

ACT 101

H.B. NO. 227

A Bill for an Act Relating to Cemeteries and Mortuaries.

*Be It Enacted by the Legislature of the State of Hawaii:*

SECTION 1. Section 441-1, Hawaii Revised Statutes, is amended to read as follows:

**“§441-1 Definitions.** As used in this chapter:

[“Cemetery” means a place dedicated to and used or intended to be used for the permanent interment of human remains. It may be either a burial park, for earth interment; a mausoleum for vault or crypt interments; a structure or place used or intended to be used for the interment of cremated remains; or any combination of one or more thereof.

“Cemetery authority” means any person who undertakes to establish, maintain, manage, operate, improve, or conduct a cemetery; the interring of human remains, or the care, preservation, and embellishment of cemetery property, or to sell pre-need interment service, whether or not the person undertakes such activity for profit.

“Mausoleum crypt” means a chamber or space in a structure or building of sufficient size, used or intended to be used, to entomb human remains.

“Niche” means recess of space in a structure or plot of each used or intended to be used for the permanent inurnment therein of the cremated remains of one or more deceased persons.

“Perpetual care” by whatever term denominated by a cemetery authority, including, but not limited to endowment care, endowment fund care, and free maintenance, means keeping the sod in repair, keeping all places wherein

interments have been made in proper order, caring for the trees and shrubs, and the general maintenance, care, and embellishment of a cemetery, regularly and continually without limitation as to time.

"Perpetual care cemetery" means any cemetery or section of a cemetery, the plots, crypts, or niches of which are sold or disposed of, or are offered for sale or disposition, upon the representation that the plots, crypts, or niches will receive perpetual care.

"Perpetual care fund" means a fund separately maintained to provide for the perpetual care of a cemetery in conformity with this chapter.

"Plot" or "interment space" means a grave or space in a cemetery sold or otherwise disposed of to one or more persons, used or intended to be used, for the permanent interment therein of the remains of one or more deceased persons.

"Cemetery property" means any property, or part or interest therein, dedicated to, used or intended to be used for, the permanent interment of human remains. It may be a plot or plots in a burial park for earth interment; a place or places in a mausoleum for vault or crypt interment; one or more niches, recesses, or other receptacles for the interment of cremated remains; or any combination of one or more thereof.

"Person" means an individual, partnership, corporation, county, association, or any other group however organized.

"Pre-need funeral authority" means any person engaged in the solicitation of the public in the business of selling pre-need funeral services.

"Pre-need interment services" means the furnishing of opening and closing services and related commodities, including but not limited to vaults, markers and vases, which services are to be rendered more than ninety days after the sale or offer to sell, whichever occurs first.

"Pre-need funeral services" means the furnishing of funeral services and related commodities, including but not limited to caskets and urns, which services are to be rendered more than ninety days after the sale or offer to sell, whichever occurs first.

"Funeral services" means arranging for or providing for pick up of human remains, embalming, placing the same on display, or otherwise providing for final disposition of human remains.

"Mortuary authority" means any person who undertakes to furnish funeral services and related commodities.

"Director" means the director of the department of commerce and consumer affairs.

"Department" means the department of commerce and consumer affairs.]

"Cemetery" means any property, or part interest therein, dedicated to and used or intended to be used for the permanent interment of human remains. It may be a burial park with one or more plots, for earth interment; a mausoleum with one or more vaults or crypt interments; a structure or place with one or more niches, recesses, or other receptacles for the interment of cremated remains, or any combination of one or more thereof.

"Cemetery authority" means any person who undertakes to establish, maintain, manage, operate, improve, or conduct a cemetery to inter human remains; or offers perpetual care of the cemetery; or sells or holds money in trust for pre-need interment services, whether or not the person undertakes such activity for profit; provided that this shall not apply to the designated trustee of the funds.

“Cemetery property” means any property, or part or interest therein, dedicated to, used or intended to be used for, the permanent interment of human remains. It may be a plot or plots in a burial park for earth interment; a place or places in a mausoleum for vault or crypt interment; one or more niches, recesses, or other receptacles for the interment of cremated remains; or any combination of one or more thereof.

“Department” means the department of commerce and consumer affairs.

“Director” means the director of the department of commerce and consumer affairs.

“Funeral services” means arranging for or providing for pick up of human remains, embalming, placing the same on display, or otherwise providing for final disposition of human remains.

“Interment” means the disposition of human remains by cremation and inurnment, entombment, or burial in a place used, or intended to be used, and dedicated for cemetery purposes.

“Mausoleum crypt” means a chamber or space in a structure or building of sufficient size, used or intended to be used, to entomb human remains.

“Mortuary authority” means any person who undertakes to furnish funeral services and related commodities.

“Niche” means a recess of space in a structure or plot of earth used or intended to be used for the permanent inurnment therein of the cremated remains of one or more deceased persons.

