

SB 192 2021 - MCCA.pdf

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John R. Stierhoff
(410) 244-7833
jrstierhoff@venable.com

January 21, 2020

The Honorable Delores G. Kelley
Chair, Senate Finance Committee
3 East Miller Senate Office Building
11 Bladen Street
Annapolis, Maryland 21401

Re: Senate Bill 192 – Cemeteries – Perpetual Care – Distribution From Perpetual Care Trust Fund

Dear Chair Kelley:

I am writing on behalf of the Maryland Cemetery and Cremation Association (“Association”) in Support of Senate Bill 192.

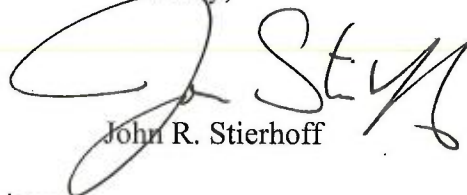
Founded in 1916, the Maryland Cemetery and Cremation Association represents the shared interests and concerns of professionals across the spectrum of Maryland’s “death care” industries.

The Association strongly supports allowing a cemetery the option to select an alternative method for distributions from a perpetual care trust fund. The proposal provides access to a previously unavailable source of funding for perpetual care, critical for the long term protection and maintenance of a cemetery. The bill also ensures that the Office of Cemetery Oversight maintains the authority to limit or prohibit fund balance distribution based on its review.

The legislation incorporates appropriate safeguards to protect members of the public and will allow cemeteries to budget and plan for future finance decisions.

The Maryland Cemetery and Cremation Association respectfully requests the Senate Finance Committee to Support Senate Bill 192.

Sincerely,



John R. Stierhoff

cc: Members, Senate Finance Committee

SB192 - Argent Trust Company - Justin Wilson - FAV

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Position: FAV



Funeral Trust Division
2602 Iron Gate Drive
Suite 202
Wilmington, NC 28412
(910) 550-0542
ArgentFinancial.com

January 12, 2021

Chair Kelley
Vice Chair Feldman
Senate Finance Committee
Miller Senate Office Building, 3 East
Annapolis, Maryland 21401

Chair Pendergrass
Vice Chair Peña-Melynk
Health and Government Operations Committee
House Office Building, Room 241
Annapolis, Maryland 21401

RE: SB192 | HB 5 – (Cemeteries – Perpetual Care – Distribution from Perpetual Care Trust Fund)

Dear Chair Kelley, Chair Pendergrass, Vice Chair Feldman, Vice Chair Peña-Melynk, Members of the Senate Finance Committee, and Members of the House Health and Government Operations Committee:

I was recently made aware that Maryland was considering the implementation of a Total Return Distribution Method for perpetual care cemeteries in the state pursuant to proposed Senate Bill 291 and House Bill 85. Our institution has reviewed this proposed legislation and would like to provide some additional insights, from the perspective of an independent trustee, as to why such a change would be in the interest of Maryland cemeteries and its citizens.

I. Argent Trust Company – (About Us)

Argent Trust Company ("Argent") is a Tennessee state-chartered trust company that administers over \$23 billion in trust assets for our various personal and institutional trust clients. Argent also maintains a dedicated funeral and cemetery trust division (the "Cemetery Trust Division") that administers over \$2 billion in funeral and cemetery trust assets for 160 clients across 35 states (excluding Maryland). The Cemetery Trust Division is composed of 12 trust professionals, which include:

- Dedicated legal team that reviews state regulations for the administration of funeral and cemetery trust assets in compliance with state law;
- Dedicated trust administration personnel to oversee any required annual reporting and the timely deposit, investment and withdrawal of funds in accordance with state regulations; and
- Dedicated investment management with an experienced team of portfolio managers that are familiar with the various state-specific investment requirements.

Argent's Cemetery Trust Division has over 150 years of combined experience in the administration and investment funeral and cemetery trust accounts. For more information about Argent or its Cemetery Trust Division, please visit our website at <https://argentfinancial.com>.

II. Trustee's Fiduciary Duty to a Perpetual Care Cemetery Trust

Perpetual care cemeteries have a profound responsibility to their clients and their communities to provide

a well-maintained final resting place, in perpetuity, for the departed. To accomplish this, states have tasked third-party fiduciaries with the responsibility, as trustee, for the oversight and administration of the perpetual care trust fund. The trustee's fiduciary obligations are ongoing duties that begin at the fund's inception and continue into perpetuity.

As you know, the perpetual care cemetery trust fund is the funding vehicle that covers the costs of lawn maintenance and the general upkeep of the cemetery grounds. As such, the trustee owes a fiduciary duty to ensure that the perpetual care cemetery trust fund is invested in a prudent manner and that distributions that are permitted under state law are made to the cemetery company in a timely manner. For the reasons mentioned below, Argent has taken the position that a Total Return Distribution Method is not only preferable for providing increased distributions to the cemetery company, but it also grows the corpus of the trust fund over time.

III. Benefits of Total Return Method vs. Net Income Method

A. Net Income Distribution Method

For generations, perpetual care cemetery trust funds have been limited to only distributions of net income, that is, the interest and dividend yielded after the payment of fees, expenses and taxes. As a result, the typical investment portfolio for Net Income Distribution Method trusts is heavily weighted toward income-producing investments. The cemetery company is entitled to receive all available net income, which generally varies from month to month. Over the past decade, low interest rates have meant that these investments have dramatically underperformed. Accordingly, cemeteries are receiving far less from their trusts' investments than in previous years, hampering their ability to pay for the upkeep and maintenance required in a perpetual care cemetery.

While the Net Income Distribution Method approach may have been satisfactory for many newer cemeteries, there has been a growing concern for older cemeteries that have either sold out or are close to selling out of their available lots and/or grave spaces. Perpetual care cemetery trusts are funded with a portion of the sale of each lot and/or grave space in accordance with state law. Such deposits are the main source of corpus appreciation for a Net Income Distribution Method trust fund since the investment of the fund is weighted toward income producing investments. If trust corpus has not grown adequately over time, then there may not be enough income generated in later years to care for the cemetery in perpetuity.

Furthermore, once a cemetery sells out of its available lots and/or graves, then there is less incentive for the cemetery company to cover the costs themselves for any required maintenance if the net income from the trust is inadequate. Argent continues to see various instances across the nation where a cemetery that is at full capacity becomes a public nuisance due to lack of proper upkeep and maintenance. In such instances, the city or township where the cemetery is located is then tasked with taking over the maintenance of the cemetery grounds. In such a scenario, the city or township must supplement, at the expense of the taxpayers, the difference between available trust income and actual cost of the cemetery maintenance.

B. Total Return Distribution Method

Under a Total Return Distribution approach, the cemetery elects a fixed percentage of income, capital gains, and/or principal based on the average annual fair market value of the trust. Accordingly, the investment portfolio under such an approach will be a balanced portfolio that focuses on a combination of stocks and interest-bearing investments with the main objective of maximizing the growth of the entire trust.

