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House Bill 4118 (Substitute H-1 as passed by the Senate)
House Bill 4119, 4120, and 4121 (as passed by the Senate)

Sponsor: Representative Mary Brown

House Committee: Judiciary

Senate Committee: Judiciary

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RATIONALE

While thousands of people are victims of criminal sexual conduct offenses each year, the response of the criminal justice system is sometimes considered inappropriate and unjust. The injustice appears even greater when the victim is a child. In many cases, the child victim is bewildered and possibly terrified by a courtroom full of adult strangers looking on, especially when the topic is one as sensitive as sex. The trauma is increased by the fact that the accused is usually seated across the courtroom, facing the child. The problem is not limited to the courtroom, however: most seem to agree that the worst of the ordeal occurs before the preliminary examination, during the repeated adult questioning and interviewing conducted to allow the different elements of the criminal justice system to hear the story. Many feel that this process revictimizes the child, which could be avoided if one videotaped statement were taken as soon as possible after the crime was reported and if other courtroom protections were afforded the child.

CONTENT

House Bills 4118 (H-1) through 4121 would amend various acts to include special provisions for the testimony of alleged victims of abuse who are developmentally disabled or under 15 years of age. House Bill 4118 (H-1) would amend the Revised Judicature Act to do the following:

- Permit the victim's statement to be videotaped by the investigating law enforcement agency before the preliminary examination, in order to avoid excessive questioning.
- Permit admission of the statement in lieu of live testimony at all pretrial proceedings but not at the preliminary examination, although it could be used for impeachment purposes and sentencing.
- Allow the victim to be accompanied by a support person during his or her testimony.
- Require a court to permit the use of anatomically correct dolls.
- Require the court to clear the courtroom of unnecessary persons during the victim's testimony, and order that other measures be taken, if necessary to protect the welfare of the victim during his or her testimony.
- Require the court to order a videotaped deposition if the victim were unable to testify even with the proposed protections.

House Bills 4119, 4120, and 4121 would include within the juvenile code, the Administrative Procedures Act,

and the teachers' tenure Act, respectively, some or all of the provisions of House Bill 4118 (H-1).

Each bill specifies that it would be in addition to other protections or procedures afforded a witness by law or court rule. Each bill would take effect January 1, 1988, and apply to hearings begun or cases filed and proceedings held on or after that date. The bills are not tie-barred.

House Bill 4118 (H-1)

The bill would apply to all prosecutions and proceedings for criminal sexual conduct in any degree, second or subsequent criminal sexual conduct offenses, attempted criminal sexual conduct, child abusive commercial activity, child cruelty, or 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 although it could not be introduced at the preliminary examination instead of the live testimony of the victim. It also could be admitted for impeachment purposes and considered by the court in sentencing. The bill provides that the questioning "should be full and complete". Questions would have to include but would not be limited to: 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 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 48 hours before the normally scheduled date for the preliminary examination.

The videotape of a videotaped statement would have to state the date and time that the statement was taken, and the persons present in the room, their identities, and whether they were present for all or only part of the videotaping. The videotape also would have to show a time clock that would have to be running during the taking of the statement.

Support Person

During his or her testimony, an alleged victim would have to 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 served on all parties, and would have

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to name the support person, identify his or her relationship with the victim, and give notice to all parties to the proceeding that the victim could request that the named support person sit with the victim 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 victim desired to use the support person.

Dolls

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

Courtroom Arrangements

Upon the motion of any party before the preliminary examination, and if the court found on the record that special arrangements were necessary for the welfare of an alleged victim testifying at a preliminary examination, the court would be required to order that all persons not necessary to the proceeding be removed from the room and, in order to protect the witness from directly viewing the defendant, order that the courtroom be arranged so that the defendant was seated as far from the witness stand as was reasonable and not directly in front of the witness stand. The defendant would have to be located so that he or she could hear and see the witness and communicate with the defense counsel. Upon request and payment of appropriate fees, a transcript of the victim's testimony would have to be made available.

