

## CHAPTER 747

## H.B. No. 744

## AN ACT

relating to the regulation of prepaid funeral services.

*Be it enacted by the Legislature of the State of Texas:*

SECTION 1. Chapter 512, Acts of the 54th Legislature, 1955 (Article 548b, Vernon's Texas Civil Statutes), is amended by amending Sections 1a, 2, 3, 4, 5, 6, 8, and 9 and by adding Section 8A to read as follows:

Sec. 1a. No organization covered by this Act shall solicit by any means whatsoever the designation by an individual of funeral services or merchandise which he desires to be provided to be paid out of any fund, investment, security, or contract, to be created or purchased by or for such an individual at the suggestion or solicitation of the organization, unless such a fund is to be created by a *life insurance policy or an annuity contract* ~~[of insurance]~~ with an insurance company licensed in Texas, or unless such fund, investment, security, or contract shall have been approved by the Department as safeguarding the right and interests of the individual, his heirs and assigns, to substantially the same or greater degree as is provided with respect to funds regulated by Section 5 hereof. Provided, however, that the Department may require evidence of payment of premiums on any *life insurance policy, or an annuity contract* ~~[of insurance]~~ used to create a fund to guarantee prepaid funeral benefits. Any seller failing to provide such evidence to the Department after being so requested by written notice shall be subject to cancellation of its permit under the provisions of Section 4 of this Act.

Sec. 2. This law shall be administered by the State Banking Department. The Department is authorized to prescribe reasonable rules and regulations concerning *application fees*, the keeping and inspection of records, the filing of contracts and reports, *changes in management or control of an organization*, and all other matters incidental to the *enforcement and orderly administration* of this law; and the Department may approve forms for sales contracts for prepaid funeral benefits. All such contracts must be in writing and no contract form shall be used without prior approval of the Department. All such contracts shall state the name of the funeral home or other organization primarily responsible for providing the funeral services or merchandise specified in such contracts. In the event the seller is not the funeral home designated to provide the specified funeral services or merchandise, such contract shall not be valid unless the funeral home so designated is a party to the contract and therein agrees and obligates itself to provide such specified funeral services or merchandise. It is further provided, that all prearranged or prepaid funeral contracts shall set forth the particulars of the funeral merchandise, including a description and specifications of the material used in the caskets or grave vaults to be furnished, and such contracts shall set forth the particulars of the professional services to be performed and the funeral home facilities *and automotive equipment* to be provided.

Sec. 3. Each organization desiring to sell prepaid funeral benefits shall file an application for a permit with the Department and shall pay a filing fee of \$250. *The Commissioner may conduct an investigation of the applicant, and if the Commissioner finds that the business ability, experience, character, and general fitness of the applicant warrants the confidence of the public, the Commissioner shall grant the application and issue a permit to the applicant. If the Commissioner finds otherwise, the Commissioner shall notify the applicant, who is entitled to a hearing on the application, on request, within 60 days after the date of the request. The Department by rule may adopt a system under which permits expire on various dates during the year. The fee for renewal is \$60* ~~[\$50. The Banking Commissioner may issue a permit upon receipt of the application and payment of the filing fee. Permits shall expire on March 1st each year, but may be renewed for a period of one year upon payment of a fee of \$40 on or before March 1st].~~

Sec. 4. The Department may cancel a permit or refuse to renew a permit for failure to comply with any provision of this Act or any valid rule or regulation which the

Department has prescribed, after reasonable notice to the permittee and after a hearing if the permittee requests a hearing.

No organization shall be entitled to a new permit for a period of one year after cancellation or refusal by the Department to renew its permit, but shall thereafter be entitled to a new permit upon satisfactory proof of compliance with this law.

*If a permit holder transfers the ownership of its business, the permit holder shall notify the Department and the depository of the funds held under Section 5 of this Act by registered mail within seven days after the date the transfer is consummated.*

Any person aggrieved by the action of the Department may appeal therefrom to a District Court in Travis County, Texas.

