Legislative Analysis

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CHILD SUPPORT AMENDMENTS

House Bill 5368 (Substitute H-1)
Sponsor: Rep. David Farhat

House Bill 5369 (Substitute H-2)
Sponsor: Rep. David Robertson

House Bill 5370 (Substitute H-1 as amended)
Sponsor: Rep. Philip LaJoy

House Bill 5371 (Substitute H-3)
Sponsor: Rep. Fran Amos

House Bill 5372 (Substitute H-1)
Sponsor: Rep. John Garfield

House Bill 5373 as introduced
Sponsor: Rep. Mike Nofs

Committee: Judiciary
First Analysis (3-9-04)

BRIEF SUMMARY: The bill package would amend various acts to create a graduated penalty structure for non-support based on the amount owed; create a public "most wanted list" of payers who owed more than $200,000 in support; limit the amount a support order could be reduced when a payer is incarcerated; require a cash bond before release pending arraignment and the preliminary examination; and put the new felony penalties in the sentencing guidelines.

FISCAL IMPACT: The bill would have fiscal implications for the state and could have fiscal implications to local units of government. See more detailed information under Fiscal Information later in the analysis.

THE APPARENT PROBLEM:

According to the Office of Attorney General, over $7 billion is owed to the state's children in the form of unpaid child support. This represents about 650,000 children. Of this figure, over 400,000 children receive no support at all. When a parent fails to pay child support, that child's standard of living is decreased and the child may be put at risk for educational and behavioral problems in the future.

Recent reforms in child support enforcement has allowed the Child Support Division of the Office of Attorney General to arrest 114 people for nonsupport and collect over $1.5 million, just in the last seven months of 2003. This year alone, about $570,000 has been collected in past due support. Unfortunately, with over $7 billion in uncollected past due child support, Michigan ranks third worst in the nation. Some believe that if the penalties for felony non-support were increased, there would be a greater incentive to pay for those who can afford to pay. Legislation has been offered to amend several statutes relating to nonpayment of child support to encourage parents to comply with child support orders.

THE CONTENT OF THE BILLS:

House Bill 5368 would amend the Office of Child Support Act (MCL 400.242) to require the office to submit to the attorney general by December 1 of each year a list of names of payers who owe more than $200,000 in past due child support. The list would have to include the amount owed by each individual and indicate whether the individual's location was known, unknown, or unverified.

The Office of the Attorney General could publish the list on an appropriate Internet web site, and could distribute a "most wanted" list, including names and photographs, and post the list on the Internet and in public places.

The Office of Child Support would have to mail a notice of possible disclosure to the last known address of each applicable payer and recipient of support at least 30 days before the disclosure on the "most wanted" list. The notice would have to detail the amount of past due support and the intent by the Office of Attorney General to disclose the payer's name, photograph, and amount of past due child support. The attorney general could disclose the payer's information if the recipient of the support consented and unless either of the following applied:

- The past due child support was paid within 30 days of the mailing of the notice.

- The payer had, since the mailing of the notice, entered into a written agreement with the Office of Attorney General for payment of the past due amount.

House Bill 5369 would amend the Penal Code (MCL 750.165) to provide a series of penalties for criminal nonsupport. Currently, the code says that an individual who does not pay court-ordered support for a current or former spouse, or for a child, is guilty of a felony punishable by imprisonment for up to four years or a fine of not more than $2,000, or both. The proposed penalties in the bill are as follows:

An individual would be guilty of a felony punishable by up to 10 years' imprisonment or a fine of not more than $15,000 or three times the unpaid support, whichever was greater, or both imprisonment and fine, if any of the following applied: the amount of unpaid support was $20,000 or more prior to the time that the individual had petitioned for and had a final determination on a petition to modify or reduce the support; the individual had failed to pay the court-ordered support for more than five years; or the individual owed $3,000 or more but less than $20,000 and had two or more prior convictions for committing or attempting to commit criminal nonsupport.

An individual would be guilty of a felony punishable by imprisonment up to five years or a fine of not more than $10,000 or three times the unpaid support, whichever was greater, or both imprisonment and a fine, if any of the following applied: the amount of unpaid support was $3,000 or more but less than $20,000 prior to the time that the individual had petitioned for and had a final determination on a petition to modify or reduce the support; the individual had failed to pay court-ordered support for more than three years; or the individual owed less than $3,000 and had one or more prior convictions for nonsupport.