Upon the motion of any party before trial, if the court found on the record that special arrangements were necessary for the victim's welfare, the court would have to order one or more of the following:

- That the courtroom be cleared of all people not necessary to the proceedings.
- That testimony be on closed-circuit television in another location.
- That the victim be protected from directly viewing the defendant. (This provision would be the same as for preliminary examinations except that the defendant's position would have to be the same for all witnesses.)
- That a questioner's stand or podium be used for the questioning of all witnesses by all parties.

In determining whether these arrangements were necessary at the preliminary examination or at trial, the court would have to consider the victim's age and psychological maturity, the nature of the offense, and the desire of the victim or his or her family or guardian to have the testimony taken in a nonpublic room.

Videotaped Deposition

If the court found on the record 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 were 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 the defense counsel.

Proposed 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 in House Bill 4118 (H-1). The bill would apply to abuse and neglect cases and to proceedings in which 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.

Proposed MCL 712A.17b

House Bill 4120

House Bill 4120 would amend the Administrative Procedures Act to provide some of the protections in House Bill 4118 (H-1) 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 have to 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 have to be excluded during the witness's testimony.

"Psychological abuse" would mean "an injury to a child's mental condition or welfare that is not necessarily permanent but results in demonstratable manifestations of mental distress".

Proposed MCL 24.275a

House Bill 4121

House Bill 4121 would amend the teachers' tenure Act in a manner identical to House Bill 4120.

Proposed MCL 38.104a

FISCAL IMPACT

House Bills 4118 (H-1) and 4119 would result in increased expenditures for State and local government. The Department of State Police reports that \$126,000 would be necessary if it were to equip all State Police posts with video equipment. Costs for local government would be dependent upon the number of cases in which video equipment would be necessary. Information provided by the Prosecuting Attorneys Coordinating Council, on recent acquisitions, indicates that \$3,000 per local law enforcement agency would cover the cost of equipment necessary for videotaping statements and remote broadcasting of testimony, if an agency chose to purchase the equipment.

House Bills 4120 and 4121 would have no fiscal impact on State or local government.

SENATE COMMITTEE ACTION

The Senate Judiciary committee adopted amendments to all of the bills to make them applicable to child victims under the age of 15, instead of 17. The committee also adopted amendments to House Bill 4118 (H-1) to require that the videotaped statement taken before a preliminary examination state the date and time of the videotaping, the persons present, and how long they were present, and to show a time clock. Committee amendments to House Bills 4118 (H-1) and 4119 also would require the judge's finding of necessity for special courtroom arrangements and a videotaped deposition to be made on the record.

Committee amendments to House Bills 4120 and 4121 would define "psychological abuse".

(Additional amendments to House Bills 4118 (H-1) and 4119 adopted on the Senate Floor would require that the defense be allowed to view and hear the videotaped statement not less than 48 hours, instead of 24 hours, before it was offered into evidence.)

ARGUMENTS

Supporting Argument

It is obvious that many children are confused and distressed by a court process designed for adults. This package of bills would go a long way toward reducing the trauma that child victims experience in the adult criminal justice system. The bills demonstrate that the needs of child victims can be addressed without infringing on the rights of the defendant. For example, the use of anatomically correct dolls and a support person should comfort the child, without harming either the truth-finding process or the rights of the defendant. The videotaped statement could reduce a child's trauma while, possibly, enhancing the discovery process. At court proceedings, the two-tiered protections -- that is, the proposed courtroom arrangements and videotaped depositions -- would address the varying degrees of need of the child victim, again without damaging any of the defendant's rights. The fact that the two-tiered protections would be afforded on a case-by-case basis would ensure that only those child victims who needed those protections would receive them.

Supporting Argument

These bills are especially important because Michigan no longer has a "tender years exception" to the hearsay rule. That is, since a 1982 Michigan Supreme Court decision, a child's out-of-court statement to a third party may not be admitted in evidence unless the statement was made under oath with an opportunity for cross-examination. Thus, it is imperative for a child victim to be allowed to tell his or her story in a credible manner under nonthreatening circumstances, if a case is to be made against the defendant. Furthermore, under the common law tender years exception, which was relied upon until the 1982 ruling, the victim's out-of-court statement could be admitted only to corroborate his or her in-court testimony. Therefore, even if the exception still applied, or were reinstated without change, the out-of-court statement could be admitted to bolster the child's testimony but would not keep the child out of court. These bills would still be necessary to afford the testifying child as much protection as possible.

