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Senate Bill 674 (Substitute S-2 as reported by the Committee of the Whole)

Sponsor: Senator Jud Gilbert, II

Committee: Economic Development and Regulatory Reform

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RATIONALE

Privately owned cemeteries in Michigan are governed by the Cemetery Regulation Act, as well as an 1855 statute providing for cemetery corporations, an 1869 statute providing for rural cemetery corporations, and administrative rules promulgated by the Department of Labor and Economic Growth (DLEG). Under the Cemetery Regulation Act, a person must obtain a permit from DLEG in order to establish a cemetery, cemeteries incorporated under the 1855 or 1869 statute must be registered with DLEG, a person must obtain a certificate of approval from the Department in order to purchase or acquire a controlling interest in a cemetery, and cemeteries must establish endowment care funds to provide for the maintenance and improvement of cemetery grounds. Despite these and other requirements, weaknesses in Michigan's regulation of cemeteries came to light within the last couple years after 28 cemeteries in the State were purchased in a fraudulent scheme involving an Oklahoma oil and gas speculator named Clayton Smart, and the money in the cemeteries' endowment care funds evidently was embezzled.

In order to prevent this type of situation from recurring, various measures have been suggested to impose new requirements governing the creation, administration, and investment of endowment care funds, and expand the State's oversight of cemetery ownership and control.

CONTENT

The bill would amend the Cemetery Regulation Act to do the following:

- **Require the Cemetery Commissioner to promulgate rules governing endowment care trusts, merchandise trust accounts, and related trust funds.**
- **Require an endowment and perpetual care trust fund to be established with one or more regulated financial institutions that would serve as trustees; and require the cemetery to enter into irrevocable trust agreements with them.**
- **Require at least \$150,000 to be deposited into a trust fund before any burial or entombment rights were sold.**
- **Require notice to the Commissioner when 30% of perpetual care funds were moved from an account or involved in a financial transaction.**
- **Require money in a merchandise trust account to be deposited into a regulated financial institution, and require records to be kept in Michigan.**
- **Increase from \$500 to \$1,500 the investigation or filing fee for a permit to establish a cemetery or for a certificate of approval for a change of control or purchase of a cemetery.**
- **Require the endowment and perpetual care trust fund for a cemetery to be escrowed for six months after its sale, transfer, purchase, or acquisition.**
- **Specify circumstances, including criminal convictions, that could make a person ineligible to become a**

cemetery owner or hold a controlling interest in a cemetery.

- **Require the Commissioner to consider certain factors, including bankruptcy, tax delinquency, and past compliance with cemetery-related licensing requirements, in determining whether to allow a person to become a cemetery owner.**
- **Expand the actions the Commissioner may take for noncompliance with requirements for a certificate of approval for the purchase or change of control of a cemetery.**
- **Require cemeteries' annual reports to include sworn statements and specified information; and authorize the Commissioner to impose an administrative fine for failure to report in a timely manner.**
- **Provide for the investigation of a person directly or indirectly controlling a cemetery, when a permit application was submitted.**
- **Require the registration of each person owning or managing a cemetery, and include actions taken by cemetery owners, directors, members, and affiliated persons among the grounds for administrative sanctions.**
- **Authorize the Commissioner to control, dispose of, transfer, or require acceptance of responsibility for, abandoned cemeteries.**
- **Authorize the Commissioner to petition for a court order to issue subpoenas to any person in regard to an investigation or hearing.**
- **Expand the authority of a receiver or conservator appointed for a cemetery.**
- **Increase criminal penalties for a violation of the Act.**

The bill also would repeal sections of the 1855 and 1869 cemetery corporation statutes governing cemetery corporations' endowment funds.

Rules

The Cemetery Commissioner is the Director of the Department of Labor and Economic Growth or the Director's designee. The Commissioner may promulgate rules to implement and administer the Act, including rules regarding the maintenance of records relative to the financial aspects of

cemeteries; requirements for permit and registration applications; and procedures governing the conduct of contested cases under the Act.

The bill would require the Commissioner to promulgate these rules, as well as rules regarding the following:

- The establishment, control, record-keeping, and auditing of endowment care trusts, merchandise trust accounts, and related trust funds.
- Requirements for trust agreements, endowment care trusts, and merchandise trust accounts.
- The full disclosure of the source, nature, and amount of consideration to be used in the sale or transfer of a cemetery.
- Submission of annual reports as required by the Act (and the bill), including requests for extensions.

Also, the rules for permit and registration applications would have to include the good moral character and financial security, responsibility, and stability of people having an interest in a cemetery and all people with decision-making authority who were employed by an applicant, registrant, or permittee. ("Good moral character" would mean that term as defined and determined under Public Act 381 of 1974, which concerns occupational licenses for former offenders. In that Act, the term refers to the propensity on the part of the person to serve the public in the licensed area in a fair, honest, and open manner.)

