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BILL



ANALYSIS

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Senate Bill 461 (as enacted)
Sponsor: Senator Tonya Schuitmaker
Senate Committee: Families, Seniors, and Human Services
House Committee: Families, Children, and Seniors

PUBLIC ACT 173 of 2012

Date Completed: 6-27-12

CONTENT

The bill amends the Estates and Protected Individuals Code (EPIC) to do the following:

- **Prevent a person from benefiting from the estate of a decedent if the person is convicted of abuse, neglect, or exploitation with respect to the decedent.**
- **List the rights of an incapacitated individual for whom a guardian is appointed.**
- **Require an incapacitated individual to be informed of his or her rights in writing.**
- **Permit a court to order a guardian to petition for the appointment of a conservator or for another protective order if the court determines that a ward requires financial protection.**
- **Provide that a court must require a conservator to furnish a bond if the cash and property readily convertible into cash in an individual's estate exceed certain limits.**
- **Prohibit a conservator from mortgaging, pledging, or causing a lien to be placed on an individual's real property without court approval.**

general provisions concerning probate and nonprobate transfers of property, including provisions dealing with the effect of homicide on a person's ability to inherit property from a decedent.

Specifically, an individual who feloniously and intentionally kills the decedent forfeits all benefits under Article II with respect to the decedent's estate, and the killing revokes the disposition or appointment of property made by the decedent with respect to the killer in a governing instrument (e.g., a will, insurance policy, or deed). The killing also severs the interests of the decedent and killer in property they held at the time of the killing as joint tenants with the right of survivorship.

Under the bill, these provisions also will apply to an individual who is convicted of committing abuse, neglect, or exploitation with respect to the decedent. For this purpose, the bill defines "abuse, neglect, or exploitation" as an act whose commission is a felony under any of the following:

- A criminal act that is an offense under Chapter 22A (Vulnerable Adults) of the Michigan Penal Code.
- A violation of Section 174a (embezzlement of a vulnerable adult's money or property) of the Penal Code.
- A criminal act that is an offense involving domestic violence as that term is defined in a section of the Code of Criminal Procedure (MCL 768.27b).
- An act that constitutes child abuse under Section 136b of the Penal Code.

The bill will take effect on October 1, 2012.

Forfeiture & Revocation of Benefits

Article II of EPIC deals with wills, intestacy (the absence of a valid will), and donative transfers (gifts). Part 8 of Article II contains

-- A criminal act that constitutes abuse, neglect, or exploitation as defined in Section 11 of the Social Welfare Act.

(Those provisions of the Penal Code, the Code of Criminal Procedure, and the Social Welfare Act are described under **BACKGROUND**, below.)

The requirements for forfeiture, revocation, and severance will not apply, however, if, after the date of the conviction for abuse, neglect, or exploitation, the decedent executes a governing instrument expressing a specific intent to allow the felon to inherit or otherwise receive the decedent's estate or property.

Currently, a payor or other third party is not liable for making a payment or transferring an item of property or another benefit to a beneficiary designated in a governing instrument affected by an intentional and felonious killing, or for taking another action in reliance on the validity of the governing instrument. A payor or other third party is liable, however, for a payment made or other action taken three or more business days after the payor or third party actually receives written notice of a claimed forfeiture or revocation under the provisions described above. A payor or other third party is not obligated to determine whether the decedent was the victim of a felonious killing or to seek evidence relating to such a killing, even if the circumstances of the decedent's death are suspicious as to the beneficiary's participation.

The bill extends these provisions to situations involving abuse, neglect, or exploitation. The bill also makes a payor or other third party liable for a payment made or action taken 10 or more, rather than three or more, business days after receiving written notice of a claimed forfeiture or revocation.

The written notice required in these provisions must contain specified information, including the name of the decedent. Under the bill, the notice also must include the decedent's age and date of birth and either the decedent's last known address or the last four digits of the decedent's Social Security number. If the claim of revocation or forfeiture is based on a conviction for abuse, neglect, or exploitation, the notice also must include a copy of the conviction.

Rights of Incapacitated Person

Article V of EPIC deals with the protection of an individual under disability and his or her property. Part 3 of Article V pertains to guardians of incapacitated individuals. (Under EPIC, "disability" means cause for a protective order under Section 5401 (e.g., an individual is unable to manage property and business affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, or chronic drug use or intoxication; or an individual is mentally competent but, due to age or physical infirmity, cannot manage his or her property and affairs effectively, and requests the appointment of a conservator). An "incapacitated individual" is a person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic drug use or intoxication, or other cause, including being a minor, to the extent that he or she lacks sufficient understanding or capacity to make or communicate informed decisions.)

Section 5306, in Part 3 of Article V, authorizes a court to appoint a guardian if the court finds by clear and convincing evidence that the individual for whom a guardian is sought is an incapacitated individual, and that the appointment is necessary as a means of providing continuing care and supervision of the individual.

