

Regulatory Analysis Form

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INDEPENDENT REGULATORY
REVIEW COMMISSION

(1) Agency

Department of State, Bureau of Professional and Occupational
Affairs, State Board of Funeral Directors

(2) I.D. Number (Governor's Office Use)

16A-4815

IRRC Number: 2627

(3) Short Title

Preneed funeral arrangements

(4) PA Code Cite

49 Pa. Code §§ 13.1, 13.224-13.229

(5) Agency Contacts & Telephone Numbers

Primary Contact: **Thomas A. Blackburn, Assistant
Counsel, Department of State (717) 783-7200**

Secondary Contact: **Joyce McKeever, Deputy Chief
Counsel, Department of State (717) 783-7200**

(6) Type of Rulemaking (check one)

Proposed Rulemaking
 Final Order Adopting Regulation
 Policy Statement

(7) Is a 120-Day Emergency Certification
Attached?

No
 Yes: By the Attorney General
 Yes: By the Governor

(8) Briefly explain the regulation in clear and nontechnical language.

This rulemaking would amend the Board's existing regulations concerning prepaid burial contracts and accounts. Instead of reporting to the Board each prepaid burial contract, a funeral director would be required to report each quarter on the current status of each preneed account. A funeral director would not be able to retain the earnings of the funds in excess of the increase in the retail cost of the funeral. A preneed contract could not be made irrevocable as to the funeral director who is to perform the services. A funeral director whose customer has cancelled the preneed contract would be required to transfer to another funeral director requested by the customer all preneed funds, and the funeral director would be prohibited from collecting any fee for services or merchandise the funeral director did not provide or for liquidated damages. The proposed rulemaking would require a funeral director selling or discontinuing the business to notify the customers and give them the opportunity to cancel the contract and transfer the preneed funds to another funeral director of the customer's choosing. The proposed rulemaking would make clear that the requirements apply to funds for fees such as an arrangement conference or additional allowance for funeral services or merchandise, but not for premiums to purchase life insurance directly from the insurance company.

Regulatory Analysis Form

(9) State the statutory authority for the regulation and any relevant state or federal court decisions.

The regulatory amendments are adopted under Sections 13(c) and 16(a) of the Funeral Director Law (63 P.S. §§ 479.13 (c) and 479.16(a)).

(10) Is the regulation mandated by any federal or state law or court order, or federal regulation? If yes, cite the specific law, case or regulation, and any deadlines for action.

The proposed rulemaking is not mandated by any federal or state law or court order or federal regulation.

(11) Explain the compelling public interest that justifies the regulation. What is the problem it addresses?

Although at the time the Funeral Director Law was enacted in 1952 preneed was a very tiny portion of funerals, today it is extremely significant. Section 13(c) of the Funeral Director Law (63 P.S. § 479.13(c)) only requires a funeral director who has received preneed funds to place those funds in a banking institution, either in trust or escrow, to be withdrawn or disbursed only for the purpose for which they were deposited. Millions of dollars are now held in preneed accounts for Pennsylvanians. By its current regulations, the Board requires that all interest and other earnings of preneed funds stay with the principal in order to provide funeral goods and services of the quality anticipated in the preneed contract.

Funeral directors who enter into preneed contracts often purport to guarantee the funeral, by promising to provide the funeral goods and services at no additional fee to the customer's family, in exchange for being able to retain all earnings of the preneed funds. A funeral director is thus tempted to place the funds in higher risk investments in order to maximize the funeral director's ultimate return, risking only the funeral director's wholesale cost to later provide the funeral services and merchandise. Prohibiting a funeral director from collecting a fee for providing a preneed funeral in excess of the fee on the funeral director's current price list for that service and requiring a funeral director to honor a customer's demand to rescind the contract and transfer the funds to another funeral director of the customer's choosing would take away all motivation for a funeral director to make risky investment of preneed funds, thereby better assuring that funds are available to provide for the customer's funeral service.

In addition, the proposed rulemaking would reduce the burden imposed by the existing prepaid contract reporting requirements.

(12) State the public health, safety, environmental or general welfare risks associated with nonregulation.

Non-regulation would continue to place before funeral directors significant temptation to become overly involved in investment of preneed funds. In addition, please see the response to question 11.

Regulatory Analysis Form

(13) Describe who will benefit from the regulation. (Quantify the benefits as completely as possible and approximate the number of people who will benefit.)

Licensees will benefit from the simplified reporting of preneed contracts, and the public will benefit from the increased rights of consumers embodied in the proposed rulemaking.

(14) Describe who will be adversely affected by the regulation. (Quantify the adverse effects as completely as possible and approximate the number of people who will be adversely affected.)

All licensed funeral directors and funeral entities will be subject to the amended regulation and may be adversely affected. The Board has identified no other group of individuals or entities that will be adversely affected by the regulation.

(15) List the persons, groups or entities that will be required to comply with the regulation. (Approximate the number of people who will be required to comply.)

All persons holding licenses to practice the profession of funeral director and all funeral establishments will be required to comply with the regulation. Currently, there are approximately 7640 licensed funeral directors, of whom the licenses of approximately 3870 are active.

(16) Describe the communications with and input from the public in the development and drafting of the regulation. List the persons and/or groups who were involved, if applicable.

In the spring of 2002, the Board conducted public work sessions concerning regulation of preneed sales of funeral goods and services. In April, 2003, the Board solicited exposure draft comments from the Pennsylvania Funeral Directors Association (PFDA) and all individuals who had attended any Board meeting during the preceding year. Frank Switzer, Jr., FD; Gregory L. Myer, FD; PFDA; Pennsylvania Cemetery Funeral Association; James Kutz, Esquire (on behalf of Pennsylvania Pre-Need Association); and Philadelphia Trust Company commented. The Board considered all these comments in preparing this proposed rulemaking.

(17) Provide a specific estimate of the costs and/or savings to the regulated community associated with compliance, including any legal, accounting or consulting procedures which may be required.

It is impossible to estimate the costs or savings to the regulated community resulting from compliance with this regulation and improved practice by licensees. In order to minimize the costs of compliance, the Board has simplified the reporting requirements.

(18) Provide a specific estimate of the costs and/or savings to local governments associated with compliance, including any legal, accounting or consulting procedures which may be required.

There are no costs or savings to local governments associated with compliance with the proposed regulation.

Regulatory Analysis Form

(19) Provide a specific estimate of the costs and/or savings to state government associated with the implementation of the regulation, including any legal, accounting, or consulting procedures which may be required.

There are no costs or savings to state government associated with implementation of the proposed regulation.

(20) In the table below, provide an estimate of the fiscal savings and costs associated with implementation and compliance for the regulated community, local government, and state government for the current year and five subsequent years.

	Current FY 06-07	FY+1 07-08	FY+2 08-09	FY+3 09-10	FY+4 10-11	FY+5 11-12
SAVINGS:						
Regulated Community						
Local Government						
State Government						
Total Savings	N/A	N/A	N/A	N/A	N/A	N/A
COSTS:						
Regulated Community						
Local Government						
State Government						
Total Costs	N/A	N/A	N/A	N/A	N/A	N/A
REVENUE LOSSES:						
Regulated Community						
Local Government						
State Government						
Total Revenue Losses	N/A	N/A	N/A	N/A	N/A	N/A

(20a) Explain how the cost estimates listed above were derived.

Not applicable.

(20b) Provide the past three year expenditure history for programs affected by the regulation.

Program	FY-3 (FY 03-04)	FY-2 (FY 04-05)	FY-1 (FY 05-06)	Current FY (FY 06-07)
Pa. State Board of Funeral Dir.	\$609,000	\$700,000	\$821,000	\$842,000

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(21) Using the cost-benefit information provided above, explain how the benefits of the regulation outweigh the adverse effects and costs.

The consumer protection benefits and simplification of reporting outweigh any minimal marginal costs associated with compliance with the regulations.

(22) Describe the nonregulatory alternatives considered and the costs associated with those alternatives. Provide the reasons for their dismissal.

Because the proposed rulemaking implements the Funeral Director Law and amends current Board regulations, the Board considered no non-regulatory alternatives.