Within 12 months after the bill's effective date, the Commissioner would have to update any existing rules that had to be changed due to the bill's amendments.

Endowment & Perpetual Care Trust Fund

Under the Cemetery Regulation Act, the Commissioner must require each cemetery to establish and maintain an irrevocable endowment care fund, as required by Section 35a of Public Act 87 of 1855 (which provides for cemetery corporations) or Section 7a of Public Act 12 of 1869 (which deals with rural cemetery corporations). The bill would delete reference to those sections, but continue to require each cemetery to establish and maintain an irrevocable endowment and perpetual care trust fund.

A trust fund would have to be established with one or more regulated financial institutions that would be trustees of the fund. The fees and costs associated with the regulated financial institution could be paid from the principal of the trust.

The cemetery would have to enter into irrevocable trust agreements with the trustees. The agreements would have to provide that the investments of the trust were subject to Section 7302 of the Estates and Protected Individuals Code (EPIC). (That section requires a trustee, except as otherwise provided by the terms of the trust, to act as a prudent person would in dealing with the property of another, including following the standards of the Michigan prudent investor rule. If the trustee has special skills or is named trustee on the basis of representation of special skills or expertise, the trustee is under a duty to use those skills.)

A cemetery could direct the management and investment of the trusts by the trustees if the direction were consistent with the recommendations of an investment advisor registered with the Security Exchange Commission under the Investment Advisors Act or the Uniform Securities Act, and the investments were subject to Section 7302 of EPIC. The determination of whether any such direction complied with the prudent investor rule would have to be made solely by the trustee.

The cemetery could change trustees or registered investment advisors at any time, subject to its agreement with the trustee or registered investment advisor and the approval of the Commissioner. The cemetery would have to give the Commissioner written notice within 30 days after the appointment as trustee of either regulated financial institutions or registered investment advisors.

Beginning on the bill's effective date, an endowment and perpetual care trust fund would have to be created by the deposit of at least \$150,000 into the fund before any sale of burial rights, entombment rights, or columbarium rights was made.

Each month, at least 15% of all proceeds received during the previous month from the sales of burial, entombment, or columbarium rights would have to be

deposited with the trustee for inclusion in the endowment and perpetual care trust fund. No total deposit for a single burial right sale or assignment could be less than \$20. A cemetery could apply to the Commissioner for a modification of the minimum deposit requirement. The Commissioner would have to take testimony and investigate as he or she considered necessary. If the Commissioner determined that the applicant's endowment and perpetual care trust fund would generate sufficient interest to meet all current and future costs of keeping the applicant's cemetery in good condition, the Commissioner could modify the minimum deposit requirement. A cemetery applying for modification would have to be assessed the actual costs for the Commissioner's examination and investigation.

The amounts deposited from sales proceeds would have to be held in perpetuity by the trustee. Interest or income could be used only for endowment care. Except as provided below, money in the trust fund could not be commingled with any other money or trust accounts.

If a cemetery owner owned or operated more than one cemetery, the owner could commingle or bundle endowment and perpetual care trust funds for investment purposes as long as separate accounting was maintained for each cemetery's trust activities. The accounting records would have to be maintained in a manner that allowed for full disclosure of each cemetery's liabilities and related assets. Upon the Commissioner's written approval, a cemetery owner could spend more than 20% of the cemetery's endowment and perpetual care assets for use at another cemetery within a one-year period.

The bill would require interest or income from the money in an endowment and perpetual care trust fund to be used exclusively for endowment and perpetual care. No portion of the interest or income could be used directly or indirectly for salaries or other payments to the officers, directors, partners, members, or managers of the entity owning the cemetery. Withdrawals of accumulated interest or income from the trust fund could be authorized by the trustee, and would have to be documented as provided by rule of the Commissioner. A cemetery would have to

maintain records showing that interest from the trust fund was used exclusively for endowment and perpetual care.

Within 30 days after 30% of the endowment and perpetual care or perpetual care funds established under the Act were moved from an account or otherwise engaged in some type of financial transaction or investment, the cemetery owner or operator would have to notify the Commissioner of the transaction. Failure to comply with this requirement would be considered a violation of the Act.

The bill would define "regulated financial institution" as a State or nationally chartered bank, savings and loan association or savings bank, credit union, or other State or federally chartered lending institution or a regulated affiliate or regulated subsidiary of any of those entities.

"Cemetery owner" would mean the person who has title to the cemetery.

"Operator" would mean any of the following:

- A person, an officer of a person, a partner of a person, or a member or manager of a limited liability company (LLC), who holds more than 50% voting rights in a cemetery owner.
- A person who is a member of the board of directors of a cemetery owner, a partner in a cemetery owner, or a member or manager of an LLC that is a cemetery owner.
- An administrative official of the cemetery owner or the person holding more than 50% voting rights in a cemetery owner, comparable to a chief administrative officer, chief executive officer, or chief financial officer.