The main benefits for the Total Return Method are as follows:

- Diversified portfolio under a Prudent Investor Standard encourages both growth of corpus and income generation;
- Trust investment portfolio not completely dependent on interest rates;

- Consistent amount distributed each period to the cemetery, which allows for ease of managing and budgeting;
- Typically, the Total Return Distribution amount exceeds the amount of net-income generated under the Net Income Method; and
- The cremation rate is dramatically increasing nationwide, which correlates to fewer sales of lots and/or grave spaces per year. However, under a Total Return approach, the cemetery is no longer completely reliant on growing the trust corpus via deposits from sales of new lots and/or grave spaces.

In our experience, issues with utilizing the Total Return Distribution Method only appear to occur when:

- The trustee and/or investment manager are not familiar with the Total Return calculation and/or the associated diversified growth investment strategy; or
- During periods of a prolonged market downturn, this method could result in the possible overpayment of trust corpus.

After reviewing SB 192 and HB 05, it is our belief that these proposed bills contain the necessary provisions for the Office of Cemetery Oversight to review these trust funds on a regular basis and intervene if either issue noted above is found for a particular perpetual care trust fund. Specifically, these bills permit the Director of the Office of Cemetery Oversight to limit or prohibit any distribution after a review of the trust fund found either deficiency noted above.

IV. Conclusion

It is Argent's position that a Total Return Distribution Method is the preferable choice for providing consistent, increased returns to the cemetery company, while at the same time enhancing the fund's long-term viability by growing the corpus of the trust fund over time. After reviewing SB 192 and HB 05, Argent believes that they are similar in nature to Total Return/Unitrust laws that have been passed in other states for which we currently act as a cemetery trustee. At this time, Argent would recommend that SB 192 and HB 05 be passed since they would increase the monthly/quarterly distributions to cemetery companies, they would grow the corpus of the perpetual care cemetery trust fund, and they contain adequate regulatory safeguards to prohibit the excess invasion of principal during periods of lower investment returns.

If you should have any questions, please feel free to contact me at jwilson@argenttrust.com or (910) 550-0542.

Respectfully submitted,



Justin D. Wilson | SVP & Senior Legal Counsel
Argent Trust Company

Total Return Method

For Perpetual Care Trusts

Why is the Total Return Method a better option?

The total return method allows for creation of broader diversification (which can reduce volatility and spread market risk) by owning various asset classes, market capitalizations (large, mid, small) and investment styles (value, growth). Perpetual care is a marathon, not a sprint. It is “perpetual care” not “next year’s” care. It is crucial to be prudent to protect the cemetery and the consumers utilizing it.

How does the Total Return Method differ from the current Net Income Method?

The total return method allows distribution to cemeteries in the form of a percentage of total market value. It allows for no less than 3 percent and no more than 5 percent. The net income method only distributes interest and dividends, and so forces asset allocation into certain types of investments, which may be less desirable.

What are safeguards to protect consumers and the public in a downturn?

- A rolling average for distributions keeps trustees from distributing excessively high amounts in good years or low amounts in bad years. It evens the playing field.
- Built in protections require the cemetery to temporarily revert back to net income method if facts warrant such a move.
- The Office of Cemetery Oversight reviews each cemetery’s annual report to ensure funds are protected and growing for the life of the cemetery.

Are other states utilizing the Total Return Method?

Yes: Arizona, Colorado, Delaware, Florida, Georgia, Indiana, Iowa, Missouri, Nevada, North Carolina, Oklahoma, Tennessee, Texas, Virginia and Washington have passed into law the total return statutes applicable to Cemetery Perpetual Care Trusts or have unitrust provisions. California has passed legislation that will become effective in 2021. Several other states are reviewing it.

What are benefits of Total Return Method?

- Total return method has historically produced 2 to 4 percent greater than net income method.
- Allows for higher and more sustainable distributions to the cemetery to be utilized for the care and maintenance of the cemetery pursuant to Maryland Statute 5-603(e). ALL distributed funds must be used for the perpetual care of the cemetery.
- Principal can grow at a greater rate than net income method.
- Reflects exactly how much funds will be available, in advance, which is key for budgeting and planning purposes for the cemetery.

Why should the change be made now?

The total return method provides a sustainable and stable cash flow allowing cemeteries to make future financial decisions efficiently to serve the consumer. This should be an option. It is not mandatory. The individual cemeteries can choose what option best fits their specific needs

Perpetual Care Trusts are created to ensure cemeteries remain properly maintained, attractive and safe for consumers into perpetuity. A percentage of each burial plot sale funds them.

Historically, once funded corporate trustees invest under Prudent Person Rule to seek income while preserving capital to support net income distributions. The current low interest environment does not support perpetual care trusts with net income method.

The net income method yields lower total rate of return which results in lack of funds to maintain cemetery (i.e. mowing grass, planting flowers, trimming trees, paving roads, etc.)

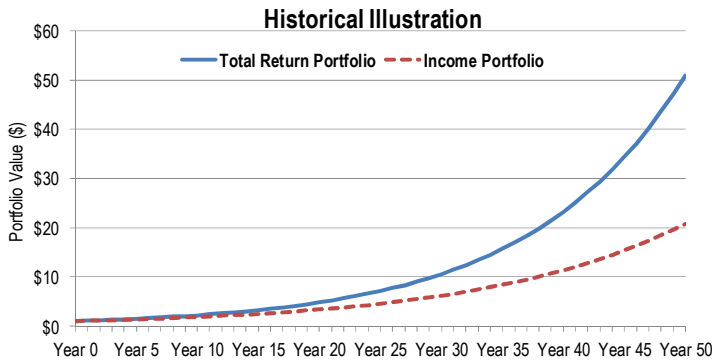
Perpetual care trust accounts are not generating enough funds to maintain the cemetery and build a nest egg for unpredictable maintenance costs.

This causes consumer concern and complaints. It also results in cemeteries being turned over to municipalities and states because of insufficient funds to continue maintaining them. Taxpayer money is then thwarted.

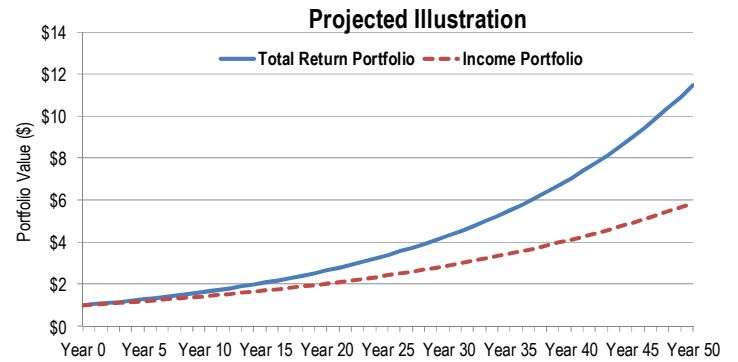
A MORE VIABLE OPTION IS THE TOTAL RETURN METHOD.