“Perpetual care” by whatever term denominated by a cemetery authority, including but not limited to endowment care, endowment fund care, and free maintenance, means keeping the sod in repair, keeping all places wherein interments have been made in proper order, caring for the trees and shrubs, and the general maintenance, care, preservation and embellishment of a cemetery, regularly and continually without limitation as to time.

“Perpetual care cemetery” means any cemetery or section of a cemetery, the plots, crypts, or niches of which are sold or disposed of, or are offered for sale or disposition, upon the representation that the plots, crypts, or niches will receive perpetual care.

“Perpetual care fund” means a fund separately maintained to provide for the perpetual care of a cemetery in conformity with this chapter.

“Person” means an individual, partnership, corporation, county, association, or any other group however organized.

“Plot” means a grave or space in a cemetery sold or otherwise disposed of to one or more persons, used or intended to be used, for the permanent interment therein of the remains of one or more deceased persons.

“Pre-need funeral authority” means any person who is engaged in the business of selling pre-need funeral services, or holds money in trust to provide for future funeral services; provided that this shall not apply to the designated trustee of the funds.

“Pre-need funeral service” means arranging for the pick up of human remains, embalming, placing the same on display, furnishing of funeral services and related commodities, including but not limited to caskets and urns, or otherwise providing for the final disposition of human remains, which services are to be rendered at some future date.

“Pre-need interment services” means the furnishing of opening and closing services and related commodities, including but not limited to vaults, markers, and vases, which services are to be rendered at some future date.

"Pre-need trust" means a fund separately maintained to provide for the future services agreed to or contracted for by the pre-need funeral service plan participant or the pre-need interment service plan participant.

"Trustee" means a bank or a trust company, authorized to transact such business in the state, or a board of trustees appointed by the governing body of the cemetery and pre-need funeral authority, designated as trustee pursuant to a written trust agreement under the terms of this chapter for the funds deposited by an authority. The board of trustees may consist of three or more members; provided that no member of the board shall be affiliated with the authority which appointed the board."

SECTION 2. Section 441-19, Hawaii Revised Statutes, is amended to read as follows:

**"§441-19 Powers and duties of director.** In addition to any other duties and powers granted by this chapter the director shall, pursuant to chapter 91:

- (1) Grant licenses to [mortuary,] cemetery[,] and pre-need funeral authorities pursuant to this chapter;
- (2) Make, amend, or repeal such rules [and regulations] as the director deems proper to fully effectuate this chapter and carry out the purpose thereof, which purpose is the protection of the general public in its acquisitions of cemetery property, pre-need interment services, at-need funeral services, and pre-need funeral services. The rules [and regulations] may forbid acts or practices deemed by the director to be detrimental to the accomplishment of the purpose of this chapter, and the rules [and regulations] may require mortuary, cemetery, and pre-need funeral authorities to make reports to the director containing such information as will better enable the director to enforce this chapter and the rules [and regulations], or as will better enable the director from time to time to amend the rules [and regulations] to more fully effectuate the purpose of this chapter, and further, the rules [and regulations] may require mortuary, cemetery, and pre-need funeral authorities to furnish reports to their clients containing such matters of information as the director deems necessary to promote the purpose of this chapter; provided that this enumeration of specific matters which may properly be made the subject of rules [and regulations] shall not be construed to limit the director's broad general power to make all rules [and regulations] necessary to fully effectuate the purpose of this chapter;
- (3) Enforce this chapter and rules [and regulations] adopted pursuant thereto;
- (4) [Suspend] Fine, suspend, or revoke any license for any cause prescribed by this chapter, or for any violation of the rules [and regulations], and refuse to grant any license for any cause which would be ground for revocation or suspension of a license;
- (5) Report to the governor annually and at such other times and in such other manner as he may require concerning the director's activities;
- (6) Publish and distribute pamphlets and circulars containing such information as the director deems proper to further the accomplishments of the purpose of this chapter;
- (7) Investigate the actions of any person acting in the capacity of a licensee under this chapter if there is reason to believe that there

may be a violation of this chapter[.] or the rules adopted pursuant thereto."

SECTION 3. Section 441-21, Hawaii Revised Statutes, is amended to read as follows:

**"§441-21 No cemetery or pre-need funeral authority license issued when.** No cemetery or pre-need funeral authority license shall be issued:

- (1) To any person unless [he] the person has filed an application therefor;
- (2) To any person who does not possess financial integrity;
- (3) To any person unless it is a religious institution, corporation, county, or any association which has a perpetual existence;
- (4) To any person unless [he] the person files with the director a bond as required by section 441-22;
- (5) To any person failing to establish and maintain pre-need trusts and perpetual care funds as required by this chapter[.];
- (6) To any person failing to file with the director a copy of the documentation as required by either section 441-37(a) and (b) or section 441-37(a) and (c);
- (7) To any person failing to file with the director a copy of contract form as required by section 441-32.5."

