

191—101.8(523I) Distribution of care fund amounts using a total return distribution method.

101.8(1) Purpose. This rule is authorized by Iowa Code section 523I.811(2) and is intended to encourage care fund investments in appreciating assets that will produce higher care fund income levels created by growth in the care fund principal.

101.8(2) Definition of “total return distribution method.” For purposes of this rule, a “total return distribution method” is a plan for distributing care fund amounts which takes into account both income (interest and dividends) earned by the care fund and capital appreciation (the change in the market value) of the care fund’s assets. A total return distribution method takes into account the estimated rate of return to ensure growth of the care fund over time.

101.8(3) Principal of care fund. The principal of a care fund required by Iowa Code section 523I.806 shall remain available as a funding source for care of the cemetery. A cemetery shall not reduce the principal of a care fund voluntarily, except for the distribution of income. Pursuant to Iowa Code section 523I.811(2), the commissioner, by this rule, establishes terms and conditions under which a care fund trustee or, in the event of multiple trustees, a majority of the trustees, may, in the trustee’s or trustees’ sole discretion and without approval of a court, adopt a total return distribution method for the distribution of care fund income, subject to the terms and conditions of this rule.

a. In maintaining accounts for the care fund, the trustee or trustees shall maintain separate accountings of principal and of income.

b. The care fund trust’s governing instrument must clearly manifest intent to use a total return distribution method. Conversion to an investment policy utilizing the total return distribution method shall not conflict with or affect any provision of the trust agreement, if any, regarding the distribution of principal. If the trust agreement indicates intent that net appreciation shall not be expended, the trust may not use the total return distribution method. The care fund trust’s governing instrument shall clearly indicate how the reserve account shall be established and administered.

c. Distributions permitted under the total return distribution method shall be paid from the following sources in the order listed:

- (1) Income; and
- (2) If permitted by paragraph 101.8(6)“a,” principal.

d. The distributions under the total return distribution method shall be used in any manner determined to be in the best interests of the cemetery if authorized by a resolution, bylaw, or other action or instrument establishing the care fund, including but not limited to the following: the general care of memorials; memorialization; cutting and trimming lawns, shrubs, and trees at reasonable intervals; maintaining drains, water lines, roads, buildings, fences, and other structures; maintaining machinery, tools, and equipment; compensating maintenance employees; paying insurance premiums; making payments to maintenance employees’ pension and benefit plans; paying expenses necessary to maintain ownership, transfer, and interment records of the cemetery; capital improvements; and paying overhead expenses incidental to such purposes.

e. The trustee or trustees shall, not less than annually, determine the fair market value of each asset of the care fund that consists primarily of real property or other property that is not traded on a regular basis in an active market, by appraisal or other reasonable method or estimate. That determination, if made reasonably and in good faith, shall be conclusive as to all persons interested in the care fund.

101.8(4) Trustee to exercise care and prudence. The trustee or trustees shall exercise ordinary business care and prudence regarding the investment of care fund amounts, by considering the following:

- a.* The Probate Code, Iowa Code chapter 633;
- b.* The Uniform Prudent Investor Act, Iowa Code sections 633A.4301 through 633A.4309;
- c.* Present and anticipated financial requirements of the cemetery, including but not limited to the following: the cemetery’s need to fund the current and long-term expenses of care and maintenance; expected total return from income and appreciation of principal; price level trends of equity and fixed income investments; needs for liquidity; regularity of income; preservation or appreciation of capital; general economic conditions; the possible effect of inflation or deflation; and the retention of income and net appreciation to adjust for inflation.

101.8(5) Adoption and implementation of a total return distribution method.

a. Prior to implementation of a total return distribution method, the trustee or trustees shall do all of the following:

(1) Adopt a written investment and distribution policy under which future distributions from the care fund will be total return distribution amounts rather than net income distribution amounts.

1. The investment goals and objectives shall be to achieve principal growth through equity investment; current income through income investments; and an appropriate balance between:

- Maintaining purchasing power through principal appreciation; and
- Generating current income to support the cemetery's current requirements for care and maintenance.

2. The trustee or trustees shall treat the net appreciation, realized and unrealized, in the fair value of the assets of a care fund as if it were net income of the care fund for purposes of determining the amount available for distributions, from time to time, from the care fund.

(2) Ninety days prior to implementation of the total return distribution method, file with the division a request for the division's approval of the proposed plan for use of the total return distribution method. The request shall include copies of the following:

1. The care fund governing instrument.
2. The written election adopting the total return distribution method.
3. The written investment and distribution policy required by paragraph 101.8(5) "a."
4. Evidence of the existence of any reserve fund required and information explaining how the amount of the reserve fund was calculated.
5. Other information requested by the division.

