

No: 548

WEST VIRGINIA LEGISLATURE
REGULAR SESSION, 1987



ENROLLED

Committee Substitute for
SENATE BILL NO. 548

(By Senator Tucker)



PASSED March 14 1987

In Effect ninety days from Passage



ENROLLED

COMMITTEE SUBSTITUTE

FOR

Senate Bill No. 548

(SENATOR TUCKER, *original sponsor*)

[Passed March 14, 1987; in effect ninety days from passage.]

AN ACT to amend and reenact sections two, four, five, seven and eight, article fourteen, chapter forty-seven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, all relating to preneed burial contracts; setting forth definitions; redefining the term "department" to mean the office of the attorney general instead of the department of labor; requiring licensure; revising terminology consistent with definition changes; providing for the disposition of proceeds; procedure for administration; promulgation of rules; removing certain fidelity bond requirements; prescribing the use of income on trust accounts; enforcement of contracts; limitations; providing for the appointment of a board of trustees; fidelity bond required; duties of trustee; permitting an irrevocable contract in all instances and removing public assistance requirement therefor; contract approved by department; fees; use of the moneys collected as fees; providing for the performance, transfer and assignment of such contracts; credit life insurance; and assumption of obligations by successor to contract seller.

Be it enacted by the Legislature of West Virginia:

That sections two, four, five, seven and eight, article fourteen, chapter forty-seven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted, all to read as follows:

ARTICLE 14. PRENEED BURIAL CONTRACTS.

§47-14-2. Definitions.

1 As used in this article, unless the context otherwise
2 requires:

3 (1) "Burial goods" means all merchandise supplied in
4 regard to burial, or entombment in a mausoleum or
5 inurnment in a columbarium, but does not include those
6 services actually performed by a cemetery acting only as
7 such, or the sale by any person of cemetery lots, land or
8 interests therein, services incidental thereto, or the sale by
9 any person of markers, memorials, monuments, equipment,
10 crypts, urns, burial vaults or vaults constructed or to be
11 constructed in a mausoleum or columbarium.

12 (2) "Contract beneficiary" means any person specified
13 or implied in a preneed funeral contract, upon whose death
14 funeral services, funeral goods or burial goods shall be
15 performed, provided or delivered.

16 (3) "Contract buyer" means any person, whether or not
17 a contract beneficiary, who purchases goods or services
18 pursuant to a preneed funeral contract but shall not include
19 any person other than a natural person.

20 (4) "Contract seller" or "seller" means a person, his
21 agent or his employee, who sells, makes available or
22 provides preneed funeral contracts.

23 (5) "Department" means the office of the attorney
24 general.

25 (6) "Funds" means moneys or other consideration
26 received pursuant to the sale of a preneed funeral contract,
27 including interest accrued or earned thereon.

28 (7) "Funeral goods" means those items of merchandise
29 sold or offered for sale directly to the public by any person
30 which will be used in connection with a funeral or
31 alternative for final disposition of human remains, but does
32 not include those services actually performed by a cemetery
33 acting only as such, or the sale by the cemetery of cemetery
34 lots, land or interest therein, services incidental thereto, or

35 the sale by any person of markers, memorials, monuments,
36 equipment, crypts, urns, burial vaults or vaults constructed
37 or to be constructed in a mausoleum or columbarium.

38 (8) "Funeral services" means those services usually
39 performed by a funeral service licensee, including, but not
40 limited to, care and preparation of human remains and
41 coordinating rites and ceremonies in connection with the
42 disposition of human remains carried out at the request of
43 any individual responsible for funeral and disposition
44 arrangements.

45 (9) "Person" means a natural person, partnership, firm,
46 association or corporation, including any agent or employee
47 thereof residing in or doing business in this state who is
48 engaged in the selling of, making available of or providing
49 of "preneed funeral contracts," defined herein, or is the
50 recipient of funds paid for such purpose.

51 (10) "Person who makes a preneed funeral contract
52 available" means a person who, while not directly selling
53 the contents of a preneed funeral contract to the public
54 through his efforts, makes such contracts available to the
55 public but shall not include manufacturers of funeral goods
56 or burial goods.

57 (11) "Personal residence" means any residential
58 building in which one temporarily or permanently
59 maintains his abode including, but not limited to, hotels,
60 motels, apartments, nursing homes, convalescent homes,
61 homes for the aged and public and private institutions.

