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WEST VIRGINIA LEGISLATURE

REGULAR SESSION, 1993

ENROLLED

Committee Substitute for
SENATE BILL NO. 407

(By Senator *Summitt, Mr. President, et al*)

PASSED April 8, 1993
In Effect July 1, 1993 Passage

E N R O L L E D

COMMITTEE SUBSTITUTE

FOR

Senate Bill No. 407

(SENATORS BURDETTE, MR. PRESIDENT, BLATNIK,
FELTON, SHARPE, WAGNER AND BOLEY, *original sponsors*)

[Passed April 8, 1993; to take effect July 1, 1993.]

AN ACT to amend chapter thirty-five of the code of West Virginia, one thousand nine hundred thirty-one, as amended, by adding thereto a new article, designated article five-b, relating to the sale of preneed cemetery company property, goods and services; definitions; requirements for engaging in business as a cemetery company; fees; compliance agent; state treasury special account; exemptions; deposit in trust fund of percentage of proceeds from sale of property, goods and services required; contents of preneed cemetery company contracts; composition of trust account; payment of certain expenses from trust account; exceptions; disbursement of trust funds; construction of mausoleums; records to be kept; financial report to tax commissioner; audit; appointment of trustee; fidelity bond of trustee; breach of contract; purpose of trust; liability of trustee; transfer of trust funds; advertisement of name of trustee; maintenance of cemetery property; prohibition of waiver; and criminal penalties.

Be it enacted by the Legislature of West Virginia:

That chapter thirty-five of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended by adding thereto a new article, designated article five-b, to read as follows:

ARTICLE 5B. PRENEED CEMETERY COMPANY PROPERTY, GOODS AND SERVICES; RELATED CONTRACTS.

§35-5B-1. Definitions.

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

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

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

14 (3) "Cemetery company" or "seller" means any
15 person, partnership, firm or corporation engaged in
16 the business of operating a cemetery or selling prop-
17 erty, goods or services used in connection with inter-
18 ring or disposing of the remains or commemorating
19 the memory of a deceased human being, where
20 delivery of the property or goods or performance of
21 the service may be delayed later than one hundred
22 twenty days after receipt of the initial payment on
23 account of such sale. Such property, goods or services
24 include, but are not limited to, burial vaults, mausole-
25 um crypts, lawn crypts, memorials, marker bases and
26 opening and closing and/or interment services, but do
27 not include graves or incidental additions such as
28 dates, scrolls or other supplementary matter repres-
29 enting not more than ten percent of the total contract
30 price.

31 (4) "Commissioner" or "tax commissioner" means
32 the secretary of the West Virginia department of tax

33 and revenue.

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

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

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

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

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

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

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

70 (12) "Mausoleum crypt" means a burial receptacle

71 usually constructed of reinforced concrete and usually
72 constructed or assembled above the ground and is
73 considered real property.

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

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

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

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

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

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

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

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

1 On or after the first day of July, one thousand nine
2 hundred ninety-three, no person, partnership, firm or
3 corporation may engage in the business of operating a
4 cemetery company in this state without having first
5 paid an annual registration fee established by the tax
6 commissioner in an amount not to exceed four
7 hundred dollars, and filing with the tax commissioner
8 certain information which shall include the name and
9 addresses of all officers, owners and directors of the
10 cemetery company and the name of the designated
11 compliance agent. The cemetery company shall notify
12 the tax commissioner of any changes in the informa-
13 tion required to be filed within ninety days of the date
14 on which the change occurs. A new filing shall also be
15 required if there is a change in the ownership of the
16 cemetery company or if there is a change in the name
17 of the compliance agent designated by the cemetery
18 company. The cemetery company shall pay an addi-
19 tional fee as established by the commissioner in
20 connection with the reporting of such changes, not to
21 exceed one hundred dollars. There is hereby created
22 in the state treasury a special account to be known as
23 the "cemetery company account" into which all fees
24 collected under this article shall be deposited: *Pro-*
25 *vided*, That amounts collected which are found from
26 time to time to exceed funds needed for the purposes
27 set forth in this article may be transferred to other
28 accounts or funds and redesignated for other purposes
29 by appropriation of the Legislature. Funds in this
30 account shall be expended upon appropriation of the
31 Legislature by the secretary of tax and revenue in
32 connection with the administration of this article.

§35-5B-3. Exemptions.