Sec. 5. All sums heretofore or hereafter paid or collected on contracts for prepaid funeral benefits entered into prior to the effective date of this Act shall be handled in accordance with the manner in which they have heretofore been handled. All sums paid or collected on such contracts entered into after the effective date of this Act (with the exception of those paid where a contract of insurance *previously* is created or ~~those~~ approved by the Department, ~~as both are provided for in Section 1a of this Act~~) shall be handled in the following manner:

(1) The funeral home (or other entity collecting said funds) may retain as its own money, for the purpose of covering its selling expenses, servicing costs, and general overhead, an amount not to exceed one-half of all funds so collected or paid until it has received for its use and benefit an amount not to exceed ten percent of the total amount agreed to be paid by the purchaser of said prepaid funeral benefits as such total amount is reflected in the contract. No charges or assessments, except premiums collected on an insurance policy guaranteeing the payments on a prepaid funeral contract or the unpaid balance thereof, shall be collected from the purchaser other than those included in the total amount of said contract.

(2) All amounts paid or collected, with the exception of those permitted to be retained as set forth above, shall, within thirty days after such collection, be (a) deposited in a savings and loan association in this state *in an interest-bearing account insured by the federal government*, or (b) deposited in a state or national bank in this state *in an interest-bearing account insured by the federal government*, or (c) placed with the trust department in a state or national bank in this state, or in a trust company authorized to do business in this state, to be invested by such trust department or company in accordance with the terms and provisions of the Texas Trust Code (Subtitle B, Title 9, Property Code). Such deposits or trust accounts shall be carried in the name of the funeral home or other entity to whom the purchaser makes payment, but accounting records shall be maintained showing the amount deposited or invested with respect to any particular purchaser's contract.

(3) The date of death of the purchaser of such contract (or other individual who may be designated in the contract as the person for whose funeral such funds may be used) shall be the maturity date of the contract, and as soon as conveniently practicable after such maturity date and upon presentation of a certified copy of the death certificate of such person together with proper affidavits as may be required by the Department, such funds shall be released in fulfillment of the contract, and the funeral home (or other entity to the contract which has collected the funds) shall, if the amount so withdrawn does not equal one hundred percent of the total amount paid *by the purchaser* ~~[under such contract]~~, make up the difference so that the amount available for funeral benefits shall equal one hundred percent of the total amount paid *by the purchaser* ~~[in under such contract]~~. Any amounts accumulated at maturity on any particular contract in excess of one hundred percent of the amount *deposited or placed by the seller* ~~[paid in on such contract]~~ shall be available to the funeral home (or other entity collecting said funds) in making up the difference on any particular contract which at maturity did not have funds available equal to one hundred percent of the amount paid *by the purchaser* ~~[under such contract]~~.

(4) The seller may withdraw at any time funds out of accrued interest or income *on* ~~[of the [deposit accounts or trust]~~ accounts for the purpose of paying reasonable and necessary charges made by a savings and loan association, or bank, or trust department

of a bank, or trust company, and trustee's fees made by a savings and loan association, or bank, or trust department of a bank, or trust company, with respect to such accounts, [œ] for the purpose of paying any taxes, *with prior approval of the Department*, caused or created by reason of the existence of such deposit accounts or trust accounts, *or for the purpose of paying any assessment under this Act or ordered by the Department for funding a fund to guarantee performance of prepaid funeral contracts.*

*The seller may also withdraw funds from the accrued interest or income on the deposit accounts for the purpose of paying the examination fee for one examination by the Department each calendar year, or for the preparation of financial statements required by the Department in lieu of an examination by the Department.*

Upon the maturity date of a contract as above provided and only after the funeral home has fully performed its obligations under said contract with the purchaser, or at the time of cancellation prior to maturity as provided in Subsection (5) [(4)] herein, the seller may additionally withdraw from said deposit account (whether a trust or other funded account) any enhanced value, accrued interest, or accrued income on [œ] said contract. Such withdrawal shall be the proportionate part of the total enhanced value, accrued interest or accrued income, that the amount deposited under said contract bears to the total amount deposited from all unmatured contracts *or, if the Commissioner has affirmatively determined that the records of the permit holder are adequate to allow this method to be exercised in an accurate manner, the withdrawals may be equal to the actual earnings on individual matured contracts, minus any properly allocated expenses permitted by this subsection. On application, the Commissioner may, after notice and hearing conducted pursuant to the Administrative Procedure and Texas Register Act (Article 6252-13a, Vernon's Texas Civil Statutes), authorize the seller of preneed services to withdraw excess earnings from the trust deposits. For the purposes of this section, "excess earnings" means funds in the trust deposit that exceed 107 percent of the seller's obligations on each contract for which deposits have been made after the date the contracts are entered into. The Commissioner may grant the authorization if, in the Commissioner's opinion, the evidence shows that the seller's ability to deliver the contracted services and merchandise is not diminished by the withdrawal. The Commissioner by rule may set out factors that may be considered in evaluating each application. The Commissioner's decision on whether to grant the withdrawal is not limited to those factors. A withdrawal of excess earnings made after an initial withdrawal as provided by this subsection may not be approved for more than 93 percent of the funds remaining in the accounts after the withdrawal that are in excess of the 107 percent to be maintained in satisfaction of the seller's contractual obligations.*

