

# Legislative Analysis



## ESTATES AND PROTECTED INDIVIDUALS CODE

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<http://www.house.mi.gov/hfa>

### House Bill 4898 (H-1) as reported from committee

Sponsor: Rep. Graham Filler

Committee: Judiciary

Complete to 6-8-22

Analysis available at  
<http://www.legislature.mi.gov>

### SUMMARY:

House Bill 4898 would amend the Estates and Protected Individuals Code (EPIC) to do all of the following (in addition to other changes described in detail below):

- Increase certain threshold amounts for different assets of a decedent and require those amounts to be adjusted for inflation for the calendar year in which the decedent dies.
- Provide for standby guardians.
- Add provisions regarding patient advocates.
- Regulate trusts regarding the care of animals, noncharitable trusts, and nondisclosure periods.

#### **Threshold amounts for assets**

Sections 2519, 3605, 3916, 3917, 3918, 3981, 3982, and 5102 of the act contain specific dollar amounts that function as thresholds for certain actions that can be taken with regard to certain assets of a decedent. EPIC now requires these statutory amounts to be multiplied by the *cost-of-living adjustment factor* for the calendar year in which the decedent dies.

*Cost-of-living adjustment factor* means a fraction whose numerator is the *United States Consumer Price Index* for the prior calendar year and whose denominator is the United States Consumer Price Index for 1997.

*United States Consumer Price Index* means the annual average of the United States Consumer Price Index for All Urban Consumers as defined and reported by the United States Department of Labor, Bureau of Labor Statistics, or its successor agency, and as certified by the state treasurer.

The bill would amend the sections listed above to increase the statutory dollar amounts of those threshold asset values. The bill also would provide that, beginning January 1, 2023, those amended amounts must be multiplied by the cost-of-living adjustment factor for the calendar year in which a decedent dies. The table below shows the increases proposed by the bill.

Section and description	Current amount	Proposed amount
Section 2519: distributable estate assets to a minor beneficiary under Michigan statutory will	Up to \$5,000 a year	Up to \$25,000 a year
Section 3605: interest in or claim against estate for which bond demand may be made	Over \$2,500	Over \$25,000

Section 3916: distribution as part of the residue of a decedent's estate	Up to \$250	Up to \$1,000
Section 3917: percentage the county treasurer may take from amounts paid out under court order	1%, unless the amount paid out to an individual exceeds \$1,000, then \$10 plus 1/2 of 1% of the amount over \$1,000	1%, unless the amount paid out to an individual exceeds \$1,500, then \$15 plus 1/2 of 1% of the excess over \$1,500
Section 3918: distribution of assets to the spouse, parent, or other close relative residing with disabled heir under certain circumstances	Up to \$5,000 a year or property up to \$5,000 in value	Up to \$25,000 a year or property up to \$25,000 in value
Section 3981: delivery of money by hospital, nursing home, morgue, or law enforcement agency	Up to \$500	Up to \$1,000
Section 3982: value of property of gross estate turned over to surviving spouse or heirs after funeral expenses are paid (or from which those expenses must first be paid)	Up to \$15,000	Up to \$25,000
Section 5102: delivery of money or personal property to a minor	Up to \$5,000 a year	Up to \$25,000 a year

The bill also would increase a threshold amount for an estate seeking to collect a debt. After a decedent's death, a person indebted to the decedent is currently required to pay the debt to the successor on being presented with the death certificate and sworn statement made by or on behalf of the successor. The statement must include certain information, including that the estate does not include real property and that the value of the entire estate does not exceed **\$15,000**, as adjusted by the cost-of-living adjustment factor. The bill would increase this amount to **\$25,000** and provide for the new value's adjustment by the cost-of-living adjustment factor as described above.

**Knowledge of a fact**

Section 7104 of Article VII (Michigan Trust Code) currently defines "knowledge of a fact" involving a trust. The bill would move these provisions to a new section in Part 2 (Construction and General Provisions) of Article I (Definitions, General Provisions, and Court Jurisdiction), to define "knowledge of a fact" for purposes of the entire act. (The definition would still apply to facts involving a trust.) Generally speaking, except for that broader scope,<sup>1</sup> the language of the new section would be the same as that of current law. The bill would repeal section 7104.

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<sup>1</sup> Another possible exception is a provision that now says that reasonable diligence does not require an employee of an organization to communicate information unless the individual knows **that** a matter would be materially affected by the information, which under the bill would be "unless the individual knows a matter **that** would be materially affected by the information." That is, instead of having to know that the information would materially affect something, the individual would have to know something that the information would materially affect. It is unclear whether this is a difference that would make a difference.

