

Date of Hearing: May 11, 2020

ASSEMBLY COMMITTEE ON JUDICIARY

Mark Stone, Chair

AB 2332 (Katra) – As Amended May 4, 2020

**SUBJECT:** PRENEED FUNERAL ARRANGEMENTS: UNCLAIMED PROPERTY

**KEY ISSUE:** IF A PERSON’S FUNERAL COSTS HAVE BEEN PREPAID, BUT THE PERSON’S SURVIVORS ARE UNAWARE OF THE PREPAYMENT ARRANGEMENT, SHOULD THE MONEY PAID TO THE FUNERAL ESTABLISHMENT ESCHEAT TO THE STATE CONTROLLER SO THAT THE DECEDENT’S HEIRS MIGHT EVENTUALLY CLAIM IT?

**SYNOPSIS**

*This salutary bill provides some long-needed consumer protections for purchasers of preneed funeral arrangements: contracts under which a person pays money or delivers securities while they are still living, in order to cover the costs of their funeral services when they pass away. Under state law, these funds are held in trust (for which the trustee can collect an annual fee for administering) so long as the beneficiary is living; upon death, the funeral establishment provides the contracted-for services and can then claim the funds held in trust.*

*A problem arises, however, if a person passes away and their survivors are unaware of the preneed funeral arrangement. For example, the decedent may have made the arrangement many years earlier and neglected to tell their next of kin. The harm, in such a circumstance, is two-fold: the decedent does not receive the benefit of the prepaid funeral arrangement they entered into, and their survivors must bear the costs of whatever funeral arrangement the survivors are able to afford. Meanwhile, the trustee collects administration fees in perpetuity, since no one will ever come claim the prepaid funds.*

*What ought to occur is that the unclaimed preneed funeral funds escheat to the state under the Unclaimed Property Law, so that the decedent’s heirs might discover and claim the funds. In fact, preneed funeral funds, as a form of intangible property, are already subject to the UPL, just as are bank accounts, insurance policies, and so forth. The challenge is in determining that the beneficiary has passed away. Unlike, say, a bank account, which can be presumed to be eligible for escheatment if it is inactive for a period of time, there may be no need for ongoing contact or activity between the beneficiary of a prepaid funeral arrangement and a funeral establishment.*

*To solve this issue, this bill establishes a set of dormancy triggers under which unclaimed preneed funeral trust funds escheat to the state; it specifies how funds held in trust are to be allocated, including providing for a revocation fee to be collected by the funeral establishment prior to escheatment; it provides for escheatment of funds held in trust to secure arrangements with funeral establishments that close or lose their licenses; it absolves trustees and funeral establishments of liability for escheated funds; and it permits funeral establishments to claim escheated funds if it turns out that the arrangement was not abandoned and the decedent’s survivors show up to claim the benefits of the arrangement.*

*AB 2332 is sponsored by the California State Controller’s Office. There is no registered opposition to this bill.*

**SUMMARY:** Establishes procedures for when and how preneed funeral arrangements that are not claimed upon the beneficiary's death should escheat to the state under the Unclaimed Property Law (UPL). Specifically, **this bill**:

- 1) Requires, effective January 1, 2021, that funds maintained in a preneed funeral trust (or similar account or plan) escheat to the state under the provisions of the UPL, if, for more than three years after the funds become "payable and distributable," neither the trustor nor the beneficiary corresponds or otherwise indicates an interest in the trust property, as established by the records of the funeral establishment or trustee.
- 2) Deems preneed funeral trust funds to become payable and distributable under any of the following circumstances:
  - a) The beneficiary has attained, or would have attained if still living, 105 years of age;
  - b) 45 years have passed since execution of the contract establishing the preneed funeral arrangement;
  - c) The holder has received notification of the death or presumed death of the beneficiary and has not provided the contracted-for funeral goods and services; or
  - d) The preneed funeral trust is an installment trust, the amount due has not been paid in the three preceding years, and neither the trustor nor the beneficiary has communicated with the funeral establishment or the trustee about the trust during that time.
- 3) Deems the funeral establishment that is obligated to provide preneed funeral services under the trust agreement to be the "holder" for purposes of the UPL under (2) (a)-(c) above, and the trustee to be the "holder" under (2) (d), above.
- 4) Exempts from escheatment under the UPL funds received by a funeral establishment, cemetery, or other person for funeral plots.
- 5) Requires that every preneed funeral trust agreement mandate that the trustee, in addition to conveying the corpus of the trust, convey any income accrued in the trust—including interest, dividends, and capital gains—as follows:
  - a) To the funeral establishment, if the establishment provides funeral goods and services to the beneficiary under the preneed funeral arrangement;
  - b) To the trustor, if the trustor cancels the preneed funeral arrangement;
  - c) In accordance with the UPL under (1), above;
  - d) To the State Controller, if the preneed funeral arrangement is deemed abandoned; or
  - e) To the trustor, beneficiary, or their legal representative if the funeral establishment is dissolved, closed, or has its license revoked; but if these persons cannot be located, then to the state, through escheatment, in accordance with the UPL.
- 6) Permits the statutorily-permissible revocation fee that can be collected if a preneed funeral arrangement is canceled under (5)(b) above to also be collected if the arrangement is deemed abandoned under (5)(d).

