

BILL ANALYSIS

Senate Research Center
83R15914 AED-D

H.B. 52
By: Flynn (Carona)
Business & Commerce
5/9/2013
Engrossed

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

Currently, a consumer purchasing burial rights in a cemetery obtains the property rights to the plot, which the consumer may in turn sell or bequeath to an heir. Over the years, as American families' mobility has increased, the sale of these property rights has become more prevalent. Consequently, third party cemetery brokers have offered to help families sell their burial rights in neighboring regions, where cemetery organizations are familiar with local third party cemetery brokers.

In recent years, online third party cemetery brokers have begun advertising the sale of burial rights in multiple states via their websites. As the practice becomes less regional, cemetery organizations have noticed an increase in the number of situations where the sale of a burial right is not properly documented with the corresponding cemetery, leaving the deed transfer incomplete. As a result, the consumer who purchased the property right is often unaware of any problems until the time for burial.

H.B. 52 seeks to regulate such third party sellers by establishing a system for the registration of cemetery brokers and procedures to document the sale of a plot with a cemetery organization.

H.B. 52 amends current law relating to the sale of a cemetery plot; providing penalties; authorizing a fee.

RULEMAKING AUTHORITY

Rulemaking authority is expressly granted to the Finance Commission of Texas in SECTION 2 (Section 711.012, Health and Safety Code), SECTION 6 (Sections 711.047 and 711.048, Health and Safety Code), and SECTION 10 (Section 711.082, Health and Safety Code) of this bill.

Rulemaking authority previously granted to the Finance Commission of Texas is rescinded in SECTION 2 (Section 711.012, Health and Safety Code) of this bill.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Section 711.001, Health and Safety Code, by adding Subdivision (2-b), to define "cemetery broker."

SECTION 2. Amends Section 711.012(a), Health and Safety Code, as follows:

- (a) Authorizes the Finance Commission of Texas (finance commission) to adopt rules to enforce and administer Subchapter C-1 and Section 711.0381, among other sections. Deletes existing text authorizing the finance commission to adopt rules to enforce and administer Section 711.062 (Request to Install Lawn Crypts in Fewer Than 10 Units). Makes a nonsubstantive change.

SECTION 3. Amends the heading to Section 711.038, Health and Safety Code, to read as follows:

Sec. 711.038. SALE OF PLOTS BY CEMETERY ORGANIZATIONS.

SECTION 4. Amends Section 711.038(e), Health and Safety Code, to provide that a person who is an officer, agent, or employee of the cemetery organization or its affiliate and who is exempt from registration under Subchapter C-1 is not required to be licensed or registered to sell a plot in a dedicated cemetery, rather than providing that a person is not required to be licensed to sell a plot in a dedicated cemetery.

SECTION 5. Amends Subchapter C, Chapter 711, Health and Safety Code, by adding Section 711.0381, as follows:

Sec. 711.0381. SALE OR RESALE OF PLOTS BY CERTAIN PERSONS. (a) Prohibits a person from acting as a cemetery broker in the sale or resale of the exclusive right of sepulture in a plot unless the person is registered as a cemetery broker under Subchapter C-1 or is exempt from registration under Subchapter C-1.

(b) Provides that the resale of the exclusive right of sepulture in a plot is subject to the rules of the cemetery organization and any restrictions in the certificate of ownership, quitclaim agreement, or other instrument of conveyance. Requires that a quitclaim agreement or other instrument evidencing the conveyance of the exclusive right of sepulture be:

(1) in a form authorized by or otherwise acceptable to the cemetery organization, subject to Subsection (c);

(2) signed by:

(A) the grantee named in the certificate of ownership or other instrument of conveyance as filed and recorded in the cemetery organization's office in accordance with Section 711.038 or 711.039(g)(2) (relating to authorizing the exclusive right of sepulture in an unused grave, niche, or crypt of a plot in which the plot owner has been interred to be conveyed by the surviving spouse, if any, and the heirs-at-law of the owner), as the seller or transferor;

(B) the designated purchaser or transferee; and

(C) each cemetery broker or other agent assisting in the transfer of the interment rights; and

(3) filed and recorded with the cemetery organization not later than the third business day after the date of the sale.