An individual would be guilty of a misdemeanor punishable by imprisonment for up to one year or a fine of not more than $2,000 or three times the unpaid support, whichever was greater, or imprisonment and a fine, if the amount of unpaid support was less than $3,000 prior to the time that the individual had petitioned for and had a final determination on a petition to modify or reduce the support or the individual had failed to pay court-ordered support for more than 90 days.

If a prosecuting attorney intended to seek an enhanced penalty based upon a defendant's prior conviction or convictions, he or she would have to list the prior convictions on the complaint and information. The existence of the prior convictions would be determined by the court, without a jury, at sentencing or at a separate hearing for that purpose before sentencing. The prior convictions, however, could not be used to further enhance sentences for convictions under Sections 10, 11, or 12 of Chapter IX of the Code of Criminal Procedure, which deal with sentencing for committing multiple felonies.

The current penalty does not apply unless the payer appeared in, or received notice by personal service of, the action in which the support order was issued. Instead, the bill would only apply if any of the following applied to the payer:

- The individual had been apprehended on a bench warrant.
- The individual appeared at a show cause hearing.
- The individual made any voluntary or involuntary child support payment.
- The individual responded to a pleading.
- The individual objected to any child support enforcement action.
- The individual received notice by personal service or certified mail.

Furthermore, the prosecuting attorney could not initiate a prosecution under the bill or Section 161 or 167 (which pertain to desertion or refusal to provide for one's family and subsequent violations of a person deemed to be "disorderly" due to refusal or neglect to support his or her family, respectively) for a period of 180 days after the individual was released from prison if he or she had been ordered to pay support under a support order and was without resources to pay the support.

House Bill 5370 would put the new felony penalties proposed by House Bill 5369 into the sentencing guidelines in the Code of Criminal Procedure (MCL 777.16i) and is tie-barred to House Bill 5369.

House Bill 5371 would amend the Friend of the Court Act (MCL 552.519) to amend the provision that establishes a formula for the modification of child support and health care obligations. The bill would specify that the formula could not reduce an established support payment by more than 50 percent if the individual filing the petition was incarcerated in prison and had been sentenced to serve a maximum term of five years in

prison, or by more than 75 percent if the individual was incarcerated and had been sentenced to serve more than a minimum term of five years and less than a maximum term of ten years.

If a parent who was incarcerated in prison and without resources to pay support filed a petition for modification under Section 3 of the Support and Parenting Time Enforcement Act, the formula would have to provide that no additional surcharge could accrue while the parent was imprisoned.

House Bill 5372 would amend the Support and Parenting Time Enforcement Act (MCL 552.631) to specify that if an individual was arrested on a felony warrant for violating the criminal nonsupport provisions of the Michigan Penal Code, the court would require the individual to remain in custody until the time of the preliminary examination unless the individual deposited a cash performance bond. The bill also would specify that upon notification that a payer with an outstanding bench warrant had been arrested or arraigned on a felony warrant, the court would order the bench warrant recalled.

If a person who was ordered to pay support under a support order was imprisoned and without resources to pay the support, no additional surcharge on the support could accrue, no bench warrant for failure to pay support or show cause action for failure to pay support could be authorized, and no prosecution under certain sections of the penal code pertaining to felony non-support and failure to provide for one's family could be initiated for a period of 180 days after the person was released from imprisonment.

House Bill 5373 would amend the section of the Michigan Penal Code (MCL 750.165) dealing with the failure to pay court-ordered support to specify that an individual arrested for a violation would remain in custody until the arraignment unless the individual deposited a cash bond of at least $500 or 25 percent of the arrearage, whichever was greater. If the individual remained in custody, the court would address the amount of the cash bond at the arraignment and at the preliminary examination and, except for good cause shown on the record, would order the bond to be continued in the same amount. At the court's discretion, the cash bond could be set at an amount not more than 100 percent of the arrearage and the court could add costs required under the Support and Parenting Time Enforcement Act. The court would specify that the cash bond amount be entered into the LEIN. If a bench warrant under the Support and Parenting Time Enforcement Act was outstanding for an individual when the individual was arrested, the court would notify the court handling the civil support case that the bench warrant should be recalled.

House Bills 5372 and 5373 are tie-barred to one another, meaning neither would take effect unless both were enacted.

FISCAL INFORMATION:

If the Family Independence Agency (FIA) handles the responsibilities outlined in House Bill 5368, the fiscal impact would be the cost of hiring of one or two FTEs, 66 percent of which could be paid by the federal government under Title IV-D of the Social Security

Act. If the attorney general handles the responsibilities, Title IV-D funding would not be available, and the attorney general would also incur the cost of a new interface with the existing FIA Child Support Distribution and Child Support Enforcement Systems.