The Act defines "endowment care" as all general work necessary to keep the cemetery property in a presentable condition at all times, including the cutting of grass at reasonable intervals; the raking, cleaning, filling, seeding, and sodding of graves; the replacement, pruning, or removal of shrubs and trees in order to assure access to interment rights; and the repair and maintenance of enclosures, buildings, drives, walks, and the various memorial gardens. Under the bill, this definition would apply to "endowment and perpetual care".

Permit to Establish a Cemetery

Under the Act, a person who wishes to establish a cemetery must file an application for a permit with the Commissioner. The application must be accompanied by a investigation fee of \$500. The bill would require a nonrefundable investigation fee of \$1,500.

After receiving an application, the Commissioner must conduct an investigation pertaining to the physical plans, the community need for the planned cemetery, and pertinent information concerning the applicant's experience, financial stability, ability, and integrity. If the applicant is not an individual, the general manager and principal owners must be investigated. Under the bill, the investigation of the applicant would pertain to experience; financial security, responsibility, and stability; ability; and good moral character. If the applicant were not an individual, the Commissioner would have to investigate the directors, officers, partners, members, or any person occupying a similar status or performing similar functions, or an affiliated person.

The bill would require a cemetery corporation to give the Commissioner immediate notice of any change in its directors, officers, partners, members, affiliated persons, or any people occupying a similar status or performing similar functions. If the Commissioner determined, after investigation, that any director, officer, partner, member, affiliated person, or similar person did not have suitable experience, ability, good moral character, and financial security, responsibility, and stability, the Commissioner would have to order the cemetery company to void the appointment of that person.

The bill would define "affiliated person" as a person directly or indirectly controlling a cemetery. The term would include all of the following:

- A person who holds at least a 50% interest in a cemetery.
- A person who is a member of the board of directors or a cemetery owner, a partner in a cemetery owner, or a member or manager of a limited liability company that is a cemetery owner.

- A person who is an officer of the person who holds at least a 10% interest in a cemetery corporation or other entity having control of the cemetery.

Cemetery Purchase or Change of Control

Certificate of Approval. Under the Act, if a person proposes to purchase or otherwise acquire a controlling interest in an existing cemetery company, the person must apply to the Commissioner for a certificate of approval of a proposed change of control of the company. The application must include the name and address of the proposed new owner or operator and other information the Commissioner requires.

Under the bill, the application also would have to include a sworn statement attesting to the assets and liabilities related to the cemetery, including all trust accounts and their value, as well as a sworn statement of who would assume those assets and liabilities. In addition, the application would have to include a sworn statement that the principal from the endowment and perpetual care trust accounts would be held in escrow for six months from the latest of the following:

- The Commissioner's approval of the application.
- The close of the sale of a controlling interest in the cemetery owner or the sale of a substantial portion of the owner's assets.
- The transfer of title of the cemetery.

Under the Act, the Commissioner is to issue a certificate of approval only after he or she is satisfied that the proposed new owner is qualified by character, experience, and financial responsibility to control and operate the cemetery in a legal and proper manner, and that the interest of the public generally will not be jeopardized by the proposed change in ownership and management. Under the bill, the Commissioner would have to be satisfied that the proposed new cemetery owner or operator was qualified by good moral character, experience, and financial stability, responsibility, and security.

The Act requires the application for a purchase or change of control to be accompanied by an initial filing or

investigation fee of \$500. The bill would increase the fee to \$1,500.

Sanctions. Currently, if a transfer of controlling interest is found to have taken place without prior Commissioner approval, the Commissioner may suspend or revoke the registration of the cemetery, and take other appropriate action until it demonstrates compliance with these requirements. Under the bill, the Commissioner could do any of the following:

- Suspend or revoke the cemetery's registration.
- Issue a cease and desist order or other order requiring a person immediately to take remedial action as prescribed by the Commissioner.
- Seek injunctive or other equitable action from a court of competent jurisdiction.

The Commissioner also could take other appropriate action until the person purchasing or otherwise acquiring a controlling interest in an existing cemetery, purchasing an existing cemetery, or otherwise acquiring the cemetery demonstrated compliance or divested itself of any interest or control of the cemetery.

("Controlling interest" means the capability to decide the operating and financial policies of the cemetery company or to select the officers or directors with majority control of the company.)

Escrow Account. After the sale, transfer, purchase, or acquisition of a controlling interest in a cemetery was completed, the endowment and perpetual care trust fund for it would have to be escrowed into an account for the first six months of the new ownership. This requirement could not be construed to prevent or prohibit the cemetery from receiving interest or income from the trust fund to maintain the cemetery.

