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House Bill 4898 (Substitute H-1 as passed by the House)  
Sponsor: Representative Graham Filler  
House Committee: Judiciary  
Senate Committee: Judiciary and Public Safety

Date Completed: 11-28-22

### **CONTENT**

**The bill would amend the Estates and Protected Individuals Code (EPIC) to do the following:**

- **Prescribe provisions pertaining to notice or knowledge of fact.**
- **Specify that any part of a governing instrument that made a substantial gift to an attorney who drafted the instrument would be void unless the attorney was related to the individual making the substantial gift and specify that any provision in the governing instrument that attempted to waive or otherwise void application of this provision would be unenforceable.**
- **Increase threshold amounts for various assets of a decedent and require those amounts to be adjusted for cost-of-living.**
- **Allow a court to designate one or more standby guardians.**
- **Specify that a standby guardian would not have authority to act unless the guardian was unavailable for any reason.**
- **Specify that various provisions pertaining to guardians for an incapacitated person would apply to the designation of a standby guardian.**
- **Specify that, 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.**
- **Specify that a person providing care, custody, or medical or mental health treatment to a patient would not be required to determine if a patient advocate complied with any of the patient's instructions.**
- **Modify Section 5508 to refer to a "medical professional" instead of a "physician".**
- **Allow a trust to be created to provide for the care of a designated domestic pet or animal alive during the settlor's lifetime.**
- **Prescribe rules governing a trust created for other noncharitable purposes.**
- **Prescribe rules governing trusts with a nondisclosure period.**
- **Modify provisions governing the power of appointment, creditor's claims against settlors, contesting the validity of a revocable trust, and discretionary trust provisions of irrevocable trusts.**

The bill also would repeal Section 2722 (which governs honorary trusts and trusts for domestic or pet animals) and 7104 (which pertains to notice or knowledge of fact) of EPIC.

### Knowledge of Fact

Under the bill, a person would have knowledge of a fact if one or more of the following applied:

- The person had actual knowledge of it.
- The person had received a notice or notification of it.
- From all the facts and circumstances known to the person at the time in question, the person had reason to know it.

An organization that conducted activities through employees would have notice or knowledge of a fact only from the time the information was received by an employee having responsibility to act or from the time the information would have been brought to the employee's attention if the organization had exercised reasonable diligence. An organization would exercise reasonable diligence if it maintained reasonable routines for communicating significant information to the employee having responsibility to act and there was reasonable compliance with the routines. Reasonable diligence would not require an employee of the organization to communicate information unless the communication was part of the individual's regular duties or the individual knew a matter that would be materially affected by the information.

### Substantial Gift to Attorney

Under the bill, any part of a governing instrument that directly or indirectly made a substantial gift to an attorney who drafted the instrument or a person related to the attorney who drafted it would be void unless the attorney who drafted the governing instrument or the person related to the attorney who drafted it 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, a 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.

"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 or executed, or both.
- The individual directly or indirectly prepared or supervised the preparation, execution, or both, of the governing instrument.

Among other ways, the individual would be considered to have prepared, or supervised the execution of, the governing instrument if the preparation, or supervision of the execution, of the governing 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 or execution, or both.

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

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

If a purchaser or lender for value acquired property distributed in kind or a security interest in property from a person that had received a substantial gift pursuant to a part of a governing instrument that was void, the purchaser or lender would take title free of any claims arising under, and would incur no personal liability by reason of, this provision. These provisions would not directly or indirectly impose liability on a person that honored or relied on a part of a governing instrument that was void and that contained or effectuated a substantial gift, unless the person had knowledge that the part of the governing instrument was void.

If a part of a governing instrument were void, the part that was void would be severable and would not affect any other part of the governing instrument that could be given effect, including a term that would make an alternate or substitute gift. If the part of the governing instrument that were void could not be severed, the entire governing instrument would be void. For a power of appointment, this provision would not affect the power to appoint in favor of persons other than the attorney who drafted the governing instrument or a person related to the attorney who drafted the governing instrument. "Power of appointment" would mean that term as defined in Section 2 of the Powers of Appointment Act: 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. The term may include a power of amendment or revocation but does not include a power of sale or a power of attorney.

