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October 20, 2009

Via Facsimile: 717-783-2664 and

Email: Irrc@irrc.state.pa.us and jjewett@irrc.state.pa.us

The Honorable Arthur Coccodrilli, Chairman
The Honorable George D. Bedwick, Vice Chairman
The Honorable Silvan B. Lutkewitte, III, Commissioner
The Honorable John Mizner, Commissioner
The Honorable S. David Fineman, Commissioner
Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, PA 17101

John H. Jewett, Regulatory Analyst
Independent Regulatory Review Commission
14th Floor, Harristown 2
333 Market Street
Harrisburg, PA 17101

**RE: Comments in Opposition to Proposed State Board of Funeral Director Regulation
No. 16A-4815 (IRRC # 2627)**

Dear Chairman, Vice Chairman, Commissioners and Mr. Jewett:

By e-mail dated September 22, 2009, Mr. Jewett was kind enough to advise that your Commission, along with the appropriate legislative committees, had received a final form regulation proposed by the State Board of Funeral Directors. In that e-mail, Mr. Jewett advised that the Commission would accept written comments from interested parties, either in support of or in opposition to that regulation which has been identified as "Regulation No. 16A-4815 (IRRC # 2627)" – relating to pre-need agreements. The undersigned had previously submitted detailed comments to the State Board on behalf of the Pennsylvania Cemetery Cremation & Funeral Association ("PCCFA") back in September of 2007, and that which follows constitutes a few additional comments and concerns because, despite the multitude of comments and concerns expressed by PCCFA, numerous other commenters, the House Professional Licensure Committee, and IRRC itself, the State Board appears intractable and unbending in its effort to essentially render the concept of pre-need so difficult and financially impracticable that it will soon be a thing of the past. Such an end result is bad for Pennsylvanians; it will result in much

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higher costs because all contracts will become at-need (at the time of death) where emotions control decision-making; and, perhaps most importantly, there is absolutely nothing “broke” that requires “fixing” by these latest proposals – indeed they “fix” nothing.

As noted above, on September 24, 2007, the undersigned submitted detailed comments relating to this same regulatory scheme and, rather than duplicating the effort set forth in that correspondence, the undersigned simply incorporates by reference the *seriatim* concerns raised therein. A copy of that September 24, 2007 correspondence is attached hereto as Exhibit “A”.

Moving on, PCCFA has read with great detail the “Regulatory Analysis Form” that accompanied the current regulatory proposal. With respect, the “Statement of Need” is both unpersuasive and circular. First, the Board acknowledges that the rulemaking is not mandated by any federal or state law and the Board further acknowledges that the rulemaking is not based upon any “data, studies, or references.” The simple fact is that, despite the boilerplate assertions that these regulations are “needed” and that there exists a “compelling public interest that justifies the regulation”, there is simply no description of what that need is or what the compelling public interest is comprised of. The reason for the absence of such a discussion derives from the inescapable fact that there is no problem at the present and, therefore, there is no need for a scheme which will turn on its head the manner in which pre-need sales and business have operated successfully and beneficially for the consumer over the last several decades. Quite to the contrary, by making all pre-need agreements “illusory” and by requiring funeral directors to constantly advise their pre-need customers every time there is any change in ownership, the Board will have effectively created so many disincentives for the funeral director that pre-need business, marketing and peace of mind for the Pennsylvania consumer shall have come to a *de facto* end.

As set forth more fully in the September 24, 2007 comments, this current proposed scheme is simply a backdoor attempt to do that which the Board attempted, via fiat, to accomplish five or six years ago. Unfortunately for the Board, Commonwealth Court, in an *en banc* decision known as Bean v. Department of State, State Board of Funeral Directors, 855 A.2d 148 (Pa. Cmwlth. 2004), *appeal denied*, 584 Pa. 696, 882 A.2d 479 (2005) (attached hereto as Exhibit B”)¹, concluded that the Board could not demonstrate any reason for “declaring” all pre-need agreements “rescindable”. Some five years later, the Board continues to be unable to show why such a seismic change in the pre-need industry is required, unless, of course, the motive is to open a door for unhealthy pilfering of existing customers and customer contracts and/or to make the pre-need business so untenable that the customer will be left to contract at-need when

¹ The undersigned was counsel of record in Bean.

The Honorable Arthur Coccodrilli, Chairman
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emotions are high, decisions are made based upon grief, and the old line funeral director profits thereby.

Through its passage of the Future Interment Law, our General Assembly created a framework for the pre-need sale of funeral and cemetery merchandise. In that statute, appearing at 63 P.S. § 480.1 *et seq.*, a provision was enacted which provided that “if the purchaser moves out of the state...[he] may cancel any such contract for the furnishing of personal property or services...”. This “out of state” change in circumstance makes sense and provides a legitimate governmental protection. However, the very fact that the Funeral Director Law itself (as opposed to the Future Interment Law) does not contain this provision, does not, *ipso facto*, statutorily empower this Board to “legislate” into existence illusory, one-sided contracts. Basic tenets of contract law require reciprocal “consideration”. Thus, although this Board identifies these agreements as “pre-need funeral contracts”, they are not legal or binding contracts, since the funeral director secures no consideration but for the duty to hold a customer’s funds unless and until that customer wishes (and/or is coerced) to “move” his funds to another pirating funeral director.

From a free commerce perspective, consider the impact these regulations will have upon the sale of any funeral home or funeral business. If the Board has its way, every time there is any transfer of any portion of the business, all pre-need customers of that home must be notified and given the opportunity to “exit” their contract. An acquiring entity is simply unable to consider the pre-need accounts of the seller as having any value under such circumstances, yet there is no offsetting governmental benefit associated with the requirement. In this regard, the regulation will significantly “devalue” a funeral director’s “business” – something the funeral director hardly needs in this economic climate.