62 (12) "Preneed funeral contract" means any contract,
63 agreement, mutual understanding, series or combination of
64 contracts, agreements and mutual understandings, other
65 than a contract of insurance, under which, for a specified
66 consideration paid in advance of death in a lump sum or by
67 installments, a person promises to furnish or make
68 available or provide funeral services, funeral goods or
69 burial goods for use at a time determinable by the death of
70 the "contract beneficiary" who is either named or implied.

71 (13) "Provider" means a person who, though not a party
72 to a preneed funeral contract does, through his efforts,
73 make the services or goods referred to in such a contract
74 available to the public pursuant to such a contract.

75 (14) "Trustee" means any natural person, partnership
76 or corporation, including any bank, trust company, savings
77 and loan association or credit union, which receives money

78 pursuant to any agreement or contract made pursuant to
79 the provisions of this article.

§47-14-4. Agents and employees; licenses required; fee to go to department.

1 No agent or employee of a contract seller may sell preneed
2 funeral contracts in this state without first obtaining from
3 the department a license for such purpose. The fee for such
4 license and the annual renewal thereof shall be twenty-five
5 dollars. These fees shall be payable to the "Preneed Burial
6 Contract Regulation Fund" established by section three of
7 this article. The department shall not issue such license
8 without requiring an applicant for the license, or if the
9 applicant is a corporation, its individual agents, to provide
10 proof to warrant its issuance by presenting with the
11 application affidavits from his employer stating that, to the
12 employer's best information, knowledge and belief the
13 applicant merits a license. The acts of the agent shall be
14 considered acts of the employer. The department may
15 require the applicant to pass a written examination to
16 ascertain if the applicant has sufficient knowledge of the
17 industry and the provisions of this article to properly carry
18 on the business covered by this article.

§47-14-5. Disposition of proceeds; trusts; procedure for administration, department to promulgate rules and regulations.

1 (a) All sums paid or collected on such contracts entered
2 into after the effective date of this article shall be handled in
3 the following manner:

4 (1) The contract seller or other person collecting the
5 funds may retain for his own use and benefits and for the
6 purpose of covering his selling expenses, servicing costs and
7 general overhead, an amount not to exceed ten percent of
8 the total amount agreed to be paid by the contract buyer as
9 reflected in the preneed funeral contract. Such ten percent
10 or other amount is exempt from the trust and refunding
11 provisions of this article;

12 (2) All of the funds collected under the contract, less the
13 amount authorized to be deducted under subdivision (1) of
14 this subsection, shall be deposited under the provisions of
15 subdivision (3) hereof;

16 (3) Unless otherwise specifically exempt under this
17 article, all funds paid to or collected by any person from a
18 preneed funeral contract shall, within thirty days after
19 receipt thereof by such a person, be deposited in this state (i)
20 in the name of a trustee who is a contract seller, provider or
21 person making the preneed funeral contract available, in a
22 state or federally chartered and insured bank, savings
23 institution, building and loan institution located in this
24 state or in a state or federally chartered credit union located
25 in this state, or (ii) under the terms of a trust instrument
26 entered into with a national or state bank having trust
27 powers or a trust company located in this state.

28 (b) The funds to be deposited from more than one
29 preneed funeral contract may at the option of the recipient
30 thereof or the certificate of authority holder, be placed in a
31 common or commingled trust fund in this state under a
32 single trust instrument.

33 (c) All deposits shall be placed in an account with a
34 trustee in the name of the contract seller, provider or person
35 making the contract available, as set forth in the contract,
36 to whom the contract buyer makes payment. Records shall
37 be maintained as to each contract showing the amount paid,
38 the amount deposited and the amount invested with respect
39 to any particular buyer's contract.

40 (d) All funds required to be deposited and covered by
41 this article shall remain in this state.

42 (e) All accounts of money deposited in any bank, savings
43 institution, building and loan association or credit union in
44 accordance with the provisions of this article are subject to
45 periodic examination by the department of banking of this
46 state.

47 (f) The department shall promulgate rules and
48 regulations in accordance with chapter twenty-nine-a of
49 this code for the purpose of administering the provisions of
50 this article.

§47-14-7. Income on trust accounts.

1 (a) Whether the payments on a preneed funeral contract
2 are placed in a bank, savings institution, building and loan
3 association, credit union or in a common trust fund as
4 permitted in this article, or are part of a commingled
5 common trust fund as permitted in this article, the income
6 from a contract deposit, except as otherwise provided

7 herein, shall accrue to the individual account until such
8 time as the burial goods, funeral goods and funeral services
9 for the contract beneficiary are required to be delivered and
10 returned by reason of such beneficiary's death.

