

BILL ANALYSIS

Senate Research Center

S.B. 1167
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Enrolled

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

A cemetery operated as a perpetual care or endowment care cemetery means that a perpetual care fund has been established in conformity with the laws of the State of Texas to provide for the ongoing maintenance, repair, and care of the cemetery. Perpetual care cemeteries are regulated under Chapters 711 (General Provisions Relating to Cemeteries) and 712 (Perpetual Care Cemeteries) of the Health and Safety Code, which provide that all cemeteries established after September 1, 2003, are required to be licensed by the Texas Department of Banking (TDB) as a perpetual care cemetery. TDB licensing and regulation cover a range of matters including issues relating to the licensing, establishment and maintenance of the cemeteries, and applicable fees associated with operating the perpetual care cemetery. Since 2003, a number of issues have arisen in connection with the regulation of perpetual care cemeteries.

S.B. 1167 amends current law relating to cemeteries and perpetual care cemetery corporations and provides a penalty.

RULEMAKING AUTHORITY

Rulemaking authority is expressly granted to the Finance Commission of Texas in SECTION 8 (Section 712.0037, Health and Safety Code) and SECTION 11 (Section 712.0441, Health and Safety Code) of this bill.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Section 711.001(3), Health and Safety Code, to redefine "cemetery organization."

SECTION 2. Amends Section 711.002, Health and Safety Code, by adding Subsection (a-1), as follows:

(a-1) Provides that if the person with the right to control the disposition of the decedent's remains fails to make final arrangements or appoint another person to make final arrangements for the disposition before the earlier of the 6th day after the date the person received notice of the decedent's death or the 10th day after the date the decedent died, the person is presumed to be unable or unwilling to control the disposition, and:

(1) the person's right to control the disposition is terminated; and

(2) the right to control the disposition is passed to the following persons in the following priority: any other person in the same priority class under Subsection (a) (relating to the disposition of remains) as the person whose right was terminated; or a person in a different priority class, in the priority listed in Subsection (a).

SECTION 3. Amends Section 711.061, Health and Safety Code, as follows:

Sec. 711.061. REQUIREMENTS FOR LAWN CRYPTS. (a) Creates this subsection from existing text. Prohibits a lawn crypt from being installed unless, among other criteria, the lawn crypt is installed in multiple units of 10 or more or as prescribed by

Subsection (b). Deletes existing text providing an exception as provided by Section 711.062 (Request to Install Lawn Crypt in Fewer Than 10 Units).

(b) Authorizes a lawn crypt that is part of a private estate to be installed in fewer than 10 units. Provides that for purposes of this subsection, a private estate is a small section of a cemetery that has the following characteristics:

(1) is sold under a single contract;

(2) is usually offset from other burial sites;

(3) allows for interment of several members of the same family or their designees; and

(4) is identified on the plat for cemetery property as a private estate in accordance with Section 711.034 (Dedication).

SECTION 4. Amends Subchapter E, Chapter 711, Health and Safety Code, by adding Sections 711.063 and 711.064, as follows:

Sec. 711.063. CONSTRUCTION; DEFAULT. (a) Requires that a cemetery in which undeveloped lawn crypt spaces are being sold or reserved for sale begin construction on the lawn crypt section not later than 48 months after the date of the first sale or reservation, whichever is earlier, and complete construction not later than 60 months after the date of the first sale or reservation, whichever is earlier.

(b) Requires that the cemetery, if construction of a lawn crypt section described by Subsection (a) does not begin or has not been completed by the dates specified in Subsection (a), on the buyer's written request, refund the entire amount paid for the undeveloped lawn crypt space not later than the 30th day after the date of the buyer's request.

Sec. 711.064. CONTRACT DISCLOSURES. (a) Requires that a sales contract for an undeveloped lawn crypt space contain terms, whether in English or Spanish, that inform the buyer:

(1) that the buyer may, after providing written notice, cancel the contract for failure by the cemetery or contractor to construct the lawn crypt space within the time limits specified by Section 711.063(a) and receive a refund of the entire amount paid under the contract for the undeveloped lawn crypt space as described by Section 711.063(b); and

(2) of the options available under a fully paid contract if the person to be interred in the undeveloped lawn crypt space dies before completion of the related lawn crypt section, including the option to:

(A) select a replacement lawn crypt space or other interment acceptable to the buyer or the buyer's representative;

(B) elect temporary interment of the human remains or cremated remains in an existing mausoleum space until the undeveloped lawn crypt space is completed, at which time the cemetery shall disinter and reinter the human remains or cremated remains at no additional charge to the buyer; or

(C) cancel the contract on written notice of the buyer or the buyer's representative and receive a refund of the entire amount paid under the contract for the undeveloped lawn crypt space if the cemetery does not offer a temporary interment option, or the buyer or the

buyer's representative does not accept a replacement lawn crypt or other interment.

