

SB 0148

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REGULAR SESSION, 1995



ENROLLED

Committee Substitute for
SENATE BILL NO. 148

(By Senator Ross, et al)



PASSED MARCH 7, 1995
In Effect 90 days from Passage

ENROLLED

COMMITTEE SUBSTITUTE
FOR

Senate Bill No. 148

(SENATORS ROSS, LOVE, MILLER, PLYMALE
AND SHARPE, *original sponsors*)

[Passed March 7, 1995; in effect ninety days from passage.]

AN ACT to amend and reenact article fourteen, chapter forty-seven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, relating to the regulation of persons who offer, sell or negotiate for the sale of preneed funeral contracts; setting forth legislative policy and intent; definitions; excluding premiums and annuities paid to insurance companies from the definition of "funds"; excluding life insurance companies from the definition of "trustee"; requirement of certificate of authority from the consumer protection division of the office of the attorney general for persons controlling funds paid pursuant to a preneed funeral contract and for persons who offer preneed funeral contract; exceptions; application for certificate; biennial reporting period; renewal of certificate of authority; providing for a temporary certificate and establishing a fee therefor; issuance of certificate; records of certificate holder; license for agents and employees of preneed funeral contract sellers; fee and

requirements for license; limiting authorized deduction of overhead costs from contract proceeds; deposit of contract proceeds or insurance premiums; restrictions on management of proceeds; review of accounts by division of banking; promulgation of legislative rules by the consumer protection division of the office of the attorney general; disbursement of proceeds; authority to provide services or goods after the death of a contract beneficiary; refund of proceeds; cancellation of contract; immunity from civil liability; interest on proceeds; unenforceable contracts and recovery of proceeds; trustees and fidelity bond for trust funds; investment standards; irrevocable contracts; contract recording requirements and fee; allocation of recording fee to preneed burial contract regulation fund and preneed guarantee fund and subjecting said funds to legislative appropriation; payment of lost benefits from preneed guarantee fund on pro rata basis; performance and fulfillment of contract; transfer and assignment of contract; credit life insurance; sale of business; forms; limitations on solicitation of contracts; prohibited acts; proceedings, actions and remedies upon occurrence of prohibited acts; statutory lien for claim against contract provider; liability of certificate holder for acts and omissions of employees and agents; specific civil actions against contract providers; award of punitive damages and attorney fees and deposit thereof into preneed burial contract regulation fund; severability; and criminal penalties.

Be it enacted by the Legislature of West Virginia:

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

ARTICLE 14. PRENEED FUNERAL CONTRACTS.

§47-14-1. Declaration of policy; legislative intent.

- 1 It is contrary to public policy for any person to receive,
- 2 hold, control or manage funds or proceeds received from
- 3 the sale of, or from a contract to sell, funeral services,

4 funeral goods, burial goods or any one or combination of
5 them, where payments for the same are made either
6 outright or on an installment basis, prior to the death of
7 the person or persons so purchasing them, or for whom
8 they are purchased, unless that person holds, controls or
9 manages those funds pursuant to the limitations pre-
10 scribed by this article and the legislative rules promul-
11 gated pursuant thereto.

12 It is the legislative intent that the provisions of this
13 article shall be construed as a limitation upon the
14 manner in which a person is permitted to accept funds in
15 prepayment of funeral services to be performed in the
16 future, or funeral or burial goods to be used in connec-
17 tion with the funeral or final disposition of human
18 remains, so that at all times members of the public may
19 have an opportunity to arrange and pay for funerals for
20 themselves and their families in advance of need while at
21 the same time providing all possible safeguards where-
22 under such prepaid funds cannot be dissipated, whether
23 intentionally or not, in order that such funds are avail-
24 able for the payment of funeral services so arranged.
25 Further, it is the legislative intent that no person may
26 offer, sell or negotiate for the sale of a preneed funeral
27 contract through anyone who is not licensed pursuant to
28 the provisions of this article.

§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
9 by any person of markers, memorials, monuments,
10 equipment, crypts, urns, burial vaults or vaults con-
11 structed or to be constructed in a mausoleum or colum-

12 barium.

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

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

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

24 (5) "Division" means the consumer protection division
25 of the office of the attorney general.

26 (6) "Funds" means moneys or other consideration,
27 other than premiums for insurance policies or annuities
28 paid to a life insurance company, received pursuant to
29 the sale of a preneed funeral contract, including interest
30 accrued or earned thereon.

31 (7) "Funeral goods" means those items of merchandise
32 sold or offered for sale directly to the public by any
33 person which will be used in connection with a funeral
34 or alternative for final disposition of human remains, but
35 does not include those services actually performed by a
36 cemetery acting only as such, or the sale by the cemetery
37 of cemetery lots, land or interest therein, services
38 incidental thereto, or the sale by any person of markers,
39 memorials, monuments, equipment, crypts, urns, burial
40 vaults or vaults constructed or to be constructed in a
41 mausoleum or columbarium.

