

**HOUSE OF REPRESENTATIVES STAFF ANALYSIS**

**BILL #:** PCS for HB 423 Cemeteries  
**SPONSOR(S):** Insurance & Banking Subcommittee  
**TIED BILLS:** **IDEN./SIM. BILLS:**

<b>REFERENCE</b>	<b>ACTION</b>	<b>ANALYST</b>	<b>STAFF DIRECTOR or BUDGET/POLICY CHIEF</b>
Orig. Comm.: Insurance & Banking Subcommittee		Emmanuel	Cooper

**SUMMARY ANALYSIS**

Chapter 497, F.S., regulates cemeteries, human burials, human cremation, and funeral directors through the Division of Funeral, Cemetery and Consumer Services, within the Department of Financial Services. In order to be licensed, new private cemeteries must be formed as a corporation, partnership, or limited liability company, have at least 30 acres, establish a care and maintenance trust with a starting amount of \$50,000, and make certain financial disclosures. The care and maintenance trust is then funded through a set portion of all future costs and thereafter increases directly proportional to use.

Some cemeteries are specifically exempted by statute from these requirements, although certain provisions apply regardless of whether or not a cemetery is exempt. Currently, all religious institutions founded prior to 1971 as well as those that are less than 5 acres are exempted. The statute defines religious institutions as those that qualify for 501(c)(3) status from the IRS.

This Proposed Committee Substitute (PCS) creates an exemption from many of the provisions of ch. 497 for religious institutions to build a cemetery over 5 and up to 60 acres provided the institution establishes a care and maintenance trust fund of \$2,000,000 and limits the burial rights to members of the institution and their families.

The PCS should not have any fiscal impact on local governments. Regarding any fiscal impact to the state, the Department of Financial Services has indicated that the PCS will have some unspecified administrative costs. To the extent that this PCS allows the creation of new cemeteries, there will be more competition in the marketplace.

The PCS provides an effective date of July 1, 2014.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Statutory Background

Chapter 497, F.S., otherwise known as “The Florida Funeral, Cemetery, and Consumer Services Act” provides for the regulation of cemeteries, columbaria, mausoleums, human burials, human cremation, and funeral directors.<sup>1</sup>

Currently, the Division of Funeral, Cemetery and Consumer Services (FCCS) is tasked with the administration of the overall licensing process of the industry.<sup>2</sup> In that regard, FCCS conducts investigations, financial examinations, and inspections of all licensed cemeteries.

FCCS is partially governed by an appointed board. The Board of Funeral, Cemetery, and Consumers Services is comprised of 10 members, 9 of whom are appointed by the Governor from nominations made by the CFO.<sup>3</sup> Unless the cemetery falls under an exemption, the Board has ultimate authority to approve or deny applications for cemeteries.<sup>4</sup>

#### Requirements to Build a New Licensed Cemetery

Currently, cemeteries fall into two categories; those cemeteries, typically for-profit, that are licensed through FCCS and those that are exempted from most regulation through a specific statutory exception. For those seeking to open a licensed cemetery, the entity must meet certain requirements, including corporate structure, trust, and financial disclosure requirements.

The law requires that a “cemetery license may only be applied for and issued to a corporation, partnership, or limited liability company”.<sup>5</sup> For religious institutions, not all faiths organize as one of these legal entities. For example, the Catholic Church organizes itself in Florida as a corporation sole,<sup>6</sup> which is embodied in the Bishop of each diocese.<sup>7</sup> Currently, the Catholic Church, as presently organized, believes that it is unable to establish a new licensed cemetery without creating a new legal entity.<sup>8</sup>

In addition to being a corporation, partnership, or limited liability company, all newly licensed cemeteries must create a care and maintenance trust fund with an initial capital of \$50,000.<sup>9</sup> After the initial investment, the trust fund funded by a portion of every burial performed (the greater of 10% of the arrangement or \$25) or prearrangement sold (calculated as 75%).<sup>10</sup> Because of this provision, the care and maintenance trust funds are directly proportional to the use of the cemetery rather than geographic

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<sup>1</sup> s. 497.001, F.S.

<sup>2</sup> s. 497.151(11), F.S.