Representative Illustrations

- The graphs below illustrate the hypothetical growth of \$1 for a Total Return portfolio versus an Income-oriented portfolio, in both historical and projected scenarios. In both cases, the Total Return portfolio yields a higher portfolio value and cumulative distributions over the long term.



Cumulative Distributions	
Total Return Portfolio	\$30.55
Income Portfolio	\$13.93
Difference	\$16.62



Cumulative Distributions	
Total Return Portfolio	\$10.47
Income Portfolio	\$3.72
Difference	\$6.75

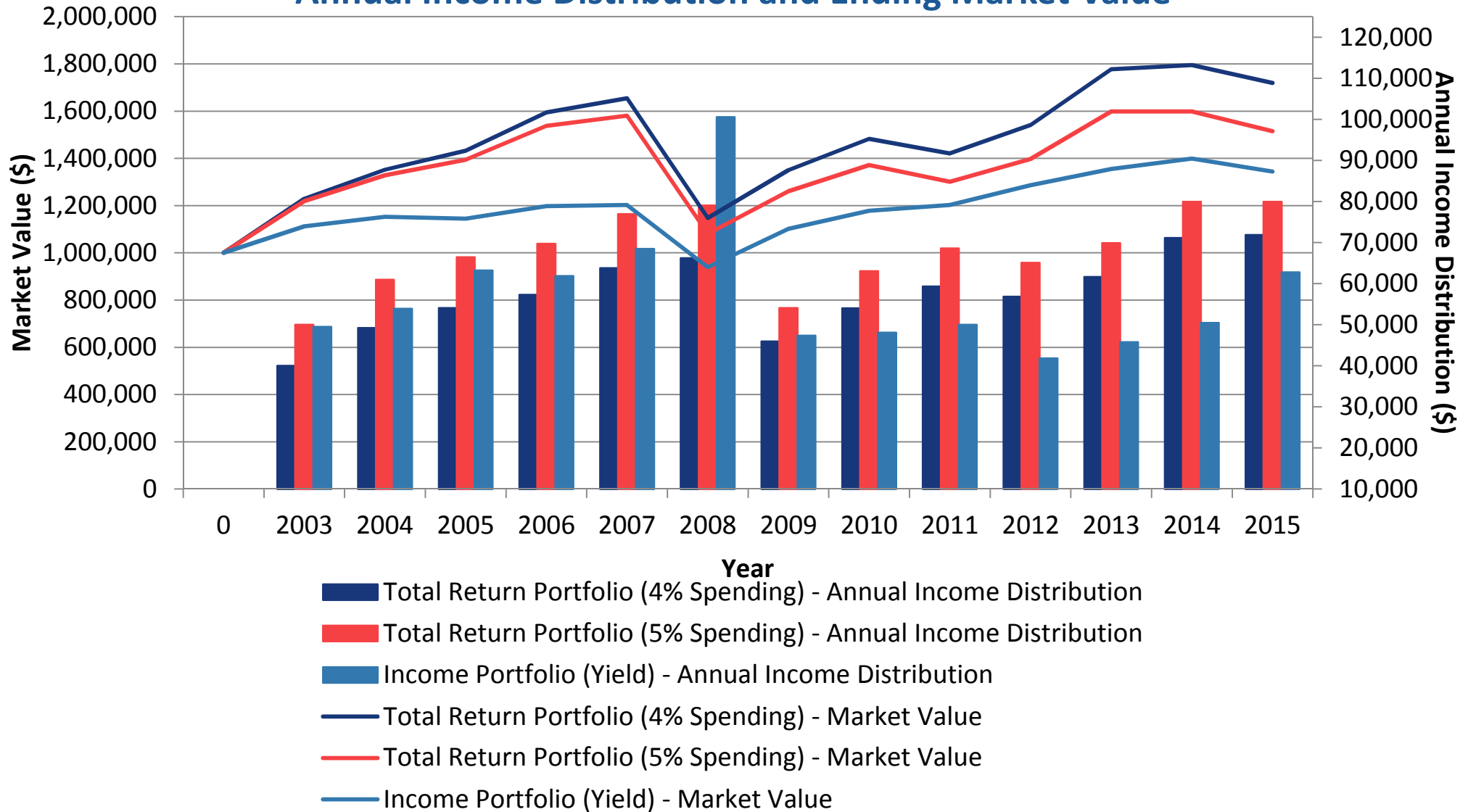
Note: The Total Return Portfolio consists of 60% Stocks/40% Bonds and the Income Portfolio consists of 20% Stocks/80% Bonds. Rate of returns (capital appreciation and income) used for illustration purposes are held constant each year with portfolios rebalanced annually. The Total Return Portfolio assumes a 5.0% annual distribution rate, while the Income Portfolio distributes only current income. The Historical Illustration is based on data from Ibbotson Associates, 1926-2014. The Projected Illustration is based on data from LCG Associates and Standard & Poor's.

