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Senate Bill 551 (as enrolled)
Sponsor: Senator Tonya Schuitmaker
Senate Committee: Judiciary
House Committee: Judiciary

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RATIONALE

The Estates and Protected Individuals Code (EPIC) specifies an order of priority outlining who is entitled to make decisions about a decedent's funeral arrangements and the disposition of a decedent's body. Evidently, despite this statutory instruction, there often is confusion, disagreement, and controversy over who may make those decisions. For instance, the legal authority to decide might fall to a person who is related to but estranged from the decedent or who is distantly related but has not been close to the person who died. Arguably, in some cases, it might be more appropriate for someone closer to the decedent, but not related to him or her, to decide about funeral arrangements and the disposition of the body but current law does not authorize that. Michigan law allows an individual to designate another as a patient advocate or gives someone power of attorney to make medical and/or legal decisions on his or her behalf, if the individual is not able to make those decisions himself or herself, but that authority ends when the person dies. It has been suggested, therefore, that EPIC should permit an individual to designate another person as a funeral representative, to make decisions regarding funeral arrangements and disposition after the individual dies.

CONTENT

The bill would amend the Estates and Protected Individuals Code to do the following:

- **Revise the order of priority for the individuals who have the rights and power to make decisions about funeral arrangements and the disposition of a decedent's body.**
- **Authorize an adult of sound mind to designate another adult as his or her funeral representative, granting that person the rights and power to make decisions about funeral arrangements and the disposition of the decedent's body.**
- **Allow a declarant to designate a successor funeral representative in the event the first person named did not accept, was incapacitated, resigned, or was removed.**
- **Specify circumstances under which a funeral representative designation would be revoked.**
- **Revise provisions for petitioning the court when there is a disagreement as to who has the rights and power to make decisions about funeral arrangements and the disposition of a decedent's body.**

Order of Priority

Under EPIC, subject to Public Act 181 of 1953 (which requires a county medical examiner to investigate the cause and manner of an individual's death under certain circumstances) and Part 28 (Vital Records) and Article 10 (Anatomical Gifts and Disposition of Human Body Parts) of the Public Health Code, a person with priority under Section 3206 or acting under other provisions of that section has the right and power to make decisions about funeral arrangements and the handling, disposition, or disinterment of a decedent's body, including decisions about cremation and the right to possess cremated remains.

Under Section 3206, a person with priority or otherwise acting under that Section has the rights and powers described above. As a rule, a person having priority is the surviving spouse or, if there is no surviving spouse, the individual or individuals at least 18 years of age in the highest priority under Section 2103 of EPIC, and related to the decedent in the closest degree of consanguinity (by blood).

(Section 2103 specifies the order of priority of inheritance when a person dies intestate (without a valid will). Under that section, any part of the intestate estate that does not pass to the surviving spouse, or the entire intestate estate if there is no surviving spouse, passes in the following order to the following individuals who survive the decedent:

- The decedent's descendants.
- If there is no surviving descendant, the decedent's parents equally, if both survive, or the surviving parent.
- If there is no surviving descendant or parent, the descendants of the decedent's parents or of either of them by representation.

If there is no surviving descendant, parent, or descendant of a parent, but the decedent is survived by one or more grandparents or descendants of grandparents, half of the estate passes to the decedent's paternal grandparents equally if both survive, or the surviving paternal grandparent, or the descendants of the decedent's paternal grandparents or either of them if both are deceased, the descendants taking by representation; and the other half passes to the decedent's maternal relatives in the same manner. If there is no surviving grandparent or descendant of a grandparent on either the paternal or the maternal side, the entire estate passes to the decedent's relatives on the other side in the same manner as the half.)