The bill adds Section 5306a to state that an individual for whom a guardian is sought or has been appointed under Section 5306 has the following rights (as provided in specific sections of Part 3):

- To object to the appointment of a successor guardian by will or other writing.
- To have the guardianship proceeding commenced and conducted in the place where the individual resides or is present or, if he or she is admitted to an institution by a court, in the county where the court is located.
- To petition on his or her own behalf for the appointment of a guardian.
- To have legal counsel of his or her own choice represent him or her on the petition to appoint a guardian.
- To have a guardian ad litem appointed to represent the individual on the petition to appoint a guardian, if the individual is not represented by legal counsel.

- To have an independent evaluation of his or her capacity by a physician or mental health professional, at public expense if the individual is indigent.
- To be present at the hearing on the petition to appoint a guardian and to have all practical steps taken to ensure this, including moving the hearing site if necessary.
- To see and hear the evidence presented in the hearing.
- To have a trial by jury on the petition to appoint a guardian.
- To have a closed hearing on the petition.
- To be informed of the name of each person known to be seeking appointment as guardian.
- To require that proof of incapacity and the need for a guardian be proven by clear and convincing evidence.
- To have the powers and period of time of a guardianship limited to only the amount and time that are necessary.
- To have a guardianship designed to encourage the development of maximum self-reliance and independence.
- To prevent the grant of powers to a guardian if those powers are already held by a valid patient advocate.
- To have periodic review of the guardianship by the court, including the right to a hearing and the appointment of an attorney if issues arise upon the review.
- To seek modification or termination of the guardianship by informal letter to the judge at any time.
- To have a hearing within 28 days of requesting a review, modification, or termination of the guardianship.
- To have the same rights on a petition for modification or termination of the guardianship including the appointment of a visitor, as apply to a petition for appointment of a guardian.
- To receive personal notice of a petition for appointment or removal of a guardian.
- To receive written notice of the nature, purpose, and legal effects of the appointment of a guardian.
- To choose the person who will serve as guardian, if the chosen person is suitable and willing to serve.
- To consult with the guardian about major decisions affecting the individual, if meaningful conversation is possible.
- To have quarterly visits by the guardian.

- To have the guardian notify the court within 14 days of a change in the individual's residence.
- To have the guardian secure services to restore the individual to the best possible state of mental and physical well-being, so he or she can return to self-management at the earliest possible time.
- To have the guardian take reasonable care of the individual's clothing, furniture, vehicles, and other personal effects.

If a guardian ad litem is appointed, the individual also has the following rights:

- To be personally visited by the guardian ad litem.
- To have an explanation by the guardian ad litem of the nature, purpose, and legal effects of a guardian's appointment.
- To have an explanation by the guardian ad litem of the individual's rights in the hearing procedure.

The individual also has the right to be informed by the guardian ad litem of the right to contest the petition, to request limits on the guardian's powers, to object to a particular person being appointed, to be present at the hearing, to be represented by legal counsel, and to have legal counsel appointed if the individual cannot afford legal counsel.

(A guardian ad litem is a person appointed by the court to represent the interest of a minor, an incapacitated person, or a person meeting other criteria, because the court has determined that representation of that interest otherwise would be inadequate.)

The bill requires a guardian ad litem to give the ward written notice of the rights listed in Section 5306a. The State Court Administrative Office and the Office of Services to the Aging must promulgate a form to be used to give the notice. The form must contain space for the court to include information on how to contact the court or other relevant personnel with respect to the enumerated rights.

Powers & Duties of Guardian

Currently, the guardian of a legally incapacitated person is responsible for the ward's care, custody, and control, except as limited under Section 5306. A guardian has

all of the powers and duties specified in EPIC except as modified by court order. The bill provides, instead, that a guardian is responsible for the ward's care, custody, and control to the extent the guardian is granted powers by the court under Section 5306; and a guardian has the specified powers and duties to the extent granted by court order.

The Code requires a guardian to notify the court within 14 days of a change in the ward's place of residence. The bill also requires a guardian to notify the court within 14 days of a change in the guardian's place of residence.

The Code provides that a guardian of an individual for whom a conservator also is appointed controls the ward's custody and care, and is entitled to receive reasonable amounts for those services. Under the bill, this applies to the extent granted by the court under Section 5306.

Financial Protection

Under the bill, if the court determines that financial protection is required for a ward, the court may order his or her guardian to petition for the appointment of a conservator or for another protective order under Part 4 of Article V in relation to the ward's estate.

If a conservator has not been appointed for a ward's estate and the guardian determines that there is more cash or property that is readily convertible into cash in the estate than was estimated by the guardian ad litem and reported to the court, the guardian must report the additional amount to the court.

Conservator

Part 4 of Article V deals with the protection of property of an individual under disability or a minor, and allows the court to appoint a conservator or make another protective order in relation to an individual's or a minor's estate and affairs.