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

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

These provisions would apply only to a governing instrument executed after the bill's effective date.

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 governing instrument, the person was any of the following:

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

### Cost-of-Living Adjustment

Under the bill, before January 1, 2023, the specific amounts stated in Sections 2519, 3605, 3916, 3917, 3918, 3981, 3982, and 5102 apply to those sections. Beginning January 1, 2023,

those specific amounts would have to be multiplied by the cost-of-living adjustment factor for the calendar year in which the decedent died.

Valid Statutory Will. Section 2519 prescribes the valid form of a statutory will under Michigan law. Under Section 2519, a personal representative may distribute estate assets otherwise distributable to a minor beneficiary to the minor's conservator or, in amounts not exceeding \$5,000 per year, either to the minor, if married; to a parent or another adult with whom the minor resides or who has the care, custody, or control of the minor; or to the guardian.

The bill would increase, from \$5,000 to \$25,000, the amount described above. The amount would have to be adjusted for cost-of-living as provided in the bill.

Demand for Bond by Interested Person. Under Section 3605, a person apparently having an interest in an estate worth in excess of \$2,500 or a creditor having a claim against the estate in excess of \$2,500 may make a written demand that a personal representative give bond.

The bill would increase, from \$2,500 to 25,000, the minimum estate worth described above. The dollar amount would have to be adjusted for cost-of-living as provided in the bill.

Disposition of Unclaimed Assets. Under Section 3916, in exchange for suitable receipts and following a court order if the administration is supervised, a fiduciary making final distribution must deposit with the county treasurer the money or personal property the fiduciary has that belongs to any of the following:

- An heir, devisee, trust beneficiary, or claimant whose whereabouts the fiduciary cannot ascertain after diligent inquiry.
- An heir, devisee, trust beneficiary, or claimant who declines to accept the money awarded to the person.
- A person if the right of the person is the subject of appeal from an order of the court.

As an alternative to deposit with the county treasurer, if the amount involved for an heir, devisee, trust beneficiary, or claimant whose whereabouts the fiduciary cannot ascertain after diligent inquiry or an heir, devisee, trust beneficiary, or claimant who declines to accept the money awarded to the person is \$250 or less, the fiduciary may distribute the amount as part of the residue of the decedent's estate or to those entitled to the trust fund balance.

The bill would increase, from \$250 to \$1,000, the amount described above. The dollar amount would have to be adjusted for cost-of-living as provided in the bill.

Duties of a County Treasurer. Section 3917 requires a county treasurer to receive and safely keep money deposited under authority of EPIC in a separate fund and keep a separate account for each distributee or claim.

For the care of the money received under authority of EPIC, the county treasurer may take 1.0% from the different amounts paid out under court order unless the amount paid out to a single individual exceeds \$1,000, in which case the county treasurer must take \$10 plus 0.5% of the excess of the amount over \$1,000.

Instead, under the bill, for the care of the money received under authority of EPIC, the county treasurer could take 1.0% from the different amounts paid out under court order unless the amount paid out to a single individual exceeded \$1,500, in which case the county treasurer would have to take \$15 plus 0.5% of the excess of the amount over \$1,500.

The dollar amount would have to be adjusted for cost-of-living as provided in the bill.

Distribution to Person Under Disability. Under Section 3918, if an heir or devisee is under legal disability other than minority, a personal representative is authorized to distribute to any of the following:

- A trustee appointed by the court.
- An attorney in fact who has authority under a power of attorney to receive property for that individual.
- The spouse, parent, or other close relative with whom the individual under legal disability resides if a conservator has not been appointed for the individual and the distribution is in amounts not exceeding \$5,000 a year or property not exceeding \$5,000 in value, unless the court authorizes a higher amount or value.