Under the bill, a designated funeral representative or a person with priority or authorization under Section 3206 would have the right and power to make decisions about funeral arrangements and the handling, disposition, or disinterment of a decedent's body, including decisions about cremation and the right to retrieve from the funeral establishment and possess cremated remains immediately after cremation. The following would have those rights, in the order of priority shown below:

- If the decedent were a service member at the time of his or her death, a person designated to direct the disposition of the service member's remains according to a U.S. statute or regulation, policy directive, or instruction of the Department of Defense.
- A funeral representative designated under the bill.
- The surviving spouse.
- The individual or individual 18 years of age or older in the following priority: the decedent's children; the decedent's grandchildren; the decedent's parents; the decedent's grandparents; the decedent's siblings; a descendant of the decedent's parents who first notified the funeral establishment of his or her decision to exercise rights under Section 3206; or a descendant of the decedent's grandparents who first notified the funeral establishment of his or her decision to exercise rights under Section 3206.

If an individual described in the last item had the right to dispose of the decedent's body, but affirmatively declined to exercise that right or failed to exercise it within 48 hours after receiving notification of the decedent's death, the individual would not have the right to make a decision about the disinterment of the decedent's body or possession of the decedent's cremated remains.

Under EPIC, if the surviving spouse or an individual with priority does not exercise the rights and powers under Section 3206 or cannot be located after a good-faith effort to contact him or her, the rights and powers may be exercised by the individual or individuals in the same order of priority under Section 2103 who are related to the decedent in the next-closest degree of consanguinity. Under the bill, if the individuals with the highest priority could not be located after a good-faith effort to contact and inform them of the decedent's death, affirmatively declined to exercise their rights or powers under Section 3206, or failed to exercise those rights and powers within 48 hours after receiving notification of the decedent's death, the rights and powers could be exercised by

the individuals in the order of priority described above (rather than the next-closest blood relative). (For purposes of this provision only, exercising rights and powers would refer to informing the funeral establishment in possession of the decedent's body of an individual's decision to exercise his or her rights or powers under Section 3206.)

If no individual in the order of priority exists, exercises the rights or powers to make decisions about a decedent's body, or can be located after a sufficient attempt, the personal representative or nominated personal representative may exercise those rights and powers, either before or after his or her appointment. If the decedent was under a guardianship at the time of death, the guardian may exercise those rights and powers and make a claim for the reimbursement of burial expenses. If the decedent died intestate and was not under a guardianship, a special personal representative appointed under EPIC may exercise those rights and powers. Under the bill, if the decedent died intestate and were not under a guardianship, a special fiduciary or special personal representative appointed under EPIC could exercise the rights and powers.

If there is no person described in any of the provisions above to exercise the rights and powers to make decisions about funeral arrangements and the disposition of the decedent's body or cremated remains, one of the following, as applicable, must exercise those rights and powers:

- The county public administrator, if willing, or the medical examiner for the county where the decedent lived at the time of death.
- If the decedent was incarcerated in a State correctional facility at the time of death, the Director of the Department of Corrections (DOC) or the Director's designee.

The bill would delete the reference to the county public administrator.

Under the bill, a person who had been criminally charged with the intentional killing of the decedent could not exercise a right or power regarding funeral arrangements or the disposition of the decedent's body or cremated remains while the charges were pending.

The bill specifies that a person who had the rights and powers regarding funeral arrangements and the disposition of a decedent's body or cremated remains and who exercised those rights would have to ensure payment for the costs of the disposition through a trust, insurance, commitment by another person, prepaid contract under the Prepaid Funeral and Cemetery Sales Act, or other effective and binding means. To the extent that payment was not ensured, the person would be liable for the costs of the disposition. These provisions would not apply to a special fiduciary or special personal representative appointed under EPIC; a medical examiner; or the DOC Director or his or her designee.

Funeral Representative Designation

The bill would allow an individual who was at least 18 years of age and of sound mind at the time of designation, to designate in writing another individual who was at least 18 and of sound mind to have the right and power to make decisions about funeral arrangements and the handling, disposition, or disinterment of a decedent's body, including decisions about cremation and the right to retrieve and possess the decedent's cremated remains. An individual who was named in a funeral representative designation to have those rights and powers would be known as a "funeral representative" and a person who made a funeral representative designation would be known as a "declarant".