(23) Describe alternative regulatory schemes considered and the costs associated with those schemes. Provide the reasons for their dismissal.

The Board did not consider any alternative regulatory schemes.

(24) Are there any provisions that are more stringent than federal standards? If yes, identify the specific provisions and the compelling Pennsylvania interest that demands stronger regulation.

The proposed regulatory amendments do not overlap or conflict with any federal requirements.

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(25) How does this regulation compare with those of other states? Will the regulation put Pennsylvania at a competitive disadvantage with other states?

Maryland requirements are similar to those proposed for Pennsylvania. However, a funeral director may retain the earnings of the invested funds when performing under the preneed contract, but must return all principal and interest upon discontinuance or inability to perform. The contract is revocable unless the buyer agrees to an irrevocable trust. Each Maryland funeral director must file an annual report of the preneed accounts he controls. New Jersey requirements are similar to those proposed for Pennsylvania, except that a preneed contract may be irrevocable. Ohio requirements are similar to those proposed for Pennsylvania. However, a customer has the right to cancel a preneed contract within 7 days or cancel a preneed contract that is not irrevocable at any time, and receive a full refund of principal and earnings. Each funeral director must report preneed funds annually. West Virginia requirements are similar to those proposed for Pennsylvania. However, a West Virginia funeral director must receive a separate certificate of authority to engage in preneed sales and report all contracts and funds biennially. A West Virginia funeral director does not need to trust the costs of selling preneed contracts (up to 10% of the contract price). A customer who has cancelled a preneed contract is entitled to a refund of all payments, but without earnings. West Virginia maintains a payment guarantee fund to protect a preneed customer (principal only) in the event the seller defaults.

The proposed rulemaking will not put Pennsylvania at a competitive disadvantage with these other states.

(26) Will the regulation affect existing or proposed regulations of the promulgating agency or other state agencies? If yes, explain and provide specific citations.

This rulemaking will have no effect on other regulations of the Board or other state agencies.

(27) Will any public hearings or informational meetings be scheduled? Please provide the dates, times, and locations, if available.

The Board reviews its regulatory proposals at regularly scheduled public meetings, generally the first Wednesday of each month. More information can be found on the Board's web-site (www.dos.state.pa.us/funeral), or by calling the Board office at (717) 783-3397.

(28) Will the regulation change existing reporting, record keeping, or other paperwork requirements? Describe the changes and attach copies of forms or reports which will be required as a result of implementation, if available.

Yes. The proposed rulemaking would eliminate the reporting to the Board by funeral directors of the execution and fulfillment of each preneed contract, in favor of a single report every quarter of the preneed funds held by the funeral director. The regulation will change no other record keeping or paperwork requirements.

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(29) Please list any special provisions which have been developed to meet the particular needs of affected groups or persons including, but not limited to, minorities, elderly, small businesses, and farmers.

The Board has determined that there are no special needs of any subset of its applicants or licensees for whom special accommodations should be made.

(30) What is the anticipated effective date of the regulation; the date by which compliance with the regulation will be required; and the date by which any required permits, licenses or other approvals must be obtained?

The rulemaking will be effective upon publication in final form in the Pennsylvania Bulletin.

(31) Provide the schedule for continual review of the regulation.

The Board continually reviews the efficacy of its regulations, as part of its annual review process pursuant to Executive Order 1996-1.

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REVIEW COMMISSION

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FACE SHEET
FOR FILING DOCUMENTS
WITH THE LEGISLATIVE REFERENCE BUREAU

(Pursuant to Commonwealth Documents Law)

* 2627

Copy below is hereby approved as to form and legality. Attorney General

Copy below is hereby certified to be a true and correct copy of a document issued, prescribed or promulgated by:

Copy below is approved as to form and legality. Executive or Independent Agencies.

BY: Angela M. Elliott
(DEPUTY ATTORNEY GENERAL)

State Board of Funeral Directors
(AGENCY)

BY: Andrew C. Clark

MAY 08 2007

DOCUMENT/FISCAL NOTE NO. 16A-4815

MAR 19 2007

DATE OF APPROVAL

DATE OF APPROVAL

DATE OF ADOPTION:

BY: Anthony Scarantino
Anthony Scarantino

(Deputy General Counsel
(Chief Counsel,
Independent Agency
(Strike inapplicable title)

[] Check if applicable
Copy not approved.
Objections attached.

TITLE: Chairperson
(EXECUTIVE OFFICER, CHAIRMAN OR SECRETARY)

[] Check if applicable.
No Attorney General approval
or objection within 30 day
after submission.

PROPOSED RULEMAKING

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF STATE
BUREAU OF PROFESSIONAL AND OCCUPATIONAL AFFAIRS
STATE BOARD OF FUNERAL DIRECTORS

49 Pa. Code §§ 13.1, 13.224-13.229
PRENEED FUNERAL ARRANGEMENTS

The State Board of Funeral Directors (Board) proposes to amend §§ 13.1, 13.224, 13.225 and 13.226 and to add §§ 13.227, 13.228 and 13.229 (relating to limitations on preneed funeral contracts; transfer of a preneed funeral contract by customer; and transfer of preneed funeral contracts or preneed funeral funds by funeral director), to read as set forth in Annex A.

Effective date

The amendments will be effective upon publication of the final-form rulemaking in the *Pennsylvania Bulletin*.

Statutory Authority

The amendments are authorized under sections 13(c) and 16(a) of the Funeral Director Law (act) (63 P.S. §§ 479.13(c) and 479.16(a)).

Background and Need for the Amendment

Section 13(c) of the act requires that a funeral director who accepts money under a contract with a living person to render funeral services to that person when needed to forthwith deposit the money in an escrow account or transfer it in trust to a banking institution in this Commonwealth. The money may be withdrawn or disbursed only for the purposes for which it was deposited.

The Board's current regulations regarding preneed funeral arrangements were originally promulgated in 1977 and last amended in 1991. Current § 13.224 (relating to depositing and reporting preneed funeral funds) requires a funeral director to place all funds received for preneed funeral arrangements into trust or escrow accounts kept separate from the funeral director's personal or business accounts and to make reports to the Board. Under § 13.226 (relating to nature and description of escrow or trust account for preneed funeral funds), all interest or other earnings from preneed funds must be kept together with the principal to assure delivery of the same quality of services and merchandise for which the preneed contract was entered.

The Board has determined that the regulations need to be updated to conform to existing practices in the funeral industry and to provide adequate protection to the consumer of preneed services in the instance of changed circumstances. For example, reports under § 13.224 are time-consuming to prepare and to review. However, the reports provide little value to the Board, the regulated community or the public. Existing regulations do not address the transferability of funds when a funeral director other than the contracting funeral director provides funeral services and merchandise or the ability of a customer to change funeral directors or transfer funds in the event of a change of funeral directors. Nor do the regulations adequately address the cessation or acquisition of a preneed funeral business.

Description of the Proposed Amendments

In § 13.1 (relating to definitions), definitions of “prepaid burial contract” and “prepaid burial account” would be deleted and replaced with definitions of new terms “preneed funeral contract” and “preneed funds.” The proposed definition of preneed funds would exclude premiums paid directly to an insurance company to purchase a life insurance policy. However, preneed funds would include amounts to be paid for arrangement fees or additional allowance for other services or merchandise. Preneed funds would also include the assignment of a life insurance policy or other asset received by a funeral director to fund a preneed contract. A definition of “funeral entity” would be added to include persons, corporations and others authorized to practice funeral directing.

Section 13.224 (relating to depositing and reporting preneed funeral funds) requires a funeral director to deposit in escrow or transfer in trust money received under a prepaid contract. The Board proposes to amend subsection (a) to require the deposit or transfer be made within 10 days of receipt. In addition, the Board proposes to add a provision to prohibit a funeral director or entity from using another person or entity to avoid this requirement. Currently, a funeral director must submit to the Board a written report every time the funeral director enters into a prepaid burial contract or performs under a prepaid contract. Under the proposed subsection (b), a funeral director would be required to report to the Board all preneed accounts on a quarterly basis, including any activity during that quarter. A funeral director could submit these reports on paper or disk or electronically, and must maintain copies of the report for 3 years. A funeral director closing a business would be required to submit a report showing how all funds were distributed. These reports are not public records and will not be available for public review.

