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BILL ANALYSIS

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Senate Bill 1051 (as reported without amendment)
Sponsor: Senator Alan L. Cropsey
Committee: Judiciary

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RATIONALE

The Estates and Protected Individuals Code (EPIC) was enacted in 1998 to replace Michigan's Revised Probate Code, which had been enacted 20 years earlier. While the older statute had primarily addressed the settlement of decedents' estates, EPIC also governs the administration of trusts and the powers of trustees, and includes a prudent investor rule for fiduciaries. The recent legislation also repealed and recodified several other statutes, including the Disclaimer of Property Interests Act. These changes were the culmination of about 10 years of review by the Council of the Probate and Estate Planning Section of the State Bar, including six years of preparation by probate lawyers and judges, probate registers, and corporate trust officers. Since EPIC was enacted, the Council has continued to review the law and has found a number of ambiguities in EPIC. The Council also has raised concerns about provisions dealing with trustees' disclosure of information to beneficiaries.

CONTENT

The bill would amend provisions of the Estates and Protected Individuals Code that pertain to trusts and estates. Among other things, the bill would do the following:

- Revise the information that a trustee must give to beneficiaries in a statement of account.**
- Provide that a beneficiary's claim for breach of trust would be barred one year after he or she was sent a report disclosing the existence of a potential claim, rather than an annual or final account; and provide**

for a five-year statute of limitations in other cases.

- Require the repayment of improper distributions from a trust.**
- Require the payment of interest on money that a fiduciary deposited with a county treasurer, when the money was paid to a claimant.**
- Exclude the value of property in trust for the benefit of a child of a decedent, from the intestate share of a surviving spouse who married the decedent after he or she made a will.**
- Revise provisions for the disclaimer of a property interest.**
- Expand the authority of a personal representative to make certain decisions regarding taxation.**

Trust Administration

Statement of Account. Under EPIC, a trustee must provide a statement of account to each current trust beneficiary at least annually and on termination of the trust or a change of the trustee. Upon reasonable request, a trustee also must provide a statement of account to each interested trust beneficiary who is not a current trust beneficiary.

The bill specifies that a statement of account would be a report by the trustee that, at a minimum, would have to list the trust assets, giving their market values if feasible, the trust liabilities, receipts, and disbursements, and state the source and amount of the trustee's compensation. A particular format or formality would not be required for a report or statement of account unless a court specified its content and manner of presentation.

Claim for Breach of Trust. Currently, a beneficiary's claim against a trustee for breach of trust is barred unless a proceeding on the claim is begun within one year after the beneficiary receives an annual or final account (unless the claim has been previously barred by adjudication, consent, or limitation). An account must contain certain information described in EPIC, including sufficient information to put interested persons on notice as to all significant transactions affecting administration during the accounting period, and significant transactions that do not affect the amount for which the trustee is accountable. An account must be provided as required for notice of a hearing. The bill would delete all of these provisions.

Under the bill, a beneficiary would be barred from commencing a proceeding against a trustee for breach of trust if the proceeding were not begun within one year after the date the beneficiary or a representative of the beneficiary was sent a report that adequately disclosed the existence of a potential claim for breach of trust, and informed the beneficiary of the time allowed for commencing a proceeding. A beneficiary also could be barred from commencing a proceeding by adjudication, consent, ratification, estoppel, or other limitation.

A report would adequately disclose the existence of a potential claim for breach of trust if it provided sufficient information so that the beneficiary or representative knew of the potential claim or should have inquired into its existence.

If the one-year period of limitations did not apply, a proceeding against a trustee for breach of trust would have to be commenced within five years of the first of the following to occur:

- The trustee was removed, resigned, or died.
- The beneficiary's interest in the trust terminated.
- The trust terminated.

Multiple Trustees. Currently, if there are more than two trustees and the trust instrument expressly provides for the execution of any of their powers by all or any one of them, the provisions of the trust instrument govern. Under the bill, this

would apply if there were two or more, rather than more than two, trustees.