Use of Trust Fund. The new owner of an existing cemetery could not use the endowment and perpetual care trust fund of a cemetery being sold in any manner to purchase or otherwise finance the purchase of that cemetery from the previous owner.

Eligibility

Under the bill, notwithstanding any other provisions governing eligibility as a cemetery owner, a person could be ineligible to become a cemetery owner or hold a controlling interest in a cemetery company if any of the following circumstances existed:

- The person had been convicted of a felony under the laws of this State, any other state, or the United States.
- The person had been convicted of a misdemeanor involving gambling, theft, dishonesty, or fraud in any state, or had been convicted under a local ordinance in any state involving gambling, dishonesty, theft, or fraud that substantially corresponded to a misdemeanor in Michigan.
- The person had knowingly submitted an application for a license under the Act that contained false information.
- The person lacked the requisite character, experience, and financial responsibility to control and operate the cemetery in a legal and proper manner, as determined by the Commissioner, and the proposed ownership or change in ownership and management was likely to jeopardize the public.

In determining whether to allow a person to become a cemetery owner, the Commissioner also would have to consider all of the following:

- The past and present compliance of the person and its affiliated person with cemetery or cemetery-related licensing requirements, cemetery-related arrangements, or compacts with the State of Michigan or any other jurisdiction.
- Whether the person had filed, or had filed against it, a bankruptcy proceeding or ever had been involved in any formal process to adjust, defer, suspend, or otherwise work out the payment of any debt.
- Whether the person had been served with a complaint or other notice filed with any public body regarding a payment of any tax required under Federal, State, or local law that had been delinquent for one year or more.
- Whether the person had a history of noncompliance with any regulatory

requirements in this State, any other jurisdiction, or the Federal government.

The Commission also would have to consider whether the person had been indicted, charged, arrested, or convicted, had pleaded guilty or no contest, or had forfeited bail concerning any felony or misdemeanor offense under the laws of any jurisdiction, excluding traffic violations, unless the offense had been expunged, pardoned, or reversed on appeal or otherwise nullified as determined by the Commissioner.

Merchandise Trust Account

A cemetery that is required to register under the Act, and an agent who is authorized by a cemetery or acting on its behalf under an agreement or sales contract to sell cemetery merchandise or services, must establish a merchandise trust account and deposit a percentage of the gross proceeds received from sales, as determined by the Commissioner. The bill would refer to an agreement or contract entered into before January 1, 2005.

The account must be maintained exclusively for the deposit of the money into a State or national bank, a State or federally chartered savings and loan association, or a trust company. Under the bill, the account would have to be maintained exclusively for the deposit of money into a regulated financial institution. Also, all documents, reports, and records regarding the trust would have to be kept in Michigan.

The bill would define "merchandise trust" as trusts required by Section 16 of the Act (which contains these provisions), composed of deposits made in connection with merchandise and service sales made before January 1, 2005.

Investigations; Remedies

The Act authorizes the Commissioner to hold hearings, administer oaths, take testimony under oath, and make written requests for the appearance and testimony of witnesses and the production of documents. The bill also would authorize the Commissioner to conduct investigations.

Currently, upon a witness's refusal to appear, testify, or submit documents after a written request, the Commissioner or a

party to a contested case may apply to the Ingham County Circuit Court for a subpoena or a subpoena duces tecum (ordering a person to appear and produce documents). The bill, instead, would allow the Commissioner (but not a party to a case) to petition the Ingham County Circuit Court for an order to issue, as part of his or her general investigative and enforcement authority, a subpoena or a subpoena duces tecum relating to any person's appearance and testimony and for the production, examination, or copying of books, papers, or other documents pertaining to an investigation or hearing within the scope of the Commissioner's authority under the Act.

The failure to obey a subpoena issued to any person by the Commissioner through a court order could subject the person to punishment by the court as contempt of court.

Any person who was required by the Act to take any oath or affirmation and who knowingly made any false oath or affirmation would be considered to have committed the crime of perjury. (Under the Michigan Penal Code, any person who is required by law to take an oath, and who swears falsely, is guilty of the felony of perjury, which is punishable by up to 15 years' imprisonment (MCL 750.423).)

Currently, when it appears to the Commissioner that a person or registrant has violated the Act or a rule promulgated or order issued under it, the Commissioner may issue a cease and desist order; issue an assurance of discontinuance; and/or bring a circuit court action to enforce compliance. Under the bill, the Commissioner could take these actions when a person or registrant had engaged in, or was about to engage in, any act or practice constituting a violation of the Act or a rule or order.