ARGUMENTS:

For:

Michigan ranks as the third worst state for the amount of overdue child support payments. This proposed legislation, say proponents, will provide strong disincentives for a parent to neglect his or her responsibility towards his or her child or children. It will do this by increasing terms of imprisonment and allowing for the imposition of fines, requiring a bond to be posted for release until arraignment or preliminary examination, and mandating the posting of a "most-wanted list". As a result, many children will be better provided for, fewer families will be dependent on public assistance, and the amount of uncollected child support will decrease (which in turn may make the state eligible to receive more revenue from a federal incentive measure designed to encourage increased collection rates). According to the Attorney General's testimony before the House Judiciary Committee, the intent is not to conduct a "witch-hunt" against parents who have fallen behind because of unemployment or falling on hard times, but to go after the "deadbeats who refuse to pay". Those parents who faithfully fulfill their legal responsibilities will have nothing to fear from this legislation.

Against:

The bill package fails to distinguish between those who intentionally hide assets, refuse to pay, or deliberately choose lower paying jobs or unemployment as a way to reduce payments from those parents who have struggled to maintain adequate employment during a slow economic period, those who have lost jobs or had to reduce their hours at work due to illness or injury, and those faced with large arrearages as a result of a modification order that increased their payments retroactively. It is not uncommon for some modification orders to take a couple of years to go through the system, resulting in the payer suddenly being presented a bill for thousands of dollars going back to the date the modification petition was filed. Yet, it seems the public is being asked to trust that county prosecutors and the attorney general will only go after the "true" deadbeats, even though it appears that the established practice is to target the poor who cannot pay and who are less likely to retain adequate legal help. Perhaps more could be collected if enforcement efforts included job counseling, training, and placement.

If the intent of the legislation is to increase collection of overdue child support so as to better the lives of the children affected, then why take a punitive approach that will likely increase the amounts owed rather than reduce them? Rather than send parents to prison, it would be more cost effective to enroll them in the tether program (of which participants must pay a portion of the daily cost and which restricts their movements to between home and work or school). In that way, the parent can continue working and therefore continue to pay child support. For those who are unemployed or underemployed, job training and counseling should be provided. Parenting classes could strengthen the parent-child relationship; children with positive relationships with both parents are less likely to

engage in high risk behaviors. Current law restricts probation to five years; probation, and thus oversight, should be allowed to continue for the full duration of the time needed to repay a child support arrearage. These approaches are much more likely to result in the lifestyle changes that will enable a parent to fulfill his or her parenting and support responsibilities. Besides, there already are civil and criminal remedies available, including the loss of a driver license or occupational license of the person with an arrearage. It would seem that better enforcement of the laws already on the books could make a significant difference. Lastly, the annual surcharge on overdue amounts needs to be dropped. A past attempt at encouraging compliance with support orders, the surcharge has instead increased arrearages for those who can only make the minimum payments to an amount that will probably never be paid off.

For:

House Bill 5368 would allow the attorney general to publish a list of the names of people who owe $200,000 or more of back child support. Reportedly, over 440 people currently owe more than $200,000. Some of these outrageous arrearages are due to a payer's deliberate choice of a lifestyle that enables them to avoid paying what a court has decided is their fair share. Knowing that their names and photographs may soon appear on the Internet may encourage some of these parents to pay up what is owed to their children.

Before a name could be listed, the Office of Child Support (OCS) within the Family Independence Agency would have to send a notice to the parent who has an arrearage and the parent to whom the money is owed. This is not overly harsh as the parent to whom the money is owed would have to agree to the other parent's name being put on the public "most wanted list". Also, a person could avoid having his or her name published on the list if he or she paid the arrearage within 30 days of the mailing date of the notice or if he or she entered into a written agreement to repay the amount due.

Against:

House Bill 5368 would allow the attorney general to publish a "most wanted list" of payers owing at least $200,000, but the information needed to publish the list is collected by the OCS within the FIA and by the Friend of the Court (FOC). Plus, it is the OCS and FOC that have the responsibility and capability to create payment options for payers with large arrearages, not the attorney general's office. Similar programs in other states utilize the agency that operates under Title IV-D of the federal Social Security Act to implement and maintain the lists. To ensure federal IV-D funding, the bill would have to be amended to designate the OCS, not the attorney general, as the agency to publish the names of parents with large past due amounts; and the names should be limited to IV-D cases only.

