

SUBJECT: Regulating cemeteries and perpetual care cemetery corporations

COMMITTEE: Pensions, Investments, and Financial Services — favorable, without amendment

VOTE: 9 ayes — Truitt, Anchia, C. Anderson, Creighton, Hernandez Luna, Legler, Nash, Orr, Veasey

0 nays

SENATE VOTE: On final passage, April 7 — 31-0, on Local and Uncontested Calendar

WITNESSES: *(On House companion bill, HB 2495:)*  
For — *(Registered, but did not testify: Ken Whalen, Texas Daily Newspaper Association, Texas Press Association; Russell Allen, Texas Cemeteries Association; Matthew Emal, Service Corporation International)*

Against — None

On — *(Registered, but did not testify: Stephanie Newberg, Texas Department of Banking)*

DIGEST: SB 1167 would make a variety of changes to the Health and Safety Code provisions governing perpetual care cemeteries and final disposition.

**Appointing an alternative designee for final disposition.** SB 1167 would amend Health and Safety Code, sec. 711.002 to create a process to appoint an alternative designee to make decisions about the final disposition for a deceased person if the original designee had failed to make the final arrangements within 10 days of the death or six days of the initial notice of death, whichever was earlier. SB 1167 would terminate the originally designated individual's right to control the disposition and pass the responsibility to the first willing person in the priority classes listed below:

- the decedent's surviving spouse;
- any one of the decedent's surviving adult children;

- either one of the decedent's surviving parents;
- any one of the decedent's surviving adult siblings; or
- any adult person in the next degree of kinship in the order named by law to inherit the estate of the decedent.

**Requirements for lawn crypts.** SB 1167 would permit the installment of a lawn crypt on a private estate if it was smaller than 10 units. A private estate would be:

- a small section of a cemetery;
- sold under a single contract;
- usually offset from other burial sites;
- in an area that would allow for interment of several members of the same family or their designees; and
- identified on the plat or map for cemetery property as a private estate in accordance with current law.

A cemetery selling lawn crypt spaces would have to begin construction on the section within 48 months after the date of the first sale or reservation, whichever was earlier, and would have to complete construction within 60 months of the date of the first sale or reservation, whichever was earlier. If the project were incomplete, then the cemetery would be required to refund the entire amount paid for the undeveloped lawn crypt space within 30 days of the buyer's request.

A sales contract for an undeveloped lawn crypt would have to contain a notice written in plain language that could be easily understood by the average consumer and printed in a font and type size that could be read without difficulty. The sales contract also would have to comply with applicable regulations of the Federal Trade Commission. The contract would have to contain terms that informed the buyer, in English or Spanish, that a full refund was available if the terms of the contract were not fulfilled. The contract would have to provide information about options available if an individual died before the purchased lawn crypt was completed, which would include:

- selecting a replacement lawn crypt space or other resting place acceptable to the buyer or the buyer's representative;
- electing a temporary resting place for the human or cremated remains in an existing mausoleum space at no additional charge to the buyer until the contracted lawn crypt was completed; and

- cancelling the contract for a full refund upon the written notice of the buyer or the buyer's representative if an acceptable agreement could not be reached.

**New requirements for perpetual care cemeteries.** The bill would amend provisions of the Health and Safety Code on perpetual care cemeteries by changing the definition of a corporation to conform with the terms defined by the Business Organizations Code.

Under the bill, a new perpetual care cemetery could not operate in the state unless the necessary start-up forms were filed with the secretary of state showing subscriptions and payments in cash for 100 percent of the business entity's ownership or membership interests. A corporation would have to obtain and hold a certificate of authority to operate a perpetual care cemetery, which would have to be filed for within 30 days of the submission of the initial application materials and meet all standard incorporation requirements governed by the secretary of state. The commissioner of the Department of Banking could instruct the secretary of state to cancel the registration of any corporation that failed to comply with this process.

The commissioner would be authorized to investigate an applicant prior to issuing a certificate of authority. The applicant would have to demonstrate to the commissioner that the business could meet specific criteria, including:

- sufficient experience, character, financial condition, and general fitness to warrant the public's confidence;
- at least two years of experience in cemetery management;
- issuance of the certificate of authority would be in the public interest;
- a clean financial record, without any outstanding fees, penalties, or other amount owed to the department related to managing perpetual care cemeteries;
- a history of good standing and statutory compliance with this state;
- proper authorization to engage in the perpetual care cemetery business in this state; and
- owing no delinquent franchise or other taxes to this state.