(5) [(4)] In the event a purchaser under a contract should desire to cancel the contract prior to maturity, such cancellation may be accomplished by the seller [purchaser] giving fifteen days notice in writing to the Department, *signed by the purchaser [and to the seller of the contract]*, and thereafter, upon written authorization from the Department, such seller [purchaser] may withdraw the funds in such depository being held for the purchaser's [his] use and benefit; provided, however, such purchaser shall be entitled to [withdraw and] receive only the actual amounts paid in by him less the amounts permitted to be retained as provided in Subsection (1) hereof. Purchaser *or seller* may make no partial cancellations or withdrawals.

*If the purchaser cancels the contract on the solicitation of the seller, the purchaser is entitled to withdraw all funds paid to the seller and all enhanced value attributable to the funds. If the funds are used to purchase a new preneed funeral contract pursuant to a solicitation by the seller, the new contract must, as determined by the Department, protect the purchaser to an extent equal to or greater than that provided by the original contract, and the purchaser's cost of the same or substantially the same services and merchandise may not be increased above that contained in the canceled contract.*

Sec. 6. Each organization subject to this Act shall designate an agent or agents, either by names of the individuals or by titles of their offices or positions, who shall be considered as fiduciaries under Section 32.45, Penal Code, and who are responsible for

deposit of funds collected under contracts for prepaid funeral benefits. The organization shall notify the Department of such designation within 10 days after it becomes subject to this Act, and shall also notify the Department of any change in such designation within 10 days *before* [~~after~~] such change occurs. If *the seller or any other person* acting on behalf of the seller collects any money under such a contract and fails to deliver it, within 30 days after collection, to a designated agent, or if any designated agent fails to deposit the money within 30 days after he receives it, he *commits an offense under Section 32.45, Penal Code* [~~shall be guilty of a misdemeanor and a violation of this Act and shall be punished by those means prescribed in Section 9 of this Act~~].

Sec. 8. (a) Each organization which has outstanding contracts for prepaid funeral benefits shall maintain within this state such records as the Department may require to enable it to determine whether the organization is complying with the provisions of this Act. Such records shall be subject to annual examination by the Department or its agent and to such additional examinations as it deems necessary. The organization shall pay for the cost of examination, including the salary and traveling expenses paid to the person making the examination during the time spent in making the examination and in traveling to and returning from the point where the records are kept, and all other expenses necessarily incurred in the examination. The Banking Commissioner or his agent shall assess and collect a fee in connection with each examination, based on the organization's total outstanding contracts, covering the cost of such examination, the equitable or proportionate cost of maintenance and operation of the Banking Department, and the enforcement of the provisions of this Act; but the cost to the organization shall not be more than a total cost of \$3,000 [~~\$1,000~~] for each examination.

(b) *Following cancellation of a permit, the Commissioner may seize all prepaid funeral funds, including earnings, of the prior permit holder, place them in a state bank under the sole control of the Commissioner, and cause the funds to be maintained under that arrangement for the benefit of the purchasers. The Commissioner shall notify each purchaser of the Commissioner's action and direct the purchaser to forward payments on contracts directly to the depository designated by the Commissioner.*

(c) Those organizations with less than 50 contracts outstanding shall be assessed an examination fee of \$50 plus one-fourth of one percent of the dollar amount of the organization's outstanding contract funds on deposit, in trust, or vested in any other program subject to this Act. Those organizations with 50 or more contracts outstanding shall be assessed an examination fee of \$100 plus one-fourth of one percent of the dollar amount of the organization's outstanding contract funds on deposit, in trust, or vested in any other program subject to this Act.