Illustration – Distributions and Growth of \$500,000

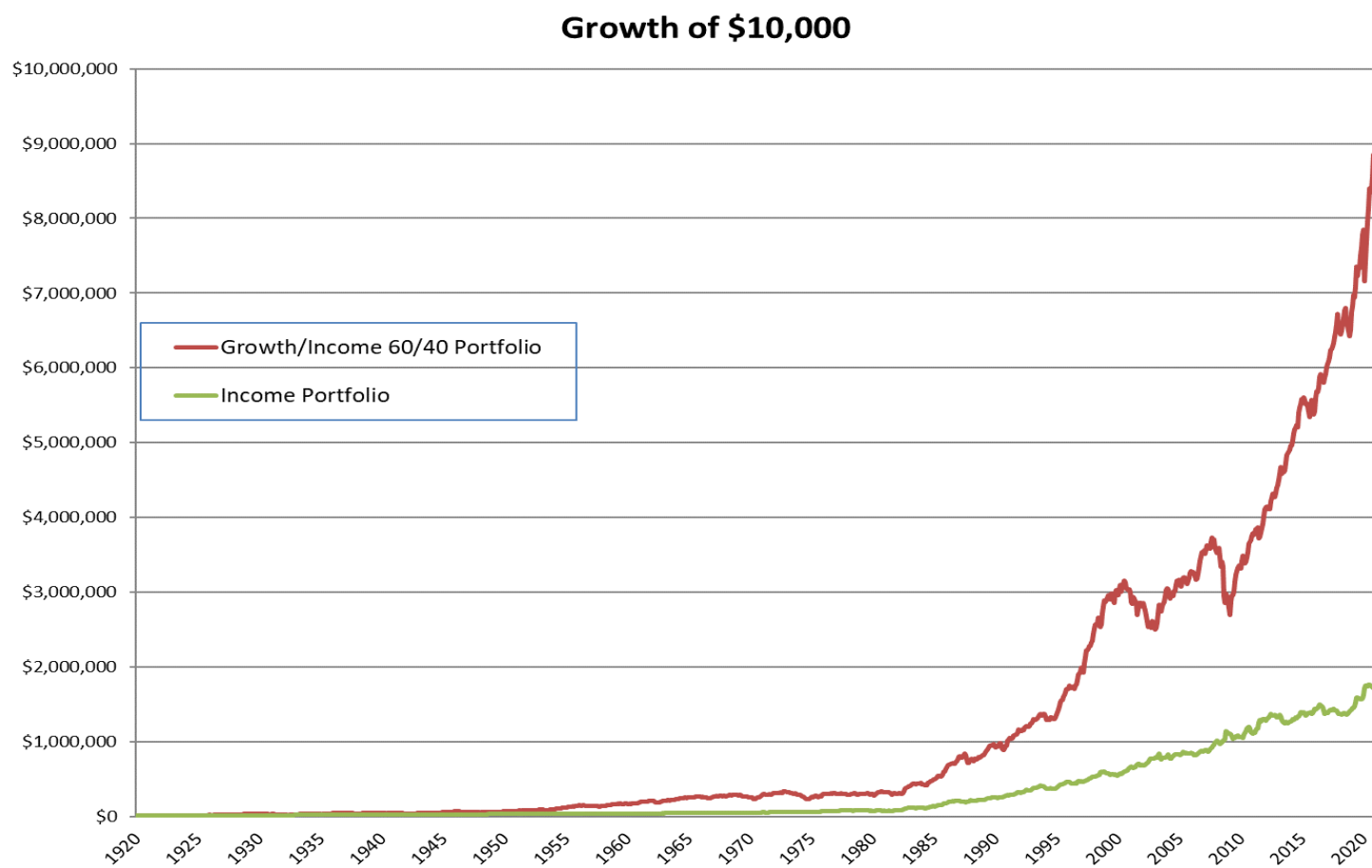
YEAR	TOTAL RETURN PORTFOLIO 4% SPENDING RATE			TOTAL RETURN PORTFOLIO 5% SPENDING RATE			INCOME PORTFOLIO	
	Total Return Portfolio (4% Spending) - Market Value	Total Return Portfolio (4% Spending) - Annual Income Distribution		Total Return Portfolio (5% Spending) - Market Value	Total Return Portfolio (5% Spending) - Annual Income Distribution		Income Portfolio (Yield) - Market Value	Income Portfolio (Yield) - Annual Income Distribution
0	500,000			500,000			500,000	
2003	614,605	20,000		609,605	25,000		556,169	24,739
2004	675,867	24,584		664,273	30,480		576,390	26,932
2005	716,162	27,035		697,234	33,214		572,530	31,606
2006	797,101	28,646		769,061	34,862		598,691	30,934
2007	827,159	31,884		790,371	38,453		601,267	34,224
2008	573,815	33,086		540,391	39,519		469,632	50,278
2009	675,167	22,953		630,435	27,020		550,689	23,656
2010	741,259	27,007		685,844	31,522		589,207	24,038
2011	710,537	29,650		650,560	34,292		601,284	24,981
2012	770,147	28,421		698,633	32,528		643,033	20,908
2013	888,870	30,806		799,346	34,932		677,454	22,870
2014	897,706	35,555		799,298	39,967		699,747	25,228
2015	859,733	35,908		757,494	39,965		671,935	31,378
TOTAL		375,536			441,752			371,771

Total Return and Income Portfolio Expectations

Annual Income Distribution and Ending Market Value



Note: The Total Return Portfolio consists of 60% Stocks/40% Bonds and the Income Portfolio consists of 20% Stocks/80% Bonds. Rate of returns (capital appreciation and income) used for illustration purposes are held constant each year with portfolios rebalanced annually. All illustrations and assumptions provided by Trust Advisors, Inc., a subsidiary of SCI, and LCG, a registered investment advisor.



Perpetual or endowment care involves the continued preservation, improvement, embellishment and maintenance in a proper manner markers, lots, compartments, crypts or other space in a cemetery, columbarium or mausoleum.

How to Put Aside Enough Now To Cover Cemetery Costs Later

by Hayden Burrus

Editor's note: This is the first in a three-part series about how to set up and maintain a perpetual care or endowed care fund for a cemetery.

Perpetual care funds were originally established by some forward-thinking cemeteries. They were later mandated by virtually all state governments, with certain cemeteries, such as those run by religious or fraternal organizations, exempted. They are also referred to as endowment care funds, but for the purposes of this article we will use the term "perpetual care fund."



Hayden Burrus

The funds were created and are designed to ensure that enough money will be set aside from today's cemetery revenue to pay for the care of cemeteries in the future. To achieve that goal, a forward-thinking cemetery must do much more than simply set aside the state-mandated amount of money—or more than that amount. The money in the fund must be properly invested.

These funds must cover three very different types of expenses:

- **Continual, standard cemetery maintenance.** These expenses include mowing the cemetery grounds, regular custodial care, landscape and grounds maintenance and any other expenses that occur regularly, on a monthly, quarterly or annual basis. They are the easiest to work with and project. Although these periodic expenses may not currently be that high, the effect of costs rising slowly but indefinitely can be very significant. This is illustrated in Table 1.

- **Periodic "one-time" expenses.** These expenses include all maintenance and

TABLE 1: ANNUAL EXPENSE \$1,000

In a moderate inflationary environment of 5% per year, even a small annual expense of \$1,000 will cost a cemetery almost \$3 million during this century.

YEAR	4% ANNUAL INFLATION		5% ANNUAL INFLATION	
	ANNUAL EXPENSE	CUMULATIVE EXPENSE	ANNUAL EXPENSE	CUMULATIVE EXPENSE
2000	\$ 1,000	\$ 1,000	\$ 1,000	\$ 1,000
2010	\$ 1,480	\$ 12,486	\$ 1,629	\$ 13,207
2020	\$ 2,191	\$ 30,969	\$ 2,653	\$ 34,719
2050	\$ 7,107	\$ 158,774	\$ 11,467	\$ 219,815
2100	\$ 50,505	\$ 1,287,129	\$ 131,501	\$ 2,740,526

improvement expenses occurring on an infrequent and sometimes irregular basis. Examples include road repaving, major landscaping work and new roofing for cemetery buildings. Even when cemetery grounds are currently well maintained, the infrastructure gradually decays and requires major restoration efforts or replacement. Consider that if restoration work on cemetery structures must occur once every 20 years, the work must be done five times during the next century. At a cost (in today's dollars) of \$25,000 to \$50,000, the total cost for this work could be as high as \$10.7 million after considering inflation. (With an inflation rate of 5 percent, a \$50,000 restoration expense occurring every 20 years will cost \$133,000 in 2020, \$352,000 in 2040, \$934,000 in 2060, \$2,478,000 in 2080 and \$6,575,000 in 2100.)