SECTION 4. Section 441-22, Hawaii Revised Statutes, is amended to read as follows:

**"§441-22 Bond.** (a) [Except as provided in section 441.22.1, mortuary, cemetery, and pre-need funeral authorities shall file and maintain with the director a bond in the following amount:

- (1) Each mortuary holding more than \$5,000 in pre-need funeral funds shall post a bond in the penal sum of \$50,000; and
- (2) Each pre-need funeral authority or cemetery authority which engages in pre-need sales shall post a bond in the penal sum of \$50,000 for each new license and for the renewal of a license; provided that a cemetery authority whose gross income for the taxable year preceding the year of renewal totaled less than \$50,000 shall only be required to post a bond in the penal sum of \$5,000.]

Each cemetery or pre-need funeral authority shall file and maintain with the director a bond in the penal sum of \$50,000 for each new license and for the renewal of a license. The bond shall continue in full force and effect, and shall run concurrently:

- (1) With the period of the license and for any renewal thereof; or
- (2) With the period established by the director pursuant to the rules as the case may be, unless terminated or canceled by the surety.

The form of the bond shall be approved by the director.

(b) All bonds required by this section shall be issued by a surety company authorized to do business in the State, and shall run to the State. The bond shall be conditioned that the [mortuary, cemetery, or funeral authority] cemetery or pre-need funeral authority will faithfully, promptly, and truly account and pay over to all persons to or for whom it may sell, lease, or otherwise deal in cemetery property, pre-need interment, [at-need funeral services,] or pre-need funeral services all sums of money that may properly be due them.

(c) In addition to any other remedy, the director or any person [sustaining any] claiming to have sustained damage [resulting from] by reason of any breach of the conditions of the bond may [sue the surety] bring action on the

bond for the recovery of any damages sustained [by the person.] therefrom. The liability of the surety shall not exceed the amount of the bond issued to the establishment for which the bond was issued. [The bond shall be continuous in full force and effect, and shall run concurrently:

- (1) With the license period and for any renewals thereof; or
- (2) With the period established by the director pursuant to rules; as the case may be, unless terminated or canceled by the surety.]

(d) Termination or cancellation shall not be effective, unless notice thereof is delivered by the surety to the director at least sixty days prior to the date of termination or cancellation. The director shall forthwith give notice thereof to the [mortuary,] cemetery[, or pre-need funeral authority affected by the termination or cancellation]. The notice shall be by registered or certified mail, with request for return receipt, and shall be addressed to the establishment at the addresses shown on the records of the department. The] that the license of [any] the licensee shall be suspended upon termination or cancellation of the bond, unless prior thereto, a new bond has been filed with the director. [The form of the bond shall be approved by the director.]

(e) Failure, refusal or neglect of a licensed cemetery and pre-need funeral authority to maintain in full force and effect a bond as required by this section shall cause the automatic suspension of the license of the cemetery or pre-need funeral authority effective as of the date of expiration or cancellation of its bond. The director shall not reinstate the affected license until satisfactory proof of bond coverage is submitted to the director as required by this section. Failure to effect a reinstatement of a suspended license within sixty days of the expiration of the requirements of licensing shall cause it to be terminated, thereby forfeiting all license and biennial renewal fees. A licensee may, within fifteen days after receipt of the notification of the license termination, request an administrative hearing to review the termination pursuant to chapter 91."

SECTION 5. Section 441-22.1, Hawaii Revised Statutes, is amended to read as follows:

**"§441-22.1 Exemption.** The director shall exempt any cemetery authority from the bonding requirement and the fee requirements for license, renewal and reinstatement upon proof satisfactory to the director that it does not [actively engage in pre-need sales, or] sell for financial profit."

SECTION 6. Section 441-22.2, Hawaii Revised Statutes, is amended to read as follows:

**"§441-22.2 Pre-need trusts required.** [(a) Every cemetery or pre-need funeral authority shall maintain one or more trusts. All payments received after the recovery of acquisition costs, which shall be the lesser of thirty per cent of the contract price or the difference between the contract price and the cost of the pre-need interment or pre-need funeral services contracted to be provided, shall be deposited in such trusts within thirty days of receipt.

The administration of the trusts provided for in this section shall be as provided for perpetual care funds under sections 441-37, 441-40, 441-41, 441-42, 441-43, and 441-44.

The principal amount deposited shall not be diminished or withdrawn except in payment of the pre-need interment or pre-need funeral services contracted for and provided to the deceased purchaser or his designee or for the contractual refund to the purchaser.

(b) Based on the findings of the annual audit and the annual actuarial study, the trust administrator shall determine whether the income from the trusts should be added to the corpus.

