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BILL ANALYSIS



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Senate Bill 487 (as reported without amendment)
Sponsor: Senator Loren Bennett
Committee: Judiciary

Date Completed: 9-15-95

RATIONALE

In 1959, Michigan adopted the Uniform Gifts to Minors Act (UGMA), which essentially allows a person, during his or her lifetime, to make a gift to a minor of money, securities, life insurance, or annuities; and provides for the transfer of the property to a custodian until the minor reaches the age of 18. In its 1984 annual report, the Michigan Law Revision Commission recommended that the Uniform Transfers to Minors Act be adopted to replace the UGMA. According to the report, the proposed Act "has a twofold purpose: (1) to expand the UGMA's custodial mechanism so that it is available for a wider range of property interests and transactions; and (2) to address an increasing lack of uniformity, and resulting conflicts problems, produced by piecemeal modifications of the UGMA by various states in recent years". Unlike the UGMA, the uniform transfers Act covers all types of property, includes transfers by a person obligated to a minor, encompasses transfers made in a will or trust, and allows a custodial relationship to continue until the minor turns 21. Michigan has not yet replaced the UGMA, however, and the Probate and Estate Planning Section of the State Bar has recommended the adoption of the uniform transfers Act.

CONTENT

The bill would enact the "Michigan Uniform Transfers to Minors Act" to repeal and replace the Michigan Uniform Gifts to Minors Act (MCL 554.451-554.461). The new Act would apply to the transfer of "custodial property", i.e., "an interest in property transferred to a custodian under this act and the income from, and proceeds of, that interest in property". The bill would do the following:

- Describe how custodial property could be created and transferred, including property transferred in a will or trust, or by a person obligated to a minor.
- Provide for the appointment and resignation of a custodian.
- Prescribe the duties and powers of a custodian, and establish a standard of care for custodians.
- Allow a custodial relationship to continue until the minor turned 21.
- Specify that a custodian would not be personally liable on a contract unless the custodian failed to reveal the custodianship, or for an obligation or a tort unless the custodian were personally at fault.
- Allow certain parties to petition for an accounting or a determination of responsibility.
- Specify transfers to which the new Act would apply, including transfers made under the current Act.

Creation of Custodial Property

Custodial property would be created and a transfer made when one of the following events occurred:

- A certificated or uncertificated security was registered in the name of a custodian for the minor or delivered to an adult other than the transferor or to a trust company as custodian.
- Money was paid or delivered to a broker or financial institution for credit to a custodian for the minor.
- A life or endowment insurance policy was registered or assigned in the name of a custodian for the minor.

- Written notice of an irrevocable exercise of a power of appointment or an irrevocable present right to future payment under a contract, naming the custodian for the minor, was given to the payor.
- An interest in real property was recorded in the name of the custodian for the minor.
- Title to tangible personal property was issued in the name of the custodian for the minor or delivered to an adult other than the transferor or to a trust company as custodian.
- An interest in other property was transferred to an adult other than the transferor or to a trust company by a written instrument in substantially the form set forth in the bill.

A transferor would be required to place the custodian in control of the custodial property as soon as practicable. A transfer could be made for only one minor, and only one person could be the custodian. Custodial property held under the proposed Act by the same custodian for the benefit of the same minor would constitute a single custodianship.

Transfers

A transfer made under the provisions described above would be irrevocable, and the custodial property indefeasibly vested in the minor, but the custodian would have all the rights, powers, duties, and authority provided in the proposed Act, and neither the minor nor the minor's legal representative would have any right, power, duty, or authority with respect to the custodial property except as provided in the Act.

The validity of a transfer would not be affected by:

- Failure of the transferor to comply with the bill's provisions concerning control.
- Designation of an ineligible custodian, except that the transfer would be invalidated by designation of a transferor in the case of property for which the transferor was ineligible to serve as custodian.
- Death or incapacity of a person nominated or designated as custodian or the declination of the office by that person.

A person having the right to designate the recipient of property transferrable upon the occurrence of a future event could revocably nominate a custodian to receive the property for a minor beneficiary

upon the occurrence of the event by naming the custodian as the custodian for the minor under the uniform Act. The nomination could name one or more persons as substitute custodians to whom the property would have to be transferred, in the order specified, if the first nominated custodian died before the transfer or were unable, declined, or were ineligible to serve. The nomination could be made in a will, trust, deed, instrument exercising power of appointment, or writing that designated a beneficiary of contractual rights that was registered with or delivered to the payor, issuer, or other obligor of the contractual rights. The nomination of a custodian under these provisions would not create custodial property until the nominating instrument became irrevocable or a transfer to the nominated custodian was completed. Unless the nomination were revoked, upon the occurrence of the future event, the custodianship would become effective and the custodian would have to enforce a transfer of the custodial property.

A person could make a transfer by irrevocable gift to, or the irrevocable exercise of a power of appointment in favor of, a custodian for the benefit of a minor.

A personal representative or trustee could make an irrevocable transfer to a custodian for the benefit of a minor as authorized in the governing will or trust. If the testator or grantor had nominated a custodian to receive custodial property, the transfer would have to be made to the custodian. If a testator or grantor had not nominated a custodian or all persons nominated died before the transfer or were unable, declined, or were ineligible to serve, the personal representative or trustee would be required to designate a custodian.