### **Substantial gifts to attorneys**

The bill also would add a new section regarding *substantial gifts* to attorneys to Part 2 (Construction and General Provisions) of Article I (Definitions, General Provisions, and Court Jurisdiction). The new section would apply only to a *governing instrument* executed after the effective date of the bill. Under the new section, any part of a governing instrument that directly or indirectly makes a substantial gift to an *attorney who drafted the governing instrument* or a person *related* to that attorney would be void unless the attorney or person related to the attorney was related to the individual making the substantial gift.

*Substantial gift* would mean a *gift*, the value of which exceeds \$5,000 as a result of a single governing instrument or two or more related governing instruments.

*Gift* would include an inter vivos gift, testamentary transfer of property, and the power to make the testamentary transfer regardless of any of the following:

- Whether the gift or testamentary transfer is outright or in trust.
- When the gift or testamentary transfer is to take effect.
- Whether the power is held in a fiduciary or nonfiduciary capacity.

*Governing instrument* would mean any of the following:

- A deed.
- A will.
- A trust.
- A funeral representative designation.
- An insurance or annuity policy.
- An account with POD designation.
- A security registered in beneficiary form (TOD).
- A pension, profit-sharing, retirement, or similar benefit plan.
- An instrument creating or exercising a power of appointment or a power of attorney.
- A dispositive, appointive, or nominative instrument of any similar type.

*Attorney who drafted the governing instrument* would mean an individual to whom both of the following apply:

- The individual is or was licensed to practice law in Michigan or any other state, before or at the time the governing instrument was prepared, executed, or both.
- The individual directly or indirectly prepared or supervised the preparation, execution, or both, of the governing instrument. The individual would be considered to have prepared or supervised the execution of the governing instrument if the preparation or supervision of the instrument was performed by an employee, subordinate, partner, co-owner, or other person or lawyer employed by the same firm or company as the individual as of the time of preparation, execution, or both.

A person would be *related* to an individual if, at the time the attorney who drafted the governing instrument prepared or supervised the preparation or execution of the instrument, the person was any of the following:

- A spouse of the individual.
- A lineal ascendant or descendant of the individual or of the individual's spouse.

- A spouse of a lineal ascendant or descendant of the individual or of the individual's spouse.
- A sibling of the individual.
- A spouse of a sibling of the individual.

An organization would be *related* to an attorney if the attorney owned a 50% or greater interest in the organization or otherwise controlled the organization.

This new section would not apply to a provision in a governing instrument appointing as a fiduciary the attorney who drafted the governing instrument or a person related to that attorney.

A provision in a governing instrument purporting to waive or otherwise avoid the application of this new section would be unenforceable.

The bill would additionally provide that if a purchaser or lender for value acquires property distributed in kind or a security interest in property from a person that has received a substantial gift pursuant to a part of a governing instrument that is void under this new section, the purchaser or lender takes title free of any claims arising under, and incurs no personal liability by reason of, the new section. This new section also would not directly or indirectly impose liability on a person that honors or relies on a part of a governing instrument that is void and that contains or effectuates a substantial gift, unless the person has knowledge that the part of governing instrument is void.

The bill would provide that if a part of a governing instrument is void under this new section, the part that is void is severable and does not affect any other part of the instrument, including a term that makes an alternate or substitute gift. If the part of the instrument that is void under the new section could not be severed, then the entire governing instrument would be void. For a power of appointment, this new section would not affect the power to appoint in favor of persons other than the attorney who drafted the instrument or a person related to that attorney.

If the court determined that an attorney who drafted the governing instrument disguised or attempted to disguise a substantial gift to the attorney or to a person related to the attorney as a conveyance for consideration for less than fair market value, the court could find the conveyance void.

The rights and remedies granted in this new section would be in addition to any other rights or remedies a person may have at law. A part of a governing instrument that is not void under this new section could be challenged under other legal grounds.

### **Standby guardians**

The bill would add a new section regarding standby guardians to Part 3 (Guardians of Incapacitated Individuals) of Article V (Protection of an Individual under Disability and His or Her Property). The court could designate one or more standby guardians at a hearing convened under Part 3. The standby guardian would have to be a competent person who is suitable and willing to serve in the order of priority listed in section 5313, with the standby guardian as the last option of priority.

Under the bill, the nominated standby guardian would have to receive a copy of the petition nominating the person to serve, the court order establishing or modifying guardianship, and the order designating the standby guardian and would have to file an acceptance of the person's

designation within 28 days after receiving notice. If the standby guardian were unable or unwilling to serve, the standby guardian would have to promptly notify the court and interested persons in writing.