<sup>3</sup> s. 497.101(1), F.S.

<sup>4</sup> s. 497.103(j), F.S.

<sup>5</sup> s. 497.141(12)(c), F.S.

<sup>6</sup> 18 C.J.S. Corporations § 15, p. 393 says that corporation sole is composed of a single member and his successors in the office.

<sup>7</sup> See *Hurley v. Werly*, 203 So. 2d 530 (Fla. 2d DCA 1967), summarizing *Reid v. Barry*, 112 So. 846 (Fla. 1927) (defining a corporate sole as a “single person, who is made a body corporate and politic, in order to give him some legal capacities and advantages, and especially that of perpetuity, which, as a natural person, he cannot have. A bishop, dean, parson, and vicar are given in the English books as instances of Sole Corporation; and they and their successors in perpetuity take the corporate property and privileges.”) In *Barry*, the Florida Supreme Court held that “[b]oth our Constitution and our statutes provide for the means for the formation of corporations aggregate, but we find nothing in either Constitution or statutes which either expressly or impliedly repeals the ancient common-law institution of the ‘corporation sole.’”

<sup>8</sup> Email exchange with Florida Catholic Conference of Bishops, 2/20/2014. On file with the Insurance & Banking Subcommittee staff.

<sup>9</sup> s. 497.263(3)(a), F.S.

<sup>10</sup> s. 497.268(1)(a), F.S.

size. According to the FCCS, the average licensed cemetery has a trust balance of around \$1.6 million.<sup>11</sup> Some cemeteries in larger metropolitan areas have trust funds in excess of \$6 million.<sup>12</sup>

Once created, a care and maintenance trust fund may only be used for care and maintenance of the cemetery.<sup>13</sup> Financial reports are required to be turned into FCCS biannually for the first two years of the cemetery's existence and then annually thereafter.<sup>14</sup> FCCS is authorized to seek more records if they deem it necessary.

In addition to the trust funds, licensed cemeteries are required to pay into a statewide emergency fund. This fund acts as an insurance policy of last resort for the whole community.<sup>15</sup>

After obtaining a license, DFS is tasked with collecting an annual license fee as determined by statute. The fee structure is based on gross sales, which ranges from a \$250 fee for those cemeteries of less than \$25,000 in gross sales to a statutory maximum of \$4900 for cemeteries that exceed \$5,000,000 in gross revenue.<sup>16</sup>

## Existing Exemptions

Currently, there are several categorical exemptions for certain cemeteries from many, but not all, of the provisions of Chapter 497. Some of the provisions of Chapter 497 apply to all cemeteries, regardless of designation. The excepted cemeteries can be divided into two general categories: non-religious and religious cemeteries. Section 497.100(63), F.S., defines a religious institution as "an organization formed primarily for religious purposes that has qualified for exemption from federal income tax as an exempt organization under the provisions of s. 501(c)(3) of the Internal Revenue Code of 1986, as amended". Of the religious institutions, exempted cemeteries can be further divided into those exempted due to age and those exempted due to size.

1. Non-religious institutions: The nonreligious cemeteries that are excluded under these exemptions are as follows: all county and city cemeteries<sup>17</sup>, all single level community and nonprofit cemeteries that sell burial spaces or merchandise<sup>18</sup>, all family cemeteries of less than 2 acres that do not sell burial spaces or merchandise<sup>19</sup>, and any columbaria located on the main campus of a university<sup>20</sup>.
2. Religious institutions existing prior to 1971: All religious cemeteries dedicated prior to June 23, 1971 are exempt from the statutory requirements.<sup>21</sup> This includes several large cemeteries in South Florida. The statute allows for any religious cemetery operating under this exemption that in a county that had a population of 1.3 million in 1996 to open one additional cemetery under this exemption in 2020.<sup>22</sup> In practice, this exemption only applies to Miami-Dade County.<sup>23</sup>
3. Religious institutions exempted based on size: For those religious cemeteries that were not grandfathered in, exceptions exist for cemeteries that are less than 5 acres that are single-level ground burials<sup>24</sup>, sufficiently funded mausoleums<sup>25</sup> up to 2 acres that are immediately

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<sup>11</sup> Email exchange with DFS, 3/4/2014. On file with the Insurance & Banking Subcommittee staff.

