



Senate Fiscal Agency  
P. O. Box 30036  
Lansing, Michigan 48909-7536



BILL ANALYSIS

Telephone: (517) 373-5383  
Fax: (517) 373-1986  
TDD: (517) 373-0543

Senate Bill 674 (as introduced 8-1-07)  
Sponsor: Senator Jud Gilbert, II  
Committee: Economic Development and Regulatory Reform

Date Completed: 5-7-08

## **CONTENT**

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

- Create the Office of Cemetery Regulation within the Office of Financial and Insurance Regulation (OFIR).
- Provide that the Cemetery Commissioner would be the OFIR Commissioner or his or her designee.
- Require the Cemetery Commissioner to promulgate rules governing endowment care trusts, merchandise trust accounts, and related trust funds, as well as trustees.
- Require an endowment care trust fund to be established with a single Michigan financial institution, which would have to serve as trustee; and require at least \$150,000 to be deposited into the fund before the sale of any burial rights.
- Require interest on the money in an endowment care trust fund to be used exclusively for endowment care.
- Require money in a merchandise trust account to be deposited into a Michigan financial institution, and require records to be kept in Michigan.
- Require a report by a CPA if funds in an endowment care trust fund and merchandise trust account exceeded \$50,000.
- Authorize the Commissioner to control, dispose of, transfer, or require acceptance of responsibility for, abandoned cemeteries.

- Authorize the Commissioner to subpoena witnesses, and to request 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 from \$500 to \$5,000 the investigation or filing fee for a permit to establish a cemetery or for a certificate of approval for a change of control.
- Expand the actions the Commissioner may take for failure to comply with certificate of approval requirements.
- 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 owners, directors, and members among the grounds for administrative sanctions.

The bill also would repeal sections of other statutes concerning cemetery corporations' endowment funds.

### Office of Cemetery Regulation

The bill would create the Office of Cemetery Regulation within OFIR, and require the Commissioner to designate an individual as the Cemetery Commissioner. Currently, the Cemetery Commissioner is the Director of the Department of Labor and Economic Growth (DLEG). Under the bill,

the Cemetery Commissioner would be the OFIR Commissioner or his or her designee. The bill would transfer to OFIR all records, personnel, property, and unspent balance of appropriations, allocations, and other funds used, held, available, or to be made available to the DLEG Director for his or her activities and responsibilities in administering the Act.

### Rules

Currently, the Cemetery 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:

- Requirements for third-party trustees.
- 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.

Also, the rules for permit and registration applications would have to include the good moral character and financial security, responsibility, and stability of individuals having an interest in a cemetery and all people with decision-making authority who were employed by an applicant, registrant, or permittee.

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 Care Trust Fund

Under the 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 this

provision (as well as those sections of the 1855 and 1869 Acts).

Under the bill, the Commissioner would have to require each cemetery to establish and maintain an irrevocable endowment care trust fund, whose income or proceeds would have to be perpetually devoted for endowment care. Money in the trust fund could not be commingled with other money, including endowment care trust funds from other cemeteries.

An endowment care trust fund would have to be established with a single Michigan financial institution that agreed to serve as a trustee. The trustee would have to invest money in the trust fund in one or more interest-bearing accounts in a depository. Documents, reports, and records regarding the trust fund would have to be kept in a Michigan financial institution.

Beginning on the bill's effective date, an endowment 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 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 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 bill would require interest from the money in an endowment care trust fund to be used exclusively for endowment care. No portion of the interest 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 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 care.

Currently, the Commissioner must require each person engaged as agent or seller in the sale of burial rights, entombment rights, or columbarium rights owned by a party other than a cemetery or corporation subject to the trust fund requirements, to deposit 15% of all gross proceeds from the sale of those rights into the endowment care fund of the cemetery in which the rights are located, if a trust fund exists for the cemetery. The bill would retain this requirement but delete a provision that allows excess sums on deposit in the fund to be applied by a cemetery against future deposits.

The bill would define "Michigan financial institution" as a State or federally chartered bank, savings bank, savings and loan association, or credit union that has its main or branch offices in Michigan. The term would not include such an entity that is directly or indirectly owned or controlled by a person who owns or operates a cemetery.

"Depository" would mean a State or nationally chartered bank or a State or federally chartered savings and loan association, savings bank, or credit union, whose deposits are insured by an agency of the United States government under the laws of Michigan or the United States. The term would include the trust department, if any, of such an entity. It would not include an entity that is directly or indirectly owned or controlled by a person who owns or operates a cemetery.

#### 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 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 Michigan financial institution.

The bill also would require that all documents, reports, and records regarding the trust be kept in Michigan.

#### Investigations; Remedies

The Act authorizes the Commissioner to hold hearing, 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, 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, upon a witness's refusal to appear, testify, or produce documents, to issue a subpoena in furtherance of an investigation or hearing. The Commissioner also could 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 that was within the scope of the Commissioner's authority under the Act.

The failure to obey a subpoena issued to any person by the Commissioner or the circuit court 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 made any false oath or affirmation would be considered to have committed the crime of perjury.

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, other than 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. A 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.

#### 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 nonrefundable investigation fee of \$500. The bill would increase the fee to \$5,000.

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 any person directly or indirectly controlling the cemetery entity.

A person directly or indirectly controlling a cemetery would include all of the following;

- A person holding at least a 50% interest in the cemetery.
- A person who was an owner, director, partner, member, or manager of the cemetery.
- An individual who was an officer of the person holding at least a 10% interest in

a cemetery corporation or other entity having control of the cemetery.

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

#### 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 statement that the proposed new owner or operator agreed to assume the liabilities of the cemetery and to preserve the assets of any prepaid merchandise or service contracts and any trust and endowment care trust accounts. A copy of an agreement to assume liabilities would have to be attached to the application.

The Act requires the application for a purchase or change of control to be accompanied by an initial filing fee or investigation fee of \$500. The bill would increase the fee to \$5,000.

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.)

#### Annual Reports

Under the Act, the Commissioner must require each cemetery to report annually, and the reports must include information the Commissioner considers necessary to ascertain that the Act is being implemented. Under the bill, 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.

If funds in an endowment care trust fund and a merchandise trust account exceeded \$50,000, the report would have to be accompanied by a report prepared by a Michigan certified public accountant expressing an opinion as to whether the requirements concerning these funds and accounts had been met. At a minimum, the Commissioner would have to require the following information concerning the endowment care trust fund:

- Beginning and ending balance.
- Receipts from the sale of burial, entombment, and columbarium rights.
- Deposits to the trust fund.
- Itemized withdrawals of interest.
- Documentation establishing that withdrawn interest was used solely for endowment care.

## 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 an owner, director, and member engaged in this conduct. In addition, the bill would include in the grounds for disciplinary action conduct that demonstrated a lack of good moral character.

## Other Provisions

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, other than 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 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.

The Act requires that the books, papers, records, and documents of a cemetery corporation 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.

## 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. 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 at least 15% of the proceeds of sales; and otherwise governs endowment care funds.

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.

MCL 456.522 et al.

Legislative Analyst: Suzanne Lowe

## **FISCAL IMPACT**

The bill would transfer responsibility for cemetery regulation within the Department

of Labor and Economic Growth, and money from the Bureau of Commercial Services to the Office of Financial and Insurance Regulation. The Office 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.

Fiscal Analyst: Elizabeth Pratt  
Maria Tyszkiewicz

S0708\sb674sa

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.