A personal representative or trustee could make an irrevocable transfer to another adult or trust company as custodian for the benefit of a minor, in the absence of a will or under a will or trust that did not contain authorization to make the irrevocable transfer. A conservator could make an irrevocable transfer to another adult or trust company as custodian. A transfer under these provisions could be made only if the personal representative, trustee, or conservator considered the transfer to be in the best interest of the minor; the transfer were not prohibited by or inconsistent with provisions of the applicable will, trust agreement, or other governing instrument; and, if a transfer exceeded \$10,000 in value, the transfer were

authorized by the court. ("Court" would mean the probate court for the county in which the minor resided.)

Subject to the following provisions on nominating a custodian, a person not subject to provisions concerning a personal representative or trustee who held property of, or owed a liquidated debt to a minor not having a conservator could make an irrevocable transfer to a custodian for the benefit of the minor.

If a person who had the right under the bill to nominate a custodian to receive custodial property did so, the transfer would be made to that person. If no custodian had been nominated or all persons nominated custodian died before the transfer or were unable, were ineligible, or declined to serve, a transfer could be made to an adult member of the minor's family or to a trust company. If the value of the property exceeded \$10,000, a transfer could be made only if authorized by the court.

Custodial Duties

A custodian would be required to do all of the following:

- Take control of custodial property.
- Register or record title to custodial property if appropriate.
- Collect, hold, manage, invest, and reinvest custodial property.

A custodian also would be required to observe the standard of care that would be observed by a prudent person dealing with property of another. If a custodian had a special skill or expertise or were named custodian on the basis of representations of a special skill or expertise, the custodian would be required to use that skill or expertise. Nevertheless, a custodian, in the custodian's discretion and without liability to the minor or the minor's estate, could retain any custodial property received from a transferor.

A custodian could invest in or pay premiums on life insurance or endowment policies on the life of the minor only if the minor or minor's estate were the sole beneficiary, or on the life of another person in whom the minor had an insurable interest only to the extent that the minor, the minor's estate, or the custodian was the irrevocable beneficiary. A custodian would have to keep custodial property separate from all other property in a manner

sufficient to identify it clearly as the minor's custodial property. A custodian also would have to keep records of all transactions with respect to custodial property. A custodian, acting in a custodial capacity, would have all the rights,

powers, and authority over custodial property that an unmarried adult owner has over his or her own property, but a custodian could exercise those rights, powers, and authority in that capacity only.

A custodian could deliver or pay to the minor or spend for the minor's benefit as much of the custodial property as the custodian considered advisable for the use and benefit of the minor, without court order and without regard to the duty or ability of the custodian personally or of any other person to support the minor, or any other income or property of the minor that could be applicable or available for that purpose.

On petition of an interested person or the minor, if he or she were at least 14 years of age, the court could order the custodian to deliver, pay to the minor, or spend for the minor's benefit, as much of the custodial property that the court considered advisable for the minor's use and benefit. A delivery, payment, or expenditure would be in addition to and not a substitute for, and would not affect any obligation of a person to support the minor.

A custodian would be entitled to reimbursement from custodial property for reasonable expenses incurred in the performance of the custodian's duties.

A third person in good faith and without court order could act on the instructions of any person purporting to make a transfer or act in the capacity of a custodian and, in the absence of knowledge, would not be responsible for determining any of the following:

- The validity of the purported custodian's designation.
- The propriety of, or the authority under the Act for, any action of the purported custodian.
- The validity or propriety under the Act of any instrument executed or given by the person purporting to make a transfer or by the purported custodian.
- The propriety of the application of property of the minor delivered to the purported custodian.

A custodian would be required to transfer the custodial property to the minor or the minor's estate upon the earlier of the following:

- The minor's becoming 18 years of age, with respect to custodial property that was transferred under provisions of the bill.
- The minor's death.

Transfer of custodial property to the minor, that was first transferred to the custodian, could be delayed until a specified time after the minor was 18 years of age, but not later than the minor's 21st birthday.

Liability

A person could assert against custodial property a claim based on a contract entered into by a custodian acting in that capacity, an obligation arising from the ownership or control of custodial property, or a tort committed during the custodianship, by proceeding against the custodian, whether or not the custodian or the minor were personally liable. A custodian would not be personally liable in either of the following situations:

- On a contract properly entered into unless the custodian failed to reveal the custodial capacity and to identify the custodianship in that contract.
- For an obligation arising from control of custodial property or for a tort committed during the custodianship unless the custodian were personally at fault.

A minor would not be personally liable for an obligation arising from ownership of custodial property or for a tort committed during the custodianship unless the minor were personally at fault.