The following could not act as a funeral representative for a declarant unless he or she were the declarant's surviving spouse or relative:

- An officer, partner, member, shareholder, owner, representative, or employee of a funeral establishment that would provide services.
- A health professional, or an employee of or volunteer at a health facility or veterans' facility, who provided medical treatment or nursing care to the declarant during the final illness or

immediately before the declarant's death, or a partner, member, shareholder, owner or representative of the health facility where treatment or care was provided.

- An officer, partner, member shareholder, owner, representative, or employee of a cemetery at which the declarant's body would be interred, entombed, or inurned.
- An officer, partner, member, shareholder owner, representative, or employee of a crematory that would provide the declarant's cremation services.

A funeral representative designation would have to be in writing and be dated and signed voluntarily by the declarant, or be signed by a notary public on the declarant's behalf. A funeral representative designation could be included in the declarant's will, patient advocate designation, or other writing. If a funeral representative designation were contained in an individual's will, the will would not have to be admitted to probate for the funeral representative designation to be valid. A funeral representative designation would have to be one or both of the following:

- Signed in the presence of and signed by two witnesses.
- Acknowledged by the declarant before a notary public, who endorsed on the designation a certificate of the acknowledgment and the true date of taking the acknowledgment.

A funeral representative or a person disqualified from acting as a funeral representative could not be a witness. A witness could not sign the funeral representative designation unless the declarant appeared to be of sound mind and under no duress, fraud, or undue influence.

In a funeral representative designation, a declarant could designate a successor individual as funeral representative who could exercise the rights and powers under Section 3206 if the first individual named as funeral representative did not accept, were incapacitated, resigned, or were removed.

An individual designated as a funeral representative would accept the designation by signing an acceptance of funeral representative, or by acting as the funeral representative. The authority under a designation would be exercisable by a funeral representative only after the declarant's death. Except as provided in the designation, a funeral representative could not delegate his or her powers to another person.

A funeral representative would have to provide a copy of the funeral representative designation to a funeral establishment upon its request.

Revocation of Designation

Unless a successor funeral representative had been designated, a funeral representative designation would be revoked if any of the following occurred:

- The funeral representative resigned.
- The funeral representative could not be located after reasonable efforts by the decedent's family or funeral establishment.
- The funeral representative refused to act within 48 hours after receiving notice of the decedent's death.

A funeral representative designation also would be revoked by either of the following:

- A declarant's revocation of the designation.
- A subsequent funeral representative designation that revoked the prior designation either expressly or by inconsistency.

A declarant's revocation of the funeral representative designation would have to be in writing and signed in the manner as provided for the designation.

Under EPIC, a divorce or annulment of a marriage revokes certain instruments that are revocable, including a nomination of a divorced individual's former spouse or a relative of the former spouse

to serve in a fiduciary or representative capacity. The bill would include a nomination as a funeral representative in that provision. The bill also specifies that a divorce or annulment would bar the former spouse from exercising a power to make decisions about funeral arrangements and the handling, disposition, and disinterment of the decedent's body.

Under EPIC, an individual who feloniously and intentionally kills or who is convicted of committing abuse, neglect, or exploitation with respect to the decedent forfeits all benefits from the decedent's estate. The felonious and intentional killing or the conviction of the felon for the abuse, neglect, or exploitation of the decedent also revokes certain instruments that are revocable, including a nomination of the killer or felon to serve in a fiduciary or representative capacity. The bill would include a nomination as a funeral representative in that provision. The bill also specifies that the felonious and intentional killing or the conviction of the felon for the abuse, neglect, or exploitation of the decedent would bar the killer or felon from exercising a power to make decisions about funeral arrangements and the handling, disposition, and disinterment of the decedent's body.

Surviving Spouse

Currently, for certain purposes under EPIC, a surviving spouse does not include any of the following:

- An individual who obtains or consents to a final decree or judgment of divorce from the decedent or an annulment of their marriage, which decree or judgment is not recognized as valid in Michigan, unless they subsequently participate in a marriage ceremony purporting to marry each other or live together as husband and wife.
- An individual who, following an invalid decree or judgment of divorce or annulment obtained by the decedent, participates in a marriage ceremony with a third individual.
- An individual who was a party to a valid proceeding concluded by an order purporting to terminate all marital property rights.
- An individual who, at the time of the decedent's death, is living in a bigamous relationship with another individual.
- An individual who did any of the following for one year or more before the decedent's death: was willfully absent from the decedent spouse; deserted the decedent spouse; or willfully neglected or refused to provide support for the decedent spouse if required to do so by law.