The bill would increase, from \$5,000 to \$25,000, the amount described above. The dollar amount would have to be adjusted for cost-of-living as provided in the bill.

Subsequent Administration. Under Section 3959, if estate property is discovered after an estate is settled and either the personal representative is discharged or one year has expired after a closing statement is filed, or if there is other good cause to reopen a previously administered estate, including an estate administratively closed, upon petition of an interested person and notice as the court directs, the court may appoint the same or a successor personal representative to administer the subsequently discovered estate.

Instead, under the bill, a court may reopen an estate if either of the following applied:

- Estate property is discovered after an estate is settled and either the personal representative is discharged or one year has expired after a closing statement is filed.
- There is other good cause to reopen a previously administered estate, including an estate administratively closed, upon petition of an interested person and notice as the court directs.

The court could appoint the same or a successor personal representative to administer the subsequently discovered estate.

Delivery of Cash Not Exceeding \$500. Section 3981 specifies that a hospital, convalescent or nursing home, morgue, or law enforcement agency holding \$500 or less and wearing apparel of a decedent may deliver the money and wearing apparel to an individual furnishing identification and a sworn statement that the individual is the decedent's spouse, child, or parent and that there is no application or petition pending for administration of the decedent's estate.

The bill would increase, from \$500 to \$1,000, the amount described above. The dollar amount would have to be adjusted for cost-of-living as provided in the bill.

Court Order Distributing Small Estates. Under Section 3982, on a showing of evidence, satisfactory to the court, of payment of the expenses for the decedent's funeral and burial and if the balance of a decedent's gross estate consists of property of the value of \$15,000 or less, the court may order that the property be turned over to the surviving spouse or, if there is not a spouse, to the decedent's heirs.

On a showing of evidence, satisfactory to the court, that the decedent's funeral or burial expenses are unpaid or were paid by a person other than the estate, and if the balance of the gross estate after payment of the expenses would consist of property of the value of \$15,000 or less, the court must order that the property be first used to pay the unpaid funeral and burial expenses, or to reimburse the person that paid those expenses, and may order that

the balance be turned over to the surviving spouse or, if there is not a spouse, to the decedent's heirs.

The bill would increase, from \$15,000 to \$25,000 the amounts described above. The dollar amounts would have to be adjusted for cost-of-living as provided in the bill.

Collection of Personal Property by Sworn Statement. Section 3983 specifies that 28 days after a decedent's death, a person indebted to the decedent or having possession of tangible personal property or an instrument evidencing a debt, obligation, stock, or chose in action belonging to the decedent must pay the indebtedness or deliver the tangible personal property or the instrument to a person claiming to be the decedent's successor upon being presented with the decedent's death certificate and a sworn statement made by or on behalf of the successor stating all of the following:

- Twenty-eight days have elapsed since the decedent's death.
- An application or petition for the appointment of a personal representative is not pending or has not been granted in any jurisdiction.
- The claiming successor is entitled to payment or delivery of the property.
- The name and address of each other person that is entitled to a share of the property and the portion to which each is entitled.
- The estate does not include real property and the value of the entire estate, wherever located, net of liens and encumbrances, does not exceed \$15,000, adjusted for cost-of-living.

The bill would increase, from \$15,000 to \$25,000, the value threshold described above.

Payment or Delivery of Money or Property to a Minor. Section 5102 allows a person under a duty to pay or deliver money or personal property to a minor to perform this duty by paying or delivering the money or property, in an aggregate value that does not exceed \$5,000 each year, to any of the following:

- The minor if he or she is married.
- An individual having the care and custody of the minor with whom the minor resides.
- A guardian of the minor.
- A financial institution incident to a deposit in a state or federally insured savings account in the sole name of the minor with notice of the deposit to the minor.

The bill would increase, from \$5,000 to \$25,000, the aggregate value described above. The dollar amount would have to be adjusted for cost-of-living as provide in the bill.

