



**House
Legislative
Analysis
Section**

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ABUSED CHILDREN: COURT PROCEDURES

House Bills 4118-4121 as passed by the House
Second Analysis (4-1-87) **RECEIVED**

Sponsor: Rep. Mary C. Brown
Committee: Judiciary

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THE APPARENT PROBLEM:

While thousands of people are victims of criminal sexual offenses each year, the response of the criminal justice system is sometimes inappropriate and seemingly unjust. The injustice appears even greater when the victim is a child. In many cases, the child victim is bewildered and confused by a courtroom full of adult strangers looking on. The trauma is increased by the fact that the accused is usually seated across the courtroom, facing the child. However, the problem is not limited to the courtroom. Many agree that the worst of the ordeal occurs before the preliminary examination, during the repeated adult questioning and interviewing conducted by the various elements of the criminal justice system. Some people believe that this process results in revictimization of the child, and that it could be avoided by taking one videotaped statement as soon as possible after the crime is reported. Many people concerned with minimizing courtroom trauma for abused children have urged that Michigan law recognize various options — such as the use of videotaping — for the special situation of a child or developmentally disabled person having to testify as a victim in an abuse case.

THE CONTENT OF THE BILLS:

House Bills 4118 through 4121 would amend various acts to make special provision for testimony from alleged victims of abuse who are developmentally disabled or are children under 17 years of age. House Bill 4118 would amend the Revised Judicature Act to provide for the submission of videotaped statements and depositions, the use of anatomically correct dolls, the presence of a support person for the witness, clearing the courtroom, and protecting the witness from directly viewing the accused. House Bills 4119, 4120, and 4121 would make parallel changes to the Juvenile Code, the Administrative Procedures Act, and the teachers' tenure act, respectively. Each bill would be in addition to any protections afforded a witness by law or court rule. Each bill would take effect January 1, 1988, and apply to cases filed and proceedings held on or after that date (House Bills 4120 and 4121 would apply to hearings beginning on or after that date). The bills are not tie-barred.

House Bill 4118

House Bill 4118 would add a new section to the Revised Judicature Act to provide certain protections for children and developmentally disabled people who are alleged victims of abuse and who must provide testimony. The bill would apply to all prosecutions and proceedings for criminal sexual conduct or the attempt of it, child abusive commercial activity, child cruelty, and child torture.

Videotaped Statement

In order to avoid excessive questioning of the alleged victim, a videotaped statement could be taken by the investigating law enforcement agency before the normally scheduled date for the preliminary examination. The statement could be admitted as evidence at all pretrial

proceedings except that it could not be introduced at the preliminary examination instead of the live testimony of the alleged victim. It could be admitted for impeachment purposes and could also be considered by the court in sentencing. The bill would say that full and complete questioning of the witness "should" be included in a videotaped statement. Questions would have to include: the time and date of the alleged offense; the location of the alleged offense; the relationship, if any, between the alleged victim and the accused; the details of the offense; and, the names of any other persons known to the alleged victim who may have personal knowledge of the alleged offense. The defendant and defense counsel would have the right to view and hear the videotaped statement not less than 24 hours before the normally scheduled date for the preliminary examination.

Support Person

During his or her testimony, an alleged victim would be permitted to have a support person nearby. Notice of intent to use a support person would have to be filed with the court and be served on all parties, and would have to name the support person and identify his or her relationship with the alleged victim, and give notice to all parties to the proceeding that the alleged victim may request that the named support person sit with him or her during his or her testimony at any stage of the proceeding. The court would be required to rule on any motion objecting to the use of a named support person before the date on which the alleged victim desired to use the support person.

Dolls

If pertinent, the court would permit the use of dolls or mannequins, including anatomically correct dolls or mannequins, to assist an alleged victim in testifying on direct and cross-examination.

Courtroom Arrangements

Upon the motion of any party before the preliminary examination, and if necessary for the welfare of an alleged victim testifying at a preliminary examination, the court would remove from the room all persons not necessary to the proceeding (transcripts would be made available) and arrange the courtroom so that the witness was protected from directly viewing the defendant. To accomplish the latter, the defendant would be seated as far from the witness stand as was reasonable, and not directly in front of the witness stand. The defendant would be located so as to be able to hear and see the witness and to communicate with his or her attorney.