<sup>12</sup> Id.

<sup>13</sup> s. 497.267, F.S.

<sup>14</sup> s. 497.269, F.S.

<sup>15</sup> Conversation with Elder Care Services, 3/12/2014. Notes on file with the Insurance & Banking Subcommittee staff.

<sup>16</sup> s. 497.265, F.S.

<sup>17</sup> s. 497.260(1)(b), F.S.

<sup>18</sup> s. 497.260(1)(c), F.S.

<sup>19</sup> s. 497.260(1)(g), F.S.

<sup>20</sup> s. 497.260(1)(i), F.S.

<sup>21</sup> s. 497.260(1)(d), F.S.

<sup>22</sup> s. 497.260(4), F.S.

<sup>23</sup> See *Countywide, Unincorporated, and Incorporated Total: 1972-2013*, Office of Economic & Demographic Research, the Florida Legislature at <http://edr.state.fl.us/Content/population-demographics/data/> (Last visited January 1, 2014).

<sup>24</sup> s. 497.260(a), F.S.

contiguous to the religious institution<sup>26</sup>, and a columbarium<sup>27</sup> of less than one-half acre which is immediately contiguous to the religious institution<sup>28</sup>. With careful planning, a religious institution would be able to utilize all three of these exceptions, for a grand total of 7.5 acres of memorial space. Even though the term “cemetery” is defined by statute to include related mausoleums and columbaria,<sup>29</sup> this section of exceptions expand the area in practice by drafting around the definition.

Section 497.260(2), F.S., specifies that all cemeteries in this state, regardless of exemption status, are subject to the following requirements:

- Prohibits discrimination by race, color, creed, marital status, sex or national origin;<sup>30</sup>
- Requires the cemetery to keep records regarding burials;<sup>31</sup>
- Regulates solicitation of sales of burial rights, merchandise or services by licensees;<sup>32</sup>
- Provides a mechanism to record human remains in the county of records;<sup>33</sup>
- Forbids a cemetery company from charging a fee for the installation of a monument or marker not purchased from it;<sup>34</sup>
- Prohibits sellers of a grave space from tying that purchase to the purchase of a monument;<sup>35</sup> and
- Outlines provisions for counties and municipalities in dealing with an abandoned cemetery.<sup>36</sup>

### **Preneed Services**

According to statute, a preneed contract is any arrangement or method, of which the provider of funeral merchandise or service has actual knowledge, whereby any person agrees to furnish funeral merchandise or service in the future.<sup>37</sup> Generally, those wishing to sell preneed contracts must be licensed through FCCS.<sup>38</sup> An individual does not need a funeral director’s license in order to sell pre-need policies.

Pre-need arrangements are prepaid transactions for future promises that take place once the beneficiary is deceased. Many of those seeking these arrangements may be elderly or infirm. In many cases, the market value of a funeral home is determined by physical assets plus existing preneed contracts with the business. Those seeking pre-need arrangements can be a target for unscrupulous individuals.

### **Effect of the Proposed Committee Substitute (PCS)**

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<sup>25</sup> Section 497.005 (42), F.S., defines a “mausoleum” as “a structure or building that is substantially exposed above the ground and that is intended for human remains.”

<sup>26</sup> s. 497.260 (h), F.S.

<sup>27</sup> Section 497.005 (16), F.S., defines a “columbarium” as “a structure or building that is substantially exposed above the ground and that is intended to be used for the interment of cremated remains.”

<sup>28</sup> s. 497.260 (f), F.S.

<sup>29</sup> Section 497.005 (11), F.S., defines a “cemetery” as “a place dedicated to and used or intended to be used for the permanent interment of human remains or cremated remains. A cemetery may contain land or earth interment; mausoleum, vault, or crypt interment; a columbarium, ossuary, scattering garden, or other structure or place used or intended to be used for the interment or disposition of cremated remains; or any combination of one or more of such structures or places.”

<sup>30</sup> s. 497.152(1)(d), F.S.