- 7) Mandates that, if a funeral establishment is dissolved, closed, or has its license revoked, that the trustee must cause all funds in any corresponding preneed trust account to be returned to the beneficiary, trustor, or their legal representative within 30 days; however, if the trustee is unable to locate these persons, then the trustee must cause these funds to escheat to the state. In neither case may the trustee retain a revocation fee.
- 8) Provides that the escheatment of funds to the State Controller releases the funeral establishment from any obligation to provide goods or services under the original preneed funeral arrangement.
- 9) Safeguards the funeral establishment if it provides goods or services to the beneficiary of a preneed funeral arrangement post-escheatment by permitting the funeral establishment to recover escheated funds by submitting appropriate documentation to the State Controller.
- 10) Forbids a trustee or funeral establishment from charging a trust, trustor, or beneficiary any fees or costs associated with searches or verifications required to fulfill the requirements of this bill, but does permit the recoupment of these fees or costs from the annual trust administration fees currently permitted by law.
- 11) Clarifies that delivery of funds in a preneed funeral trust to the State Controller relieves the trustee and the funeral establishment of any further liability with respect to those funds.

#### **EXISTING LAW:**

- 1) Authorizes licensed funeral establishments to solicit and enter into preneed funeral arrangements—contracts under which a party pays upfront for funeral-related goods and services that are not immediately required—only if any money paid and securities delivered under the contract are held in trust until the contract's terms are fulfilled. (Business & Professions Code Section 7735.)
- 2) Defines the following terms:
  - a) "Trustor" means the person who pays money or delivers securities as consideration for preneed funeral arrangements.
  - b) "Beneficiary" means the person for whom funeral services are arranged.
  - c) "Corpus of the trust" means the money paid or securities delivered by the trustor. (Business & Professions Code Section 7736.)
- 3) Requires that a trustee be either a banking institution or trust company authorized by the state to act as trustee, or else a group of not less than three persons, only one of whom may be an employee of the funeral establishment. (*Ibid.*)
- 4) Permits the income from the trust to be used to pay a reasonable annual fee, as determined by the Cemetery and Funeral Bureau, for administering the trust. Any such fees paid cannot exceed the total amount of income posted to the trust in the preceding 12 months. (Business & Professions Code Section 7735.)
- 5) Sets the maximum annual fee at either a) four percent of the trust balance on December 31 in a year in which the corpus of the trust is not claimed, or b) four percent of all payments

deposited into the trust plus all accumulated income from prior years on the date the trust matures or is canceled. (California Code of Regulations, Title 16, Section 1265.)

