Legislative Analysis

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ADOPTION LAW CHANGES

House Bill 6008 (Substitute H-1)
House Bill 6009 (Substitute H-1)
Sponsor: Rep. Lauren Hager

House Bill 6010 (Substitute H-1)
Sponsor: Rep. Artina Tinsley-Hardman

Committee: Family and Children Services
First Analysis (6-30-04)

BRIEF SUMMARY: The bills would make a variety of changes to the Michigan Adoption Code, notably providing for one court of jurisdiction and a determination of the child's best interest during Section 45 hearings.

FISCAL IMPACT: There is no information at present.

THE APPARENT PROBLEM:

In April 2002, Jennifer and Patrick Holey entered into a suicide pact amid allegations that the two sexually assaulted a 14-year old girl. Patrick Holey committed suicide on April 9th, while Jennifer, who was pregnant with the couple's second child, survived the suicide attempt. The next day, the Holey's daughter Liliandra was placed with foster parents Chadd and Tamera Smith of DeWitt. In August 2002, Jennifer Holey gave birth to Pearl, who was later placed in the custody of the Smiths. That next month, Jennifer Holey, serving 4-15 years in prison after pleading no contest to third degree criminal sexual conduct, had her parental rights terminated in Ingham County Circuit Court. In December 2002, the superintendent of the Michigan Children's Institute (MCI) recommended the Smiths for adoption of the two girls, and the final adoption order was approved in Clinton County family court in March 2003.

With the entry of that final adoption order, the adoption process of the Holey children, who had been issued new birth certificates with "Smith" as their last name, should have finally come to an end. However, a month after that final adoption order, an Oakland County family division judge ruled that the Clinton County order was in error, and awarded custody of Lily and Pearl to Donna and Jonathan Cromwell of Farmington Hills.

As it turns out, while the Smith's adoption petition proceeded in Clinton County, the Cromwell's petition proceeded in Oakland County. In April 2002, a few days after Lily was placed in the Smith's home, Donna Cromwell (a first cousin of Jennifer Holey's mother) expressed her interest in taking Lily into her home to Lutheran Social Services, the child placing agency contracted by the Family Independence Agency. The Cromwells proceeded to file for a relative placement adoption, but were told by staff of

Lutheran Social Services that they did not qualify as "relatives" because the connection to children was by sixth degree of consanguinity. In August 2002, shortly after the birth of Pearl, Jennifer Holey consented to a direct placement adoption by the Cromwells (and, subsequently, consented to the voluntary termination of her parental rights). However, Ingham County Judge Paula Manderfield didn't approve of the consent and terminated Ms. Holey's parental rights under the Juvenile Code. The children were then committed to the Michigan Children's Institute.

In January 2003, the Cromwells filed a motion under Section 45 of the Adoption Code alleging that the decision by the MCI superintendent to not consent to the adoption by them was "arbitrary and capricious". In April 2003, nearly a month after the Smith's adoption was finalized in Clinton County, an Oakland County judge determined that the decision of the MCI superintendent was, indeed, arbitrary and capricious, and vacated the final adoption order of the Smiths and entered an adoption order awarding custody of the children to the Cromwells. Following the Oakland County decision, the Clinton County judge vacated the Smith's adoption order. Lily and Pearl were removed from the Smith's home in May 2003 and placed with the Cromwells, and a protracted legal battle has ensued. While state appellate courts have thus far declined to hear an appeal, the matter was heard in federal district court in December 2003, with a decision still pending.

Child advocates believe that the state's adoption system failed both of these families, especially the Smiths, and that changes are necessary. Among the main points of concern with current law, are the lack of a clear definition of who is considered to be a "relative", the ability to have adoption proceedings regarding the same child or siblings occur in multiple counties, and the lack of proper notice provided to interested parties in an adoption proceeding. Others have also questioned the lack of autonomy of the superintendent of the Michigan Children's Institute with regard to the ability to consent to adoptions.

THE CONTENT OF THE BILL:

House Bill 6008 (MCL 710.45)

The Michigan Adoption Code (Chapter X of the Probate Code of 1939) generally requires the consent of, among others, the representative of the Family Independence Agency (i.e., the superintendent of the Michigan Children's Institute) or the child placing agency or the court having permanent custody of a child, before an adoption order can be finalized. However, if the prospective adoptive parent is unable to obtain consent from the MCI superintendent, the child placing agency, or the court, he or she can file a motion with the court alleging that the decision to withhold consent to the adoption is "arbitrary and capricious." (This is often referred to as a Section 45 hearing). The bill would add to this, that in making a decision on the motion, the court would make a determination about the child's best interest.