- 1 The provisions of this article do not apply to:
- 2 (1) Sales of property, goods and services subject to
3 the provisions of article fourteen, chapter forty-seven
4 of this code;
 - 5 (2) Sales of services by perpetual care cemeteries
6 subject to the provisions of article five-a of this chapter;

7 (3) Sales of property, goods and services by cemeter-
8 ies owned and operated by a county, municipal corpo-
9 ration, by a church or by a nonstock corporation not
10 operated for profit if the cemetery: (A) Does not
11 compensate any officer or director except for
12 reimbursement of reasonable expenses incurred in the
13 performance of official duties; (B) does not sell or
14 construct or directly or indirectly contract for the sale
15 or construction of vaults or lawn or mausoleum crypts;
16 and (C) uses proceeds from the sale of all graves and
17 entombment rights for the sole purpose of defraying
18 the direct expenses of maintaining the cemetery;

19 (4) Sales of property, goods and services by commun-
20 ity cemeteries not operated for profit if the cemetery:
21 (A) Does not compensate any officer, owner or direc-
22 tor except for reimbursement of reasonable expenses
23 incurred in the performance of official duties; and (B)
24 uses the proceeds from the sale of the graves for the
25 sole purpose of defraying the direct expenses of
26 maintaining its facilities; and

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

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

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

14 (b) If payment is made on an installment or deferred
15 payment basis, the seller shall have the option of

16 depositing into the trust fund forty percent of the
17 amount of the principal initially, or alternatively,
18 depositing forty percent of the principal of each
19 payment within thirty days after the close of the
20 month in which said receipts are paid to it.

21 (c) (1) The trustee of the trust fund shall be appoint-
22 ed by the person owning, operating, or developing a
23 cemetery company. If the trustee is other than a bank,
24 savings and loan or other federally insured investment
25 banking institution, the trustee shall be approved by
26 the tax commissioner. A trustee that is not a bank,
27 savings and loan or other federally insured investment
28 banking institution shall apply to the tax commissioner
29 for approval, and the tax commissioner shall approve
30 the trustee when satisfied that:

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

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

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

47 (3) If the trustee is other than a bank, savings and
48 loan or other federally insured investment banking
49 institution, and if it appears that an officer, director or
50 employee of the trustee is dishonest, incompetent or
51 reckless in the management of a trust fund required
52 by the provisions of this article, the tax commissioner
53 may bring an action in the circuit courts of this state
54 to remove the trustee and to impound the property
55 and business of the trustee as may be reasonably

56 necessary to protect the trust funds.

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

- 1 A preneed cemetery company contract shall:
- 2 (1) Be written in clear understandable language and
3 printed in easy-to-read type, size and style;
- 4 (2) Identify the seller, the contract buyer and the
5 person for whom the contract is bought if other than
6 the contract buyer;
- 7 (3) Contain a complete description of the property,
8 goods or services bought;
- 9 (4) Clearly disclose whether the price of the proper-
10 ty goods or services bought is guaranteed;
- 11 (5) Provide that if the particular property, goods and
12 services specified in the contract are unavailable at the
13 time of delivery, the seller shall be required to furnish
14 property, goods and services similar in size and style
15 and at least equal in quality of material and workman-
16 ship and that the representative of the deceased has
17 the right to reasonably choose the property, goods or
18 services to be substituted; and
- 19 (6) Be executed in duplicate and a signed copy given
20 to the buyer.

§35-5B-6. Identification of funds.

- 1 Any funds deposited in the trust account as required
2 by section four of this article, shall be identified in the
3 records of the seller by the contract number and by
4 the name of the buyer. The trustee may commingle
5 the deposits in any preneed trust account for the
6 purposes of the management thereof and the invest-
7 ment of funds therein.

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

- 1 The corpus of the trust account shall remain intact
2 until the property or goods are delivered or services
3 performed as specified in the contract: *Provided*, That

4 the net income from the preneed trust account may be
5 used to pay any appropriate trustee and auditor fees,
6 commissions and costs. The net income from the
7 preneed trust account, after payment of any appro-
8 priate trustee and auditor fees, commissions and costs,
9 shall remain in the account and be reinvested and
10 compounded. Any trustee fees, commissions and costs
11 in excess of income shall be paid by the cemetery
12 company and not from the trust. However, the trustee
13 shall, as of the close of the cemetery company's fiscal
14 year, upon the written assurance to the trustee by a
15 certified public accountant employed by the seller,
16 return to the seller any income in the seller's account
17 which, when added to the corpus of the trust account
18 is in excess of the current cost requirements for all
19 undelivered property, goods or services included in the
20 seller's preneed cemetery company contracts including
21 all outstanding preneed cemetery company contracts
22 entered into prior to the first day of July, one thou-
23 sand nine hundred ninety-three. The seller's cost
24 requirements shall be based upon wholesale cost and
25 certified in its records by a sworn affidavit by the
26 compliance agent and shall be determined by the
27 seller as of the close of the cemetery company's fiscal
28 year.

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

1 (a) Upon performance of the preneed cemetery
2 company contract, the seller shall certify to the trustee
3 by affidavit the amount of specific funds in the trust,
4 identified with the contract performed, which the
5 trustee shall pay to the seller. The seller may in its
6 records itemize the property, goods or services and the
7 consideration paid or to be paid therefore, to which
8 the deposit requirements of this article apply. In such
9 case the seller may, upon certification to the trustee of
10 performance or delivery of such property, goods or
11 services and of the amount of specific trust funds
12 identified in its records with such items, request
13 disbursement of that portion of the specific funds
14 deposited pursuant to the contract, which the trustee

15 shall pay to the seller.