Receiver or Conservator

The Act allows a permanent or temporary injunction or restraining order to be granted and a receiver or conservator to be appointed by the court, upon a proper showing regarding an action brought for a violation. An appointed receiver or conservator may take possession of the assets and may sell, assign, transfer, or convey the cemetery to a municipal corporation or other person, except the

holder of a license for the practice of mortuary science or a person who owns, manages, supervises, operates, or maintains a funeral establishment, in order to discharge contractual obligations.

Under the bill, a receiver or conservator could operate the cemetery, as well as take possession of the assets, and could sell, assign, transfer, or convey the assets, as well as the cemetery, as currently provided. The receiver or conservator would have the rights and obligations of the cemetery as to all trust and escrow accounts. The receiver or conservator would have to receive compensation from the cemetery as determined by the court.

Subject to court approval, the receiver or conservator could take possession of the books, records, and assets of the cemetery or cemetery entity. The receiver or conservator also could employ employees and agents, legal counsel, actuaries, accountants, appraisers, consultants, and other personnel as he or she considered necessary, and set their reasonable compensation, with the court's approval.

The Act requires the court, in the order of sale of the cemetery, to provide for notice to creditors and the filing of claims against the receivership or conservatorship. Any remaining funds held by the cemetery in escrow belong to the contract buyers or their beneficiaries, and may not be distributed to the general creditors of the cemetery. The bill provides, instead, that any remaining funds held by the cemetery in trust or in escrow could not be distributed to the general creditors of the cemetery.

Abandoned Cemeteries

The bill would authorize the Commissioner to control, manage, and dispose of or transfer abandoned cemeteries or to require acceptance of responsibility for an abandoned cemetery according to law. The Commissioner could promulgate rules necessary for the Department to carry out its powers and duties under this provision.

Annual Reports

Under the Act, the Commissioner must require each cemetery to report annually before July 1, and the reports must include information the Commissioner considers

necessary to ascertain that the Act is being implemented. Under the bill, the cemetery owner or operator would be responsible for reporting, and the reports would have to include information the Commissioner considered necessary to ascertain that the requirements of the Act and rules promulgated under it were being implemented. Subject to the Department's approval, the owner or operator could ask for an extension of up to 90 days to submit the report.

Each report would have to include a sworn statement by the cemetery owner or operator that contained the following:

- A certification that the signing owner or operator had reviewed the report.
- Based on the owner's or operator's knowledge, that the report did not contain any untrue statement of material fact related to the financial condition of the endowment and perpetual care trust fund or merchandise trust accounts.
- Based on the owner's or operator's knowledge, that the report fairly presented all material information regarding the financial condition of the trust fund or trust accounts.

The sworn statement also would have to state that the signing owner or operator was responsible for establishing and maintaining internal controls; had designed those controls to ensure the accuracy of material information relating to the condition of the endowment and perpetual care trust fund or merchandise trust accounts; had evaluated the effectiveness of the internal controls within 90 days before the report was issued; and had included information evaluating the controls' effectiveness.

In addition, at a minimum, the Commissioner would have to require the following information concerning the endowment and perpetual care trust fund, whose accuracy would have to be certified by a certified public accountant:

- Beginning and ending balances.
- Receipts from the sale of burial, entombment, and columbarium rights.
- Deposits to the trust fund.
- Itemized payments of interest or income.
- Documentation that interest was used solely for endowment care.

Upon finding, after notice and an opportunity for a hearing, that a cemetery owner or operator had not timely submitted a required report, regardless of whether the owner or operator acted alone or through an employee or agent, the Commissioner could impose an administrative fine, payable to the Commissioner, for the enforcement of the Act. If the Commissioner found that a violation occurred despite the exercise of due care, he or she could issue a warning instead of imposing a fine.

The Director would have to advise the Attorney General of a person's failure to pay an administrative fine. The Attorney General could bring an action in a court of competent jurisdiction for the failure to pay a fine.

Applicable provisions of the Revised Judicature Act would apply to civil actions filed under these provisions.

Examination & Audit

The Cemetery Regulation Act authorizes the Commissioner, or an examiner, investigator, or other person he or she appoints, to visit and examine the affairs of any cemetery or person required to register under the Act. The Commissioner or other person is to have free access to the books, papers, records, and documents that relate to the business of the cemetery corporation, person, or agent acting on its behalf. The bill also would require free access to the documents relating to the business of an affiliated person.

The Act requires that the books, papers, records, and documents be available for inspection or audit at any time during regular business hours, and requires one or more qualified people to conduct the audit. Under the bill, these people would have to be designated by the Commissioner. As currently required, their services would have to be charged to and paid by the cemetery, but the bill would delete a requirement that the rate be \$10 per hour and not total more than \$1,000.

