

SFA

BILL ANALYSIS

Senate Fiscal Agency

Lansing, Michigan 48909

(517) 373-5383

RECEIVED**OCT 08 1990****Mich. State Law Library**

Senate Bill 635 (as enrolled)

Sponsor: Senator John F. Kelly

Senate Committee: Judiciary

House Committee: Judiciary

Date Completed: 7-17-90

RATIONALE

As a means of relieving the backlogged dockets of Michigan's trial courts, where several years can elapse before a case is heard, and allowing parties to a civil dispute to have their case resolved quickly outside of the trial court system, it has been suggested that Michigan establish an alternative forum in which parties could select a former or retired judge to hear and decide the action.

CONTENT

The bill would amend the Revised Judicature Act to do the following:

- Establish a new procedure under which the parties to a nonjury civil action could stipulate to the assignment of a "senior judge" (a former judge or justice not currently holding judicial office) to hear and decide the case.
- Require the stipulation to be approved both by the chief judge of the court in which the action was pending and by the Supreme Court.
- Establish a stipulated assignment fee fund in each circuit court, and require the parties to pay into the fund a \$250 fee, which would be used for the provision of civil legal services to legal aid clients.
- Establish in each circuit court a senior judge civil action fund for the deposit and payment of a senior judge's compensation and the expenses of a trial.
- Authorize the Michigan Supreme

Court to assign a judge of any court to serve in any other court.

The bill would take effect October 1, 1990.

Assignment Stipulation

In any nonjury civil action pending in any court in this State, with the consent of all of the parties to the action, the parties could stipulate to the assignment of a senior judge to hear and decide the action. "Senior judge" would mean a former Supreme Court justice or a former judge of the Court of Appeals, circuit court, recorder's court, district court, probate court, common pleas court, or municipal court, who met all of the following requirements:

- Was a member in good standing of the State Bar.
- Was once elected to judicial office in this State.
- At the time of assignment did not hold a judicial office by appointment or election.
- Had never been removed from judicial office pursuant to Article 6 of the State Constitution (which provides for removal of a judge for reasonable cause short of grounds for impeachment) or Article 11 (which provides for impeachment of civil officers "for corrupt conduct in office or for crimes or misdemeanors"), or as allowed by law.
- Was a legal resident of this State.

A stipulation would have to name two senior judges, agreed upon by all the parties, selected

from a list approved by the Supreme Court. It would have to specify the hourly rate of compensation the parties agreed to pay the senior judge for his or her services, and estimate realistically the number of judicial hours needed to hear the action and to perform all the functions required of the senior judge. The hourly rate could not exceed an hourly rate that, if computed on a daily basis, would be more than the daily salary paid to a judge of the court in which the action was pending. The stipulation also would have to estimate realistically the costs of trial, including notice, the services of a court reporter, the rental of an appropriate site to hold the trial, and necessary expenses of the senior judge and support staff, including travel, lodging, and meals. Further, the stipulation would have to contain a determination of who was responsible for initially paying the costs of the action, and who was responsible for those costs upon final judgment. Finally, the stipulation would have to include a realistic estimate of the cost to the local unit of government for administering the senior judge civil action fund for that action.

The stipulation and a receipt for the deposit of required fees and costs would have to be filed with the chief judge of the court in which the action was pending. Upon that judge's approval of the stipulation, it would have to be forwarded to the Supreme Court for approval and assignment of the senior judge.

If neither of the senior judges selected by the parties were designated, or if the designated judge could not hear the action for any reason, the parties could either select two other senior judges and resubmit the stipulation, or any of the parties could withdraw the stipulation. Upon withdrawal, all deposits paid, except the stipulation assignment fee, would have to be refunded. Otherwise, a stipulation could not be withdrawn except with the consent of the senior judge assigned to hear the action. Upon withdrawal, the action would regain the same status it had before the stipulation was filed or as ordered by the chief judge of the court in which the action was pending.

Senior Judge Authority

If the Supreme Court directly or through the State Court Administrator approved the stipulation and assigned a senior judge named

in the stipulation, the assignment would take effect upon entry of that order of approval. The senior judge would be authorized to perform all judicial duties required in the action and would exercise the same powers and duties of a judge sitting without a jury in the court in which the action was pending. The senior judge would have the same immunity from criminal and civil liability in connection with the exercise of his or her powers and duties as judge, as a judge of that court.

While hearing and deciding an action, a senior judge would be subject to the Code of Judicial Conduct, and would be prohibited from holding a nonjudicial office to the same extent as a judge of the court in which the action was pending, pursuant to Section 2, Article 3 of the State Constitution. The senior judge could be censured, suspended, or removed. Service as a senior judge would not constitute service for purposes of retirement in any public retirement system in this State.

A written transcript of the proceedings would have to be filed in the court in which the action was pending upon the request of any party at that party's expense, or upon the request of the senior judge, in which case the expense would have to be allocated by the judge among the parties. Except for good cause shown to the chief judge, a final judgment would have to be entered by the senior judge within 21 days after all the parties had submitted their closing proofs and arguments. An order, decision, or judgment of the senior judge would be conclusive, and appeal would not be available to any party. The order, decision, or judgment would be enforceable to the same extent as an order, decision, or judgment of the court in which the action was pending.

