

SENATE BILL No. 1377

June 8, 2010, Introduced by Senators CLARKE, CROPSEY and STAMAS and referred to the Committee on Judiciary.

A bill to amend 1968 PA 251, entitled
"Cemetery regulation act,"
by amending section 16 (MCL 456.536), as amended by 2008 PA 478.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

1 Sec. 16. (1) The commissioner shall require each cemetery to
2 establish and maintain an irrevocable endowment and perpetual care
3 trust fund. The amounts deposited into an endowment and perpetual
4 care trust fund pursuant to subsection (5) shall be held in
5 perpetuity by the trustee and may only be distributed to the
6 cemetery upon order of a court following petition by the
7 commissioner. Interest or income shall be used only for endowment
8 care. Except as otherwise provided in subsection (2), money in the
9 endowment and perpetual care trust fund shall not be commingled

1 with any other money or trust accounts. The cemetery shall report
2 annually before July 1 of each year, on forms approved and
3 furnished by the commissioner, endowment and perpetual care trust
4 fund information required to be reported to the commissioner by
5 other statutes and information regarding the funds as the
6 commissioner considers pertinent in the public interest. A cemetery
7 applying to the commissioner as authorized by other statutes for an
8 endowment and perpetual care trust fund deposit modification or
9 waiver shall be assessed the actual expenses for an examination or
10 investigation by the commissioner.

11 (2) Notwithstanding subsection (1), bundling of funds held in
12 trust or escrow, for each cemetery or among cemeteries with common
13 ownership, is permissible only under the following circumstances:

14 (a) Each cemetery maintains separate trust and escrow account
15 records pursuant to statutory and rule requirements for endowed
16 care, merchandise, or prepaid funeral and cemetery sales.

17 (b) A cemetery, or cemeteries with common ownership, has all
18 its trust or escrow accounts on deposit with 1 or more regulated
19 financial institutions with trust powers in this state.

20 (c) The trustee, or the trustee's trading block nominee, holds
21 title in the name of each individual trust or escrow account for
22 that trust or escrow account assets and the assets are promptly
23 settled back to the individual accounts by the trustee in the
24 ordinary course of business.

25 (3) Notwithstanding subsection (2), other comparable methods
26 of bundling or pooling of trust or escrow funds for investment
27 purposes may be permissible upon terms and conditions approved in

1 writing by the commissioner and only after the commissioner is
2 reasonably satisfied that the title to, character of, and
3 accounting for funds held in trust or escrow is preserved.

4 (4) Not later than January 1, 2010, the irrevocable endowment
5 and perpetual care trust fund shall be established, or
6 reestablished, with 1 or more regulated financial institutions with
7 trust powers that shall be the trustee of the portion of the fund
8 allocated to it. The cemetery shall enter into agreements of
9 irrevocable trust agreements with each trustee. Those agreements
10 shall provide that the investing of the assets are subject to the
11 Michigan prudent investor rule as set forth in sections 1501 to
12 ~~1511 and 7302~~ **1512 AND 7803** of the estates and protected
13 individuals code, 1998 PA 386, MCL 700.1501 to ~~700.1511 and~~
14 ~~700.7302~~ **700.1512 AND 700.7803**, except that the agreement shall not
15 be modified or amended, as allowed under sections 1502(2) and ~~7302~~
16 **7803** of the estates and protected individuals code, 1998 PA 386,
17 MCL 700.1502 and ~~700.7302~~ **700.7803**, to provide less than the
18 standard of care in the prudent investor rule. The cemetery shall
19 notify the commissioner, in writing, not later than 14 days ~~prior~~
20 ~~to~~ **BEFORE** the effective date of an appointment of a trustee. The
21 cemetery may remove and replace a trustee at any time, subject to
22 the consent of the commissioner, and subject to the terms of the
23 cemetery's agreement with the trustee. The fees and costs of the
24 trustee may, in accordance with the terms of the trust agreement,
25 be paid from the principal of the trust. A cemetery that
26 establishes its irrevocable endowment and perpetual care trust with
27 1 or more regulated financial institutions with trust powers, and

