VIRGINIA ACTS OF ASSEMBLY -- 2017 SESSION

CHAPTER 65

An Act to amend and reenact §§ 54.1-2322 and 54.1-2324 of the Code of Virginia, relating to perpetual care trust funds; method of distribution.

[S 891]

Approved February 20, 2017

Be it enacted by the General Assembly of Virginia:

1. That §§ 54.1-2322 and 54.1-2324 of the Code of Virginia are amended and reenacted as follows:

§ 54.1-2322. Use of income from perpetual care trust fund; distributions.

A. The income from the perpetual care trust fund shall be used solely and exclusively for the general care, maintenance, administration, and embellishment of the cemetery. Unless prior approval has been obtained from the Board or a court of competent jurisdiction, the principal of the perpetual care trust fund shall only be used for investment purposes.

B. A cemetery company may request the trustee of a perpetual care trust fund to elect the distribution of either of the following from the perpetual care trust fund:

1. All net income, which for purposes of this section means the collected dividends, interest, and other income of the perpetual care trust fund less any taxes on income, fees, commissions, and costs. A distribution made under this subdivision shall be referred to as a "net income distribution method"; or

2. An amount not to exceed five percent of the fair market value of the perpetual care trust fund at the close of its fiscal year preceding the distribution year. A distribution made under this subdivision shall be referred to as a "total return distribution method."

C. A cemetery company may request the trustee of a perpetual care trust fund to convert from a net income distribution method to a total return distribution method by delivering written or electronic notice to the trustee. Notice of such conversions shall be provided to the Board at least 90 days prior to implementation of the total return distribution method. Such notices may be written or electronic and shall include a copy of the trust instrument, election of distribution method, and an investment and distribution policy pursuant to subdivision D 1. In the event that a distribution method is not elected, distributions shall be limited to the net income distribution method.

D. The trustee of a perpetual care trust fund may reject a cemetery company's request to elect a total return distribution method. If a trustee determines that election of a total return distribution method is proper, he shall:

1. Prior to implementation of the total return distribution method, adopt a written investment and distribution policy under which the amounts of future distributions from the perpetual care trust fund will be calculated under the total return distribution method rather than net income distribution method. The investment goals and objectives of such policy shall be tailored to achieve (i) principal growth through equity investment; (ii) current income through income investment, as necessary; and (iii) an appropriate balance between (a) maintaining purchasing power through principal appreciation and (b) generating income to support the cemetery company's care and maintenance. A copy of such policy shall be sent to the Board with the notice required in subsection C;

2. Ensure that asset allocation under the perpetual care trust fund includes a diversified portfolio and that investment decisions are made in accordance with all other applicable laws of the Commonwealth;

3. Determine the fair market value of the perpetual care trust fund at least annually using generally accepted valuation methods and such valuation date or dates or averages of valuation dates as are readily ascertainable;

4. Make distributions from the perpetual care trust fund on a monthly, quarterly, semi-annual, or annual basis, as agreed upon by the cemetery company and the trustee;

5. Require that both of the following tests be met each fiscal year prior to allowing any distribution from the perpetual care trust fund to the cemetery company: (i) the fair market value of the perpetual care trust fund after the distribution will be greater than the aggregate of 80 percent of the fair market value of the perpetual care trust fund at the close of the preceding fiscal year plus the total contributions made to the trust principal from such date to the date that the method of distribution is elected and (ii) beginning with the third year of using a total return distribution method, a three-year analysis of investment returns and distribution practices indicates that such practices will result in sufficient protection of the trust principal. If either test is not met, distributions for that fiscal year shall be limited to the net income distribution method;

6. In the event that the taxes and fees paid by the perpetual care trust fund are greater than two and one-half percent of the fair market value of the trust at the close of the preceding fiscal year, reduce the distribution by the amount exceeding two and one-half percent; and

7. Maintain records documenting the fair market value of the assets held in the perpetual care trust fund at the end of the accounting period immediately prior to conversion to the total return distribution method.

E. In addition to filing an annual perpetual care trust fund financial report with the Board pursuant to § 54.1-2324, a cemetery company that has elected a total return distribution method shall also file a copy of such financial report at the close of each fiscal year with the commissioner of accounts in a jurisdiction in the Commonwealth in which the cemetery company owns a cemetery. The commissioner of accounts shall review the financial report and forward his finalized accounting to the Board, with all reasonable fees and costs for such filing and review borne by the cemetery company. A trustee shall not make any distribution from a perpetual care trust fund under a total return distribution method until the review by the commissioner of accounts has been finalized. A review shall be deemed finalized if the commissioner of accounts has not responded or communicated any deficiencies within 60 days of the submission of the financial report.

