

SENATE BILL No. 1009

July 16, 2014, Introduced by Senator PAPPAGEORGE and referred to the Committee on Regulatory Reform.

A bill to amend 1968 PA 251, entitled
"Cemetery regulation act,"
by amending section 16 (MCL 456.536), as amended by 2010 PA 326.

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),~~ **SUBSECTIONS**
9 **(2) AND (3),** money in the endowment and perpetual care trust fund

1 shall not be commingled with any other money or trust accounts. The
2 cemetery shall report annually before July 1 of each year, on forms
3 approved and furnished by the commissioner, endowment and perpetual
4 care trust fund information required to be reported to the
5 commissioner by other statutes and information regarding the funds
6 as the commissioner considers pertinent in the public interest. A
7 cemetery applying to the commissioner as authorized by other
8 statutes for an endowment and perpetual care trust fund deposit
9 modification or waiver shall be assessed the actual expenses for an
10 examination or 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, **BUT** only under **ALL OF** the following
14 circumstances:

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

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

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

26 (3) Notwithstanding subsection (2), other comparable methods
27 of bundling or pooling of trust or escrow funds for investment

1 purposes ~~may be~~ **ARE** permissible upon terms and conditions approved
2 in writing by the commissioner ~~and only~~ after the commissioner is
3 reasonably satisfied that the title to, character of, and
4 accounting for funds held in trust or escrow is preserved.

5 (4) Not later than January 1, 2010, the irrevocable endowment
6 and perpetual care trust fund shall be established, or
7 reestablished, with 1 or more regulated financial institutions with
8 trust powers that shall be the trustee of the portion of the fund
9 allocated to it. **NOT LATER THAN JANUARY 1, 2015, A NEW OR EXISTING**
10 **IRREVOCABLE ENDOWMENT AND PERPETUAL CARE TRUST FUND MAY BE**
11 **ESTABLISHED OR REESTABLISHED WITH 2 OR MORE INDIVIDUALS ACTING AS**
12 **TRUSTEES OF THE PORTION OF FUND ALLOCATED TO THEM. THE INDIVIDUALS**
13 **ACTING AS TRUSTEES MAY BE OFFICERS OR DIRECTORS OF THE CEMETERY.**
14 The cemetery shall enter ~~into agreements of~~ **AN** irrevocable trust
15 ~~agreements with each trustee.~~ **AGREEMENT WITH THE TRUSTEE OR**
16 **TRUSTEES OF EACH PORTION OF THE FUND.** Those agreements shall
17 provide that ~~the investing of the assets~~ **ASSET INVESTMENTS** are
18 subject to the Michigan prudent investor rule as set forth in
19 sections 1501 to 1512 and 7803 of the estates and protected
20 individuals code, 1998 PA 386, MCL 700.1501 to 700.1512 and
21 700.7803, except that the agreement shall not be modified or
22 amended, as allowed under sections 1502(2) and 7105 of the estates
23 and protected individuals code, 1998 PA 386, MCL 700.1502 and
24 700.7105, to provide less than the standard of care in the prudent
25 investor rule. The cemetery shall notify the commissioner, in
26 writing, not later than 14 days before the effective date of an
27 appointment of a trustee. The cemetery may remove and replace a

1 trustee at any time, subject to the consent of the commissioner,
2 and subject to the terms of the cemetery's agreement with the
3 trustee. The fees and costs of the trustee may, in accordance with
4 the terms of the trust agreement, be paid from the principal of the
5 trust. A cemetery that establishes its irrevocable endowment and
6 perpetual care trust with 1 or more regulated financial
7 institutions with trust powers, and that does not reserve, retain,
8 or otherwise exercise any power of direction of specific
9 investments, is not liable for any deficiencies in the irrevocable
10 endowment and perpetual care trust caused by performance of the
11 investments. A cemetery may reserve the right to recommend, to a
12 trustee, an investment advisor ~~, WHO IS~~ registered with the
13 securities and exchange commission under the investment advisers
14 act of 1940, 15 USC 80b-1 to 80b-21, or under the uniform
15 securities act (2002), 2008 PA 551, MCL 451.2101 to 451.2703, to
16 advise the trustee in the trustee's decisions on asset allocation,
17 investment managers, and investments. ~~, except that a~~ **HOWEVER, THE**
18 trustee is not required to heed such **FOLLOW THE** advice **OF THE**
19 **INVESTMENT ADVISOR**. ~~Alternatively, and notwithstanding any other~~
20 ~~provisions of this section, and at all times subject to the~~
21 ~~Michigan prudent investor rule, a cemetery may direct the trustees~~
22 ~~to make certain investments, provided that the trust is a named~~
23 ~~beneficiary of fiduciary liability insurance covering the~~
24 ~~cemetery's or other fiduciaries' actions in an amount equal to 100%~~
25 ~~of the amount so directed. Proof of the fiduciary liability~~
26 ~~coverage shall be provided not less than annually to the~~
27 ~~commissioner, in a form to be determined by the commissioner,~~