Under the bill, for purposes of Section 3206, a surviving spouse would not include any of the individuals listed above or an individual who was a party to a divorce or annulment proceeding with the decedent at the time of the decedent's death.

Court Petition

Under EPIC, if there is a disagreement between individuals who share rights and powers under Section 3206, or if one or more people with those rights and powers cannot be located, either or both of the following may petition the court to determine who has the authority to exercise rights and powers under Section 3206:

- An individual with rights and powers under that section.
- A funeral establishment that has custody of the decedent's body.

Under the bill, instead, one or more of the following could petition the court to resolve a disagreement or rebut a presumption under Section 3206:

- An individual with rights and powers under that section.
- A funeral establishment that had custody of the decedent's body.
- An individual other than a person with priority under Section 3206 or acting under that section.

In deciding a petition brought to resolve a disagreement, the court must consider factors specified in EPIC. Under the bill, the court also would have to consider the following factors:

- Whether the decedent executed a funeral representative designation or a designation of a person to direct the disposition of a service member's remains under U.S. law.
- If the decedent were married at the time of death, whether the decedent's spouse was physically and emotionally separated from the decedent at the time of death and had been separated for a period that clearly demonstrated an absence of due affection, trust, and regard between the spouse and decedent.

If refrigeration were not reasonably available, the funeral establishment that had custody of a decedent's body could embalm the body before the court made a decision on a petition.

Funeral Establishment; Cemetery; Crematory

The bill specifies that a funeral establishment, cemetery, or crematory could rely on the designation of a funeral representative; the designation of a person to direct the disposition of a service member's remains according to U.S. law or regulation, policy, directive, or instruction of the Department of Defense; the order of priority determined under Section 3206; or a court order pursuant to a petition that determined who may exercise rights and powers under Section 3206.

The Code provides that a funeral establishment is not a guarantor that a person exercising the rights and powers under Section 3206 has the legal authority to do so. The bill would include a cemetery or crematory in that provision. The bill also specifies that a cemetery or crematory could rely on a funeral establishment's representation as to who may exercise those rights and powers.

Currently, a funeral establishment does not have to contact or independently investigate the existence of relatives of the deceased, but may rely on information provided by the deceased's family members. The bill would extend this provision to a cemetery or crematory. A funeral establishment, cemetery, or crematory also could rely on information provided by a person other than a family member whom the funeral establishment, cemetery, or crematory reasonably believed knew the existence or location of the relatives of the deceased or the funeral representative. As used in those provisions, "information" would include an affirmation that reasonable efforts to contact the individual or individuals with the rights and powers under Section 3206 and to inform the individual or individuals of the death have been made without success.

Repeal

The bill would repeal Section 3208 of the Code, which authorizes an individual other than a person with priority or acting under Section 3206 to file an action in the circuit court to challenge the presumption to be determined as the individual who has the authority to exercise the rights and powers under Section 3206.

MCL 700.1104 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 current process for identifying who is authorized to make decisions about a deceased person's funeral and the disposition of the person's body is complicated and burdensome. If there is no surviving spouse, EPIC relies on the order of inheritance when a person dies without a valid will to determine who can make funeral and final disposition decisions. Often, this results in multiple people (e.g., the decedent's descendants) collectively having the decision-making authority. Sometimes, it gives the authority to estranged or distant relatives, who might not be easily located or want to be involved. The funeral establishment, cemetery, or crematory may face situations in which multiple parties with equal authority disagree or in which they have to conduct an extensive search to find someone with legal authority to direct them as to final disposition. This can be further complicated if the deceased person had been close to someone to whom he or she was neither married nor related (such as a long-term life partner), because that person has no legal

authority to make funeral arrangements or decisions about the disposition of the decedent's remains.

