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SFA



BILL ANALYSIS

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Senate Bill 881 (Substitute S-1 as passed by the Senate)
Sponsor: Senator Joel D. Gougeon
Committee: Families, Mental Health and Human Services

Date Completed: 9-4-98

RATIONALE

The Michigan Rules of Evidence contain what is commonly called the “tender years” exception to the rule against hearsay evidence. Hearsay is any statement made outside of the courtroom by someone other than a party, which is offered to prove the truth of the statement. Typically, hearsay is excluded because it is not considered trustworthy, but there are a number of exceptions for statements made under circumstances that lend credibility to a statement. The tender years exception (MRE 803A) allows the admission of a statement made by a child under the age of 10 regarding a sexual act. The statement is admissible if it corroborates the child’s testimony and meets other criteria in the rule (described below in **BACKGROUND**).

The testimony of children was the subject of several recommendations of the State Bar of Michigan’s Task Force on Children’s Justice (which was formed in September 1993 and existed for about two years). The recommendations include a suggestion that the tender years exception should be extended to children up to the age of 15, and that a child’s statement about sexual activity should be admissible without the testimony of the child.

CONTENT

The bill would amend the Revised Judicature Act to specify circumstances under which a court could admit the testimony of a proposed witness about a statement made to the witness by someone who was developmentally disabled or under the age of 16 at the time the statement was made. This testimony would be admissible if the statement described an act that was criminal child abuse; child sexually abusive activity; first-, second-, third-, or fourth-degree criminal sexual conduct; assault with intent to commit criminal sexual conduct; and/or child abuse or child neglect as defined in the

Child Protection Law. In addition, at a hearing before the trial, the court would have to find both of the following:

- Based on the testimony of the proposed witness, the circumstances leading to the statement provided sufficient indicators of its trustworthiness.
- The statement was not otherwise inadmissible.

The bill specifies that this testimony would be admissible regardless of the availability of the person who made the statement to the proposed witness. In addition, the witness’s testimony would be substantive evidence of an act or omission that the statement described.

Proposed MCL 600.2170

BACKGROUND

The tender years exception came into Michigan jurisprudence in 1886 (*People v Gage*, 62 Mich 271), and was reiterated by the Michigan Supreme Court in 1930 (*People v Baker*, 251 Mich 326), as follows: “The rule in this State is that where the victim is of tender years the testimony of the details of her complaint may be introduced in corroboration of her evidence, if her statement is shown to have been spontaneous and without indication of manufacture; and delay in making the complaint is excusable so far as it is caused by fear or other equally effective circumstance.” The Court also limited the exception to the first complaint made.

In 1982, however, the Michigan Supreme Court held that the tender years exception no longer existed (*People v Kreiner*, 415 Mich 372). The Court stated that the exception did not survive the

1978 adoption of the Michigan Rules of Evidence, and that hearsay evidence as to what a child related about circumstances of a sexual assault could be admitted only if it came within one of the existing exceptions to the hearsay rule. According to MRE 101, "These rules govern proceedings in the courts of this state to the extent and with the exceptions stated in Rule 1101". Rule 1101 lists situations and proceedings to which the rules do not apply, and none of those exceptions encompasses the tender years exception. In addition, the tender years exception was not included among the specific exceptions to the hearsay rule.

In 1991, the Michigan Supreme Court reinstated the tender years exception with the adoption of MRE 803A, which applies only in criminal and delinquency proceedings. The rule contains the following criteria for the admission of "a statement describing an incident that included a sexual act performed with or on the declarant by the defendant or an accomplice":

- The statement corroborates testimony given by the declarant during the same proceeding.
- The declarant was under 10 when the statement was made.
- The statement is shown to have been spontaneous and without indication of manufacture.
- The declarant made the statement immediately after the incident, or any delay was caused by fear or other equally effective circumstance.
- The statement is introduced through the testimony of someone other than the declarant.
- Only the first statement is admissible, if the declarant made more than one.
- Advance notice of the statement's content and the intent to offer the statement is given to the opposing party.

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

By expanding the hearsay rule, the bill would advance the interests of justice and the protection of children. Under the bill, the admission of a child's statement about a sexual act would not be limited to the corroboration of the child's testimony; in

other words, a witness could testify about a statement made to him or her even if the child did not testify. In addition, the exception would apply to statements made by children up to the age of 15, rather than nine, as well as to statements made by developmentally disabled individuals. To ensure that a statement was reliable, the court would have to find that the circumstances leading up to the statement adequately indicated its trustworthiness. This would be consistent with the so-called "catch-all" exception to the hearsay rule, under which a statement that does not fall within any of the other exceptions may be admitted if it has "equivalent circumstantial guarantees of trustworthiness" (MRE 803(24)).

Response: Though laudable, the bill would conflict with the existing rule of evidence governing the tender years exception. Since rules of evidence are promulgated by the Michigan Supreme Court, it is not clear whether a conflicting statutory provision would be enforceable.

Legislative Analyst: S. Lowe

FISCAL IMPACT

The bill would have an indeterminate fiscal impact. The effect the bill could have regarding the number of trials and convictions is speculative.

Fiscal Analyst: B. Bowerman

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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.