- **Unplanned, unexpected costs.** In addition to the expected expenses mentioned above, over the course of time, unexpected and sometimes catastrophic costs may be caused by fire, explosion, flood, earthquake, tornado, vandalism, etc. The trust fund must have the ability to pay for the repairs associ-

ated with these events unless the cemetery has insurance to cover all of these eventualities. The size of the policy deductible should rise as the value of the trust fund rises.

Regulations

As a part of my work with cemetery perpetual care funds, I have had the opportunity to speak with more than 40 regulators and legislators in jurisdictions across the United States and Canada. The laws in these jurisdictions have the same general structure, but the regulators' attitudes toward cemetery regulation vary widely.

Perpetual care fund regulations universally require a fixed percentage of sales to be contributed into the care fund. In most cases, this percentage varies between 10 percent and 20 percent. Some jurisdictions have different contribution rates for different categories of cemetery space. In addition, some jurisdictions require cemeteries to collect a fixed fee from each purchaser of cemetery property.

Funding of this type has many benefits, from an actuarial and financial viewpoint.

TABLE 2: INITIAL VALUE \$100,000

An investment income maximization strategy can be catastrophic.

YEAR	VALUE OF TRUST FUND EMPHASIZING INVESTMENT INCOME	VALUE OF TRUST FUND EMPHASIZING TOTAL RETURN	LOST VALUE IF TOTAL RETURN IS NOT EMPHASIZED
2000	\$ 100,000	\$ 100,000	\$ 0
2010	\$ 183,354	\$ 275,115	\$ 91,761
2020	\$ 336,185	\$ 756,882	\$ 420,697
2050	\$ 2,072,273	\$ 15,760,533	\$ 13,688,261
2100	\$ 42,943,147	\$ 2,483,944,148	\$ 2,441,001,000

First and foremost, it leads to the sharing of perpetual care expenses among all cemetery plot owners. It also results in social equity, since people purchasing more desirable (and costly) cemetery property contribute more toward the perpetual care of the cemetery as a whole. A further benefit of the percentage of sales contribution plans is that they are inflation sensitive—no adjustments need to be made to the legislation to account for the effect of inflation on the cost of perpetual care. As the expenses related to perpetual care rise, so will the cost of cemetery plots and the contributions to the perpetual care trust fund.

Some states do not require any funding of individual cemetery perpetual care funds by people who bought cemetery plots before the cemetery established a perpetual care fund (i.e. their exclusion from cemetery perpetual care fund legislation was grandfathered in). This addendum to perpetual care legislation is inherently unfair. It shifts the burden of funding the perpetual care of the entire cemetery onto future purchasers of cemetery property. This burden is especially great for property purchasers in cemeteries that are close to full capacity.

The specifics of legislation pertaining to contributions into perpetual care funds in most jurisdictions are based on political compromise and legislative fiat rather than sound actuarial and financial theory.

Investment practices for cemetery perpetual care funds are not usually specifically stated. Instead, they are governed by a doctrine known as the “prudent investor rule.” This rule normally contains language similar to the following:

“In acquiring, investing, reinvesting, exchanging, retaining, selling and managing property for the benefit of another, a fiducia-

ry shall exercise the judgment and care under the circumstances then prevailing which persons of prudence, discretion and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds considering the probable income as well as the probable safety of their capital. Within the limitation of the foregoing standard, a fiduciary is authorized to require and obtain every kind of property”

In essence, this rule allows complete flexibility for the perpetual care fund investment officer to adjust investment practices as the condition of the fund and the financial climate change. It acknowledges that there are a variety of reasonable and intelligent investment strategies and allows investment strategies to change over time. It is sound legislation.

In contrast to the wide latitude the prudent investor rule provides, regulations governing withdrawals from perpetual care funds are very stringent and narrow. I have found no jurisdictions that permit any withdrawals of principal from perpetual care trust funds. The logic behind this is that contributions into perpetual care trust funds are intended to support cemetery maintenance indefinitely, therefore initial contributions should remain indefinitely. In most cases, this rule is sound and instrumental in ensuring the long-term solvency of perpetual care funds.

Most jurisdictions distinguish trust fund income between investment income (arising from interest and dividends on securities) and capital gains (arising from the increase in value of stocks, bonds and other assets). Withdrawal of capital gains is often prohibited by legislation, while withdrawal of at least part of the investment income is permitted. The investment vehicles generating the largest portion of their income through

■ In contrast to the wide latitude the prudent investor rule provides, regulations governing withdrawals from perpetual care funds are very stringent and narrow.

investment income are bonds and cash investments. The investment vehicles generating the largest portion of their income through capital gains are common stocks.

This distinction is arbitrary, unnecessary and harmful to the long-term solvency of perpetual care trust funds. All appreciation (or depreciation) in the value of a trust fund affects the trust fund equally, regardless of whether it comes from investment income or capital gains. This legislation, in effect, forces trust fund managers to ignore capital gains and adjust their portfolios to ensure that the investment income from the funds will be high enough to allow for the withdrawals the cemetery must make.

The time horizon for cemetery trust funds is very long. Vanguard Investment Group, the largest mutual fund provider in the world, advises in its brochure “Creating the Right Investment Mix”: “The longer your investment time frame, the more you can ignore short-term risks and focus on long-term results. In other words, the further you are from your investment goal, the more it’s worth taking risks with stocks.” To further support that point, let me point out two additional items about the long-term performance of the Standard & Poor’s (S&P) 500 common stocks:

- Between 1926 and 2000, there has been no 20-year historical period—not even during the Great Depression of the 1930s—when the bond market has outperformed the S&P 500.

- Between 1926 and 2000, there has been no 20-year historical period where the S&P 500 has not appreciated in value faster than inflation.

Ignoring the long-term potential for common stocks can be catastrophic. Consider two trust funds valued today at \$100,000. One is focused on maximizing investment income; it has invested 90 percent of its portfolio in the bond market and 10 percent in common stocks. The other is focused on maximizing its total return without regard to the mix between investment income and capital gains; it has invested 90 percent of its portfolio in

common stocks, and 10 percent of its portfolio in the bond market. Table 2 shows the future values of each of these portfolios.

Table 2 illustrates that an investment income maximization strategy can be catastrophic. Even after a medium time horizon of 20 years, the investment income maximization strategy will cost the sample trust fund in this example over \$400,000 in lost investment return—more than four times the value of the original investment. Over the 50- and 100-year time horizon, the loss is in the millions.

Coming next issue: The mismatch of perpetual care costs, cemetery revenues and perpetual care fund revenues.