Under the Act, if, after an audit by the Commissioner's staff, a deficit is found in the amount of required deposits to the trust funds, the Commissioner may assess a penalty not to exceed 10% of the amount of the deficit. The cemetery may request an

administrative hearing within 30 days after being notified of a deficit. If the Commissioner determines, after the hearing, that a deficit does exist, an additional penalty not to exceed 1.5% may be assessed each month on the unpaid monthly balance until the deficit is paid in full.

The bill would allow the Commissioner to assess a penalty in the amount allowed under the Act, rather than a penalty not to exceed 10% of the amount of the deficit. The bill also would delete the maximum percentage of the unpaid balance that may be assessed each month as an additional penalty.

Administrative Sanctions

The Act authorizes the Commissioner to impose various administrative sanctions, including the denial of a permit or registration, when he or she finds that an applicant, its officer, or its general manager has made a false statement of material fact in the application, been guilty of an unlawful or fraudulent act in connection with selling or otherwise dealing in cemetery lots and burial rights, failed to comply with the Act, or committed other specified violations.

Under the bill, the sanctions also would apply if a cemetery owner, director, member, or affiliated person engaged in this conduct. In addition, the grounds for disciplinary action would include conduct that demonstrated a lack of good moral character.

Criminal Penalties

A person who violates the Act is guilty of a misdemeanor. If the violator is an individual, the first offense is punishable by a maximum fine of \$100 or imprisonment for up to 90 days, and the second offense is punishable by a maximum fine of \$500 and/or imprisonment for up to one year. If the violator is not an individual, the maximum fine is \$100 for a first offense and \$1,000 for a second offense.

The bill provides, instead, that a person who violated the Act would be guilty of a misdemeanor punishable by a maximum fine of \$10,000. If the violator were an individual, the offense also would be punishable by imprisonment for up to one year.

Other Provisions

The Act prohibits the Cemetery Commissioner, or his or her spouse or child, from having a financial interest in a cemetery, a supplier of cemetery services or memorials, or a funeral establishment. The bill would refer to a "direct or indirect" financial interest, and also would prohibit a financial interest in cemetery operations.

The Act requires each person operating a cemetery to register it by filing a registration application with the Commissioner each year. The bill would extend this requirement to each person owning or managing a cemetery.

All fees, charges, and penalties collected under the Act, except fines, must be paid to the Commissioner for deposit in the State's General Fund. The bill would extend this to other money from any source.

The bill provides that, in addition to all other remedies at law or in equity, the Attorney General and the circuit court of the county in which a cemetery was located would have all the powers and jurisdiction granted to the Attorney General and the court as to trusts covered by Public Act 280 of 1915 (which governs gifts, grants, bequests, and devises for the care or maintenance of a cemetery or other purposes). These remedies would include all endowment and perpetual care trust funds without regard to uncertainty or indefiniteness of beneficiaries.

The bill would require all departments, agencies, public bodies corporate, committees, commissioners, or officers of the State, and any political subdivision of the State, as far as compatible with their duties, to give the Cemetery Commissioner or his or her designee any necessary assistance required by the Commissioner in the performance of his or her duties. All of those entities and individuals also would have to give the Commissioner free access to any book, record, or document in their custody relating to the matters within the scope of the Commissioner in the performance of his or her duties.

The bill would permit the Commissioner to enter into contracts to accomplish requirements under the Act, including contracts for the engagement of consultants.

Repeals

The bill would repeal Sections 35 and 35a of Public Act 87 of 1855. Section 35 requires the board of trustees of a cemetery corporation to establish an endowment care fund, whose income or proceeds must be devoted perpetually for endowment care. Contributions to an endowment fund must be securities as the board of trustees determines, or deposited in the savings department of a State or national bank, or State or federally chartered savings and loan association.

Section 35a requires an endowment care fund to be created by the deposit of \$25,000 before the sale of any burial, entombment, or columbarium rights; requires the monthly deposit into the fund of at least 15% of the proceeds of sales; provides that no deposit may be less than \$20; and allows a cemetery with an endowment fund of more than \$125,000 and more than \$10,000 per acre of the developed portion of the cemetery to apply to the Cemetery Commissioner for a waiver of the 15% or \$20 minimum requirement. The endowment care fund may be administered by the board of directors or by the fund's individual or corporate trustees, as the fund selects under the terms of a trust instrument or declaration.

The bill also would repeal Sections 107 and 107a of Public Act 12 of 1869. Section 107 prescribes the duties of the board of directors of a rural cemetery corporation, including the establishment of an irrevocable endowment fund to provide income for cemetery maintenance. Section 107a contains essentially the same requirements as Section 35a of the 1855 Act.

Under both Acts, endowment care funds must be invested subject to Section 7302 of EPIC.

MCL 456.522 et al.

BACKGROUND

The following information was obtained from an article in the September 2007 issue of *Condé Nast Portfolio.Com* ("A Swindle to Die For", by Kurt Eichenwald).