### Standby Guardians

Designation of a Standby Guardian. The bill would add Section 5301c to EPIC to allow a court to designate one or more standby guardians at a hearing convened under Part 3 (Guardians of Incapacitated Individuals) of Article V (Protection of an Individual Under Disability and His or Her Property). The court could designate as standby guardian a competent person that is suitable and willing to serve in the order of priority under Section 5313.

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.

A standby guardian would have to file an acceptance of the person's designation within 28 days after receiving notice of the order designating the standby guardian.

If the standby guardian were unable or unwilling to serve, the standby guardian promptly would have to notify the court and interested parties in writing.

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

- The guardian died.
- The guardian was permanently or temporarily unavailable.
- The court removed or suspended the guardian.

During an emergency affecting the legally incapacitated individual's welfare when the guardian was unavailable, the standby guardian could assume the powers and duties of the guardian temporarily. A person could rely on the standby guardian's representation that the standby guardian had the authority to act if the person were given the order establishing or modifying guardianship and acceptance was filed. A person that acted in reliance on the representations and documentation described in this provision without knowledge that the representations were 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.

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

On assuming office, the standby guardian promptly would have to notify the court, any known agent appointed under a power of attorney executed under Section 5103, and interested persons. On receiving notice, the court could enter an order appointing a standby guardian as guardian without the need for additional proceedings. The appointed guardian would have to serve the court's order on the interested persons.

Appointment of a Guardian for an Incapacitated Person by Will or Other Writing. Under Section 5301, if serving as guardian, the parent of an unmarried legally incapacitated individual or the spouse of a married legally incapacitated individual, as applicable, may appoint by will, or other writing signed by the parent and attested by at least two witnesses, a guardian for the legally incapacitated individual. If both parents are dead or the surviving parent is adjudged legally incapacitated, a parental appointment becomes effective when, after having given seven days' prior written notice of intention to do so to the legally incapacitated individual and to the person having the care of the legally incapacitated individual or to the nearest adult relative, the guardian files acceptance of appointment in the court in which the will containing the nomination is probated or, if the nomination is contained in a nontestamentary nominating instrument or the testator who made the nomination is not deceased, when the guardian's acceptance is filed in the court at the place where the legally incapacitated individual resides or is present.

Under the bill, these provisions would apply if no standby guardian had been appointed.

Court Appointment of a Guardian for an Incapacitated Person. Section 5303 allows an individual in his or her own behalf, or any person interested in the individual's welfare, to petition for a finding of incapacity and appointment of a guardian.

Under the bill, the individual or person interested in the individual's welfare also could petition for designation of a standby guardian.

An individual alleged to be incapacitated would be entitled to be present at the hearing to appoint a guardian or designate a standby guardian in person.

Guardian Ad Litem, Duties. Section 5305 prescribes the duties of a guardian ad litem appointed for an individual alleged to be incapacitated.

Under the bill, those duties would include explaining to the individual the hearing procedure and the individual's rights in the hearing procedure, including the right to object to a particular person's designation as standby guardian; informing the individual of the name of each person known to be seeking designation as a standby guardian; and making determinations, and informing the court of those determination on whether the individual objected to a particular person being designated a standby guardian.

If the individual alleged to be incapacitated wished to contest the petition, to have limits placed on the guardian's powers, or to object to a particular person being designated as standby guardian and if legal counsel had not been secured, the court would have to appoint legal counsel to represent the individual alleged to be incapacitated.

Rights of an Individual for Whom a Guardian is Sought or Appointed. Section 5306a prescribes the rights of an individual for whom a guardian is sought or appointed.

Under the bill, the rights prescribed in Section 5306a also would apply to the designation of a standby guardian.

Resignation or Removal of a Guardian. Under Section 5310, on petition of a guardian and subject to the filing and approval of a report prepared as required by Section 5314, a court must accept the guardian's resignation and make any other order that is appropriate.