42 (8) "Funeral services" means those services usually
43 performed by a licensed funeral establishment or direc-
44 tor, including but not limited to, care and preparation of
45 human remains and coordinating rites and ceremonies in
46 connection with the disposition of human remains

47 carried out at the request of any individual responsible
48 for funeral and disposition arrangements.

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

56 (10) "Person who makes a preneed funeral contract
57 available" means a person who, while not directly selling
58 the contents of a preneed funeral contract to the public
59 through his efforts, makes such contracts available to the
60 public, but does not include manufacturers of funeral
61 goods or burial goods.

62 (11) "Personal residence" means any residential
63 building in which one temporarily or permanently
64 maintains his abode including, but not limited to, hotels,
65 motels, apartments, nursing homes, convalescent homes,
66 homes for the aged and public and private institutions.

67 (12) "Preneed funeral contract" means any contract,
68 agreement, mutual understanding, series or combination
69 of contracts, agreements and mutual understandings,
70 including a contract that is financed by the purchase of
71 an insurance policy or annuity, under which, for a
72 specified consideration paid in advance of death in a
73 lump sum or by installments, a person promises to
74 furnish or make available or provide funeral services,
75 funeral goods or burial goods for use at a time determi-
76 nable by the death of the contract beneficiary who is
77 either named or implied therein.

78 (13) "Provider" means a person who, though not
79 necessarily a party to a preneed funeral contract, makes
80 the services or goods referred to in such a contract
81 available to the public pursuant to such a contract.

82 (14) "Trustee" means any natural person, partnership

83 or corporation, including any bank, trust company,
84 savings and loan association or credit union, which
85 receives money pursuant to any agreement or contract
86 made pursuant to the provisions of this article. The term
87 "trustee" does not include an insurance company li-
88 censed pursuant to chapter thirty-three of this code.

**§47-14-3. Certificate of authority required; fees to go to
division; special account established; duties of
certificate holder.**

1 (a) No person may receive, hold, control or manage any
2 funds or other thing of value tendered as payment on any
3 preneed funeral contract unless such person has ob-
4 tained a certificate of authority or renewal thereof from
5 the division: *Provided*, That no bank, trust company,
6 savings and loan association or other financial institu-
7 tion regulated by this state or insured by an agency of
8 the United States federal government or life insurance
9 companies licensed pursuant to the provisions of chapter
10 thirty-three of this code is required to obtain a certifi-
11 cate of authority.

12 (b) No person may sell, make available or be a provider
13 of a preneed funeral contract unless such person has
14 obtained a certificate of authority or renewal thereof
15 from the division.

16 (c) Any person desiring to obtain a certificate of
17 authority shall file with the division, upon forms pro-
18 vided by the division, a completed application, together
19 with a two hundred dollar application fee for the origi-
20 nal certificate of authority. The fee shall be payable to
21 a special revenue account to be known as the "Preneed
22 Burial Contract Regulation Fund" to be used for the
23 purpose of administering the provisions of this article.
24 The original application or a renewal application shall
25 contain at least the following information:

26 (1) The name and address of each person owning ten
27 percent or more interest in the applicant;

28 (2) The experience of the applicant;

29 (3) Such other information as the division may require
30 to determine to its satisfaction that the applicant pos-
31 sesses the ability, experience, financial stability and
32 integrity to negotiate preneed funeral contracts and, in
33 the case of a funeral service provider, to provide the
34 funeral services, funeral goods or burial goods as speci-
35 fied therein; and

36 (4) The types of preneed funeral contracts proposed to
37 be written or otherwise used and copies of any writings
38 used pursuant thereto; and if a person is a party to or
39 bound by any such contract, an itemization of all out-
40 standing preneed funeral contracts, the dates upon
41 which such contracts were entered into, the names of all
42 parties involved in such contracts or having any right
43 thereunder, the amount paid toward each contract and,
44 if payments are not completed, the amounts owing on
45 each contract and the present depository or holder of all
46 such funds.

47 (d) Each certificate of authority holder shall renew its
48 certificate of authority according to the schedule estab-
49 lished by this article. The fee for renewal shall be two
50 hundred dollars per each entity, payable to the "Preneed
51 Burial Contract Regulation Fund" established by this
52 section.

53 (e) Each certificate of authority holder shall file with
54 the division a biennial report which shall contain the
55 following:

56 (1) An identification of all outstanding preneed funeral
57 contracts, the dates upon which the contracts were
58 entered into by the parties, the names of all parties
59 involved in such contracts or having any right thereun-
60 der, including, but not limited to, the contract benefi-
61 ciary, the amount paid and interest earned on each
62 contract and, if payments are not completed, the
63 amounts owing and the present balance of funds applica-

64 ble to each such contract.

65 (2) The date on which any insurance policy or annuity
66 was purchased to fund a preneed funeral contract, the
67 amount paid for each such insurance policy or annuity
68 and the present value of each such insurance policy or
69 annuity.