- 6) Permits the income from the trust to be used to establish a reserve, not to exceed 10 percent of the value of the trust, that may be forfeited as a revocation fee if the beneficiary cancels the contract. (Business & Professions Code Section 7735.)
- 7) Provides for payment of taxes on the trust's income, and for the accumulation in the trust of any income remaining after fees, reserves, and taxes. (*Ibid.*)
- 8) Prohibits using the corpus of the trust to pay trust administration fees, taxes, or any commission. (*Ibid.*)
- 9) Requires that the trust agreement mandate that the trustee deliver the corpus of the trust to the funeral establishment upon receipt of the following: a) the signatures of a majority of the trustees, b) a certified copy of the death certificate or other satisfactory evidence of the beneficiary's death, and c) satisfactory evidence that the funeral establishment provided the contracted-for goods and services. (Business & Professions Code Section 7737.)
- 10) Requires that the trust agreement mandate that the trustee deliver the corpus of the trust, plus any accrued income and minus the revocation fee, to the trustor upon written demand, so long as the funeral establishment has not yet furnished the goods and services provided for under the preneed funeral arrangement. (*Ibid.*)
- 11) Exempts preneed funeral arrangements from the asset tests for aid to families with dependent children and for state supplemental income benefits; further authorizes such trusts to be made irrevocable if needed to qualify for these exemptions. (Business and Professions Code Section 7737; Welfare and Institutions Code Section 11158; Welfare and Institutions Code Section 12152.)
- 12) Establishes the Unclaimed Property Law. (Code of Civil Procedure Sections 1500-1582.)
- 13) Declares the Legislature's intention, in the UPL, that property owners be reunited with their property and adopts an expansive notification program that will provide all of the following:
  - a) Notification by the state to all owners of unclaimed property prior to escheatment;
  - b) A more expansive post-escheatment policy that takes action to identify the owners of unclaimed property; and
  - c) A waiting period of not less than seven years from delivery of property to the state prior to disposal of any unclaimed property deemed to have no commercial value. (Code of Civil Procedure Section 1501.5 (c).)
- 14) Establishes the baseline conditions for intangible personal property to escheat to the state from its holder, and provides specific requirements for when banking, financial, insurance, and other businesses or entities that hold another's property—whether in accounts, insurance policies, annuities, or safe deposit boxes, or other instruments—must transmit that property to the State Controller. Escheatment typically occurs if the owner fails to engage in any activity for a specified period of time (usually three years), and if the owner fails to respond to legally-required notices. (Code of Civil Procedure Sections 1510-1521.)

- 15) Requires the holder of escheated property to timely submit a verified report, containing specified information, to the State Controller on an approved form. (Code of Civil Procedure Section 1530.)
- 16) Permits a person who claims to be the owner of property delivered to the State Controller under the UPL to file a claim for the property or the net proceeds of any sale of the property. Requires the Controller to consider each claim within 180 days and to either return the property to the claimant, or provide a written explanation to the claimant if it denies the claim. Allows any person aggrieved by a decision of the Controller to bring an action, as specified. (Code of Civil Procedure Sections 1540-1541.)
- 17) Provides for the sale of escheated securities and retention of the proceeds by the Controller absent claim by those securities' owner. (Code of Civil Procedure Section 1563.)

**FISCAL EFFECT:** As currently in print this bill is keyed fiscal.

**COMMENTS:** This bill plugs a longstanding gap in California law. Money that is paid in advance and held in trust for a beneficiary's funeral arrangements is a form of intangible property. As such, if the beneficiary passes away, but the prepaid funds are not used for their funeral arrangements, the funds should escheat to the state under the Unclaimed Property Law. However, California law has lacked a definition of the appropriate triggers for when such funds are deemed payable and distributable, and therefore, eligible for escheatment as unclaimed property. By establishing these triggers, and necessary accompanying procedures, this bill would finally facilitate the escheatment of unclaimed preneed funeral funds to the State Controller's Office, so that the intended beneficiary's heirs might claim them.

***Background and justification for the bill.*** Current law permits preneed funeral arrangements: contracts under which a person prepays for the costs of funeral services and merchandise, such as a casket, embalming, burial, and so forth. Prepaid funds are held in trust until the beneficiary of the arrangement passes away; at this point, the principal of the trust, plus any interest and less any fees and taxes, is used to pay the costs of the funeral. Prepayment helps ensure that a person can have the funeral service they desire without causing undue financial burden for their survivors.

A problem arises, however, if the decedent's survivors do not know about the preneed funeral arrangement. For example, the decedent may have made the arrangement many years earlier and neglected to tell their next of kin, who are their only survivors. The harm, in such a circumstance, is two-fold: the decedent does not receive the benefit of the prepaid funeral arrangement they entered into, and their survivors must bear the costs of whatever funeral arrangement the survivors are able to afford. While, absent a time machine, it is unlikely any legislation can prevent the first harm, this bill would help ensure that the decedent's heirs might recover prepaid funds that would sit in trust forever, generating windfall management fees and interest income for the trustee.