The limitations proposed for contract provisions are added in § 13.227 (relating to limitations on preneed funeral contracts). Under the proposed rulemaking, every preneed contract must be in writing. Also, a funeral director performing under a preneed contract would be prohibited from charging or collecting any fee that exceeds the fees set forth in the funeral director’s current price list at the time the service or merchandise is provided. In addition, a preneed contract may not incorporate a contract with an unlicensed person or entity.

Proposed § 13.228 (relating to transfer of a preneed funeral contract by customer) would govern customer transfers of preneed funds to another funeral director or funeral entity. Every preneed funeral contract entered into after the effective date of the rulemaking must expressly permit the customer to transfer the preneed funeral account and funds to another funeral director or funeral entity of the customer’s choosing that will provide funeral goods and services. The funeral director would be required to forward to the other funeral director the entire amount of preneed funds, including both principal and interest or other earnings, within 30 days of notice from the customer. The proposed rulemaking would prohibit a funeral director from collecting a fee for any funeral goods or services that have not been provided or liquidated damages for the cancellation.

Proposed § 13.229 (relating to sale or transfer of preneed funeral contracts or preneed funeral funds by funeral director) would govern funeral director transfers of preneed contracts or funds. It would require a funeral director or entity that acquires any portion of the preneed business of another

to notify each customer and provide each customer with the opportunity to transfer the contract and funds to another funeral director of the customer's choosing. A funeral director ceasing preneed business must notify each customer and provide each customer with the opportunity to transfer the preneed funds to another funeral director of the customer's choosing.

Compliance with Executive Order 1996-1

The Board solicited input from and provided an exposure draft of this proposed rulemaking to funeral directors and organizations as required under the directives of Executive Order 1996-1 (February 6, 1996). In addition, the Board considered the impact the rulemaking would have on the regulated community and on public health, safety and welfare. The Board finds that the proposed rulemaking addresses a compelling public interest as described in this Preamble and otherwise complies with Executive Order 1996-1.

Fiscal Impact and Paperwork Requirements

The proposed rulemaking will have no adverse fiscal impact on the Commonwealth or its political subdivisions. The rulemaking will impose no additional paperwork requirements upon the Commonwealth, its political subdivisions, or the private sector.

Sunset Date

The Board continuously monitors the cost effectiveness of its regulations. Therefore, no sunset date has been assigned.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on August 15, 2007, the Board submitted a copy of this proposed rulemaking and a copy of a Regulatory Analysis form to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the Senate Consumer Protection and Professional Licensure Committee and the House Professional Licensure Committee. A copy of this material is available to the public upon request.

Under section 5(g) of the Regulatory Review Act, IRRC may convey any comments, recommendations or objections to the proposed rulemaking within 30 days of the close of the public comment period. The comments, recommendations or objections shall specify the regulatory review criteria which have not been met. The Regulatory Review Act specifies detailed procedures for review, prior to final publication of the rulemaking, by the Board, the General Assembly and the Governor of comments, recommendations or objections raised.

Public Comment

Interested persons are invited to submit written comments, suggestions or objections regarding this proposed rulemaking to Michelle T. Smey, Administrative Officer, State Board of Funeral Directors, P. O. Box 2649, Harrisburg, PA 17105-2649, within 30 days of publication of this proposed rulemaking in the *Pennsylvania Bulletin*. Please reference No. 16A-4815 (Preneed funeral arrangements), when submitting comments.

Anthony Scarantino
Chairperson

ANNEX A

TITLE 49. PROFESSIONAL AND VOCATIONAL STANDARDS

PART I. DEPARTMENT OF STATE

Subpart A. PROFESSIONAL AND OCCUPATIONAL AFFAIRS

CHAPTER 13. STATE BOARD OF FUNERAL DIRECTORS

GENERAL PROVISIONS

§ 13.1. Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

* * * * *

Funeral entity – A restricted business corporation, professional corporation, pre-1935 corporation, partnership, sole proprietorship, widow, widower, or estate authorized by the Board to practice the profession of funeral director.

* * * * *

[*Prepaid burial account* – An account in which moneys are deposited by the funeral director during the lifetime of an individual in accordance with a contract executed between the parties for funeral merchandise and services to be performed and delivered at a future time.

Prepaid burial contract – A contract executed between a consumer and a licensed funeral director which provides that the funeral director will provide funeral merchandise and render services to the consumer upon the consumer's death or the death of another designated individual and for which the consumer pays to the funeral director moneys at the time of the contract or at a time prior to the rendition of these services.]

Preneed funeral contract – An agreement under which a funeral entity promises or agrees to provide funeral merchandise and render services upon the death of a person living at the time the contract is made, whether or not the funeral entity receives preneed funeral funds.

Preneed funeral funds – Funds provided to a funeral director or funeral entity for the purpose of providing funeral services or merchandise on behalf of a person living at the time of provision of funds, whether or not a contract to provide specified funeral services or merchandise exists. This term includes any funds paid, or to be paid, for arrangement fees, or additional allowance for other fees for service or merchandise. This term includes the assignment of an insurance policy and any other asset received by a funeral director or funeral entity to fund a preneed funeral contract. This term does not include any premiums paid directly to an insurance company.

* * * * *

[PREPAID BURIAL CONTRACTS] PRENEED FUNERAL ARRANGEMENTS

§ 13.224. [Funding] Depositing and reporting [of prepaid burial contracts] preneed funeral funds.

(a) A funeral director or funeral entity shall deposit in escrow or transfer in trust to a banking institution in this Commonwealth, the entire amount of [monies received by the funeral director under a prepaid contract for funeral services or merchandise, including additional service fees or arrangement fees] preneed funeral funds within 10 days of receipt. A funeral director or funeral entity may not avoid the requirements of this subsection by creating or controlling or otherwise utilizing a person or entity that is not a funeral entity.

(b) [In regard to prepaid contracts entered into by funeral directors after November 4, 1989, a funeral director shall file a report with the Board within 90 days containing the information specified in

subsection (c) with respect to each prepaid contract for funeral services and merchandise. Forms for the reports, including the report required under subsection (d), will be provided by the Board.] Within 30 days of the end of each calendar quarter, every funeral entity shall file with the Board a report containing the information required in subsection (c) of all accounts of preneed funeral funds of the funeral entity during that quarter. The report shall include all accounts held by the funeral entity at any time during the reporting period, including those first created during the period and those closed during the period. The rollover of an account shall be treated as the closing of one account and the opening of another account.

(c) [A funeral director shall file a report] Each report required by subsection (b) shall be filed with the Board on a form provided by the Board, certifying as true and correct, the following information with respect to each [prepaid contract for funeral services and merchandise entered into] account containing preneed funeral funds:

- (1) The date [of the prepaid contract] preneed funeral funds were first received by the funeral entity and the name and address of the [purchasers under the contract] person for whose benefit the funds were received.
- (2) The name and address of the banking institution in which [100% of the money received by the funeral director on account of the contract had been deposited] the account is held.
- (3) The account number, account registration title – name and persons for whom the account is established – and the date the account was established.
- (4) [In installment contracts, if the entire amount of the contract has not been paid, the report shall expressly indicate the fact that an installment contract is involved, and the total amount of installments received by the funeral director and deposited in escrow or in trust.] The account

balance at the beginning of the period, the total principal amounts added, interest or other earnings, disbursements or other transfers out, and balance at the end of the period.

(d) [A funeral director shall report within 30 days all fulfilled prepaid contracts, following:

(1) The name of the deceased.

(2) The date of death.

(3) The account number.

(4) The name of the banking institution.] Within 30 days of the sale or other cessation of all or part of its preneed business, a funeral entity shall file with the Board a report, including all accounts as specified in subsection (b) and all information as specified in subsection (c), to demonstrate how all preneed funeral funds were distributed. Each distribution shall identify the recipients and amount of funds, including transfers to other funeral entities and payments to the funeral entity for provision of funeral goods and services.