11 (b) Upon the death of such contract beneficiary, the
12 total amount in the trust account attributable to the
13 contract beneficiary shall be disbursed as follows:

14 (1) If the cost of the goods and services contracted for at
15 the time of such beneficiary's death exceeds the amount
16 paid under the contract, then the provider may have and use
17 the principal and so much of the interest as may be
18 necessary to defray such additional cost over and above the
19 contract cost: *Provided*, That to the extent that the cost of
20 goods and services provided exceeds the principal and
21 interest thereon, the provider shall provide and make
22 available the goods and services contracted for at no
23 additional cost to the contract purchaser or to the heirs or
24 personal representative of the contract beneficiary;

25 (2) To the extent the principal and interest thereon
26 exceed the cost of the goods and services contracted for,
27 then the provider may retain only so much of the principal
28 and interest necessary to defray the total of such cost and
29 the balance shall be returned to the estate of the contract
30 beneficiary or to the contract buyer as may be proper under
31 the provisions of this article or the rules and regulations of
32 the department.

33 (c) The trustee for the trust shall make annual
34 valuations of assets held in trust. No person may withdraw
35 income from the trust, except for the purpose of executing
36 the terms of the contract, disbursing the trust proceeds as
37 provided in this article and paying costs incidental to the
38 trust, including, but not limited to, reasonable trust fees
39 and tax assessments.

**§47-14-8. Limitations on enforcement of contract;
appointment and removal of trustees; standards
for administration of trusts; contracts may be
irrevocable; "Preneed Guarantee Fund"
established; assignment of contract allowed;
credit life insurance allowed; successor in in-
terest defined.**

1 (a) A contract seller, provider or person making the
2 preneed funeral contract available may not enforce a

3 preneed funeral contract made in violation of this article,
4 but a contract buyer or his heirs or legal representative may
5 recover all amounts paid under his contract and all accrued
6 income on such amount where the contract seller, provider
7 or person making the preneed funeral contract available
8 has violated the provisions of this article as to such
9 contract. The right of such recovery is in addition to the
10 remedy provided for in section twelve of this article.

11 (b) A contract seller, provider or person making the
12 preneed funeral contract available may appoint a board of
13 at least three individual trustees under a trust instrument, if
14 the trustee is other than a chartered state or national bank
15 or trust company under the supervision of the department
16 of banking of this state, to serve as trustees of its trust funds.
17 Each individual trustee shall be a resident of this state and
18 shall hold office subject to the direction of the seller. Not
19 more than one member of the board of trustees of a trust
20 fund may have a proprietary interest in the seller
21 appointing trustees or in any certificate of authority holder
22 who is placing funds in such trust.

23 Individual trustees of a trust fund established under the
24 provisions of this article shall file a fidelity bond with a
25 corporate surety thereon which is licensed to do business in
26 this state with the department in an amount equal to the
27 funds in trust, guaranteeing payment of damages
28 occasioned by breach of the trustees' fiduciary duties. The
29 trustees of one or more trust funds need file only one such
30 bond. The aggregate liability of the surety shall in no case
31 exceed the face amount of the bond. The department or any
32 aggrieved person claiming against any bond required by
33 this section may maintain an action against the trustee and
34 the surety. Individual trustees shall take no action
35 respecting trust funds unless there is on file with the
36 department a bond as required by this section. If the
37 trustees are individuals, the department may suspend the
38 certificate of authority of any contract seller, provider or
39 person making the preneed funeral contract available
40 having trust funds with respect to which there is no bond on
41 file with the department as required by this section.

42 (c) All trustees under the terms of this article are subject
43 to the following investment standards: In acquiring,
44 investing, reinvesting, exchanging, retaining, selling and
45 managing property for the benefit of others, trustees have

46 the responsibilities which customarily attach to such
47 offices and to the type of estates entrusted to their care and
48 shall exercise the judgment and care under the
49 circumstances then prevailing which men of prudence,
50 discretion and intelligence exercise in the management of
51 their own affairs, not in regard to speculation but in regard
52 to the permanent disposition of their funds, considering the
53 probable income as well as the probable safety of their
54 capital.

55 (d) No preneed funeral contract may restrict any
56 contract buyer who may make his or her contract
57 irrevocable in accordance with the laws and regulations of
58 this state.

