

SUBJECT: Continuing the Texas Funeral Service Commission

COMMITTEE: Public Health — committee substitute recommended

VOTE: 8 ayes — Capelo, Laubenberg, Truitt, Dawson, McReynolds, Naishtat,
Taylor, Zedler

0 nays

1 absent — Coleman

WITNESSES: For — *(On committee substitute:)* Lee Longino, SCI and Texas Funeral
Directors Association

Against — Lamar Hankins, Funeral Consumers Alliance of Texas

On — Erica Wissolik, Sunset Advisory Commission

BACKGROUND: The Texas Funeral Service Commission (FSC) was established as the State Board of Embalming in 1903 to license and regulate embalmers in order to contain contagious diseases. In 1987 and 2001, the Legislature expanded the FSC's authority. The commission now licenses both funeral directors and embalmers, registers cemeteries and crematories, and enforces laws involving prepaid funerals, vital statistics, and fraud and misrepresentation. The FSC regulates about 5,000 individuals, 1,300 licensed establishments, and 180 registered cemeteries and crematories.

The FSC operates with a board of commissioners whose seven members, appointed by the governor, serve staggered six-year terms. The board includes four public members, two commissioners licensed as both an embalmer and a funeral director, and one cemetery owner/operator. The commission has 12 full-time employees and a budget of \$1.6 million in the current biennium.

The FSC last underwent sunset review in 2001, as a result of the 76th Legislature's moving the commission's sunset date from 2003 to 2001. The commission's previous sunset review was in 1991. Unless continued, the commission's authority will expire September 1, 2003.

HB 3067 by Chisum, et al., enacted in 2001, continued the FSC from 2001 to 2003. It specified six criteria that the FSC must meet to be continued for the normal 12 years. The commission must:

- significantly improve information technology;
- improve understanding of statutory authority, rules, policies, and procedures;
- establish clearer guidelines for more effective use of penalties;
- establish a risk-based approach to scheduling inspections;
- establish new rules to outline a more fair and open complaint process; and
- implement all other provisions of HB 3067.

The Sunset Advisory Commission's report found that FSC had implemented or partially implemented each of the six evaluation criteria.

DIGEST:

CSHB 1538 would continue the FSC until September 1, 2015. It also would require the commission to develop guidelines for stakeholders' participation in developing rules before they are proposed in the *Texas Register*. It would remove the requirement that the governor's designee as presiding chair of the commission be a public member.

The bill would authorize the commission to regulate cemetery and crematory services as they relate to the care and treatment of remains in an urn, casket, or other enclosure. The FSC would have to examine and license crematory operators, establish ethical and professional standards for crematory operators, and inspect cemeteries and crematories, including a risk-based approach to inspections. The bill would specify components of the required exam for crematory operators.

A cemetery or crematory establishment could not operate without a license from the FSC, though this prohibition would not apply to family, fraternal, or community cemeteries smaller than 10 acres, to unincorporated plot owners, and to religious or government-owned cemeteries.

The bill would transfer to the FSC from the Texas Department of Health (TDH) authority found in Health and Safety Code, ch. 711, 714, and 715, relating to cemeteries. It would authorize the FSC to adopt rules to implement

these chapters and would transfer TDH functions, rules, references, and cases under these statutes to the FSC.

Similarly, the bill would transfer to the FSC from the Department of Banking (TDB) regulation of perpetual-care cemeteries, while authorizing the TDB to regulate their financial aspects. It would authorize the Finance Commission and FSC to adopt, enforce, and administer rules regarding perpetual care.

The bill would specify the commission's authority to establish ethical and professional standards of conduct for the funeral industry, including forgery of a physician's signature. Under certain circumstances, the bill would give immunity from penalty to those who voluntarily disclose violations of the law. It also would prohibit people regulated by the FSC from making fraudulent statements about funeral-related goods or services.

CSHB 1538 would include standard sunset provisions related to the use of technology, alternative dispute resolution, provisional licensing, and penalties and disciplinary options. In addition to standard language on provisional licensing, the bill would add the option for the FSC to grant a provisional license to a person who was enrolled in an accredited school of mortuary science and was employed by a funeral director in an apprentice capacity.

The bill would take effect September 1, 2003. Cemeteries and crematory establishments would have to be licensed by March 1, 2004, and crematory operators would have to be licensed by September 1, 2004.

**SUPPORTERS
SAY:**

CSHB 1538 would continue the FSC and would require improvements in its already much improved operations. It would strengthen regulation of funeral services in a manner that would balance concerns of the funeral service industry with the rights of the public.