(e) [The report required in subsection (c) is not a public record] The reports required under subsections (b) and (d) are not public records under the act of June 21, 1957 (P.L. 390, No. 212) (65 P.S. §§ 66.1-66.4), known as the Right-to-Know Law. The [report] information contained in the reports will be available to the following:

(1) Parties privy to the preneed funeral contract.

(2) Heirs of the deceased.

(3) Executors or administrators of the estate of the deceased.

(4) Courts of competent jurisdiction.

(5) The Board.

(f) [Prepaid burial contracts or preneed contracts to be used by a funeral director shall be reviewed and approved by the Board and should reflect whether or not an additional service fee or arrangement fee is charged. Prepaid burial contracts or preneed contracts used by a funeral director may not incorporate a contract for funeral merchandise entered into by a person or entity other than a funeral director.] Reports made under this section may be filed in paper form or on disk or electronically, as permitted by the Board. A funeral entity must retain a copy of each report required to be filed under this section for 3 years after the report was due or filed, whichever is later.

§ 13.225. Affidavit for [prepaid burial accounts] preneed funeral funds.

A licensed funeral director shall, within 30 days of receiving notification from the Board, file with the Board, an affidavit that he has complied or will comply within a reasonable time, with section 13(c) of the act (63 P.S. § 479.13(c)) and has deposited or will deposit in escrow or trust in a banking institution in this Commonwealth, 100% of monies received by him for preneed funeral arrangements or incidentals. Failure to file will result in disciplinary action by the Board.

§ 13.226. Nature and description of escrow or trust account for [prepaid burial contracts] preneed funeral funds.

(a) [Funds received for prepaid burial contracts] Preneed funeral funds shall be placed in an escrow or trust fund account which shall be separate and distinct from the business and personal accounts of the funeral director and funeral entity.

(b) [If funds received by a funeral director for preneed burial contracts are deposited in a banking account which bears interest, or are invested by the trustee bank and produce earnings, the] The

interest or earnings of all preneed funeral funds shall be retained in the account with the principal and shall be held, accounted for and transferred in the same manner as the principal amount, to assure delivery of the same quality of service and merchandise for which the contract was made or the funds were provided.

[(c) In the event of a sale or transfer of the business of a funeral director, prepaid burial contracts and prepaid burial accounts shall immediately be transferred to the control of the licensee who will assume responsibility for completion of the prepaid burial contracts. The licensee-transferee shall notify the Board in writing of the licensee's willingness to accept responsibility for completion of the prepaid burial contracts.]

§ 13.227. Limitations on preneed funeral contracts.

(a) A preneed funeral contract shall be in writing.

(b) A funeral director or funeral entity shall not charge or collect any fees under a preneed funeral contract for funeral goods and services that exceed the fees for such goods and services as set forth on the funeral entity's general price list at the time the goods or services are provided.

(c) A preneed funeral contract may not incorporate a contract for funeral merchandise entered into by a person or entity other than a funeral director.

§ 13.228. Transfer of a preneed funeral contract by customer.

(a) Every preneed funeral contract entered into after (Editor's note: Insert effective date of this rulemaking) shall expressly permit the customer to transfer the preneed funeral account and funds to another funeral director or funeral entity of the customer's choosing that will provide funeral goods

and services.

(b) Within 30 days after written notification of the election to transfer a preneed funeral account and funds as authorized by subsection (a), the funeral director or funeral entity shall forward to the other funeral entity as requested by the customer the entire amount of funds in the prepaid funeral account, including accumulated interest and earnings.

(c) A funeral director or funeral entity may not retain any amount of fees for services that have not been provided or merchandise that has not been delivered to the customer under a preneed funeral contract for which the preneed funeral account or funds have been transferred as authorized by subsection (a).

(d) A funeral director or funeral entity may not collect liquidated damages for the transfer of a preneed funeral account or funds under a preneed funeral contract as authorized by subsection (a).

§ 13.229. Sale or transfer of preneed funeral contracts or preneed funeral funds by funeral director.

(a) In the event of a sale or transfer of any portion of the preneed funeral business of a funeral entity, a funeral entity that assumes an obligation to perform under an existing preneed funeral contract or receives a preneed funeral account or funds shall, within 30 days of the transfer, notify each customer under those contracts or provider of those funds of the transfer and permit each customer who chooses to do so to notify the funeral director within 90 days that the funeral entity is to transfer the preneed funeral account and funds, including all accumulated interest and earnings, to another funeral entity of the customer's choosing as authorized by § 13.228(a) (relating to transfer of a preneed funeral contract by customer).

(b) A funeral entity that is ceasing business or otherwise will not perform under a preneed funeral contract, except as provided in subsection (a), shall notify each preneed customer at least 60 days in advance of the planned cessation and notify each customer of the customer's right to choose to transfer the preneed funeral account and funds, including all accumulated interest and earnings, to another funeral entity of the customer's choosing as authorized by § 13.228(a).

**Kevin M. Bean, Petitioner v. Department of State, State Board of Funeral Directors,
Respondent**

No. 1088 C.D. 2003

COMMONWEALTH COURT OF PENNSYLVANIA

855 A.2d 148; 2004 Pa. Commw. LEXIS 553

June 9, 2004, Argued

July 22, 2004, Decided

July 22, 2004, Filed

SUBSEQUENT HISTORY: Appeal denied by *Bean v. Dep't of State, State Bd. of Funeral Dirs. Ass'n, 2005 Pa. LEXIS 1677 (Pa., Aug. 10, 2005)*

PRIOR HISTORY: **[**1]** Appealed From No. 0406-48-2003. State Agency State Board of Funeral Directors. *Bean v. Dep't of State, State Bd. of Funeral Dirs., 2004 Pa. Commw. LEXIS 114 (Pa. Commw. Ct., Feb. 9, 2004)*

DISPOSITION: REARGUMENT GRANTED. Reversed.

COUNSEL: James J. Kutz, Camp Hill, for petitioner.

Gerald S. Smith, Harrisburg, for respondent. Kathleen K. Ryan, Harrisburg, for intervenor, PA Funeral Directors Association.

JUDGES: BEFORE: HONORABLE JAMES GARDNER COLINS, President Judge, HONORABLE BERNARD L. McGINLEY, Judge, HONORABLE DORIS A. SMITH-RIBNER, Judge, HONORABLE DAN PELLEGRINI, Judge, HONORABLE ROCHELLE S. FRIEDMAN, Judge, HONORABLE BONNIE BRIGANCE LEADBETTER, Judge, HONORABLE RENEE L. COHN, Judge. **OPINION BY JUDGE PELLEGRINI. DISSENTING OPINION BY:** Judge SMITH-RIBNER (Judge LEADBETTER joins in this dissenting opinion).

OPINION BY: DAN PELLEGRINI

OPINION: [*149] REARGUMENT GRANTED AND PREVIOUS OPINION WITHDRAWN 2/9/04

OPINION BY JUDGE PELLEGRINI

Kevin M. Bean (Bean), a licensed funeral director, appeals from a decision and order of the Department of State, State Board of Funeral Directors (Board) that irrevocable pre-need agreements are subject to rescission at the request of a customer who has previously agreed to

the terms of that agreement and are transferable to another funeral director.

At issue in this case are two **[**2]** pre-paid burial contracts or "pre-need agreement" forms as they are referred to herein which are used by Bean in his business. They allow a customer to purchase merchandise, services or other benefits that are rendered at the time of death. Both forms have been approved by the Board as required by the Board's regulations at 34 Pa. Code § 13.224 which provide that "prepaid burial contracts or preneed contracts to be used by a funeral director shall be reviewed and approved by the Board..." One form clearly states that it is irrevocable and only allows the customer of Bean's services to cancel the transaction within three business days of signing the agreement. The other form, which was endorsed by SecurChoice, an affiliate of the Pennsylvania Funeral Directors Association, not only allows for the three-business day cancellation, but also gives the customer of Bean's services the option to revoke the agreement by checking a specified box marked "revocable." n1 If that box is checked, then the agreement may be terminated by either the buyer or the funeral home at any time prior to the customer's death. This does not mean that the customer can revoke the nature **[**3]** of the contract, i.e., the funeral or burial services, but he or she may transfer the services for another funeral director to carry out upon his or her death. If the "irrevocable" box is checked, the agreement cannot be terminated **[*150]** unless done so within the first three days after signing.

n1 The revocable form further provides that the agreement could be terminated by either the customer or the funeral home at any time prior to the beneficiary's death if any of the following conditions are met: "(1) You checked the "Revocable box" on the front of this agreement and; (2) You or the beneficiary move and reside outside the Commonwealth of Pennsylvania."

