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BILL ANALYSIS

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House Bill 6008 (Substitute S-1 as reported)
House Bill 6009 (Substitute S-1 as reported)
House Bill 6010 (Substitute S-1 as reported)
Sponsor: Representative Lauren Hager (H.B. 6008 & 6009)
Representative Artina Tinsley-Hardman (H.B. 6010)
House Committee: Family and Children Services
Senate Committee: Judiciary

Date Completed: 11-29-04

RATIONALE

A widely reported situation involving competing adoption proceedings in separate counties has highlighted some apparent problems with the Michigan Adoption Code. In March 2003, following the recommendation of the Michigan Children's Institute (MCI) superintendent, the Clinton County Circuit Court entered an order for a DeWitt couple to adopt two children for whom they had been providing foster care. The next month, however, the Oakland County Circuit Court placed the children with a Farmington Hills couple, and the Clinton County Circuit Court set aside its earlier order of adoption. The adoptive parents in DeWitt were not notified of the Oakland County Circuit Court hearing because they did not qualify as "interested parties" under the Adoption Code. A Federal lawsuit filed by the DeWitt couple is pending. (Please see **BACKGROUND** for more information about this case.)

Some child advocates believe that the State's adoption system failed the children and both families involved in the proceedings. They and others have raised concerns about jurisdiction over adoption proceedings, particularly when prospective adoptive parents file adoption petitions in different judicial circuits; the lack of notice of hearings to all petitioners for adoption; and the autonomy of the MCI superintendent with regard to the ability to consent to adoptions.

CONTENT

House Bills 6008 (S-1) and 6010 (S-1) would amend the Michigan Adoption Code and House Bill 6009 (S-1) would amend Public Act 220 of 1935, which provides for family home care for children committed to the State and governs the Michigan Children's Institute, to do all of the following:

-- Establish requirements for notice and a hearing concerning a motion alleging an arbitrary and capricious decision by the Family Independence Agency (FIA), a child placing agency, or a court to withhold consent to adoption and require the court to give all interested parties the opportunity for a fair hearing.
-- Delete a provision for commitment to the MCI by observation order.
-- Authorize the MCI superintendent to make decisions on behalf of a child committed to the MCI.
-- Add to the Adoption Code's "general purposes".
-- Expand the Code's list of "interested parties" in various adoption-related petitions and hearings.
-- Prohibit a family court from ordering an adoption until certain appeals deadlines had been passed or appeals procedures had concluded.
-- Allow adoption petitions to be filed in the court of the county where parental rights were terminated or pending termination.

-- Authorize a court to allow a child to attend his or her adoption hearing in a direct adoption.

House Bill 6008 (S-1)

Under the Adoption Code, a court may not allow a person to file a petition to adopt a child if the law requires the consent of the court having custody or a representative of the FIA or child placing agency, unless the petition is accompanied either by the required consent or by a motion alleging that the decision to withhold consent was arbitrary and capricious. If consent has been given to another petitioner and if the child has been placed with that other petitioner, the motion may not be brought after 1) 56 days following the entry of the order placing the child or 2) entry of an order of adoption.

The bill would require the court to provide notice of a motion alleging an arbitrary and capricious decision to withhold consent to all "interested parties" in a petition of adoption as described in Section 24a(1) of the Code. (House Bill 6010 (S-1) would amend that section.)

Under the Code, 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 the FIA, and enter further orders in accordance with the Adoption Code or the juvenile code. The bill would require the court, in making that decision, to make a written determination regarding the best interests of the child.

For a motion alleging an arbitrary and capricious decision to withhold consent, the court would have to give all interested parties the opportunity for a fair hearing. All interested parties also would have to be allowed to offer testimony and documentation regarding their position on the motion or on the child's adoption.

House Bill 6009 (S-1)

Under Public Act 220 of 1935, a child under 17 years old whose support and education have been provided under FIA regulations may be admitted to the Michigan Children's Institute either by commitment to the FIA or by observation order.

The bill would delete the option of commitment by observation order. Under that option, if a child is a ward of the court and it appears to the court that, because of the circumstances of the case or because the child's condition might be benefited, the court may make a temporary commitment to the FIA and direct the child to be taken to an MCI facility for up to 90 days for observation. If the MCI superintendent reports to the court that the observation order should be extended or that the child is in need of treatment for emotional disturbance, the court may extend the temporary commitment and continue the observation order or establish a treatment period to any date before the child's 19th birthday.

The bill would retain admission to the MCI by commitment. Under that option, the MCI superintendent must represent the State as guardian of each child committed beginning with the day the child is admitted and continuing until he or she is 19, unless the superintendent or FIA discharges the child sooner, as provided under the Act.

