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**BILL ANALYSIS**

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House Bill 4968 (Substitute H-2 as passed by the House)
Sponsor: Representative Tonya Schuitmaker
House Committee: Judiciary
Senate Committee: Judiciary

Date Completed: 10-18-05

CONTENT

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

- **Revise the definition of "estate" to include rights to collect from others amounts necessary to pay claims, allowances, and taxes.**
- **Specify that a spouse's intestate share would reduce the amount available to him or her as an elective share.**
- **Revise provisions pertaining to the effectiveness of a disclaimer of a power of appointment.**
- **Revise provisions granting a personal representative, conservator, and trustee the power to employ an attorney.**
- **Delete references to a "proposed personal representative" in a provision pertaining to a claimant's presentation of a claim against a decedent's estate.**
- **Specify when the appointment of a guardian for a minor, an unmarried legally incapacitated individual, or a married legally incapacitated individual would take effect if the testator making the nomination were not deceased.**
- **Specify that, if a personal representative were not appointed for a settlor's estate within four months after the publication of notice to creditors, a revocable trust would not be liable for payment of homestead, family, or exempt property allowances.**

Definition of "Estate"

Under EPIC, "estate" includes the property of the decedent, trust, or other person whose affairs are subject to the Code as the property is originally constituted and as it exists throughout administration. The bill would delete a provision that, except when used in the term "probate estate", "estate" includes the right of an estate described in Section 7502 to proceed against a recipient of a nonprobate transfer on death and against a trust subject to a power of revocation as necessary to enable the estate to discharge claims and family allowances. Instead, the bill specifies that "estate" would include the rights described in Sections 3805, 3922, and 7502 to collect from others amounts necessary to pay claims, allowances, and taxes.

(Section 3805 provides that if a personal representative is aware of other nonprobate transfers that may be liable for claims and allowances, then he or she must proceed to collect the deficiency, unless the will provides otherwise. Section 3922 provides that in a case in which property required to be included in the gross estate does not come into the

personal representative's possession, he or she must recover certain amounts for certain persons. Section 7502 requires a trustee of a revocable trust to pay to the personal representative of the settlor's estate the amount from time to time that the personal representative certifies is required to pay the administration expenses of the estate; an enforceable and timely presented claim of a creditor of the settlor, including a claim for his or her funeral and burial expenses; and homestead, family, and exempt property allowances.)

Spouse's Intestate Share

Under Section 2301 of EPIC, except as otherwise provided, if a surviving spouse of a testator (a person with a valid will) marries the testator after he or she executes his or her will, the surviving spouse (referred to as a pretermitted spouse) is entitled to receive, as an intestate share, not less than the value of the share of the estate the surviving spouse would have received if the testator had died intestate (without a valid will) as to that portion of the testator's estate, if any, that is not any of the following:

- Property devised to or in trust for the benefit of a child of the testator who was born before the testator married the surviving spouse and who is not the surviving spouse's child.
- Property devised to or in trust for the benefit of a descendant of a child described above.
- Property that passes to a child described above, or to a descendant of such a child, under other provisions of EPIC (addressing substitute gifts and failures of testamentary provisions).

The bill specifies that a spouse who received an intestate share under Section 2301 also could exercise the right of election under Section 2202, but the intestate share received by the spouse under Section 2301 would reduce the sum available to him or her under Section 2202.

(Section 2202 provides for the "elective share" of a surviving spouse. Under this Section, a surviving spouse of a decedent who was domiciled in Michigan and who dies testate may file with the court a written election that the spouse elects one of the following:

- That the spouse will abide by the terms of the will.
- That the spouse will take one-half of the sum or share that would have passed to him or her had the testator died intestate, reduced by half of the value of all property derived by the spouse from the decedent by any means other than testate or intestate succession upon the decedent's death.
- If a widow, that she will take her dower right under Revised Statute 66 of 1846 (MCL 558.1-558.29).

Disclaimer of Power of Appointment

The Code provides that, if the donee of a power of appointment disclaims the power of appointment, the property that is subject to the power of appointment devolves as follows:

- As if the donee died before the decedent, if the power of appointment arises out of a will or testamentary instrument.
- As if the disclaimant died before the effective date of the governing instrument, if the power of appointment arises out of a governing instrument other than a will or testamentary trust.