Hayden Burrus is the principal actuary of HB Actuarial Services in Delray Beach, Florida. He is an associate of the Casualty Actuarial Society (ACAS) and a Member of the American Academy of Actuaries (MAAA). HB Actuarial Services specializes in stochastic simulations of financial results, forecasting of uncertain cash flows and non-traditional forecasting methodologies, as well as standard property and casualty pricing and reserving issues. He can be reached at (561) 279-2323, or through e-mail at burrus@Hbactuarial.com.

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January 15, 2021

Chair Kelley
Vice Chair Feldman
Senate Finance Committee
Miller Senate Office Building, 3 East
Annapolis, Maryland 21401

Chair Pendergrass
Vice Chair Peña-Melynk
Health and Government Operations Committee
House Office Building, Room 241
Annapolis, Maryland 21401

RE: RE: SB192 | HB5 - Cemeteries - Perpetual Care - Distribution From Perpetual Care Trust Fund

Dear Chair Kelley, Chair Pendergrass, Vice Chair Feldman, Vice Chair Peña-Melynk, Members of the Senate Finance Committee, and members of the House Health and Government Operations Committee:

This correspondence is to provide further context regarding the total return distribution method that the Maryland legislation is considering adopting. Regions Bank is a leading provider of trustee and fiduciary services in the death care industry with over \$4.5 billion in death care trusts. We currently are trustee for approximately 3,000 unique trusts located in 36 states.

Over the past few years, several states have enacted total return distribution legislation and subsequently, an increasing number of Regions' clients have elected to implement the total return distribution method. In our view, this trend is due to the consistency the total return distribution method provides cemetery owners with respect to funds they are dependent on to adequately maintain their properties while simultaneously protecting and increasing the corpus of the trust over the long-term investment horizon of a perpetual care trust.

Our experience indicates that cemetery owners are finding it increasingly challenging to properly maintain their properties given the particularly low interest rate environment the US has been experiencing over the course of more than a decade (see enclosed publication, *Why Low Interest Rates are Hurting Cemetery Owners*). Accordingly, a total return distribution can offer cemetery owners stability in the form of consistent distributions calculated on a fixed percentage of the perpetual care fund's overall value while keeping pace with the increasing costs of maintaining a cemetery.

I hope the enclosed information is of benefit as you consider adopting the total return distribution method. Should you have any questions, please feel free to contact me.

Sincerely,

David Falconer
Senior Vice President, Funeral and Cemetery Trust Manager

Regions Bank – Funeral and Cemetery Division
3773 Richmond Ave. Ste #1100 | Houston, TX 77046
David.Falconer@Regions.com | 713.244.8083



Why Low Interest Rates Are Hurting Cemetery Owners

Cemetery trusts have been dependable sources of maintenance income for cemetery owners, but an extended period of low interest rates has put the squeeze on returns.

A decade of historically low interest rates has been a boon to borrowers but disastrous for many owners of the nation's 50,000 active cemeteries. They depend upon investment income from endowment care trusts to pay for care and maintenance, since most states prohibit cemeteries from invading the principal of an endowment care trust.

But interest rates have fallen over the last quarter century, resulting in lower returns for interest-generating investments held in cemetery trusts. Meanwhile, as income has plummeted, maintenance costs have increased, leaving cemetery owners scrambling to stay afloat.

"There may be millions of dollars in an endowment, but the cemetery owners are left with only this thin little income stream trickling out because so much of what's in the fund is either original investment or capital gains," says **Robert M. Fells, Executive Director of the International Cemetery, Cremation and Funeral Association**, based in Sterling, Virginia.

In response, cemeteries are searching for alternatives to the traditional fixed-income investment portfolio strategies that have supported the care and maintenance of their property.

Two primary strategies are gaining momentum: The first, a total-return approach, allows cemetery owners to spend a fixed percentage of their endowments' overall value each year, rather than being restricted to investment income. The second strategy, a reconsideration of capital gains, involves counting the sale of equity investments, including stocks, as income rather than as additional funds to an endowment's principal.

Both philosophies promise to ease the cash crunch for cemetery owners. But there's a catch: Both approaches require favorable state laws. Since 2009, Tennessee, Iowa, Missouri, Oklahoma and Florida have modified their statutes so cemeteries can adopt the total-return approach, and more states are likely to follow. And the capital-gains-as-income approach is also permitted in only a handful of states.

(Since the creation of this article, six additional states have adopted Total Return legislations: Arizona, Colorado, Georgia, Nevada, Texas, and Virginia.)

The relaxation of state statutes is definitely a trend. "But it's still just the beginning of a trend," says **David Falconer, Funeral and Cemetery Trust Manager at Regions**.

The shifting regulatory environment creates opportunities, but it also creates complexities that many cemetery owners may not be equipped to handle.

“It can be very challenging for a cemetery owner to keep up with what’s going on right now on a state-by-state basis and see all the trends,” he says.

New Challenges for a Traditional Strategy

Traditionally, investments such as bonds and CDs had three things working in their favor: They were secure, paid a predictable income, and provided accessible income to cemeteries. As a result, portfolios heavily weighted toward fixed-income investments became a default strategy for cemeteries. Though falling interest rates put a squeeze on cemetery owners, the system worked well until the Great Recession.

Following the housing crisis of 2008, interest rates plummeted to historic lows and have remained there for nearly a decade. Coupons on 10-year Treasury bonds were higher than 4 percent before the recession; they currently sit at about 2.5 percent and have dipped below 2 percent during the 2010s. As a result, fixed-income investments haven’t produced as much income as they once did. As the lean years have compounded, cemeteries have felt the pinch.

A Reconsidered Approach

Although interest rates are rising, it’s probably not quickly enough to ease the burden on cemeteries, Falconer says.

“Incremental near-term rate increases won’t be enough to really move the needle,” Falconer says. “Cemetery owners are still stuck in the same spot, and with maintenance costs going up, they’re looking for a way to manage this pool of money in a different fashion.”

Falconer suggests consulting a financial advisor to assess the regulatory environment in your state, including statutory changes that may be on the horizon. In states that allow either total return or the capital-gains-as-income consideration, you may be able to make fundamental changes to how you manage your finances.

Depending on the state environment, your income could be exponentially more than today. “It frees up operating funds so that you can focus on marketing, recruiting, hiring, and growing the businesses,” he says.