Opposing Argument

Situations in which children falsely accuse others of sexual abuse are either increasing or becoming increasingly evident. This is particularly true in the context of a divorce, where one parent encourages the child to allege sexual assault by the other parent, in order to gain an advantage in the custody order or property settlement, or simply out of vindictiveness. This situation has become so prevalent, in fact, that a group of falsely accused parents has been formed: Sexual Allegations in Divorce (SAID). Further, Department of Social Services figures reportedly show that from 1982 to 1985 the percentage of substantiated allegations of sexual or other abuse decreased from 45% to 38%. While most of the bills' provisions actually would protect victims who make legitimate claims of abuse, care should be taken to ensure that the system does not generate a second victim: a falsely accused defendant.

Videotaped Statement

Supporting Argument

It is inexcusable that children are subjected to repeated questioning by the various parties in the criminal justice system. The trauma that results from this questioning process would be significantly reduced if one videotaped statement were taken before the preliminary examination.

This statement could then be shown to any party who wished to interview the child again, and further harm to the child would be avoided. The statement also would have the effect of facilitating more plea bargaining, and thus would help to avoid the trauma to the child of testifying in court. It is reasonable to assume that the defendant would be more likely to enter into a plea agreement after seeing and hearing the child's statement, rather than after simply reading an arrest report.

Supporting Argument

Requiring a videotaped statement to state the date and time, identify the persons present and how long they were present, and show a running clock, would help to authenticate the statement and ensure its reliability. Without these protections, the procedure could be abused, resulting in prejudicial and virtually irrebuttable videotaped statements. These provisions also would make House Bill 4118 (H-1) more consistent with the Michigan Court Rule regulating videotaped depositions, which requires a video deposition to be timed by a clock and to begin with a statement on camera of the date, time, and place at which the recording is being made (MRE 2.315).

Supporting Argument

Requiring that the defendant be given an opportunity to view and hear the videotaped statement not less than 48 hours before the date of the preliminary examination would help ensure that defense counsel had enough time to prepare for that proceeding and rebut the statement. A shorter time frame could be used by the prosecutor to withhold the statement from the defense until the last possible moment. While that sort of conduct may be unethical, it is not unheard of.

Opposing Argument

The videotaped statement should be mandatory. By leaving videotaping up to the discretion of the law enforcement agency, the bill would not necessarily change anything and children could continue to be traumatized by repeated questioning. A mandatory statement with instructions as to its purpose, however, would go a long way toward reducing the child's trauma, and at the least would eliminate questioning after the statement was made.

Response: Mandating a videotaped statement could result in more, rather than fewer, interviews of child victims, which is exactly what proponents of this measure are seeking to avoid. Since the videotaped statement could be used for impeachment purposes (i.e., compared to trial testimony to point out inconsistencies and discredit the witness), interviewers could be tempted to question the child repeatedly in order to get a "perfect" videotaped statement. Further, since the police would not be required to employ any particular investigative technique in any other circumstance, it would be inconsistent to mandate a videotaped statement in every case of child sexual abuse. Also, permissive language would be more appropriate in the event that a child was simply unwilling to talk.

Videotaped Deposition

Supporting Argument

Requiring videotaped depositions of children who were unable to testify would spare the most sensitive and vulnerable children the additional psychic trauma of testifying in the courtroom. At the same time, the criterion that the child be psychologically or emotionally unable to testify would impose a high enough standard to ensure

that only those children who were incapable of testifying would be deposed. Such a discretionary standard would avoid violating the defendant's constitutional right to confront the witnesses against him or her.