(c) In addition to the audited financial statements required by section 441-24.5, every cemetery authority operating a perpetual care cemetery and any pre-need funeral authority or mortuary authority which engages in pre-need sales or holds moneys in trust for future funeral services shall conduct an annual independent actuarial study of the pre-need trust funds. The findings of the study conducted during each calendar year shall be submitted to the director during the month of December. The findings of the study shall include a statement by the actuary conducting the study as to whether or not, in the actuary's professional opinion, the pre-need funding requirements imposed by this section are adequate for the protection of the consuming public. The director may take such appropriate action as may be indicated by the actuarial reports submitted.] Every cemetery and pre-need funeral authority shall maintain one or more trusts for deposit of payments received from purchasers of pre-need services."

SECTION 7. Section 441-22.5, Hawaii Revised Statutes, is amended to read as follows:

"[ §441-22.5 ] Mortuary [authority; disclosure of price.], cemetery, or pre-need funeral authority; disclosure requirements, [(a) No funeral services and related commodities shall be furnished unless a mortuary authority provides to a prospective purchaser a written estimated price for the funeral services and related commodities which the prospective purchaser desires to purchase, and the purchaser approves of the funeral services and related commodities and the estimated price, and the prospective purchaser signs the estimate.

(b) No mortuary authority shall charge a price for funeral services and related commodities which is greater than the price on the estimate which the purchaser has signed, unless the purchaser requests an additional item and approves the higher price.] (a) No cemetery property, interment services, funeral services, and related commodities shall be sold unless the mortuary, cemetery, or pre-need funeral authority first satisfies the requirements stated in section 441-22.6.

(b) Every cemetery or pre-need funeral authority shall be required to provide to the purchaser of cemetery property, pre-need interment, or pre-need funeral services and related commodities a written contract which shall contain the following disclosure requirements:

- (1) The names and addresses of the authority and purchaser;
- (2) A clear and concise statement of the property, services, and related commodities to be supplied or not supplied and by whom, particularly if the authority is not to be the provider under the terms of the contract;
- (3) The purchase price of each item of property, services, and related commodities to be supplied and how the purchase price is payable;
- (4) Related costs covered under the contract;
- (5) The basis on which funds are to be deposited in trust;
- (6) Refund provisions of the contract;
- (7) The date and place of execution of the contract;
- (8) The authority's or its duly authorized agent's signature on the contract and the identification of this person by name and title; and
- (9) A statement that the written contract, when signed, shall constitute the entire agreement between the parties relative to its subject

matter and that all obligations of both parties shall be fixed and enforceable by the other parties of the contract.

(c) No mortuary, cemetery, or pre-need funeral authority shall charge a price for the cemetery property, interment, or funeral services, whether it be at-need or pre-need, which is greater than the price on the itemized price list or contract which the purchaser had signed, unless the purchaser or the purchaser's authorized representative requests an additional item, the authority discloses the price for the additional item, and the purchaser or its authorized representative approves the price for the additional item. The mortuary, cemetery, or pre-need funeral authority may charge the higher price for the additional item but shall collect in payment only that sum which is the difference between the higher price and the price listed on the itemized price list or contract which the purchaser had previously signed."

SECTION 8. Section 441-22.6, Hawaii Revised Statutes, is amended to read as follows:

"[ §441-22.6[ ] Mortuary [authority;], cemetery, or pre-need funeral authority; price list to be furnished. [(a)] Each mortuary, cemetery, or pre-need funeral authority shall provide to every prospective purchaser, for written approval, a current price list, which shall contain separately stated prices for each type of property, service, or item which is a part of the cemetery property, interment, or funeral services and related commodities which the mortuary, cemetery, or pre-need funeral authority offers.

[Any] The mortuary, cemetery, or pre-need funeral authority may use the format for a price list as established by the rules adopted by the [board.] director.

[(b) The price list specified in subsection (a) shall be provided to each prospective customer before that prospective customer approves the written estimated price, as required by section 441-22.5.]"

SECTION 9. Section 441-23, Hawaii Revised Statutes, is amended to read as follows:

"§441-23 [Revocation,] Fine, revocation, suspension, and renewal of authority licenses. The director may fine an authority, revoke any authority license, or suspend the right of the licensee to use the license, or refuse to renew any such license for any of the following causes:

- (1) Any dishonest or fraudulent act as a cemetery or pre-need funeral authority which causes substantial damage to another;
- (2) Making repeated misrepresentations or false promises through advertising or otherwise;
- (3) [Wilful violation] Violation of this chapter or the rules adopted pursuant thereto;
- (4) Commingling the money or other property of others with [his own;] that of the licensee;
- (5) Adjudicated insane or incompetent;
- (6) Selling or offering to sell any cemetery property, pre-need interment, funeral services, or pre-need funeral services based on speculation or promises of profit from resale[.];
- (7) Failing to file the actuarial study or an audited financial statement or to maintain in effect the bond as required by section 441-22; or
- (8) Failing to maintain pre-need trusts or perpetual care funds as required by this chapter.