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Senator West - SB 192 Cemeteries Perpetual Care

Uploaded by: West, Christopher

Position: FAV

CHRIS WEST
Legislative District 42
Baltimore County

Judicial Proceedings Committee

Vice Chair, Baltimore County
Senate Delegation



THE SENATE OF MARYLAND
ANNAPOLIS, MARYLAND 21401

Annapolis Office
James Senate Office Building
11 Bladen Street, Room 303
Annapolis, Maryland 21401
410-841-3648 • 301-858-3648
800-492-7122 Ext. 3648
Chris.West@senate.state.md.us

District Office
1134 York Road, Suite 200
Lutherville -Timonium, MD 21093
410-823-7087

January 21, 2021

Senate Finance Committee
The Honorable Delores G. Kelley
3 East Miller Senate Building
Annapolis, Maryland 21401-1991

RE: SB 192 – Cemeteries – Perpetual Care – Distribution from Perpetual Care Trust Fund

Dear Chairman Kelley and Members of the Committee:

This bill will make an important change to existing law so our regulated cemeteries in Maryland can continue to be properly maintained in the future.

Maryland law does not currently regulate cemeteries owned and operated by churches or synagogues or other non-profit organizations, and this bill does not apply to them. But there are 89 cemeteries in Maryland that are operated by cemetery companies and that are subject to State regulation. These regulated cemeteries are each required to deposit 10% of the selling price of each cemetery lot into a perpetual care trust fund, and it is from such trust funds that the money is derived to maintain the cemeteries. It is very important that these funds are sufficient because if they are not, these cemeteries will lack essential maintenance and will fall into disrepair.

Currently, Maryland law provides that the “income” from a perpetual care trust fund shall be used for the perpetual care of the cemetery. For reasons that I will explain, this “income” standard is old-fashioned and inadequate.

The “income” standard provides that the principal of a trust fund cannot be touched and that the beneficiaries of the trust fund can only withdraw the “income” of the fund. But the “income” standard leads to two ways of administering a trust fund that inevitably will seriously impair the long-term viability of the fund. First, in order to maximize “income”, the trust fund trustee will tend to invest in securities that generate the most income. These securities tend to be fixed income securities such as bonds, which pay higher income each year than most stocks. But the higher income comes at a price. If you invest \$20,000 in a 20 year bond today, at the end of the 20th year, you only receive your \$20,000 back; the money hasn’t grown. And if you then re-invest the \$20,000 in another 20 year bond, at the end of that 20th year, you again only receive your \$20,000 back. In a world in which inflation causes the cost of living to rise each year, you

can see how a system that induces the trustees of perpetual care trust funds to invest the fund principal in fixed income securities will over time strap cemetery owners of the money that they require to properly maintain the cemeteries. And then comes the second problem. As the income produced by a trust fund's investment in fixed income securities becomes inadequate to pay for a cemetery's maintenance, the fund trustee will be tempted to invest in more risky investments with higher payoffs. This policy might work for a time, but more risky investments are by definition *more risky*, and at some point, it is likely that the principal of the trust fund will be impaired or lost altogether.

Recognizing the deficiencies of using the "income" standard, many years ago, the nation's leading foundations and its university endowments, hospital endowments and other endowments shifted to a different standard of investing known as the "total return" standard. This standard is not in the least bit exotic or unusual. I am a member of an Episcopal church in downtown Baltimore. Our church endowment is invested pursuant to the "total return" standard. I am also on the board of a charitable foundation that annually donates about \$700,000 to Baltimore City non-profits which benefit underprivileged children. Our endowment is invested pursuant to the "total return" standard. And finally, when my parents passed away and left their money in trust for my brother and me, we used the provisions of Maryland's existing estates and trusts law to invest the money of my parents' trust pursuant to the "total return" standard.

SB 192 will allow a regulated Maryland cemetery to either select the "income" or the "total return" method of distributing money from the cemetery's perpetual care trust fund. If the cemetery were to choose the "total return" method, the trustee would compute the end-of-year fair market value of the trust fund principal for each of the past three years, take the average and then distribute to the cemetery up to 4% of that average periodically during the following year to be used for cemetery maintenance. It is critical to note here that SB 192 explicitly provides that such a distribution may **only** be used for cemetery maintenance, repair and administrative purposes. Not a single dime of such distributions will find its way into the pockets of the cemetery's owners.

The advantage of the "total return" method is that it will encourage the fund trustees to invest fund assets in a balanced way in some securities that will pay current income but also in securities expected to pay little current income but rather to appreciate in value over the years. It is that appreciation in the value of the fund principal that will enable cemeteries over time to be able to cope with inflationary pressures and have enough money available to continue to pay for the proper maintenance of the cemetery as the decades pass. SB 192 further provides that all realized capital gains of a perpetual care trust fund "shall be deposited in the perpetual care trust fund as principal of the perpetual care trust fund." Once again, therefore, SB 192 makes it clear that the owner of the cemetery will not profit from the investment of some of the fund's assets in growth stocks.

I have attached to this testimony several documents showing the dramatic growth of the U. S. stock market over the past 100 years. In particular, there are two charts that show that, with only brief interruptions, the stock market has steadily risen. In a broadly diversified portfolio, the past hundred years of stock market results suggests that the value of the portfolio will grow as the years pass.

SB 192 places serious additional restrictions on cemeteries that choose to adopt the “total return” method. In such cases, the fund’s trustee must adopt an investment policy that supports the growth of the fund. Secondly, if the market value of the fund’s principal in any year is under 80% of the three year rolling average, the distribution will revert to the “income” method for that year. Thirdly, the fund must provide to the Office of Cemetery Oversight financial information for the past 5-7 years, and if the Director should conclude that the performance of the fund during the period in which the “total return” method applied has not resulted in sufficient protection of the fund’s principal, the Director may limit or prohibit a distribution. In these ways, SB 192 bends over backwards to protect the principal of perpetual care trust funds while permitting fund trustees, in the exercise of their fiduciary duties, to invest the fund’s assets so that they will grow over time.

I hope that the Finance Committee will carefully consider SB 192 and stand ready to answer any questions once my other witnesses have had a chance to make their presentations.

FCAME testimony on SB192 21Jan2021.pdf

Uploaded by: Ditzler, Brian

Position: UNF



Funeral Consumers Alliance of Maryland and Environs

Protecting a consumer's right to a meaningful, dignified, and affordable funeral.

Senate Finance Committee of the Maryland General Assembly

Testimony on: SB 192 "Cemeteries – Perpetual Care – Distribution From Perpetual Care Trust Fund"

Position: Oppose

Hearing Date: January 21, 2021

The Funeral Consumers Alliance of Maryland and Environs strongly opposes SB 192. It would remove protections of cemetery perpetual care trust funds in current law and expose cemeteries to greater risk of depleting their perpetual care trust fund's assets.

The cemetery business is different from others. It receives money from consumers often many years, if not decades, before the products and services paid for in advance will need to be provided for the purchaser. At least 10% of the price of each right to interment in a burial plot goes into the principal of a cemetery's perpetual care trust fund. Currently, a cemetery can only take an annual distribution of interest and dividends of the trust fund to be used for current and future repair and maintenance of cemetery grounds and buildings; the principal of the fund cannot be touched. Any capital gains earned from investments of the principal must remain so the principal can continue to grow over time and keep pace with inflation.

