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BILL



ANALYSIS

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Senate Bill 1059 (Substitute S-2 as passed by the Senate)
Sponsor: Senator William Van Regenmorter
Committee: Judiciary

Date Completed: 10-14-96

RATIONALE

Michigan's Revised Probate Code (RPC) governs matters pertaining to the settlement of the estates of deceased persons. Enacted in 1978, the Code replaced a 1939 law that was considered extremely vague and unnecessarily complex. Although the RPC was viewed as a major overhaul at the time, many people now believe that a complete reorganization of the law is called for. Approximately eight years ago, the Council of the Probate and Estate Planning Section of the State Bar began a review of the entire RPC.

Among the 1978 revisions was the introduction of independent probate as an alternative to supervised administration, in which the judge oversees most matters. The independent probate process allows a personal representative to administer an estate with a minimum of court involvement. Independent probate is considered a streamlined, accessible procedure that saves costs and expedites the closing of an estate. At any time during an independent probate proceeding, a party may petition for supervision of all or part of the administration of the estate. Judges do not have the authority, however, to initiate formal proceedings, or to determine the degree of supervision that is needed in a particular case. The Council of the Probate and Estate Planning Section has recommended the continuation of independent probate as well as the establishment of formal and new supervised proceedings, which would allow the parties and the court to determine the appropriate level of court supervision.

In addition, according to the Council, contemporary estate planning techniques rely heavily on the use of revocable trusts, rather than wills. The RPC, however, primarily addresses wills. It has been suggested that the statute also should include detailed provisions governing the administration of trusts and the powers of trustees.

Another contemporary problem involves real estate that is or may be contaminated. Apparently, in some cases, concerns about environmental hazards might deter a person from accepting the position of personal representative or delay the settlement of an estate.

The Council of the Probate and Estate Planning Section has suggested a number of changes that would address these and other concerns.

CONTENT

The bill would create the "Estate Settlement Act" and repeal the Revised Probate Code (MCL 700.1-700.993). The proposed Estate Settlement Act (ESA) would, among other things, do the following:

- **Establish the "Michigan prudent investor rule" for fiduciaries.**
- **Provide that specific dollar amounts applicable to beneficiaries would be subject to cost-of-living adjustments in future years.**
- **Provide for three methods of probating an estate: informal probate, formal probate, and supervised administration.**
- **Permit a personal representative to exclude contaminated real estate from the scope of his or her responsibility.**
- **Specify procedures for dealing with property and debts of nonresident decedents.**
- **Specify the duties, liabilities, and powers of trustees.**
- **Repeal various laws that provide for a widow's right to dower.**

The ESA would take effect on September 1, 1997. The following is a brief overview of the bill.

Article I - Definitions, General Provisions, and Jurisdiction of the Court

This article would retain the exclusive legal and equitable jurisdiction of the probate court over estate settlement matters. Under the ESA, the probate court also would have exclusive jurisdiction to settle the accounts of all fiduciaries. (Under the RPC, this jurisdiction is concurrent with the circuit court for the accounts of some trustees.)

Article I provides that the specific dollar amounts stated in various sections of the ESA would apply to decedents who died before January 1, 1999. For decedents dying on or after that date, the specific dollar amounts would have to be adjusted by a cost-of-living factor according to a list published by the Department of Treasury. (The dollar amounts pertain to the intestate share of a surviving spouse, the homestead allowance, the exempt property allowance, the family allowance, and small estate value.)

The proposed Michigan prudent investor rule states, "A fiduciary shall invest and manage assets held in a fiduciary capacity as a prudent investor would, taking into account the purposes, terms, distribution requirements expressed in the governing instrument, and other circumstances of the fiduciary estate. To satisfy this standard, the fiduciary must exercise reasonable care, skill, and caution." The rule could be expanded, restricted, eliminated, or otherwise altered by the governing instrument (e.g., a deed, will, trust, insurance or annuity policy, security registered in beneficiary form, pension or retirement plan, or instrument creating a power of appointment or power of attorney). ("Fiduciary" would include a personal representative, guardian, conservator, trustee, plenary guardian or partial guardian appointed under the Mental Health Code, and successor fiduciary.)