70 (3) The name of the contract seller and the name of the
71 provider of the services and goods and a statement that
72 the provider has sufficient funds available to perform all
73 of its obligations under its contracts.

74 (4) A statement that the contract seller and the person
75 receiving funds paid thereunder have complied with the
76 trust requirements of this article, and the name and
77 address of the present depository or holder of such funds
78 and a statement of all the amounts thereof itemized as to
79 each such contract.

80 (5) Any changes or amendments in any contracts or
81 obligations of the seller and provider which have oc-
82 curred since the date of the last report.

83 (6) Such other information as may be considered
84 necessary by the division in order to meet its responsibil-
85 ities under this article.

86 Any person who sells, provides or makes preneed
87 funeral contracts available or receives moneys or other
88 consideration therefor from the public or who otherwise
89 holds or performs such contracts with or without a
90 certificate of authority is required to file a biennial
91 report with the division as prescribed in this subsection.
92 Beginning with the year one thousand nine hundred
93 ninety-five, the reporting period for which a biennial
94 report is to be made pursuant to this section shall be a
95 calendar year ending on the thirty-first day of December
96 every other year. All such reports shall be filed with the
97 division no later than the thirty-first day of March of the
98 year following the reporting period.

99 (f) Beginning with the calendar year one thousand nine
100 hundred ninety-five, the certificate of authority shall
101 expire on the thirtieth day of June following its issuance:
102 *Provided*, That a temporary certificate of authority may
103 be issued by the division for a period not to exceed six
104 months for purposes of implementing the change in the
105 certificate of authority reporting period for the year one
106 thousand nine hundred ninety-five. The fee for such
107 temporary certificate shall be one hundred dollars.

108 (g) Every application, request for renewal and state-
109 ment filed with the division shall be sworn to by the
110 applicant or certificate holder. If the certificate holder is
111 a partnership, it shall be sworn to by each member
112 thereof. If the certificate holder is a corporation, it shall
113 be sworn to by the president and secretary thereof.

114 (h) Upon the satisfaction of the division, based upon
115 the application statements and any other information
116 that the applicant meets the requirements of this article
117 and of the rules promulgated by the division and, if upon
118 investigation by the division of the principals, including
119 directors, officers, stockholders, employees and agents of
120 such person, nothing is found to warrant denial of the
121 certificate, the division shall issue the certificate of
122 authority or renewal thereof.

123 (i) (1) The certificate holder shall keep accurate ac-
124 counts, books and records in this state of all transac-
125 tions, copies of all contracts, dates and amounts of
126 payments made and accepted thereon, the name and
127 address of each contract buyer, the name of the contract
128 beneficiary of each contract, the name of the trustee
129 holding trust funds received under each contract and
130 such other records as the division may require to deter-
131 mine whether such certificate holder is complying with
132 the provisions of this article. Such records must be kept
133 for twelve months after the date of termination of the
134 applicable preneed contract.

135 (2) The certificate holder shall make all books and

136 records pertaining to preneed funeral contracts available
137 to the division for examination. The division may not
138 more frequently than once in any calendar year, unless
139 pursuant to an order of court for good cause shown,
140 during ordinary business hours, cause to be examined
141 the books, records and accounts of the certificate holder
142 with respect to funds received by said certificate holder
143 and for that purpose may require the attendance of and
144 examine, under oath, all persons whose testimony the
145 division may require.

146 (3) The certificate holder shall pay for the cost of any
147 examination which is not the first one in that calendar
148 year, including the salary and traveling expenses paid to
149 the person making the examination during the time
150 spent in making the examination and in traveling to and
151 returning from the point where the records are kept and
152 all other expenses necessarily incurred in the examina-
153 tion. The division shall assess and collect a fee for each
154 such examination, based on the certificate holder's total
155 outstanding preneed funeral service contracts and the
156 cost of such examination, but the cost to the person
157 being audited shall not be more than a total cost of five
158 hundred dollars for each such examination. This fee
159 shall be payable to the "Preneed Burial Contract Regula-
160 tion Fund" established in this section.

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

1 No agent or employee of a contract seller may sell
2 preneed funeral contracts in this state without having
3 first obtained a license from the division. The fee for
4 such license and the annual renewal thereof is twenty-
5 five dollars. These fees shall be payable to the "Preneed
6 Burial Contract Regulation Fund" established by section
7 three of this article. The division shall not issue such
8 license without requiring an applicant for the license, or
9 if the applicant is a corporation, its individual agents, to
10 provide proof to warrant its issuance by presenting with

11 the application affidavits from his employer stating that,
12 to the employer's best information, knowledge and
13 belief, the applicant merits a license. The acts of the
14 agent shall be considered acts of the employer. The
15 division may require the applicant to pass a written
16 examination to ascertain if the applicant has sufficient
17 knowledge of the industry and the provisions of this
18 article to properly engage in the business governed by
19 the provisions of this article.