In the early 1990s, corporate funeral home chains were popular with investors. One of

these was the Loewen Group, a large publicly traded funeral home from British Columbia, which bought up a number of its competitors across North America. The corporation was interested in acquiring a collection of 28 funeral homes in Michigan, but this State's law prevents funeral home owners from purchasing cemeteries, and Loewen already owned funeral homes in Michigan. To get around this, three shell corporations were set up. Loewen purchased the 28 cemeteries for \$90 million, and then sold them to the shells.

When the Loewen Group's financial situation took a downturn in 1999, one of the company's in-house lawyers, Craig Bush, bought out the man who was running the shell corporations. Five months later, Loewen filed for bankruptcy and its creditors unsuccessfully demanded the Michigan cemeteries. Once the lawsuit was resolved, Bush planned to sell them to a competitor, Cornerstone. After Loewen terminated its contract with the provider of the cemeteries' accounting system, however, Bush had no means to assess their financial performance, and no access to information a buyer would want if the Cornerstone deal fell through, which it did.

Meanwhile, Clayton Smart, who had formed a number of unsuccessful ventures, founded an oil lease company called Quest Minerals & Exploration, in 1999. Smart heard that someone was desperate to sell cemeteries in Michigan, and Smart needed to create the illusion that he was an oil millionaire. A colleague put him in touch with a legitimate businessman from Houston, David Strauss, who was interested in making acquisitions. Strauss loaned about \$6 million to Smart and his colleagues, ultimately losing almost \$3.7 million.

During 2003 and 2004, the parties met with Craig Bush and others in Lansing and Ann Arbor. There were plenty of reasons for Bush to question the legitimacy of the deal, including Smart's failure to conduct due diligence, his interest in the cemetery trust funds, his offer to write a \$12.5 personal check, and a photocopy of a forged \$100 million bill that was faxed during the negotiations. Nevertheless, the cemeteries were sold in August 2004 for \$31 million. Because Smart could not transfer money to Bush directly from the cemetery trusts, some of the cash was transferred to a

Smart-controlled entity, which "loaned" \$20 million to Quest Minerals & Exploration (whose president by then was an elderly aunt of Smart's wife). Quest provided a 5% note, with no interest or principal due for 10 years.

Several weeks after the sale, a broker who had been involved in the negotiations established accounts for Smart, Bush, Quest, and related entities. Over a period of weeks, \$20 million was transferred from the Quest account to Bush. Money from the trust funds flowed in many directions, including a \$25 million investment with a firm run by a Carter Green, whose other company had faxed the phony \$100 million bill. Michigan trust fund money evidently was used to acquire cemeteries in Tennessee, as well.

By October 2004, David Strauss realized that he had been duped. Strauss wrote to State officials in Michigan, stating that Smart was in default on loans that might have financed the purchase of the Michigan cemeteries. In Indiana, where a bank held some of the trust fund money, state regulators reportedly raised concerns about how the funds were being handled. A lawyer for Smart resigned and told state officials that crimes may have been committed.

In July 2006, when a man in Tennessee contacted a local cemetery to arrange for his mother's prepaid burial, the cemetery's new owners told him that they would no longer honor contracts purchased by some 13,000 people because there was not enough money in the trust funds. The man then contacted the news media, whose report led to numerous calls to Forest Hill Funeral Home and Memorial Park, which ran the Tennessee cemeteries owned by Smart. After receiving unsatisfactory answers, people began contacting state officials, who already had concerns about Smart's cemeteries.

The Tennessee investigators found that money from the Michigan trust funds appeared to have been used to purchase cemeteries in the two states. They alerted Michigan's Attorney General, who launched an investigation. On April 24, 2007, Smith was indicted in Tennessee on charges of theft, conspiracy, and money laundering,

and he faces additional charges in Michigan for racketeering and embezzlement.

According to an on-line news source, commercialappeal.com, in December 2007, Carter Green was convicted of one count of racketeering and three counts of uttering and publishing for his role in the alleged embezzlement ("Daily Briefing: Clayton Smart associate is convicted", 12-22-07).

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

The bill would take a number of steps to protect consumers' investments and ensure that unscrupulous people did not acquire private cemeteries and raid their trust funds. Under current statute and administrative rules, cemeteries must establish endowment care funds, a fund must be administered by a trustee or trustees, and the assets must be deposited with a bank or trust company. The law also states, however, that an endowment care fund may be administered by the cemetery's board of directors, and board members may serve as trustees. By requiring funds to be deposited in a regulated financial institution that would serve as the trustee, the bill would ensure that trust funds were professionally administered by independent third parties. A cemetery still could direct the management of the trusts upon the recommendations of a registered financial advisor subject to the prudent investor rule.