If the commissioner determined that the applicant met the necessary qualifications and requirements and believed the applicant's cemetery

business would be conducted fairly and lawfully, according to applicable state and federal law, then the department would issue the applicant a certificate of authority.

An applicant could within 30 days request a hearing on a denied request for certification. The hearing would have to be held within 60 days of the request unless the administrative law judge had reason to extend the period or the parties agreed to a later date.

An initial certificate of authority would expire on March 1 of the first year after it was issued and would require annual renewal. Applicants would have to satisfy the same requirements as in the initial application for certification, pay a renewal fee, and submit a renewal report. If the department did not receive all of the necessary materials by the renewal date, then the commissioner would be required to provide notification in writing that informed the certificate holder that the materials and payment, plus a possible late fee, were required within 30 days of the renewal date. The department would have to review the reports and take appropriate action on the certificate of authority. Denied renewal applicants could request a hearing to appeal the decision within 30 days of the mailing of the refusal notice. If a cemetery operator had allowed the certificate to expire or wished to manage another operation, the provider would have to submit a new application.

A cemetery operator could not transfer the certificate of authority to another operator. An operator who transferred 25 percent or more of the ownership interests would have to notify the department in writing. The cemetery operator would have to provide details on the nature of the transfer. If the transfer were voluntary, then the operator could submit this information within seven days of the completion of the contract, and if involuntary, then within one business day. The transfer would not be permitted until after a new certificate of authority had been issued to the new cemetery operator. A hearing could be requested if an application was denied by the department.

A cemetery operator could apply to the commissioner for permission to surrender the certificate of authority if the operator:

- qualified for an exemption but had voluntarily elected to become a perpetual care cemetery;
- performed fewer than 10 burials per year during each of the last five years;

- maintained a cemetery that was 10 acres or less; and
- managed a perpetual care fund that was less than \$30,000.

The bill would require an operator to publish a notice of the intention to surrender a certificate of authority once in a newspaper that circulated throughout the county where the cemetery was located. The notice would have to inform readers that a plot owner or the heir of a plot holder could request a hearing to contest the surrender within 14 days of publication. The cemetery operator would have to submit the publisher's affidavit evidencing publication to the department within seven days of the newspaper printing.

The commissioner would have to hold a hearing if a plot owner contested the surrender by the deadline. Otherwise, a hearing could be arranged at the discretion of the commissioner. If a denial was issued before a hearing date was arranged, a plot owner could request a hearing to appeal a decision within 30 days of the mailing of the denial letter.

Before an order of surrender could be approved, four conditions would have to be satisfied:

- the perpetual care fund would have to remain in an irrevocable trust, permitting income to be used only for maintaining the cemetery in general and the plots that were purchased before the certificate was surrendered;
- the cemetery would have to remove any signage that could suggest the cemetery was a perpetual care cemetery;
- each contract and other ownership documents would have to clearly state that the cemetery was not a "perpetual care cemetery" and not regulated by the Texas Department of Banking; and
- the order would have to state the location of cemetery records and require the cemetery to comply with all record-keeping requirements established by the department.

The cemetery operator surrendering the certificate of authority would be required, within 10 days of the approval for surrender, to deliver the original certificate along with additional documentation that included the location of the operator's records and other contact information for an individual who was authorized to provide access to the records. A failure to satisfy any of these conditions would violate the commissioner's order and could make the surrendering certificate holder liable to an enforcement action.

Under SB 1167, a corporation authorized by law to operate a perpetual care cemetery, but was not doing so, could do so if it complied with the requirements for obtaining a certificate of authority.

**Enforcement.** The commissioner could issue an order requiring restitution by a person if it was determined that the corporation had not ordered headstones or other memorials in compliance with the deadlines established by ch. 711 of the Health and Safety Code.

The commissioner could issue an order to cease and desist to a person if there was credible evidence that the person had violated state law related to perpetual care cemeteries and if the violation was not corrected within 31 days of the receipt of written notice of the violation from the department. The cease and desist order would be served on the person and would state the reasons for the proposed order and the proposed effective date, which could not be less than 20 days after the order was mailed or delivered. The order would become effective on the proposed date unless the person requested a hearing within 19 days of the delivery of the notice. A hearing would be conducted in accordance with procedures for a contested case hearing.