**§47-14-5. Disposition of proceeds; trusts; procedure for ad-
ministration; division to promulgate rules.**

1 (a) All sums paid or collected on such preneed funeral
2 contracts entered into after the seventh day of June, one
3 thousand nine hundred eighty-three, shall be handled in
4 the following manner:

5 (1) The contract seller or other person collecting the
6 funds may retain for his own use and benefit and for the
7 purpose of covering selling expenses, servicing costs and
8 general overhead, an amount not to exceed ten percent
9 of the total original amount agreed to be paid by the
10 contract buyer as reflected in the original preneed
11 funeral contract. Upon retaining such amount, no
12 further deduction from any sums collected pursuant to
13 the contract for such purposes shall be made by any such
14 seller or person or their assignees or transferees. Such
15 ten percent or other amount is exempt from the trust and
16 refunding provisions of this article;

17 (2) All of the funds collected under the contract, less
18 the amount authorized to be deducted under subdivision
19 (1) of this subsection, shall be deposited under the
20 provisions of subdivision (3) of this subsection;

21 (3) Unless otherwise specifically exempt under this
22 article, all funds paid to or collected by any person as the
23 result of a preneed funeral contract shall, within thirty
24 days after receipt thereof by such a person, be deposited
25 in this state: (i) In the name of a trustee who is a con-

26 tract seller, provider or person making the preneed
27 funeral contract available, in a state or federally char-
28 tered and insured bank, savings institution, building and
29 loan institution located in this state or in a state or
30 federally chartered credit union located in this state; or
31 (ii) under the terms of a trust instrument entered into
32 with a national or state bank having trust powers or a
33 trust company located in this state. In the event a
34 preneed funeral contract is funded by the purchase of an
35 insurance policy or an annuity, the premiums paid on
36 such insurance policy or annuity shall be deposited with
37 an insurer licensed pursuant to the provisions of chapter
38 thirty-three of this code.

39 (b) The funds to be deposited from more than one
40 preneed funeral contract may at the option of the
41 recipient thereof or the certificate of authority holder be
42 placed in a common or commingled trust fund in this
43 state under a single trust instrument.

44 (c) All deposits, other than for insurance policies or
45 annuities, shall be placed in an account with a trustee in
46 the name of the contract seller, provider or person
47 making the contract available, as set forth in the con-
48 tract, to whom the contract buyer makes payment. Each
49 trustee shall maintain records showing the trust's
50 investment and, as to each contract showing the amount
51 paid, the amount of interest earned and the current
52 balance with respect to any particular buyer's contract.

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

55 (e) All accounts of money deposited in any bank,
56 savings institution, building and loan association or
57 credit union in accordance with the provisions of this
58 article are subject to periodic examination by the
59 division of banking of this state.

60 (f) The division shall promulgate legislative rules in
61 accordance with the provisions of chapter twenty-nine-a

62 of this code for the purpose of administering the provi-
63 sions of this article.

§47-14-6. Withdrawal of funds.

1 (a) Disbursements of funds discharging any preneed
2 funeral contract shall be made by the trustee to the
3 person named in the contract upon receipt of a certified
4 photostatic copy of the death certificate of the contract
5 beneficiary and evidence satisfactory to the trustee that
6 the preneed funeral contract has been fully performed.
7 In the event that, after the death of the contract benefi-
8 ciary, the contract services or goods are not desired by
9 the heirs or by the personal representative of the con-
10 tract beneficiary, the party obligated to provide the
11 funeral services, funeral goods or burial goods under the
12 contract shall have authority to provide such services or
13 goods despite the desires to the contrary expressed by
14 such heirs or personal representative. If the service and
15 goods are not provided upon the death of the contract
16 beneficiary because of actions of the seller, provider or
17 person making the preneed funeral contract available,
18 then all of the funds held on deposit shall in ten days be
19 refunded to the contract buyer or his legal representative
20 who also has available any other remedy set forth in this
21 article.

22 (b) Any contract buyer or legally authorized person
23 acting in his behalf may cancel a preneed funeral con-
24 tract prior to the death of the contract beneficiary by
25 notifying in writing the contract seller or present obligor
26 of the provisions thereof, if a different person, of such
27 desire to cancel. The seller or obligor shall, in ten days
28 after receipt of such notice, notify the trustee of such
29 cancellation and the trustee shall within thirty days after
30 receipt of written notification pay to the contract buyer
31 or his legal representative all funds placed in the trust
32 account and paid on the contract.

33 (c) If the contract buyer is more than one hundred
34 eighty days in default with respect to any payment or

35 installment due on or pursuant to the preneed funeral
36 contract, the contract seller or provider may, on ten
37 days' prior written notice, cancel the contract. All funds
38 in the trust account shall be refunded to the contract
39 purchaser or to the estate of the contract beneficiary.

40 (d) The seller of a preneed funeral contract may not
41 cancel the contract unless the contract is in default as to
42 the buyer's obligations.

43 (e) Payment by any depository or any trustee made in
44 good faith pursuant to the terms of this section shall
45 forever relieve such depository or trustee, as such, for
46 any further liability for such funds under the contract
47 and in law.