PCCFA finds both noteworthy and disturbing, the fact that the Funeral Board essentially ignored each and every recommendation and concern of both IRRC and the House Professional Licensure Committee. See, for example, Exhibit “C”. Such conduct demonstrates a course of obdurate and transparent behavior designed to protect the funeral industry and not the Pennsylvania consumer. There is no reason why any intelligent Pennsylvania adult cannot enter into an agreement which gives him or her substantial benefit, peace of mind, and the contractual assurance that his plans for disposal of his remains are committed to a particular funeral home, replete with specified services and ultimate disposal of the remains. In other words, he should have the choice to rid himself of pirating efforts and eleventh-hour efforts of next-of-kin or attorneys- in-fact to thwart well-thought out estate planning.

Beyond that, and despite the legal rhetoric asserted by the Board, this concept of “portability” as opposed to “rescindability” is a distinction without a difference. Indeed, the new, pirating funeral director who has lured away the existing customer will generally be required, as a matter

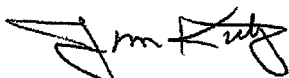
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of law, to give a three-day right of rescission to his new customer, which, of course, means that the new contract and the new terms are subject to rescission *ab initio*. If the Members of this Honorable Commission read the Bean decision of 2005, you will see that the Board argued for pure "rescindability". The concept of "portability" was simply a cute, but transparent effort to secure rescindability under the guise of continued irrevocability when legally, such is not the case. Indeed, recent comments submitted to this Commission by the Disability Rights Network of Pennsylvania (see, Exhibit "D") confirm that there will be huge negative implications associated with Social Security and Medical Assistance if these regulations are promulgated. The Board's proffered "explanation" as to why these funds would remain eligible for SSI or Medical Assistance is disingenuous and plain wrong. Beyond that, the Board's submission does not explain where, in the statute, authority exists to "legislate" these rules. To the contrary, Section 13(c) requires that funds may be received only when "withdrawal or disbursement is for the purpose" for which the funds were accepted in the first place! Allowing funds to be "moved"; allowing new contracts to be negotiated; allowing the customer a new three-day right of rescission; and allowing a new funeral home to provide services at a different location and for different services or merchandise conflicts with Section 13(c).

With respect, if the concept of pre-need contracts is to be abolished, as is the clear intent of these regulations, such a monumental decision and change of Commonwealth policy should be accomplished by the General Assembly and not by a Board who takes its direction from the asserted interests of its own industry.

In summary, these regulations are offensive to the notion of free enterprise, competition, and consumer peace of mind. They deftly remove the concept of pre-need as a valuable option for the Pennsylvania consumer and, in fact, they will expose the Pennsylvania consumer to constant efforts of "come with me - I can do it cheaper!"(but probably at a cost to the consumer). It is nothing short of astounding that the Board has been unable to point to a single consumer complaint, yet it asserts in its Regulatory Analysis Form that a compelling need exists for the promulgation. PCCFA respectfully urges IRRC to reject this regulatory proposal because it is simply no different from that which was previously provided to this Honorable Commission, and it was this Commission which, by letter dated October 24, 2007, (see, Exhibit "D") noted a host of problems and concerns associated with the scheme.

Very truly yours,



James J. Kutz

JJK/dlh

The Honorable Arthur Coccodrilli, Chairman
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The Honorable Silvan B. Lutkewitte, III, Commissioner
The Honorable John Mizner, Commissioner
The Honorable S. David Fineman, Commissioner

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Enclosures

cc: Thomas A. Blackburn, Esquire w/encs. (via email: tblackburn@state.pa.us)

EXHIBIT “A”



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September 24, 2007

Via Hand Delivery

Michelle T. Smey, Board Administrator
State Board of Funeral Directors
Department of State
2601 North Third Street
Harrisburg, PA 17110

**RE: Comments of Pennsylvania Cemetery Cremation & Funeral
Association to Proposed Regulations of State Board of Funeral
Directors Published August 25, 2007 Re: Pre-Need Funeral Contracts**

Dear Ms. Smey:

On Saturday, August 25, 2007, the State Board of Funeral Directors published Notice of Proposed Rulemaking, inviting public comment within 30 days of that publication. Allow this letter to serve as notice that the undersigned represents the Pennsylvania Cemetery Cremation & Funeral Association ("PCCFA"), and the comments that follow have been authorized by that entity and its members, who comprise every aspect of the death-care industry.

As an initial point, PCCFA wishes to go on record as being strongly opposed to the subject Regulations for a host of reasons. Specifically, these proposed Regulations constitute what is now a third attempt by the State Board and the Pennsylvania Funeral Directors Association ("PFDA") to legislate in an area which should be left for the General Assembly and to render nugatory a comprehensive and well-reasoned Commonwealth Court *en banc* decision authored by Judge Dan Pellegrini, wherein he reversed an Adjudication of the State Board of Funeral Directors, with direction that the Board could not declare irrevocable, pre-need agreements revocable at the whim of the customer and/or urging of another funeral director who is simply trying to harass an existing pre-need customer and pirate the business therefrom. See *Bean v. Department of State, State Board of Funeral Directors*, 855 A.2d 148 (Pa. Cmwlth. 2004), appeal denied, 584 Pa. 696, 882 A.2d 479 (2005) (holding that the Board's proffered "rationale" for requiring revocability or transferability is not supportable). Indeed, there is simply no need to detrimentally overhaul an existing pre-need contract scheme which has worked quite well over the last several decades. In other words, there is nothing "broke" whatsoever; there is little or no genuine consumer benefit to be derived by these proposed changes; and if promulgated, the end result will simply be to benefit the funeral director financially and expose pre-need customers, who have made final arrangements, to constant telemarketing and other harassment by those who

currently do not have pre-need business but are willing to attempt to lure existing customers from funeral directors who have lawfully and fairly secured pre-need business.