By establishing an option for a person to designate another as his or her funeral representative, and giving the funeral representative priority to make decisions about funeral arrangements and the disposition of the decedent's body, the bill would streamline the procedures for making those choices. These provisions also would ease the burden on funeral operators because they would not have to track down relatives and/or rely on a majority of certain family members (such as the decedent's children) to decide on matters such as embalming, viewing and visitation, memorial services, and cremation or burial. Designating a funeral representative also could enable a person to decide his or her own arrangements and disposition, by entrusting the responsibility to make those decisions to a life partner, close friend, or particular relative rather than having that authority automatically fall to a relative who might not be aware of the decedent's wishes.

Supporting Argument

Allowing the designation of a funeral representative would help hospital and hospice employees in proceeding with the disposition of a deceased person's body. When a person dies under care, the hospital or hospice must coordinate with the person authorized to make decisions about funeral arrangements and the disposition of the body and, sometimes, to obtain authorization for an autopsy. Locating the next of kin can involve considerable time and effort if the family was not involved with the decedent's medical care, especially if the person was unmarried and did not have children. That task can be complicated by a number of factors, including older adults' outliving their next of kin, family relationship breakdowns, divorce, geographical separation of family members, unmarried couples, and relatives' emotional or cognitive inability to assume the responsibility of deciding how to proceed. The bill would allow a person to avoid those challenges by designating a trusted person to make funeral arrangements and final disposition choices. In turn, that would assist medical institutions in identifying who could legally make the person's postdeath decisions.

Supporting Argument

Although Michigan law allows any adult to grant decision-making authority regarding his or her health care or treatment to another adult, regardless of whether they are related, it does not allow the designation of another person to make postdeath decisions such as funeral arrangements, burial site, or cremation. Even if a person gave medical power of attorney or patient advocate status to a life partner or other person, so the designee could advocate for and make decisions about the person's medical care and treatment, that authority ends upon the death of the person who granted the authority. Authorizing the designation of a funeral representative would be consistent with the legal authority to designate another person as a patient advocate.

Opposing Argument

Although authorizing the designation of a funeral representative could improve upon the current system, it would fall short of ensuring that the deceased person's wishes were honored. Rather than provide for a designee to make postdeath decisions, the bill should allow people to create a legally binding document specifying their wishes about their own funeral arrangements and disposition, and require funeral operators, cemeteries, and crematories to abide by those wishes.

Response: A funeral representative would function as a fiduciary, with an obligation to act in the interests of the person who had died. As with the designation of a personal representative to administer a decedent's estate, a funeral representative would have a particular duty to fulfill after the declarant's death.

Opposing Argument

Several provisions of the bill could complicate, not simplify, decision-making regarding a decedent's funeral arrangements and final disposition. The bill includes a 48-hour period for a person to exercise, affirmatively decline to exercise, or fail to exercise his or her right to make those decisions. This is far too short, as there are many reasons that could delay someone from deciding that quickly. The bill should allow at least 96 hours for a person to exercise the right to make funeral and final disposition decisions.

Also, the bill would not define "reasonable efforts" with regard to attempts to locate a designated funeral representative or someone else who had priority to exercise the right to make decisions about funeral arrangements and final disposition. By not identifying specific measures to locate someone that would be deemed to be "reasonable efforts", the bill could expose funeral establishments, cemeteries, and crematories to potential litigation and liability.

The bill would further complicate the determination of a spouse who may have the right to determine final arrangements for a deceased person. By excluding an individual who was a party to a divorce or annulment proceeding with the decedent at the time of death, the bill would deny decision-making authority to someone who was still married to the deceased at the time of his or her death. This could lead to awkwardness and resentment during discussions between the spouse and the funeral establishment, cemetery, and/or crematory concerning the relationship between the spouse and the deceased during a time of grief.

Response: Divorce or annulment proceedings indicate a significant change in the marital relationship and merit eliminating the decedent's spouse as a decision-maker regarding final arrangements.

Legislative Analyst: Patrick Affholter

FISCAL IMPACT

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

Fiscal Analyst: Ryan Bergan