Other problems with the bill include the lack of procedures for a payer to contest a mistake (for example, if a computer glitch created a false arrearage) or for an individual with a similar sounding name to protect his or her privacy. In addition, the bill could result in additional costs for FIA to add staff sufficient to handle the added responsibilities under the bill and to add software programs to interface with the attorney general's office and the provisions may conflict with federal confidentiality laws.

For:

Criminal penalties for nonpayment of child support are a critical enforcement tool for those who ignore or evade civil remedies to collect on child support arrearages. Currently, though, the penalty is the same whether a person owes $500 or $500,000 (failure to pay support is a felony punishable by imprisonment for up to four years and/or a fine of not more than $2,000). House Bill 5369 would create a tiered penalty structure based on the amount of child support a person owes, whether it is a first or subsequent offense, and the length of time since the person last made a support payment. Failure to pay for 90 days or an arrearage under $3,000 would be a 93-day misdemeanor. Perhaps early prosecutions under this provision will prevent or reduce the numbers of parents who stop paying altogether or who rack up huge arrearages. With the possibility of spending up to ten years in prison (for amounts of $20,000 or more or failure to pay for more than five years), there will be a strong incentive to stay current with ordered child support payments. As is current law, a sentence imposed under these provisions may be suspended by a court if the person files a bond in the amount and with the sureties the court required. As long as the person complies with the support order, he or she can avoid imprisonment.

House Bill 5371 would provide another strong incentive to avoid prison. Reportedly, it is common practice for judges to reduce an existing support order to zero when a payer is incarcerated (if he or she files a petition to modify the support order). The bill would limit a judge's ability to reduce the support payment. If a person was sentenced to serve less than five years in prison, the support payment could only be reduced up to 50 percent, and by a maximum of 75 percent for those sent to prison for between five and ten years. However, during the time of incarceration, the eight percent surcharge added annually on arrearages would not apply. Obviously, a parent will incur a support arrearage during his or her time in prison and so upon release could owe a sizable amount of money. But, House Bill 5369 and House Bill 5372 would prohibit a prosecutor from filing charges for felony nonsupport for a period of 180 days after the person was released from prison. Also, House Bill 5372 would toll the eight percent surcharge during this period and prohibit a bench warrant for failure to pay support or a show cause action for failure to pay support from being issued during the 180-day period. This would only apply to those persons who, during the time of incarceration, had no resources to pay the support. This six-month "grace period" will give a recently released parent time to find employment, submit a new petition for modification of the support order, and enter into a written agreement with the attorney general for repayment of the arrearage.

Against:

House Bill 5369 would allow a court to impose a fine in addition to the arrearage, but doesn't specify which would have to be repaid first – the fine or the child support arrearage. Money collected from the payer should go to the child's support first before a penal fine is paid. Secondly, the bill isn't clear if "previously incarcerated" refers to being incarcerated for any crime or only for incarceration for previous child support arrearages. In addition, the bill should only target those parents who willfully avoid

paying child support and who have the ability to pay, not those who can't pay or who can't (and probably never will) be able to pay the arrearage in full.

According to federal records, those who fall behind in child support payments typically earn less than $10,000 per year. These are the ones who cannot afford good legal representation, the ones who have fewer opportunities for higher paying jobs, and therefore the ones who will represent the majority of parents targeted by this legislation. Incarcerating them for longer periods of time and restricting a court's authority to suspend support payments during the time of incarceration will only result in these parents falling further and further behind. In addition, some people are concerned that the legislation will unfairly target minority parents. Suspending the eight percent annual surcharge on the arrearage, as House Bill 5371 would do, will do little to help parents who fall behind. Moreover, incarceration will separate them from their children. Encouraging relationships between children and noncustodial parents is beneficial to a child's well-being and increases the likelihood that support will be paid in a timely manner.

At a time when prisons are filling up and the state is looking for ways to provide early release for nonviolent criminals, the reasoning behind increasing prison sentences for parents who cannot pay their child support must be questioned. There are many reasons for falling behind in child support payments. Many parents fall behind due to lengthy or multiple periods of unemployment, illness or injury that prevents them from working or working full time, support increases that take months or years to process but are retroactive to the filing date of the modification petition, the length of time for support reductions to take effect after a modification petition is filed (reductions are not retroactive to the filing date, therefore an arrearage can continue to increase), and mistakes by FOC and FIA computer systems. A recent *Free Press* article dated 2-25-04 chronicled problems by the OCS computer system that is actually creating false arrearages for some and creating extra child support cases for others (e.g., the computer may claim that a person has three children instead of two and begin charging him or her for a nonexistent child). The article quoted the OCS director as saying it will take months to sort out the problems and get the system operating smoothly.