In 2002, Bean received a demand from a customer who wanted money returned that had been paid pursuant to an irrevocable agreement. Bean was aware of communications between the Board and a state representative regarding the licensing of another funeral director, the gist of the communications being that the Board believed that all pre-need funds belonged to the customer [**4] and not to the funeral director. n2 As a result of his dispute with the customer and the communications between the Board and the state representative, on January 10, 2003, Bean filed a petition for review in the nature of a declaratory judgment n3 action in this Court's original jurisdiction seeking a declaration that the Board could not interfere and direct that irrevocable pre-need agreements were subject to rescission at the request of the customer who had agreed to the terms of the agreement. In response, the Board filed preliminary objections alleging that this Court did not have original jurisdiction and that the case was not ripe for review as there was no case or controversy.

n2 More specifically, Thomas Blackburn (Blackburn), counsel to the Board, received an e-mail from the Honorable Michael K. Hanna, State Representative (Representative Hanna), who stated that a constituent funeral director had been approached by a potential client who had previously entered into a pre-need contract with another funeral director but now wanted to transfer the funds to the constituent funeral director and the originating funeral director refused to transfer the funds. Representative Hanna requested the Board's opinion regarding the refusal. Blackburn advised him that "the Board believes that all pre-need funds belong to the customer, and not to the funeral director, until the time of death and services are provided. Also, despite any contrary language...[in] the contract, while the contract may be irrevocable as to the use of the funds, it is revocable as to which funeral director or funeral home is to provide services. Accordingly, a pre-need customer may rescind a pre-need contract and demand the funeral director to forward the entire principal and all earnings to date to a subsequent funeral home for a pre-need contract with that subsequent funeral director. With the exception of any reasonable arrangement fees which may not be finally collected until after the customer's death, a funeral director may not retain pre-need funds after the customer has rescinded the pre-need contract..." Blackburn stated the Board's conclusions were based on Section 13(c) of the Funeral Director Law, Act of January 14, 1952, P.L. (1951), 1898, *as amended*, 63 P.S. §

479.13(c), and the Board's regulations at 49 Pa. Code § 13.224(a) and 13.226.

[**5]

n3 See the Declaratory Judgments Act, 42 Pa.C.S. §§ 7531-7541.

Because we had jurisdiction over the declaratory judgment action but believed that this was an area within the Board's expertise, with the agreement of the parties, we invoked the doctrine of primary jurisdiction and referred the primary legal question involved to the Board. As part of that order, we directed the Board to hold an administrative hearing for the purpose of addressing whether a customer could rescind an irrevocable pre-need agreement and to issue an adjudication within 30 days. More specifically, the order required the Board to address:

Whether, under the current law, a pre-need customer may, for any reason, rescind an irrevocable pre-need agreement and demand the funeral director to forward the entire principal and the earnings to date to a subsequent funeral director for a pre-need contract with the subsequent director, even if the initial pre-need contract expressly provides that it shall be irrevocable and non-cancelable except for the three-day right-of-rescission [**6] provided for under the Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201-7?

[*151] The Board held a timely hearing on the matter. Then, relying on Section 13(c) of the Funeral Director Law, 63 P.S. § 479.13(c), and its regulations found at 49 Pa. Code §§ 13.224(a) and 13.226, the Board concluded that a customer could rescind an irrevocable pre-need agreement reasoning that because a funeral director who entered into a pre-need contract with a customer and received funds in advance acted as a fiduciary or a trustee of the funds received, the funds remained the property of the consumer until the services were provided. It also reasoned that neither the *Funeral Director Law* nor the Board's regulations prohibited the transfer of those funds to another funeral director by the customer to provide those services. Bean then filed a petition for review with this Court appealing that determination and arguing that the Board erred in holding that a customer could rescind an irrevocable pre-need agreement. The Board, reneging on the agreement and representation it made [**7] to the Court, maintained that there was no controversy and this Court lacked subject matter jurisdiction to hear the matter. This appeal by Bean followed. n4

n4 Our scope of review of the Board's decision is limited to determining whether constitutional rights have been violated, whether findings of fact are supported by substantial evidence and whether errors of law have been committed. *Firman v. Department of State, State Board of Medicine*, 697 A.2d 291 (Pa. Cmwlth. 1997), petition for allowance of appeal denied, 550 Pa. 722, 706 A.2d 1215 (1998).

I.

Initially, we must address the Board's position that our order referring the matter to the Board was in error because no actual controversy existed, and the doctrine of primary jurisdiction remanding the matter to the Board for consideration was improperly invoked.

This matter originally came before the Court as a request for declaratory action n5 in which Bean alleged that there was a controversy because the Board [**8] had indicated to a state representative that the pre-need agreements were rescindable, and because Bean had been contacted by a client to rescind an irrevocable pre-need agreement which he believed was irrevocable under the contract which the Board had previously approved. Preliminary objections were filed and the Board agreed to an order by this Court that the matter be referred to the Board, which, by doing so, essentially conceded that there was a controversy to be resolved. By acquiescing to this Court's order to hold a hearing on the issue of the revocability of the pre-need agreement rather than appealing that order, the Board agreed that there was a controversy and waived the argument it now makes. Not only did the Board waive that argument, but by its letter to the state representative indicating that the irrevocable pre-need agreements were rescindable, it created doubt in an area that it was charged to administer, and neither funeral directors nor customers know how to conduct their affairs. All of this is confirmed by the adjudication it issued under the consent order. n6

n5 Declaratory relief may be granted for the purpose of affording relief from uncertainty and insecurity regarding legal rights, status and other relations. *Faldowski v. Eighty Four Mining Co.*, 725 A.2d 843 (Pa. Cmwlth. 1998).

[**9]

n6 If Bean had not returned the money, he could have been subject to discipline under Sec-

tions 11 and 17 of the Funeral Director Law, 63 P.S. §§ 479.11 and 479.17 (pertaining to suspension/revocation of license and penalties, respectively.) Although Bean has yet to be disciplined, the record is clear that Bean has already received at least one demand from a customer that money paid pursuant to an irrevocable pre-need agreement be returned and the same demand has been made of another funeral director as evidenced by the inquiry of Representative Hanna. This Court has previously determined that:

If differences between the parties concerned, as to their legal rights, have reached the state of antagonistic claims, which are being actively pressed on one side and opposed on the other, an actual controversy appears; where, however, the claims of the several parties in interest, while not having reached the active stage, are nevertheless present, and indicative of threatened litigation in the immediate future, which seems unavoidable, the ripening seeds of a controversy appear.

Mid-Centre County Authority v. Boggs, 34 Pa. Commw. 494, 384 A.2d 1008, 1011 (Pa. Cmwlth. 1978). Because litigation for the return of the pre-paid funds is a distinct possibility as the next logical step for dissatisfied customers, a controversy does, in fact, exist.

[**10]

[*152] As to the Board's argument that we improperly invoked the doctrine of "primary jurisdiction," "primary jurisdiction" is a judicially created doctrine that allows courts to make a workable allocation of business between themselves and agencies responsible for the regulation of certain industries, and arises where the original jurisdiction of the court is being invoked to decide the merits of the controversy. Rather than exercising its own jurisdiction, the Court declines jurisdiction because it is proper to defer to the administrative agency's jurisdiction. Primary jurisdiction is exclusive jurisdiction because the agency has jurisdiction over the cause of action to which a decision of the court is relevant, and the jurisdiction of the court will extend to the remaining issues and the relief to be granted. Jaffe, *Primary Jurisdiction*, 77 Harv. L. Rev. 1037 (1964).