(b) Requires that a sales contract for undeveloped lawn crypt space comply with applicable regulations of the Federal Trade Commission, including 16 C.F.R. Section 433.2, with respect to a contract payable in installments.

(c) Requires that each notice required by this section be written in plain language designed to be easily understood by the average consumer and be printed in an easily readable font and type size.

SECTION 5. Amends Section 712.001(b)(3), Health and Safety Code, to redefine "corporation."

SECTION 6. Amends the heading to Section 712.003, Health and Safety Code, to read as follows:

Sec. 712.003. REGISTRATION REQUIRED; MINIMUM CAPITAL.

SECTION 7. Amends Section 712.003(a), Health and Safety Code, to prohibit a perpetual care cemetery from being operated in this state unless a certificate of formation for a domestic filing entity or registration to transact business for a foreign filing entity is filed, rather than unless articles of incorporation are filed, with the secretary of state (SOS) showing certain information, including subscriptions and payments in cash for 100 percent of the entity's ownership or membership interests, rather than subscriptions and payments in cash for the corporation's full capital stock.

SECTION 8. Amends Subchapter A, Chapter 712, Health and Safety Code, by adding Sections 712.0032 through 712.0039 and Section 712.0395, to read as follows:

Sec. 712.0032. CERTIFICATE OF AUTHORITY REQUIREMENT. Requires a corporation to hold a certificate of authority issued under this chapter to operate a perpetual care cemetery.

Sec. 712.0033. CERTIFICATE OF AUTHORITY APPLICATION; FEES. (a) Requires an applicant, to obtain a certificate of authority to operate a perpetual care cemetery, to not later than the 30th day after the date a corporation files its certificate of formation or application for registration with SOS, file an application, made under oath, on a form prescribed by the Banking Department of Texas (TDB); and pay a filing fee in an amount set by the Finance Commission of Texas under Section 712.008 (Rules).

(b) Authorizes the Banking Commissioner of Texas (commissioner), if the corporation fails to comply with Subsection (a), to instruct SOS to remove the corporation from SOS's active records or cancel the corporation's registration. Requires SOS, on an instruction from the commissioner under this subsection, to remove the corporation from SOS's active records or cancel the corporation's registration and serve notice of the cancellation on the corporation by registered or certified letter, addressed to the corporation's address.

(c) Provides that a fee or cost paid under this chapter in connection with an application or renewal is not refundable.

Sec. 712.0034. QUALIFICATIONS FOR CERTIFICATE OF AUTHORITY; INVESTIGATION. (a) Authorizes the commissioner to investigate an applicant before issuing a certificate of authority.

(b) Requires an applicant, to qualify for a certificate of authority under this chapter, to demonstrate to the satisfaction of the commissioner that:

(1) the applicant's business ability, experience, character, financial condition, and general fitness warrant the public's confidence;

(2) the cemetery operations manager has at least two years of experience in cemetery management;

(3) the issuance of the certificate of authority is in the public interest;

(4) the applicant, a principal of the applicant, or a person who controls the applicant does not owe TDB a delinquent fee, assessment, administrative penalty, or other amount imposed under this chapter or a rule adopted or order issued under this chapter; and

(5) the applicant corporation is in good standing and statutory compliance with this state; is authorized to engage in the perpetual care cemetery business in this state; and does not owe any delinquent franchise or other taxes to this state.

Sec. 712.0035. ISSUANCE OF CERTIFICATE OF AUTHORITY. (a) Requires the commissioner to issue a certificate of authority if the commissioner finds that:

(1) the applicant meets the qualifications listed in Section 712.0034 and it is reasonable to believe that the applicant's cemetery business will be conducted fairly and lawfully, according to applicable state and federal law, and in a manner commanding the public's trust and confidence;

(2) the issuance of the certificate of authority is in the public interest;

(3) the documentation and forms required to be submitted by the applicant are acceptable; and

(4) the applicant has satisfied all requirements for issuance of a certificate of authority.

