



House  
Legislative  
Analysis  
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## FIDUCIARIES: NONPROFIT ORGS.

House Bill 5034 as introduced  
First Analysis (10-14-93)

Sponsor: Rep. Bill Martin  
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 bring suit, and the matter is in the early stages of litigation. In the meantime, however, there are over

a dozen nonprofit corporations in the state serving probably several thousand wards, and the decision has thrown their status into question. Many argue that the nonprofit guardianship organizations provide an essential public service, and that legislation should be promptly enacted to resolve the matter.

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

The bill would amend the Revised Probate Code to explicitly allow a probate court to appoint or approve a nonprofit corporation as a fiduciary, if the organization was incorporated under the Nonprofit Corporation Act and provided fiduciary services as its primary function. The bill could not be construed to imply that another person eligible to be appointed or approved would no longer be eligible after the bill took effect.

MCL 700.501a

### **FISCAL IMPLICATIONS:**

There is no fiscal information at present. (10-13-93)

### **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.

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***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.

***Against:***

If the real problem is the inability of a guardianship organization to be legally incorporated as a nonprofit corporation, then the answer may lie elsewhere, perhaps in amendments to the Nonprofit Corporation Act. The state evidently maintains that incorporation is not possible under current law, but the bill would authorize appointment only of an organization incorporated for the primary purpose of doing something that the state says it may not do. Moreover, by authorizing appointment of a nonprofit, rather than specifically authorizing a nonprofit to act as a fiduciary, the bill may fail to meet the condition set forth in the banking code. Some have perceived the bill to purport to authorize the probate court to do something the banking code says it may not do.

***Against:***

The bill may be overbroad. Although the bill arose from the need to address the threatened status of nonprofit organizations that serve poor or near-poor wards, there is nothing in the bill that limits its applications to situations involving small estates, or even to guardianships and conservatorships, as a fiduciary can include a personal representative named to administer a will. There perhaps should at least be a limit on the size of estate that comes under the bill, so that large nonbank corporations are not able to provide expensive services that should be provided by banks under strict state regulation.

***Response:***

The bill would not affect the administration of decedents' estates, because the probate code already says that a personal representative can be a "person," which includes a corporation.

***Against:***

Concerns have been expressed regarding the bill's apparent lack of protection for wards and their estates. While the banking code requires banks to meet certain solvency and capitalization requirements to protect the public, there are no

such assurances that a nonprofit corporation will have any assets from which to make good on mismanaged estates. Moreover, the bill does not specifically require any sort of financial accountability in the form of a bond or personal liability.

***Response:***

The probate code contains many protections for wards and their estates. For example, probate judges have the discretion to require bonds of fiduciaries and frequently do; conservators must by court rule make annual accountings to the probate court. What problems do arise generally have more to do with whether the probate court adequately fulfilled its responsibility rather than whether statute gave the court adequate power to act. However, to mandate bonds or more frequent review of cases could be ill-advised; such matters generally are best left to the discretion of the court so that individual circumstances may be accommodated, and court resources may be directed where most needed.

***POSITIONS:***

The Michigan Guardianship Association supports the bill. (10-13-93)

The Michigan Probate Judges Association supports the bill. (10-12-93)