1 ~~which cemetery~~ **THAT** does not reserve, retain, or otherwise exercise
 2 any power of direction of specific investments, ~~shall not be~~ **IS NOT**
 3 liable for any deficiencies in the irrevocable endowment and
 4 perpetual care trust caused by performance of the investments. A
 5 cemetery may reserve the right to recommend, to a trustee, an
 6 investment advisor, registered with the securities and exchange
 7 commission under the investment advisers act of 1940, 15 USC 80b-1
 8 to 80b-21, or under the uniform securities act **(2002)**, ~~1964 PA 265,~~
 9 ~~MCL 451.501 to 451.818,~~ **2008 PA 551, MCL 451.2101 TO 451.2703,** to
 10 advise the trustee in the trustee's decisions on asset allocation,
 11 investment managers, and investments, except that a trustee is not
 12 required to heed such advice. Alternatively, and notwithstanding
 13 any other provisions of this section, and at all times subject to
 14 the Michigan prudent investor rule, a cemetery may direct the
 15 trustees to make certain investments, provided that the trust is a
 16 named beneficiary of fiduciary liability insurance covering the
 17 cemetery's or other fiduciaries' actions in an amount equal to 100%
 18 of the amount so directed. Proof of ~~such~~ **THE** fiduciary liability
 19 coverage shall be provided not less than annually to the
 20 commissioner, in a form to be determined by the commissioner, ~~prior~~
 21 ~~to~~ **BEFORE** any direction being given. The commissioner or the
 22 attorney general may prosecute a claim against the fiduciary
 23 liability insurance on behalf of the trust. The trustees ~~shall not~~
 24 ~~be~~ **ARE NOT** liable, or otherwise punishable, for complying with ~~such~~
 25 **THE** direction of investments except that the trustees shall retain
 26 custody of all ~~such~~ **THE** investments.

27 (5) Beginning ~~the effective date of the amendatory act that~~

~~added this subsection~~ **JANUARY 12, 2009**, an irrevocable endowment and perpetual care trust fund shall be created by the deposit of at least \$50,000.00 into the fund before any sale of burial rights, entombment rights, or columbarium rights is made.

(6) Each month, not less than 15% of all proceeds received during the previous month from the sales of burial rights, entombment rights, or columbarium rights shall be deposited with the trustee for inclusion in the endowment and perpetual care trust fund. No total deposit for a single burial right sale or assignment shall be less than \$20.00. A cemetery may apply to the commissioner for a modification of the minimum deposit requirement. The commissioner shall take testimony and investigate as he or she considers necessary and if the commissioner determines that the applicant's endowment and perpetual care trust fund will generate sufficient income to meet all current costs of keeping the applicant's cemetery in good condition, the commissioner may modify the minimum deposit requirement. A cemetery applying to the commissioner for a modification of the endowment and perpetual care trust fund deposit requirements shall be assessed the actual costs for the commissioner's examination and investigation. Excess ~~sums~~ ~~on deposit~~ **MONEY** in the fund may be applied by a cemetery against future deposits and shall be annually reported to the commissioner in a manner prescribed by the commissioner.

(7) The commissioner shall require each person engaged as agent or seller in the selling of burial rights, entombment rights, or columbarium rights owned by a party other than a cemetery or corporation subject to the irrevocable endowment and perpetual care

1 trust fund requirements of this act and other laws, to deposit 15%
2 of all gross proceeds received from the sales of those rights into
3 the irrevocable endowment and perpetual care trust fund of the
4 cemetery in which the rights are located if an irrevocable
5 endowment and perpetual care trust fund exists for that cemetery. A
6 deposit required to be made by those persons shall be modified or
7 waived if the cemetery has received an irrevocable endowment and
8 perpetual care trust fund deposit modification or waiver approved
9 by the commissioner. The total deposit for a single adult burial
10 right sale or assignment shall not be less than \$20.00.