These Regulations will also effectively gut the good will and value of any funeral business which holds pre-need contracts because the Regulations, as drafted, create a wholly illusory contract to which one of the parties is bound to no obligation and for which no funeral director could ever convey his funeral business with the pre-need asset. Adding insult to injury, these proposed Regulations would wreak havoc with the currently in-place banking institutions who have agreed to serve as the recipient and trustee of these pre-need monies. With respect, no banking institution would likely continue to serve if the entire pre-need trust account could be drained at any point in time, except, of course, as that arrangement exists with PFDA's for-profit affiliate.

Both Governor Directives and existing statutory law make clear that Regulations are not to be proposed and implemented, unless a decision has been made that a "compelling public interest" needs to be advanced. Here, the Board suggests, without any true basis, that the current Regulations must be updated to "conform to existing practices and to provide adequate protection to the consumer of pre-need services in the instance of changed circumstances." First, the Board never identifies what "existing" practice within the industry has done away with legitimate, irrevocable, pre-need agreements under which the funeral director binds himself to certain significant commitments upon the death of the customer. Indeed, the State Board of Funeral Directors has, for the last many years, reviewed and approved for use pre-need agreements which, by their terms, were irrevocable. Query: If the Board was approving these types of agreements, what new fact or change in circumstance has come into play? The simple answer is – this Regulation is simply another one of PFDA's efforts (and I might add, successful efforts) to utilize the State Board to change the law whenever it suits and helps PFDA. Indeed, for years PFDA pre-need agreements contained irrevocability provisions and they were approved for years by the Board. What truly appears to be the catalyst for this "automatic transferability" requirement is to either (a) create the opportunity for PFDA and its members to pirate away customers who have entered into pre-need agreements with individuals not aligned with PFDA, or (b) make pre-need so unattractive that it ceases to exist, thereby enabling the funeral profession to make more money when the at-need arrangements are made during a time of extreme familial grief. PFDA has its own pre-need affiliate; its own for-profit marketing arm; and PFDA, through its use of this Board (comprised entirely of PFDA members as professional members) now weaves its desired end result. It is certainly legitimate for a trade organization to proffer issues and positions to a regulatory agency. However, in this instance, the proposed Regulations reflect another patent example of PFDA's use of the Board to manufacture any financial end result desired by PFDA. Indeed, in the proceeding involving Bean and the State Board (wherein this irrevocability issue was first and finally litigated), PFDA sought intervention from the Board and was granted intervention. Predictably, PFDA lobbied for an Adjudication which would *defacto* void irrevocable agreements and predictably, the Board concluded precisely what PFDA told it to conclude.

The General Assembly knows where and when to impose restrictions on the otherwise existing right of two private parties to contract. For example, in the Future Interment Law, 63 P.S. § 480.1 *et seq.*, which provides a vehicle for the sale of funeral merchandise pre-need, the statute expressly states that, if the purchaser of a pre-need contract for goods or merchandise moves out of state, the holder of the pre-need agreement is entitled to receive the principal amount of money on deposit to the credit of that particular contract. See 63 P.S. § 480.5. Notably, although the Funeral Director Law has been amended several times since the enactment of the Future Interment Law in 1963, the General Assembly has chosen not to enact a statutory provision dealing with irrevocability for funeral director pre-need contracts. That silence by the Legislature strongly reflects that it has chosen not to intrude upon the right of two parties to contract. Yet, the State Board, by attempting to “legislate” these Regulations, seeks that end result. As the mission and authority of a state agency is to interpret law, and not make law, these Regulations must be rejected.

Beyond these concerns, this Regulation, if adopted, will create absurd and prejudicial effects on consumers. For example, the Social Security Administration currently permits a pre-need customer to exempt funds from estate taxes and other attachments if pre-need arrangements are irrevocable by their terms. Inasmuch as these draft Regulations will allow consumers to “undo” contracts they have entered into, they are, by definition, not irrevocable and will be the subject of the evils set forth above.

The following scenario illustrates another absurd result. Assume customer “x” pays \$6,000 for a pre-need contract which guarantees him/her funeral services and merchandise at the time of death. Assume funeral director Smith, aware of this agreement, lobbies the customer to undo that existing contract and, instead, contract with him at a lower price. Under the Board’s proposed scenario, the funeral director must turn over the then-existing balance in the account of that customer which, in many instances, will be less than the principal amount paid by reason of investment activity. In other words, the consumer, believing that he or she will get \$6,000, is not necessarily guaranteed that amount. Beyond that, the consumer then needs to enter into a second, new contract with a funeral director who may be far less worthy and law abiding than the original contracting funeral director. Then, to add insult, if the second agreement costs the consumer less, the monies are returned to the consumer, thus exposing those funds to the previous in-place protections of SSI.

Simply stated, proposed Section 13.228 is unnecessary; it is anti-competitive; anti-consumer; it will create uncertainty and confusion for the customer; and it will expose the customer to acts of preying by both in-state and out-of-state hustlers. Importantly, if the contract was secured through unfair marketing practices, the Attorney General can intervene, and common law rescission (or fraud) options exist.

