



Senate Fiscal Agency
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BILL ANALYSIS



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Senate Bill 490 (as reported without amendment)
Sponsor: Senator William Van Regenmorter
Committee: Judiciary

Date Completed: 9-15-95

RATIONALE

The Probate and Estate Planning Section of the State Bar has suggested a couple of changes to the Revised Probate Code pertaining to estates. The first concerns actions taken by someone acting under a power of attorney after the death of the person who created the power. Under the law, a person (the "principal") may create a power of attorney authorizing another person (the "attorney in fact") to act on the principal's behalf. Traditionally, a power of attorney does not survive the principal's incapacity or incompetence, but the Revised Probate Code permits the creation of a "durable" power of attorney that takes effect or continues in effect when the principal becomes incapacitated or incompetent. The Code further provides that the death, disability, or incompetence of a principal does not revoke the agency of an attorney in fact who, without actual knowledge of the death, disability, or incompetence of the principal, acts in good faith under the power of attorney; any such action is binding on the principal and his or her heirs. Apparently, this provision has been construed to apply only to nondurable powers of attorney, and actions taken by an attorney in fact under a durable power of attorney, after the principal's death, are not considered binding on the principal's estate.

The second issue concerns the obligation of a personal representative to notify creditors of the estate. Currently, the Code requires a personal representative to publish a notice notifying creditors to present their claims within four months after the date of publication, as well as send a notice to any creditor who is known to the personal representative. A creditor is considered known if the personal representative is aware that the personal representative has demanded payment from the decedent or the decedent's estate. In effect, creditors are obligated to demand payment before they are entitled to actual notice. According to the State Bar section, this probably would not satisfy the constitutional requirements set forth by

the U.S. Supreme Court. In 1988, the Court held that due process requires actual notice to "known or reasonably ascertainable creditors" (*Tulsa Professional Collection Services v Pope*, 108 S.Ct. 1340).

CONTENT

The bill would amend the Revised Probate Code to provide that the actions of a person acting under a durable or nondurable power of attorney would bind the principal and his or her heirs and personal representative, if the person acted without actual knowledge of the principal's death. The bill also would revise provisions pertaining to claims against a decedent's estate, including requiring a personal representative to send notice to a creditor of whom the personal representative had actual notice or whose existence was reasonably ascertainable by the personal representative.

The Code provides that the death, disability, or incompetence of a principal who has executed a power of attorney in writing does not revoke or terminate the agency of the attorney in fact or other person who, without actual knowledge of the principal's death, disability, or incompetence, acts in good faith. The bill provides, instead, that the death of a principal who had executed a power of attorney, durable or otherwise, would not revoke or terminate the agency of the attorney in fact or other person who acted in good faith without actual knowledge of the principal's death. The bill also specifies that the disability or incompetence of a principal would not revoke the agency of the attorney in fact or other person who acted in good faith without actual knowledge of the disability or incompetence. As current law provides, an action so taken would bind the principal and his or her heirs, devisees, and personal representative.

Under the Code, unless notice already has been given, a personal representative must publish a notice notifying creditors of the estate to present their claims within four months after the date of the publication. The personal representative also must send a notice to any creditor who is known to the personal representative. For purposes of the notice provision, a personal representative has knowledge of a creditor if he or she is aware that the creditor has demanded payment from the decedent or the decedent's estate. The bill, instead, provides that a creditor of the decedent would be known to the personal representative if he or she had actual notice of the creditor or the existence of the creditor were reasonably ascertainable by the personal representative. The bill also would delete a provision that the Code does not impose a duty on the personal representative or his or her attorney to conduct a search for creditors of the estate.

The Code provides that claims against an estate are barred unless presented within specified time limits. The Code also states that this does not affect or prevent collection of compensation for services rendered and reimbursement of expenses advanced by the personal representative or by the attorney or accountant for the representative. The bill would refer, instead, to compensation for services rendered and expenses advanced by the personal representative or by an attorney, auditor, investment adviser, or other specialized agent or assistant for the representative.

In addition, the Code requires that the personal representative give to all interested persons a copy of any claim made by him or her against the estate within seven days after the time for original presentation of the claim has expired. The bill would require that a personal representative's claim contain a warning that the claim would be allowed unless a notice of objection were delivered or mailed to the representative within 63 days after the time for original presentation of the claim had expired. This requirement would not apply, however, to a claim for collection of compensation for services rendered or for reimbursement of expenses advanced by the representative.

MCL 700.497 et al.

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

The bill would implement two changes recommended by the Probate and Estate Planning Section of the State Bar. First, the bill would make it clear that an action taken by an attorney in fact under a durable power of attorney, without knowledge of the principal's death, was binding on the principal's estate. While this provision already applies to nondurable powers of attorney, it apparently does not apply to durable powers. The bill would remove this inconsistency from the law.

In addition, the bill would make the Revised Probate Code's notice requirements consistent with the constitutional due process requirements set forth by the U.S. Supreme Court. Currently, the Code requires a creditor to demand payment before the estate has an obligation to give notice. The bill would require that personal representatives send notice to known or reasonably ascertainable creditors. As the Court pointed out, "...a requirement of actual notice to known or reasonably ascertainable creditors is not so cumbersome as to unduly hinder the dispatch with which probate proceedings are conducted." The Court also indicated that a personal representative needs to make reasonably diligent efforts to uncover the identities of creditors. For creditors who are not reasonably ascertainable, publication notice will suffice; notice by mail is sufficient for known or reasonably ascertainable creditors.

Legislative Analyst: S. Margules

FISCAL IMPACT

The bill would have no fiscal impact on State or local government.

Fiscal Analyst: M. Bain

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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.