

SESSION OF 2011

SUPPLEMENTAL NOTE ON HOUSE BILL NO. 2240

As Amended by Senate Committee of the Whole

Brief*

HB 2240 deals with cemetery corporations, the trust funds they maintain, and a new fee fund relative to these functions.

The bill would do the following:

Cemetery Merchandise Trust Fund; Preneed Merchandise Contracts

- Add a definition of “cemetery merchandise trust fund,” that being a special purpose trust fund required to administer payments received from the sale of preneed cemetery merchandise, preneed burial products or services.
- Establish the primary purpose of this fund as maintaining the corpus of the trust fund, with the goal that the growth of the corpus will be at least equal to the wholesale costs of the preneed cemetery merchandise, burial products or services, at the time of delivery or need.
- Change the defined term from “prepaid” to “preneed” merchandise contract, and revise the definition of “preneed merchandise contract” to include agreements for the sale of preneed burial products or services which requires either partial or full payment prior to delivery. The bill also would require that preneed cemetery

*Supplemental notes are prepared by the Legislative Research Department and do not express legislative intent. The supplemental note and fiscal note for this bill may be accessed on the Internet at <http://www.kslegislature.org>

merchandise contracts be in writing, and it would make conforming changes to reflect the term change.

- Revise the definition of “preneed cemetery merchandise” to include any of the listed merchandise delivered to cemeteries (in addition to that sold or used in the cemeteries).
- Add definitions for the terms “distributable earnings” and “trustee.” “Trustee” would include any federally chartered bank, savings and loan association, savings bank or credit union having a physical location within the state and the authority to provide trust services.
- Increase the amount to be placed in trust from 110 percent of the wholesale cost to 50 percent of the retail price to the cemetery corporation of the preneed cemetery merchandise.
- Modify the statute that stipulates payment actions regarding what would be termed “preneed” (previously “prepaid”) merchandise contracts as follows: The term would be limited in its application to the contracts entered into by a cemetery corporation that allow the purchaser to make installment payments. Under the bill, the cemetery corporation would be entitled to retain all purchaser payments until 25 percent of the purchase price of preneed cemetery merchandise is received before it is required to deposit 100 percent of each payment into the cemetery merchandise trust fund. The bill also would increase the amount of time before deposits to the cemetery merchandise trust fund must be made, from 10 business days after the money is received to 15 days following the end of each calendar month after the money is received.
- Require the cemetery corporation to provide the trustee and the Secretary of State the following:

- A quarterly report within 30 days following the end of each quarter. Details of the report's contents are specified in the bill.
 - A report of all deposits to and distributions from the cemetery merchandise trust fund.
- Require the cemetery merchandise trust fund trustee to allocate at least annually, as of December 31, the distributable earnings to all preneed cemetery merchandise, preneed burial products or services for which funds are held in the trust fund. The bill would authorize the trustee to allocate distributable earnings on a regular basis more often than annually, at the request of the cemetery, and under this circumstance it would require quarterly filing of the distributable earnings calculation.
- Authorize the cemetery merchandise trust fund trustee to appoint one or more agents to provide administrative or investment advisory services. The bill further would state that its provisions could not be used to prohibit the trustee from entering into a co-trustee relationship with another trustee who would not independently satisfy the requirements set forth for the trustee, as long as the co-trustee is authorized to do business in Kansas and submits personally to the jurisdiction of Kansas courts. In both instances, the trustee would not be allowed to assign or delegate the liability and fiduciary responsibilities to another financial institution or agent.
- Establishes stipulations for the trust instrument.
- Clarifies a criminal statute regarding misuse of the cemetery merchandise trust fund by specifically defining the crime of “misuse of the cemetery merchandise trust fund or any money belonging thereto” and increasing the penalty from a class A misdemeanor to a severity level 7, nonperson felony.

- Change the statute authorizing the auditing of cemetery merchandise trusts by clarifying that the Secretary of State is authorized to obtain trust accounting records from the trustee, and authorizing the Secretary of State to promulgate rules and regulations for the purpose of overseeing and auditing the cemetery merchandise trust fund.

Permanent Maintenance Fund

- Establish the primary purpose of the permanent maintenance fund as maintaining the corpus of the fund. The bill would permit the income earned from the fund to be distributed to the cemetery, and it would require all capital gains to be allocated to principal.
- Require the cemetery corporation to obtain prior written approval from the Secretary of State before the trust instrument is to be terminated, transferred, or amended. The cemetery corporation further would be required to provide the Secretary of State copies of any amendments to the trust instrument before they are to become effective.
- Make definitional changes to the statute establishing the crime of “misuse of the permanent maintenance fund or any money belonging thereto.”
- Delete language regarding in whose custody a trust must be held and what must be done with trusts depending on whether their market value is less than \$45,000, or \$45,000 and higher. These stipulations would be replaced with the following:
 - Permanent maintenance fund with a value of less than \$100,000 – The bill would allow the permanent maintenance fund to be held in a Kansas financial institution, in either certificates of deposit or a business savings account insured by the Federal Deposit Insurance Corporation, as

long as the funds are maintained in a segregated account. The cemetery corporation would be required to comply with the Act's reporting requirements in this situation.

