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**SFA****BILL ANALYSIS**

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Senate Bill 209 (as enrolled)  
Sponsor: Senator William Van Regenmorter  
Senate Committee: Judiciary  
House Committee: Judiciary

**PUBLIC ACT 386 of 1998**

Date Completed: 1-8-99

**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 have since believed that a complete reorganization of the law was called for. Approximately 10 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 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 was suggested, therefore, 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 suggested a number of changes to address these and other concerns.

**CONTENT**

The bill creates the "Estates and Protected Individuals Code" (EPIC) and repeals the Revised Probate Code (MCL 700.1-700.993). The EPIC, among other things, does the following:

- Establishes the "Michigan prudent investor rule" for fiduciaries.
- Provides that specific dollar amounts applicable to beneficiaries will be subject to cost-of-living adjustments in future years.
- Provides for three methods of probating an estate: informal probate, formal probate, and supervised administration.
- Provides for self-proving wills.
- Permits a personal representative to exclude contaminated real estate from the scope of his or her responsibility.
- Specifies procedures for dealing with property and debts of nonresident decedents.
- Specifies the duties, liabilities, and powers of trustees.

The EPIC will take effect on April 1, 2000. The following is a brief overview of the bill.

## Article I - Definitions, General Provisions, and Court Jurisdiction

This article retains the exclusive legal and equitable jurisdiction of the probate court over estate settlement matters. Under the EPIC, the probate court also will 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 EPIC will apply to decedents who die before January 1, 2001. For decedents dying on or after that date, the specific dollar amounts must 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 new 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 may 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” includes 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

In general, the EPIC increases the share of the surviving spouse of a person who dies intestate (without a will). The Code also contains additional rules for allocating shares among heirs of an intestate decedent.

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 EPIC increases 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) is increased from \$3,500 to \$10,000. The EPIC continues to provide for a “reasonable family allowance”, but allows a personal representative to establish a family allowance of up to \$18,000 without prior court approval.

Under current law, a surviving spouse may choose either to receive a statutory “elective share” (a percentage of the estate) or to 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 EPIC, the statutory allowances are in addition to amounts a surviving spouse or minor child otherwise receives.

Under the law, a will must be signed by the testator (the person making the will) and two witnesses. As a rule, when the will is probated, one or both of the witnesses must appear in court or submit an affidavit to prove that they signed the will and that the testator was competent at the time. Under Article II, a will may be simultaneously executed, attested, and made “self-proved” if the testator and the witnesses sign and swear to particular statements before a notary public. In addition, a will that already has been executed may be made self-proving if the required notarized statements are subsequently attached to the will.

Article II also specifies rules of construction applicable only to wills, and rules applicable to wills and other governing instruments. In addition, Article II contains a part entitled the “disclaimer of property interests law”, which replaces the current Disclaimer of Property Interests Act.

## Article III - Probate of Wills and Administration

The EPIC provides for three options for processing an estate: informal proceedings or probate (which is substantially equivalent to the current independent probate); formal proceedings; and supervised administration.

The Code defines “informal proceedings” as proceedings for probate of a will or appointment of a personal representative conducted by the probate register without notice to interested persons. “Formal proceedings” means proceedings conducted before a judge with notice to interested

persons. The Code states that a formal testamentary proceeding is litigation to determine whether a decedent left a valid will. Formal proceedings may be employed for any single issue during probate administration.

Supervised administration is a settlement process that will require two hearings: one to approve the will and appoint the personal representative, and the second to approve any distribution to beneficiaries. The Code states that “supervised administration” “is 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 in the Code or ordered by the court, a supervised personal representative will have the same powers and duties as a personal representative who is 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 EPIC provides that, in accepting the duties of the office, a personal representative may exclude from the scope of his or her responsibility, for up to 91 days, real estate or an ownership interest in a business entity if the personal representative reasonably believes that the real estate or other property owned by the business is or may be contaminated by a hazardous substance, or is or has 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 will 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 requests 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.

If a personal representative does not complete estate administration within one year after the original appointment, he or she must file with the court and send to all interested parties a notice that the estate remains under administration and the reason for continuation of administration. This notice must be filed at the end of each annual period.