Although the primary jurisdiction doctrine was originally a federal doctrine that was established by the United States Supreme Court in *Texas & Pac. Ry. v. Abi-*

lene Cotton Oil Co., 204 U.S. 426, 51 L. Ed. 553, 27 S. Ct. 350, (1907), our Supreme Court adopted it in *Weston v. Reading Co.*, 445 Pa. 182, 282 A.2d 714 (1977), [**11] and further explained it in *Elkin v. Bell Tel. Co.*, 491 Pa. 123, 132-133, 420 A.2d 371, 376 (1980), as follows:

The principles of the doctrine of primary jurisdiction are well settled. The United States Supreme Court "...recognized early in the development of administrative agencies that coordination between traditional judicial machinery and these agencies was necessary if consistent and coherent policy were to emerge. The doctrine of primary jurisdiction has become one of the key judicial switches through which this current has passed." The doctrine "...requires judicial abstention in cases where protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme." (Citations omitted.)

Our Supreme Court went on to explain its effect, stating:

It is equally important to realize what the doctrine is not--it is not simply a polite gesture of deference to the agency seeking an advisory opinion wherein the court is free to ignore the agency's determination. Rather, once the court properly refers a matter or a specific issue to the agency, that agency's determination is binding upon the court and the parties [**12] (subject, of course, to appellate review through normal channels), and is not subject to collateral attack in the pending court proceeding. "The common law doctrine of res judicata, including the subsidiary doctrine of collateral estoppel, is designed to prevent the relitigation by the same parties of the same claim or issues." K.C. Davis, *Administrative Law*, § 181.10 (1972). Once the administrative (155 Pa. Commw. 93) tribunal has determined the issues within its jurisdiction, [*153] then the temporarily suspended civil litigation may continue, guided in scope and direction by the nature and outcome of the agency determination. *Feingold v. Bell of Pennsylvania*, supra [477 Pa. 1] at 22, 383 A.2d [791] at 801 (1977) (Pomeroy, J., dissenting).

In *Poorbaugh v. Pennsylvania Public Utility Commission*, 666 A.2d 744 (Pa. Cmwlth. 1995), petition for al-

lowance of appeal denied, 544 Pa. 678, 678 A.2d 367 (1996), we further explained the doctrine as follows:

Essentially, the doctrine creates a workable relationship between the courts and administrative agencies wherein, in appropriate circumstances, the courts can have [**13] the benefit of the agency's view on issues within the agency's competence. (Citations omitted.)

The doctrine of primary jurisdiction requires judicial abstention in cases where protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme. (Citations omitted.) Our Supreme Court stated in *Elkin* that the doctrine serves several purposes, chief of which are the benefits to be derived by making use of the agency's special experience and expertise in complex areas with which judges and juries have little familiarity. *Id.* Another important consideration is the need to promote consistency and uniformity in certain areas of administrative policy. *Id.* at 133, 420 A.2d 376. Once the administrative tribunal has determined the issues within its jurisdiction, then the temporarily suspended civil litigation may continue, guided in scope and direction by the nature and outcome of the agency determination. *Elkin*, 491 Pa. at 133-34, 420 A.2d at 377.

Id., 666 A.2d at 749. Therefore, when primary jurisdiction is conferred on an administrative agency, usually the following elements are [**14] present:

1. The industry is a heavily regulated industry;
2. To resolve the matter at issue requires a special expertise that resides within the agency;
3. The issue is fact specific and ordinarily requires voluminous and conflicting testimony to resolve it;
4. The administrative agency was created to address and focus on problems similar to the one for which its primary jurisdiction is being advanced;
5. It has jurisdiction to issue the relief requested;
6. Overriding all other factors, the regulatory system will work better if the administrative agency hears the matter rather than the courts.

Because the issue of the pre-need contracts was given to the Board to regulate and would better balance the interests involved, the doctrine of primary jurisdiction permitted this Court to send the matter to the Board for a determination on that specific issue. This Court's order requiring an administrative hearing *and* an adjudication gave the Board jurisdiction to hear the matter and now gives this Court jurisdiction to review the final adjudication of the Board. *See Pa. R.A.P. 1551* (review of quasi-judicial orders shall be heard by the court on the record).

[**15] II.

As to the merits, whether the Board erred in finding that irrevocable pre-need agreements may be revoked by a customer at any time prior to death, Bean argues that determination is not supported by the Funeral Director Law or the Board's regulations. The Board argues that both the Funeral Director Law and its regulations create a trustee relationship [*154] between the customer and the funeral director, thereby allowing the customer to terminate its relationship with the funeral director at any time regardless of whether the contract is "irrevocable."

The only section in the Funeral Director Law pertaining to pre-need agreements n7 is *Section 13(c)* which does not address whether irrevocable pre-need agreements may be rescinded. That section provides, in relevant part, the following:

No person other than a licensed funeral director shall, directly or indirectly, or through an agent, offer to or enter into a contract with a living person to render funeral services to such person when needed. If any such licensed funeral director shall accept any money for such contracts, he shall, forthwith, either deposit the same in an escrow account in, or transfer the same in trust to a [*16] banking institution in this Commonwealth, conditioned upon its withdrawal or disbursement *only for the purposes for which such money was accepted.* (Emphasis added.)

63 P.S. § 479.13(c). Similarly, nothing in the Board's regulations provide any direction or comment on pre-need agreements regarding rescission.

n7 There is also a section addressing pre-need agreements relative to future interment, but that also does not address whether an irrevocable pre-need agreement may be rescinded at any

time. *See* Section of 1 of the Funeral Director Law, 63 P.S. § 480.1.

While the Board acknowledges that nothing in the Act or implementing regulations makes irrevocable pre-need agreements revocable, the Board argues that a trustee relationship allows for the rescission of an irrevocable agreement. It relies on the following regulations which it has issued which govern the sale and safeguard of funds for pre-arranged burial needs. 49 Pa. Code § 13.224 [*17], titled "Funding and reporting of prepaid burial contracts," provides in relevant part:

(a) A funeral director shall deposit in escrow or transfer in trust to a banking institution in this Commonwealth, the entire amount of monies received by the funeral director under a prepaid contract for funeral services or merchandise, including additional service fees or arrangement fees.

* * *

(f) *Prepaid burial contracts or pre-need contracts to be used by a funeral director shall be reviewed and approved by the Board and should reflect whether or not an additional service fee or arrangement fee is charged.* Prepaid burial contracts or preneed contracts used by a funeral director may not incorporate a contract for funeral merchandise entered into by a person or entity other than a funeral director. (Emphasis added.)

49 Pa. Code § 13.226, titled "Nature and description of escrow/or trust accounts for prepaid burial contracts," provides the following:

(a) Funds received for prepaid burial contracts shall be placed in an escrow or trust fund account which shall be separate and distinct from the business and personal accounts of the funeral [*18] director.

(b) If funds received by a funeral director for preneed burial contracts are deposited in a banking account which bears interest, or are invested by the trustee bank and produce earnings, the interest or earnings shall be retained in the account with the principal and shall be held, accounted for and transferred in the same manner as the principal amount, to assure

delivery of the same quality of service and merchandise for which the contract was made.

[*155] (c) In the event of a sale or transfer of the business of a funeral director, pre-paid burial contracts and prepaid burial accounts shall immediately be transferred to the control of the licensee who will assume responsibility for completion of the prepaid burial contracts. The licensee-transferee shall notify the Board in writing of the licensee's willingness to accept responsibility for completion of the prepaid burial contracts.