There are a number of ways in which the Board could take appropriate steps, if it had a concern that consumers were entering into irrevocable pre-need agreements while not understanding the commitment. For example, a Regulation could arguably be proffered which requires some

separate disclosure of "irrevocability" to the consumer and its implications. Similar to the Pennsylvania Unfair Trade Practices Act, there could be some three-day right of rescission where applicable. Indeed, even with the sale of hearing aids, the General Assembly builds in a 30-day refund "for any reason" clause. Even a geographical provision, similar to the Future Interment Law might make some sense. There appears to be no other instance where an agreement is wholly rescindable by one party in the area of free enterprise and free market. In fact, even federally regulated banking institutions have the right to penalize a customer who seeks to terminate a Certificate of Deposit contract prematurely. These Regulations give the funeral director every disincentive to meet with customers and allow them to plan the type and form of funeral or other service they choose to commit to. Such end result is not pro-consumer. Rather, the end result will either be the harassment of existing pre-need customers by those who do not have pre-need business, or the beginning of the end of pre-need opportunities for Pennsylvania consumers, given the huge disincentive for legitimate funeral homes to commit resources, services and merchandise, only to have the plug pulled at the whim of the consumer. Judge Pellegrini said it best when he indicated there could be circumstances justifying concern within the Board, but the wholesale opportunity to rescind for any reason is simply not justified.

Another area of significant concern is this Board's effort to render illegal that which has been legal for years. Specifically, the Board now proposes that a funeral director may not have any ownership in any other entity involved in the sale of funeral merchandise or goods, even though the law nowhere prohibits same. It is simply unconstitutional and shocking that this Board, in 2007, would seek to render illegal many, many arrangements which funeral directors and others have put in place, wherein the funeral director has an interest in a corporation or other entity which can lawfully sell funeral goods or merchandise. Indeed, as late as 1999, PFDA (the Board's alter ego and vice versa) was disseminating statewide information and recommendations urging funeral directors to create a separate entity, so that funeral merchandise could be sold and trusted at 70%, consistent with the Future Interment Law. Indeed, PFDA went so far as to create an "Incorporation Kit" for use by the funeral directors within the state. Apparently realizing that its project did not get off the ground, PFDA has now convinced "its" State Board to make illegal that which PFDA recommended just some seven or eight years ago. Law should not be interpreted depending upon the whims of a trade organization and a regulatory board which demonstrates a "captured" status to that trade organization by doing whatever the trade organization wants at that particular point in time!!

In closing, PCCFA regrets the zeal with which it has discussed the proposed Regulations and its concerns for those proposals. However, given the total absence of consumer "need" for these draft Regulations, and given the flip-flop approach of the Board to interpreting the Funeral Director Law, PCCFA believes it appropriate to "shoot straight" and urge this Board to do the honorable thing; *to wit*, withdraw the Regulations as unnecessary, anti-consumer, and protectionist. If the Board wishes to do away with legitimate pre-need contracting, it should seek legislative revision. However, it is not the province of the State Funeral Board to make major policy and business decisions which affect significantly and detrimentally businesses which have been operating within the bounds of law for decades. PCCFA is also fully aware that, on the

Michelle T. Smey, Board Administrator
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heels of these proposed Regulations relating to revocability, the death industry will be met with additional anti-competitive Regulations prohibiting agents and employees of funeral homes from effectively communicating with prospective pre-need customers. The linkage between the current Regulations and those which are going to follow, cannot be ignored. The consumer is not benefitted when reasonable and legitimate pre-need is effectively abolished, in lieu of at-need decision-making where the next-of-kin are obviously emotional and frequently subject to decision-making processes which their deceased loved one would not have wanted, or, in the case of these Regulations, directed to be otherwise.

Very truly yours,

James J. Kutz

JJK:dlh

EXHIBIT “B”

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Citation: 2004 Pa. Commw. LEXIS 553

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

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.**CASE SUMMARY****PROCEDURAL POSTURE:** Petitioner, a licensed funeral director, appealed the decision and order of the Pennsylvania Department of State, State Board of Funeral Directors, which determined that irrevocable pre-need agreements were subject to rescission at the request of a customer who had previously agreed to the terms of that agreement and were transferable to another funeral director.**OVERVIEW:** At issue in the case were two pre-need agreement forms, which had been approved by the Board. On appeal, the Board argued that the appellate court's 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. The appellate court concluded that by acquiescing to the appellate 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 was making on appeal. In addition, the appellate court concluded that the Board erred in determining that the Pennsylvania Funeral Director Law and its regulations allowed customers to rescind irrevocable pre-need agreements because there was nothing in the Funeral Director Law or the implementing regulations that allowed the Board to change irrevocable contracts to revocable ones when it had approved the contracts. Also, a customer's funds for pre-need arrangements accepted in trust did not give the customer the right to rescind that agreement at any time.**OUTCOME:** The Board's decision and order were reversed.


CORE TERMS: funeral director, pre-need, customer, irrevocable, primary jurisdiction, burial, rescind, revocable, prepaid, declaratory, state representative, declaratory relief, administrative agency's, funeral home, merchandise, licensed, consumer, funeral, escrow, matter jurisdiction, exclusive jurisdiction, disciplinary, rescission, rescinded, earnings, banking, box, order requiring, time of death, original jurisdiction


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
[Administrative Law](#) > [Judicial Review](#) > [Standards of Review](#) > [Substantial Evidence](#) 


HN1  An appellate court's scope of review of a decision of the Pennsylvania Department of State, State Board of Funeral Directors 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. [More Like This Headnote](#)


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HN2  Declaratory relief may be granted for the purpose of affording relief from uncertainty and insecurity regarding legal rights, status and other relations. [More Like This Headnote](#)


[Civil Procedure](#) > [Justiciability](#) > [Case or Controversy Requirements](#) > [Actual Disputes](#) 


[Civil Procedure](#) > [Justiciability](#) > [Ripeness](#) > [General Overview](#) 


[Constitutional Law](#) > [The Judiciary](#) > [Case or Controversy](#) > [Ripeness](#) 


HN3  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. [More Like This Headnote](#)


