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INDEPENDENT REGULATORY

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COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF STATE
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October 19, 2009

Kim Kauffman, Executive Director
John Jewett, Regulatory Analyst
Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, PA 17101

RE: Final Rulemaking 16A-4815

Dear Mr. Kaufmann and Mr. Jewett:

On behalf of the State Board of Funeral Directors, I would like to respond to the public comment of Ms. Shane and others on behalf of Pennsylvanians with Disabilities and assure the Commission that the provision in 16A-4815 prohibiting "irrevocable" preneed funeral contracts would not place the consumer or the funeral director in violation of state or federal public assistance regulations. In fact, the Funeral Board submits that prohibiting "irrevocable preneed" funeral contracts is all about providing the consumer with freedom of choice, is a long overdue pro-consumer addition to the Funeral Board's regulations covering preneed contracts and would in no way preclude funeral establishments from guaranteeing prices on "revocable" preneed funeral contracts.

Preliminarily, the Board wishes to thank all of the individuals and organizations representing Pennsylvanians with disabilities for their comments and contributions to the rulemaking process. The Board gave extensive consideration to the effect of its regulation upon all recipients of public assistance benefits, including Pennsylvanians with disabilities, with the intention of promulgating a regulation that offered all citizens the greatest latitude, freedom and choice in making preneed funeral arrangements.

October 19, 2009

Page 2

First and foremost, the Board notes for the record that the public policy underpinning the prohibition against irrevocable preneed funeral contracts is very pro-consumer. This rule provides the consumer with some much needed portability and attempts to strengthen consumers' bargaining power in the transaction with the funeral director. In other words, if funeral directors are permitted to enter into "irrevocable contracts", then consumers would be unfairly locked into a single provider even when their own personal situation and circumstances have changed or the relationship with the funeral director has deteriorated or has become irretrievably broken.

At the same time, contrary to certain comments implied or otherwise by sellers of funeral goods and services, the Board determined that an "irrevocable preneed funeral contract" is NOT mandated by state and federal public assistance federal regulations. The Board determined that the actual "prohibition" on irrevocable preneed contracts would not violate state or federal public assistance regulations and requirements. Nor would that prohibition place the consumer or the funeral director in violation of any state or federal law.

Indeed, to that end, funeral board legal counsel conducted a thorough analysis and reviewed the applicable statutes and regulations pertaining to the calculation of resources to determine eligibility for public assistance benefits which were the very same regulations cited by Ms. Shane. Based upon that internal review, counsel prepared a memorandum of law on this issue and concluded:

... it is clear that a consumer who wants to exempt assets from resource calculations for public assistance benefits does not need to enter into an irrevocable contract with a specific funeral establishment.

Board counsel then requested a separate review from the Office of Chief Counsel for the Department of Public Welfare (DPW). The response of the Office of Chief Counsel of the Department of Public Welfare was summarized as follows:

There is no requirement that an individual be contractually bound to one funeral establishment. An individual can choose to establish an irrevocable burial reserve with a bank or other financial institution. The only requirement is that the funds can't be withdrawn prior to the death of the named beneficiary.

As confirmed by DPW, the Board submits that the prohibition against "irrevocable" preneed funeral contracts in 16A-4815 does not change or alter state and federal regulations which specify that preneed funds must be deposited into an irrevocable trust. In short, public assistance regulations are concerned only with the irrevocability of the *purpose* of the funds not the *payee*. It appears that there may be confusion over an "irrevocable contract" and "irrevocable trust". There of course is a big difference, which may be lost to individuals who are not within the funeral service industry.

October 19, 2009

Page 3

For example, in contrast to a preneed contract, an irrevocable burial trust is an instrument that must be irrevocable because it serves the important function of separating out and preserving the consumers own preneed funeral funds and at the same time provides a reliable funding source for the funeral director. In fact, it is possible to deposit funds in an irrevocable burial trust bank account without ever executing a preneed contract in the first place.¹

Once a consumer's preneed funds are deposited into an irrevocable trust, those funds can only be used for funeral services and not for the personal use of the consumer. Funds deposited in an irrevocable trust may be paid upon death only to a provider who has actually delivered funeral goods and services at the death of a consumer. The transfer of the preneed contract to another funeral director has no effect upon the irrevocability of a burial trust or the terms under which those assets are held in trust. Accordingly, the funeral director that actually provides the services at the time of death must comply with the terms and conditions of the irrevocable burial trust that was established as a preneed arrangement.

Finally, the Board would like to reply to the suggestion that has been made, presumably based upon representations made by funeral directors to consumers, that funeral directors will not guarantee prices unless they can make the preneed contract irrevocable. The Funeral Board knows of no evidence to support that contention. On the contrary, the professional members of the Funeral Board advise me that, based upon their combined experience in the profession, funeral establishments guarantee prices on *revocable* contracts in this Commonwealth every day, and have been doing so for decades.

The bottom line remains, the regulation in question does not change or alter the requirement that preneed funds must be deposited into an irrevocable trust. The prohibition established in this regulation provides the consumer with portability so that he or she can get his/her own funds and move those funds to another funeral director if the consumer's circumstances and situation changes and the regulation would not preclude funeral establishments from guaranteeing prices on "revocable" preneed funeral contracts. Thank you for your attention to this matter. Please feel free to contact me to discuss this matter further.

Sincerely,



Basil L. Merenda
Commissioner

cc: The Honorable Robert M. Tomlinson, Chairman, Consumer Protection and Professional Licensure Committee
The Honorable Lisa Boscola, Senate Consumer Protection and Professional Licensure Committee

¹ The Funeral Director Law, Section 13(c), 63 P. S. § 479.13(c), expressly provides that all preneed moneys must be deposited in a bank account, and "... conditioned upon its withdrawal or disbursement *only for the purposes for which such money was accepted*", i.e., an irrevocable trust. (Emphasis added.)

October 19, 2009

Page 4

The Honorable Michael P. McGeehan, PA House of Representatives
The Honorable William F. Adolph Jr., Republican Chairman
Arthur Coccodrilli, Chairman, Independent Regulatory Review Commission
George D. Bedwick, Vice Chairman, Independent Regulatory Review Commission
Silvan B. Lutkewitte, III, Commissioner, Independent Regulatory Review Commission
John Mizner, Commissioner, Independent Regulatory Review Commission
S. David Fineman, Commissioner, Independent Regulatory Review Commission
Ilene W. Shane, Chief Executive Officer, Disability Rights Network of Pennsylvania
Shirley A. Walker, President and CEO, Pennsylvania Association of Resources for
Autism and Intellectual Disabilities
Rob Reid, President & CEO, Access Services
Ann Rink, Community Programs, St. Joseph's Center
Tamiko K. Leake, Program Services Administrator, TAIG, Inc.
Jen Duggan, Administrative Director, Community Mental Retardation/Information
Services