Article II - Intestacy, Wills, and Donative Transfers

Under the RPC, a surviving spouse and minor children are entitled to a homestead allowance, an exempt property allowance, and a family allowance, which have priority over other claims against the estate. The ESA would increase the amount of the homestead allowance from \$10,000 to \$15,000. The exempt property allowance (which applies to furniture, automobiles, furnishings, appliances, and personal effects) would be increased from \$3,500 to \$10,000. The ESA would continue to provide for a "reasonable family allowance", but specifies that a personal

representative could establish a family allowance of up to \$18,000 without prior court approval.

Under current law, a surviving spouse may either receive a statutory "elective share" (a percentage of the estate) or abide by the provisions of the will, if any. A surviving spouse who is a widow has the third option of receiving dower (an interest in the land that had been owned by her husband). The statutory homestead allowance, however, is deducted from the amount a surviving spouse or minor child otherwise receives. Under the ESA, the statutory allowances would be in addition to amounts a surviving spouse or minor child would otherwise receive, and provisions pertaining to dower would be repealed.

Article III - Probate of Wills and Administration

The ESA would retain the concept of independent probate, but would refer to independent probate as informal probate or informal proceedings. "Informal proceedings" would mean proceedings for probate of a will or appointment of a personal representative conducted by the probate register. Article III also would provide for formal testacy and appointment proceedings, and would define "formal proceedings" as proceedings conducted before a judge with notice to interested persons. Formal proceedings could be employed for any single issue during probate administration.

In addition, the ESA would provide for supervised administration, which would require two hearings: one to approve the will and appoint the personal representative, and the second to approve any distribution to beneficiaries. "Supervised administration" would mean "a single in rem proceeding to secure complete administration and settlement of a decedent's estate under the court's continuing authority that extends until entry of an order approving estate distribution and discharging the personal representative or other order terminating the proceeding". Except as otherwise provided by the court, a supervised personal representative would have the same powers and duties as a personal representative who was not supervised.

Under the law, a personal representative is responsible for administering an estate and winding up its affairs, subject to the supervisory authority of the probate court. The ESA provides that, in accepting the duties of the office, a personal representative could exclude from the scope of his or her responsibility, for up to three months, real estate or an ownership interest in a

business entity if the personal representative reasonably believed that the real estate or other property owned by the business was or could be contaminated by a hazardous substance, or was or had been used for any activity involving a hazardous substance, that could result in liability to the estate or otherwise impair the value of property held in the estate. The personal representative's responsibilities would extend to the excluded property at the end of the exclusion period or upon his or her notice to the court of acceptance of that property, unless he or she requested the court to appoint a special personal representative with respect to the excluded property or to exercise administrative authority over that property by direct judicial order.

Article IV - Foreign Personal Representatives and Ancillary Administration

This article contains rules and procedures for handling the property and debts of a nonresident decedent, and would provide for the powers of a personal representative from the decedent's state of domicile (a domiciliary foreign personal representative). (Though not defined in the bill, "ancillary administration" refers to administration in a state in which the decedent has property and that is not where the decedent was domiciled.) As a rule, a creditor of the decedent could pay the debt to the domiciliary foreign personal representative unless a resident creditor of the decedent complained.

Article V - Protection of an Individual under Disability and His or Her Property

Article V generally would retain current Michigan law on guardianships and conservatorships for minors and incapacitated individuals. The ESA would allow a parent or guardian of a minor or incapacitated person to appoint a guardian by any written document (not just a will) signed by the parent and at least two witnesses. The ESA also specifies activities that a conservator could perform in response to an environmental concern or hazard affecting property.

Article VII - Trust Registration

This article governs the treatment of trusts and trust administration. The ESA would provide for the registration of trusts; court jurisdiction concerning trusts; duties and liabilities of trustees (including the duty to account to trust beneficiaries); powers of trustees (including

responses to environmental concerns or hazards); and claims against a decedent's revocable trust.

