



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 461 (Substitute S-2)  
Sponsor: Senator Tonya Schuitmaker  
Committee: Families, Seniors, and Human Services

*(as passed by the Senate)*

Date Completed: 10-19-11

## CONTENT

**The bill would amend 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 were convicted of abuse, neglect, or exploitation with respect to the decedent.**
- **List the rights of an incapacitated individual for whom a guardian was appointed.**
- **Require an incapacitated individual to be informed of his or her rights in writing.**
- **Provide that an incapacitated person could handle his or her property or money without supervision, except to the extent a court granted power to a guardian or conservator.**
- **Provide that a court would have to require a conservator to furnish a bond if the cash and property readily convertible into cash in an individual's estate exceeded certain limits.**
- **Prohibit a conservator from mortgaging, pledging, or causing a lien to be placed on an individual's real property without court approval.**

The bill would take effect on April 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 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 would apply to an individual who was convicted of committing abuse, neglect, or exploitation with respect to the decedent. For this purpose, "abuse, neglect, or exploitation" would mean any of the following:

- An intentional act whose commission is a felony prohibited 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.
- 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 would not apply, however, if, after the date of the conviction for abuse, neglect, or exploitation, the decedent executed 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 would extend these provisions to situations involving abuse, neglect, or exploitation. The bill also would make 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 would have to 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 were based on a conviction for abuse, neglect, or exploitation, the notice also would have to 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 would add Section 5306a to state that an individual for whom a guardian was appointed under Section 5306 would have 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 resided or was present or, if he or she were admitted to an institution by a court, in the county where the court was 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 were 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 were 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 were 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 were 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 arose 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 with respect to 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 would serve as guardian, if the chosen person were suitable and willing to serve.
- To consult with the guardian about major decisions affecting the individual, if meaningful conversation were 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 could 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.
- To partially self-manage his or her property to encourage self-reliance and independence.

If a guardian ad litem were appointed, the individual also would have 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 would have 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 could not 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.)

A guardian ad litem would have 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 would have to promulgate a form to be used to give the notice. The form would have to 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 would be responsible for the ward's care, custody, and control to the extent the guardian was granted powers by the court under Section 5306. A guardian would have the specified powers and duties to the extent granted by court order.

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 would apply to the extent granted by the court under Section 5306.

Presently, to encourage self-reliance and independence in a legally incapacitated person, the court may authorize the individual to function without the consent or supervision of his or her guardian or conservator in handling part of his or her money or property. Under the bill, instead, except to the extent the court granted a guardian or conservator the power to control the incapacitated individual's money or property, the individual could handle his or her money or property without the consent or supervision of the guardian or conservator.

#### 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 determined that the value of cash and property readily convertible into cash in the estate and in the conservator's control exceeded the limit for administering a decedent's estate under Section 3982, the court would have to require the conservator to furnish a bond, unless one or more of the following applied:

- The estate contained no property readily convertible to cash and the cash was in a restricted account with a financial institution.
- The conservator had been granted trust powers under the Banking Code.
- The court determined that requiring a bond would impose a financial hardship on the estate.

- The court stated on the record the reasons why a bond was 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 would refer to the protected individual's principal dwelling, real property, or interest in real property, and would prohibit a conservator from selling, mortgaging, pledging, or causing a lien to be placed on any such property without court approval.

In addition, the bill would require 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 was located. Unless the order had been recorded or a copy of it had been given to a person to whom an interest in the real property was transferred, the person would not be entitled to presume that the conservator had 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 would have an indeterminate, but likely negligible, fiscal impact on State and local government. To the extent that the bill increased the administrative workload of various courts, local jurisdictions could incur additional costs.

Fiscal Analyst: Matthew Grabowski

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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.