1 ~~before any direction being given. The commissioner or the attorney~~
2 ~~general may prosecute a claim against the fiduciary liability~~
3 ~~insurance on behalf of the trust. The trustees are not liable, or~~
4 ~~otherwise punishable, for complying with the direction of~~
5 ~~investments except that the trustees shall retain custody of all~~
6 ~~the investments.~~

7 (5) Beginning January 12, 2009, an irrevocable endowment and
8 perpetual care trust fund shall be created by the deposit of at
9 least \$50,000.00 into the fund before any sale of burial rights,
10 entombment rights, or columbarium rights is made.

11 (6) Each month, not less than 15% of all proceeds received
12 during the previous month from the sales of burial rights,
13 entombment rights, or columbarium rights shall be deposited with
14 the trustee for inclusion in the endowment and perpetual care trust
15 fund. ~~NO~~**THE** total deposit for a single burial right sale or
16 assignment shall **NOT** be less than \$20.00. A cemetery may apply to
17 the commissioner for a modification of the minimum deposit
18 requirement. The commissioner shall take testimony and investigate
19 as he or she considers necessary and if the commissioner determines
20 that the applicant's endowment and perpetual care trust fund will
21 generate sufficient income to meet all current costs of keeping the
22 applicant's cemetery in good condition, the commissioner may modify
23 the minimum deposit requirement. A cemetery applying to the
24 commissioner for a modification of the endowment and perpetual care
25 trust fund deposit requirements shall be assessed the actual costs
26 for the commissioner's examination and investigation. Excess money
27 in the fund may be applied by a cemetery against future deposits

1 and shall be annually reported to the commissioner in a manner
2 prescribed by the commissioner.

3 (7) The commissioner shall require each person engaged as
4 agent or seller in the selling of burial rights, entombment rights,
5 or columbarium rights owned by a party other than a cemetery or
6 corporation subject to the irrevocable endowment and perpetual care
7 trust fund requirements of this act and other laws ~~to~~ to deposit 15%
8 of all gross proceeds received from the sales of those rights into
9 the irrevocable endowment and perpetual care trust fund of the
10 cemetery in which the rights are located if an irrevocable
11 endowment and perpetual care trust fund exists for that cemetery. A
12 deposit required to be made by those persons shall be modified or
13 waived if the cemetery has received an irrevocable endowment and
14 perpetual care trust fund deposit modification or waiver approved
15 by the commissioner. The total deposit for a single adult burial
16 right sale or assignment shall not be less than \$20.00.

17 (8) Interest or income from the money in the endowment and
18 perpetual care trust fund shall be used exclusively for endowment
19 and perpetual care. No portion of the interest or income may be
20 used directly or indirectly for salaries or other payments to the
21 officers, directors, partners, members, or managers of the entity
22 owning the cemetery. Withdrawals of accumulated interest or income
23 from the endowment and perpetual care trust fund may be authorized
24 by the trustee, and ~~such~~ **THE** withdrawals shall be documented in the
25 manner provided by rule of the commissioner. A cemetery shall
26 maintain records showing that interest from the endowment and
27 perpetual care trust fund is used exclusively for endowment and

1 perpetual care. The trustees are not responsible for ascertaining
2 that money paid to the cemetery is expended for the limited
3 purposes permitted by this subsection.

4 (9) Subject to subsection (17), a cemetery that is required to
5 register pursuant to this act and an agent authorized by a cemetery
6 or acting on its behalf under an agreement or sales contract to
7 sell cemetery merchandise or cemetery services shall establish a
8 merchandise trust account and deposit a percentage of the gross
9 proceeds received from the sales as determined by the commissioner.
10 The merchandise trust account shall be maintained exclusively for
11 the deposit of the money into a regulated financial institution
12 under the terms of a written trust agreement approved by the
13 commissioner. All documents, reports, and records regarding the
14 trust shall be kept in this state. ~~It shall be the responsibility~~
15 ~~of each~~ **EACH** registrant under this act ~~to assure~~ **SHALL ENSURE** that
16 documents relating to the merchandise trust account are provided to
17 the commissioner upon request. If a subpoena is issued to obtain
18 these documents, the registrant shall pay all costs related to
19 obtaining the documents. ~~The money~~ **MONEY** shall be deposited **IN THE**
20 **MERCHANDISE TRUST ACCOUNT** not later than the month following its
21 receipt.

22 (10) Subject to subsection (17), the total deposits to a
23 merchandise trust for the sale of cemetery burial vaults or other
24 outside containers, other than crypts installed underground and
25 sold as part of a cemetery lot, shall at all times be not less than
26 the greater of \$100.00 per vault or outside container or 130% of
27 the total costs of the containers covered by the trust. Money

1 deposited in connection with a sale shall be repaid within 30 days
2 upon written demand of the purchaser. A burial vault shall be
3 installed only at need or by separate written authorization of the
4 purchaser. The cemetery shall have the right to withdraw the amount
5 on deposit for the delivered vault or outside container.