In addition, the bill would require the court to provide a notice for a Section 45 hearing to all interest persons, including, among others, the prospective adoptive parents, the child's

attorney or guardian ad litem, or any other agency or individual with a legitimate interest in the outcome of the motion. During the hearing, all interested parties would be provided a "fair hearing" and permitted to provide testimony and other documentation regarding their position on the withholding consent motion or on the adoption of the child.

The bill also specifies that in a matter subject to a Section 45 hearing, the court would not enter an order of adoption unless, (1) the motion is heard and decided, and the time in which to appeal has expired, (2) the motion is heard and decided, an appeal has been filed, the court of appeals issues an opinion, and the time in which to file an appeal with the supreme court has expired, or (3) the supreme court has denied the motion for an appeal, or has granted the appeal and issued an opinion.

If a motion or petition for a Section 45 hearing is incomplete, the court would notify the petitioner of the deficiency, and the petitioner would have 21 days from the time of the notice to correct the deficiency. If the 21-day period expires, the motion or petition would be dismissed. The court could penalize the department or supervising agency, the petitioner, or a court employee for the failure to provide appropriate notice or the contact information of the individuals to be subpoenaed.

House Bill 6009 (MCL 400.202)

The bill would amend Public Act 220 of 1935 to update portions of the act by replacing references to the Social Welfare Commission and the Department of Social Services with the Family Independence Agency. The bill would also remove provisions relating to children committed to the MCI by observation orders, as those no longer occur.

House Bill 6010 (MCL 710.21a et al.)

The bill would make numerous changes to the Adoption Code.

General Purpose - The act includes a listing of three general purposes of the code. The bill would add that the purpose of the code is also to achieve permanency and stability for adoptive children as quickly as possible, and to support the permanency of a finalized adoption by allowing all interested parties to participate in proceeding regarding the adoptive child.

Definitions- The bill defines "prospective adoptive parent" to mean an individual who has filed a petition for adoption that has not yet been adjudicated. The bill also defines "relative" to mean an individual who is related to the child within the fifth degree by marriage, blood, or adoption.

Attendance by children - The bill would add that the court could permit a child to attend his or her adoption hearing.

Temporary Placements - The act permits the parent or guardian of a child placed in a temporary placement to regain custody of the child by filing a petition that the temporary placement be revoked and that the child be returned to the parent. In addition, if the prospective adoptive parent who receives a child through a temporary placement is no longer willing or able to proceed with the adoption, he or she can file a petition to determine custody of the child. Finally, if a child placing agency that places a child in a temporary placement cannot proceed with the adoption, the agency can file a petition to determine custody of the child. In all cases, the petition is filed in the court that receives notice of the temporary placement. This court is the court of the county where child's parent or guardian resides, where the prospective parent resides, or the where the child is found. The bill would not delete current language specifying where such petitions must be filed, but would add that the petitions would have to be filed in the court of the county where the parent's parental rights were terminated. If both parents' parental rights were terminated at different times and in different counties, the petition would be filed in the court where the parental rights were first terminated. In addition, the court could transfer jurisdiction to another court in another county.

Adoption Petitions - The act currently permits a petition for adoption to be filed in the court of the county in which the petitioner resides or where the child is found. The bill would, instead, provides that adoption petitions would have to be filed in the court of the county where the parent's parental rights were terminated. If both parents' parental rights were terminated at different times and in different counties, the petition would be filed in the court where the parental rights were first terminated. In addition, the court could transfer jurisdiction to another court in another county. The bill retains language that provides that if there has been a temporary placement, the adoption petition shall be filed in the court that received the report of the temporary placement - that is, the court of the county where the parent or guardian resides, where the petitioner resides, or where the child is found.

Interested parties - The act includes a list of interested parties in a petition for adoption, to which the bill would add the adoptive parents. The act also includes a list of interested parties in a petition for a hearing to identify the father or an adoptee and to determine or terminate his parental rights. The bill would add to this list, the guardian or guardian ad litem of an interested person.