Furthermore, some people do not know that they can petition to have the support order modified; perhaps the OCS or FOC could do more to educate payers about the petition process. However, a parent can only request one modification every 24 months. If a parent was downsized and had to take a lower paying job, he or she could request a modification of support. But, if he or she later lost that job and could only find employment at an even lower level of compensation, he or she would have to wait until two years had passed from the last modification order before being able to reapply for a reduction in support. Obviously, the parent will incur financial hardship and possibly, if not probably, incur a child support arrearage during this time period. Under the bills, a parent could avoid incarceration by posting a bond and entering into an agreement of repayment with the attorney general. But what if the "agreement" offered by the attorney general was not realistic and the parent still could not make the support payments, or if a

parent could not afford the cost of the bond? According to provisions in these bills, he or she would be incarcerated and fined, making a bad situation worse.

For:

Current law requires a bond of at least $500 or 25 percent of the arrearage, whichever is greater, before a person can be released after being arrested on a bench warrant for nonsupport. House Bills 5372 and 5873 would establish a minimum bond amount for felony non-support at the same minimal level for misdemeanor bench warrants.

Response:

According to the OCS, these bills would result in additional costs to FIA regarding the release information data exchange and corresponding system and procedural changes that could be in excess of $350,000. The bills could also increase the state match of federal IV-D money, which would result in an additional cost of $122,000 to the OCS. The Michigan Child Support Enforcement System (MiCSES) would have to be modified to comply with requirements in House Bill 5372 regarding no bench warrants or show cause hearings within the 180-day grace period after release from prison. There could be an increased need for data exchanges with the Department of Corrections, and local costs for county jails could increase due to housing those who can't afford the bond requirements.

Against:

The bills make no provisions for military reservists who may be called to active duty with only a day or so notice. If a reservist has only 24 hours or so to report, he or she does not have time to file a petition to modify a support order, nor will he or she be available for the hearing several months later. For many people, reserve pay is lower than their regular jobs. With the relatively low threshold contained in House Bill 5369, $2,000 for a misdemeanor and $3,000 for the lowest felony offense, a person could trigger the bill's penalties in just a few months.

Against:

A recent Michigan appellate court ruling may complicate some of the provisions contained in the bill package. Recently, the court ruled that once a child reaches 18 years of age, he or she can bring an action under common law (which allows an action to be initiated within one year of turning 18) to receive child support retroactive to his or her birth. [*Clough* v *Balliet*, No. 243090 (2-10-04)]. In that case, the defendant, Kent Balliet, fathered a daughter during a brief relationship while in college in 1982. However, media reports stated that he did not know of the child's existence until the child's legal guardians sued him in 1998, fifteen years after she was born. After paternity was established, Mr. Balliet paid weekly child support until the daughter graduated from high school. When the daughter, whom he has never met, turned 18, she sued him under common law for child support dating from the time of her birth in 1983. (There is no provision in statute for support retroactive to birth unless an action is filed under the Paternity Act within six years of the child's birth.) Because of the court's decision, Mr. Balliet suddenly owes over $100,000 in back support! This ruling is troubling because some mothers choose not to tell their babies' fathers of the pregnancy because they do not want that person involved in the rearing of the child; other parents may turn down the offer of child support in exchange for the father (or mother) bowing out of the child's

life. Under this ruling, however, a person could suddenly find themselves obligated for up to 18 years of child support, and possibly open to prosecution under the bill package if he or she falls behind in the repayment of this sudden debt.

POSITIONS:

The Office of Attorney General supports the bills. (2-19-04)

The Friend of the Court Association/State of Michigan has no formal position on House Bill 5368, does not support House Bill 5371. Regarding House Bills 5369-5370, the association is generally supportive of improvements to felony non-support statutes; regarding House Bills 5372-5373, the association does not favor a blanket provision of law that requires the recall of a civil bench warrant when a felony non support warrant is served, but feels each case should be considered individually. (2-17-04)

The Family Independence Agency opposes House Bills 5368-5372 and is neutral on House Bill 5373. (2-18-04)

The National Family Justice Association supports House Bills 5368 and 5371 and opposes the rest of the package. (2-19-04)

A representative of the Center for Civil Justice indicated opposition for House Bill 5371 and a neutral position on the rest of the bill package. (2-17-04)

A representative of the Family Law Section/State Bar of Michigan indicated support for House Bills 5369, 5372, and 5373; opposition for House Bills 5368 and 5371; and a neutral position on House Bill 5370. (2-17-04)

A representative of ACES indicated support for House Bills 5368 and 5373. (2-17-04)

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.