Tax Matters. The Code authorizes a trustee to take certain actions in connection with a tax matter. These include making, revising, or revoking an available allocation, consent, or election affecting a tax that is appropriate to carry out the settlor's estate planning objectives and to reduce the overall burden of taxation. After making this decision, the trustee may make compensating adjustments between principal and income. Under the bill, the trustee could make these compensating adjustments in the manner provided by the Uniform Principal and Interest Act (proposed by House Bill 5307).

Repayment of Improper Distribution. Under the bill, unless a distribution or payment could no longer be questioned because of adjudication, estoppel, or other limitation, a distributee or claimant who received property that was improperly distributed or paid from a trust would have to return the property and any income and gain from it since distribution, if the recipient had the property. If not, the recipient would have to pay the value of the property as of the date of distribution or payment and any income or gain from the property since distribution.

Payment by County Treasurer

The Code requires a fiduciary making final distribution to deposit with the county treasurer money or personal property that belongs to an heir, devisee, trust beneficiary, or claimant whom the fiduciary cannot locate or who declines to accept the money, or money or property belonging to a person whose right is the subject of appeal from a court order.

A person entitled to money deposited with a county treasurer may petition the court for an order directing the treasurer to pay over the money. If satisfactory proof of the claimant's right to the money is made, the court must order the county treasurer to pay the money to the claimant. Under the bill, the court would have to order the treasurer to pay the money and interest earned on it, less the treasurer's fee, to the claimant.

Currently, if a person who cannot be located or who declined to accept the money does not claim it within three years after the

money has been deposited with the county treasurer, the money that would have been distributed to that person, less expenses, must be distributed by court order to everyone who would be entitled to it if the person had died, and his or her claim is forever barred. Under the bill, interest earned on the money also would have to be distributed.

Surviving Spouse's Intestate Share

Under EPIC, if the surviving spouse of a decedent had married that person after he or she made a will, the surviving spouse is entitled to a share of the decedent's estate. The surviving spouse is entitled to the value of the share of the estate that he or she would have received if the decedent had died intestate (without a will), subject to certain exclusions. The exclusions apply to property that was left to a child of the decedent who was born before he or she married the surviving spouse and who is not the surviving spouse's child, and property devised to a descendant of the child. Under the bill, these exclusions also would apply to property that was in trust for the benefit of such a child or his or her descendant.

Disclaimer of Interest

Part 9 of Article 2 is known as the "Disclaimer of Property Interests Law", and provides for the right of a person to disclaim, or give up, a disclaimable interest in property. ("Disclaimable interest" includes property, the right to receive or control property, and a power of appointment.) A disclaimer may be of a fractional or percentage share, or a limited interest or estate. Under the bill, a person also could disclaim a specific asset, an interest in a specific asset, or a pecuniary amount.

Currently, except for a trust or a power of attorney, the right to disclaim exists notwithstanding a spendthrift provision or a restriction or limitation on the right to disclaim contained in the governing instrument (a deed, will, contract, etc. under which property devolves, a property right is created, or a contract right is created). The bill provides, instead, that unless the governing instrument were a trust instrument that did not authorize the trustee to disclaim, or a power of attorney that

denied the agent (the person acting under the power of attorney) the authority to disclaim, the right to disclaim would exist notwithstanding either of the following:

- A spendthrift provision or similar restriction that limited the interest of the disclaimant.
- A restriction or limitation on the right to disclaim contained in the governing instrument.

Personal Representative: Tax Elections

A personal representative is a person responsible for administering an estate and winding up its affairs. The Code authorizes a personal representative to take certain actions for the benefit of interested persons. These include making tax elections that are appropriate in order to carry out the decedent's estate planning objectives and to reduce the overall burden of taxation. The bill, instead, would authorize a personal representative to make, revise, or revoke an available allocation, consent, or election in connection with a tax matter as appropriate to carry out the decedent's estate planning objectives and reduce the overall burden of taxation.

Under the Code, the authority to make tax elections includes electing to take expenses as estate tax or income tax deductions; electing to allocate the exemption from the tax on generation skipping transfers among transfers subject to estate or gift tax; and electing to have all or part of a transfer for a spouse's benefit qualify for the marital deduction. The authority under the bill also would include the following for Federal estate tax purposes:

- Electing the date of death or an alternate valuation date.
- Excluding or including property from the gross estate.
- Valuing property.

