BILL ANALYSIS

Senate Research Center
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H.B. 1948
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Engrossed

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

Cemeteries are in existence forever (perpetual), and therefore require care and maintenance forever such as mowing, trimming, or maintaining walkways and common grounds. Whenever someone buys a plot in a cemetery, current law requires a small portion of that purchase be added to that cemetery's perpetual care fund and the income from this fund is to be used to cover the maintenance needs.

Under current law, only realized income, not principal, can be distributed for cemetery maintenance. Because of this, cemeteries focus on income-producing investments resulting in a portfolio geared more toward bonds over equities. Using the unitrust method, annual distributions are calculated based on a certain, preset percentage amount (3-5 percent) of the total trust market value. Any growth of the portfolio in excess of such elected percentage remains in the perpetual care fund.

H.B. 1948 addresses this by providing perpetual care cemeteries the option to use the total return method for determining permissible distributions. This would allow cemeteries the ability to extract enough income from their trust to provide for the ongoing care and maintenance of the cemetery while generating higher portfolio growth.

H.B. 1948 amends current law relating to the administration and operation of certain trusts created to provide for the general care and maintenance of perpetual care cemeteries.

RULEMAKING AUTHORITY

Rulemaking authority is expressly granted to the Finance Commission of Texas in SECTION 1 (Section 712.0356, Health and Safety Code) of this bill.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Chapter 712, Health and Safety Code, by adding Subchapter B-1, as follows:

SUBCHAPTER B-1. DISTRIBUTIONS FROM FUND

Sec. 712.0351. DEFINITIONS. Defines "net income fund," "net income method," "total return fund," total return method," and "total return percentage."

Sec. 712.0352. MODIFICATION OF DISTRIBUTION METHOD. (a) Requires the trustee of a cemetery perpetual care trust fund (fund), except as otherwise provided by this subchapter, to use the net income method (NIM) to determine permissible distributions from the fund to the corporation.

(b) Authorizes a corporation on concurrence of the corporation's trustee to modify the terms of the trust instrument governing the fund to require the trustee to use the total return method (TRM) in determining permissible distributions to the corporation. Requires the corporation, to convert a net income fund (NIF) to a total return fund (TRF), at least 60 days before the effective date of the conversion, which must be the first day of the fund's next fiscal year, to submit written documentation to the banking commissioner of Texas (commissioner) in support of the conversion that includes certain documentation and information.

(c) Authorizes a corporation that converts the corporation's fund to a TRF under this section to elect to reconvert the fund to an NIF and modify the terms of the trust instrument governing the fund to require the trustee to calculate permissible distributions under the NIM. Requires the corporation, to reconvert a TRF to an NIF, to submit written documentation to the commissioner in support of the reconversion before the proposed effective date of the reconversion, that includes:

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

(2) the proposed effective date of the reconversion, provided that the effective date is required to be the first day of the fund's next fiscal year unless the total distributions received or to be received from the fund in the current fiscal year would not exceed the distributions permissible for a NIF at the beginning of the current fiscal year; and

(3) any additional information required by rules adopted under this chapter (Perpetual Care Cemeteries (PCC)).

(d) Requires the trustee of an NIF or a TRF to 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 (Use of Fund Income).

Sec. 712.0353. DETERMINATION OF FAIR MARKET VALUE. (a) Requires the trustee of a TRF, or of an NIF seeking to convert to a TRF, to determine for the corporation, in the trustee's sole discretion and in accordance with this section, the average fair market value (FMV) of the fund at the beginning of each fiscal year.

(b) Requires the trustee to derive the average FMV of the fund at least annually by averaging the FMV 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. Requires the trustee to exclude from the FMV calculation any asset described in Section 712.030(b) and any asset for which the trustee is not able to reasonably ascertain a FMV. Requires the trustee, in determining the average FMV, to adjust the FMV 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 is required to add the amount of each addition to all years in which the addition is not included; and

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

(c) Requires the trustee of a TRF, before the 31st day after the beginning of each fiscal year, to send written notice to the commissioner and to the corporation of the trustee's determination of the current FMV of the fund as of the beginning of the current fiscal year and the average FMV of the fund for determining permissible distributions for the fiscal year, with identification and explanation of any asset excluded from the determination. Requires the trustee, if the trustee alters the methodology of determining FMV in a manner that changes the FMV of the fund during a fiscal year, to send written notice to the commissioner and to the corporation of the revised current and average FMV of the fund and the reason for the revision before the first distribution is made based on the revised average FMV.

(d) Provides that this section does not alter or otherwise affect a fiduciary duty under other law to evaluate and monitor the FMV of assets held in trust.

Sec. 712.0354. DETERMINATION OF TOTAL RETURN PERCENTAGE. (a) Requires the trustee of a TRF, in the exercise of the trustees's sole discretion and consistent with the prudent investor rule, to select the TRP to be used in determining permissible distributions from a total return trust at least annually, in an amount that represents a reasonable current return from the fund in light of the investment policy currently applicable to the fund, provided that the TRP does not exceed five percent.

(b) Requires the trustee of a TRF, before the 31st day after the beginning of each fiscal year, to send written notice to the commissioner and to the corporation of the trustee's determination of the TRP to be applied in the fiscal year. Requires the trustee, if the trustee alters the TRP during a fiscal year, to send written notice to the commissioner and to the corporation of the revised TRP and the reason for the revision before the first distribution is made based on the new TRP.