No license shall be suspended for longer than two years and no person whose license has been revoked shall be eligible to apply for a new license until the expiration of two years."

SECTION 10. Section 441-24.5, Hawaii Revised Statutes, is amended to read as follows:

"[ ]§441-24.5[ ] Pre-need trusts and perpetual care funds; [audits;] audited financial statements. Every cemetery authority operating a perpetual care cemetery[, ] or which engages in pre-need sales or holds money in trust for pre-need interment services, and every pre-need funeral authority[, and mortuary authority] which engages in pre-need sales or holds money in trust for [future] pre-need funeral services shall [annually] submit an audited financial statement of its pre-need trusts and perpetual care funds to the [bank examiner.] director within ninety days after the close of the authority's books on a fiscal or calendar year basis."

SECTION 11. Section 441-29, Hawaii Revised Statutes, is amended to read as follows:

"§441-29 Application [fees.] for license; fees. Every applicant for [any] a license under this chapter shall file an application with the director in such form and setting forth such information as may be prescribed or required by the director and shall furnish such additional information bearing upon the issuance of the license as the director requires. Every application shall be sworn to before an officer authorized to administer oaths. [Every application shall be accompanied by an application fee of \$10.] In the case of a copartnership or corporation any officer may sign the application and verify the same on behalf of the applicant. The application shall be accompanied by an application fee, none of which is refundable, as provided in rules adopted by the director pursuant to chapter 91."

SECTION 12. Section 441-31, Hawaii Revised Statutes, is amended to read as follows:

"§441-31 Fees[, original license and biennial renewals, refunds.]; biennial renewals. (a) The fee for a cemetery or pre-need funeral authority original license [and], for reinstatement of a suspended license [shall be \$200 and], for biennial renewal [fee] of a license, and for the reissuance of a license when there has been a change in the licensee's name, shall be [\$400 except as otherwise provided in section 441-22.1.] as provided in rules adopted by the director pursuant to chapter 91. All fees and other moneys collected or received under this chapter shall be paid to the director and deposited with the director of finance to the credit of the general fund.

(b) The biennial renewal fee shall be paid to the [department] director on or before December 31 of each odd-numbered year. Failure, neglect, or refusal of any duly licensed cemetery or pre-need funeral authority to pay the biennial renewal fee shall constitute a forfeiture of [his] its license. Any such license may be restored upon written application therefor within one year of such date and the payment of the delinquent fees plus an amount equal to ten per cent thereof.

[b) A fee of \$5 shall be charged for the reissuance of any lost license or for the reissuance of license when there has been a change in the licensee's name.

(c) All fees and other moneys collected or received under this chapter shall be deposited by the director of commerce and consumer affairs with the director of finance to the credit of the general fund.]"

SECTION 13. Section 441-32, Hawaii Revised Statutes, is amended to read as follows:

**"§441-32 Delivery of agreement.** [When a salesman secures the signature of any party or parties to any contract pertaining to cemetery property, pre-need interment or pre-need funeral services, he shall deliver a copy of such agreement or contract to the party or parties signing it, at the time the signature is obtained; provided that only one copy need be delivered to the parties signing as co-tenants. The agreement or contract shall reasonably describe in detail the property or services to be provided.] The cemetery or pre-need funeral authority shall deliver a copy of any contract pertaining to cemetery property, pre-need interment or pre-need funeral services to the person or persons signing it at the time the signature is obtained; provided that only one copy need be delivered to the parties signing as co-tenants."

SECTION 14. Section 441-32.5, Hawaii Revised Statutes, is amended to read as follows:

**"[ §441-32.5[ ] ] Sales contracts[.]; filing with the director.** [Any sales contracts shall, at a minimum, explain the trust, pre-need fund, and refund provisions of the contract and the salesman shall explain what related purchases, if any, will be necessary.] Every cemetery or pre-need funeral authority shall file with the director a copy of all existing contract forms, and any new contract form prior to its use, relating to the selling of cemetery property or pre-need services and related commodities. The content of the contract shall be in conformance with section 441-22.5(b)."

SECTION 15. Section 441-34, Hawaii Revised Statutes, is amended to read as follows:

**"§441-34 Hearings.** In every case where it is proposed to refuse to grant a license or to fine, revoke, suspend, or refuse to renew any license for any of the causes hereinabove enumerated, the applicant or licensee shall be entitled to notice and hearing in conformity with chapter 91."

SECTION 16. Section 441-36, Hawaii Revised Statutes, is amended to read as follows:

**"§441-36 Perpetual care required.** Any cemetery hereafter established shall be a perpetual care cemetery. No existing cemetery shall be operated as, or advertised or represented to be, a perpetual care cemetery except in compliance with this chapter. Every cemetery authority operating a perpetual care cemetery shall establish a perpetual care fund."