A standby guardian would not have authority to act unless the guardian were unavailable for any reason, including any of the following:

- The guardian dies.
- The guardian is permanently or temporarily unavailable.
- The court removes or suspends the guardian.

A standby guardian's appointment as guardian would be effective, without further proceedings or reiteration of acceptance, immediately on the guardian's unavailability as described above. The standby guardian would have the same powers and duties as the prior guardian.

During an emergency affecting the legally incapacitated individual's welfare when the guardian is unavailable, the standby guardian could temporarily assume the powers and duties of the guardian. A person given the filed order and acceptance could rely on the standby guardian's representation that the standby guardian has the authority to act. A person that acts in reliance on these representations and documentation without knowledge that the representations are incorrect would not be liable to any person for so acting and could assume without further inquiry the existence of the standby guardian's authority.

Upon assuming office, the standby guardian would have to promptly notify the court, any known agent appointed under a power of attorney executed under Part 1 of Article V, and interested persons. Upon receiving notice, the court could enter an order appointing a standby guardian as guardian without the need for additional proceedings. The guardian appointed under this subsection would serve the court's order on the interested persons.

The bill would also add language throughout Article V to include standby guardians in various estate proceedings to reflect the new section described above.

### **Patient advocates**

The bill would amend provisions concerning patient advocates in Part 5 (Durable Power of Attorney and Designation of Patient Advocate) of Article V. Under the bill, if more than one individual were designated as a patient advocate to serve at the same time, a person providing care, custody, or medical or mental health treatment could rely on the representations of any designated patient advocate without further inquiry.

Additionally, a patient advocate designation could include the patient's instructions about how the patient advocate is to make decisions. However, a person providing care, custody, or medical or mental health treatment to a patient would not have to determine if a patient advocate complied with any of the patient's instructions and would not be liable if the patient advocate failed to comply with any of the patient's instructions.

The bill also would amend a provision requiring a patient's attending physician and another physician or licensed psychologist to determine upon examination whether the patient is unable to participate in medical treatment decisions, to instead require that determination to be made by the patient's *attending medical professional* and another *medical professional* or licensed psychologist.

***Attending medical professional*** would mean a medical professional who has primary responsibility for the treatment and care of the patient.

***Medical professional*** would mean any of the following:

- A physician licensed to practice medicine or osteopathic medicine and surgery in Michigan under the Public Health Code.
- A physician’s assistant licensed to practice in Michigan under the Public Health Code.
- A certified nurse practitioner under Part 172 of the Public Health Code.

### **Trusts**

The bill also would amend several provisions concerning trusts in Article VII (Michigan Trust Code). The definitions of the following terms used in Article VII would be amended as follows:

- “Charitable trust” would require that a charitable purpose be a material purpose of the trust.
- “Qualified trust beneficiary” would mean either a trust beneficiary whom the settlor intends to benefit as a material purpose of the trust and to whom one or more of the current provisions apply on the date the trust beneficiary’s qualification is determined, or, if it is determined there is no trust beneficiary, a trust beneficiary to whom one or more of the same provisions apply on the date the trust beneficiary’s qualification is determined.

The bill would add sections 7408, 7409, and 7409a to regulate trusts regarding for the care of animals, noncharitable trusts, and nondisclosure periods. Currently under the act, the terms of a trust prevail over any other provision of Article VII, except for certain specified exceptions. The bill would add that the duration limits specified in the new sections 7408, 7409, and 7409a prevail over the terms of a trust.

#### **Trust for the care of animals**

Section 7408 would allow for the creation of a trust to provide for the care of a designated domestic pet or animal alive during the settlor’s lifetime. Such trust would terminate upon the death of the animal or, if created to provide for the care of more than one animal, upon the death of the last surviving animal.

The trust could be enforced by a person appointed in the terms of the trust or, if none, by a person appointed by the court. A person that has an interest in the welfare of an animal for which the trust is created could request the court to appoint a person to enforce the trust or to remove a person appointed in the terms of the trust.

Property of such a trust could be applied only to its intended use, except to the extent that the court determines that the value of the trust property exceeds the amount required for the intended use. Except as otherwise provided in the terms of the trust, property not required for the intended use would have to be distributed to the settlor, if then living, or otherwise to the settlor’s successors in interest.

#### **Noncharitable trusts**

Section 7409 would provide that, except as otherwise provided in section 7408 or any other law, the following rules apply:

- A trust may be created for a noncharitable purpose without a definite or definitely ascertainable beneficiary or for a noncharitable but otherwise valid purpose to be

selected by the trustee. Such a trust may be performed by the trustee according to the terms of the trust for up to 25 years, regardless of whether the terms of the trust contemplate a longer duration.