At trial, if necessary for the witness's welfare, the court would do one or more of the following: clear the courtroom of all people not necessary to the proceedings (testimony would be on closed-circuit television in another location); protect the witness from directly viewing the defendant (this provision would be the same as for preliminary examinations except that the bill would specify that the defendant's position be the same for all witnesses); and, use a questioner's stand or podium for the questioning of all witnesses by all parties.

H.B. 4118 through 4121 (4-1-87)

Videotaped Deposition

If the court found that the alleged victim was or would be psychologically or emotionally unable to testify even with the bill's protections, the court would have to order that a videotaped deposition be taken and admitted instead of live testimony. During the taping, examination and cross-examination would proceed as if the witness was testifying at the court proceeding for which the deposition was to be used. While testifying, the alleged victim could not be confronted by the defendant, but the defendant would be allowed to hear the testimony of the witness and to consult with his or her attorney (MCL 600.2163A).

House Bill 4119

House Bill 4119 would add a new section to the Juvenile Code to provide for videotaped statements and depositions, support persons, anatomically correct dolls, and shielding witnesses from the accused in much the same way as provided by House Bill 4118. The bill would apply to abuse and neglect cases and to proceedings where the accused was a juvenile charged with what otherwise would be a felony involving child cruelty or torture, child abusive commercial activity, criminal sexual conduct, or assault with intent to commit criminal sexual conduct (MCL 712A.17B).

House Bill 4120

House Bill 4120 would amend the Administrative Procedures Act to provide some of House Bill 4118's protections to a child or developmentally disabled person testifying in a contested case hearing as an alleged victim of sexual, physical, or psychological abuse. The witness would be permitted the use of anatomically correct dolls if pertinent, and could have a support person nearby if proper notice had been given. All persons not necessary to the proceeding would be excluded during the witness's testimony (MCL 24.275A).

House Bill 4121

House Bill 4121 would amend the teachers' tenure act in a manner identical to House Bill 4120 (MCL 38.104A).

FISCAL IMPLICATIONS:

The House Fiscal Agency says that the bills would have negligible fiscal implications (3-2-87).

ARGUMENTS:

For:

Many children are confused and distressed by a court process designed for adults; their shyness and fear can silence them at the moment when communication is crucial. The procedures offered by the bills would reduce trauma for children while preserving a defendant's constitutional rights to a public trial and to confront and cross-examine the witnesses against him or her. For example, the use of anatomically correct dolls would enable an inarticulate child to communicate what has happened, and the presence of a support person would comfort the child, but neither would damage the truth-finding process or interfere with the rights of the defendant.

The use of videotaping can protect a child from intimidating and repeated pretrial questioning and make it easier for a frightened child to speak the truth, but videotaped testimony would replace live testimony at trial only when the court found the child to be unable to testify, and examination and cross-examination would proceed as if in the courtroom. Further, the bills would not forbid the taping of additional testimony in the event of new evidence coming to light; there would be sufficient flexibility to meet the needs of justice. Eye-to-eye confrontation is not necessary to avoid violating a defendant's constitutional

right to confront witnesses. Although a courtroom could be closed when necessary to protect the victim, transcripts of the preliminary examination and closed-circuit television coverage of the trial would be available to the public, thereby protecting the defendant's right to a public trial. Because various protections would be provided at the court's discretion on a case-by-case basis, only those victims that need them will receive them, and any effect on normal courtroom procedures will be minimal.

The bills are especially important because Michigan does not have a "tender years" exception to the hearsay rule. Prior to a 1982 Michigan Supreme Court decision, a child's out-of-court statement could be used to corroborate in-court testimony. Now even that small recognition of the special needs of children is lost: as the supreme court noted, the rules of evidence adopted in 1978 do not recognize any hearsay rule exception based on age alone. Victims of abuse who are children or developmentally disabled people need special protections against what can be an overly intimidating criminal justice system. The bills would provide such protections, balanced with the rights of defendants.