(c) Requires a cemetery organization, on request of a person acting as a cemetery broker, to provide its rules, conveyance forms, and written guidelines and procedures for brokered sales, if any.

(d) Prohibits the resale of the exclusive right of sepulture in a group of interment rights that were conveyed collectively from being divided without the consent of the cemetery organization.

(e) Requires a person acting as a cemetery broker that sells or resells the right of sepulture in a plot to collect and remit to the cemetery organization all fees required by law, and any other fee required by the rules of the cemetery organization, subject to Subsection (f).

(f) Prohibits a fee required by a rule of the cemetery organization for the sale or resale of the right of sepulture in a plot under this section from exceeding the fee charged by the cemetery organization on the sale of the right of sepulture in a plot under Section 711.038.

(g) Requires a person acting as a cemetery broker to keep a record of each sale or resale under this section, and that the record include:

- (1) the name and address of the purchaser;
- (2) the date of the purchase;
- (3) a copy of the purchase agreement, with the name and address of the cemetery;
- (4) a specific description of the interment rights;
- (5) the purchase price;
- (6) the amount of fees collected and remitted in accordance with Subsection (e); and
- (7) information on the disposal of the purchase agreement, including whether the agreement was conveyed, canceled, or voided.

SECTION 6. Amends Chapter 711, Health and Safety Code, by adding Subchapter C-1, as follows:

SUBCHAPTER C-1. CEMETERY BROKER REGISTRATION

Sec. 711.045. DEFINITIONS. Defines, in this subchapter, "commission," "commissioner," and "department."

Sec. 711.046. CEMETERY BROKER REGISTRATION. (a) Requires a cemetery broker, to register under this subchapter, to file with the Texas Department of Banking (TDB) a sworn, notarized statement that contains:

- (1) the name and street address of the cemetery broker;
- (2) the name, street address, and telephone number of the representative of the cemetery broker to be contacted regarding a written complaint; and
- (3) any Internet or other electronic mail address of the cemetery broker.

(b) Provides that the registration of a cemetery broker is valid until withdrawn or revoked. Provides that periodic renewal of the registration is not required.

(c) Requires a registered cemetery broker to update the information contained in the registration statement not later than the 60th day after the date the information changes.

(d) Authorizes TDB to charge a cemetery broker a reasonable fee to cover the costs of filing and maintaining the registration statement and administering this chapter. Prohibits the administration fee from exceeding \$100 per year.

Sec. 711.047. EXEMPTIONS. Provides that this subchapter does not apply to a person offering to sell or selling the exclusive right of sepulture in a plot if the person is:

- (1) an officer, agent, employee, or affiliate of the cemetery organization in which the plot is located, acting at the direction or under the control of the cemetery organization;
- (2) an employee of a registered cemetery broker;
- (3) with respect to the specific plot for sale:

(A) a grantee named in the certificate of ownership or other instrument of conveyance for the plot as filed and recorded in the cemetery organization's office under Section 711.038;

(B) a spouse or other heir of the named grantee as described by Section 711.039 (Rights of Interment in Plot);

(C) an executor, administrator, or guardian of the named grantee appointed by court order; or

(D) an attorney-in-fact for the named grantee under a durable power of attorney if the person is not otherwise engaged in the business of a cemetery broker and does not solicit appointment as attorney-in-fact for the purpose of offering to sell or selling the exclusive right of sepulture of the named grantee; or

(4) otherwise exempt in accordance with rules adopted by the finance commission as necessary to protect the public health and safety.

Sec. 711.048. COMPLAINTS. (a) Provides that a cemetery broker is subject to rules adopted under Section 11.307 (Rules Relating to Complaints), Finance Code, regarding the manner in which the cemetery broker provides consumers with information on how to file complaints with TDB. Requires that the rules be consistent with the obligations imposed by this section.

(b) Requires TDB, if TDB receives a signed written complaint from a person concerning a cemetery broker, to provide written notification of the complaint to the cemetery broker's designated representative not later than the 31st day after the date the complaint was received and provide a copy of the complaint to the representative. Authorizes TDB to require the cemetery broker to resolve the complaint or to provide the department with a response to the complaint, or provide written direction requiring the cemetery broker to take specific action to resolve the complaint.

