

By: Elkins

H.B. No. 1948

A BILL TO BE ENTITLED

AN ACT

relating to the administration and operation of certain trusts created to provide for the general care and maintenance of perpetual care cemeteries.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Chapter 712, Health and Safety Code, is amended by adding Subchapter B-1 to read as follows:

SUBCHAPTER B-1. DISTRIBUTIONS FROM FUND

Sec. 712.0351. DEFINITIONS. In this subchapter:

(1) "Net income fund" means a fund from which permissible distributions are calculated based on the net income method.

(2) "Net income method" means calculation of permissible annual distributions by the trustee as equal to the annual net income of the fund.

(3) "Total return fund" means a fund from which permissible distributions are calculated based on the total return method.

(4) "Total return method" means the calculation of permissible annual distributions by the trustee as equal to the average fair market value of the assets in the fund, determined under Section 712.0353, multiplied by the total return percentage.

(5) "Total return percentage" means the annual percentage selected by the trustee in accordance with Section

1 712.0354.

2 Sec. 712.0352. MODIFICATION OF DISTRIBUTION METHOD. (a)
3 Except as otherwise provided by this subchapter, the trustee of a
4 fund shall use the net income method to determine permissible
5 distributions from the fund to the corporation.

6 (b) A corporation on concurrence of the corporation's
7 trustee may modify the terms of the trust instrument governing the
8 fund to require the trustee to use the total return method in
9 determining permissible distributions to the corporation. To
10 convert a net income fund to a total return fund, at least 60 days
11 before the effective date of the conversion, which must be the first
12 day of the fund's next fiscal year, the corporation shall submit
13 written documentation to the commissioner in support of the
14 conversion that includes:

15 (1) a copy of the trust instrument governing the fund
16 and any proposed amendments to the instrument necessary to
17 authorize the conversion;

18 (2) the trustee's estimates of the current fair market
19 value and the average fair market value of the fund as of the
20 effective date of the conversion, as determined under Section
21 712.0353, and actions by the trustee to finalize the trustee's
22 determination of both current and average fair market value of the
23 fund and to advise the corporation and the commissioner as soon as
24 reasonably possible after the effective date;

25 (3) a description of the method the trustee used or
26 will use to determine the fair market value of any unique and
27 hard-to-value asset in the fund, and identification and explanation

1 of any asset the trustee excluded or will exclude from the average
2 fair market value calculation;

3 (4) the total return percentage selected by the
4 trustee under Section 712.0354, and the reasons for the selection;

5 (5) a copy of the written investment policy for the
6 fund as modified to support use of the total return method; and

7 (6) any additional information required by rules
8 adopted under this chapter.

9 (c) A corporation that converts the corporation's fund to a
10 total return fund under this section may elect to reconvert the fund
11 to a net income fund and modify the terms of the trust instrument
12 governing the fund to require the trustee to calculate permissible
13 distributions under the net income method. To reconvert a total
14 return fund to a net income fund, the corporation must submit
15 written documentation to the commissioner in support of the
16 reconversion before the proposed effective date of the
17 reconversion, that includes:

18 (1) a copy of the trust instrument governing the fund
19 and any proposed amendments to the instrument necessary to
20 authorize the reconversion;

21 (2) the proposed effective date of the reconversion,
22 provided that the effective date must be the first day of the fund's
23 next fiscal year unless the total distributions received or to be
24 received from the fund in the current fiscal year would not exceed
25 the distributions permissible for a net income fund at the
26 beginning of the current fiscal year; and

27 (3) any additional information required by rules

adopted under this chapter.

(d) The trustee of a net income fund or a total return fund shall make distributions to the corporation, annually or in more frequent installments agreed to by the trustee and the corporation, to be used by the corporation in the manner required by Section 712.025.

Sec. 712.0353. DETERMINATION OF FAIR MARKET VALUE. (a) The trustee of a total return fund, or of a net income fund seeking to convert to a total return fund, shall determine for the corporation, in the trustee's sole discretion and in accordance with this section, the average fair market value of the fund at the beginning of each fiscal year.

(b) The trustee shall derive the average fair market value of the fund at least annually by averaging the fair market value of fund assets, determined on an asset-by-asset basis, as of the beginning of the current fiscal year and in each of the two previous years, or for the entire term of the trust with less than two previous years, using the valuation date or averages of valuation dates as the trustee considers appropriate. The trustee shall exclude from the fair market value calculation any asset described in Section 712.030(b) and any asset for which the trustee is not able to reasonably ascertain a fair market value. In determining the average fair market value, the trustee shall adjust the fair market value for each year used in the calculation as follows:

(1) for assets added to the fund during the years used to determine the average, the trustee shall add the amount of each addition to all years in which the addition is not included; and

1 (2) for assets withdrawn from the fund during the
2 years used to determine the average, other than in satisfaction of
3 permissible distributions, the trustee shall subtract the amount of
4 each withdrawal from all years in which the withdrawal is not
5 included.