The bill would delete that provision and specifies, instead, that if the donee of a power of appointment or other power not held in a fiduciary capacity disclaimed the power, all of the following would apply:

- If the donee had not exercised the power, the disclaimer would take effect as of the time the instrument creating the power became effective.
- If the donee had exercised the power, the disclaimer would take effect immediately after the last exercise of the power.
- The instrument creating the power would be construed as if the power expired when the disclaimer became effective.

Employment of an Attorney

Under provisions of EPIC that specify the powers of a personal representative, a conservator, and a trustee, a person acting in any of those capacities may employ an attorney to perform necessary legal services or to advise or assist the personal representative, conservator, or trustee in the performance of his or her administrative duties. The bill specifies that a personal representative, conservator, or trustee would be authorized to employ an attorney for those purposes even if the attorney were associated with the personal representative, conservator, or trustee, and the personal representative, conservator, or trustee could act without independent investigation upon the attorney's recommendation.

Proposed Personal Representative

Under EPIC, a claimant must present a claim against a decedent's estate in either of two ways, one of which is delivering or mailing a written statement to the personal representative or proposed personal representative indicating the claim's basis, the claimant's name and address, and the amount claimed, or filing with the court a written statement of the claim in the form prescribed by court rule and delivering or mailing a copy of the statement to the personal representative or proposed personal representative. The bill would delete these references to a proposed personal representative.

Appointment of a Guardian

The Code allows the parent of an unmarried minor to appoint a guardian for the minor by will or by another writing signed by the parent and attested by at least two witnesses. Subject to certain rights of a minor, if both parents are dead or have been adjudged to be legally incapacitated or the surviving parent has no parental rights or has been adjudged to be legally incapacitated, a parental appointment becomes effective when the guardian's acceptance is filed in the court in which a nominating instrument is probated or, if the nomination is contained in a nontestamentary instrument, in the court at the place where the minor resides or is present. The bill also specifies that, if the testator who made the nomination were not deceased, an appointment would become effective when the guardian's acceptance was filed in the court at the place where the minor lived or was present.

Under EPIC, if serving as a guardian, the parent of an unmarried legally incapacitated individual may appoint a guardian for that individual by will or other writing signed by the parent and attested by at least two witnesses. 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 caring for him or her or to the nearest adult relative, the guardian files acceptance of appointment in the court in which the will is probated or, if the nomination is contained in a nontestamentary nominating instrument, in the court at the place where the legally incapacitated individual lives or is present. The bill also specifies that, if the testator who made the nomination were not deceased, an appointment would become effective when the guardian's acceptance was filed in the court at the place where the legally incapacitated individual lived or was present.

Under EPIC, if serving as guardian, the spouse of a married legally incapacitated individual may appoint a guardian of the individual by will or other writing signed by the spouse and attested by at least two witnesses. The 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 caring for him or her or the nearest adult relative, the guardian files acceptance of appointment in the court in which the will is probated or, if the nomination is contained in a nontestamentary nominating instrument, in the court at the place where the legally incapacitated individual lives or is present. The bill also specifies that, if the testator who made the nomination were not deceased, an appointment would become effective when the guardian's acceptance was filed in the court at the place where the legally incapacitated individual lived or was present.

Liability of Revocable Trust

Currently, when there is no personal representative appointed for the settlor's estate, a revocable trust is not liable for payment of homestead, family, or exempt property allowances. The bill specifies, instead, that if a personal representative were not appointed for the settlor's estate within four months after the date of the publication of notice to creditors, a revocable trust would not be liable for payment of homestead, family, or exempt property allowances.

Under EPIC, upon the expiration of four months after the date of publication of the notice to creditors, the trustee must proceed to pay various claims against the trust, including for the homestead, family, and exempt property allowances. The bill would delete those allowances from the payments that the trustee must make.

MCL 700.1104 et al.

Legislative Analyst: Patrick Affholter

FISCAL IMPACT

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

Fiscal Analyst: Bill Bowerman
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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.