#2627

Jefferson Memorial Funeral Home, Inc.
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Jan B. Jefferson
Supervisor

September 20, 2007

Michelle T. Smey, Administrative Officer
State Board of Funeral Directors
P.O. Box 2649
Harrisburg, Pa. 17105-2649

RE: Proposed Rule Making Regulation ID #16A-4815 (#2627).
State Board of Funeral Directors [49 PA. Code Ch. 13] Preneed Funeral Arrangements

Via Email: msmey@state.pa.us and st-funeral@state.pa.us

Dear Mrs. Smey,

I am a third generation death care provider. My family owns and operates one of the largest funeral homes in Pittsburgh. I have, for more than two years, provided input to this Board regarding these preneed regulations. I attended the public work session regarding these regulations, participated in the Board committee meeting, written comment letters and have been a frequent attendee at the monthly board meetings. I have watched this Board press ahead with its "agenda" without any documented or compelling need to issue these regulations. Further these proposed regulations exceed the statuary authority granted by the legislature in the Funeral Director Law. And these proposed regulations clearly violate the Federal Court Walker decision[1] as well as the Commonwealth Court Bean decision[2]. Over the many years I have observed this Board I have concluded that they are dead set on drafting regulations that restrict competition, restrict free communication of honest information, and establish a monopoly in the death care industry for licensed funeral directors. The end result will do nothing but hurt Pennsylvania consumers by driving up prices as alternate vendors are driven from the market by this Boards actions and regulations. In my opinion this Board is perhaps the most reactionary funeral licensing board in the United States and the expensive renegade among all the boards BPOA oversees. It takes little effort to see the partisanship of this Board when one of the "independent consumer members" was previously the legal council for the trade association The Pennsylvania Funeral Directors Association

[1] United States District Court for the Middle District of Pennsylvania in the matter captioned Michael Walker, et al. v. Jodi Flitton, et al., No. 4: CV-01-02252
[2] Commonwealth court of Pennsylvania in the matter captioned Kevin M. Bean v. Department of State, state Board of Funeral Directors No. 1088C.D.2003

(PFDA). It was this member who spoke the loudest and the longest pressing for approval of these regulations.

In the section titled "Input from the Regulated Community the Board states" that it has solicited the opinions from funeral directors and organizations. However the input they have received has fallen on deaf ears. During a public work session the over whelming majority of participants, both in writing and/or in testimony, urged rejection or substantive and significant revision to the proposed regulations. Later I and others were invited to participate in a two component board meeting reviewing the proposed regulations. After those two meetings some amendments were made in the second draft of the regulations. Yet in the May 2007 meeting the Board has jettisoned all the work and input by the participants by voting a third draft and current draft of the regulations. This third draft is essentially fraught with the same series of problems as the initial draft they started with two years ago. The end result is that the regulated community has been ignored.

In the "Background and Need for the Amendment" the board summarizes that it has ***"determined that the regulations need to be updated to conform to existing practices in the funeral industry"***. I cannot imagine what the board is referring too. These proposed regulations do not "conform" to any existing practices and in reality force the industry to reverse 50 years of progress. The end result of these proposed regulations will force the industry to offer fewer consumer choices because of the unnecessary restrictions they impose on the funeral provider.

- For example: the proposed definition of a Preneed Funeral Contract makes a "contract" out of a non-binding wish list. As you may know many consumers make their future wishes known to a funeral provider without paying for their funeral. The industry commonly refers to this as a "wish list". There is no offer or consideration so a wish list is not a contract. It is not binding on the consumer or the funeral establishment. Regardless of contract law this proposed regulation defines this as a contract ***"whether or not the funeral entity receives preneed funeral funds."*** This exceeds the statutory authority granted in 13 (c) which clearly requires money to change hands for a contract to be executed.

- The proposed Preneed Funeral Funds definition is confusing if not treacherous to a funeral provider. In (i) it states that preneed funds are funds provided to the funeral ***provider "whether or not a contract to provide specified funeral services or merchandise exists."*** Yet the proposed 13.227 (a) requires all contracts to be in writing.

- The proposed definitions in (iii) include assignment of an insurance policy. However (iv) excludes any premium paid to an insurance company. This proposal does not discuss whether the assignment is revocable or irrevocable.

Obviously a revocable assignment can be rescinded at any time. Even with an irrevocable assignment of an insurance policy the funeral provider does not have the money, has no control of the money and will not receive the money until the death occurs (assuming and providing the policy is in enforce at the time of death).

- This proposal, contrary to industry practice and current regulations, wants this insurance assignment of a pre-existing policy reported as a contract ***"whether or not a contract to provide specified funeral services or merchandise exists"*** and the ***"premiums (are) paid directly to an insurance company"***. There is no possible reason for such convoluted regulatory logic. And such a regulation exposes the funeral provider to the extreme risk of prosecutorial misconduct.

The single issue the Board got right in their "Background and Need for the Amendment" is the fact that ***"reports under 13.224 are time-consuming to prepare and to review. However, the reports provide little value to the board, the regulated community or the public."*** The basis of adherence with all laws in our country is VOLUNTAIRY COMPLIANCE. Honest individuals and businesses comply with laws; the dishonest do not. No amount of government paperwork sent to a regulatory agency will stop someone who wishes to intentionally defraud the consumer. Business keeps records so that they can honor their contracts and serve their customers. Regulatory agencies often specify record retention periods for enforcement reasons. These reports, even if the board has time and manpower to really review them (by their own admission they do not), will not prevent one potential problem. Therefore they are nothing but an unnecessary and expensive burden on Pennsylvania funeral businesses that has no effect other than to raise the cost to Commonwealth consumers.