(b) Entitles the applicant, on request, to a hearing on a denial of the application. Requires that the request be filed with the commissioner not later than the 30th day after the date the notice of denial is mailed. Requires that the hearing be held not later than the 60th day after the date of the request unless the administrative law judge extends the period for good cause or the parties agree to a later hearing date. Provides that the hearing is a contested case under Chapter 2001 (Administrative Procedure), Government Code.

Sec. 712.0036. TERM OF CERTIFICATE OF AUTHORITY. Provides that an initial certificate of authority expires March 1 of the year after the year the certificate is issued. Requires that the certificate be renewed at that time and by March 1 of each following year.

Sec. 712.0037. RENEWAL OF CERTIFICATE OF AUTHORITY. (a) Requires a certificate holder, as a condition of renewal, to meet the qualifications and satisfy the requirements that apply to an applicant for a new certificate of authority. Requires a certificate holder, additionally, not later than the certificate's annual renewal date, to:

(1) pay an annual renewal fee in an amount established by Finance Commission of Texas rule; and

(2) submit a renewal report under oath and in the form and medium required by the commissioner that demonstrates that the certificate holder meets the qualifications and requirements for holding a certificate.

(b) Provides that if TDB does not receive a certificate holder's renewal fee and complete renewal report on or before the certificate's renewal date, the commissioner:

(1) is required to notify the certificate holder in writing that the certificate holder must submit the renewal report and pay the renewal fee not later than the 30th day after the certificate's renewal date; and

(2) is authorized to require the certificate holder to pay a late fee, in an amount established by Finance Commission of Texas rule and not subject to appeal, for each business day after the certificate's renewal date that the commissioner does not receive the completed renewal report and renewal fee.

(c) Requires TDB, on timely receipt of a certificate holder's complete renewal report and renewal fee and any late fee, to review the report and authorizes the commissioner to renew the certificate of authority; or refuse to renew the certificate of authority and take other action the commissioner considers appropriate.

(d) Entitles the applicant on request to a hearing to contest the commissioner's refusal to renew the certificate. Requires that the request be filed with the commissioner not later than the 30th day after the date the notice of refusal to renew is mailed. Provides that the hearing is a contested case under Chapter 2001, Government Code.

(e) Requires the holder or principal of or the person in control of the holder of an expired certificate of authority, or the holder or principal of or person in control of the holder of a certificate of authority surrendered under Section 712.00395, who wishes to conduct activities for which a certificate of authority is required under this chapter to file a new application for a certificate of authority and satisfy all requirements for the certificate that apply at the time the new application is filed.

Sec. 712.0038. TRANSFER OR ASSIGNMENT PROHIBITED. Prohibits a certificate of authority issued under this chapter from being transferred or assigned.

Sec. 712.0039. TRANSFER OF BUSINESS OWNERSHIP; CHANGE OF CONTROL.

(a) Requires a certificate holder to notify TDB in writing of a transfer of ownership of the certificate holder's business or a transfer of 25 percent or more of the stock or other ownership or membership interest of the corporation as follows:

(1) in the case of a voluntary transfer, not later than the seventh day after the date the contract for transfer is executed; and

(2) in the case of an involuntary transfer, not later than one business day after receiving notice of the impending foreclosure or other involuntary transfer.

(b) Authorizes the proposed transferee, if the proposed transferee is not a certificate holder, to file any necessary documents with SOS and an application for a certificate of authority with TDB as required by this chapter. Prohibits the transfer of the perpetual care fund from occurring until after the date a certificate of authority is issued to the transferee applicant.

(c) Authorizes a hearing, if the commissioner denies the application, to be requested and conducted according to the procedures in Section 712.0035(b).

Sec. 712.00395. SURRENDER OF CERTIFICATE OF AUTHORITY; FEE. (a) Authorizes a certificate holder to apply to the commissioner for permission to surrender the certificate of authority if the holder is a cemetery that qualified for an exemption under Section 711.021(g) (relating to criteria in which the formation of a corporation does not apply), but voluntarily elected to become a perpetual care cemetery; has

performed not more than 10 burials per year during each of the last five years; is not larger than 10 acres; and has a perpetual care fund that is less than \$30,000.

(b) Requires that the application for permission to surrender a certificate of authority be sworn to and be on a form prescribed by TDB.