59 (e) All preneed funeral contracts must be in writing and
60 no contract form may be used without prior approval of the
61 department.

62 (f) Each contract buyer shall pay a fee of five dollars to
63 the contract seller, who in turn will forward such sum to the
64 department within ten days after execution of the preneed
65 funeral contract. The contract shall be recorded in the
66 department. Within ten days after receiving the fee, the
67 department will notify the contract purchaser, by mail, of
68 the recording. The fees shall be placed by the department in
69 an account under the department's control entitled
70 "Preneed Guarantee Fund," and the income thereon shall
71 accrue to the fund. The department may use such income, if
72 necessary in its discretion, to enforce this article.

73 In the event any buyer of any preneed funeral contract is
74 unable to receive the benefits of his contract, or to receive
75 the funds due by reason of his cancellation thereof, such
76 buyer may apply to the department on a form supplied by
77 the department. Upon the finding of the department that
78 said benefits or return of payment is not available to the
79 buyer, the department will cause to be paid to the said buyer
80 from the "Preneed Guarantee Fund" the amount actually
81 paid by the buyer under his or her contract. If the seller's
82 liability for default is subsequently proven, any award
83 made by a court of law shall be made payable to the
84 "Preneed Burial Contract Regulation Fund" established in
85 section three of this article.

86 (g) Notwithstanding the provisions of subsection (f),
87 section five of this article, delivery of funeral or burial
88 goods prior to the death of the person for whose benefit they

89 are purchased does not constitute performance or
90 fulfillment, either wholly or in part, of any preneed contract
91 or series of contracts.

92 (h) The contract buyer may, on acceptance in writing by
93 a transferee, transfer the obligations of the seller, provider
94 or person making the preneed funeral contract available to
95 other persons within or without this state. The funds on
96 deposit for the contract on any future payments, if any, by
97 the contract buyer shall then be transferred to and
98 deposited under applicable state law, if any, in the state
99 wherein the contract buyer resides or to a state where the
100 obligations of the provider of the funeral service and goods
101 will be fulfilled.

102 Upon such transfer, the contract buyer and transferee
103 shall, in writing, release the contract seller, provider or
104 person making the preneed funeral contract available and
105 the trusts, as applicable, for any further liability under such
106 contract.

107 Nothing in this article or in any preneed contract may
108 limit the right of a contract buyer to assign such a contract
109 to any person whomsoever except as specifically provided
110 herein and except that if the assignee is a resident of this
111 state or the contract is to be fulfilled by the assignee in this
112 state, the assignee must hold a certificate of authority under
113 this article. If the contract is to be fulfilled in another state,
114 the assignee must in all respects be in compliance with the
115 preneed funeral law of that state, if any.

116 (i) Notwithstanding any other law of this state, a
117 contract seller, provider or person making the preneed
118 funeral contract available may, if requested by the contract
119 buyer where the contract is to be paid in installments,
120 provide for the sale of credit life insurance on the life of the
121 contract beneficiary in order to have the funds necessary to
122 make payment in full under the contract if the beneficiary
123 should die prior to completing all the payments due. The
124 seller shall disclose all costs of such insurance in clear
125 language and shall inquire of the buyer whether he
126 understands the terms of the insurance contract and is
127 aware of the total cost of the insurance.

128 (j) In the event any certificate of authority holder or
129 anyone in violation of the article who has outstanding
130 preneed funeral contracts and is not the current holder of a
131 certificate of authority sells its business, through the sale of

132 assets or stock, which is involved in the fulfillment of
133 obligations under preneed funeral contracts, the buyer of
134 such business is a "successor in interest" and is covered not
135 only by this article but shall assume the obligations of seller
136 under seller's outstanding preneed funeral contracts
137 regardless of whether seller made known to buyer the
138 existence of such contract or contracts.

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Blaine DeLoach
.....
Chairman Senate Committee

Bernard V. Kelly
.....
Chairman House Committee

Originated in the Senate.

In effect ninety days from passage.

Todd C. Willis
.....
Clerk of the Senate

Donald L. Kopp
.....
Clerk of the House of Delegates

Russ Tomlinson
.....
President of the Senate

Walter R. Anderson
.....
Speaker House of Delegates

The within *approved* this the *28th*
March day of 1987.

Arch A. Shroyer
.....
Governor



PRESENTED TO THE

GOVERNOR

Date 3/23/87

Time 3:20 p.m.

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OFFICE OF THE ATTORNEY GENERAL
STATE OF NEW YORK