BACKGROUND INFORMATION:

Section 45 Hearings

Under Section 45 of the Adoption Code, if the prospective adoptive parent is unable to obtain consent from the MCI superintendent, the child placing agency, or the court, he or she can file a motion with the court alleging that the decision to withhold consent to the adoption is "arbitrary and capricious." The act specifies that unless the petitioner establishes by clear and convincing evidence that the decision to withhold consent was arbitrary and capricious, the court shall deny the motion and dismiss the petition to adopt. If the court finds by clear and convincing evidence that the decision to withhold consent

was arbitrary and capricious, the court may terminate the rights of the appropriate court, child placing agency, or department and may enter further orders in accordance with the adoption code or Chapter XIIA, Section 18 of the Probate Code.

The Michigan Court of Appeals in *In re Cotton* 208 Mich App 180 (1994) describes the section 45 hearing as follows: "The fact that the Legislature in drafting the statute limited judicial review to a determination whether consent was withheld arbitrarily and capriciously, and further required that such a finding be based upon clear and convincing evidence clearly indicated that it did not intent to allow the probate court to decide the adoption issue do novo and substitute its judgment for that of the representative of the agency that must consent to the adoption. Rather, the clear and unambiguous language terms of the statute indicate that the decision of the representatives of the agency to withhold consent to an adoption must be upheld unless there is clear and convincing evidence that that representative acted arbitrarily and capriciously. Thus, the focus is not whether the representative made the 'correct' decision or whether the probate judge would have decided the issue differently than the representative, but whether the representative acted arbitrarily and capriciously in withholding that consent. It is only after the petitioner has sustained the burden of showing by clear and convincing evidence that the representative acted arbitrarily and capriciously that the proceedings may then proceed to convincing the probate court that it should go ahead and enter a final order of adoption."

The court further noted, "[b]ecause the initial focus is whether the representative acted arbitrarily and capriciously, the focus of such a hearing is not what reasons existed to authorize the adoption, but the reasons given by the representative for withholding consent to the adoption. That is, if there exist good reasons why consent should be granted and good reasons why consent should be withheld, it cannot be said that the representative acted arbitrarily and capriciously in withholding that consent even though another individual, such as the probate judge, might have decided the matter in favor of the petitioner. Rather, it is the absence of any good reason to withhold consent, not the presence of good reasons to grant it, that indicated that the representative was acting in an arbitrary and capricious manner."

MCI Superintendent recommendation to the adoption by the Smiths

On December 5, 2002, the MCI superintendent, Bill Johnson, consented to the adoption by the Smiths. The consent to adoption was based on three factors.

- "Lily has already experienced parental neglect which has significantly increased the risk of emotional and developmental harm. She has thrived while placed in her current foster home. The care that she has received while placed in their home has resulted in her making remarkable progress and overcoming alarming developmental delays. The resulting emotional attachment which she has to the foster parents is a very important consideration in making a decision about adoption. The emotional attachment which has development after such significant neglect is of considerable importance."

- "Although the relatives have been determined to be suitable for adoption, they do not provide a familiar environment for these children. The children have become acquainted with the relatives via the visits which have taken placement over the last several weeks. However, the children do not have an existing familiar relationship with the relatives. The strength of the biological and emotional connection of the children to the relatives is not strong."

- "The siblings should be adopted together. Although it would be less traumatic to remove Pearl from her current foster home and place her with the relatives, it would not be in the best interests of either child to be separated from her sister on a permanent basis."

Oakland County decision

The decision of the Oakland County court is premised on five major conclusions.

- No one appeared on behalf of the FIA or the MCI superintendent to support his decision to withhold consent to the adoption by the Cromwells.

- Lutheran Social Services requested that the FIA take over the adoption case.

- Prior to her parental rights being terminated, Jennifer Holey consented to the direct placement of the children with the Cromwells;

- "The blatant disregard by [Lutheran Social Services of Michigan] and [Lutheran Adoption Services] of the law and FIA policy with regard to relative placements and who qualifies as a relative" and other misrepresentations during the adoption proceedings.

- Testimony by three FIA workers in which they testified that they disagreed with the decision of the MCI superintendent regarding consent.

