



House  
Legislative  
Analysis  
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## FIDUCIARIES: NONPROFIT CORP.

House Bill 5034 as enrolled  
Public Act 327 of 1994  
Second Analysis (1-30-95)

Sponsor: Rep. Bill Martin  
House Committee: Judiciary  
Senate Committee: Judiciary

### ***THE APPARENT PROBLEM:***

It is relatively common, at least in some counties, for probate courts to appoint nonprofit guardianship corporations to serve as guardians and conservators for incapacitated adults. (Basically, a guardian makes decisions affecting the person of the ward, while a conservator makes decisions regarding the ward's financial affairs. Both guardians and conservators are appointed by the probate court; a guardian may make certain financial decisions in cases where the court has not appointed a separate conservator.) Typically, a nonprofit's clients are people of modest means, often on government assistance, who need someone to pay their bills and make sure they have needed clothing and care.

A problem has arisen recently with the appointment of nonprofit organizations as guardians and conservators. The probate code defines "fiduciary" to include guardians and conservators, as well as personal representatives (executors of wills), and in general usage, a fiduciary is anyone who manages the money or property of another, which is something that guardians and conservators do. The banking code, however, contains a provision that no nonbank corporation may act as a fiduciary in Michigan unless specifically authorized to do so by another Michigan statute.

Thus, when a prospective nonprofit corporation recently applied to the Department of Commerce to be incorporated to provide guardianship-related services in the Van Buren County area, state regulators in the corporations and securities bureau determined that they were unable approve the application because the nonprofit corporation was not for a lawful purpose: that is, as there evidently was no statute granting specific authority for a nonprofit corporation to act as a fiduciary, to allow the nonprofit to incorporate would be in violation of the banking code.

The state's decision prompted the organizers to file a suit against the state in Van Buren County Circuit Court on August 30, 1993. However, there are over a dozen nonprofit corporations in the state serving probably several thousand wards, and the state's decision has thrown their status into question. Reportedly, the state is not taking action against these organizations until the issue has been litigated or the law changed. To resolve the matter, statutory amendments have been proposed.

### ***THE CONTENT OF THE BILL:***

The bill would amend the Revised Probate Code to explicitly allow the probate court to appoint as a guardian or conservator a nonprofit corporation whose primary function was to provide fiduciary services in the same manner as other fiduciaries under the probate code. This provision could not be construed to make someone who was not a nonprofit corporation ineligible to be appointed or approved as a fiduciary.

The court could only appoint a nonprofit corporation as a fiduciary if the court made on-the-record findings of both of the following: that the appointment of the nonprofit corporation was in the ward's or developmentally disabled person's best interests, and that another qualified and suitable person has not come before the court and expressed a willingness to serve in that fiduciary capacity.

A nonprofit corporation appointed to serve as a fiduciary would have to file a bond in an amount and with conditions determined by the court. The court could not appoint the corporation to act as a personal representative or trustee. A nonprofit corporation appointed to serve as a fiduciary would be prohibited from receiving a resulting benefit beyond compensation specifically authorized for that

type of fiduciary by the probate code or the Mental Health Code.

MCL 700.501a

***FISCAL IMPLICATIONS:***

The Senate Fiscal Agency reported that the bill would have no fiscal impact on the state or local units of government. (5-13-94)

***ARGUMENTS:***

***For:***

The bill would clearly legitimize the operations of the nonprofit guardianship organizations in the state, eliminate doubt over hundreds of guardianship arrangements, and prevent the need to find and reappoint guardians for those wards. The bill would do this by satisfying state regulators' requirement that a certain condition of the banking code be met. The applicable provision of the banking code bars a nonbank corporation from acting as a fiduciary unless specifically authorized to do so by another statute. The bill would provide this specific authority, and thus solve the problem. Any concerns about protection of the wards' interests should be resolved by the bill's requirement for nonprofit corporations acting as fiduciaries to file a bond and be subject to conditions set by the court.

***Response:***

It is unclear to many how the banking code can rule over the clear and exclusive jurisdiction of the probate court over guardianship matters. By attempting to regulate nonbank entities, the banking code overreaches itself and intrudes on a matter that is governed by the probate code. The banking code provision may be considered an unconstitutional amendment by reference.

LEGISLATIVE COUNCIL SECRETARY