The ward or a person interested in the ward's welfare may petition for an order removing the guardian, appointing a successor guardian, modifying the guardianship's terms, or terminating the guardianship. Instead, under the bill, the ward, a person appointed guardian in a will or other writing by a parent or spouse, or any other person interested in the ward's welfare could petition for an order removing the guardian, changing the designated standby guardian, appointed a successor guardian, modifying the guardianship's terms, or terminating the guardianship. If a request were made by the person appointed by will or other writing, person also would have to present proof of the person's appointment by will or other writing.

Also, the court could send a visitor to the present guardian's residence and to the place where the ward resided or was detained to observe conditions and report in writing to the court before changing the designated standby guardian.

Appointment or Removal of a Guardian, Notice of Hearing. Under Section 5311, in a proceeding for the appointment or removal of an incapacitated individual's guardian, other than the appointment of a temporary guardian or temporary suspension of a guardian, notice of hearing must be given to each of the following:

- The ward or the individual alleged to be incapacitated and that individual's spouse, parents, and adult children.
- A person who is serving as the guardian or conservator or who has the individual's care and custody.
- If known, a person named as attorney in fact under a durable power of attorney.
- If no other person is notified, at least one of the individual's closest adult relatives, if any can be found.

Instead, under the bill, in a proceeding for the appointment or removal of an incapacitated individual's guardian, other than the appointment of a temporary guardian or temporary



suspension of a guardian, or to designate a standby guardian or change the designated standby guardian, notice of hearing would have to be given to each of the following:

- The ward or the individual alleged to be incapacitated and that individual's spouse, parents, and adult children.
- A person who was serving as the guardian or conservator or who had the individual's care and custody.
- If known, a person named as attorney in fact under a durable power of attorney.
- The standby guardian or the person nominated to be designated as standby guardian.
- If no other person were notified, at least one of the individual's closest adult relatives, if any could be found.

Section 5311 specifies that in a proceeding for a guardian's appointment, a copy of the petition must be attached to the hearing notice, and the notice to the alleged incapacitated individual must contain the nature, purpose, and legal effects of the appointment of a guardian and the alleged incapacitated individual's rights in the proceeding, including the right to appointed legal counsel.

Under the bill, this provision also would apply to a proceeding for the designation of a standby guardian, and the notice would have to contain the nature, purpose, and legal effects of the designation of a standby guardian.

Order of Priority for Appointment as a Guardian. Section 5313 allows a court to appoint a competent person as guardian of a legally incapacitated individual. In appointing a guardian, the court must appoint a person, if suitable and willing to serve, in the following order of priority:

- A person previously appointed, qualified, and serving in good standing as guardian for the legally incapacitated individual in another state.
- A person the individual subject to the petition chooses to serve as guardian.
- A person nominated as guardian in a durable power of attorney or other writing by the individual subject to the petition.
- A person named by the individual as a patient advocate or attorney in fact in a durable power of attorney.

Instead, under the bill, the court would have to appoint a person, if suitable and willing to serve, in the following order of priority:

- A person previously appointed, qualified, and serving in good standing as guardian for the legally incapacitated individual in *Michigan* or another state.
- A person the individual subject to the petition chose to serve as guardian.
- A person nominated as guardian in a durable power of attorney or other writing by the individual subject to the petition.
- A person named by the individual as a patient advocate or attorney in fact in a durable power of attorney.
- A person appointed by a parent or spouse of a legally incapacitated individual by will or other writing.

Powers & Duties of a Guardian. Section 5314 prescribes the powers and duties of a guardian, which include the duty to report the condition of the ward and the ward's estate that is subject to the guardian's possession or control, as required by the court, but not less often than annually. The guardian also must serve the report on the ward and interested people as specified in the Michigan Court Rules. A report under this subdivision must contain certain prescribed information.

Under the bill, the report also would have to include, if a standby guardian had been designated, a statement signed by a standby guardian that the standby guardian continued to be willing to serve in the event of the unavailability, death, incapacity, or resignation of the guardian.