ARGUMENTS:

House Bill 6008

For:

House Bill 6008 would require a judge, in a Section 45 hearing, to make a determination regarding the best interests of the child. Under a Section 45 hearing, the judge makes a determination as to whether a decision by the MCI superintendent to withhold consent to an adoption was made in an arbitrary and capricious manner. A Section 45 hearing does not focus on the actual decision of the MCI superintendent, but rather it focuses on the decision process employed by the MCI superintendent. Irrespective of whether the MCI superintendent's decision was arbitrary and capricious, the decision of the court must be mindful of what is in the best interests of the children involved in the proceeding. In the

case that prompted this package of bills, the Oakland County judge found the decision of the MCI superintendent to be arbitrary and capricious, but critics say the court did not appear to consider the best interests of the children when it voided the decision of the Clinton County court. Was it in the best interests of the children to remove them from the Smith's custody? Some contend that it was not, notwithstanding other concerns with the Oakland County decision.

Against:

It is not entirely clear as to how the best interests of a child would be factored into a Section 45 hearing. The court of appeals noted that the focus of a Section 45 hearing "is not whether the representative made the 'correct' decision or whether the probate judge would have decided the issue differently than the representative, but whether the representative acted arbitrarily and capriciously in withholding that consent." Requiring a judge to make a finding regarding the child's best interests seems to open the door to a situation where the judge will take it upon himself or herself to make the "correct" decision regarding consent to the adoption and substitute that decision for the judgment of the MCI superintendent, another court, or a child placing agency.

For:

House Bill 6008 also clarifies that an adoption petition shall not be issued until a motion for a Section 45 hearing is heard and decided (including any appeal). In the current situation, the Cromwells filed a motion for a Section 45 hearing in Oakland County at the end of January 2003. While that motion was still pending, the Clinton County judge finalized the Smith's adoption petition in March. Had the issue been decided in Oakland County, the Smiths could have avoided a lot of heartache and grief (that is, by not believing the process was finally closed and officially welcoming the children into the family, including getting new birth certificates, until the Section 45 motion was settled.)

Response:

The bill should also clarify what actions a court may take upon making a determination on a Section 45 motion. Subsection 6 provides that if the court finds by clear and convincing evidence that the decision to withhold consent was arbitrary and capricious, the court may terminate the rights of the appropriate court, the child placing agency, or FIA and may enter further orders in accordance with the Adoption Code. If you add to that Michigan Court Rules 3.205(c), which provides "a subsequent court must give due consideration to prior continuing order of other courts, and may not enter orders contrary to or inconsistent with such orders, except as provided by law." Given that, it is not entirely clear how the Oakland County court was permitted to vacate the adoption order of the Clinton County court, and terminate the rights of the Smiths. Section 45 does not permit the court to terminate the parental rights of the parents granted such rights under a prior court order.

For:

The bill also explicitly provides all interested parties with the opportunity for a fair hearing. Some people believe that the Smiths were not offered a fair hearing on the Section 45 motion. They weren't made aware of the hearing, leaving them with no

opportunity to adequately demonstrate to the Oakland County court that they should be the adoptive parents of the two girls.

House Bill 6009

Against:

As introduced, this bill, by transferring the MCI out of the FIA and into the DMB as an autonomous agency, had the potential to improve the adoption process. The committee substitute, by contrast, is essentially a technical bill without much impact. Traditionally, the decision of the MCI superintendent to consent to or deny an adoption petition has been ***the*** decision of the entire department. If the decision to withhold consent is challenged through a Section 45 hearing, the MCI superintendent is provided legal representation through the attorney general's office and afforded the opportunity to defend its decision in court. Until now, with regard to the finality of decisions, the MCI superintendent has operated rather autonomously. However, with regard to the Smith-Holey-Cromwell decision, the then-FIA director did not agree with the decision to withhold consent and did not allow legal representation through the attorney general's office, thus leaving the MCI superintendent unable to support his decision in court. [The FIA reportedly was in the process of developing a review plan where the MCI superintendent would issue tentative decisions, subject to the approval of a special panel.] This is a particularly important fact in this case, as the Oakland County judge based her decision, in part, on the fact that the department didn't defend its position.

That being said, some believe that the FIA acted improperly when it refused to support the MCI superintendent's decision, and that this sort of interference could be avoided if the MCI were removed out from under the control of the FIA.

Response:

A great many others believe that the location of the MCI within the FIA is quite beneficial to all involved in the adoption process, as the MCI would likely have better access to departmental staff, child placing agencies, and other parties involved in an adoption petition. Moreover, the inclusion of the MCI within the FIA's bureaucracy ensures some accountability in the adoption process. The Oakland County decision, on several occasions, noted that staff of the FIA and child placing agencies disagreed with the decision of the MCI superintendent to grant consent to the Smiths. If the MCI superintendent reached a decision in error, there must be certain checks in the adoption process to remedy those errors. Imagine the public outcry if the MCI superintendent, acting as an autonomous state official, were to erroneously consent to an adoption in a case where he or she clearly should not have.