Contrary to the Board's argument, under the Board's regulations at *49 Pa. Code § 13.1*, the pre-need agreements are defined as "a contract executed between a consumer and a licensed funeral director which provides that the funeral director will provide funeral [**19] merchandise and render services to the consumer upon the consumer's death." Because pre-need agreements are defined as contracts, contract principles apply. In *Empire Sanitary Landfill, Inc. v. Riverside School District*, 739 A.2d 651 (Pa. Cmwlth. 1999), we stated that a contract had to be construed according to the meaning of its language, and:

"The fundamental rule in construing a contract is to ascertain and give effect to the intention of the parties." *Sun Co., Inc. (R & M) v. Pennsylvania Turnpike Commission*, 708 A.2d 875, 878 (Pa. Cmwlth. 1998). "The intention of the parties must be ascertained from the document itself, if its terms are clear and unambiguous." *Id.* The Court's inquiry should focus on what the agreement itself expressed and not on what the parties may have silently intended. *Delaware County v. Delaware County Prison Employees Independent Union*, 552 Pa. 184, 713 A.2d 1135 (1998). "It is not proper, under the guise of construction, to alter the terms to which the parties, whether in wisdom or folly, expressly agreed." *Id.* at 190, 713 A.2d at 1138. The law assumes that the parties chose the [**20] language of their contract carefully. *Liazis v. Kosta, Inc.*, 421 Pa. Super. 502, 618 A.2d 450 (1992).

Id., 739 A.2d at 654. While the Board contends that contract law n8 recognizes a distinction between a purely commercial contract and one for professional services, whereby the latter will not be specifically enforced, this

argument ignores that the significant portion of the pre-need agreement is not for professional services but for the merchandise to be provided, i.e., a casket, urn, vault, etc. In this case, both the revocable and irrevocable pre-need agreements are unambiguous and, specifically, on the form endorsed by SecurChoice, the customer is able to choose whether he or she wishes to enter into a revocable or irrevocable agreement by signing the appropriate box.

n8 The Board relies on *Section 367 of the Restatement (Second) of Contracts* which provides:

(1) A promise to render personal service will not be specifically enforced.

(2) A promise to render personal service exclusively for one employer will not be enforced by an injunction against serving another if its probable result will be to compel a performance involving personal relations the enforced continuance of which is undesirable or will be to leave the employee without other reasonable means of making a living.

[**21]

Even if we were to agree with the Board that trust laws apply, they would not apply in this case to create a trustee relationship between Bean and the customer. The regulations specify that the money given by the customer to Bean must be placed in escrow or trust in a banking institution, thereby making the banking institution the trustee, not Bean, and the trust is both for the benefit of Bean and the customer. Again, assuming that a trust existed, in *In re Estate of Agostini*, 311 Pa. Super. 233, 457 A.2d 861 (Pa. Super. 1983), our Superior Court [*156] held that where property of any kind is placed in the name of the donor or settler in trust for a named beneficiary, *unless a power of revocation is expressly or impliedly reserved*, the general principle of law is that such facts create a trust which is *prima facie irrevocable*. Therefore, a customer's funds for pre-need arrangements accepted in trust does not give the customer the right to rescind that agreement at any time. n9

n9 Because a customer may not rescind an irrevocable pre-need agreement even if a trust is created, the Board's argument comparing the fu-

neral director/customer relationship to an attorney/client relationship where the client can discharge an attorney at any time is non-persuasive.

[**22]

While we agree with the Board that by not allowing contracts to be revoked there would sometimes be serious problems created, i.e., if he or she dies in another location in Pennsylvania far away from where the first funeral director is located, not only is there is nothing in the Funeral Director Law or the implementing regulations that allows the Board to change irrevocable contracts to revocable ones when it has approved the contracts, but that is not a rationale for making all contracts revocable. n10 Consequently, the Board erred in determining that the Funeral Director Law and its regulations allow customers to rescind irrevocable pre-need agreements.

n10 See Section 5 of the Funeral Director Law, 63 P.S. § 480.5, which allows for the revocation of a pre-need agreement if the customer moves out of state prior to his or her death.

Accordingly, the decision of the Board is reversed.

DAN PELLEGRINI, JUDGE

President Judge Colins concurs in result only.

\$= [**23] ORDER

AND NOW, this 22nd day of July, 2004, the order of the Department of State, State Board of Funeral Directors, dated May 7, 2003, is reversed.

DAN PELLEGRINI, JUDGE

DISSENT BY: DORIS A. SMITH-RIBNER

DISSENT: DISSENTING OPINION

BY JUDGE SMITH-RIBNER

I dissent from the decision of the majority to reverse the May 7, 2003 order issued by the State Board of Funeral Directors (Board), which declared that irrevocable pre-need agreements for the purchase of services required at the time of death were subject to rescission at the customer's request. The Board lacked subject matter jurisdiction to decide the question presented and to enter the order inasmuch as no case or controversy was presented that required a ruling. For this reason, the Board's order should be vacated and declared a nullity and the appeal

filed by Kevin M. Bean, licensed funeral director, should be dismissed.

The record shows that in 2002 Bean received a demand from a customer that funds paid to him pursuant to an irrevocable pre-need agreement be returned to the customer. In addition, Bean became aware of a communication between the Board's Counsel and a Pennsylvania State Representative who made an inquiry [**24] to the Board on behalf of his brother, another licensed funeral director, concerning the transfer of pre-need funds. Counsel for the Board stated:

The Board believes that all pre-need funds belong to the customer, and not to the funeral director, until the time of death and services are provided. Also, despite any contrary language drafted in the contract by the funeral director, while the contract may be irrevocable as to the use of funds, it is revocable as to which funeral director or funeral home is to provide services. Accordingly, a pre-need customer may rescind a pre-need contract and demand the funeral director to forward the entire principal [*157] and all earnings to date to a subsequent funeral director. With the exception of any reasonable arrangement fees which may not be finally collected until the customer's death, a funeral director may not retain pre-need funds after the customer has rescinded the pre-need contract.

(R.R. 632a.) In response to the above, the State Representative responded:

Tom, I've now had an opportunity to review the statute and the code. I don't see anything that expressly says that the trust must be transferable to another funeral home, [**25] other than in the case of the buyer moving out of state. Am I missing something?

In response Board counsel replied:

No, you are not missing anything. That conclusion is what the Board draws from the statute and the Board's regs.

(R.R. 631a.)

Bean thereafter filed his petition for review with this Court seeking declaratory relief, and the Board filed its

preliminary objections asserting that (a) the Court did not have original jurisdiction to consider the petition because the Board has exclusive jurisdiction and because an adequate statutory remedy existed before the Board subject to appellate review; (b) the Court lacks jurisdiction since Counsel's letter was not an adjudication; and (c) under the Declaratory Judgments Act, 42 Pa.C.S. § 7531 - 7541, no actual case or controversy existed as Counsel's letter represented an advisory opinion. Following a hearing before a judge of the Court and an order directing the Board to determine whether a pre-need agreement may be rescinded, the Board issued its order stating that a customer may rescind an irrevocable pre-need agreement and direct the funeral director to forward [**26] all funds paid by the customer to another funeral director.

In ruling on the merits rather than dismissing this appeal, the majority overlooks well-settled law that declaratory relief may be granted only for purposes of affording relief from uncertainty and insecurity regarding legal rights, status and other relations. *Faldowski v. Eighty Four Mining Co.*, 725 A.2d 843 (Pa. Cmwlth. 1998). Also a request for declaratory relief will be denied when the proceeding is within the exclusive jurisdiction of a tribunal other than a court. *Id.* Moreover, relief is unavailable under the Declaratory Judgments Act with respect to determining rights in anticipation of events that may never occur, *Silo v. Ridge*, 728 A.2d 394 (Pa. Cmwlth. 1999), and a court may not prematurely entertain an administrative appeal when an adequate statutory remedy exists. *Jordan v. Fayette County Board of Assessment Appeals*, 782 A.2d 642 (Pa. Cmwlth. 2001).

Bean seeks a declaration that the *Funeral Director Law* n1 (Law) and current regulations do not authorize the Board to discipline a funeral director who refuses to transfer consumer funds held in escrow for the [**27] benefit of a customer to another funeral director. As the Board points out, currently there are no pending disciplinary proceedings against Bean nor may such proceedings ever be filed. At oral argument, Board Counsel assured the Court that no disciplinary action would be instituted against Bean. Thus no basis existed for directing the Board to issue the order, and even if the Board did initiate disciplinary action it would be within the Board's exclusive jurisdiction to resolve, subject to appellate review.

n1 Act of January 14, 1952 (P.L. 1951), 1898, as amended, 63 P.S. §§ 479.1 - 479.20.