§47-14-7. Income on trust accounts.

1 (a) Whether the payments on a preneed funeral con-
2 tract are placed in a bank, savings institution, building
3 and loan association, credit union or in a common trust
4 fund as permitted in this article, or are part of a com-
5 mingled common trust fund as permitted in this article,
6 the income from a contract deposit, except as otherwise
7 provided herein, shall accrue to the credit of the individ-
8 ual account of such contract until such time as the burial
9 goods, funeral goods and funeral services for the con-
10 tract beneficiary are required to be delivered and
11 returned by reason of such beneficiary's death.

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

15 (1) If the cost of the goods and services contracted for
16 at the time of such beneficiary's death exceeds the
17 amount paid under the contract, then the provider may
18 have and use the principal and so much of the interest as
19 may be necessary to defray such additional cost over and
20 above the contract cost: *Provided*, That to the extent
21 that the cost of goods and services provided exceeds the
22 principal and interest thereon, the provider shall provide

23 and make available the goods and services contracted for
 24 at no additional cost to the contract purchaser or to the
 25 heirs or personal representative of the contract benefi-
 26 ciary;

27 (2) To the extent the principal and interest thereon
 28 exceed the cost of the goods and services contracted for,
 29 then the provider may retain only so much of the princi-
 30 pal and interest necessary to defray the total of such cost
 31 and the balance shall be returned to the estate of the
 32 contract beneficiary or to the contract buyer as may be
 33 proper under the provisions of this article or the legisla-
 34 tive rules promulgated by the division.

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

**§47-14-8. Limitations on enforcement of contract; appoint-
 ment and removal of trustees; standards for
 administration of trusts; contracts may be
 irrevocable; "Preneed Guarantee Fund" estab-
 lished; assignment of contract allowed; credit
 life insurance allowed; successor in interest
 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
 4 article, but a contract buyer or his heirs or legal repre-
 5 sentative may recover all amounts paid under his con-
 6 tract and all accrued income on such amount where the
 7 contract seller, provider or person making the preneed
 8 funeral contract available has violated the provisions of
 9 this article as to such contract. The right of such recov-
 10 ery is in addition to the remedy provided for in section
 11 twelve of this article.

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

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

45 (c) All trustees subject to the provisions of this article
46 shall comply with to the following investment standards:
47 In acquiring, investing, reinvesting, exchanging, retain-
48 ing, selling and managing property for the benefit of
49 others, trustees have the responsibilities which custom-

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

58 (d) No preneed funeral contract may restrict any
59 contract buyer who may make his or her contract
60 irrevocable in accordance with the laws and regulations
61 of this state. Irrevocable preneed contracts may be
62 transferred pursuant to the provisions of this section.

63 (e) All preneed funeral contracts must be in writing
64 and no contract form may be used without prior ap-
65 proval of the division.

66 (f) Each contract buyer shall pay a contract recording
67 fee of five dollars to the contract seller. Beginning on
68 the first day of July, one thousand nine hundred ninety-
69 five, the contract buyer shall pay a fee of ten dollars to
70 the contract seller. Beginning on the first day of Janu-
71 ary, one thousand nine hundred ninety-six, the contract
72 buyer shall pay a fee of fifteen dollars to the contract
73 seller. Beginning on the first day of January, one thou-
74 sand nine hundred ninety-seven, the contract buyer shall
75 pay a fee of twenty dollars to the contract seller. The
76 contract seller is to forward such sum and a copy of the
77 contract to the division within ten days after its execu-
78 tion. The division shall record the contract. Within ten
79 days after receiving the fee, the division will notify the
80 contract buyer, by mail, of the recording. Forty percent
81 of the contract recording fee shall be placed by the
82 division in an account under the division's control
83 entitled "Preneed Guarantee Fund", and the income
84 thereon shall accrue to the fund. The division may use
85 such income, if necessary in its discretion, to enforce this
86 article. For fiscal years beginning after the thirtieth day

87 of June, one thousand nine hundred ninety-six, no
88 expenditures or disbursements may be made from the
89 "Preneed Burial Contract Regulation Fund" and the
90 "Preneed Guarantee Fund" created in this article except
91 by appropriation by the Legislature. The remaining sixty
92 percent of the contract recording fee shall be placed by
93 the division in the "Preneed Burial Contract Regulation
94 Fund" as provided in section three of this article.

95 In the event any contract buyer of any preneed funeral
96 contract is unable to receive the benefits of the contract,
97 or to receive the funds due by reason of his cancellation
98 thereof, such buyer may apply therefor to the division on
99 a form supplied by the division. Upon the finding of the
100 division that said benefits or return of payment is not
101 available to the buyer, the division will cause to be paid
102 to the said buyer from the "Preneed Guarantee Fund"
103 the amount actually paid by the buyer under the contract
104 to the extent funds are available in the "Preneed Guar-
105 antee Fund". In the event multiple claims are made and
106 there are insufficient funds in the "Preneed Guarantee
107 Fund" to satisfy all claims in full, payments from the
108 "Preneed Guarantee Fund" shall be made on a pro rata
109 basis. If the seller's liability for default is subsequently
110 proven, any judgment resulting therefrom shall, to the
111 extent that it is for amounts paid from the "Preneed
112 Guarantee Fund", be ordered payable to the "Preneed
113 Guarantee Fund".