The bill also would strengthen the requirements for an endowment care trust fund by increasing the minimum initial deposit from \$25,000 to \$150,000; requiring a fund to be escrowed for the first six months of new ownership of the cemetery; prohibiting a new owner from using endowment care fund money to pay for the purchase of the cemetery; requiring notice to the Commissioner if 30% of the money in a trust fund were moved from an account or involved in a financial transaction or investment; specifying information about a trust fund that the Commissioner would have to require, and requiring a CPA to certify the accuracy of the information; requiring a cemetery's annual reports to include a sworn statement by the owner or

operator; authorizing the Commissioner to impose an administrative fine if reports were not filed in a timely manner; increasing the maximum criminal fine for a violation to \$10,000; and increasing the maximum term of imprisonment for a first offense from 90 days to one year. Also, the Commissioner would have to promulgate rules governing the establishment, control, record-keeping, and auditing of endowment care trusts, and requirements for trust agreements.

In addition, the bill would give the Commissioner greater oversight of cemetery ownership and control by requiring the investigation of directors, officers, partners, members, anyone performing a similar function, and affiliated persons; authorizing the Commissioner to order a cemetery to void the appointment of a person who lacked suitable experience, good moral character, or financial security, responsibility, and stability; specifying that people could be ineligible to own or hold a controlling interest in a cemetery for particular reasons; and requiring the Commissioner to consider specific factors in deciding whether to allow someone to own a cemetery. The Commissioner also would have to promulgate rules for the full disclosure of the source, nature, and amount of consideration to be used in the sale or transfer of a cemetery, as well as rules regarding the good moral character and financial security, responsibility, and stability of people having an interest in a cemetery and all cemetery employees with decision-making authority.

These and other provisions would help restore the public's trust in privately owned cemeteries in Michigan. Individuals and families place their confidence in cemetery owners and operators, and have the right to expect that the funds they pay to ensure the future maintenance and improvement of burial grounds will not be jeopardized by risky investments, fraudulent dealings, or outright embezzlement. The actions of Clayton Smart and his cohorts highlighted deficiencies in Michigan's cemetery regulations. Although there no reason not to believe that most of the State's cemeterians are honest and financially responsible, future incidents of theft and corruption are possible without the protections in this bill.

Response: Not all banks, savings and loan associations, or credit unions have a

trust department. Because the bill would require endowment care trust funds to be deposited in a financial institution that would be the trustee, perhaps the funds should be held exclusively by trust banks, which specialize in the care and management of trusts.

Opposing Argument

Several provisions in the bill could have a negative impact on cemeteries and, ultimately, consumers. Requiring endowment care trust funds to be deposited in financial institutions that would serve as trustees would be costly for cemeteries, which would have to pay substantial fees for administration of the trusts. According to testimony submitted to the Economic Development and Regulatory Reform Committee, a cemetery that has an endowment care fund with a market value of \$10.0 million would have to pay over \$95,000 in annual fees; if the fund has a market value of \$40.0 million, the annual fees would be \$380,000. Paying these fees would result in less money for cemetery maintenance and improvement, and cemeteries would have to raise prices and/or cut back on care services and expansion plans.

In addition, compared with a disinterested third party bank trustee, cemetery officers, directors, and owners have more knowledge about a cemetery's present and future maintenance and care needs, and are in a better position to balance their investment portfolio to meet those needs.

The bill's record-keeping requirements also would place undue administrative and accounting burdens upon cemeteries, especially those that are small businesses. Among other things, cemeteries would be required to provide documentation, certified by a CPA, that fund interest was used solely for endowment care. This could require cemetery laborers to record their maintenance and care time, or require cemeteries to hire an additional accounting clerk to keep track of maintenance time. Furthermore, cemeteries with over \$50,000 in merchandise or service liabilities already are required to have a CPA perform an annual audit of their endowment care funds.

Response: Instead of reducing cemeteries' income, the bill actually could increase it by ensuring that endowment care trusts were professionally administered and

funds were professionally invested. Cemeteries still would be allowed to direct the investment and management of trusts upon the recommendations of a registered financial adviser.

Legislative Analyst: Suzanne Lowe

FISCAL IMPACT

The Department of Labor and Economic Growth, Bureau of Commercial Services would receive a minimal amount of additional fee revenue from the increased application and investigation fees in the bill, and would have the authority to recover the cost of audits.

The bill would have an indeterminate fiscal impact on local government. There are no data to indicate how many offenders would be convicted of violating the Cemetery Regulation Act. To the extent that the bill resulted in increased incarceration time or convictions, local governments would incur increased costs of incarceration in local facilities, which vary by county. Additional penal fine revenue would benefit public libraries.

Fiscal Analyst: Elizabeth Pratt
Maria Tyszkiewicz
Lindsay Hollander

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.