Bean seeks declaratory relief because he has entered into irrevocable pre-need agreements with various customers, and the communication between Board Counsel and the State Representative indicated that Counsel

viewed irrevocable agreements [*158] to be revocable to the extent that a customer could demand that funds held by one funeral director be forwarded to a different [**28] funeral director. Such circumstances, however, are not appropriate grounds for declaratory relief. See *Pennsylvania Turnpike Commission v. Hafer*, 142 Pa. Commw. 502, 597 A.2d 754 (Pa. Cmwlth. 1991) (declaratory relief is appropriate only when there is imminent and inevitable litigation). Bean has entered into pre-need agreements for years without any disciplinary action having been filed against him, and litigation is not imminent or inevitable merely because Board Counsel responded to an inquiry and expressed his views regarding the revocability of pre-need agreements. Therefore, no case or controversy exists. Should a dispute arise as to the revocability of such agreements warranting disciplinary action, the matter would be within the Board's exclusive jurisdiction in accordance with Section 11(a) of the Law, 63 P.S. § 479.11(a). n2

n2 Section 11(a) of the Law provides that:

(a) The board, by a majority vote thereof, may refuse to grant, refuse to renew, suspend or revoke a license of any applicant or licensee, whether originally granted under this act or under any prior act, for the following reasons:

...

(6) Violation of or non-compliance with the provisions of this act or the rules and regulations of the board.

[**29] /

Based on well-established legal principles, I conclude that the Board's order should be vacated and declared a nullity and that Bean's appeal should be dismissed. The Board lacked subject matter jurisdiction to determine the question presented to it, and the Court lacked authority to direct the Board to issue the declaratory order. n3 Additionally, neither the Law nor the Declaratory Judgments Act authorizes the Board to issue advisory opinions. Because the Board lacked jurisdiction in the underlying claim, the majority erred in disposing of the merits of this appeal and in granting the requested declaratory relief. Therefore, I dissent.

n3 I disagree with the majority's assertion that the doctrine of primary jurisdiction allowed

the Court to remand this matter for the Board to determine the question presented, but more fundamentally I disagree that the Court's order requiring the Board to hold a hearing and to issue an adjudication "gave the Board jurisdiction to hear the matter and now gives this Court jurisdiction to review the final adjudication of the Board." Slip op at 10. If the order requiring the Board to hold a hearing and to issue an adjudication is all that is needed to confer jurisdiction on a tribunal, then the majority essentially has determined that the doctrine has no meaning. In *Ostrov v. I.F.T., Inc.*, 402 Pa. Super. 87, 586 A.2d 409, 413 (Pa. Super. 1991), the court explained that primary jurisdiction applies "where the administrative agency cannot provide a means of complete redress to the complaining party and yet the dispute involves issues that are clearly better resolved in the first instance by the administrative agency charged with regulating the subject matter of the dispute." However, for primary jurisdiction to apply, the agency must have subject matter jurisdiction in the first instance. *Id.* The Board here

did not have subject matter jurisdiction to determine whether pre-need customers may rescind an irrevocable contract.

In his order requiring a hearing, the judge noted that "the parties hereby agree and the Court, therefore, orders, the following...." (R.R. at 1a.). The Board was then ordered to and did hold an administrative hearing to address the legal question involved. Bean contends that the Board cannot now complain about the procedure. However, to the extent that Bean claims the Board consented to its subject matter jurisdiction, I note that subject matter jurisdiction can never be waived. *City of Philadelphia v. White*, 727 A.2d 627 (Pa. Cmwlth. 1999).

[**30]

DORIS A. SMITH-RIBNER, Judge

Judge Leadbetter joins in this dissenting opinion.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF STATE

DATE: January 16, 2007

SUBJECT: Proposed Rulemaking:
State Board of Funeral Directors
Preneed Funeral Arrangements (16A-4815)
RESUBMITTED

TO: Andrew C. Clark, Deputy General Counsel *AWB*
Office of General Counsel

FROM: Thomas A. Blackburn, Assistant Counsel
Department of State

There are no significant legal and policy issues, other than as discussed in this memo or the preamble, presented by this proposed amendment to the regulations of the State Board of Funeral Directors regarding preneed contracts for funeral services and merchandise. The proposed rulemaking would amend the Board's regulations to set forth standards for funeral directors to follow in handling preneed accounts and preneed funds and reporting them to the Board.

The proposed rulemaking is partly in response to *Bean v. State Bd. of Funeral Directors*, 855 A.2d 148 (Pa. Cmwlth. 2004), *appeal denied*, 882 A.2d 479 (Pa. 2005). In that case, customers who had signed irrevocable preneed contracts with Bean or other funeral directors demanded moneys that they had paid be returned to them. The Board determined that the customers could rescind the contracts. The Court found that neither section 13(c) of the Funeral Director Law (63 P.S. § 479.13(c)) nor existing regulations of the Board allow it to establish nonregulatory standards for the revocability or transferability of preneed funds among funeral directors or licensed entities. The Court ruled that legislation or regulation is necessary to accomplish the stated policy of the Board.

I certify that I have reviewed this regulation for form and legality, that I have discussed any legal and policy issues with the administrative officers responsible for the program, and that all information contained in the Preamble and Annex is correct and accurate.

TAB



COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF STATE
BUREAU OF PROFESSIONAL AND OCCUPATIONAL AFFAIRS
STATE BOARD OF FUNERAL DIRECTORS
Post Office Box 2649
Harrisburg, Pennsylvania 17105-2649
(717) 783-3397

August 15, 2007

The Honorable Arthur Coccodrilli, Chairman
INDEPENDENT REGULATORY REVIEW COMMISSION
14th Floor, Harristown 2, 333 Market Street
Harrisburg, Pennsylvania 17101

Re: Proposed Regulation
State Board of Funeral Directors
16A-4815: Preneed Funeral Arrangements

Dear Chairman Coccodrilli:

Enclosed is a copy of a proposed rulemaking package of the State Board of Funeral Directors pertaining to Preneed Funeral Arrangements.

The Board will be pleased to provide whatever information the Commission may require during the course of its review of the rulemaking.

Sincerely,

A handwritten signature in cursive script that reads "Anthony Scarantino".

Anthony Scarantino, Chairperson
State Board of Funeral Directors

AS/TAB:rs

Enclosure

cc: Basil L. Merenda, Commissioner
Bureau of Professional and Occupational Affairs
Albert H. Masland, Chief Counsel
Department of State
Joyce McKeever, Deputy Chief Counsel
Department of State
Cynthia Montgomery, Regulatory Counsel
and Senior Counsel in Charge
Department of State
Thomas A. Blackburn, Counsel
State Board of Funeral Directors
Frank Bolock, Jr., Esquire
State Board of Funeral Directors

TRANSMITTAL SHEET FOR REGULATIONS SUBJECT TO THE
REGULATORY REVIEW ACT

RECEIVED

I.D. NUMBER: 16A-4815
SUBJECT: PRENEED FUNERAL ARRANGEMENTS
AGENCY: DEPARTMENT OF STATE
STATE BOARD OF FUNERAL DIRECTORS

2007 AUG 15 PM 12: 22

INDEPENDENT REGULATORY
REVIEW COMMISSION

TYPE OF REGULATION

- X Proposed Regulation
Final Regulation
Final Regulation with Notice of Proposed Rulemaking Omitted
120-day Emergency Certification of the Attorney General
120-day Emergency Certification of the Governor
Delivery of Tolled Regulation
a. With Revisions b. Without Revisions

FILING OF REGULATION

DATE	SIGNATURE	DESIGNATION
8/15/07	<i>Jan M. Law</i>	HOUSE COMMITTEE ON PROFESSIONAL LICENSURE
8-15-07	<i>Fred Leggeman</i>	SENATE COMMITTEE ON CONSUMER PROTECTION & PROFESSIONAL LICENSURE
8/15/07	<i>Dr. Belmont</i>	INDEPENDENT REGULATORY REVIEW COMMISSION
		ATTORNEY GENERAL (for Final Omitted only)
8/15/07	<i>C. Lee-Bauer</i>	LEGISLATIVE REFERENCE BUREAU (for Proposed only)