SECTION 17. Section 441-37, Hawaii Revised Statutes, is amended to read as follows:

**"§441-37 [Fund required; who may act as administrator.] Trustee of perpetual care fund and pre-need trust.** [Every cemetery authority operating a perpetual care cemetery shall establish a perpetual care fund, which shall be administered by a nonprofit corporation or by a perpetual care trust.

(1) If the administrator shall be a nonprofit corporation, the majority of the members of its board of directors shall not be affiliated with the cemetery authority which created the perpetual care fund.

(2) If the administrator shall be a perpetual care trust, the trustee thereof shall be either (A) a trust company authorized to do business in the State, or (B) a board of trustees appointed by the governing body of the cemetery authority consisting of three or more members, who shall be residents of the State, and the

majority of which shall not be affiliated with the cemetery authority which created the perpetual care fund.

An executed copy of the declaration of trust, any amendments thereto, and notice of the appointment of any successor trustee thereunder shall be filed with the director.] (a) Every perpetual care fund and pre-need trust shall be administered by a bank or a trust company authorized to do business in the State; or a board of trustees as defined in section 441-1. Each authority covered under this chapter shall file with the director a copy of an executed copy of the declaration of the fund or trust and any amendment thereto.

(b) The bank or trust company appointed as trustee shall file a notice with the director disclosing the name of the bank or trust company, business address, and such additional information as the director requires. A successor trustee shall be subject to the requirements stated in this section.

(c) The board of trustees appointed as trustee shall file the following:

- (1) A notice with the director disclosing the names of its members;
- (2) A sworn affidavit stating that its members are not affiliated with the authority which appointed it;
- (3) A bond in the penal sum of \$100,000 issued by a surety company authorized to do business in the State; and
- (4) Evidence of the insurance required by section 441-41(b).

The bond required in this subsection may be filed either as a board or an individual board member for \$100,000 and shall run to the State. The bond shall be conditioned that the board of trustees will faithfully, promptly, and truly account and pay over to all persons to or for whom it may hold money in trust all sums of money that may properly be due them. The director or any person claiming to have sustained damage by reason of any breach of the conditions of the bond may bring action on the bond for the recovery of any damages sustained therefrom. The liability of the surety shall not exceed the amount of the bond issued to the board of trustees. The bond shall continue in full force and effect."

SECTION 18. Section 441-38, Hawaii Revised Statutes, is amended to read as follows:

"§441-38 Contribution<sup>1</sup> and payments to [administrator.] the trustee. (a) A cemetery authority may take, receive, and transfer to the [administrator] trustee as a part of or incident to the perpetual care fund any property, real, personal, or mixed, bequeathed, devised, granted, given, or otherwise contributed to it for perpetual care purposes and shall transfer to the [administrator] trustee the amount stipulated in the contract or deed as being for perpetual care purposes for each plot, niche, or mausoleum crypt sold or disposed of, but not less than:

- (1) \$1 per square foot of interment space;
- (2) \$50 for each mausoleum crypt;
- (3) \$15 for each niche.

Such transfer shall be made not later than thirty days after the receipt of the final payment of the purchase price of each plot, niche, or crypt sold as property entitled to perpetual care.

(b) A cemetery or pre-need funeral authority may take and receive, but shall transfer to the trustee as part of or incident to the pre-need trust, all payments received after the recovery of acquisition costs, which shall be the lesser of thirty per cent of the contract price or the difference between the contract price and the cost of the pre-need interment or pre-need funeral services contracted to be provided. The transfer shall be made not later than thirty days

after receipt of payment from the purchaser and shall be immediately deposited in the trust."

SECTION 19. Section 441-39, Hawaii Revised Statutes, is amended to read as follows:

**"§441-39 Principal of fund[;] or trusts; use of income, reserves. (a)** The principal of the perpetual care fund shall be invested and in no event reduced. Only so much of the income of the fund shall be paid to the cemetery authority as it, by submission of vouchers, can reasonably show to be necessary to cover the cost of perpetual care of the cemetery, including reasonable administrative expenses incurred in connection therewith; provided that a reserve may be created from which principal losses may be replaced by setting aside a reasonable percentage of surplus income, if any, or net capital gains from investments, and a reserve may also be set aside out of surplus income or net capital gains for future maintenance, repair, or restoration of property or embellishments in the cemetery, which may be necessary or desirable as a result of wear, deterioration, accident, damage, or destruction. "Net capital gains" means the amount by which the cumulative capital gains since the establishment of the perpetual care fund [exceed] exceeds the sum of cumulative capital losses since the establishment of the fund. Any surplus income or net capital gains not so set aside in reserve shall become a part of the principal of the fund.