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

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

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

1 Each seller of a preneed cemetery company contract
2 shall record and keep detailed accounts of all contracts
3 and transactions regarding preneed cemetery company
4 contracts and the records shall be subject to examina-
5 tion by the tax commissioner.

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

1 (a) The cemetery company shall report the following
2 information to the tax commissioner within four
3 months following the close of the cemetery company's
4 fiscal year:

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

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

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

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

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

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

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

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

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

1 Nothing in this article prohibits the sale within the
2 contract of preneed property, goods or services to be
3 delivered within one hundred twenty days after the
4 receipt of the initial payment on account of such sale.
5 Contracts may specify separately the total considera-
6 tion paid or to be paid for preneed property, goods or
7 services not to be delivered or provided within one
8 hundred twenty days after receipt of initial payment.
9 If a contract does not so specify the seller shall deposit
10 forty percent of the total consideration for the entire
11 contract.

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

1 (a) If, after a written request, the seller fails to
2 perform its contractual duties, the purchaser, executor
3 or administrator of the estate, or heirs, or assigns or

4 duly authorized representative of the purchaser shall
5 be entitled to maintain a proper legal or equitable
6 action in any court of competent jurisdiction. No other
7 purchaser need be made a party to or receive notice
8 of any proceeding brought pursuant to this section
9 relating to the performance of any other contract.

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

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

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

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

1 The seller may, upon notification in writing to the
2 trustee, and upon such other terms and conditions as
3 the agreement between them may specify, transfer its
4 account funds to another trustee qualified under the
5 provisions of this article. The trustee may, upon
6 notification in writing to the seller, and upon such
7 other terms and conditions as the agreement between
8 them may specify, transfer the trust funds to another
9 trustee qualified under the provisions of this article.

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

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

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

1 With respect to cemetery property maintained by a
2 cemetery company, the cemetery company is respon-
3 sible for the performance of:

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

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

§35-5B-17. Waiver of article void.

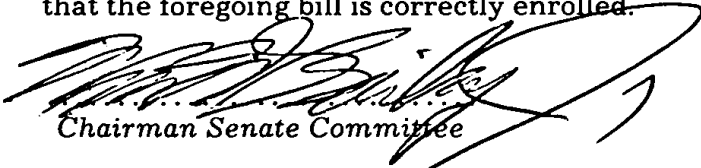
1 Any provision of any contract which purports to
2 waive any provision of this article is void.

§35-5B-18. Violation a misdemeanor.

1 Any person who violates any of the provisions of this
2 article is guilty of a misdemeanor, and, upon conviction
3 thereof, shall be fined not less than one hundred
4 nor more than one thousand dollars for each occurrence,
5 or incarcerated in the county or regional jail for
6 a term not to exceed one year, or both fined and
7 incarcerated. Any person who violates any of the
8 provisions of this article shall for a second offense be
9 guilty of a felony and, upon conviction thereof, shall
10 be fined not less than five hundred nor more than
11 three thousand dollars, or incarcerated in the penitentiary
12 not less than one nor more than three years, or,
13 in the discretion of the court, be incarcerated in the
14 county jail for a term not to exceed one year.

Enr. Com. Sub. for S. B. No. 407] 14

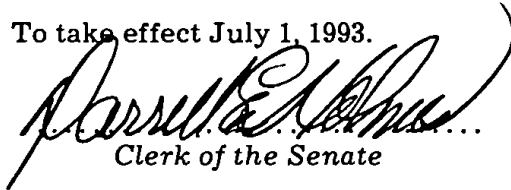
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.


Chairman Senate Committee


Ernest C. Moore
Chairman House Committee

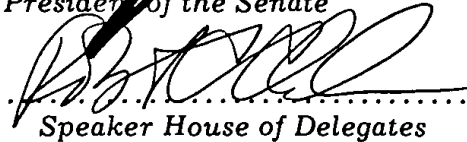
Originated in the Senate.

To take effect July 1, 1993.

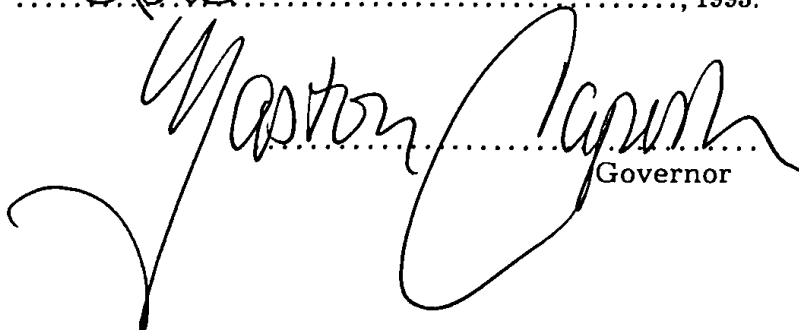

Clerk of the Senate


Clerk of the House of Delegates


President of the Senate


Speaker House of Delegates

The within is approved.....this the ^{22nd}.....
day of ^{April}....., 1993.


Governor

PRESENTED TO THE

GOVERNOR

Date

4/19/93

Time

9:52 am