- The current regulations allow 90 days to report each preneed. Though this is a burdensome requirement the proposed requirement is even more so. The proposed regulation would require a report every 90 days that has been expanded to ***"include all accounts held by the funeral entity at any time during the reporting period, including those first created during the reporting period and those closed during the period."*** In addition the report shall include ***"The account balance at the beginning of the period, the total principal amounts added, interest or other earnings, disbursements or other transfers out and balance at the end of the period."*** For any long established firm with hundreds or thousands of preneeds on file this is a massive report. The cost of updating this report for submission 4 times a year will be enormous. The cost of this unnecessarily burdensome report will be passed along to the consumer in the form of higher funeral costs.

- To require the deposit into escrow or transfer within 10 days is a requirement that is out of touch with the way business accounting is done in our computerized world. Firms small and large run monthly closeouts of the firm (not daily each time an individual contract is consummated). When the monthly closeout is complete, which usually takes a week, the amount due the escrow is calculated.

Then the escrow is paid. To update the regulations to conform to existing practices, as the Board stated it desired to do, this regulation should allow 45-60 days to deposit into the escrow account not 10 days. To comply with this regulation firms would be required to perform a closeout each time a contract is written or revert to manual accounting requiring repeated computer journal entries for each contract. From a practical point of view this is archaic.

The reasonable and necessary current regulation 13.226 (c) requires that upon sale or transfer of a business the new licensee-transferee notify the board of his/her willingness to accept responsibility for completion of the preneeds on account. This reasonable requirement is to be replaced with the unreasonable 13.229 requiring the new owner to notify each customer of the change of ownership and to give that customer up to 90 days to transfer their preneed to another funeral home. This is just another example of this board exceeding it's statuary authority and heaping onerous and expensive requirements on licensee's whose cost ultimately gets passed on to Commonwealth consumers.

- This proposed regulation violates established contract law by invalidating the established contracts so that they can be transferred.

- The reality is that, unless it is an irrevocable contract (in which case this regulation violates the Bean decision) a consumer can move their preneed funds at the time of delivery to any funeral provider they wish. Transfers happen infrequently but they do occur. A reputable firm will not force a family to use them if the family does not want too. The Board has documented no case where this has been an issue requiring additional regulation.

- In addition this regulation would do great and unnecessary harm to the licensee it regulates. When a funeral director wishes to retire and potential purchasers value his business the number of preneed contracts on file is a tremendous plus in raising the value of the business. This proposed regulation invalidates those contracts and lowers the value of the business.

The "limitations on preneed funeral contracts" created in 13.227 clearly exceed the statutory authority granted by the law and unreasonably restrict the licensees constitutional right to operate legally under other existing laws. Yet this onerous proposal does nothing to protect the consumer. These regulations would, however, remove alternative vendors from the market, thereby reducing consumer choice and increasing consumer funeral costs.

- There are a number of legally established 3rd party companies selling death care merchandise (caskets, burial vaults, grave markers, cremation urns etc.). These 3rd party sellers are regulated by the Future Interment Act (63 P.S. 480). A few of

these firms have been established by funeral directors. There is nothing illegal or immoral about this as long as the respective laws are followed by the entity making the sale.

- This board has not shown even one instance of harm to a consumer who purchased their merchandise from a 3rd party seller rather than a traditional funeral provider.

The transferability of a funeral contract proposed in 13.228 means that any contract written is a binding contract on the funeral provider but not upon the consumer. This proposal will restrict the consumer's choices because few funeral firms will wish to offer guarantee preneed contracts when they cannot be assured their contract is enforceable on the purchaser. This proposed regulation certainly exceeds the statutory authority and attempt to circumnavigate contract law and the Bean decision with regulation.

- This board somehow overlooks the issue that preneed contracts are price guaranteed by the selling funeral firm. If the consumer transfers his/her preneed to another firm, the new firm will not guarantee to perform the funeral for the same price as the original contract- generally written years ago. If transferability is to be truly beneficial to the consumer the regulation MUST require the receiving funeral establishment assume the entire contract as it was originally written (at the original price) and perform the funeral at no additional cost other than what has been trusted (As costs and prices have no doubt increased since the contract was originally written, it is doubtful any funeral home, not even mine, would do that).

- This board also overlooks the fact that the funds and markets these preneed funds are invested in go up and down. For example: If a $5000 preneed funeral was trusted and the market contracted 10% there would only $4,500 in the trust account. Yet if the death should occur the selling funeral home is obligated to deliver the funeral at the contracted price. Under the proposed regulations if the family chooses to move their money then the receiving funeral director would receive $4500.

- These proposed regulations seem to indicate that using a master trust would no longer be approved since everything must be trusted individually. The end result of this is consumers choices will become limited as funeral firms choose not to offer preneed because of the risks created by this regulation.

In summary these regulations should not be passed. The Board has shown no documented consumer harm caused by current industry conduct requiring it to promulgate such draconian regulations. The proposed regulations exceed the statutory authority granted under the funeral director law. And these regulations violate many of the tenants set forth in the recent court rulings of Walker and Bean.

I urge you to disapprove these proposed regulations by the State Board of Funeral Directors.

Respectfully submitted,

Harry C. Neel
President