A trial conducted by a senior judge would have to be a public trial held within the venue of the court where the action was pending. Unless the trial were held in a facility provided by the court, notice of the site of the trial would have to be entered upon the court file and published by the court clerk in a legally designated newspaper circulating within the court's jurisdiction not less than seven days before the trial date.

Stipulation Assignment Fee Fund

A stipulation assignment fee fund would be established in the circuit court in each judicial circuit. Each party to an action would have to pay a nonrefundable stipulation assignment fee of \$250.

The total fees would have to be used for the provision of civil legal services through the Legal Aid and Defender Association of Detroit or through existing legal services and legal aid programs funded by the Legal Services Corporation. By January 30 each year, the circuit court would have to distribute the fees received the previous year solely to the existing civil legal services programs within its judicial circuit. If more than one program existed within a circuit, each program would have to receive an equal share of the funds.

Senior Judge Civil Action Fund

A senior judge civil action fund would be established in the circuit court in each judicial circuit to pay the compensation and costs of actions under the bill. The following money would have to be deposited in the fund: a sum equal to the estimated compensation that would be due the senior judge for his or her services, costs, and expenses; a sum equal to the estimated costs of trial (including costs to the local unit for administering the fund); and other funds as provided by law or court rule.

Before receiving payment from the fund, a senior judge would have to file a detailed statement of services rendered and costs incurred. The chief judge would have to review and approve the statement. The clerk would have to reimburse the senior judge for actual and necessary expenses and for services according to the hourly rate provided for in the stipulation, up to the amount deposited in the fund by the parties. Before the trial concluded, the senior judge could file for interim payments.

If at any time the chief judge believed that the parties had not deposited a sufficient sum to cover the senior judge's compensation or the costs of the trial, the chief judge could order the parties to deposit an additional amount, and could adjourn the trial until that amount was paid. If the additional amount were not paid within 10 days after it was ordered, the

chief or presiding judge could take appropriate action, including returning the action to the status it had before the stipulation was filed, for failure to comply with the order.

Money deposited in the senior judge civil action fund in excess of the actual compensation and costs of the trial would have to be refunded to the parties within a reasonable time after final judgment.

Senior judges would not be subject to the section of the Act that establishes the salary of retired judges performing judicial service.

Judicial Transfers

Under the Act, the Supreme Court may direct a judge to serve in any court in which he or she "is authorized to act as judge", and municipal court and district court judges may serve as judges of the Detroit Recorder's Court. The Act also provides that the Supreme Court may direct a district or circuit court judge or an attorney judge of the probate court to serve as a judge in any district, circuit, or probate court, although a probate judge may be directed to serve as a probate judge in any county or probate court district. The bill, instead, would authorize the Supreme Court to assign a judge of any court to serve as a judge in any other court in the State, although a nonattorney probate judge could be assigned only to serve as a judge in another county or probate court district. An assigned judge would have to perform the duties of the judicial office in the same manner as if he or she were elected to that office. An assignment would have to be for a limited period or specific assignment.

The bill also would apply to all assigned judges the current requirement that a transferred judge be paid as a salary for each day served the greater of \$25 or 1/250 of the amount by which the salary of the judgeship to which he or she is transferred exceeds his or her total salary. (District judges assigned to the recorder's court presently are limited to the 1/250 amount.)

Like current law, the bill would require an assigned judge's salary and expenses to be paid by the county or district control unit that provided an additional salary for the judicial office to which the judge was returned, and would require that source to return to the

respective counties or district control units in which the assigned judge was appointed or elected, for each day served, 1/250 of the annual additional salary paid by those counties or district control units to the assigned judge. The bill also provides that the same source paying the salary to an assigned recorder's court judge would have to return to the State for each day served 1/250 of the annual additional salary paid to the judge.

In addition, the bill would require that an assigned municipal judge be compensated as provided in Section 225a of the Act. (Section 225a provides for a transferred municipal court judge to receive the same salary as the judge to whose court he or she is assigned, as well as travel and living expenses and an additional sum of up to \$20 per day, if approved by the local governing body. The salary for each day the judge serves is to be 1/250 of the annual salary for the vacant judicial office.)

Finally, the bill would repeal other sections of the Act authorizing the Supreme Court to assign a circuit court judge or probate judge to serve as a judge in any other circuit court or county or probate court district, respectively (MCL 600.558 and 600.825).

MCL 600.225 et al.

FISCAL IMPACT

The bill would have an indeterminate fiscal impact on State and local units of government. Cost savings to the State and local units could result from use of the provisions that would allow parties to stipulate to a senior judge assignment, by reducing case backlogs without using State and local funds. The amount of savings would depend on the number of individuals who would use the provision. Moreover, the requirement of the \$250 nonrefundable stipulation assignment fee would increase local funds available to legal services and legal aid programs by that amount, per case filed. The number of cases filed per circuit court under the provisions of this bill cannot be anticipated.