Sec. 711.049. TERMINATION OF REGISTRATION. (a) Authorizes a cemetery broker to withdraw the cemetery broker's registration at any time.

(b) Authorizes the Banking Commissioner of Texas (commissioner), after notice and opportunity for a hearing, to revoke the registration of a registered cemetery broker that:

(1) fails to pay the annual administration fee and fails to cure the default not later than the 30th day after the date written notice of the default is mailed by TDB to the cemetery broker;

(2) fails or refuses to comply with TDB's written request for a response to a complaint; or

(3) the commissioner concludes, after considering a complaint filed under this subchapter, has engaged in an intentional course of conduct that violates federal or state law, or constitutes improper, fraudulent, or dishonest dealings.

(c) Requires the commissioner to state the basis of the decision in an order revoking the registration of a cemetery broker. Authorizes the cemetery broker to appeal an order revoking registration in the manner provided by Chapter 2001 (Administrative Procedure), Government Code.

SECTION 7. Amends Section 711.052(a), Health and Safety Code, as follows:

(a) Provides that a person who is an individual, firm, association, corporation, or municipality, or an officer, agent, or employee of an individual, firm, association, corporation, or municipality, commits an offense if the person:

(1)-(3) Makes no change to these subdivisions;

(4) Makes a nonsubstantive change;

(5) offers or receives monetary inducement to solicit business for a cemetery broker;

(6) fails or refuses to keep records of sales or resales or to collect and remit fees as required by Section 711.0381; or

(7) fails or refuses to register as a cemetery broker as required by Subchapter C-1.

SECTION 8. Amends Section 711.056(a), Health and Safety Code, as follows:

(a) Requires the trier of facts, if after a hearing conducted as provided by Chapter 2001, Government Code, the trier of fact finds that a violation of this chapter or a rule of the finance commission establishes a pattern of wilful disregard for the requirements of this chapter or rules of the finance commission, to recommend to the commissioner that the maximum administrative penalty permitted under Section 711.055 (Enforcement by Commissioner) be imposed on the person committing the violation or that the commissioner cancel or not renew:

(1) the person's registration under Subchapter C-1, if the person is registered under that subchapter; or

(2) Creates this subdivision from existing text and makes no further change.

SECTION 9. Amends Subchapter D, Chapter 711, Health and Safety Code, by adding Sections 711.057, 711.058, and 711.059, as follows:

Sec. 711.057. EMERGENCY ORDER. (a) Authorizes the commissioner to issue an emergency order that takes effect immediately if the commissioner finds that immediate and irreparable harm is threatened to the public or a beneficiary under a sale of the exclusive right of sepulture in a plot.

(b) Provides that an emergency order remains in effect unless stayed by the commissioner.

(c) Authorizes the person named in the order to request in writing an opportunity for a hearing to show that the emergency order should be stayed. Requires the commissioner, on receipt of the request, to set a time for the hearing before the 22nd day after the date the commissioner received the request, unless extended at the request of the person named in the order.

(d) Provides that the hearing is an administrative hearing relating to the validity of findings that support immediate effect of the order.

Sec. 711.058. RESTITUTION. Authorizes the commissioner to issue an order to a person requiring restitution if, after notice and opportunity for hearing, the commissioner finds that the person:

(1) failed to remit a fee in accordance with Section 711.0381; or

(2) misappropriated, converted, or illegally withheld or failed or refused to pay on demand money entrusted to the person that belongs to a cemetery organization under an instrument of conveyance.

Sec. 711.059. SEIZURE OF ACCOUNTS AND RECORDS. (a) Authorizes the commissioner to issue an order to seize accounts in which funds from the sale or resale of the exclusive right of sepulture in a plot, including earnings, may be held and to issue an order to seize the records that relate to the sale or resale of the exclusive right of sepulture in a plot if the commissioner finds, by examination or other credible evidence, that the person:

- (1) failed to remit a fee in accordance with Section 711.0381;
- (2) misappropriated, converted, or illegally withheld or failed or refused to pay on demand money entrusted to the person that belongs to a cemetery organization under an instrument of conveyance;
- (3) refused to submit to examination by TDB;
- (4) was the subject of an order to cancel, suspend, or refuse a registration under Subchapter C-1; or
- (5) is required to register under Subchapter C-1 and is not registered or has transferred the ownership of the business that required registration to another person who is not registered.