**(b)** The principal of the pre-need trust shall be invested and shall not be diminished or withdrawn except in payment of the pre-need interment or pre-need funeral services contracted for and provided to the deceased purchaser or designee or for the contractual refund to the purchaser. The cemetery or pre-need funeral authority shall submit to the trustee a certified statement that the purchaser or an assignee of the purchaser has received the pre-need services under contract with the authority in order for the principal to be withdrawn. In the case of refund to the purchaser, the authority shall submit to the trustee a certified statement that the purchaser desires a refund. A reserve may be created from which principal losses may be replaced by setting aside a reasonable percentage of surplus income, if any, or net capital gains from investments."

SECTION 20. Section 441-40, Hawaii Revised Statutes, is amended to read as follows:

**"§441-40 Application of [income; administrator not responsible for.] principal and income; responsibility of trustee.** [The administrator shall not be required to inquire into the propriety of the expenditures made by the cemetery authority in connection with perpetual care of the cemetery, and it shall not be held responsible in any manner whatsoever for and on account of payments of the income from the perpetual care fund made to the cemetery authority upon vouchers.] **(a)** The trustee shall be held responsible for all payments received for deposit in the perpetual care fund and pre-need trust. The trustee shall not withdraw money from the income of the perpetual care fund unless the cemetery authority submits a certified statement that withdrawals shall be used for the perpetual care of the cemetery, including reasonable administrative expenses incurred in connection with operating a perpetual care cemetery. Further, the trustee shall not withdraw money from the principal of the pre-need trust unless the cemetery or pre-need funeral authority submits a certified statement that the person entitled to the pre-need services or the assignee has received the services or that the purchaser has requested a refund of moneys.

**(b)** For the purposes of asset management and safekeeping of the funds, the trustee shall have the authority to inquire into the propriety of expenditures

made by a cemetery and pre-need funeral authority in connection with the operation of the authority's business.

(c) The cemetery and pre-need funeral authority shall provide the trustee with the findings of the annual audit and actuarial study, which shall serve as guidelines in the management and safekeeping of the funds."

SECTION 21. Section 441-41, Hawaii Revised Statutes, is amended to read as follows:

"§441-41 Investment of perpetual care funds[,] and pre-need trusts. (a) The investment of perpetual care funds and pre-need trusts by a bank or trust company appointed as trustee shall be governed by the standards prescribed in section 406-22 for trust companies acting as fiduciaries. [The administrator may, from time to time, reserve from investment and keep in the form of cash balances (which cash may be held on deposit with any institutional depository, without interest) such portion of the fund, whether principal or income, as the administrator deems advisable.]

(b) The investment of perpetual care funds and pre-need trusts by a board of trustees shall be governed by the following standards:

- (1) Funds may be invested in either:
  - (A) An institution listed with the New York Stock Exchange, that is a member of the Securities Investor Protection Corporation (SIPC), and provides additional insurance coverage of \$1,000,000 per account above and beyond the minimum cash and securities protected by SIPC; or
  - (B) An institution whose deposits are federally insured.
- (2) Funds invested with an institution as provided in section 441-41(b)(1) shall be insured on a cash basis by the institution for the full amount of those funds. If the institution insures a portion of the fund, the perpetual care and pre-need funeral authority shall acquire additional insurance in the amount equal to or in excess of the funds held by the institution. The insurance shall be in full force and effect and shall not lapse or be reduced below the full amount of the funds. The perpetual care and pre-need funeral authority shall immediately notify the director when the insurance is not in conformity with the requirements stated herein. Failure, refusal, or neglect of a licensed cemetery and pre-need funeral authority to maintain in full force and effect the insurance as required by this section shall cause the automatic suspension of the license effective as of the date of expiration or cancellation of the insurance. The authority's license shall not be reinstated until evidence of insurance as required in this section is received by the director. The director may assess a fee on the licensee not to exceed \$500 as a condition for the reinstatement of a suspended license, pursuant to this section. Failure to effect a reinstatement of a suspended license within sixty days of the expiration of the requirement of licensing shall cause it to be terminated, thereby forfeiting all license and biennial renewal fees. A licensee may, within fifteen days after receipt of the notification of the license termination, request an administrative hearing pursuant to chapter 91.
- (3) Investment by the board of trustees in an institution described in section 441-41(b)(1)(a) shall be limited to stocks which are either listed on a national securities exchange or traded over-the-counter on the national market of the national association of securities

dealers, inc., automated quotation system. Only the board of trustees shall have the authority to make investment decisions. No securities salesperson shall be granted or allowed to have discretionary authority over the account.

- (4) Investment of monies designated for perpetual care and pre-need services shall be held intact."