<sup>31</sup> s. 497.276(1), F.S.

<sup>32</sup> s. 497.164, F.S.

<sup>33</sup> s. 497.2765, F.S.

<sup>34</sup> s. 497.278, F.S.

<sup>35</sup> s. 497.280, F.S.

<sup>36</sup> s. 497.284, F.S.

<sup>37</sup> s. 497.005 (56), F.S.

<sup>38</sup> See s. 497.466, F.S.

The PCS amends Chapter 497 to allow religious institutions to construct an exempted cemetery of between 5 and 60 acres, provided that the cemetery has \$2,000,000 set aside in a financial institution and limits burial rights to members of the institution and their families. The PCS also allows these exempt cemeteries to sell a limited amount of preneed products.

The minimum of \$2,000,000 set aside in reserves must be submitted to FCCS under oath and must identify the financial institution and the account number where the funds are maintained.

This PCS does not apply to those religious cemeteries who are also less than 5 acres.

The PCS also limits burial rights to “members of the religious institution and their families”. The term “families” is not defined in the PCS. One of the PCS proponents considers family members to be those “in the direct lineal chain, including parents and children and also includ[ing] siblings and spouse”.<sup>39</sup> According to FCCS, the term “families” is not defined by Chapter 497 or by DFS rule.<sup>40</sup>

The Florida Statutes currently provide at least two definitions for families, found in Chapter 732 regarding estate definitions and in Chapter 63 regarding the adoption definitions. Chapter 732 defines familial relationships for the purposes of intestate succession and includes provisions for mixed families, adoptions, and those children born out of wedlock. For the purposes of adoption, the Florida Statutes has defined a “close relative” as a “brother, sister, grandparent, aunt, or uncle”.<sup>41</sup> The adoption statute assumes the deaths of both parents, which is why spouses, fathers, and mothers are not included.

#### B. SECTION DIRECTORY:

**Section 1.** Amends s. 497.260, F.S., relating to cemeteries.

**Section 2.** Amends s. 497.452, F.S., relating to preneed license requirements.

**Section 3.** Provides an effective date July 1, 2014.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

##### 1. Revenues:

None.

##### 2. Expenditures:

The Department of Financial Services has indicated that the PCS will have some unspecified administrative costs.

#### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

##### 1. Revenues:

None.

##### 2. Expenditures:

None.

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<sup>39</sup> Email exchange with Florida Catholic Conference of Bishops, 2/20/2014. On file with the Insurance & Banking Subcommittee staff.

<sup>40</sup> Conversation with FCCS, 2/24/14. Notes on file with the Insurance & Banking Subcommittee staff.

<sup>41</sup> s. 63.172(2), F.S.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The demand for burials in Florida private cemeteries has decreased as a percentage over the past few years.<sup>42</sup> This has been attributed to the rise of cremation rates and federal cemeteries. The increase of cremation paired with the expansion of three new federal veterans' cemeteries in Florida has led FCCS to express concern regarding the financial solvency of any new cemeteries.<sup>43</sup>

To the extent that a religious cemetery with a lower regulatory burden will compete for business with private cemeteries, there may be an impact on competition in the private sector. With more cemeteries comes the risk of having more cemeteries going out of business, leaving administrative costs in perpetuity.

D. FISCAL COMMENTS:

None.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This PCS does not appear to: require counties or municipalities to spend funds or take an action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Currently, there are no provisions in the law to limit the ability of any exempted cemetery operating under any provision to contract with third parties for services relating to the industry. There are instances of large religious cemeteries in other states contracting out cemetery functions and maintenance to third party funeral companies.<sup>44</sup> A similarly contracted entity would have a competitive advantage in the current regulatory environment.

### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

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<sup>42</sup>See FCCS's Bill Analysis, SB 512. On file with the Insurance & Banking Subcommittee staff.

<sup>43</sup> Id.

<sup>44</sup> Archdiocese of Philadelphia Announces Outsourced Management Agreement and Long-term Lease with Stonemor L.P. Regarding Catholic Cemeteries" Press Release, Archdiocese of Philadelphia (Sept 26, 2013) *available at*

<http://archphila.org/press%20releases/pr002245.php>

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