Until 2001, crematories and crematory operators were not regulated at all. At that point, the Legislature required them to register with the FSC, though the requirement generated substantial opposition. However, in the intervening biennium, crematory scandals in other states have raised the industry's and the public's awareness of consumer vulnerability concerning crematory services. Now, full regulation, as opposed to registration, seems the most appropriate public policy toward crematories and crematory operators.

The FSC should provide the funeral industry and other stakeholders with an opportunity to play a larger role in developing proposed rules before they are published for public comment. Currently, agency staff write rules with no stakeholder input until the public comment phase. This has created concern, controversy, and inefficiency. Other state agencies incorporate stakeholder input early in the rulemaking process, and CSHB 1538 would require the FSC to do the same.

Some funeral homes sell a financial instrument for perpetual care of the grave and grave top. Because these instruments are interest-earning arrangements, the TDB has regulatory authority over them. However, TDB has not exercised authority over consumers' concerns in cases in which something happens to the body or casket, such as being buried in the wrong place or being disinterred. Since the FSC currently has no regulatory authority in these instances, no governmental entity can address consumers' concerns. This bill would leave regulation of the financial instrument with TDB, while giving the FSC authority to regulate cemetery and crematory services that relate to the care and treatment of a body.

The bill would authorize the governor to appoint the most appropriate person as the commission's presiding officer, removing the restriction that the chair must be a public member. A public member is not always the most qualified to chair the commission, and the governor should have greater discretion in this regard.

The FSC needs the bill's express grant of authority over unethical conduct of funeral service professionals. The funeral industry consistently challenges the agency's authority to make certain rules governing ethical conduct, and FSC needs this statutory change to avoid legal challenges and inefficiencies in the rulemaking process.

CSHB 1538 contains provisions not recommended by the Sunset Advisory Commission that nonetheless are necessary for effective regulation of the funeral industry. First, funeral personnel need the option to report their own violations to the FSC voluntarily without being penalized. This promotes transparency and good business practices and encourages self-regulation, which is in the best interest of consumers. Consumers still would be protected against egregious violations, because the bill would exempt certain violations

from the immunity clause. Second, funeral homes should be able to hire mortuary school students, not only graduates, as apprentices. Funerary skills are learned through practice in addition to classroom learning. The bill would meet the needs funeral directors as well as of mortuary science students.

**OPPONENTS
SAY:**

This bill should not remove the requirement that the governor's designee to chair the commission be a public member. This provision was added by the Legislature only four years ago to rectify almost 100 years of the FSC's being dominated by industry interests. Four years with a public member as chair is not sufficient to reverse 100 years of industry domination. The Sunset Advisory Commission considered this proposed change and rejected it. Enacting this provision would undermine the public interest.

Similarly, the bill contains language rejected by the Sunset Commission that would grant a person immunity from redress for violations of the law when voluntarily disclosed, except in the most serious instances. The bill would establish a cumbersome process for deciding whether or not a person receives immunity that would require FSC staff to understand much more than they normally do about legal evidentiary concepts, such as burden of proof and civil liability. It would give attorneys more opportunities to delay decisions on consumer complaints by expertly navigating the bill's complex provisions. Immunity would weaken consumer protections and serve no public purpose.

A third area in which the bill would deviate from the Sunset Commission's recommendations is in reducing provisional licensing requirements for students in mortuary school. Currently, the FSC grants a provisional license only to someone who has completed an educational program in mortuary science. The bill would require the FSC to issue a provisional license to a person enrolled in mortuary school and employed in an apprenticeship by a funeral director, even if it was the person's first day of class, thus allowing a funeral home to hire someone as an embalmer who never had taken a course in anatomy or embalming technique. This provision would jeopardize quality service and consumer protection and would serve only to allow funeral homes to hire people whom they could pay less.

CSHB 1538 would not prevent cemetery employees and salespeople from misleading consumers about legal and other requirements. In a recent incident, a cemetery salesperson falsely informed a family that Texas law

required a funeral director to be at a family's private graveside service, costing the family an unnecessary \$600. The bill should be amended to address this type of deception.

NOTES:

The committee substitute changed the filed version of HB 1538 by:

- defining perpetual-care cemeteries and giving the TDB regulatory authority over their financial aspects;
- deleting a requirement that the governor appoint a public member as the board's presiding officer;
- adding inspection requirements for cemeteries and crematories;
- codifying the six-month minimum length for funeral director licensing programs;
- modifying provisional license and license suspension components;
- specifying rulemaking authority for the FSC and TDB, including immunity for voluntary disclosure of violations; and
- prohibiting the FSC from charging a fee to perpetual-care cemeteries.

The companion bill, SB 278 by Shapleigh, has been referred to the Senate Government Organization Committee.

A related bill, HB 587 by Marchant, revising regulation of crematories, passed the House on April 14 and was reported favorably, without amendment, by the Senate Administration Committee on April 29.