

(1) The total amount of principal in the preneed trust account;

(2) The securities in which the preneed trust account is invested;

(3) The income received from the trust and the source of that income during the preceding fiscal year;

(4) An affidavit executed by the compliance agent that all provisions of this article applicable to the seller relating to preneed trust accounts have been complied with;

(5) The total receipts required to be deposited in the preneed trust account;

(6) All expenditures from the preneed trust account; and

(7) If the trustee is other than a bank, savings and loan or other federally insured investment banking institution, proof, in a manner determined by the Tax Commissioner, that the fidelity bond required by the provisions of section four of this article has been secured and that it is in effect.

(b) The cemetery company shall employ an independent certified public accountant who is to audit the account and provide assurance, which assurance shall be forwarded with the report required by subsection (a) of this section, that forty percent of the cash receipts from the sale of preneed property, goods or services which will not be delivered or performed within one hundred twenty days after receipt of the initial payment on account has been deposited in the account within thirty days after the close of the month in which the payment was received.

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§35-5B-11. Inclusion of property, goods and services to be delivered within one hundred twenty days.

Nothing in this article prohibits the sale within the contract of preneed property, goods or services to be delivered within one hundred twenty days after the receipt of the initial payment on account of such sale. Contracts may specify separately the total consideration paid or to be paid for preneed property, goods or services not to be delivered or provided within one hundred twenty days after receipt of initial payment. If a contract does not so specify, the seller shall deposit forty percent of the total consideration for the entire contract.

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§35-5B-12. Breach of contract by seller; trust to be single purpose trust.

(a) If, after a written request, the seller fails to perform its contractual duties, the purchaser, executor or administrator of the estate, or heirs, or assigns or duly authorized representative of the purchaser shall be entitled to maintain a proper legal or equitable action in any court of competent jurisdiction. No other purchaser need be made a party to or receive notice of any proceeding brought pursuant to this section relating to the performance of any other contract.

(b) The trust shall be a single purpose trust, and the trust funds are not available to any creditors as assets of the seller, nor may the seller encumber the trust funds.

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§35-5B-13. Trustee may rely on certifications and affidavits.

The trustee may rely upon all certifications and affidavits which have been made pursuant to the provisions of this article and is not liable to any person for such reasonable reliance.

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§35-5B-14. Transfer of trust funds to another trustee.

The seller may, upon notification in writing to the trustee, and upon such other terms and conditions as the agreement between them may specify, transfer its account funds to another trustee qualified under the provisions of this article. The trustee may, upon notification in writing to the seller, and upon such other terms and conditions as the agreement between them may specify, transfer the trust funds to another trustee qualified under the provisions of this article.

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§35-5B-15. Use of trustee's name in advertisements.

No person subject to the provisions of this article may use the name of the trustee in any advertisement or other public solicitation without written permission of the trustee.

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§35-5B-16. Cemetery property maintained by cemetery company.

With respect to cemetery property maintained by a cemetery company, the cemetery company is responsible for the performance of:

(1) The care and maintenance of the cemetery property it owns; and

(2) The opening and closing of all graves, crypts or niches for human remains in any cemetery property it owns.

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§35-5B-17. Waiver of article void.

Any provision of any contract which purports to waive any provision of this article is void.

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§35-5B-18. Violation a misdemeanor.

Any person who violates any of the provisions of this article is guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than one hundred nor more than $1,000 for each occurrence, or incarcerated in the county or regional jail for a term not to exceed one year, or both fined and incarcerated. Any person who violates any of the provisions of this article shall for a second offense be guilty of a felony and, upon conviction thereof, shall be fined not less than five hundred nor more than $3,000, or incarcerated in the penitentiary not less than one nor more than three years, or, in the discretion of the court, be incarcerated in the county jail for a term not to exceed one year.

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§35-5B-19. Abandoned interment rights.

(a) A preneed cemetery company contract may include a provision whereby interment rights that are not used for a period of seventy-five years or more shall be deemed abandoned if unclaimed and shall revert to the cemetery company if the procedures in subsection (b) are followed.

(b) (1) Prior to deeming an owner's interment rights abandoned, a cemetery company shall send notice of such intent to the owner of record, his or her heirs or assigns or any next of kin, by registered letter, return receipt requested, at the owner's last known address requesting the owner's current address or the names and addresses of the heirs or assigns of the owner of record. If a written response is received, then the records of the cemetery company shall be amended accordingly and the interment rights shall be maintained for seventy-five years from the date the written response was received by the cemetery company.

(2) If the registered letter is undeliverable or if no response is received within thirty days after the registered letter was sent, then the cemetery company shall advertise a notice of its intent to declare the interment rights abandoned in a newspaper of general circulation in the county where the cemetery is located and also in the county of the last known address of the owner of record, which notice shall contain the name and business address of the cemetery and the name of the last owner of record. If no response to the newspaper notice is made on behalf of the owner of record or his or her heirs or assigns within one hundred twenty days, then the interment rights shall be deemed abandoned and shall revert to the cemetery company. Upon the reversion of the interment rights to the cemetery company, the cemetery company shall amend its records accordingly and maintain these records for thirty years. If a written response is received, then the records of the cemetery company shall be amended accordingly and the interment rights shall be maintained for seventy-five years from the date the written response was received by the cemetery company.

(c) If, within thirty years after the interment rights have been declared abandoned, the owner of record or his or her heirs or assigns can prove to a cemetery company or a court of competent jurisdiction that he or she would be entitled to the interment rights of the owner of record if those rights had not reverted to the cemetery company as provided for by this section, then the cemetery company shall, at no cost, provide a right of interment similar to the one that was deemed abandoned.

(d) The provisions of this section shall take effect on July 1, 1999, and shall not be construed to apply retroactively.

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