According to the author:

Preneed funeral trust accounts are funds held in trust by funeral establishments for promised funeral merchandise and services to be provided after the beneficiary's death. Usually, the deceased's estate contacts the funeral establishment in order to fulfil the agreement for funeral services. However, in cases where the estate is not aware of the trust and does not

fulfill the services promised and paid for, the trust account can lie dormant indefinitely, despite the death or presumed death of the beneficiary. [...]

AB 2332 protects consumers and their surviving loved ones by providing a convenient way to locate and claim unused preneed trust fund that could be otherwise held indefinitely.

While we lack exact data on the number of unclaimed preneed funeral trust accounts, data from the Cemetery and Funeral Bureau shows that:

- As of December 31, 2018, there were 1,094 licensed funeral establishments regulated by the Bureau, and these funeral establishments reported holding \$593 million in preneed contract funds for consumers.
- As of December 31, 2018, the Bureau was aware of 126 funeral establishments that had gone out of business, yet their trustees reported holding and earning income from more than \$16 million in preneed contract trust funds established for this purpose.

With regards to the last point, among this bill's salutary features is the establishment of a new mandate that, upon the dissolution, closure, or license revocation of a funeral establishment, all funds in preneed trust accounts associated with that establishment be returned to the beneficiary, trustor, or their legal representative within 30 days; however, if the trustee is unable to locate these persons, then the trustee must cause the funds to escheat to the State Controller's Office.

***Background regarding the Unclaimed Property Law.*** The Unclaimed Property Law, enacted in 1958, establishes procedures for the escheatment of unclaimed personal property to the state. Once escheated to the state, the property is in state custody in perpetuity, until the owner (or their heirs) claims the property. Under the UPL, there are three significant parties: the owner, the holder, and the state. The "owner" is the person with the legal right to the property prior to escheatment. The "holder" is the person or entity who has possession of the property (such as a bank or other money depository), or a business that has issued a check to an individual or other business, or a company that holds the proceeds of a life insurance policy or annuity. Holders of unclaimed property have no ownership interest in the unclaimed property. (*Bank of America v. Cory* (1985) 164 Cal. App. 3d 66, 74.) A holder is simply a trustee of the property until it is reclaimed by its owner. However, while the property is in the custody of the holder, the holder generally has the right to use the funds or property as an asset. Once the property is turned over to the state, the state is entitled to keep any interest earned on the property.

The UPL has dual objectives: (1) to protect unknown owners by locating them and restoring their property to them; and (2) to give the state, rather than the holders of unclaimed property, the benefit of its retention, since experience shows that most abandoned property will never be claimed. (*State v. Pacific Far East Line, Inc.* (1962) 261 Cal. App. 2d 609, 611; *Douglas Aircraft Co. v. Cranston* (1962) 58 Cal. 2d 462, 463.) The state, through the Controller, acts as the protector of the rights of the true owner. (*Bank of America v. Cory*, supra, at 74.) A person with a legal right to escheated property may file a claim to recover the property from the state. (Code of Civil Procedure Sections 1540 to 1542.) The Controller maintains a website (<http://www.sco.ca.gov>) where members of the public may search a database to discover if the state holds any of their property, and may submit claims to recover the funds or property.

The UPL establishes the procedures which must be followed once property goes unclaimed, generally for a period of three years, and then—as a consequence—escheats to the state. Under

existing law, the holder must annually report on unclaimed property and turn the property over to the Controller. (Code of Civil Procedure Sections 1530 and 1532.) In turn, the Controller is required to mail a notice to each person who appears to be entitled to the unclaimed property, according to the report filed by a holder, as well as to publish a notice about the property in a newspaper of general circulation. (Code of Civil Procedure Sections 1531 and 1531.5.) Since at least 2001, however, the requirement to publish the notice in a newspaper of general circulation has been preempted by language in the SCO's budget, which authorizes the Controller to publish the notice in any manner determined by the SCO to be reasonable.

***Preneed funeral trust funds are already subject to the UPL.*** This bill does not make any new category of property subject to the UPL.

Preneed funeral payments held in trust are already subject to the UPL. Under California law, unless another statute provides for a contrary disposition, intangible personal property escheats to the state if the conditions under the UPL are met. The provision applicable to trusts reads:

All...intangible personal property maintained in a deposit or account, and the income or increment on such tangible or intangible property, held in a fiduciary capacity for the benefit of another person escheats to this state if for more than three years after it becomes payable or distributable, the owner has not [performed any of the defined actions concerning the property. (Code of Civil Procedure Section 1518 (a)(1).)