### Patient Advocates

Designation of a Patient Advocate. Under Section 5506, an individual 18 years of age or older who is of sound mind at the time a patient advocate designation is made may designate in writing another individual who is 18 years of age or older to exercise powers concerning care, custody, and medical or mental health treatment decisions for the individual making the patient advocate designation.

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.

A patient advocate designation also could include the patient's instructions about how the patient advocate would have to make decisions.

Liability of Provider. Under the bill, a person providing care, custody, or medical or mental health treatment to a patient would not be required to determine if a patient advocate complied with any of the patient's instructions. A person providing care, custody, or medical or mental health treatment to a patient would not be liable if the patient advocate failed to comply with any of the patient's instructions about how the patient advocate would have to make decisions.

Determination of an Advocate's Authority to Act. Under Section 5508, except as otherwise provided, the authority under a patient advocate designation is exercisable by a patient advocate only when the patient is unable to participate in medical treatment or, as applicable, mental health treatment decisions. The patient's attending physician and another physician or licensed psychologist must determine upon examination of the patient whether the patient is unable to participate in medical treatment decisions, must put the determination in writing, must make the determination part of the patient's medical record, and must review the determination at least annually.

The bill would refer to a "medical professional" instead of a physician in Section 5508. "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 who is licensed to practice medicine or osteopathic medicine and surgery.
- A licensed physician's assistant.
- A certified nurse practitioner.

### Trusts

Duties & Powers of a Trustee. Under Section 7105, the terms of a trust prevail over any provision of Article 7 (Michigan Trust Code) of EPIC, except under certain listed circumstances.

The bill would add to this list the duration limits specified in all of the following:

- Section 7408 for the care of animals.
- Section 7409 for other noncharitable purpose trusts.

-- Section 7409a for nondisclosure periods.

Trust Created to Provide for the Care of a Domestic Pet or Animal. The bill would add Section 7408 to EPIC to allow a trust to be created to provide for the care of a designated domestic pet or animal alive during the settlor's lifetime. A trust created under this provision would terminate on the death of the animal or, if the trust were created to provide for the care of more than one domestic or pet animal alive during the settlor's lifetime, on the death of the last surviving animal.

A trust authorized to provide for the care of designated domestic pet or animal could be enforced by a person appointed in the terms of the trust or, if there were not a person appointed in the terms of the trust, by a person appointed by the court. A person that had an interest in the welfare of an animal for which the trust was 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 a trust authorized by Section 7408 could be applied only to its intended use, except to the extent the court determined that the value of the trust property exceeded 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.

Trust Created for Other Noncharitable Purposes. The bill would add Section 7409 to EPIC, under which the following rules would apply, except as otherwise provided in Section 7408 or any other law:

- A trust could 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; a trust created under Section 7409 could be performed by the trustee according to the terms of the trust for up to 25 years whether or not the terms of the trust contemplated a longer duration.
- A trust authorized by Section 7409 could be enforced by a person appointed in the terms of the trust or, if there were not a person appointed in the terms of the trust, by a person appointed by the court.
- Property of a trust authorized by Section 7409 could be applied only to its intended use, except to the extent the court determines that the value of the trust property exceeded 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 Period. The bill would add Section 7409a to EPIC, which specifies that if the terms of a trust other than a charitable trust were embodied in a trust instrument that clearly expressed the settlor's intent that one or more items of prime disclosure information should be withheld, generally or in specified circumstances, from one or more of the trust beneficiaries, the trustee or any holder of either a nondisclosure correlative right or a protection power would not be 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 of prime disclosure information during the trust's nondisclosure period would be 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 was removal.

The Code defines "charitable trust" as a trust, or portion of a trust, created for a charitable purpose described in Section 7405(1). Under the bill, this definition would apply if the charitable purpose were a material purpose of the trust.