114 (g) Notwithstanding any other provision of this article
115 to the contrary, delivery of funeral or burial goods prior
116 to the death of the person for whose benefit they are
117 purchased does not constitute performance or fulfill-
118 ment, either wholly or in part, of any preneed contract or
119 series of contracts.

120 (h) The contract buyer may, on acceptance in writing
121 by a transferee, transfer the obligations of the seller,
122 provider or person making the preneed funeral contract
123 available to other persons within or without this state.

124 The funds on deposit for the contract and any future
125 payments, if any, by the contract buyer shall then be
126 transferred and deposited under applicable state law, if
127 any, in the state wherein the contract buyer resides or to
128 a state where the obligations of the provider of the
129 funeral service and goods will be fulfilled.

130 Upon such transfer, the contract buyer and transferee
131 shall, in writing, release the contract seller, provider or
132 person making the preneed funeral contract available
133 and the trusts, as applicable, from further liability under
134 such contract.

135 Nothing in this article or in any preneed funeral
136 contract may limit the right of a contract buyer to assign
137 such a contract to any person whomsoever except as
138 specifically provided herein and except that if the
139 assignee is a resident of this state or the contract is to be
140 fulfilled by the assignee in this state, the assignee must
141 hold a certificate of authority under this article. If the
142 contract is to be fulfilled in another state, the assignee
143 must in all respects be in compliance with the preneed
144 funeral law of that state, if any.

145 (i) Notwithstanding any other law of this state, a
146 contract seller, provider or person making the preneed
147 funeral contract available may, if requested by the
148 contract buyer where the contract is to be paid in
149 installments, provide for the sale of credit life insurance
150 on the life of the contract beneficiary in order to have
151 the funds necessary to make payment in full under the
152 contract if the beneficiary should die prior to completing
153 all the payments due. The seller shall disclose all costs
154 of such insurance in clear language and shall inquire of
155 the buyer whether he understands the terms of the
156 insurance contract and is aware of the total cost of the
157 insurance.

158 (j) In the event any certificate of authority holder or
159 anyone in violation of the article who has outstanding
160 preneed funeral contracts and is not the current holder

161 of a certificate of authority sells its business, through the
162 sale of assets or stock, which is involved in the fulfill-
163 ment of obligations under preneed funeral contracts, the
164 buyer of such business is a "successor in interest" and is
165 covered not only by this article but shall assume the
166 obligations of seller under seller's outstanding preneed
167 funeral contracts regardless of whether seller made
168 known to buyer the existence of such contract or con-
169 tracts.

§47-14-9. Forms and rules.

1 The administration and enforcement of the provisions
2 of this article are vested in the division. The division
3 shall prepare and furnish all forms necessary under this
4 article, including forms for applications for certificates
5 of authority, for renewals thereof, for annual statements,
6 for other required reports and for preneed funeral
7 contracts. The division shall promulgate, in accordance
8 with the provisions of chapter twenty-nine-a of this
9 code, legislative rules as may be necessary to effectuate
10 the purpose of this article.

§47-14-10. Solicitation.

1 (a) Any contract seller or agent or employee or person
2 acting in behalf of any such person may not:

3 (1) Directly or indirectly call upon individuals or
4 persons in hospitals, rest homes, nursing homes or
5 similar institutions for the purpose of soliciting preneed
6 funeral contracts or making funeral or final disposition
7 arrangements without first having been specifically
8 requested by such person to do so;

9 (2) Directly or indirectly employ any agent, assistant,
10 employee, independent contracting person or any other
11 person to call upon individuals or persons in hospitals,
12 rest homes, nursing homes or similar institutions for the
13 purpose of soliciting preneed funeral contracts or
14 making funeral or final disposition arrangements
15 without first having been specifically requested by such

16 person to do so;

17 (3) Solicit relatives of persons whose death is appar-
18 ently pending or whose death has recently occurred for
19 the purpose of providing funeral services, final disposi-
20 tion, burial or funeral goods for such person;

21 (4) Solicit or accept or pay any consideration for
22 recommending or causing a dead human body to be
23 provided funeral services and funeral and burial goods
24 by specific persons or the services of a specific crema-
25 tory, mausoleum or cemetery except where such arrange-
26 ment is the subject of a preneed funeral contract;

27 (5) Solicit by telephone call or by visit to a personal
28 residence, unless such solicitation has been previously
29 requested by the person solicited or by a family member
30 residing at such residence.

31 (b) Notwithstanding any other provision of law to the
32 contrary, nothing in this article shall be construed to
33 restrict the right of a person to lawfully advertise, to use
34 direct mail or otherwise communicate in a manner not
35 within the above prohibition of solicitation or to solicit
36 the business of anyone responding to such communica-
37 tion or otherwise initiating discussion of the goods or
38 services being offered.