The bill also would authorize the commissioner to issue an emergency order to take immediate effect if the commissioner found that immediate and irreparable harm threatened the public, a plot owner, or another person with protected interest in a perpetual care cemetery. The order would remain in effect unless halted by the commissioner. The person named in the emergency order could request a hearing in writing, within 18 days of the mailing of the notice. Upon receipt of the hearing request, the commissioner would have to schedule the hearing within 21 days, unless the date was extended at the named individual's request. The hearing would serve as an administrative hearing on the validity of findings that supported immediate effect of the order.

**Receivership.** In conjunction with a proceeding against a perpetual care cemetery to forfeit the right to do business in this state, the attorney general could seek the appointment of a receiver to continue its operation and upkeep. If the receiver were a private party, the corporation that formerly operated the cemetery would pay the receiver. If the corporation had no assets to pay the receiver, income could be used from the perpetual care fund, but the principal could not be used. The court also could appoint a department employee to act as receiver, but the employee could not

receive funds from the corporation. The department could be reimbursed by the corporation for travel expenses and personnel costs associated the receivership. The department employee acting as receiver would not be liable for damages arising from the stewardship unless the employee acted in a malicious or corrupt manner. If an action were brought against an employee who served as a receiver, the attorney general would defend the action, even if the employee no longer worked for the department.

**Offense.** The bill would amend Health and Safety Code, sec. 712.048 to create a criminal offense if an individual collected money for the purchase of a memorial and knowingly misappropriated the funds. It would be punishable under Penal Code, sec. 32.45, with penalties ranging from a class C to a class A misdemeanor, depending on the value of the property misapplied. An aggrieved party or the attorney general could pursue action in the civil courts to recover damages, and the commissioner could take administrative action for restitution based on an injury resulting from an offense.

**Effective date.** The bill would take effect September 1, 2011.

**SUPPORTERS  
SAY:**

The additional standards and professional protocols that would be established through SB 1167 would help ensure that new operators of cemeteries met the high standards expected in a profession that handles the needs of Texans in their most vulnerable states. The bill also would make it difficult for dishonest or incompetent players to enter the market. Current law has some fairly lax licensing standards, and this has hurt the reputation of good cemetery operators and brought harm to customers and to the preservation of cemeteries.

SB 1167 would protect consumers from egregious offenses by bad actors managing perpetual care cemeteries. Many families try to plan ahead for their death and purchase plots, mausoleums, or other memorials to honor their loved ones. While most perpetual care operators take great care to uphold their clients' wishes, some business entities have manipulated customers and stolen money. The bill would provide specific provisions requiring contracts to be written in plain language and require cemetery operators to provide customers with comparable alternatives in the event of a problem or a full refund.

SB 1167 would establish a protocol to deal with deceased individuals for whom no one was in charge of the disposition arrangements. Sometimes a

person's original designee has died, cannot be found, or will not make these arrangements for some other reason, leaving the body with funeral providers sometimes for weeks. The funeral providers have no authority to act, and SB 1167 would help to remedy this tragic and unhealthy problem.

The bill would bring much-needed updating to the Health and Safety Code provisions relating to perpetual care cemeteries. Industry stakeholders and consumer advocates worked hard with the Texas Department of Banking to craft major changes to the provisions to keep the market working, keep customers safe, and force bad actors to face some stiff penalties.

**OPPONENTS  
SAY:**

SB 1167 would create a sizable barrier to entering the market of perpetual care cemeteries, which could be problematic as the Texas population ages and anticipates greater losses over the next two decades. The tough regulations and renewal requirements could threaten the livelihoods of honest cemetery operators who face declining incomes from their trust funds.

The enforcement requirements outlined in the bill also could prove harmful to some cemetery operators who accidentally mismanaged a business and could face harsh penalties. In smaller communities and rural areas, some perpetual care cemeteries are maintained out of family obligations, rather than interest. An operator could inherit this profession and be unfamiliar with the regulations. A mistake could cause the individual to be financially liable or worse.

**NOTES:**

The companion bill, HB 2495 by Hernandez Luna, passed the House by 139-3 on April 28 and passed the Senate by 31-0 on the Local and Uncontested Calendar on May 17.