The bill would define "protection power" as 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 Sections 7301(1) and 7301(2) without regard to the application of Sections 7302 to 7304 (which, collectively, prescribe rules regarding representation). (Section 7301(1) specifies that notice to a person who may represent and bind another person under Part 3 (Representation) of Article VII (Michigan Trust Code) has the same effect as if notice were given directly to the other person. Under Section 7301(2), the consent of a person who may represent and bind another person under Part 3 is binding on the person represented unless the person represented objects to the representation before the consent would otherwise have become effective.)

"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 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. "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.

During the nondisclosure period all of the following would apply:

- To the extent necessary to effectuate the settlor's expressed intent, the trustee would 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 could administer the trust in accordance with the settlor's expressed intent regarding nondisclosure of primary disclosure information 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 the Code.
- If the trust instrument granted a nondisclosure correlative right, the trustee would have a duty to administer the trust in accordance with the settlor's expressed intent regarding nondisclosure of primary disclosure information, 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 the Code.
- Any purported appointment or distribution of assets of the instant 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 Section 7409a for a period ending after the date on which the instant trust's maximum nondisclosure period ended.

"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 later of 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.

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 promptly would have to 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 was registered, if it were registered, and of the trustee's name, address, and telephone number.
- Within 63 days after the date the trustee acquired knowledge of the creation of an undisclosed trust of which the trustee is trustee or the date the trustee acquired knowledge that a formerly revocable trust of which the trustee was trustee had, 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 was registered, if it were registered, and of the right to request a copy of the terms of the trust that described or affected the power holders' rights or powers.

On the date on which the nondisclosure period ends, the trust would cease to be an undisclosed trust and to the extent terms of the trust were 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 the trustee had not already provided the notice of the trust required by the end of the trust's nondisclosure period, the trustee would be deemed for that purpose to have accepted the trust and to have acquired knowledge of the trust's creation on the date on which the nondisclosure period ended, and the identities of the qualified trust beneficiaries were determined for that purpose as of the time immediately preceding the end of the nondisclosure period.

Also, under the bill, during the nondisclosure period of a trust, a person granted a nondisclosure correlative right or protection power over the trust would have the rights of a qualified trust beneficiary.

Currently, "qualified trust beneficiary" means a trust beneficiary to whom one or more of the following apply on the date the trust beneficiary's qualification is determined:

- The trust beneficiary is a distributee or permissible distributee of trust income or principal.
- The trust beneficiary would be a distributee or permissible distributee of trust income or principal if the interests of the distributees under the trust terminated on that date without causing the trust to terminate.
- The trust beneficiary would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.

Instead, under the bill, qualified trust beneficiary would mean a trust beneficiary whom the settlor intends to benefit as a material purpose of the trust and to whom one or more of the following apply on the date the trust beneficiary's qualification is determined:

- The trust beneficiary is a distributee or permissible distributee of trust income or principal.
- The trust beneficiary would be a distributee or permissible distributee of trust income or principal if the interests of the distributees under the trust terminated on that date without causing the trust to terminate.
- The trust beneficiary would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.

The term also would mean a trust beneficiary to whom one or more of the following apply on the date the trust beneficiary's qualification is determined, if on the date a trust beneficiary's qualification is determined there is no trust beneficiary described above:

- The trust beneficiary is a distributee or permissible distributee of trust income or principal.
- The trust beneficiary would be a distributee or permissible distributee of trust income or principal if the interests of the distributees under the trust terminated on that date without causing the trust to terminate.
- The trust beneficiary would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.

Power of Appointment. Under Section 7302, the holder of a power of revocation or amendment or a presently exercisable or testamentary general or special power of appointment may represent and bind a person whose interest, as a permissible appointee, taker in default, or otherwise, is subject to the power.

Instead, under the bill, to the extent there was 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, could represent and bind a person to the extent the person's interest, as permissible appointed, taker in default, or otherwise, would be subject to the power.

For purposes of the provision described above, both of the following would apply:

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

"Nonfiduciary" would mean, with respect to a power of appointment, that the power is not held in a fiduciary capacity.