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[Administrative Law](#) > [Separation of Powers](#) > [Primary Jurisdiction](#) 

[Civil Procedure](#) > [Jurisdiction](#) > [Subject Matter Jurisdiction](#) > [General Overview](#) 


HN4  "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. [More Like This Headnote](#)


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
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HN5  The primary jurisdiction 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. [More Like This Headnote](#)


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
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HN6  The primary jurisdiction doctrine 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 (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. 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. [More Like This Headnote](#)


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
[Administrative Law](#) > [Separation of Powers](#) > [Primary Jurisdiction](#) 

HN7  Essentially, the primary jurisdiction doctrine creates a workable relationship between the courts and administrative agencies wherein, in appropriate circumstances, the courts can have the benefit of the agency's view on issues within the agency's competence. [More Like This Headnote](#)

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[Administrative Law](#) > [Separation of Powers](#) > [Jurisdiction](#) 

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
HN8  When primary jurisdiction is conferred on an administrative agency, usually the following elements are 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. [More Like This Headnote](#)


[Contracts Law](#) > [Formation](#) > [General Overview](#) 


[Contracts Law](#) > [Performance](#) > [Assignment](#) > [General Overview](#) 


[Governments](#) > [State & Territorial Governments](#) > [Licenses](#) 


HN9  See Pa. Stat. Ann. tit. 63, § 479.13(c).

[Contracts Law](#) > [Types of Contracts](#) > [Personal Service Agreements](#) 


HN10  See 49 Pa. Code § 13.224.

[Contracts Law](#) > [Types of Contracts](#) > [Personal Service Agreements](#) 

[Estate, Gift & Trust Law](#) > [Trusts](#) > [Trustees](#) > [Duties & Powers](#) > [General Overview](#) 

HN11  See 49 Pa. Code § 13.226.

[Contracts Law](#) > [Contract Interpretation](#) > [General Overview](#) 

HN12  A contract has 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. The intention of the parties must be ascertained from the document itself, if its terms are clear and unambiguous. The court's inquiry should focus on what the agreement itself expressed and not on what the parties may have silently intended. It is not proper, under the guise of construction, to alter

the terms to which the parties, whether in wisdom or folly, expressly agreed. The law assumes that the parties chose the language of their contract carefully. [More Like This Headnote](#)

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."¹ 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.

FOOTNOTES

¹ 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. ² 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 ³ 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.

FOOTNOTES

² 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]**

³ 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, renegeing 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. ⁴

FOOTNOTES

⁴ *HN1* 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 ⁵ 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. ⁶

FOOTNOTES

⁵ *HN2* 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]**

⁶ If Bean had not returned the money, he could have been subject to discipline under Sections 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:

HN3 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," *HN4* "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. Abilene 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." *HN5* 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 *HN6* 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 allowance of appeal denied, 544 Pa. 678, 678 A.2d 367 (1996), we further explained the doctrine as follows:

*HN7** 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, *HN8** 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 ⁷ is Section 13(c) which does not address whether irrevocable pre-need agreements may be rescinded. That section ^{HN9} 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.

FOOTNOTES

⁷ 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," ^{HN10} 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 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. (Emphasis added.)

49 Pa. Code § 13.226, titled "Nature and description of escrow or trust accounts for prepaid burial contracts," ^{HN11} 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 ^{HN12} 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 ^a 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.

FOOTNOTES

⁸ 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. ⁹

FOOTNOTES

⁹ Because a customer may not rescind an irrevocable pre-need agreement even if a trust is created, the Board's argument comparing the funeral 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 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. ¹⁰ Consequently, the Board erred in determining that the Funeral Director Law and its regulations allow customers to rescind irrevocable pre-need agreements.

FOOTNOTES

¹⁰ 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.

/BOLD> **[**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 ¹ (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.

FOOTNOTES

¹ 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).²

FOOTNOTES

² 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.³ 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.

FOOTNOTES

³ 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.







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EXHIBIT “C”

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ALVIN C. BUSH, VICE CHAIRMAN
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JOHN F. MIZNER, ESQ.
KIM KAUFMAN, EXECUTIVE DIRECTOR
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INDEPENDENT REGULATORY REVIEW COMMISSION
333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

October 24, 2007

Anthony Scarantino, Chairman
State Board of Funeral Directors
2601 North 3rd Street
Harrisburg, PA 17110

Re: Regulation #16A-4815 (IRRC #2627)
State Board of Funeral Directors
Preneed Funeral Arrangements

Dear Chairman Scarantino:

Enclosed are the Commission's comments for consideration when you prepare the final version of this regulation. These comments are not a formal approval or disapproval of the regulation. However, they specify the regulatory review criteria that have not been met.

The comments will be available on our website at www.irc.state.pa.us. If you would like to discuss them, please contact me.

Sincerely,

Kim Kaufman
Executive Director
wbg
Enclosure

cc: Honorable Robert M. Tomlinson, Chairman, Senate Consumer Protection and Professional Licensure Committee
Honorable Lisa M. Boscola, Minority Chairman, Senate Consumer Protection and Professional Licensure Committee
Honorable P. Michael Sturla, Majority Chairman, House Professional Licensure Committee
Honorable William F. Adolph, Jr., Minority Chairman, House Professional Licensure Committee
Honorable Pedro A. Cortes, Secretary, Department of State

Comments of the Independent Regulatory Review Commission

on

State Board of Funeral Directors Regulation #16A-4815 (IRRC #2627)

Preneed Funeral Arrangements

October 24, 2007

We submit for your consideration the following comments on the proposed rulemaking published in the August 25, 2007 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b). Section 5.1(a) of the Regulatory Review Act (71 P.S. § 745.5a(a)) directs the State Board of Funeral Directors (Board) to respond to all comments received from us or any other source.