6 (c) Before the 31st day after the beginning of each fiscal
7 year, the trustee of a total return fund shall send written notice
8 to the commissioner and to the corporation of the trustee's
9 determination of the current fair market value of the fund as of the
10 beginning of the current fiscal year and the average fair market
11 value of the fund for determining permissible distributions for the
12 fiscal year, with identification and explanation of any asset
13 excluded from the determination. If the trustee alters the
14 methodology of determining fair market value in a manner that
15 changes the fair market value of the fund during a fiscal year, the
16 trustee shall send written notice to the commissioner and to the
17 corporation of the revised current and average fair market value of
18 the fund and the reason for the revision before the first
19 distribution is made based on the revised average fair market
20 value.

21 (d) This section does not alter or otherwise affect a
22 fiduciary duty under other law to evaluate and monitor the fair
23 market value of assets held in trust.

24 Sec. 712.0354. DETERMINATION OF TOTAL RETURN PERCENTAGE.

25 (a) Consistent with the prudent investor rule, the trustee in the
26 exercise of the trustee's sole discretion shall select the total
27 return percentage to be used in determining permissible

1 distributions from a total return trust at least annually, in an
2 amount that represents a reasonable current return from the fund in
3 light of the investment policy currently applicable to the fund,
4 provided that the total return percentage does not exceed five
5 percent.

6 (b) Before the 31st day after the beginning of each fiscal
7 year, the trustee of a total return fund shall send written notice
8 to the commissioner and to the corporation of the trustee's
9 determination of the total return percentage to be applied in the
10 fiscal year. If the trustee alters the total return percentage
11 during a fiscal year, the trustee shall send written notice to the
12 commissioner and to the corporation of the revised total return
13 percentage and the reason for the revision before the first
14 distribution is made based on the new total return percentage.

15 Sec. 712.0355. REGULATORY LIMITS ON DISTRIBUTIONS. (a)
16 After notice and an opportunity for hearing, the commissioner by
17 order may convert a total return fund to a net income fund, limit or
18 prohibit distributions from the fund, or both, if:

19 (1) the current fair market value of the fund at the
20 beginning of a fiscal year is less than the original principal of
21 the fund, consisting of the sum of all required deposits into the
22 fund under this chapter, including deposits required by Sections
23 712.004 and 712.028;

24 (2) the average fair market value of the fund declines
25 by 10 percent or more over a two-year period; or

26 (3) the trustee or other fiduciary of the fund
27 responsible for investment policy has demonstrated a lack of

1 sufficient knowledge and expertise or has failed to ensure that an
2 investment policy is in place to support the use of the total return
3 method of calculating distributions in a manner consistent with
4 achieving the purposes of the fund as provided by Section
5 712.021(f).

6 (b) The commissioner may decline to impose corrective
7 measures under Subsection (a) if the commissioner finds that:

8 (1) the cause of the adverse trend in the fair market
9 value of the fund is due to one or more unusual or temporary factors
10 not within the control of the corporation or trustee of the
11 corporation's fund and could not have been reasonably anticipated;

12 (2) the current, written investment policy of the
13 fund, in light of anticipated distributions from the fund, is
14 reasonably designed to protect the fund from further declines in
15 fair market value; and

16 (3) the exception appears to be both necessary and
17 appropriate for the continued protection and perpetual existence of
18 the fund.

19 Sec. 712.0356. RULES. The Finance Commission of Texas may
20 adopt rules to implement and clarify this subchapter.

21 Sec. 712.0357. NATURE OF TOTAL RETURN DISTRIBUTIONS. (a) A
22 distribution from a total return fund is considered a distribution
23 of all income of the fund that reasonably apportions the total
24 return of the fund, and may not be considered a fundamental
25 departure from applicable state law.

26 (b) Unless the trust instrument provides otherwise, the
27 trustee of a total return fund shall treat a distribution as first

1 being made from the following sources in order of priority:

2 (1) from net accounting income;

3 (2) from ordinary accounting income not allocable to
4 net accounting income;

5 (3) from net realized short-term capital gains;

6 (4) from net realized long-term capital gains; and

7 (5) from the principal of the fund.

8 SECTION 2. Section 712.00395(h), Health and Safety Code, is
9 amended to read as follows:

10 (h) An order approving the surrender of a certificate of
11 authority must impose four conditions that are not subject to
12 objection. Failure to satisfy any of these conditions constitutes
13 a violation of the commissioner's order, and the certificate holder
14 is subject to an enforcement action under this chapter. The order
15 approving the surrender must:

16 (1) require the perpetual care fund to remain in an
17 irrevocable trust, with the permissible distributions ~~[income]~~ to
18 be used for perpetual care of the cemetery in general and for those
19 plots that were purchased before the certificate was surrendered;

20 (2) require that the cemetery remove any signage or
21 other announcement stating that the cemetery is a perpetual care
22 cemetery;

23 (3) require each contract and other evidence of
24 ownership entered into after the date of the order to clearly state
25 that the cemetery is not regulated by the Texas Department of
26 Banking and may not use the term "perpetual care cemetery"; and

27 (4) state the location of cemetery records and require

1 the cemetery to:

2 (A) retain existing records regarding the
3 perpetual care fund for five years after the date of the order; and

4 (B) continue to comply with all recordkeeping
5 requirements of Chapter 711.