Creditor's Claim Against Settlor. Under Section 7506, 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 all of the following apply:

- The individual creates, or has created, the trust for the benefit of the individual's spouse.
- The trust is treated as qualified terminable interest property.
- The individual retains a beneficial interest in the trust income, trust principal, or both, which beneficial interest follows the termination of the individual's spouse's prior beneficial interest in the trust.

Instead, under the bill, an individual who created a trust would not be considered a settlor with regard to the individual's retained beneficial interest in the trust that followed the termination of the individual's spouse's prior beneficial interest in the trust if all of the following applied:

- During the lifetime of the individual's spouse, the only distributees or permissible distributees of the trust income or principal would be either the individual's spouse or the individual's spouse and either the individual's issue or the issue of the individual's spouse.

- The individual retained a beneficial interest in the trust income, trust principal, or both, which beneficial interest follows the termination of the individual's spouse's prior beneficial interest in the trust.

An individual would not be considered a settlor of a trust for the benefit of the individual:

- If the settlor were the individual's spouse, regardless of whether or when the individual was the settlor of a trust for the benefit of that spouse.
- To the extent that the property of trust was subject to a general power of appointment in another individual.

Contesting the Validity of a Revocable Trust. Section 7604 allows a person to commence a judicial proceeding to contest the validity of a trust that was revocable at the settlor's death within the earlier of the following:

- Two years after the settlor's death.
- Six months after the trustee sent the person a notice information the person of the trust's existence, the date of the trust instrument, the date of any amendments known to the trustee, a copy of relevant portions of the terms of the trust that describe or affect the person's interest in the trust, if any, the settlor's name, the trustee's name and address, and the time allowed for commencing a proceeding.

Under the bill, if a trust that was revocable at the settlor's death became an undisclosed trust as that term is defined in Section 7409a, a person from whom information described in Sections 7814(2)(a) to (c) is withheld to the extent necessary to effectuate the settlor's expressed interest during the two-year period following the settlor's death could 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 described above.

(Sections 7814(2)(a) to (c) require a trustee to do all of the following:

- Upon the reasonable request of a trust beneficiary, promptly furnish to the trust beneficiary a copy of the terms of the trust that describe or affect the trust beneficiary's interest and relevant information about the trust property.
- Within 63 days after accepting a trusteeship, notify the qualified trust beneficiaries 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 irrevocable trust, or the date the trustee acquires knowledge that a formerly revocable trust has become irrevocable, whether by the death of the settlor or otherwise, notify the qualified trust beneficiaries 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 trust beneficiary's interests.)

Irrevocable Trusts, Discretionary Trust Provision. Under Section 7820a, if an irrevocable trust includes a discretionary trust provision, the trustee of the trust may, unless the terms of the first trust expressly provide otherwise, distribute by written instrument all or part of the property subject to that provision to the trustee of a second trust, provided that certain conditions are satisfied.

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. An increase in compensation arising solely because the duration of the second trust is longer than the duration of the first trust does not constitute an increase in or a change in the method of determining the compensation of the trustee.

Instead, under the bill, if an increase in the maximum period during which the vesting of a future interest could be postponed were solely due to a change of applicable law governing remoteness of vesting, the increase would not constitute a material change in the interest of a beneficiary. An increase in compensation arising solely because a change of applicable law governing remoteness of vesting made the duration of the second trust longer than the duration of the first trust would not constitute an increase in or a change in the method of determining the compensation of the trustee.

MCL 700.1106 et al.

Legislative Analyst: Stephen P. Jackson

### **FISCAL IMPACT**

The bill would have no fiscal impact on State government. Any fiscal impact on local court systems would be related to the addition of hearings for standby guardians. There also could be a small, negative fiscal impact related to the time a probate judge, or staff, would need to become familiar with the proposed changes in EPIC, the majority of which concern updating EPIC to account for cost-of-living and inflation since the Code's original enactment in 1998.

Fiscal Analyst: Michael Siracuse

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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.