Response: Videotaped depositions should not be mandated only in cases in which the child was unable to testify. Such a limitation loses sight of the original premise of this proposal: that the psychological and emotional damage suffered by sexually abused children is aggravated significantly by the ordeal of trial. Moreover, permitting a videotaped disposition only in extraordinary circumstances would not alleviate a child's pretrial apprehension.

Opposing Argument

Permitting the evidentiary use of child victims' testimony by any means other than in-court testimony would violate defendants' constitutionally guaranteed right to confront witnesses against them. This right is based on the long-standing belief that cross-examination is the most effective tool for discovering the truth, and the truth-seeking process is enhanced when the jury has the advantage of hearing and observing the witness' answers.

Response: Simply because a statement is made out of the courtroom does not automatically render it constitutionally suspect. The opportunity for cross-examination is preserved in a deposition, and both the United States and the Michigan Supreme Courts have held that eye-to-eye confrontation between the defendant and the witness is not always required. While live in-court testimony and cross-examination usually may be the best way of ascertaining the truth, the truth-seeking process obviously is not enhanced when the witness is rendered inarticulate by a courtroom setting. Furthermore, the 6th Amendment right to confrontation was designed to prevent Star Chamber-type of proceedings in which the defendant literally did not know who the accusers were. Finally, the Michigan Court of Appeals very recently upheld a preliminary examination procedure in which a four-year-old victim of criminal sexual conduct testified on the stand while the defendant watched and heard the proceedings from another room via closed-circuit television (People v Kasben, Court of Appeals No. 88702, 3-2-87).

Opposing Argument

Requiring the court to order a videotaped deposition if a child were unable to testify could actually prolong the proceedings and contribute to the child's trauma if a separate hearing on the question of the child's psychological or emotional inability were necessitated. In addition, a videotaped deposition could interfere with the prosecution and/or the defense. Not only is it important for the jury to be able to assess the witness — whose demeanor inevitably appears different on tape — it is also important for an attorney to assess the jury's reaction as he or she proceeds with a line of questioning.

Opposing Argument

Instead of protecting the child, the videotape procedure could give defense attorneys a tactical advantage in the courtroom. As a result of the psychological pressure induced by the courtroom setting, a child victim frequently breaks down and cries on the witness stand, thus invoking much sympathy. Such a reaction would be less likely to occur during a videotape session. Defense counsel also would benefit from knowing the precise nature of the key witness' testimony well before trial, and could better prepare for trial. Further, a videotape procedure would give defense attorneys more latitude to browbeat the child, whereas the courtroom atmosphere and the presence of a jury tend to protect a witness.

Opposing Argument

Under the Michigan Rules of Evidence (MRE), there already are several circumstances in which a witness is considered to be "unavailable" to testify in court. When a witness is determined to be unavailable, prior testimony taken under oath with full cross-examination is admissible as an exception to the hearsay rule. One instance of "unavailability" includes the situation in which a witness is unable to testify because of a "then existing physical or mental illness". Thus, the bill's standard of "psychologically or emotionally unable to testify" would merely duplicate what the child may currently be allowed under the MRE. If a videotaped deposition is in fact considered an effective means of protecting child witnesses, its use should be permitted in instances where the MRE do not already allow a hearsay exception.

Dolls

Supporting Argument

By requiring victims to be allowed the use of anatomically correct dolls, the bills would facilitate the prosecution of persons accused of sexually victimizing children. In many cases, children do not know the appropriate technical terms, or are too timid or traumatized, to verbalize what was done to them. By demonstrating with these dolls or other mannequins, however, a child could make the sexual offense explicitly clear to the jury and judge.

Opposing Argument

Some people claim that the use of these dolls actually can be used to generate cases, and that unabused children tend to use the dolls in the same manner as molested children. While permitting the use of these dolls in the courtroom may appear completely innocuous and compassionate, perhaps it would be prudent to determine whether these dolls are, in fact, prejudicial, before mandating judges to allow their use.

Response: As recently as last June, the Michigan Court of Appeals upheld the use of anatomically correct dolls in the courtroom (People v Garvie, 148 Mich App 444).

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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.