Article VIII - Effective Date and Repealer

Except as otherwise provided, on the Act's effective date (September 1, 1997), the ESA would apply to a governing instrument executed by a decedent dying after that date. The Act also would apply to a proceeding in court pending on that date or commenced after that date, regardless of the time of the decedent's death, except to the extent that the court believed the former procedure should apply in the interest of justice or because it would not be feasible to apply the ESA's procedure.

Every fiduciary holding an appointment on the Act's effective date would continue to hold the appointment, but would have only the powers conferred by the ESA and would be subject to the duties imposed with respect to an event occurring or an action taken after that date.

The ESA would not impair an accrued right or an action taken before the Act's effective date in a proceeding. If a right were acquired, extinguished, or barred upon the expiration of a prescribed period of time that began to run by a statutory provision before the ESA's effective date, the provision would remain in force with respect to that right.

In addition to repealing the RPC and laws providing for dower, the bill would repeal (and recodify in the ESA) the Disclaimer of Property Interests Act, the Uniform Simultaneous Death Act, and Public Act 83 of 1962 (which permits testamentary additions to trusts).

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 proposed Estate Settlement Act is the product of six years of review and preparation by practicing probate lawyers, probate judges, corporate trust officers, and probate registers. The legislation takes into account changes in rules, case law, and society that have occurred since the RPC was adopted in 1978, and addresses internal inconsistencies present in the existing statute. The ESA also would make Michigan probate law

more consistent with that of other states. Although the RPC was said to conform to the Uniform Probate Code, which other states have adopted, Michigan's 1978 law generally reflects the uniform statute only in regard to independent probate. Making the law more internally and externally consistent should reduce litigation and save costs.

The ESA would modernize the law by incorporating detailed provisions of the administration of trusts, which would be consistent with provisions governing wills. Existing statutory law on trusts is quite cursory and has not kept up with modern estate planning techniques. The new guidelines would avoid litigation by providing principles to be followed in trust administration, such as in the preparation of accounts and the procedure for making claims.

Under the new prudent investor rule, fiduciaries would have to determine whether an investment was advisable in the first place, rather than through hindsight. This rule would protect beneficiaries, as well as reduce lawsuits over fiduciary investment decisions. The ESA also would protect beneficiaries, and avoid the need for future legislation, by requiring certain dollar amounts to be adjusted by a cost-of-living factor. In addition, surviving spouses and children would benefit from increased homestead, personal property, and family allowances. Surviving spouses also would be able to take their statutory allowances as well as their elective share. By eliminating statutes that govern dower, the ESA would both modernize Michigan's probate law and apply it equally to widows and widowers.

The ESA would retain the concept of independent probate while strengthening protections afforded citizens using this type of administration. The modified concept of supervised administration would enable judges to tailor the degree of their involvement to the demands of a particular case. In general, supervised administration would require formal proceedings for approving a will and closing an estate, but would operate as independent probate in between unless a judge decided otherwise. In formal probate, the ESA would allow judges on their own initiative to bring issues before the court.

In addition, the ESA would provide a new, comprehensive set of rules and procedures for dealing with property and debts of nonresidents; would retain recent changes to Michigan's law on guardianships and conservatorship; and would reinstate recent amendments concerning the

disclaimer of property interests. In short, the legislation would provide Michigan citizens with greater protections and flexibility, while reducing the need for litigation.

Response: The original bill would have significantly protected the property interests of surviving spouses by providing for the concept of an "augmented estate" elective share. Currently, although a surviving spouse may take an elective share instated of abiding by a will, the elective share now applies only to property in the probate estate. As a result, someone may effectively disinherit his or her spouse by transferring property outside of probate (through trusts or life insurance, for example). An augmented estate, on the other hand, would include the probate estate as well as various nonprobate transfers.

Legislative Analyst: S. Margules

FISCAL IMPACT

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

Fiscal Analyst: M. Ortiz

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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.