This bill is necessary because beneficiaries of preneed funeral trust arrangements sometimes pass away and their survivors do not take advantage of these arrangements because they are unaware of them. Until now, these preneed funeral trust accounts have lain unclaimed, rather than escheating under the UPL, because there have not been clear guidelines in law to determine when and how they ought to escheat. It is a relatively simple matter for a bank to determine whether there has been account activity on a checking account or a safe deposit box in the last three years. It is a much more difficult thing to know whether the beneficiary of a preneed funeral arrangement is not contacting you. It may be because they have died, or it may be because they are content with their arrangement and have better things to do with their time.

This bill fixes that problem by establishing the following dormancy criteria. Property held in trust under a preneed funeral agreement would be deemed "payable and distributable," under the UPL, if one of these conditions is met:

- 1) The beneficiary has attained, or would have attained if still living, 105 years of age;
- 2) 45 years have passed since execution of the contract establishing the preneed funeral arrangement;
- 3) The holder has received notification of the death or presumed death of the beneficiary and has not provided the contracted-for funeral goods and services; or
- 4) The preneed funeral trust is an installment trust, the amount due has not been paid in the three preceding years, and neither the trustor nor the beneficiary has communicated with the funeral establishment or the trustee about the trust during that time.

Three years after one of these dormancy criteria is satisfied, this bill would require that funds and property in the preneed funeral trust escheat to the state.

***Because preneed trust funds are subject to the UPL, this bill will apply to existing preneed funeral arrangements.*** If this bill were placing a new category of personal property under the ambit of the UPL, it would likely only apply prospectively: that is, to preneed funeral arrangements entered into on or after January 1, 2021, the first date on which this bill would be in effect if enacted.

But preneed funeral trusts, as a species of intangible personal property, are already subject to the UPL. This bill does not alter any existing contractual arrangements between trustors and the funeral establishments with whom they have contracted for preneed funeral arrangements. California first codified a comprehensive unclaimed property law in 1951; while it is not impossible that some unclaimed preneed funeral trust arrangements are older than this, it seems unlikely that there are very many. Any preneed funeral arrangements entered into after 1951 have always been subject to escheatment. This bill merely establishes the dormancy triggers and necessary accompanying procedures to effectuate the escheatment.

In other words, this bill does not impair, substantially or otherwise, any contractual obligation that governs existing preneed funeral arrangements entered into after 1951. These arrangements were already governed by the UPL when they were entered into. “[T]he laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms.” (*Von Hoffman v. City of Quincy* (1867) 71 U.S. 535, 550.) Accordingly, this bill appears to present no issue under the Contracts Clause, whether of the United States Constitution or the California Constitution.

***Liability after escheatment to the state.*** This bill provides important protections from liability for funeral establishments and trustees. So long as they follow the procedures outlined in this bill, these entities would be relieved of the liabilities for any unclaimed preneed funeral assets transferred to the state. Moreover, this bill contemplates the possibility that, post-escheatment, a newly-deceased beneficiary’s survivors might unexpectedly appear and seek to invoke the benefits of the preneed funeral arrangement. If this were to happen, the funeral establishment would have the option to provide the contracted-for goods and services and obtain reimbursement from the Controller.

***ARGUMENTS IN SUPPORT:*** The State Controller’s Office, the bill’s sponsor, writes:

This bill would...clarify the party responsible for reporting abandoned trust accounts, outline dormancy triggering events and establish requirements for contact with owners of trust accounts. AB 2332 will enhance consumer protections and create a clear mechanism for people to locate and claim unused preneed funeral trust accounts.

***Other Related Legislation:*** AB 1637 (Smith, Chap. 320, Stats. 2019) authorized the State Controller to transfer property reported to the state under the Unclaimed Property Law in the name of a local agency or state agency directly to that agency without the agency needing to file a claim, and provided that existing immunity from suit under the UPL also applies to the transfer of this property.



**REGISTERED SUPPORT / OPPOSITION:**

**Support**

California State Controller's Office (sponsor)

**Support if Amended**

Cemetery and Mortuary Association of California

**Opposition**

None on file

**Analysis Prepared by:** Jith Meganathan / JUD. / (916) 319-2334