This bill would eliminate the requirement that realized capital gains be retained in the trust fund. Not only that, it would require that any taxes or fees on those gains be paid out of the principal of the trust fund. Even more problematic is that the bill would allow a cemetery owner to take annual distributions of up to 4% of the fair market value of the fund averaged over the preceding 3 years. During periods of high financial asset valuation, this could result in drawdown of principal to the point that when financial assets decline again in value, the trust fund would be severely depleted.

Currently there is around \$90 million total in the perpetual care trust funds of the 85 licensed cemeteries in the state. SB 192 says the Director of the Office of Cemetery Oversight (OCO) may limit or prohibit a cemetery's proposed distribution based on a review of the prior 5 to 7 years of performance of a perpetual care trust fund. However, OCO lacks the requisite staff and expertise to make the substantive financial analysis necessary to determine the health of up to 85 cemeteries' perpetual care trust funds. Such analysis is needed to determine whether further distributions from a cemetery's perpetual care trust fund's principal should be allowed.

Maryland law clearly states that a cemetery perpetual care trust fund "shall be a single purpose trust fund", and "shall be retained intact to provide for the future maintenance of the cemetery" so it doesn't become neglected or abandoned, and a burden on taxpayers. Why is SCI seeking to allow the principal in cemetery perpetual care trust funds to be invaded? They tell us it's to enable the trust fund's income to be increased. There's another reason why they want Maryland's cemetery law weakened that they don't talk about. If this bill is passed, the company's profits would increase. Despite \$3.4 billion in annual revenue from their 1900 funeral homes and cemeteries in the U.S. and Canada, SCI still feels the need to raid the perpetual care trust funds at the cemeteries they own.

In summary, let me quote the last line of the Fiscal and Policy Note on SB 192. "The bill exposes these businesses to additional risks of depleting assets in their perpetual care trust funds." We totally agree with that assessment and urge an unfavorable report on this bill.

Brian Ditzler, FCAME Vice President, bditzler@gmail.com

Funeral Consumers Alliance of Maryland & Environs

<http://www.funerals.org>

info@mdfunerals.org

P.O. Box 34177, Bethesda, MD 20827

SB 192 Opposition Letter 2021.pdf

Uploaded by: Straughn, Karen

Position: UNF

BRIAN E. FROSH
Attorney General

ELIZABETH F. HARRIS
Chief Deputy Attorney General

CAROLYN QUATTROCKI
Deputy Attorney General



WILLIAM D. GRUHN
Chief
Consumer Protection Division

STATE OF MARYLAND
OFFICE OF THE ATTORNEY GENERAL
CONSUMER PROTECTION DIVISION

Writer's Fax No.

Writer's Direct Dial No.

410-576-7942
kstraughn@oag.state.md.us
Fax: 410-576-7040

January 21, 2021

To: The Honorable Delores G. Kelley
Chair, Finance Committee

From: Karen S. Straughn
Consumer Protection Division

Re: Senate Bill 192 – Cemeteries – Perpetual Care – Distribution from Perpetual Care Trust
Fund (OPPOSE)

The Consumer Protection Division of the Office of the Attorney General submits the following written testimony in opposition to Senate Bill 192 submitted by Senator Chris West. This bill allows a cemetery to use funds from the principal, as well as the interest, of a perpetual care trust fund, to administer, supervise and embellish the cemetery, as well as to maintain the cemetery grounds, roads, and paths and repair and renew the buildings, including columbaria and mausoleums and the property of the cemetery. The Division is aware of recent situations in which cemeteries have been left with inadequate funding to properly maintain and operate the cemetery and is concerned that Senate Bill 192 will only serve to exacerbate the situation by allowing the principal of the trust fund to be diminished.

The main purpose of a perpetual care trust fund is to provide a funding source for long-term maintenance of the cemetery. By permitting a cemetery to use the interest from the trust fund, there is a steady stream of funds to provide such maintenance. However, current law does not permit incursions into the corpus of the perpetual trust fund. The goal is to match the perpetual care income stream with the cost of cemetery maintenance in perpetuity. By permitting a cemetery to use the corpus of the trust fund, there will be no assurances that there will be sufficient funds to maintain the cemetery in perpetuity and nothing to prevent a cemetery from having inadequate funds in the future. Even though cemeteries are required to submit accounting reports to the Office of Cemetery Oversight, the Division is concerned that the Office may not have adequate resources or expertise to recognize when a cemetery is facing financial stress.

For these reasons, we ask that the Finance Committee return an unfavorable report on this bill.

cc: The Honorable Chris West
Members, Finance Committee

Zinner testimony - SB 192 2021 Senate Finance Comm

Uploaded by: Zinner, David

Position: UNF

Senate Finance Committee of the Maryland General Assembly

Testimony on: SB 192 "Cemeteries – Perpetual Care – Distribution From Perpetual Care Trust Fund"

Position: Oppose

Hearing Date: January 21, 2021

I am David Zinner, a consumer representative on the Advisory Council on Cemetery Operations. My testimony is not offered in any official capacity or as a representative of the Advisory Council or the Office of Cemetery Oversight.

When a consumer buys a plot in a Maryland regulated cemetery, a portion of that purchase price is put into a Perpetual Care Trust Fund. The fund exists to serve the **consumer** by maintaining the cemetery where the consumer's loved ones are buried.

Changes to the rules of how money is put into or taken out of the Trust Funds needs to be carefully and professionally evaluated. This evaluation **cannot** be done by an investment manager who is focused on picking stocks. It needs to be done by an actuary, who evaluates future income and expenses and lays out a road map that gives consumer's confidence and cemeteries a plan to insure future fund adequacy.

Cemeteries are unique business entities. They need to function in the present while making sure they will be able to operate long into the future. The proposed bill focuses solely on the present and ignores the future.

The Trust Fund is attached to the land, not the owners. It has to last for 100 years and more. Tinkering with the trust funds as proposed in the bill is the equivalent of throwing darts with a blindfold over your eyes. And the Maryland target is over 90 million dollars, the amount in the Perpetual Care Trust Funds in more than 80 different Maryland cemeteries.

The authors of these bills don't even bother to assert, much less prove, that this change will protect a fund that is NOT insured by the Federal or State government. All that protects the consumer and stands between the cemeteries and the Perpetual Care Fund is the statute that mandates how much money must be put into the fund and the current limits of what money – interest and dividends – can be withdrawn for maintenance expenses.

And last, but certainly not least, is the curious omission of the fiscal impact on the Office of Cemetery Oversight that was included in the same bill proposed last year. Did these costs just disappear? I believe additional office staff are needed to evaluate, administer and approve the changes outlined in the bill. It is the job of the OCO to oversee the proper use of these funds.

David Zinner – 8112 Sea Water Path – Columbia, MD 21045 410-733-3700