Sec. 712.0355. REGULATORY LIMITS ON DISTRIBUTIONS. (a) Authorizes the commissioner by order, after notice and an opportunity for hearing, to convert a TRF to a NIF, limit or prohibit distributions from the fund, or both, if:

(1) the current FMV of the fund at the beginning of a fiscal year is less than the original principal of the fund, consisting of the sum of all required deposits into the fund under this chapter, including deposits required by Sections 712.004 (Perpetual Care Trust Fund Required) and 712.028 (Amount of Fund Deposits From Sales);

(2) the average FMV of the fund declines by 10 percent or more over a two-year period; or

(3) the trustee or other fiduciary of the fund responsible for investment policy has demonstrated a lack of sufficient knowledge and expertise or has failed to ensure that an investment policy is in place to support the use of the TRM of calculating distributions in a manner consistent with achieving the purposes of the fund as provided by Section 712.021(f) (relating to the fund and contributions to be used for charitable purposes and certain benefactors that finance the fund).

(b) Authorizes the commissioner to decline to impose corrective measures under Subsection (a) if the commissioner finds that:

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

(2) the current, written investment policy of the fund, in light of anticipated distributions from the fund, is reasonably designed to protect the fund from further declines in FMV; and

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

Sec. 712.0356. RULES. Authorizes the Finance Commission of Texas to adopt rules to implement and clarify this subchapter.

Sec. 712.0357. NATURE OF TOTAL RETURN DISTRIBUTIONS. (a) Provides that a distribution from a TRF is considered a distribution of all income of the fund that reasonably apportions the total return of the fund, and is prohibited from being considered a fundamental departure from applicable state law.

(b) Requires the trustee of a TRF, unless the trust instrument provides otherwise, to treat a distribution as first being made from the following sources in order of priority; from net accounting income, from ordinary accounting income not allocable to net accounting income, from net realized short-term capital gains, from net realized long-term capital gains, and from the principal of the fund.

SECTION 2. Amends Section 712.00395(h), Health and Safety Code, as follows:

(h) Requires that an order approving the surrender of a certificate of authority impose four conditions that are not subject to objection. Provides that failure to satisfy any of these conditions constitutes a violation of the commissioner's order, and the certificate holder is subject to an enforcement action under this chapter. Requires that the order approving the surrender require the fund to remain in an irrevocable trust, with the permissible distributions, rather than income, to be used for perpetual care of the cemetery in general and for those plots that were purchased before the certificate was surrendered.

SECTION 3. Amends Section 712.021(b) and (g), Health and Safety Code, to prohibit the principal of the fund, except as otherwise provided by this chapter, rather than Section 712.0255, from being reduced voluntarily, and requires that it remain inviolable. Requires the trustee to maintain the principal of the fund separate from all operating funds of the corporation.

(g) Authorizes the trustors of two or more perpetual care trust funds to establish a common trust fund in which deposits required by this chapter are made, provided that separate records of fund assets, rather than principal and income, are maintained for each PCC for the benefit of which the common trust fund is established, rather than and further provided that the income attributable to each perpetual care cemetery is used only for the perpetual care of that cemetery.

SECTION 4. Amends Section 712.025, Health and Safety Code, as follows:

Sec. 712.025. New heading: USE OF FUND DISTRIBUTIONS. Authorizes fund distributions, rather than fund income, to be used only to provide the perpetual care described by the instrument that established the fund, including the general care and maintenance of the property entitled to perpetual care in the PCC.

SECTION 5. Amends Section 712.0225(a), Health and Safety Code, as follows:

(a) Authorizes the commissioner to petition a court to modify or terminate a fund under Section 112.054 (Judicial Modification or Termination of Trusts), Property Code. Authorizes the commissioner, in addition to the grounds described by that section, to petition a court under that section if the permissible distributions, rather than income, from the fund are inadequate to maintain, repair, and care for the PCC and another source for providing additional contributions to the fund is unavailable. Makes a nonsubstantive change.

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

(a) Authorizes the district court of the county in which the PCC is located, if the directors of a corporation do not generally care for and maintain the corporation's PCC, to by injunction compel the directors to expend the permissible distributions from, rather than from net income of, the corporation's fund as required by this chapter, or appoint a receiver to take charge of the fund and expend the permissible distributions from the fund, rather than the net income of the fund, as required by this chapter.

(c) Requires that court costs and attorney's fees in a suit for relief under this section be awarded to the directors of the corporation, if it is found that the directors are substantially expending the permissible distributions from the fund, rather than to available net income of the fund, as required by this subchapter, or to the plot owners initiating the suit, if it is found that the directors are not substantially expending the permissible distributions from the fund, rather than the available net income of the fund, as required by this subchapter.

(d) Prohibits fund assets from being used to pay court costs and attorney's fees awarded under Subsection (c).

SECTION 7. Amends Section 712.030, Health and Safety Code, as follows:

Sec. 712.030. USE OF GIFT FOR SPECIAL CARE OF PLOT IN PERPETUAL CARE CEMETERY. (a) Authorizes a trustee to take and hold property transferred to the trustee in trust in order to apply the principal, proceeds, or income of the property for any purpose consistent with the terms of the trust and the purpose of a corporation's PCC, including certain items.

(b) Provides that, except as provided by this subsection, the assets of a trust established under this section are not considered assets of the fund. Authorizes the trust, if a gift in trust is specifically intended to serve the same general purpose as the fund, to be merged with the fund.

SECTION 8. Amends Section 712.044(a), Health and Safety Code, as follows:

(a) Authorizes the commissioner to examine on a periodic basis as the commissioner reasonably considers necessary or appropriate to protect the interest of plot owners and efficiently administer and enforce this chapter the books and records of a corporation relating to its fund, including deposits to or withdrawals from the fund, income of the fund, and uses and expenditures of distributions from the fund, rather than uses and expenditures of that income.

SECTION 9. Effective date: September 1, 2017.