Against:

The bills may be unfair to defendants. An essential element in discovering the truth is to have the witness confront the accused; it is common wisdom that it is harder to lie when faced with the person to be harmed by that lie. It is naive to assume that children always tell the truth in these situations. On the contrary, it is all too easy for small children who have been coached or adolescents who harbor resentments to say that something happened when it did not. Recent news reports have emphasized the frequency with which allegations of abuse, particularly those lodged in connection with a child custody dispute, are false. Innocent acts of affection can seem loaded with significance once abuse is charged. A child's unselfconscious experimenting with "anatomically correct" dolls can lead child care experts to believe that the child has been sexually abused.

An accused's constitutional right to confront the witnesses against him or her is of critical importance when so much rests on what one child may say. A defendant needs to be able to face the witness in open court; to put the defendant out of the direct sight of the witness would make it too easy for a confused child or angry adolescent to fail to tell the whole truth. Further, the bills fail to accommodate the occasions when a defendant chooses to defend him or herself; how is this to be managed if the defendant cannot address the witness?

Against:

The bills should have stronger provisions for videotaping and thus do more to spare abused children additional trauma caused by having to suffer repeated interrogation by unfamiliar adults in intimidating surroundings. The criterion for allowing a videotaped deposition to be used in court — that a child be "psychologically or emotionally, unable to testify" is far too high. It would not protect children from the emotional damage that the ordeal of a trial can cause. Further, the pretrial videotaped statement should be mandatory so that pretrial questioning and stress is kept to a minimum. Finally, videotaping should be made available to children whose testimony is required for administrative hearings.

Response: The standard for use of videotaped testimony at trial should be kept high so that conflicts with the defendant's constitutional rights may be avoided. A provision requiring law enforcement agencies to videotape a pretrial statement would impose substantial costs for uncertain benefit: it would place an additional burden on

those children who did not wish to be taped, and without additional safeguards, it would fail to prevent excessive and inappropriate questioning. Videotaping provisions may not be necessary for administrative hearings, as administrative law judges are able to close the hearing.

Against:

The use of videotaping may fail to protect children to the degree thought. Although there is a strong desire to protect a child from the trauma of repeated questioning, the bills seem primarily hortatory in this regard: a pretrial videotaped statement may be taken "in order to avoid excessive questioning of a witness", but little else ensures that excessive questioning would be avoided. Further, children may be traumatized by having to make a series of videotaped depositions, complete with cross-examination, during trial.

The pretrial videotaped statement has been seen as a way of encouraging guilty pleas and avoiding a difficult trial: a defendant presumably would be more willing to enter into a plea agreement after viewing a videotape than he or she would be after simply reading a written report. However, some defendants may instead be encouraged to go to trial because of inconsistencies or other weaknesses spotted in a videotape.

Against:

The special protections offered by the bills should be provided only to younger children. Older children would not be confused or overawed by the legal process, and are capable of testifying in court facing the accused. The age limit for the bills should be something more like 12 or 14 years old, rather than 17.

Response: The adolescent years are very sensitive ones; it is a difficult time for most people. It is often harder for an adolescent to talk about sexual assault than it is for a small child. Most of the protections offered by the bills are discretionary, and should be available to those adolescents who need them.

Against:

The effect of House floor amendments to House Bills 4118 and 4119 is unclear. Those amendments deleted the word "physically" from provisions for videotaped depositions that originally said "the court shall order that the witness, during his or her testimony, shall not be physically confronted by the defendant but shall permit the defendant to hear the testimony of the witness and to consult with his or her attorney." With the deletion of "physically", the bills appear to directly conflict with a defendant's constitutional right to confront the witnesses against him or her. While that right may not require a face-to-face confrontation, the Sixth Amendment grants a right to be "confronted" with the witnesses. The bills should more clearly indicate what they mean by saying that a witness, under certain circumstances, "shall not be confronted by the defendant."

POSITIONS:

The Department of Social Services supports the bills (3-23-87).

The Department of State Police supports the bills (3-20-87).

The Prosecuting Attorneys Association of Michigan supports the bills (3-20-87).

The Michigan Sheriffs Association supports the bills (3-20-87).

A representative from the Wayne County Prosecutor's office testified in support of the bills on 2-24-87.

The Michigan Committee for the Prevention of Child Abuse is examining the bills and does not have an official position at this time (3-25-87).