(c) Requires the certificate holder to publish a notice of intention to surrender a certificate of authority to operate a perpetual care cemetery one time in a newspaper of general circulation in each county in which the cemetery is located. Requires that the notice be in the form and include the information required by the banking commissioner; state that the certificate holder is applying to surrender the holder's certificate of authority to operate a perpetual care cemetery; state that a cemetery plot owner or cemetery plot owner's heir may request a hearing to contest the surrender; and state that a request for a hearing must be filed with the TDB not later than the 14th day after the date the notice is published.

(d) Requires the certificate holder to submit, not later than the seventh day after the date the notice published, a publisher's affidavit evidencing publication of the notice.

(e) Requires the commissioner, if a request for hearing is timely filed by a plot owner or plot owner's heir, to hold a hearing in accordance with Chapter 2001, Government Code.

(f) Authorizes the commissioner, if a request for a hearing is not timely filed by a plot owner or plot owner's heir, to approve or deny the application.

(g) Authorizes an applicant, if an application is denied, and if a hearing is not held before the denial, to request a hearing to appeal the denial of the application. Requires the applicant's request for a hearing to be filed with the commissioner not later than the 30th day after the date the notice of denial is mailed. Provides that the hearing is a contested case under Chapter 2001, Government Code.

(h) Requires that an order approving the surrender of a certificate of authority impose four conditions that are not subject to objection. Provides that failure to satisfy any of these conditions constitutes a violation of the commissioner's order and the certificate holder is subject to an enforcement action under this chapter. Requires that the order approving the surrender:

(1) require the perpetual care fund to remain in an irrevocable trust, with the income to be used for perpetual care of the cemetery in general and for those plots that were purchased before the certificate was surrendered;

(2) require that the cemetery remove any signage or other announcement stating that the cemetery is a perpetual care cemetery;

(3) require each contract and other evidence of ownership entered into after the date of the order to clearly state that the cemetery is not regulated by TDB and may not use the term "perpetual care cemetery"; and

(4) state the location of cemetery records and require the cemetery to retain existing records regarding the perpetual care fund for five years after the date of the order; and continue to comply with all recordkeeping requirements of Chapter 711.

(i) Requires the certificate holder, not later than the 10th day after the date an order approving the surrender of a certificate of authority is signed, to deliver the original certificate of authority to the commissioner along with a written notice of surrender that includes the location of the certificate holder's records and the

name, address, telephone number, and other contact information for an individual who is authorized to provide access to the records.

(j) Provides that the surrender of a certificate of authority does not reduce or eliminate a certificate holder's administrative, civil, or criminal liability arising from any acts or omissions that occur before the surrender of the certificate.

SECTION 9. Amends Section 712.022, Health and Safety Code, to authorize a corporation authorized by law to operate a perpetual care cemetery but not doing so to do so if the corporation, among other criteria, complies with the requirements of this chapter for obtaining a certificate of authority, rather than if the corporation notifies the commissioner.

SECTION 10. Amends Section 712.044(a), Health and Safety Code, to authorize the commissioner to examine on a periodic basis, rather than annually or more often, as the commissioner reasonably considers necessary or appropriate to protect the interest of plot owners and efficiently administer and enforce this chapter, certain books, records, and files.

SECTION 11. Amends Section 712.0441, Health and Safety Code, by amending Subsection (f) and adding Subsection (f-1), as follows:

(f) Authorizes the commissioner, to issue an order requiring restitution by a person to the cemetery's fund or to a preconstruction trust, if, after notice and opportunity for hearing held in accordance with the procedures for a contested case hearing under Chapter 2001, Government Code, rather than the Administrative Procedure and Texas Register Act, the commissioner finds that the corporation has not made a deposit in the fund as required by Section 712.028 or in the preconstruction trust as required by Section 712.063. Makes a nonsubstantive change.

(f-1) Authorizes the commissioner to issue an order requiring restitution by a person if, after notice and opportunity for a hearing held in accordance with the procedures for a contested case hearing under Chapter 2001, Government Code, the commissioner finds that the corporation has not ordered memorials, as defined by Section 711.001(20-a), in compliance with the deadlines established by rules adopted under this chapter.

SECTION 12. Amends Section 712.0442(a), Health and Safety Code, to authorize, rather than requires, the trier of fact, if, after a hearing conducted as provided by Chapter 2001, Government Code, the trier of fact finds that a violation of this chapter or a rule of the Finance Commission of Texas establishes a pattern of wilful disregard for the requirements of this chapter or rules of the finance commission, to recommend to the commissioner that the maximum administrative penalty permitted under Section 712.0441 be imposed on the person committing the violation or that the commissioner cancel or not renew the corporation's certificate of authority under this chapter if the person holds such a certificate, rather than the person's permit under Chapter 154 (Prepaid Funeral Service), Finance Code, if the person holds such a permit.