F. The Board shall review all notices of conversion or reversion of perpetual care trust fund distribution method for compliance with this section. The Board may engage the services of a professional to review notices of conversion or reversion to a total return distribution method, with all reasonable costs of such review borne by the cemetery company that submitted such notice.

The Board may limit or prohibit conversion from a net income distribution method to a total return distribution method if the trustee or any investment manager is not able to demonstrate sufficient knowledge and expertise regarding effective implementation of the total return distribution method. The Board may prohibit a reversion from the total return distribution method to the net income distribution method if the trust principal is less than it was at the time the cemetery company converted to the total return distribution method, as adjusted for inflation.

If a conversion to the total return distribution method has already been made, the Board may limit or prohibit distributions from the perpetual care trust fund if the trustee or any investment manager is not able to demonstrate sufficient knowledge and expertise regarding the distribution of trust income for the maintenance of the cemetery using the total return distribution method. In deciding whether a distribution should be limited or prohibited, the Board shall consider the presence and stated value of trust assets that do not have an active market and are not traded on a regular basis, the frequency of appraisals and evaluations of such assets, the asset allocation of the trust, and whether trust principal, as adjusted for inflation, is less than it was at the time the cemetery company converted to the total return distribution method.

The Board may require a cemetery company to restore a distribution to the perpetual care trust fund if (i) the distribution and all other aspects of the trust were not in compliance with the requirements of this section at the time such distribution was made or (ii) the cemetery company has committed fraud against the trust.

G. If a total return distribution method has been elected, the perpetual care trust fund may not be reverted to a net income distribution method absent approval by the Board. A failure by a cemetery company to file a perpetual care trust fund financial report annually with the Board as required by § 54.1-2324 shall automatically prohibit a conversion to or continuation of a total return distribution method pending further action by the Board.

~~B.~~ *H.* No portion of the perpetual care trust fund shall be used to pay any personal obligation or debt of any officer or owner of the cemetery or any tax obligation incurred by the cemetery or for any purpose other than that expressly described in this section. Nothing in this section shall be construed to limit the ability of the perpetual care trust fund trustee from paying normal operating expenses and income taxes of the trust itself, the trust being a separate legal entity.

§ 54.1-2324. Financial report and report of independent certified public accountant required for perpetual care trust funds.

A. Within four months after the close of its fiscal year, the cemetery company shall report the following information to the Board, on forms prescribed by the Board:

1. The total amount of principal in the perpetual care trust fund;

2. The securities in which the perpetual care trust fund is invested and the amount of cash on hand as of the close of the fiscal year;

3. The income received from the perpetual care trust fund, and the sources of such income, during the preceding fiscal year;

4. *The method of distribution used for distributions from the perpetual care trust fund and, if a total return distribution method was used, a schedule to verify compliance with the requirements of § 54.1-2322;*

5. An affidavit executed by the compliance agent that all applicable provisions of this chapter relating to perpetual care trust funds have been complied with;

~~5.~~ *6.* The total receipts subject to the 10 percent trust requirement;

~~6.~~ *7.* All expenditures from the perpetual care trust fund;

~~7.~~ *8.* If the trustee is other than a Virginia trust company or trust subsidiary or a federally insured bank or savings institution doing business in the Commonwealth, proof that the required fidelity bond has been secured and that it is in effect; and

~~8.~~ *9.* A separate total of expenses incurred for general care and maintenance, embellishment and administration of its cemeteries.

B. The cemetery company shall (i) engage an independent certified public accountant to apply agreed-upon procedures as specified by the Board to the total of all receipts subject to § 54.1-2319, in accordance with standards established by the American Institute of Certified Public Accountants or any successor standard authorities, and (ii) provide to the Board the independent certified public accountant's report on the agreed-upon procedures. The information provided by the cemetery company shall provide full disclosure of any transactions between the perpetual care trust fund and any directors, officers, stockholders, or employees of the cemetery company, or relatives of the cemetery company's employees, and shall include a description of the transactions, the parties involved, the dates and amounts of the transactions, and the reasons for the transactions.

C. The information required to be filed hereunder with the Board shall be exempt from the Government Data Collection and Dissemination Practices Act (§ 2.2-3800 et seq.).