The provisions that relate to judicial transfers would have no fiscal impact on the State or local units of government in addition to the current costs of judicial transfers.

ARGUMENTS

Supporting Argument

The bill would create a flexible and efficient alternative to adjudication in which the parties to a nonjury civil dispute could elect to have their case heard privately and quickly by a senior judge of the parties' own choosing, instead of waiting years for the case to come before a court and trusting the luck of the draw in the assignment of a trial judge. This proposal would relieve crowded dockets while taking advantage of the wealth of talent and experience of Michigan's retired judges.

The opportunity to select a senior judge having a particular expertise would be especially valuable in a complex commercial case, in a dispute involving difficult technical questions, or in a case simply involving a large amount of money or a vital aspect of a company's business. This alternative also could be attractive in domestic disputes in which a speedy resolution is desired.

In addition, parties stipulating to the assignment of a senior judge would avoid the problems inherent in a lengthy delay, when legal counsel often can do nothing to break out of the judicial logjam but wait and hope that witnesses do not die or forget their testimony. Instead, the parties could schedule the trial for a convenient time and place and be certain of those arrangements.

Supporting Argument

The bill's provisions pertaining to the transfer and assignment of judges would give the Supreme Court maximum flexibility to assign judges where they are needed the most. Allowing any judge to be assigned to serve in any court would codify the actual practice of the past 15 or so years, would emphasize the constitutional precept that Michigan has one court of justice, and would facilitate the assignment of judges based on their expertise or background.

Opposing Argument

Although the proposed senior judge assignment system would have the trappings of an official court, the bill actually would create a private system of justice that would be paid for by and available to wealthy parties only. Many middle-

income individuals, not to mention low-income parties, could not afford to deposit in advance the estimated sum of a senior judge's fee, which would amount to hundreds of dollars per day, depending upon the salary of the sitting judge, plus the other expenses of the trial and the \$250 stipulation assignment fee. Rather than increasing the accessibility of dispute resolution, the bill could make it prohibitively costly.

Response: What the bill proposes to do is remove from the dockets complex cases in which the parties could agree on the issues but needed a neutral person to render a judgment. This in turn would free up the publicly financed court system, so that others who could not agree on the issues could have them judicially resolved. Consequently, the bill would generate savings for the taxpayers, as well as provide funding for legal services that benefit low-income individuals.

Opposing Argument

While some might argue that trial court dockets would still be relieved even if only affluent individuals and large businesses used the senior judge system, removing those cases would in fact have little impact on the dockets. In the circuit court, family law cases constitute approximately 44% of the calendar, and civil damages cases--in which the plaintiffs usually want a jury--constitute some 20%. Most of the remaining civil cases, then, involve large corporations, which would be the parties taking advantage of the senior judge system. These parties already can go to private arbitration if they choose not to litigate; they do not need a separate forum created for them. Family law cases, on the other hand, would continue to suffer from and fill up a crowded docket. Rather than creating a private forum that spent the talent and expertise of senior judges on commercial disputes, it would be far more advantageous if the Supreme Court simply exercised its existing authority to assign visiting judges to backlogged dockets to clear up the pending family law cases.

Response: Although it may be true that the cases in which the parties would stipulate to a senior judge assignment comprise only a fraction of the total civil cases, a complex commercial case or complicated divorce dispute may take years to resolve. Simply in terms of time that could be saved, removing these cases from the trial courts could have a significant

positive impact on the court calendar. Moreover, it can be argued that commercial disputes between private litigants unfairly consume the scarce resources of the judicial system and have no place in the courts at all.

Opposing Argument

By barring the appeal of a senior judge's decision, the bill would discourage litigants from making use of this alternative and would have limited likelihood of relieving crowded dockets. Without the right to appeal, the proposed system would be little more than court-annexed arbitration. Even an arbitration award, however, can be vacated by a court due to fraud or other reasons specified in the Michigan Court Rules.

Response: Whether the lack of a right to appeal would reduce the value of the proposal remains to be seen. If it were detrimental, the Legislature could modify the appeal provision in the future.

Opposing Argument

Although the bill essentially would make a senior judge subject to removal to the same extent and for the same reasons as a sitting judge, it does not address the parties' recourse in the event that a senior judge did not fulfill his or her responsibilities under what would amount to a contract between the parties and the judge; that is, whether the parties would be entitled to a refund of fees they had deposited in the stipulated assignment fee fund, and whether the judge would be obligated to reimburse interim payments already made to him or her. Conversely, the bill could be strengthened by expressly authorizing a senior judge to delay entering a final order until the parties themselves had fulfilled all of their obligations.

Response: A statement of a senior judge's services and costs would have to be approved by the chief judge, and parties would have to be reimbursed for excess payments to a senior judge civil action fund.

Legislative Analyst: S. Margules

Fiscal Analyst: F. Sanchez

A8990/S635A

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.