(3) Immediately before the implementation of the total distribution return method, determine the fair market value of the care fund's assets and maintain records of the fair market value and the evidence used to make that determination to comply with paragraph 101.8(8) "a."

b. The division may limit or prohibit adoption of a total return distribution method by a care fund for any of the following reasons:

- (1) The trustee or trustees and any investment manager are not able to demonstrate sufficient knowledge and expertise regarding effective implementation of the total return distribution method.
- (2) Trust assets cannot be adequately valued at market value.
- (3) Terms of the care fund governing instrument are inconsistent.

c. The division shall notify the trustee or trustees of its decision regarding approval of the implementation plan. If the division does not approve of the plan, the total return distribution method may not be implemented.

101.8(6) Amount of distribution payment.

a. Unless another amount is approved by the division upon a showing of good cause, the annual distribution amount shall not exceed the greater of:

- (1) The net ordinary income, or
- (2) Five percent of the fair market value of the care fund as of the last day of the care fund calendar year immediately preceding the distribution year.

b. When determining the distribution amounts, the trustee or trustees shall take into consideration the cemetery's need to fund both:

- (1) The current and future expenses of care; and
- (2) The maintenance and preservation of principal.

c. For the purpose of determining the amounts to be paid out annually, the following factors shall be taken into account:

- (1) The perpetual duration of the care fund;
- (2) Present and anticipated financial requirements;
- (3) Expected total return from income and appreciation of principal;
- (4) Price level trends of equity and fixed income investments;
- (5) Needs for liquidity;
- (6) Regularity of income;

- (7) Preservation or appreciation of capital;
- (8) General economic conditions;
- (9) The possible effect of inflation or deflation; and
- (10) The retention of income and net appreciation to adjust for inflation.

d. Any excess of income and capital appreciation over allowable cemetery expenses shall be retained in the care fund as undistributed income until needed to fund the cemetery's allowable expenses. This retained income shall be reserved for the purpose of future maintenance unless the division approves in writing of another purpose.

101.8(7) *Annual determination of fair market value of care fund.* The fair market value of the care fund shall be determined at least annually, using such valuation date or dates or averages of valuation dates as are readily ascertainable. Reasonable and appropriate valuation methods shall be utilized. As appropriate, assets may be excluded from valuation, provided all income received with respect to such assets is distributed to the extent distributable in accordance with the terms of the care fund agreement.

101.8(8) *Records maintenance.* The care fund trustee or trustees shall document and maintain a record of the following:

a. The fair market value of the care fund's assets determined immediately before conversion to the total return distribution method as required by subparagraph 101.8(5) "a"(3); and

b. Every fair market value of the care fund's assets calculated annually pursuant to subrule 101.8(7).

101.8(9) *Reserve fund.* A cemetery using the total return distribution method shall create and maintain a reserve fund to replace any care fund principal lost by capital losses incurred from the care fund's investments. The reserve fund shall be created by retaining and setting aside a reasonable percentage of the income and capital appreciation within the care fund.

101.8(10) *Division may limit use of total return distribution method.* The division may limit or prohibit ongoing use of a total return distribution method by a care fund under the following circumstances:

a. The trustee or trustees and any investment manager are not able to demonstrate sufficient knowledge and expertise regarding effective implementation of the total return distribution method. In making this determination, the division shall consider the factors for approval of a total return distribution plan as set out in subrule 101.8(5).

b. In situations where analysis shows that investment returns and distribution practices have not resulted in sufficient protection of the care fund's principal, using either a middle-term (three to five years) or a long-term (more than five years) analysis, the division may limit or prohibit the distribution of capital gains. In making this determination, the division shall consider the presence and stated value of assets that do not have an active market and are not traded on a regular basis, the frequency of appraisals and evaluations, the asset allocation of the care fund, and whether care fund principal, as adjusted for inflation, is less than it was at the time the cemetery converted to the total return distribution method.

101.8(11) *Reversion from total return distribution method.* If a care fund's trustee or trustees make an election pursuant to this rule to use a total return distribution method, that method is irrevocable unless a reversion is approved by the division. The care fund's trustee or trustees shall file a request for approval of a reversion with the division 90 days prior to a proposed reversion from the total return distribution method to the traditional net income distribution method. The division may prohibit a reversion from the total return distribution method to the traditional net income distribution method if the care fund principal, as adjusted for inflation, is less than it was at the time the cemetery converted to the total return distribution method.

101.8(12) *Annual report of total return distribution method information.* As part of the annual report required by Iowa Code section 523I.813 and rule 191—101.9(523I), a perpetual care cemetery using the total return distribution method shall file an addendum to the annual report related to the total return distribution method, detailing the following:

- a.* The asset allocation.
- b.* The annual payout.
- c.* Any changes in investment policy.

- d.* An accounting in regard to whether growth of the care fund's principal has exceeded an amount needed to compensate for inflation.
- e.* The existence and amount in a reserve fund as required by subrule 101.8(9).
- f.* A description of how the total return distribution method meets the requirements of paragraph 101.8(6) "a."
- g.* A statement that the perpetual care cemetery and care fund are in compliance with this chapter.
- h.* The investment portfolio for the perpetual care cemetery and care fund.
- i.* A statement describing how the investment portfolio for the care fund has performed in comparison to the consumer price index.
- j.* Any other pertinent information.

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