- A trust authorized under these provisions may be enforced by a person appointed in the terms of the trust or, if none, by a person appointed by the court.
- Property of a trust authorized under these provisions may be applied only to its intended use, except to the extent that the court determines that the value of the trust property exceeds the amount required for the intended use. Except as otherwise provided in the terms of the trust, property not required for the intended use would have to be distributed to the settlor, if then living, or otherwise to the settlor's successors in interest.

#### Nondisclosure periods

Section 7409a would provide that, if the terms of a trust other than a charitable trust are embodied in a trust instrument that clearly express the settlor's intent that one or more items of *prime disclosure information* should be withheld from one or more trust beneficiaries, both of the following apply:

- During the *nondisclosure period*, all of the following apply:
  - To the extent necessary to effectuate the settlor's expressed intent, the trustee does not have the duty to provide beneficiaries with the terms of the trust and information about the trust's property and to notify qualified trust beneficiaries of the existence of the trust and the identity of the trustee.
  - The trustee may administer the trust in accordance with the settlor's expressed intent regarding nondisclosure to the extent made practicable by the terms of the trust given the circumstances of the beneficiaries and any reporting obligations imposed on the trustee by law other than EPIC.
  - If the trust instrument grants a *nondisclosure correlative right*, the trustee has a duty to administer the trust according to the settlor's expressed intent regarding nondisclosure, but only to the extent made practicable by the terms of the trust given the circumstances of the beneficiaries and any reporting obligations imposed on the trustee by law other than EPIC.
  - Any purported appointment or distribution of assets of the trust to another *undisclosed trust* would be ineffective to the extent it could cause the appointed or distributed assets to be administered continuously under the authority of these provisions for a period ending after the date on which the trust's *maximum nondisclosure period* ends.
- The trustee or any holder of either a nondisclosure correlative right or a *protection power* is not liable to any trust beneficiary because of the trustee's failure to follow the terms of the trust prescribing nondisclosure of prime disclosure information. The trustee's duty, if any, to follow the terms of the trust prescribing nondisclosure during the trust's nondisclosure period is owed solely to the holders, if any, of nondisclosure correlative rights, and the sole remedy of a nondisclosure correlative right holder for the trustee's breach of that duty is removal.

*Prime disclosure information* concerning a trust would mean the fact of the trust's existence, the identity of the trustee, the terms of the trust, or the nature or extent of the trust property.

***Nondisclosure period*** would mean the shorter of the trust's maximum nondisclosure period or the period from the beginning of the maximum nondisclosure period to the trust's termination.

***Nondisclosure correlative right*** would mean a right granted by the terms of a trust that allows the right holder to remove a trustee of the trust for the trustee's failure during the trust's nondisclosure period to follow, to the extent practicable, the terms of the trust prescribing nondisclosure of prime disclosure information.

***Undisclosed trust*** would mean a trust administered under this section during the nondisclosure period.

***Maximum nondisclosure period*** would mean a period of 25 years from the first date on which property becomes subject to the terms of the trust or the date on which the trust ceases to be revocable by the settlor.

***Protection power*** would mean a power granted by the terms of a trust that allows the power holder, acting in a fiduciary capacity, to direct the trustee of the trust for the benefit of the trust beneficiaries during the trust's nondisclosure period. A protection power could authorize the power holder to represent the trust beneficiaries in the sense described in section 7301(1) to (2) of EPIC regarding representation without regard to the application of sections 7302 to 7304 of EPIC.

If the trust instrument granted either a nondisclosure correlative right or a protection power, all of the following would apply:

- On the reasonable request of a nondisclosure correlative right holder or protection power holder at any time during the trust's nondisclosure period, the trustee would be required to promptly furnish to the right or power holder a copy of the terms of the trust that describe or affect the holder's right or power.
- Within 63 days after accepting trusteeship of an undisclosed trust, the trustee would have to notify all nondisclosure correlative right holders and protection power holders of the acceptance, of the court in which the trust is registered, if it is registered, and of the trustee's name, address, and telephone number.
- Within 63 days after the date the trustee acquires knowledge of the creation of an undisclosed trust or the date the trustee acquires knowledge that a formerly revocable trust of which the trustee is trustee has, by becoming irrevocable (whether by the death of the settlor or otherwise), become an undisclosed trust, the trustee would have to notify all nondisclosure correlative right holders and protection power holders of the trust's existence, of the identity of the settlor or settlors, of the court in which the trust is registered, if it is registered, and of the right to request a copy of the terms of the trust that describe or affect the power holders' rights or powers.

