

RELIGIOUS AND CHARITABLE MATTERS; CEMETERIES: CEMETERIES - PERPETUAL CARE FUNDS, PRENEED BURIAL CONTRACTS AND CONSUMER PROTECTIONS.

Unless 40% deposit is disbursed pursuant to performance of specific preneed burial contract, both initial deposits and all income from deposits, other than trustee's fees and costs, are to remain in trust account. Authorization for trustee to distribute to seller income in trust account that, when added to initial deposits, exceeds full amount of current cost requirements for seller's unperformed preneed burial contracts. Initial deposit may be distributed only upon performance of specific preneed burial contract.

The Honorable William J. Howell

Member, House of Delegates

June 2, 1998

You request clarification regarding the funds in preneed burial contract trust accounts that may be distributed to a cemetery company pursuant to § 57-35.24 of the *Code of Virginia*.

Section 57-35.21 requires a cemetery company, as defined in § 57-35.11,¹ to deposit forty percent of the receipts from the sale of a preneed burial contract into a special trust account when delivery of the property or performance of the service may be delayed more than 120 days from the date of the initial payment on the sale. While the specific funds deposited into the account are to be identified in the records of the seller by the contract number and name of the buyer, the trustee may commingle the funds for purposes of management and investment.²

Upon performance of a preneed burial contract, § 57-35.25(A) provides for the trustee to disburse to the seller from the trust the specific funds identified to the contract performed. Until such time as the funds are disbursed pursuant to § 57-35.25, they are to remain in the trust account.³ Section 57-35.24 provides, however, that if the specific funds deposited in the account and the income from investment of the funds are "in excess of the current cost requirements for all undelivered property or services included in the seller's preneed burial contracts," the trustee is to return the excess income to the seller.⁴ Section 57-35.11 defines "cost requirement" as "the total cost to the seller of the property or services subject to the deposit requirements of § 57-35.21 required by that seller's total contracts."

When the language of a statute is plain and unambiguous, it is unnecessary to resort to rules of statutory construction.⁵ It is clear from a reading of these statutes that, unless a forty percent deposit is disbursed pursuant to the performance of a specific preneed burial contract, both the initial deposits and all of the income from the deposits, other than the trustee's fees and costs, are to remain in the trust account.⁶ Only when the income in the trust account accumulates to the extent that the income, when added to the initial deposits, exceeds the full amount, based on "current cost requirements," of all of the seller's unperformed preneed burial contracts may the trustee distribute excess income to the seller.⁷ Section 57-35.24 authorizes only the distribution of "income," not the distribution of the amount of the initial deposit. Pursuant to § 57-35.25, the initial deposit may be distributed only upon performance of the specific preneed burial contract.

¹"*Cemetery company*' means any person engaged in the business of (i) selling or offering for sale any grave or entombment right in a cemetery and representing to the public that the entire cemetery, a single grave, or entombment right therein will be perpetually cared for or (ii) selling property or services used in connection with interring or disposing of the remains or commemorating the memory of a deceased human being, where delivery of the property or performance of the service may be delayed later than 120 days after receipt of the initial payment on account of such sale. Such property or services include but are not limited to burial vaults, mausoleum crypts, garden crypts, lawn crypts, memorials, and marker bases, but shall not include graves or incidental additions such as dates, scrolls, or other supplementary matter representing not more than 53n percent of the total contract price." Section 57-35.11.

²Section 57-35.23.

³See § 57-35.24.

⁴Section 57-35.24 states: "Specific funds shall remain intact until the property is delivered or services performed as specified in the contract. The net income from the preneed trust account, after payment of any appropriate trustee fees, commissions, and costs, shall remain in the account and be reinvested and compounded. Any trustee fees, commissions, and costs in excess of income shall be paid by the cemetery company and not from the trust. However, the trustee shall, as of the close of the cemetery company's fiscal year, upon written assurance to the trustee of a certified public accountant employed by the seller, return to the seller any income in the seller's account which, when added to the specific funds, is in excess of the current cost requirements for all undelivered property or services included in the seller's preneed burial contracts. The seller's cost requirements shall be certified in its records by an affidavit sworn by the compliance agent and shall be determined by the seller as of the close of the cemetery company's fiscal year."

⁵See *Town of South Hill v. Allen*, 177 Va. 154, 12 S.E.2d 770 (1941).

⁶You ask whether capital gains are to be treated differently from other types of income. I note that the statutes make no distinction between different types of investment income, including capital gains.

⁷Section 57-35.24.