- Permanent maintenance fund with a market value of \$100,000 or more – The bill would require the cemetery corporation to establish and maintain the permanent maintenance fund in an irrevocable trust with a trustee. Additional agents could be appointed to provide administrative or investment advisory services, as long as the trustee maintains liability and fiduciary responsibilities owed to the fund. Additional stipulations are made regarding permanent maintenance funds of this size.
- Require the cemetery corporation to provide the trustee and the Secretary of State the following:
 - A report of all sales of burial spaces within 30 days following the end of each quarter. Details of the report's contents are specified in the bill.
 - A report of all deposits to and distributions from the permanent maintenance fund.
- Require the permanent maintenance fund trustee to determine, at least annually, the fund's income, less reasonable costs, taxes and fees, and pay the income to the cemetery corporation. The trustee would be required to report this calculation to the Secretary of State within 30 days.

Confidentiality and Disclosure of Cemetery Corporation Records

- Deem all information involved in the Secretary of State's investigation and examination of a cemetery corporation, or reporting by the cemetery corporation or trustee, confidential. The only entities to which the information may be disclosed by the Secretary of State's Office would be: (1) officers and members of the specific cemetery corporation board of directors; (2) the Attorney

General if the Secretary of State determines this is necessary; and (3) the appropriate municipality official if the Secretary of State determines this is necessary. In accordance with the intent of the Kansas Open Records Act, this provision would expire on July 1, 2016, unless the Legislature reviews the provision prior to that date and reauthorizes it.

- Allow the Secretary of State to disclose to anyone whether a cemetery corporation maintains a cemetery merchandise trust fund or a permanent maintenance fund, and whether such funds are maintained in compliance with the law.

Cemetery Maintenance and Merchandise Fee Fund

The bill would establish a new cemetery and merchandise fee fund in the State Treasury. Two related fees collected by the Secretary of State would be authorized by the bill, and the bill would require that these fees be deposited in the new fee fund. The fees must be forwarded to the Secretary of State on a quarterly basis, and the Secretary of State would be required to deposit any fees collected from both fee sources into the fund as of the effective date of the Act. The Secretary of State also would be required to promulgate rules and regulations fixing the fees to be charged and collected. The fees would be as follows:

- A fee not to exceed \$30 on each preneed merchandise contract for preneed cemetery merchandise, preneed burial products or services sold on or after January 1, 2011.
- A fee not to exceed \$30 on each interment sold as of January 1, 2011.

The bill would be effective upon its publication in the statute book and January 1, 2012.

Background

Earlier History

In 2009, the Secretary of State's Office formed a study group to examine issues surrounding cemeteries and the two types of trust funds Kansas law requires certain cemeteries to maintain. The study group's intent was threefold: to ensure consumers were protected when purchasing burial products and services; to protect cemeteries' ability to make a profit; and provide for the ability to audit easily.

In 2010 the Secretary of State requested two bills to address the issues identified by the study group. HB 2713, the briefer of the two bills and ultimately enacted as H. Sub. for SB 75, dealt with cemetery corporation accounting in regard to both the cemetery corporation permanent maintenance fund and the cemetery merchandise trust fund. It (1) authorized the Attorney General, at the request of the Secretary of State, to initiate an action for an accounting of either fund or its accounts; (2) authorized the cemetery corporation to implement a plan to correct a fund's deficiencies if the fund is found to be underfunded due to inadequate deposits or unauthorized distributions; and (3) authorized the Secretary of State to resolve equitably the results of an audit.

Remaining were the issues addressed in 2010 HB 2712, which would have made changes to the merchandise trust fund, the permanent maintenance trust fund, and the preneed merchandise trust fund statutes. Testimony by several conferees indicated concerns with, and suggested amendments to, the bill. Ultimately, 2010 HB 2712 died in committee.

Bill Background and Hearing; Amendments; Fiscal Note

HB 2240 was requested by the Secretary of State in an attempt to address the remaining issues identified by the

2009 study group. Testifying in favor of the bill were representatives of the Secretary of State's Office, the Kansas Bankers Association, and Service Corporation International. The representative for Service Corporation International requested an amendment dealing with allocation of earnings to preneed cemetery merchandise, preneed burial products or services. No opponents testified.

The House Committee on Local Government amended the bill to change from allocating the distributable earnings for a cemetery merchandise trust fund to all preneed cemetery merchandise, preneed burial products or services on a quarterly basis, to allocating on a regular basis more often than annually but for which the calculation would be filed quarterly. The amendment also deleted a provision in the bill requiring the cemetery merchandise trust fund trustee to report on the distributable earnings. Finally, the Committee made technical changes to the bill.

The House Committee of the Whole amended the bill to add a new section establishing a cemetery and merchandise fee fund, and to authorize two related fees to be collected by the Secretary of State to be deposited into the fund.

The Senate Committee of the Whole amended the bill to make a technical amendment requested by the Kansas Funeral Directors Association.

According to the fiscal note, passage of the original bill would have no fiscal effect on the Secretary of State's budget.