On the date the nondisclosure period ends, the trust would cease to be an undisclosed trust and to the extent terms of the trust are inconsistent with the duty to provide beneficiaries with the terms of the trust and information about the trust's property and to notify qualified trust beneficiaries of the existence of the trust and the identity of the trustee, those terms would cease to be effective.

To the extent that the trustee had not already provided the notice of the trust required under the act by the end of the trust's nondisclosure period, the trustee would be considered to have



accepted the trust and to have acquired knowledge of the trust's creation on the date the nondisclosure period ended, and the identities of the qualified trust beneficiaries would be determined for that purpose as of the time immediately before the end of the nondisclosure period.

#### Power of appointment

The bill also would add that, to the extent that there is no conflict of interest between the holder of a ***power of appointment*** and the person represented with respect to a particular question or dispute, the holder of a power of appointment, including a power of appointment in the form of a power of amendment or revocation, may represent and bind a person to the extent the person's interest, as a permissible appointee, taker in default, or otherwise, is subject to the power. For these purposes, both of the following would apply:

- There is no conflict of interest between the holder of a nonfiduciary power of appointment and a person whose interest is subject to the power to the extent the subject interest is liable to be extinguished by an exercise of the power.
- If a power of appointment is subject to a condition precedent other than the death of the holder in the case of a testamentary power, no interest is subject to the power until the condition precedent is satisfied.

***Power of appointment*** would mean a power created or reserved by a person having property subject to his or her disposition that enables the donee of the power to designate, within any limits that may be prescribed, the transferees of the property or the shares or the interests in which it shall be received. Power of appointment could include a power of amendment or revocation, but would not include a power of sale or a power of attorney.

#### Settlor of a trust

Currently under the act, an individual who creates a trust is not considered a settlor with regard to the individual's retained beneficial interest in the trust that follows the termination of the individual's spouse's prior beneficial interest in the trust if certain conditions apply, including that the individual creates, or has created, the trust for the benefit of the individual's spouse and that the trust is treated as qualified terminable interest property. These conditions would be removed. Instead, under the bill, during the lifetime of the individual's spouse, the only distributees or permissible distributees of the trust income or principal would be either of the following:

- The individual's spouse.
- The individual's spouse and either of the following:
  - The individual's issue.
  - The issue of the individual's spouse.

The bill also would add that an individual is not considered a settlor of a trust for the benefit of the individual if the settlor is the individual's spouse, regardless of whether or when the individual was the settlor of a trust for the benefit of that spouse, or to the extent that the property of trust was subject to a general power of appointment in another individual.

Generally under EPIC, a person may commence a judicial proceeding to contest the validity of a trust that was revocable at the settlor's death within certain time frames. The bill would add that if a trust that was revocable at the settlor's death becomes an undisclosed trust, then a person from whom information described in section 7814 (Duty to inform and report) is

withheld under section 7409a (Nondisclosure periods) during the two-year period following the settlor's death may commence a judicial proceeding to contest the validity of the trust within the earlier of the following:

- Two years after the trustee provided the person the information that was withheld from the person during the two-year period following the settlor's death.
- Six months after the trustee sent the person a notice, as currently described in the act.

#### Irrevocable trusts

Currently under the act, an increase in the maximum period during which the vesting of a future interest may be suspended or postponed under applicable law does not constitute a material change in the interest of a beneficiary. The bill would instead provide that if an increase in the maximum period during which the vesting of a future interest may be postponed is due solely to a change of applicable law governing remoteness of vesting, then the increase does not constitute a material change.

Additionally, the act now provides that an increase in compensation arising solely because the duration of the second trust is longer than the duration of the first does not constitute an increase in or a change in the method of determining the compensation of the trustee. The bill would instead provide that an increase in compensation arising solely because *a change of applicable law governing remoteness of vesting makes* the duration of the second trust longer than the duration of the first does not constitute an increase in or a change in the method of determining the compensation of the trustee.

#### Repealer

Finally, the bill would repeal section 7104, as described above, and section 2722, which governs honorary trusts and trusts for pets.

MCL 700.1106 et seq.

#### **FISCAL IMPACT:**

The bill would have an indeterminate fiscal impact on local court funding units. There is not a practical way to determine how court caseloads and the related administrative costs would be affected under provisions of the bill. Also, it is difficult to project the actual fiscal impact to courts due to variables such as judicial discretion, case types, and complexity of cases.

#### **POSITIONS:**

The Probate Section of the State Bar of Michigan indicated support for the bill. (5-17-22)

A representative of Right to Life of Michigan testified in opposition to the bill as written. (5-17-22)

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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations and does not constitute an official statement of legislative intent.