Against:

The committee substitute, largely a technical change to current law, does not go far enough. Rather than updating a few sections of the law, the bill should repeal the existing law, which was enacted in 1935 and has remained relatively unchanged for 70 years, and enact an entirely new, updated MCI act.

For:

Current law provides that an adoption petition may be filed in the court of the petitioner's county of residence or the county in which the child is found. In instances where a temporary placement occurs, adoption proceedings may also occur in the court of the county where the adoptee's parent resides. This creates a process where one court acts without the full knowledge of the events taking place in the other court, despite court rules requiring the other court be notified of the proceeding. In addition, this system of multiple courts also has the potential to leave the petitioners in the other county without sufficient notice of the proceedings in the other court, leaving them with virtually no representation.

The bill attempts to rectify this problem of multiple courts by requiring that petitions be filed in the court where parental rights were terminated or are pending termination. This is likely to be the court that has the most knowledge surrounding an adoption proceeding or is the first court that deals with the children. [It should be noted that bill's language is problematic on this point, as it largely adds this petition requirement onto existing provisions governing where other adoption petitions should be filed. (See sections 23d and 24 of the bill).]

The lack of adequate notice to "interested parties" presents a serious problem in adoption proceedings, particularly in the case of the Smith's, as they were not afforded the opportunity to defend themselves and their children at a hearing that ultimately terminated their parental rights.

Against:

While it is good to attempt to designate one county for an adoption proceeding, the method proposed by the bill is quite problematic. First, the bill will likely result in only a handful of courts handling the bulk of the adoption petitions. The larger urban counties, particularly Wayne, handle most of the termination cases. Even though the bill permits the court to transfer jurisdiction to another court, the process still starts in only a few counties. This will likely result in an extensive backlog of cases and petitions and invariably slow down the adoption process and delay the closure of a case. Rather than mandating one county of entrance, the adoption process would be better served if the central adoption registry served as a clearinghouse, through which petitions would be filed, providing better notification of existing petitions concerning the same child.

For:

The bill adds a definition of what is considered to be a relative. The lack of a clear definition created a major problem in the Oakland County hearing. There, the Cromwells filed a petition for a relative placement, but were told by the social workers from Lutheran Adoption Services that they did not qualify as "relatives" because Donna Cromwell's relationship to the children was a familial relationship of the sixth degree. This rejection appears to be based on Section 23a(4) of the Adoption Code [MCL

710.23a(4)], which permits a parent or guardian having legal and physical custody of a child to make a formal placement of the child for adoption with a stepparent or an individual who is related to the child within the fifth degree by marriage, blood, or adoption. (This is what is known as a relative placement.) Nevertheless, the Oakland County decision cited no specific reference in statute or in FIA policy that specifically defines relative to mean someone within the fifth degree of consanguinity. The court relied on the definition of "relative" in statute (at MCL 722.111) and in the FIA foster care manual where it refers to a parent, grandparent, brother sister, stepparent, stepsister, stepbrother, uncle, aunt, cousin, great aunt, great uncle, or stepgrandparent related by marriage, blood, or adoption, concluding that state law made no distinction among the level of cousins (1st, 2nd, etc.). The court characterized the decision to not permit a relative adoption by the Cromwells to proceed with a relative placement as being a "blatant disregard…of the law and FIA policy" and a "misrepresentation [that] is very disturbing to this Court." This apparent misrepresentation was used by the court as a principal reason to counterbalance the finding by the MCI superintendent that the Cromwells did not provide a familial environment.

The bill defines relative to mean an individual who is related to the child within the fifth degree by marriage, blood, or adoption. It strikes the reference to the actual degree of the relationship in 23a(4), which seems to suggest that this addition of a definition is merely technical in nature.

POSITIONS:

The Family Independence Agency supports the concept of the bills. (6-29-04)

Lutheran Adoption Services supports the bills. (6-29-04)

Michigan Federation for Children and Families supports the bills. (6-29-04)

Hear My Voice supports the bills. (6-29-04)

A representative from the 3rd Judicial Circuit Court (Wayne) testified in opposition to the bills. (6-24-04)

Legislative Analyst: Mark Wolf

■ 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.