1. Section 13.1. Definitions. - Reasonableness; Consistency with other regulations; Need; Clarity.

Preneed funeral contract –

We have questions in two areas concerning this definition.

First, why does this definition only include the term “funeral entity”? In addition to “funeral entity,” the term “licensed funeral director” is defined in Section 13.1 of the existing regulations. Why not include both “funeral entity” and “licensed funeral director” in the definition for preneed funeral contract?

Second, what is the intent of including the phrase “whether or not the funeral entity receives preneed funeral funds”? Why would a business enter into such a contract without receiving funds?

Furthermore, a significant focus of both Section 13(c) of the Funeral Director Law (Law) (63 P.S. § 479.13(c)) and this proposed regulation is the money received for such contracts. What type of review or oversight would the Board exercise in a situation where there is no monetary transaction? Unless the Board can justify the inclusion of this phrase, it should be deleted from the final-form regulation.

Preneed funeral funds –

In Paragraph (i) of this definition, what is the purpose of the last phrase, “whether or not a contract to provide specified funeral services or merchandise exists”? How could the Board verify that money held by a licensee or funeral entity was related to “preneed” monies if no contract existed? If a customer has not finalized her or his decisions concerning which services to select but gives money to a funeral director or funeral entity, is the funeral director or entity required to document the transaction?

Finally, Paragraphs (iii) and (iv) may be inconsistent or incompatible with the proposed regulation since they involve insurance policies and not just contracts. An assignment of an insurance policy may exist with or without a preneed contract. If there is no contract, the transfer clause required by Section 13.228(a) will not apply. If an insurance policy includes a provision requiring assignment to a particular funeral entity, the Board needs to review and explain how it will regulate a change in the policy. The Board may need to develop separate provisions to address insurance policies.

2. Section 13.224. Depositing and reporting preneed funeral funds. - Fiscal impact; Reasonableness; Consistency with the statute and regulations; Implementation procedure; Feasibility; Clarity.

Subsection (a) contains new language. For example, there is a new rule that all the preneed funds received by the funeral director or entity must be deposited within ten days of receipt. We identified questions in two areas.

First, why is the ten-day rule necessary? Is there any record or history of problems with the timeliness of deposits? The Board should explain the need for the new language in this subsection or delete it from the final-form regulation.

Second, it is unclear if Subsection (a) applies to a funeral entity that receives a preneed fund transfer from another entity at the request of a customer. If this subsection does apply to such a transfer, what happens to any accumulated earnings or interest? The earnings or interest are not mentioned in the definition of "preneed funeral fund." However, Section 13.228(b) in this proposed regulation specifically requires the transfer of "accumulated interest and earnings" with preneed funeral funds. If the first funeral entity must transfer both the preneed funds (the original money given by the customer) and any accumulated interest and earnings, then the receiving entity should be required by the final-form regulation to deposit the interest and earnings with the customer's preneed funeral funds.

Subsection (b) mandates quarterly reporting of the information described in Subsection (c). There are four concerns.

First, why is mandated reporting necessary? What will the Board do with this information? The Board needs to explain how it plans to review and utilize these reports.

Next, what will be the costs for the Board in processing and reviewing the reports, and for funeral entities or funeral directors to transmit or submit the reports? Does the Board have adequate staff to process and review these records on a regular and timely basis? Commentators report that there are thousands of preneed contracts across the state. The Board should examine these costs and provide cost estimates when it submits the final-form regulation. If the Board opts to retain the reporting requirement, the costs for both the Board and the regulated community may be reduced significantly by requiring annual or biennial reporting, rather than quarterly.

Third, the Preamble indicates that changes are necessary because the existing provisions "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.” However, quarterly or periodic reporting is not necessary to monitor these transactions. The existing regulations require a licensee to submit a report every time the funeral director enters into a preneed contract or provides the services required by a preneed contract. The final-form regulation could mirror the current rules by requiring reports whenever there is a change or an end to the contract, a switch to another funeral entity or funeral director, or a transfer of funds.

Fourth, what is the definition of the term “rollover” in Subsection (b)? As noted by the House Professional Licensure Committee (House Committee) on October 3, 2007, the final-form regulation should include a definition for this term. In addition, the intent of the last sentence of Subsection (b) is unclear. The need for this sentence should be clarified in the final-form regulation.

Regarding Subsection (c)(2), please explain the need for deleting the phrase “100% of the money received by the funeral director on account of the contract had been deposited.” This language is consistent with Section 13(c) of the Law and should be retained.

3. Section 13.227. Limitations on preneed funeral contracts. - Fiscal impact; Consistency with the statute; Reasonableness; Clarity.

Commentators for the Pennsylvania Cemetery, Cremation and Funeral Association and the Funeral Consumers Alliance of Greater Philadelphia expressed concerns with provisions in this section. We share three concerns.

First, the new language in Subsection (b) reads:

A funeral director or funeral entity may not charge or collect any fees under a preneed funeral contract for funeral goods and services that exceed the fees for the goods and services as set forth on the funeral entity's general price list at the time the goods or services are provided. [Emphasis added.]

This provision could possibly negate a benefit of preneed contracts. Price lists may be guaranteed in preneed contracts at the time when the contracts are signed. The consumer gets the benefit of the prices available at the time of the contract, and the funeral entity gets the benefit of accepting funds before they are needed. With promulgation of Subsection (b), would funeral entities be able to increase costs charged to customers based on price lists at the time of service? What happens if the preneed funds in an account do not cover the price list at the time of service? What impact would this provision have on irrevocable contracts? Should the subsection state “at the time the contract is initiated”? The Board must explain the need for this subsection or delete it from the final-form regulation.