The bill specifies that the MCI superintendent would have the power to make decisions on behalf of a child committed to the Institute. The Attorney General or his or her representative would have to represent the MCI superintendent in any court proceeding in which the superintendent considered representation necessary to carry out his or her duties under the Act.

In addition, the Act authorizes the superintendent to consent to the adoption, marriage, or emancipation of any child who has been committed to the MCI. Upon adoption, marriage, or emancipation, the child ceases to be a ward of the State. The bill specifies that, beginning on its effective date, the MCI superintendent would be authorized to provide the consent to adoption, marriage, or emancipation.

House Bill 6010 (S-1)

General Purposes of the Code

The Adoption Code provides that its general purposes are:

-- To provide that each adoptee in Michigan who needs adoption services receives those services.
-- To provide procedures and services that will safeguard and promote the best interest of each adoptee in need of adoption and that will protect the rights of all parties concerned. (The Code specifies that if conflicts arise between the rights of the adoptee and the rights of another, the rights of the adoptee are paramount.)
-- To provide prompt legal proceedings to assure that the adoptee is free for adoptive placement at the earliest possible time.

The bill would add the following to that list:

-- To achieve permanency and stability for adoptive children as quickly as possible.
-- To support the permanency of a finalized adoption by allowing all interested parties to participate in proceedings regarding the adoptive child.

Direct Adoption Hearing

A parent or guardian having legal and physical custody of a child may make a direct placement of the child for adoption by making a temporary placement or a formal placement pursuant to the Code. A parent or guardian must personally select a prospective adoptive parent in a direct placement. A parent or guardian having legal and physical custody of a child also may make a formal placement of the child for adoption with a stepparent or a relative to the child within the fifth degree by marriage, blood, or adoption. The bill specifies that, in a direct adoption, the court could allow the child to attend his or her own adoption hearing.

Adoption Petitions

Under the Code, if a person desires to adopt a child, that person together with his or her spouse, if married, must file a petition with the court of the county in which the petitioner resides or where the adoptee is found. The bill also would allow the adoption petition to be filed with the court of the county where the parent's parental rights were terminated or were pending termination. If both parents' parental rights were terminated at different times and in different courts, a petition would have to be filed in the court of the county where parental rights first were terminated.

In addition, under the bill, if a person wanted to adopt a child who was either an MCI ward or a permanent ward of the court, the person would have to file a notice of intent to file an adoption petition. The notice would have to be filed with the family court of the county in which the petitioner lived or where the adoptee was found. If there had been a temporary placement, the notice would have to be filed with the court that received the report on the transfer of the child to temporary placement. For purposes of the notice-filing requirement, all of the following would apply:

-- When a notice was filed, the court would have to contact the court in which the parent's parental rights were terminated or were pending termination or, if both parents' parental rights were terminated at different times and in different courts, the court in which the parental rights first were terminated.
-- Once contacted, the court would have to notify the requesting court, within the time established by Michigan Court Rules, of its permission to handle the adoption proceedings.
-- After permission was granted, an adoption petition could be filed.

Interested Parties

The Code identifies who are "interested parties" in a petition for adoption, in a petition for a hearing to identify the father of an adoptee and to determine or terminate his rights, and in a hearing related to temporary placement.

The Code includes "the petitioner" in the list of interested parties in an adoption petition. The bill would add "or petitioners" to the list.

Also, under the bill, the guardian or guardian ad litem of an interested person, if one had been appointed, would be included among the interested parties in a petition for a hearing to identify a father and to determine or terminate his rights.

Under the Code, interested parties in a hearing related to temporary placement include the guardian ad litem, if one has been appointed. The bill would refer to the guardian ad litem of any interested party.

Generally, unless the court determines that circumstances that make adoption undesirable have arisen, the court may enter an order of adoption six months after formal placement. If a petition for rehearing or an appeal as of right from an order terminating parental rights has been filed, however, the court may not order an adoption until one of the following occurs:

-- The petition for rehearing is granted, and the order terminating parental rights is not modified or set aside, and the period for appeal as of right to the Court of Appeals has expired without an appeal being filed.
-- The petition for rehearing is denied and the period for appeal as of right has expired without an appeal being filed.
-- The Court of Appeals affirms the order terminating parental rights.

The bill specifies that, if an application for leave to appeal had been filed with the Supreme Court, the family court could not order an adoption until one or more of the following occurred:

-- The application for leave to appeal was denied.
-- The Supreme Court affirmed the order terminating parental rights.

If a motion alleging an arbitrary and capricious decision by the FIA or a child placing agency to withhold consent to adopt were filed, the family court could not order an adoption until one of the following occurred:

-- The motion was decided and the period for appeal as of right to the Court of Appeals expired without an appeal being filed.
-- The motion was decided, an appeal as of right had been filed, the Court of Appeals issued an opinion, and the period for filing an application for leave to the Supreme Court expired without an application being filed.
-- The Supreme Court denied an application for leave or, if an application were granted, the Supreme Court issued an opinion.