39 (c) Nothing herein shall be construed to prohibit
40 general advertising.

41 (d) Anyone making a personal or written solicitation
42 for a preneed funeral contract shall, at the very first
43 instance, divulge the real reason for the contract or
44 solicitation.

45 (e) The division may promulgate legislative rules
46 regulating the solicitation of preneed contracts by
47 certificate holders or registrants to protect the public
48 from solicitation practices which utilize undue influence
49 or which take undue advantage of a person's ignorance
50 or emotional vulnerability.

§47-14-11. Disciplinary proceedings; revocation of license or certificate; liquidation upon violation.

- 1 (a) No person shall:
- 2 (1) Violate any provisions of this article;
- 3 (2) Attempt to procure or procure a certificate of
4 authority or license under this article by bribery or
5 fraudulent misrepresentation;
- 6 (3) Have had any certificate of authority or license to
7 sell preneed funeral contracts revoked, suspended or
8 otherwise acted against, including denial of licensure, by
9 a licensing authority of another jurisdiction;
- 10 (4) Have been convicted or found guilty of a crime in
11 any jurisdiction which directly relates to the sale of
12 preneed funeral contracts;
- 13 (5) Make or file a report required by this article which
14 the certificate holder knows to be false or knowingly fail
15 to make or file a report required by this article;
- 16 (6) Advertise goods or services in a manner which is
17 fraudulent, false, deceptive or misleading in form or
18 content;
- 19 (7) Engage in fraud, deceit or misrepresentation in the
20 conduct of business governed by the provisions of this
21 article;
- 22 (8) Fail to comply with a lawful order of the division;
- 23 (9) Knowingly making any false or misleading state-
24 ment, oral or written, directly or indirectly, regarding
25 the sale of services or merchandise in connection with
26 the conduct of the certificate holder's business;
- 27 (10) Fail to maintain the funds received under the
28 contracts as required by this article;
- 29 (11) Fail to cancel a preneed funeral contract upon
30 proper request and refund that portion of the amount
31 paid on such a contract as required by this article;

32 (12) Fail to renew or qualify for renewal of its certifi-
33 cate of authority or license;

34 (13) Fail to produce records in connection with the
35 certificate holder's business or otherwise fail to comply
36 with the provisions of this article or any rule promul-
37 gated by the division pursuant to this article; or

38 (14) Solicit by the certificate holder, its agents, em-
39 ployees or representatives through the use of fraud,
40 undue influence, misrepresentation or overreaching or
41 other forms of vexatious conduct as defined by law, this
42 article or the legislative rules promulgated by the
43 division.

44 (b) Upon the violation of any of the provisions of this
45 article, determined in an administrative hearing after
46 notice and an opportunity to be heard, the division may
47 institute revocation proceedings regarding a license to
48 operate a funeral establishment or a certificate of
49 authority or license to sell preneed funeral contracts, or
50 both the license and the certificate of authority or
51 license, or file a complaint in a court of competent
52 jurisdiction setting forth the relevant facts and praying
53 for the issuance of an order to show cause why the
54 license to operate a funeral home or the certificate of
55 authority or license to sell preneed funeral contracts, or
56 both the license and the certificate should not be revoked
57 or the person should not be enjoined from engaging in
58 business governed by the provisions of this article.

59 (1) Upon application for such rule to show cause, the
60 court may, in its discretion, issue an injunction restrain-
61 ing the defendant from transacting further business until
62 further order of the court.

63 (2) Upon return of such order to show cause, the court
64 shall hear and try the issue forthwith. If the court
65 determines that the person so charged as defendant in
66 such proceeding has not been guilty of the omission,
67 failure or violation alleged in the complaint by the

68 division, the court shall dismiss such complaint. If the
69 court finds that the charges of the division are supported
70 by the evidence, it may enter an order directing the
71 revocation of a license to operate a funeral home or of a
72 certificate of authority or license to sell preneed funeral
73 contracts, or the revocation of both the license and the
74 certificate of authority or license, or permanently
75 enjoining the person from engaging in business governed
76 by the provisions of this article until its requirements are
77 met. The court shall have the authority to order the
78 liquidation of the business upon a finding that the
79 person engaged therein is in violation of any provision of
80 this article.

81 (3) In any such order of liquidation or in any order or
82 orders thereafter entered, the court shall provide a
83 notice to creditors for the filing of claims and otherwise
84 direct all other matters necessary and essential to govern
85 an estate in receivership.

86 (c) When the division finds that any person has vio-
87 lated the provisions of subsection (a) of this section after
88 an administrative hearing or finds that any funeral
89 services or funeral or burial goods are offered for sale
90 when the offer is not a bona fide offer to sell such
91 services or goods, it may enter an order imposing one or
92 more of the following penalties:

93 (1) Denial of an application for a certificate of author-
94 ity or license, including a renewal;

95 (2) Revocation or suspension of a certificate of author-
96 ity or license;

97 (3) Imposition of an administrative fine not to exceed
98 one thousand dollars for each county where there are
99 separate violations;

100 (4) Issuance of a reprimand; or

101 (5) Placement of the licensee or certificate holder on
102 probation for a period of time and subject to such

103 conditions as the division may specify.