Second, Subsection (b) refers to a “funeral entity’s general price list.” Is there any situation when a funeral director would maintain a “general price list”?

Third, we question the rationale and need for Subsection (c), which reads:

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

The Law does not identify any restrictions on the source of the merchandise included in a funeral director's contract. In addition, it is our understanding that the National Funeral Directors Association recommends that "a funeral home should never refuse to service a family because they indicate that they will be using a third-party casket." This provision appears to limit the ability of a consumer to select from a variety of products. The Board should justify this provision or delete it from the final-form regulation.

4. Section 13.228. Transfer of a preneed funeral contract by customer. - Fiscal impact; Consistency with statute; Reasonableness; Feasibility; Clarity.

Pursuant to Subsection (a), every preneed contract initiated after the effective date of this regulation must expressly permit the customer to transfer the account and funds to another funeral director or funeral entity. The Preamble offers no explanation for this change beyond generic references to protection of consumers and updating regulations to match current practices in the profession.

The statute gives the Board the authority to adopt regulations. Section 16(a) of the Law (63 P.S. § 479.16(a)) reads:

The board shall be charged with the enforcement of this act. It shall be empowered to formulate **necessary** rules and regulations not inconsistent with this act for the proper conduct of the business or profession of funeral directing and as may be deemed **necessary** or **proper** to **safeguard** the interests of the public and the standards of the profession. (Emphasis added.)

The Board has not demonstrated the need for this proposed regulation. Specifically, the Board has not explained how this proposed regulation will "safeguard the interests of the public." Additionally, the Board has disclosed no record indicating a high level of consumer complaints or significant harm to consumers related to preneed contracts. In the final-form regulation submittal, the Board should explain the need for this regulation, and how it will protect consumers.

In its comments, the House Committee expressed concerns with the impact of this regulation on the calculation of resources in determining eligibility for benefits from Social Security or Medical Assistance (MA) programs. The Board claims that customers will be able to set aside the preneed funds and avoid having them calculated as a resource because the account, money or trust remains "irrevocable." Subsection (b) directs the transfer of the preneed funds from one funeral entity to another at the direction of the customer. However, nothing in this section states that the funds are "irrevocable" or that none of the funds may be returned to the customer. In fact, the words "revocable," "irrevocable" or "irrevocability" do not appear in the proposed regulation or the Preamble. In the final-form regulation, the Board should clarify whether preneed funds would be irrevocable, and how the funds would be protected from classification as an asset for the purposes of Social Security or MA programs.

The provisions of this section are very clear that the current funeral entity must transfer all the preneed funds, interest and earnings to the new funeral entity as requested by the customer. However, there is nothing that directs the actions of the new entity or what it may do with the

funds. Nothing in the proposed regulation requires that the new funeral entity honor the terms and conditions of the original contract or that it use all the preneed funds, interest and earnings for funeral services. For example, what would prevent the new funeral entity from giving a portion of the funds to the customer and reducing the list of services? The Board should clarify how the new funeral entity must treat the original contract and the funds.

The Board should also respond to the questions raised by the House Committee as to whether the preneed funds can be irrevocable yet still transferable. There is also a concern with the Law. Section 13(c) of the Law includes the following sentence:

... If any such licensed funeral entity 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 banking institution in this Commonwealth, conditioned upon its **withdrawal or disbursement only for the purposes for which such money was accepted....** (Emphasis added.)

It is unclear how the proposed regulation is consistent with the Law since none of its provisions guarantee that the money will be used for the purposes for which it was accepted. These purposes are set forth in the original preneed contract. The final-form regulation should ensure that the purposes in the original contract are fulfilled.

In its comments, the House Committee also requested further information concerning regulations or laws in other states pertaining to the portability of preneed contracts. Portability is an important issue for both the House Committee and commentators. The difficult question appears to be providing for portability while simultaneously maintaining the irrevocability of preneed funds, especially for income and asset determinations in Social Security or MA programs.

If it was only a question of portability, it is available under the existing regulations. The Board submitted a copy of the Commonwealth Court decision *Bean v. Department of State, State Board of Funeral Directors* (855 A.2d 148, 2004) with this proposed regulation. The *Bean* decision reported that Board-approved contract forms allowed customers to select an irrevocable or revocable contract. With a revocable contract, the customer can transfer preneed funds at a later date. This is portability. If the Board believes these options are insufficient, then it could establish an additional option for these forms that is based on this section.

If the goal is to combine both portability and irrevocability, the Board needs to thoroughly review options that ensure irrevocability while allowing for consumer choice. This would allow the marketplace to provide what consumers want and need. The Board should investigate a variety of options to allow for portability when needed while also guaranteeing irrevocability of the funds and terms in the contract.

5. Section 13.229. Sale or transfer of preneed funeral contracts or preneed funeral funds by funeral director. - Fiscal impact; Consistency with statute; Reasonableness; Feasibility; Clarity.

Under Subsection (a), why is it necessary to notify each customer of a transfer within 30 days? The Board should explain the basis for the 30-day period or consider extending the time period.

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INDEPENDENT REGULATORY REVIEW COMMISSION
333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

To: Tom Blackburn
Cynthia Montgomery
Agency: Department of State
Licensing Boards and Commissions
Phone: 3-7200 or 3-3394 (Cynthia)
Fax: 7-0251
Date: October 24, 2007
Pages: 7

Comments: We are submitting the Independent Regulatory Review Commission's comments on the State Board of Funeral Director's regulation #16A-4815 (IRRC #2627). Upon receipt, please sign below and return to me immediately at our fax number 783-2664. We have sent the original through interdepartmental mail. You should expect delivery in a few days. Thank you.