Custodial Service

A person nominated or designated as custodian could decline to serve by delivering a written declination to the person who made the nomination or to the transferor or his or her legal representative. The declination would have to be signed by the disclaimant and describe the custodianship that was declined. If the event that resulted in a transfer had not occurred and no substitute custodian able, willing, and eligible to serve were nominated, the person who made the nomination could nominate a substitute. If a substitute were not nominated, the transferor or his or her legal representative would be required to designate a substitute custodian at the time of the

transfer. A substitute custodian would have to be nominated or designated from among the persons eligible to serve as custodian for that kind of property. The custodian so designated would have the rights of a successor custodian.

At any time, a custodian could designate a trust company or an adult, other than a transferor, as successor custodian by executing and dating an instrument of designation before a witness other than the successor. If the instrument did not contain or were not accompanied by the resignation of the custodian, the designation of the successor would not take effect until the custodian resigned, died, became incapacitated, or was removed.

A custodian could resign at any time by delivering written notice to the minor, if the minor had attained the age of 14 years, and to the successor custodian and by having the custodial property delivered to the successor custodian.

If a custodian were ineligible, died, or became incapacitated without effectively designating a successor and the minor were at least 14 years of age, the minor could designate as successor custodian, an adult member of the minor's family, a conservator of the minor, or a trust company. If the minor were less than 14 years of age or failed to act within 60 days after the ineligibility, death, or incapacity, the conservator of the minor would become successor custodian. If the minor had no conservator or the conservator declined to act, the transferor, the legal representative of the transferor or of the custodian, an adult member of the minor's family, or any other interested person could petition the court to designate a successor custodian.

A custodian who declined to serve or resigned, or the legal representative of a deceased or incapacitated custodian, would be required to put the custodial property and records in the possession and control of the successor custodian. This successor could bring an action to enforce the obligation to deliver custodial property and records and would become responsible for each item.

A transferor, his or her legal representative, an adult member of the minor's family, the conservator of the minor, or the minor if he or she were at least 14 years of age could petition the court to remove the custodian for cause and designate a successor custodian other than a transferor or require the custodian to give appropriate bond. If a custodian were removed, the court would have to require an accounting and

order delivery of the custodial property and records to the successor custodian and the execution of all instruments required for transfer of the custodial property.

A minor who was at least 14 years of age, the minor's legal representative, an adult member of the minor's family, a transferor, or a transferor's legal representative could petition the court for either of the following:

- An accounting by the custodian or the custodian's legal representative.
- A determination of responsibility, as between the custodial property and the custodian personally, for claims against the custodial property, unless the responsibility had been adjudicated in an action to which the minor or the minor's legal representative was a party.

A successor custodian could petition the court for an accounting by the predecessor custodian. The court, in a proceeding under the proposed Act or in any other proceeding, could require or permit the custodian or the custodian's legal representative to account.

Applicability

The proposed Act would apply to a transfer that referred to the Act in the designation by which the transfer was made if, at the time of the transfer, the transferor, the minor, or the custodian were a resident of this State or the custodial property were located in the State. A transfer that purported to be made and that was valid under the Uniform Transfers to Minors Act, the Uniform Gifts to Minors Act, or a substantially similar act of another state would be governed by the law of the designated state, and could be executed and would be enforceable in this State if, at the time of the transfer, the transfer, the minor, or the custodian were a resident of the designated state or the custodial property were located there.

The proposed Act would apply to a transfer described above, that was made after the Act's effective date, when either of the following was true:

- The transfer purported to have been made under the Michigan Uniform Gifts to Minors Act.
- The instrument by which the transfer purported to have been made used in

substance the designation "as custodian under the uniform gifts to minors act" or "as custodian under the uniform transfers to minors act" of any other state, and the application of the bill would be necessary to validate the transfer.

Transfer of custodial property made before the bill's effective date would be validated, notwithstanding the absence of specific authority in the Michigan Uniform Gifts to Minors Act for the coverage of custodial property of that kind or for a transfer from that source at the time the transfer had been made.

The bill would apply to all transfers made before its effective date in a manner prescribed in the Michigan Uniform Gifts to Minors Act, except insofar as the application impaired constitutionally vested rights or extended the duration of the custodianship in existence on the effective date of the bill.

To the extent that the bill did not apply to a transfer made in a manner prescribed in the Michigan Uniform Gifts to Minors Act, or to the powers, duties, and immunities conferred by a transfer in that manner upon a custodian or someone dealing with a custodian, the repeal of that Act would not affect the transfer or those powers, duties, and immunities.

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 uniform transfers Act offers an updated and more complete application of the purpose of the UGMA to provide an economical and informal custodial mechanism, as compared with trusts, conservators, and the like, and already has been adopted by over half the states.

By including all types of property, whether real or personal, tangible or intangible, and encompassing transfers made by persons obligated to a minor, the Uniform Transfers to Minors Act accomplishes its goal of expanding the custodial mechanism so that it is available for a wider range of property interests and transactions. In addition, by covering transfers based on the occurrence of a future event, the uniform transfers Act may be used for transfers to be made by a personal representative

or trustee pursuant to the authorization of a will or trust instrument.

Because the uniform transfers Act includes a broader range of property interests, it also addresses the issue of liability and essentially limits personal liability to personal fault. The Act further includes a provision for prospective custodians, and ensures continuity by validating gifts that were made previously under the UGMA or that mistakenly refer to the UGMA.

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.