6 SECTION 3. Sections 712.021(b) and (g), Health and Safety
7 Code, are amended to read as follows:

8 (b) Except as otherwise provided by this chapter [~~Section~~
9 ~~712.0255~~], the principal of the fund may not be reduced
10 voluntarily, and it must remain inviolable. The trustee shall
11 maintain the principal of the fund separate from all operating
12 funds of the corporation.

13 (g) The trustors of two or more perpetual care trust funds
14 may establish a common trust fund in which deposits required by this
15 chapter are made, provided that separate records of fund assets
16 [~~principal and income~~] are maintained for each perpetual care
17 cemetery for the benefit of which the common trust fund is
18 established[, and further provided that the income attributable to
19 each perpetual care cemetery is used only for the perpetual care of
20 that cemetery].

21 SECTION 4. Section 712.025, Health and Safety Code, is
22 amended to read as follows:

23 Sec. 712.025. USE OF FUND DISTRIBUTIONS [~~INCOME~~]. Fund
24 distributions [~~income~~] may be used only to provide the perpetual
25 care described by the instrument that established the fund,
26 including the general care and maintenance of the property entitled
27 to perpetual care in the perpetual care cemetery.

SECTION 5. Section 712.0255(a), Health and Safety Code, is amended to read as follows:

(a) The commissioner may petition a court to modify or terminate a fund under Section 112.054, Property Code. In addition to the grounds described by that section, the commissioner may petition a court under that section if the permissible distributions [~~income~~] from the fund are [~~is~~] inadequate to maintain, repair, and care for the perpetual care cemetery and another source for providing additional contributions to the fund is unavailable.

SECTION 6. Section 712.026, Health and Safety Code, is amended by amending Subsections (a) and (c) and adding Subsection (d) to read as follows:

(a) If the directors of a corporation do not generally care for and maintain the corporation's perpetual care cemetery, the district court of the county in which the perpetual care cemetery is located may:

(1) by injunction compel the directors to expend the permissible distributions from [~~net income of~~] the corporation's fund as required by this chapter; or

(2) appoint a receiver to take charge of the fund and expend the permissible distributions from [~~net income of~~] the fund as required by this chapter.

(c) In a suit for relief under this section, court costs and attorney's fees shall be awarded:

(1) to the directors of the corporation, if it is found that the directors are substantially expending the permissible

1 distributions from [~~available net income of~~] the fund as required
2 by this subchapter; or

3 (2) to the plot owners initiating the suit, if it is
4 found that the directors are not substantially expending the
5 permissible distributions from [~~available net income of~~] the fund
6 as required by this subchapter.

7 (d) Fund assets may not be used to pay court costs and
8 attorney's fees awarded under Subsection (c).

9 SECTION 7. Section 712.030, Health and Safety Code, is
10 amended to read as follows:

11 Sec. 712.030. USE OF GIFT FOR SPECIAL CARE OF PLOT IN
12 PERPETUAL CARE CEMETERY. (a) A trustee may take and hold property
13 transferred to the trustee in trust in order to apply the principal,
14 proceeds, or income of the property for any purpose consistent with
15 the terms of the trust and the purpose of a corporation's perpetual
16 care cemetery, including:

17 (1) the improvement or embellishment of any part of
18 the perpetual care cemetery;

19 (2) the erection, renewal, repair, or preservation of
20 a monument, fence, building, or other structure in the perpetual
21 care cemetery;

22 (3) planting or cultivating plants in or around the
23 perpetual care cemetery; or

24 (4) taking special care of or embellishing a plot,
25 section, or building in the perpetual care cemetery.

26 (b) Except as provided by this subsection, the assets of a
27 trust established under this section are not considered assets of

1 the fund. If a gift in trust is specifically intended to serve the
2 same general purpose as the fund, the trust may be merged with the
3 fund.

4 SECTION 8. Section 712.044(a), Health and Safety Code, is
5 amended to read as follows:

6 (a) The commissioner may examine on a periodic basis as the
7 commissioner reasonably considers necessary or appropriate to
8 protect the interest of plot owners and efficiently administer and
9 enforce this chapter:

10 (1) the books and records of a corporation relating to
11 its fund, including deposits to or withdrawals from the fund,
12 income of the fund, and uses and expenditures of distributions from
13 the fund [~~that income~~];

14 (2) the books and records of a corporation relating to
15 sales of undeveloped mausoleum spaces and any preconstruction trust
16 established by the corporation as provided by Section 712.063,
17 including deposits to or withdrawals from the preconstruction
18 trust, income of the preconstruction trust, and uses and
19 expenditures of principal and income of the preconstruction trust;
20 and

21 (3) the consumer complaint files of a corporation
22 relating to the fund, sales of undeveloped mausoleum spaces, a
23 preconstruction trust, or to discharge of the corporation's
24 perpetual care responsibilities, minutes of the corporation's
25 board of directors, cemetery dedication statements and plat maps,
26 and mausoleum and lawn crypt construction contracts and
27 specifications.

1 SECTION 9. This Act takes effect September 1, 2017.