The EPIC provides alternative methods of closing an estate. A personal representative or an

interested person may petition the court for an order of complete estate settlement, which will require notice to all interested persons and a hearing. Also, a personal representative may close an estate by filing with the court a sworn statement that administration is complete.

#### 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 provides 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 may pay the debt to the domiciliary foreign personal representative unless a resident creditor of the decedent objects.

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

Article V generally retains current Michigan law on guardianships and conservatorships for minors and incapacitated individuals. The EPIC allows 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 Code also specifies activities that a conservator may perform in response to an environmental concern or hazard affecting property.

Article V also contains provisions for a durable power of attorney and the designation of a patient advocate that are virtually unchanged from the RPC provisions.

#### Article VI - Nonprobate Transfers on Death

Article VI contains uniform transfer-on-death security registration provisions under which a security may be registered in beneficiary form. (The Code defines “beneficiary form” as “a registration of a security that indicates the present owner of the security and the owner’s intention regarding the person who will become the security’s owner upon the owner’s death”). Upon the death of the owner, ownership of a security registered in beneficiary form will pass to the beneficiary, and the transfer will not be testamentary.

#### Article VII - Trust Administration

This article governs the treatment of trusts and trust administration. The EPIC provides 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.

Under the EPIC, on petition of an interested person, the court may approve an interpretation, construction, modification, or other settlement that is agreed upon by all identified and competent beneficiaries, in order to resolve a dispute concerning an irrevocable trust.

The EPIC also provides that a claim against a trustee for breach of trust is barred unless a proceeding is begun within one year after a beneficiary receives an annual or final account.

In addition, the EPIC contains procedures for identifying and paying claims against a decedent's revocable trust. If a trustee gives notice as required and follows the procedures, the Code imposes a four-month period of limitations on claims against the trust.

#### Article VIII - Effective Date and Repealer

Except as otherwise provided, on the Act's effective date (April 1, 2000), the EPIC will apply to a governing instrument executed by a decedent dying after that date. The Code also will 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 believes the former procedure should apply in the interest of justice or because it would not be feasible to apply the Code's procedure.

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

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

In addition to repealing the RPC, the bill repeals (and recodifies in the EPIC) the Disclaimer of

Property Interests Act, the Uniform Simultaneous Death Act, the Uniform Testamentary Additions to Trusts Act, and Public Act 433 of 1996 (which provides for the registration of securities in beneficiary form).

MCL 700.1101-700.8102

#### **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 Estates and Protected Individuals Code 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 EPIC also will make Michigan probate law more consistent with that of other states, which will give attorneys and judges a wider body of case law for consideration, and will accommodate the increasing mobility of Michigan citizens. 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 EPIC modernizes the law by incorporating detailed provisions on the administration of trusts, which are 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 will avoid litigation by providing principles to be followed in trust administration, such as in the preparation of accounts and the procedure for making claims.

The new prudent investor rule is designed to give fiduciaries greater flexibility in crafting an investment program. Currently, fiduciaries cannot take advantage of many modern investment products or employ modern portfolio management. In addition, under the new rule, fiduciaries must determine whether an investment is advisable in the first place, rather than through hindsight. This rule will protect beneficiaries, as well as reduce lawsuits over fiduciary investment decisions.

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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.

The EPIC also will 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 will benefit from increased homestead, personal property, and family allowances, and the homestead allowance no longer will be deducted from the amount otherwise received.

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

The EPIC's provisions for self-proving wills will simplify the probate process. If a will is made self-proving either at the time it is executed or at a later date, it will not be necessary to bring the witnesses to court or have them sign an affidavit.

In addition, the EPIC provides a new, comprehensive set of rules and procedures for dealing with property and debts of nonresidents; retains recent changes to Michigan's law on guardianships and conservatorship; and reinstates recent amendments concerning the disclaimer of property interests and the registration of securities in beneficiary form. In short, the legislation will provide Michigan citizens with greater protections and flexibility, while reducing the need for litigation.

Legislative Analyst: S. Lowe

#### **FISCAL IMPACT**

The bill will have an indeterminate fiscal impact on State and local government. The extent of administrative savings that could result from possible reduced litigation cannot be estimated.

Fiscal Analyst: B. Bowerman