



BY WENDY RUSSELL WIENER

MISMATCHED

LAWS

**HOW UNCLAIMED
PROPERTY LAWS
IMPACT FUNDS
IN YOUR PRENEED
TRUST.**

We all recognize the benefit of general laws dealing with unclaimed property, which facilitate reuniting people with property they've lost track of – entirely appropriate when the property is money in a bank account. But the operation of those laws on preneed trust funds is not entirely appropriate and can put trustees and licensees in an impossible position.

Let's start by looking at the only two ways to fund a preneed contract. The first option is for the consumer to pay the funeral home, which must then deposit some or all of the money into trust. The other option is for the consumer

to purchase a life insurance policy; the death benefit payable under that policy is assigned to the funeral home so that the firm will receive some or all of the money upon the death of the preneed contract beneficiary.

Only one of these funding mechanisms – insurance – is exempt from the reach of the unclaimed property laws in some states.

This is a good place to mention that the treatment of preneed contract funding mechanisms by the various states' unclaimed property laws is inconsistent. Some state laws don't treat the funding vehicles (trusts or insurance) at all, some address the abandonment of trust funds, some address the abandonment of insurance policies and some address the abandonment of both.

The imbalance in the treatment of the two funding vehicles is highlighted by the fact that some states have enacted a version of the National Council of Insurance Legislators Model Unclaimed Life Insurance Benefits Act, which expressly excludes from the definition of "policy" "any policy... used to fund a preneed funeral contract or prearrangement." Why would one funding mechanism be exempt and the other not be?

The way many state regulators seek to apply unclaimed property laws to preneed trust funds is as follows. Funds in trust are considered unclaimed when one of three circumstances occur: 1) the age of the contract is more than a certain number of years, 2) the age of the contract beneficiary exceeds a certain number of years, and 3) the beneficiary of the contract can be located in the Social Security Administration's Death Master File. Once deemed unclaimed, funds in the preneed trust must be sent to the treasury of the state in which the preneed contract was written.

Here's the problem with that. In the application of general unclaimed property laws to preneed trust funds in most states, the holder/trustee is *actually prohibited* from releasing the trust funds under any circumstance other than fulfillment, cancellation or default under the preneed contract. And most preneed trust agreements also limit the distribution of trust funds to those

same three circumstances – fulfillment, cancellation or default.

Thus, the trust funds are locked up by both law and contract, and they can only be accessed when one of the three conditions occur.

Few states include, within their preneed laws, direction to the funeral home or trustee on how to handle preneed trust funds that would be considered unclaimed. For those states that do, I say: "You got it right!"

For those that don't, I posit that including a reference to preneed trust funds in your general unclaimed property law falls short when the law fails to, more importantly, address the issue within the preneed trust law.

A preneed trustee should not be forced to violate the specific state laws limiting its disbursement of preneed trust funds without fear that it will, at a minimum, lose funeral home clients or, at a maximum, lose its authority to act as a trustee. Likewise, a funeral home should not be forced to instruct its trustee to distribute funds to a state as unclaimed property because the death-care laws do not give the funeral home the right to issue that instruction.

Though many general unclaimed property laws include a provision that indemnifies a holder of property when the holder turns the property over to the state, that indemnification will not protect a licensee or trustee that knowingly violates the law. Put another way, you and your trustee could face serious consequences if you release trust funds to the state based on the general unclaimed property law when your state preneed trust law doesn't also authorize it. Some of the consequences include losing your license or authority to act as a trustee, as well as facing civil and/or criminal penalties.

Philosophically, you may wonder: "Why would I want to keep money in trust for preneed contracts I will never fulfill?"

The answer is simple: Most state preneed laws just don't allow for you to do anything else. It's not that the funeral profession is greedy and wants to keep families separated from monies to which they may legally be entitled, but rather, state lawmakers did not foresee

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the need to address the abandonment of preneed trust funds until recently.

And now that action has been taken in some states, they've gone about it incorrectly – amending only the general unclaimed property laws while ignoring the specific preneed trust laws that expressly prohibit releasing preneed trust funds to the state.

By doing so, states have literally enacted laws that require illegal activity. Those laws leave deathcare professionals in an impossible position and should not be followed.

Finally, you may also be thinking back to the beginning of this article, where it was pointed out that insurance policies that fund preneed contracts are exempt from being deemed abandoned in some states.

You may wonder why there's a difference in treatment. Good for you! Perhaps the relevant insurance legislators recognized there is more than just one contract involved in a preneed transaction: the preneed contract *and* the insurance policy or trust agreement. That realization and treatment should be carried over to trust agreements as well.

If states seek to amend how to approach a preneed contract that won't be fulfilled, that direction should be given in the preneed law and nowhere else. The preneed law is the place in which both contracts – preneed and funding vehicle – can be addressed. References to preneed trust funds or insurance policies in the general unclaimed property laws in isolation are ineffective. ☹

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