In addition, the personal representative's authority would include joining with the surviving spouse or his or her personal representative in the execution and filing of a joint income tax return and consenting to a gift tax return filed by the surviving spouse or his or her personal representative.

Claims against an Estate: Time Limit

Under EPIC, a claim against a decedent's estate that arose before the decedent's death is barred against the estate, the personal representative, the decedent's heirs and devisees, and nonprobate transferees of the decedent, unless the claim is presented within time limits specified in the Code. The time limit is three years after the decedent's death if the personal representative did not publish notice to creditors to present their claims, as required in Section 3801. Under the bill, this time limit also would apply if a trustee did not publish notice as required in Section 7504 (which requires a trustee to publish notice if there is no personal representative).

Other Provisions

The bill would amend EPIC's definition of "interested person" or "person interested in an estate" to include the incumbent fiduciary. Presently, the term includes, among others, an heir, devisee, child, spouse, creditor, and beneficiary, and any other person who has a property right in or claim against a trust estate or the estate of a decedent, ward, or protected individual. (An interested person is entitled to receive various notices under EPIC.)

The Code provides that a future interest under the terms of a trust is contingent on the beneficiary's surviving the distribution date. (That is, if a person will become entitled to a benefit under a trust in the future, he or she must survive until the time the future interest takes effect.) Under the bill, this would not apply to a future interest if the beneficiary died or irrevocably transferred the interest before April 1, 2000 (the date EPIC took effect).

The bill would replace the phrase "an individual under legal disability" with references to "a minor or legally incapacitated individual" in provisions that describe ways of making distributions to such a person.

The bill would provide for the apportionment of estate, inheritance, or other death tax imposed with respect to property passing by beneficiary designation. This tax would be apportioned in the same manner as tax

imposed with respect to property passing by survivorship or intestacy.

MCL 700.1105 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

Rather than waiting another 20 years to overhaul EPIC, this legislation would continue the process of keeping the law up to date and workable for practitioners, while protecting the interests of individuals. For the most part, the amendments would resolve ambiguities and internal inconsistencies within the law. For example, requiring the repayment of improper distributions from a trust would be consistent with existing requirements regarding the administration of a decedent's estate. Explicitly including an incumbent fiduciary as an interested person is necessary because a fiduciary does not have a property right in or a claim against an estate, and some courts therefore have not viewed a fiduciary as an interested person. Referring to a minor or legally incapacitated individual, rather than an individual under legal disability, would provide clarity by replacing an undefined term with one that is defined. The bill also would confirm the requirement that interest earned on an asset deposited with a county treasurer be distributed to the claimant.

Supporting Argument

Section 7307 of EPIC describes the required contents of a trustee's account, in order for it to be sufficient to bar claims more than one year after the account has been delivered. According to the Council of the Probate and Estate Planning Section, this provision has proven unworkable for almost all trustees, and the amendment would move to a concept embodied in the Uniform Trust Code. Under the bill, a trustee's report would be adequate to bar claims after a one-year period if it supplied information sufficient to disclose the existence of a possible claim and informed the beneficiary of the period for making a claim. If sufficient information were not supplied, the

time limit for making a claim would be five years after certain events.

Section 7303(3) describes a trustee's obligation to supply information to trust beneficiaries, and refers to a statement of account in a number of places. Since the amendment to Section 7307 would shift from language describing an account to the term "report", the revisions to Section 7303(3) would bring that section into harmony with Section 7307 and reflect the Uniform Trust Code concept of a report, according to the Council. As the Council has pointed out, a trustee's report might include information other than simple accounting information. For example, if a trustee invests in securities of an investment trust to which the trustee provides services in a capacity other than a trustee, the trustee may disclose in its statement of account that it is compensated for those services by the investment trust out of fees charged to the trust. "Disclosure should be deemed complete if the persons entitled to receive a copy of the trustee's statement of account are informed of such charges and the account notifies those persons of the availability of a report...which discloses the rate and method by which the compensation for services is determined."

Legislative Analyst: Suzanne Lowe

FISCAL IMPACT

To the extent that it would affect the number of disputes over wills and trusts, the bill would have an indeterminate fiscal impact on the judiciary.

Fiscal Analyst: Bethany Wicksall

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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.