SECTION 22. Section 441-42, Hawaii Revised Statutes, is amended to read as follows:

**"§441-42 [Administrator's] Trustee's compensation.** The [administrator] trustee shall be entitled to the same compensation as provided by law for trust companies in the management of fiduciary accounts, but in no event shall any sum in excess of five per cent of the income derived from the fund or pre-need trust in any year be paid as compensation to the [administrator] trustee for its services in the administration of the fund[,] or trust."

SECTION 23. Section 441-44, Hawaii Revised Statutes, is amended to read as follows:

**"§441-44 [Administrator's] Trustee's account; enforcement by attorney general.** The [administrator] trustee shall annually file with the director an account which shall be made in such form as shall be prescribed by the director. The director shall notify the attorney general of any failure on the part of the [administrator] trustee to comply with sections [441-39] 441-37 to 441-44, or of the instrument creating the fund[,] or trust, and the attorney general may take such action as [he deems] deemed appropriate."

SECTION 24. Section 441-45, Hawaii Revised Statutes, is amended to read as follows:

**"§441-45 Penalty.** [Any person] In addition to the penalties otherwise provided by law, any licensee who violates[,] or omits to comply with any of the provisions of this chapter shall be fined not more than \$1,000[, unless the violation relates to pre-need trusts or perpetual care funds in which case the penalties prescribed by sections 401-20 or 401-21 shall apply.] for each violation."

SECTION 25. Chapter 441, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

**"§441- Pre-need trusts and perpetual care funds; actuarial studies.** (a) Every cemetery authority operating a perpetual care cemetery and every cemetery or pre-need funeral authority offering pre-need services shall contract with an independent actuary to conduct an annual study of its level of funding. In the case of a perpetual care cemetery, the study shall be to determine whether the authority's perpetual care fund will provide sufficient income to cover the costs of the perpetual care of the cemetery. In the case of a cemetery or pre-need funeral authority, the study shall be to determine whether the authority's pre-need trust will be sufficient to cover the claims of pre-need plan participants.

(b) The actuarial study shall be submitted to the director within one hundred twenty days after the close of the authority's books for the fiscal or calendar year. At a minimum, such study shall detail the assets and liabilities of the fund or trust, the actuarial assumptions used in preparing the report and the actuary's conclusions as to whether the levels of funding are adequate. If the actuary concludes that the funding is not adequate, the actuary shall recom-

mend what actions are necessary to protect the perpetual care fund or pre-need trust participants.

(c) If the study concludes that the levels of funding are not adequate or that the interests of the participants in the perpetual care fund or pre-need trusts are in any other respect not adequately protected, the director may require that a greater portion of the income be transferred to the fund or trust or may take such other action as is necessary to correct any inadequacies or may suspend the authority's right to accept further participants in the fund or trust. If requested by the authority, a hearing on the action taken by the director shall be conducted pursuant to chapter 91."

SECTION 26. Chapter 441, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

**"§441- Actuarial study, audited financial statement, trust agreement; available for review.** (a) The actuarial study, audited financial statement, and trust agreement filed by a cemetery or pre-need funeral authority, as required by this chapter, shall be available for review by any member of the general public upon request. The review of these documents shall be done during the department's normal business hours. The director shall have the right to deny review for reasons specified in rules adopted by the director pursuant to chapter 91.

(b) Upon delivery of an itemized price list to a prospective purchaser and upon execution of a contract for perpetual care and pre-need services, the cemetery or pre-need funeral authority shall notify the person of the availability for review of the actuarial study, audited financial statement, and trust agreement on file with the department as provided in this section."

SECTION 27. Chapter 441, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

**"§441- Surrender of license.** A licensee covered under this chapter may terminate all further responsibilities for compliance with the requirements of this chapter by voluntarily surrendering its license to the director with a sworn statement to that effect. Such statement must be accompanied by an affidavit that said licensee has lawfully expended or refunded all pre-need trust funds accepted by the person or made provisions to transfer said funds subject to the obligation related thereto to another licensee subject to approval of the director, and that the authority surrendering the license will accept no additional pre-need payments. The director shall immediately cancel or revoke such license."

SECTION 28. Chapter 441, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

**"§441- Audit of records of cemetery or pre-need funeral authority.** The department may audit the records of any cemetery or pre-need funeral authority with respect to its funds and pre-need trusts as they pertain to the deposits and withdrawals to the fund and trust. For that purpose, the department shall have free access to the office and places of business of all cemetery and pre-need funeral authorities and the trustee. The department may contract with a private consultant to audit the records of any cemetery or pre-need funeral authority, the cost of which shall be borne by the authority."

SECTION 29. Statutory material to be repealed is bracketed. New statutory material is underscored.<sup>2</sup>

## **ACT 101**

**SECTION. 30.** This Act shall take effect upon its approval.

(Approved May 14, 1985.)

### **Notes**

1. Prior to amendment, "contribution" read "contributions".
2. Edited pursuant to HRS §23G-16.5.