(b) Requires that an order be served on the person named in the order by certified mail, return receipt requested, to the last known address of the person.

(c) Provides that an order takes effect immediately and remains in effect unless stayed by the commissioner, if the commissioner finds that immediate and irreparable harm is threatened to the public or a beneficiary under a sale of the exclusive right of sepulture in a plot. Requires that the order, if such a threat does not exist, state the effective date, which is prohibited from being before the 16th day after the date the order is mailed.

(d) Provides that an emergency order remains in effect unless stayed by the commissioner. Authorizes the person named in the order to request in writing an opportunity for a hearing to show that the emergency order should be stayed. Requires the commissioner, on receipt of the request, to set a time before the 22nd day after the date the commissioner received the request, unless extended at the request of the person named in the order. Provides that the hearing is an administrative hearing relating to the findings that support immediate effect of the order.

(e) Provides that a nonemergency order takes effect as proposed unless the person named in the order requests a hearing not later than the 15th day after the date the order is mailed.

(f) Authorizes the commissioner, after the issuance of an order under this section, to initiate an administrative claim for ancillary relief, including a claim for:

- (1) costs incurred in the administration, transfer, or other disposition of the seized assets and records; or
- (2) costs reasonably expected to be incurred in connection with the administration and performance of any outstanding certificate of ownership or other instrument of conveyance that is a part of a sale by the person subject to the order.

(g) Provides that the remedy provided by Subsection (f) is not exclusive. Authorizes the commissioner to seek an additional remedy authorized under this subchapter.

SECTION 10. Amends Chapter 711, Health and Safety Code, by adding Subchapter F, as follows:

Sec. 711.081. DEFINITIONS. Defines, in this subchapter, "commission," "commissioner," and "department."

Sec. 711.082. ADMINISTRATION; FEES. (a) Requires TDB to administer Subchapters C and C-1 relating to cemetery brokers.

(b) Authorizes the finance commission to adopt reasonable rules concerning:

- (1) fees to defray the cost of administering Subchapters C and C-1;
- (2) the retention and inspection of records relating to the sale or resale of the exclusive right of sepulture in a plot;
- (3) changes in the management or control of a cemetery broker's business; and
- (4) any other matter relating to the enforcement and administration of Subchapters C and C-1.

(c) Prohibits a fee set by the finance commission from producing unnecessary fund balances.

Sec. 711.083. RECORDS; EXAMINATION. (a) Requires a person acting as a cemetery broker to maintain records in accordance with this subchapter and Section 711.0381.

(b) Requires TDB to examine the records of each person acting as a cemetery broker if the commissioner determines the examination is necessary to safeguard the interests of purchasers and beneficiaries of the exclusive right of sepulture in a plot, and efficiently enforce applicable law.

(c) Authorizes a person to maintain and provide a record required to be maintained under this section in an electronic format if the record is reliable and can be retrieved in a timely manner.

Sec. 711.084. EXAMINATION FEE. (a) Requires the commissioner or the commissioner's agent, for each examination conducted under Section 711.083, to impose on the cemetery broker a fee in an amount set by the commission under Section 711.082.

(b) Requires that the amount of the fee be sufficient to cover:

- (1) the cost of the examination, including:
 - (A) salary and travel expenses TDB employees, including travel to and from the place where the records are kept; and
 - (B) any other expense necessarily incurred in conducting the examination;
- (2) the equitable or proportionate cost of maintaining and operating TDB; and
- (3) the cost of enforcing this subchapter.

SECTION 11. (a) Effective date, except as provided by Subsection (b) of this section: upon passage or September 1, 2013.

(b) Effective date, Section 711.0381 and Subchapter C-1, Chapter 711, Health and Safety Code, as added by this Act: January 1, 2014.