6 (11) Subject to subsection (17), a contract or agreement made
7 with a purchaser of cemetery merchandise and cemetery services
8 shall contain a complete description of the cemetery merchandise
9 purchased and of the cemetery services to be rendered.

10 (12) The commissioner shall require the cemetery owner or
11 operator to report annually before July 1 of each year on forms
12 provided by the commissioner. The reports shall contain information
13 as the commissioner considers necessary to ascertain that the
14 requirements of this act and rules promulgated under this act are
15 being implemented. Subject to approval of the department, the
16 cemetery owner or operator may ask for an extension not to exceed
17 90 days to submit the report required by this subsection. All
18 reports required by this subsection and subsection (13) shall
19 include a sworn statement by the cemetery owner or operator that
20 includes **ALL OF** the following:

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

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

27 (c) Based on the operator's or owner's knowledge, that the

1 report fairly presents all material information regarding the
2 financial condition of the endowment and perpetual care trust fund
3 or merchandise trust accounts.

4 (d) That the signing operators or owners are responsible for
5 establishing and maintaining internal controls; have designed those
6 internal controls to ensure the accuracy of material information
7 relating to the condition of the endowment and perpetual care trust
8 fund or merchandise trust accounts; have evaluated the
9 effectiveness of the internal controls within 90 days before the
10 issuance of the report; and have included information evaluating
11 the effectiveness of those internal controls.

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

16 (a) Beginning and ending balances.

17 (b) Receipts from the sale of burial, entombment, and
18 columbarium rights.

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

20 (d) Itemized payments of interest or income.

21 (e) Documentation that interest was utilized solely for
22 endowment care.

23 (14) If, after an audit by the commissioner's staff, a deficit
24 in the amount of required deposits to ~~the-A trust funds-FUND~~ is
25 found, the commissioner may assess a penalty in the amount allowed
26 under this act. The cemetery entity may request an administrative
27 hearing before the commissioner or a hearing officer designated by

1 the commissioner within 30 days after being notified of a deficit
2 by the commissioner. If, following the administrative hearing, the
3 commissioner determines that a deficit does exist, an additional
4 penalty may be assessed each month on the unpaid monthly balance
5 until the deficit is paid in full.

6 (15) In addition to all other remedies at law or in equity,
7 the attorney general and the circuit court of the county in which
8 the cemetery is located have all the powers and jurisdiction
9 granted to the attorney general and court as to trusts covered by
10 1915 PA 280, MCL 554.351 to 554.353. The remedies granted include
11 all endowment and perpetual care trust funds without regard to
12 uncertainty or indefiniteness of beneficiaries.

13 (16) All fees, charges, and penalties, or other money from any
14 source, collected under this act, other than fines prescribed in
15 section 21, shall be paid to the commissioner. Upon receipt, the
16 commissioner shall remit money received to the department of
17 treasury for deposit in the general fund of this state.

18 (17) Any preneed contracts for cemetery merchandise or
19 services entered into on or after January 1, 2005 are subject to
20 the prepaid funeral and cemetery sales act, 1986 PA 255, MCL
21 328.211 to 328.235.

22 (18) Not less than 7 days before 30% of the endowment and
23 perpetual care or perpetual care funds established under this act
24 are moved from an account or otherwise engaged in some type of
25 financial transaction or investment, the cemetery owner or operator
26 shall notify the commissioner of the transaction on appropriate
27 forms that the commissioner shall authorize. The commissioner may

1 allow the submission of a notification up to 7 days after the
2 transaction, for good cause shown. Failure to comply with this
3 subsection is ~~considered~~ a violation of this act.

4 (19) The commissioner, upon finding after notice and an
5 opportunity for a hearing pursuant to the administrative procedures
6 act of 1969, 1969 PA 306, MCL 24.201 to 24.328, that a cemetery
7 owner or operator has failed to timely submit a report required
8 under subsections (12) and (13), regardless of whether he or she
9 acted alone or through an employee or agent, may impose an
10 administrative fine, payable to the commissioner, for the
11 enforcement of this act. If the commissioner finds that a violation
12 occurred despite the exercise of due care, the commissioner may
13 issue a warning instead of imposing an administrative fine.

14 (20) The commissioner shall advise the attorney general of the
15 failure of a person to pay an administrative fine imposed under
16 this section. The attorney general may bring an action in a court
17 of competent jurisdiction for the failure to pay an administrative
18 fine imposed under this section.

19 (21) Applicable provisions of the revised judicature act of
20 1961, 1961 PA 236, MCL 600.101 to 600.9947, apply to civil actions
21 filed pursuant to this section.