11 (8) Interest or income from the money in the endowment and
12 perpetual care trust fund shall be used exclusively for endowment
13 and perpetual care. No portion of the interest or income may be
14 used directly or indirectly for salaries or other payments to the
15 officers, directors, partners, members, or managers of the entity
16 owning the cemetery. Withdrawals of accumulated interest or income
17 from the endowment and perpetual care trust fund may be authorized
18 by the trustee, and such withdrawals shall be documented in the
19 manner provided by rule of the commissioner. A cemetery shall
20 maintain records showing that interest from the endowment and
21 perpetual care trust fund is used exclusively for endowment and
22 perpetual care. The trustees ~~shall not be~~ **ARE NOT** responsible for
23 ascertaining that ~~such amounts~~ **MONEY** paid ~~over~~ to the cemetery ~~are~~
24 **IS** expended for the limited purposes permitted by this subsection.

25 (9) Subject to subsection (17), a cemetery that is required to
26 register pursuant to this act and an agent authorized by a cemetery
27 or acting on its behalf under an agreement or sales contract to

1 sell cemetery merchandise or cemetery services shall establish a
2 merchandise trust account and deposit a percentage of the gross
3 proceeds received from the sales as determined by the commissioner.
4 The merchandise trust account shall be maintained exclusively for
5 the deposit of the money into a regulated financial institution
6 under the terms of a written trust agreement approved by the
7 commissioner. All documents, reports, and records regarding the
8 trust shall be kept in this state. It shall be the responsibility
9 of each registrant under this act to assure that documents relating
10 to the merchandise trust account are provided to the commissioner
11 upon request. If a subpoena is issued to obtain these documents,
12 the registrant shall pay all costs related to obtaining the
13 documents. The ~~funds~~-**MONEY** shall be deposited not later than the
14 month following ~~their~~-**ITS** receipt.

15 (10) Subject to subsection (17), the total deposits to a
16 merchandise trust for the sale of cemetery burial vaults or other
17 outside containers, other than crypts installed underground and
18 sold as part of a cemetery lot, shall at all times be not less than
19 the greater of \$100.00 per vault or outside container or 130% of
20 the total costs of the containers covered by the trust. Money
21 deposited in connection with a sale shall be repaid within 30 days
22 upon written demand of **THE** purchaser. A burial vault shall be
23 installed only at need or by separate written authorization of the
24 purchaser. The cemetery shall have the right to withdraw the amount
25 on deposit for the delivered vault or outside container.

26 (11) Subject to subsection (17), a contract or agreement made
27 with a purchaser of cemetery merchandise and cemetery services

1 shall contain a complete description of the cemetery merchandise
2 purchased and of the cemetery services to be rendered.

3 (12) The commissioner shall require the cemetery owner or
4 operator to report annually before July 1 of each year on forms
5 provided by the commissioner. The reports shall contain information
6 as the commissioner considers necessary to ascertain that the
7 requirements of this act and rules promulgated under this act are
8 being implemented. Subject to approval of the department, the
9 cemetery owner or operator may ask for an extension not to exceed
10 90 days to submit the report required by this subsection. All
11 reports required by this subsection and subsection (13) shall
12 include a sworn statement by the cemetery owner or operator that
13 includes the following:

14 (a) A certification that the signing cemetery owner or
15 operator has reviewed the report.

16 (b) Based on the operator's or owner's knowledge, that the
17 report does not contain any untrue statement of material fact
18 related to the financial condition of the endowment and perpetual
19 care trust fund or merchandise trust accounts.

20 (c) Based on the operator's or owner's knowledge, that the
21 report fairly presents all material information regarding the
22 financial condition of the endowment and perpetual care trust fund
23 or merchandise trust accounts.