104 (d) All preneed funeral contract buyers have a priority
105 in claims against the provider, to the extent that their
106 interest is set forth in this article. Such priority consti-
107 tutes a statutory lien at the time the contract was
108 executed to the extent payments on the contract were
109 made and interest has accrued.

110 (e) For purposes of this section, the acts or omissions of
111 any person employed by or under contract to or on
112 behalf of the certificate holder shall be treated as acts or
113 omissions of the certificate holder.

114 (f) Subject to the provisions of subsection (b), section
115 seven of this article, all prices or quotations of prices
116 contained in any preneed funeral contract shall be fully
117 and clearly stated.

§47-14-12. Civil action; attorney's fees.

1 (a) The failure of a certificate holder, a licensee or of
2 any other person engaged in the sale of preneed funeral
3 contracts without a certificate of authority or license
4 required pursuant to the provisions of this article to
5 comply with the provisions of this article gives rise to a
6 civil cause of action in favor of the division, any ag-
7 grieved consumer, contract guarantor or contract
8 purchaser. Upon entry of a judgment for damages in
9 favor of the plaintiff, the trial court shall award punitive
10 damages in the amount of three times the actual damages
11 awarded in the judgment.

12 (b) The prevailing party, after judgment in trial court
13 and exhaustion of all appeals, if any, shall receive
14 reasonable attorney's fees and costs from the non-
15 prevailing party.

16 (c) The attorney for the prevailing party shall submit a
17 sworn affidavit of his time spent on the case and his
18 costs incurred for all the motions, hearings and appeals
19 to the trial judge who presided over the civil case.

20 (d) The trial judge shall award the prevailing party the
21 sum of reasonable costs incurred in the action, plus a
22 reasonable legal fee for the hours actually spent on the
23 case as sworn to in an affidavit.

24 (e) Any award of attorney's fees or costs shall become
25 part of the judgment and subject to execution as the law
26 allows.

27 (f) The division shall deposit any penalties or attorney's
28 fees recovered by the division in the "Preneed Burial
29 Contract Regulation Fund" for the purpose of adminis-
30 tering and enforcing the provisions of this article.

§47-14-13. Penalty.

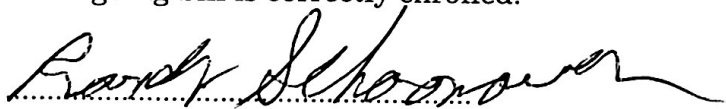
1 (a) Any person who willfully and knowingly conceals
2 or embezzles any funds paid as the result of a preneed
3 funeral contract is guilty of a felony, and, upon convic-
4 tion thereof, shall be imprisoned in the penitentiary for
5 a definite term of not less than three years and fined not
6 more than ten thousand dollars.

7 (b) Except as provided by subsection (a) of this section,
8 any person who violates any provision of this article or
9 the legislative rules promulgated hereunder is guilty of
10 a misdemeanor, and, upon conviction thereof, shall be
11 punished by a fine of not less than five hundred nor more
12 than five thousand dollars for each occurrence, or
13 confined in jail for a term not to exceed one year, or both
14 fined and confined.

§47-14-14. Severability.

1 If any section, subsection, subdivision, subparagraph,
2 sentence or clause of this article is adjudged to be
3 unconstitutional or otherwise invalid, such invalidation
4 shall not affect the validity of the remaining portions of
5 this article and, to this end, the provisions of this article
6 are hereby declared to be severable.

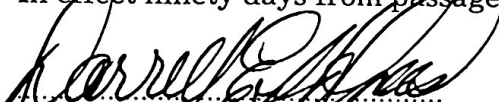
That Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.



.....
Chairman Senate Committee



.....
Chairman House Committee


Originated in the Senate.

In effect ninety days from passage.

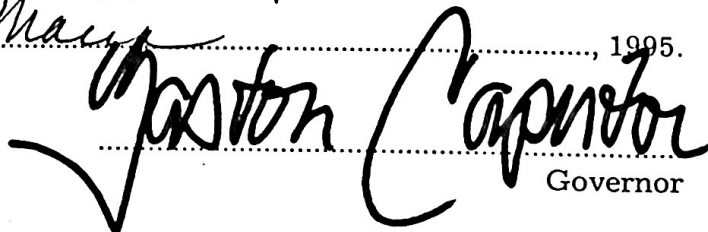

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Clerk of the Senate


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Clerk of the House of Delegates


.....
President of the Senate


.....
Speaker House of Delegates

The within *is approved* this the *16th*
day of *May*, 1995.


.....
Governor

PRESENTED TO THE
GOVERNOR
Date 3/10/95
Time 3:50 pm