SECTION 13. Amends Subchapter C, Chapter 712, Health and Safety Code, by adding Sections 712.0443, 712.0444, and 712.0445, as follows:

Sec. 712.0443. CEASE AND DESIST ORDER. (a) Authorizes the commissioner to issue an order to cease and desist to a person if the commissioner finds by examination or other credible evidence that the person has violated a law of this state relating to perpetual care cemeteries, including a violation of this chapter, the commissioner's final order, or a Finance Commission of Texas rule; and the violation was not corrected by the 31st day after the date the person receives written notice of the violation from TDB.

(b) Requires that an order proposed under this section be served on the person and state the grounds for the proposed order with reasonable certainty and the proposed effective date, which may not be less than the 20th day after the date the order is mailed or delivered. Provides that the order becomes effective on the proposed date unless the person requests a hearing not later than the 19th day after the date the order is mailed or delivered. Requires that the hearing, if the person

requests a hearing, to be conducted in accordance with the procedures for a contested case hearing under Chapter 2001, Government Code.

Sec. 712.0444. EMERGENCY ORDER. (a) Authorizes the commissioner to issue an emergency order that takes effect immediately if the commissioner finds that immediate and irreparable harm is threatened to the public or a plot owner, marker purchaser, or other person whose interest are protected by this chapter.

(b) Provides that an emergency order remains in effect unless stayed by the commissioner.

(c) Authorizes the person named in the emergency order to request in writing, not later the 18th day after the date the order is mailed, a hearing to show that the emergency order should be stayed. Requires the commissioner, on receipt of the request, to set a time for the hearing not later than the 21st day after the date the commissioner received the request, unless extended at the request of the person named in the order.

(d) Provides that the hearing is an administrative hearing relating to the validity of findings that support immediate effect of the order.

Sec. 712.0445. RECEIVERSHIP PROCEEDINGS. (a) Authorizes the attorney general, in conjunction with a proceeding to forfeit the right to do business in this state brought by the attorney general, to seek the appointment of a receiver. Provides that this remedy is in addition to other grounds for the appointment of a receiver.

(b) Requires the receiver, if the receiver is a private party, to be compensated from the corporation or, if the corporation has no assets available to pay the receiver, from the income only of the perpetual care fund. Prohibits the receiver from invading the principal of the fund.

(c) Authorizes the court to appoint a TDB employee as a receiver. Prohibits the employee, if the receiver is a TDB employee, from receiving compensation for serving as a receiver in addition to the employee's regular salary. Authorizes TDB to receive reimbursement from the corporation for the travel expenses and the fully allocated personnel costs associated with the employee's service as receiver.

(d) Provides that a TDB employee serving as receiver is not personally liable for damages arising from the employee's official act or omission unless the act or omission is corrupt or malicious. Requires the attorney general to defend an action brought against an employee serving as receiver because of an official act or omission as receiver regardless of whether the employee has terminated service with TDB before the action commences.

SECTION 14. Amends Section 712.048, Health and Safety Code, by adding Subsection (c), as follows:

(c) Provides that a person commits an offense if the person collects money for the purchase of a memorial, as defined by Section 711.001 and knowingly defalcates or misappropriates the funds. Provides that an offense under this subsection is punishable as if it were an offense under Section 32.45 (Misapplication of Fiduciary Property or Property of Financial Institution), Penal Code. Provides that this subsection does not prevent an aggrieved party or the attorney general from maintaining a civil action for the recovery of damages, or the commissioner from maintaining an administrative action for restitution, caused by an injury resulting from an offense under this subsection.

SECTION 15. Repealers: Sections 711.062 (Request to Install Lawn Crypt in Fewer than 10 Units), 712.0031 (Notices to Banking Department), and 712.0441(e) (relating to authorizing the commissioner to order a cease and desist), Health and Safety Code.

SECTION 16. Provides that a person who owns and operates a perpetual care cemetery on September 1, 2011, that on that date complies with Sections 712.003 and 712.0031, Health and Safety Code, as those sections existed before amendment or repeal by this Act, is automatically granted a certificate of authority. Provides that the certificate of authority expires March 1, 2012, unless the certificate holder renews the certificate in accordance with Section 712.0037, Health and Safety Code, as added by this Act.

SECTION 17. Effective date: September 1, 2011.