24 (d) That the signing operators or owners are responsible for
25 establishing and maintaining internal controls; have designed those
26 internal controls to ensure the accuracy of material information
27 relating to the condition of the endowment and perpetual care trust

1 fund or merchandise trust accounts; have evaluated the
2 effectiveness of the internal controls within 90 days ~~prior to~~
3 **BEFORE** the issuance of the report; and have included information
4 evaluating the effectiveness of those internal controls.

5 (13) At a minimum, the commissioner shall require the
6 following information concerning the endowment and perpetual care
7 trust fund, the accuracy of which shall be certified by a certified
8 public accountant:

9 (a) Beginning and ending balances.

10 (b) Receipts from the sale of burial, entombment, and
11 columbarium rights.

12 (c) Deposits to the endowment and perpetual care trust fund.

13 (d) Itemized payments of interest or income.

14 (e) Documentation that interest was utilized solely for
15 endowment care.

16 (14) If, after an audit by the commissioner's staff, a deficit
17 in the amount of required deposits to the trust funds is found, the
18 commissioner may assess a penalty in the amount allowed under this
19 act. The cemetery entity may request an administrative hearing
20 before the commissioner or a hearing officer designated by the
21 commissioner within 30 days after being notified of a deficit by
22 the commissioner. If, following the administrative hearing, the
23 commissioner determines that a deficit does exist, an additional
24 penalty may be assessed each month on the unpaid monthly balance
25 until the deficit is paid in full.

26 (15) In addition to all other remedies at law or in equity,
27 the attorney general and the circuit court of the county in which

1 the cemetery is located ~~shall~~ have all the powers and jurisdiction
2 granted to the attorney general and court as to trusts covered by
3 1915 PA 280, MCL 554.351 to 554.353. The remedies granted include
4 all endowment and perpetual care trust funds without regard to
5 uncertainty or indefiniteness of beneficiaries.

6 (16) All fees, charges, and penalties, or other money from any
7 source, collected under this act, other than fines prescribed in
8 section 21, shall be paid to the commissioner. Upon receipt, the
9 commissioner shall remit ~~funds~~ **MONEY** received to the department of
10 treasury for deposit in the general fund of ~~the~~ **THIS** state.

11 (17) Any preneed contracts for cemetery merchandise or
12 services entered into on or after January 1, 2005 are subject to
13 the prepaid funeral and cemetery sales act, 1986 PA 255, MCL
14 328.211 to 328.235.

15 (18) Not less than 7 days before 30% of the endowment and
16 perpetual care or perpetual care funds established under this act
17 are moved from an account or otherwise engaged in some type of
18 financial transaction or investment, the cemetery owner or operator
19 shall notify the commissioner of the transaction on appropriate
20 forms that the commissioner shall authorize. The commissioner may
21 allow the submission of a notification up to 7 days after the
22 transaction, for good cause shown. Failure to comply with this
23 subsection is considered a violation of this act.

24 (19) The commissioner, upon finding after notice and an
25 opportunity for a hearing pursuant to the administrative procedures
26 act of 1969, 1969 PA 306, MCL 24.201 to 24.328, that a cemetery
27 owner or operator has failed to timely submit a report required

1 under subsections (12) and (13), regardless of whether he or she
2 acted alone or through an employee or agent, may impose an
3 administrative fine, payable to the commissioner, for the
4 enforcement of this act. If the commissioner finds that a violation
5 occurred despite the exercise of due care, the commissioner may
6 issue a warning instead of imposing an administrative fine.

7 (20) The commissioner shall advise the attorney general of the
8 failure of a person to pay an administrative fine imposed under
9 this section. The attorney general may bring an action in a court
10 of competent jurisdiction for the failure to pay an administrative
11 fine imposed under this section.

12 (21) Applicable provisions of the revised judicature act of
13 1961, 1961 PA 236, MCL 600.101 to ~~600.9948~~ **600.9947**, apply to civil
14 actions filed pursuant to this section.