Legislative Analysis

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ADOPTION LAW CHANGES

House Bills 6008 and 6009 as enrolled
Public Acts 486 and 470 of 2004
Sponsor: Rep. Lauren Hager

House Bill 6010 (Substitute H-1)
Public Act 487 of 2004
Sponsor: Rep. Artina Tinsley-Hardman

House Committee: Family and Children Services
Senate Committee: Judiciary

Second Analysis (2-25-05)

BRIEF SUMMARY: House Bill 6008 would require notice of a Section 45 hearing under the Adoption Code to be provided to "interested parties" in an adoption petition. House Bill 6009 would provide the MCI Superintendent with representation from the Office of the Attorney General when necessary to carry out his or her duties. House Bill 6010 would require adoption petitions be filed in the court of the county where the parent's parental rights were terminated, in cases where there are multiple applicants seeking to adopt the same child.

FISCAL IMPACT: House Bills 6008 and 6010 would have an indeterminate fiscal impact on the judiciary and local court funding units; the fiscal impact would depend on how the bills affected caseloads and related administrative costs. House Bill 6009 would have no fiscal impact on the Family Independence Agency.

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, would ordinarily have 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 was proceeding in Clinton County, the Cromwell's petition was proceeding 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 did not approve 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 not to 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 agreed 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 ensued.

While state appellate courts have thus far declined to hear an appeal, the matter was heard in federal district court in December 2003. Last fall, the federal court granted and denied various motions to dismiss several complaints brought by the Smiths against the Clinton and Oakland County Circuit Courts, the judges involved in the matter, and the Cromwells. The court denied motions to dismiss the complaints against the Cromwells, Oakland County Judge Pezzetti, and Clinton County Judge Lisa Sullivan (who replaced Judge Robertson). The Smiths also filed a motion for summary judgment and a hearing is scheduled for early March.

Child advocates believe that the state's adoption system failed the two adoptive families, especially the Smiths, and that changes are needed. 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 fact that adoption proceedings regarding the same child or siblings can 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 to consent to adoptions.

THE CONTENT OF THE BILLS:

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 require the court to provide notice of the motion for a Section 45 hearing to all interested parties in an adoption petition (as described in Section 24a(1) of the Adoption Code), the guardian ad litem of the prospective adoptee, and the applicant who received consent to adopt.

In addition, the bill would require that in adoption proceedings where there is more than one applicant, the adoption petition would have to be filed in the court of the county where the parent's parental rights were terminated or are pending termination. If both parental rights were terminated at different times and in different courts, the adoption petition would be filed in the county where parental rights were first terminated. (An identical provision would be added to Section 24 of the Adoption Code by House Bill 6010.)

Finally, the bill would add that a court's decision on a Section 45 hearing would be appealable by right to the court of appeals.

House Bill 6009 (MCL 400.202)

The bill would amend Public Act 220 of 1935 to specify that the superintendent of the Michigan Children's Institute (MCI) has the power to make decisions on behalf of a child committed to the MCI, and that the attorney general's office would represent the MCI superintendent in any court proceeding where the MCI superintendent considers it necessary to carry out the duties of the office. In addition, the bill specifies that on the bill's effective date (12-28-04), the Family Independence Agency would discontinue the preliminary consent denial review process. The bill would also update the act by replacing references to the Social Welfare Commission and the Department of Social Services with the Family Independence Agency.

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 adoptees 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 "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.

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 add that if the petitioner and adoptee reside out of the state, an adoption petition would have to be filed in the county where the parents' parental rights were terminated or are pending termination. 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. If an adoption petition is filed in a county other than the county in which the petitioner resides or the prospective adoptee resides, the chief judge of the court could, upon motion, transfer the jurisdiction of the matter to the court of the county in which the petitioner or prospective adoptee resides.

In addition, the bill would add that in an adoption proceeding where there is more than one applicant – that is, an individual who desires to adopt a child and has submitted an application to a child placing agency – the adoption petition would have to be filed in the county where the parents' parental rights were terminated. If both parental rights were terminated at different times and in different counties, the petition would have to be filed in the county that first terminated the parental rights.

Adoption Orders – The bill would add that if a decision to terminate parental rights is appealed to the Michigan Supreme Court, the adoption shall not be ordered until the application for appeal is denied or the supreme court affirms the order terminating parental rights.

In addition, the bill would also add that if a motion for a Section 45 hearing is filed, the court would not enter an adoption order until the motion is decided and the time in which to file an appeal with the court of appeals or supreme court has expired without an appeal being filed or until the supreme court denies an application for appeal or issues an opinion regarding an appeal.

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 intend 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 developed 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 the agency's 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:

The bill would require notice of a motion for a Section 45 hearing to be provided to all interested parties in an adoption petition, the guardian ad litem of the prospective adoptee, and the applicant who received consent to adopt. This is particularly important

as it provides notice of the Section 45 hearing to other prospective adoptive parents – something that did not occur in the Section 45 hearing brought by the Cromwells in Oakland County. There, the Smiths were not represented at the hearing that effectively stripped them of their parental rights over Pearl and Lili.

House Bill 6009

For:

The bill would amend Public Act 220 of 1935 to specify that the MCI superintendent has the power to make decisions on behalf of a child committed to the MCI, and that the attorney general's office would represent the MCI superintendent in any court proceeding where the MCI superintendent considers it necessary to carry out his or her duties. In addition, the bill specifies that on the bill's effective date (12-28-04), the Family Independence Agency would discontinue the preliminary consent denial review process.

Traditionally, the decision of the MCI superintendent to consent to or deny an adoption petition has been ***the*** decision of the Family Independence Agency. If the decision to withhold consent is challenged through a Section 45 hearing, the MCI superintendent has been 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. The bill, then, provides the MCI superintendent with greater autonomy in making a decision to not consent to an adoption and better guards against the FIA improperly influencing the decision of the MCI superintendent to withhold or grant consent to an adoption.

House Bill 6010

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. When there are multiple petitioners seeking to adopt the same child, this creates a process where one court may act 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 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.

The bill attempts to rectify this problem of multiple courts by requiring, in cases where there is more than one applicant, 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. The bill does, however, provide for some flexibility by permitting the court to transfer jurisdiction over an adoption proceeding to the court where the petitioner resides or where the child is located.

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 (1^{st}, 2^{nd}, 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 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, although it does provide for greater clarity on this issue.

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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.