The court may require a conservator to furnish a bond. Under the bill, if the court determines that the value of cash and property readily convertible into cash in the estate and in the conservator's control exceeds the limit for administering a decedent's estate under Section 3982, the court must require the conservator to

furnish a bond, unless one or more of the following apply:

- The estate contains no property readily convertible to cash and the cash is in a restricted account with a financial institution.
- The conservator has been granted trust powers under the Banking Code.
- The court determines that requiring a bond would impose a financial hardship on the estate.
- The court states on the record the reasons why a bond is not necessary.

(Section 3982 provides for the distribution of small estates. The section refers to estates having a value of \$15,000 or less but requires that amount to be adjusted by a cost-of-living factor.)

Currently, a conservator may not sell or otherwise dispose of the protected individual's real property or interest in real property without approval of the court. The bill refers to the protected individual's principal dwelling, real property, or interest in real property, and prohibits a conservator from selling, mortgaging, pledging, or causing a lien to be placed on any such property without court approval.

In addition, the bill requires a conservator to record an order allowing the sale, disposal, mortgage, pledge of, or placement of a lien on real property in the records of the register of deeds for the county where the property is located. Unless the order has been recorded or a copy of it has been given to a person to whom an interest in the real property is transferred, the person will not be entitled to presume that the conservator has the power to sell or otherwise dispose of the real property, or to mortgage, pledge, or cause a lien to be placed on the protected individual's real property.

MCL 700.2802 et al.

BACKGROUND

Chapter 22A of the Michigan Penal Code prescribes felony penalties for a caregiver or another person with authority over a vulnerable adult who intentionally or recklessly causes serious physical or mental harm to a vulnerable adult. An operator or employee of an unlicensed facility that is subject to licensure, whose violation of a licensing act causes the death of a

vulnerable adult, also is guilty of a felony. In addition, a caregiver, another person with authority over a vulnerable adult, or a licensee who intentionally commits certain acts, including commingling funds of a resident or interfering with an investigation, is guilty of a felony for a repeat offense.

The definition of "vulnerable adult" in Chapter 22A includes following:

- An individual who is at least 18 years old who requires supervision or personal care or lacks the personal and social skills required to live independently due to age, developmental disability, mental illness, or physical disability.
- A child placed in an adult foster care family home or small group home as authorized by the Department of Human Services.
- A vulnerable person (a person unable to protect himself or herself from abuse, neglect, or exploitation because of a mental or physical impairment or advanced age) who is at least 18 years old and is suspected of being or believed to be abused, neglected, or exploited.

Section 174a of the Penal Code prescribes penalties for a person who, through fraud, deceit, misrepresentation, coercion, or unjust enrichment, obtains or uses a vulnerable adult's money or property to benefit himself or herself. The offense is a felony if the money or property has a value of \$1,000 or more, or if the violation is a repeat offense. Section 174a uses defines "vulnerable adult" as it is defined in Chapter 22A.

Under the Code of Criminal Procedure, in an action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other acts of domestic violence is admissible if relevant (MCL 768.27b). For this purpose, the Code defines "domestic violence" as one or more of the following acts that is not self-defense:

- Causing or attempting to cause physical or mental harm to a family or household member.
- Placing a family or household member in fear of physical or mental harm.
- Causing or attempting to cause a family or household member to engage in involuntary sexual activity by force, threat of force, or duress.
- Engaging in activity toward a family or household member that would cause a

reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested.

Section 136b of the Michigan Penal Code prescribes felony penalties for first-, second-, or third-degree child abuse. A person is guilty of first-degree child abuse if he or she knowingly or intentionally causes serious physical or mental harm to a child. A person is guilty of second-degree child abuse if his or her omission or reckless act causes serious physical or mental harm, or the person knowingly or intentionally commits an act that is cruel or likely to cause serious physical or mental harm. A person is guilty of third-degree child abuse if he or she knowingly or intentionally causes physical harm to a child or commits an act that poses an unreasonable risk of harm or injury to a child and the act results in physical harm.

The Social Welfare Act contains reporting and investigation requirements concerning the abuse, exploitation, or neglect of a vulnerable adult (a person who is 18 or older who cannot protect himself or herself because of a mental or physical impairment or advanced age). Section 11 of the Act defines "abuse" as harm or threatened harm to an adult's health or welfare caused by another person, including nonaccidental physical or mental injury, sexual abuse, or maltreatment. "Exploitation" means an action that involves the misuse of an adult's funds, property, or personal dignity by another person. "Neglect" means harm to an adult's health or welfare caused by the inability of the adult to respond to a harmful situation or by the conduct of a person who assumes responsibility for a significant aspect of the adult's health or welfare.

Legislative Analyst: Suzanne Lowe

FISCAL IMPACT

The bill will have an indeterminate, but likely negligible, fiscal impact on State and local government. To the extent that the bill increases the administrative workload of various courts, local jurisdictions may incur additional costs.

Fiscal Analyst: Dan O'Connor

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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.