Accepted by: Shannon Pavlovic Date: 10/24/07

EXHIBIT “D”

Disability Rights Network of Pennsylvania

A merger of PP&A and the
Disabilities Law Project

Advancing the rights of people with disabilities

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September 29, 2009

BY FAX AND MAIL

Kim Kaufman
Executive Director
Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, PA 17101
Fax: 717-783-2664

Re: *Comments on Proposed Pre-need Regulations*

Dear Ms. Kaufman:

The Disability Rights Network of Pennsylvania (DRN) submits these comments on the Proposed Rulemaking on Pre-need Funeral Arrangements and Pre-Need Activities of Unlicensed Employees. DRN is the organization designated by the Commonwealth pursuant to federal law to advocate for and protect the rights of Pennsylvanians with Disabilities. Although we realize that the proposed regulations were issued some time ago, we only recently learned about them. Given the significant potential for negative impact on Pennsylvanians with disabilities, we ask that you consider DRN's comments prior to finalization of these regulations.

Most individuals with significant disabilities live on limited incomes and subsist on Supplemental Security Income (SSI) benefits. These individuals, as a result of their SSI eligibility, also are entitled to participate in the Medical Assistance (MA) program. The MA program is critical to provide individuals with significant disabilities with health care and support services they need to remain in their own homes and communities.

As you may know, SSI eligibility and, concomitantly, MA eligibility can be jeopardized if an individual has either higher income or greater "resources" than are permitted by federal law. The resource limit is quite low, allowing an individual to have no more than \$2,000 in assets to remain eligible for SSI and MA. In counting resources, however, federal law excludes an *irrevocable* burial fund as long as the fund does not exceed \$1,500. This allows individuals on SSI to set aside money for their funeral arrangements without jeopardizing their SSI and MA eligibility.

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DRN is extremely concerned that the proposed regulations could lead to the loss of crucial SSI and MA benefits for people with disabilities. Although we are confident that this is not the State Board's intent, the devastating, if unwitting, consequences for people with disabilities must be considered before the State Board finalizes these regulations. Specifically, Section 13.228, governs the transfer of pre-need funeral contracts from one funeral entity to another, but it fails to address the following key issues: (1) whether such transfers are limited to revocable contracts; (2) if such transfers apply to irrevocable contracts, how an irrevocable contract could be legally transferred; (3) if such transfers apply to irrevocable contracts, whether such transfers undermine their irrevocability so as to potentially jeopardize an individual's continued eligibility for government benefits; and (4) whether the transferee funeral entity must comply with the terms and conditions of the original contract and use all of the funds, interest, and earnings for funeral services. It is imperative that this provision is clarified to assure that individuals who have created irrevocable burial trusts to remain eligible for government benefits do not lose their benefits because of transfers of their trusts permitted by these state regulations.

In addition to DRN's concern about the impact of proposed Section 13.228, we also are concerned that some of the other proposed regulations governing pre-need planning could prove so burdensome that funeral entities will cease to engage in such planning so as to restrict the ability of individuals with disabilities to secure affordable, pre-arranged funerals and to have a choice of funeral entities that provide these services.

- Proposed section 13.206(a) would require licensed funeral directors to enter into pre-need contracts, rather than allowing the use of unlicensed employees as does current law in certain circumstances. Individuals with disabilities may be unwilling and, in many cases, unable to travel to meet face-to-face with the funeral director and, if they have already spoken with an unlicensed employee, they feel undue pressure if required to meet with the director. DRN thinks that the State Board should guarantee the right of an individual to meet with a funeral director before signing pre-need documents, but that the right can be waived by the individual or his/her legal representative. This can be accomplished by requiring a clear notice on documents signed by the individual or his legal representative that informs him of his right to meet in-person with the funeral director before signing, but that allows him or his representative to waive that right provided that clear information about the right is included on documents that the person must sign.
- Proposed section 13.229 would require a funeral director that ceases or sells its pre-need business to notify all consumers and provide them with the opportunity to transfer their funds to a new funeral entity. Current

Kim Kaufman
September 29, 2009
Page 3

regulations are sufficient to protect the public by simply requiring that the purchaser of the business must certify whether it is willing to honor the contracts. By requiring notification even when the purchasing entity is willing to honor contracts, it makes it less likely that funeral entities will be willing to offer pre-need services.

Thank you for considering DRN's comments and recommendations. If you have any questions, please do not hesitate to contact me.

Sincerely,



Ilene W. Shane

Chief Executive Officer

cc: Sen. Robert M. Tomlinson, Chair, Senate Consumer Protection &
Professional Licensure Committee (by fax and mail)
Rep. Michael P. McGeehan, Chair, House Professional Licensure
Committee (by fax and mail)

#2627

From: Jewett, John H.
Sent: Tuesday, October 20, 2009 9:29 AM
To: Gelnett, Wanda B.; Wilmarth, Fiona E.; Cooper, Kathy
Subject: FW: Comments in Opposition to Proposed State Board of Funeral Director Regulation No. 16A-4815 (IRRC # 2627)
Attachments: Comments in Opposition to Proposed State Board of Funeral Director Regulations No. 16A-4815 (IRRC # 2627).PDF

Another comment on #2627, it ... inbox.

From: McGarvey, Janet [mailto:jmgarvey@postschell.com]
Sent: Tuesday, October 20, 2009 9:24 AM
To: IRRC; Jewett, John H.; tblackburn@state.pa.us
Cc: Kutz, James
Subject: Comments in Opposition to Proposed State Board of Funeral Director Regulation No. 16A-4815 (IRRC # 2627)



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Dear Chairman, Vice Chairman, Commissioners and Mr. Jewett:

Please see attached from Jim Kutz.

Thank you.
Janet McGarvey

Janet McGarvey
Legal Secretary
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Harrisburg, PA 17101-1601

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