(d) *As part of the examination, the Department is entitled to access to the records of any entity holding deposits under the account and to other records necessary to protect the interests of the beneficiaries. The Department may conduct an examination or audit at any place and in any manner the Department considers necessary to protect the interests of the purchasers or beneficiaries.*

Sec. 8A. (a) *The Department by rule shall create and maintain a fund to guarantee performance by sellers of prepaid funeral contracts of their obligations to purchasers under the provisions of this Act governing funeral trusts. The Department shall assess and collect from sellers an assessment of not more than \$1 for each of the unmaturing prepaid funeral contracts existing on January 1, 1988. The Department shall also assess and collect an assessment of not more than \$1 for each prepaid funeral contract sold during 1988 by a permittee first receiving a permit in 1988. The Department shall place the assessments in the fund.*

(b) *The state treasurer shall manage the fund as trustee of funds outside the treasury. The Department may use any earnings from the fund for the expenses of operating and maintaining the fund. An actuarial study shall be made before April 1, 1988, to determine the total amount needed to maintain a sound and responsible fund. The Department may make any additional assessments on unmaturing contracts to maintain the fund at the amount found to be actuarially sound.*

(c) *The operation and maintenance of the fund shall be supervised by an advisory council composed of the Commissioner and Attorney General or their representatives and one representative of the funeral industry appointed by the Banking Commissioner. The funeral industry representative serves a two-year term and may not serve more than one term.*

(d) *Notwithstanding any other law, the Department may assert a claim against a seller or trust depository that commits a violation of this Act that could result in a claim against the fund.*

Sec. 9. (a) *A permit holder may not represent that a preneed funeral vendor is approved or otherwise chosen by the Department except with the following language: "The Texas Banking Department regulates the sale of prearranged funeral contracts" and "The form of this contract has been approved by the Department."*

(b) *Except as provided by Subsection (c) of this section, any [Any] officer, director, agent, or employee of any organization subject to the terms of this Act who makes or attempts to make any contract in violation of this Act, or who refuses to allow an inspection of the organization's records, or who violates any other provision of this Act, or who is guilty of fraud, deception, misrepresentation or any other dishonest practice in sale of any contract subject to this Act, shall be punished by a fine of not less than \$100 and not more than \$500, or by imprisonment in the county jail for not less than one month and not more than six months, or by both such fine and imprisonment. Each violation of any provision of this Act shall be deemed a separate offense and prosecuted individually.*

(c) *Any failure to deposit funds in compliance with this Act, or any withdrawal of funds in a manner inconsistent with the provisions of this Act, is an offense under Section 32.45, Penal Code.*

(d) *A depository or holder of funds designated under Section 5 of this Act shall be held to the standard of duty of a fiduciary in holding, investing, and disbursing the funds.*

(e) *The Department may bring each such violation of this Act to the attention of the Attorney General of this state and it shall be the duty of the Attorney General to institute suit in the name of the State of Texas against such violator in any county in this state where such violation might occur.*

(f) *In addition to the [misdemeanor] penalties prescribed above, the Attorney General shall have the power and authority to institute quo warranto proceedings in a District Court of Travis County, Texas to forfeit the charter and right to do business of a corporation whose officer, director, agent or employee refuses or fails to correct a violation of this Act after such violation has been called to the attention of said officer, director, agent or employee by the Department or the Attorney General. A period of 30 days shall be considered sufficient time to correct such violation after notice from the Department or Attorney General.*

SECTION 2. *A fund, investment, security, or contract included in a plan approved before the effective date of this Act by the banking department under Section 1a, Chapter 512, Acts of the 54th Legislature, 1955 (Article 548b, Vernon's Texas Civil Statutes), may continue in effect. Any funds paid pursuant to such a plan under a contract entered into before or after the effective date of this Act shall continue to be handled in accordance with the plan approved by the department.*

SECTION 3. *The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended, and that this Act take effect and be in force from and after its passage, and it is so enacted.*

*Passed by the House on May 19, 1987, by a non-record vote. Passed by the Senate on May 28, 1987, by the following vote: Yeas 30, Nays 0.*

*Approved June 20, 1987.*

*Effective Aug. 31, 1987, 90 days after date of adjournment.*