MCL 710.45 (H.B. 6008)
400.203 & 400.209 (H.B. 6009)

BACKGROUND

Jennifer and Patrick Holey of Lansing had one daughter and Jennifer was pregnant when, in April 2002, they were prosecuted for the sexual assault of a 14-year-old girl. The couple then entered into a suicide pact. Patrick Holey committed suicide but Jennifer Holey survived the attempt. The FIA filed a neglect case against Jennifer Holey in the Ingham County Circuit Court, and her daughter was placed in foster care with Chadd and Tamera Smith of DeWitt. When Jennifer Holey gave birth to another girl in August 2002, that child also was placed with the Smiths.

While the neglect case was pending, Donna and Jonathan Cromwell of Farmington Hills filed for a direct placement adoption of the girls in the Oakland County Circuit Court. As the first cousin of the girls' grandmother, Donna Cromwell is related to them within the sixth degree of consanguinity (by blood). (The Adoption Code, however, gives preferences to a party related within the fifth degree.) In August 2002, shortly after the birth of her second daughter, Jennifer Holey consented to a direct placement adoption of the girls with the Cromwells and volunteered to relinquish her parental rights, as allowed under the Adoption Code. In September, however, after Jennifer Holey was sentenced to prison for third-degree criminal sexual conduct, the Ingham County Circuit Court terminated Holey's parental rights under the juvenile code, and committed the children to the jurisdiction of the Michigan Children's Institute.

In December 2002, after meeting with both the Smiths and the Cromwells, the MCI superintendent recommended the Smiths for adoption. The Smiths then filed for adoption in the Clinton County Circuit Court. In March 2003, that Court entered the final adoption order.

In January 2003, however, the Cromwells had filed a motion in the Oakland County Circuit Court for a "Section 45 hearing", challenging the MCI consent-to-adopt decision that had approved the Smiths. (In a Section 45 hearing, a party alleges that the FIA, a court, or a child placing agency made an arbitrary and capricious decision to withhold consent to adopt.) The Director of

the Family Independence Agency refused to allow the MCI superintendent to have Attorney General representation in the hearing or to defend the superintendent's recommendation that the DeWitt couple be allowed to adopt the children. A month after the Clinton County Circuit Court entered its final order, the Oakland County Circuit Court ruled that the MCI superintendent's decision was arbitrary and capricious. The Oakland County Circuit Court assumed custody of the children, placed them with the Cromwells, and committed to sign an order of adoption by the Cromwells. The Clinton County Circuit Court then vacated its adoption order.

After the Michigan Court of Appeals and the Michigan Supreme Court declined to hear appeals brought by the Smiths, they filed a case in United States District Court for the Eastern District of Michigan. On November 10, 2004, the Federal Court granted motions to dismiss claims against the Oakland County Circuit Court and the Clinton County Circuit Court, but denied motions to dismiss claims against the Oakland County judge, the Clinton County judge, and the Cromwells. According to the U.S. District Court, the Oakland County judge indicated that she will not finalize the adoption until the case is resolved.

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

House Bill 6010 (S-1) should help to prevent jurisdictional confusion in adoption proceedings. While the Adoption Code allows a petitioner to file for adoption with the court of the county in which the petitioner lives or where the child is located, it is silent regarding both the court of the county where parental rights are terminated, or where termination is pending, and the court that oversees a temporary placement of the child before adoption.

Under the bill, a person wishing to adopt a child who was a ward of the MCI or a permanent ward of the court would have to file a notice of intent to petition for adoption. If there had been a temporary placement, that notice would have to be filed with the court that received the report of transfer to temporary placement. The court in which adoption proceedings would occur would have to seek permission to handle the adoption proceedings from the court that oversaw the temporary placement. In addition, the bill would allow an adoption petition to be filed not only with the court of the county where the petitioner lived or the adoptee was located, but also where the parent's parental rights were terminated or were pending termination.

In a case like that involving the adoption of the Holey children, these requirements should result in some coordination and knowledge of competing adoption petitions by the court that would oversee a temporary placement and/or the court that had jurisdiction over the termination of parental rights. By requiring the court that oversaw a temporary placement to give its consent before another court could conduct adoption proceedings, the bill would help ensure that multiple courts did not handle conflicting proceedings.

Supporting Argument

House Bills 6008 (S-1) and 6010 (S-1) would revise notice requirements so that all interested parties would be aware of and could participate in all adoption-related proceedings. House Bill 6008 (S-1) would require the court to provide notice of a motion for a Section 45 hearing to all interested parties in a petition for adoption. While the Code specifies that "interested parties in a petition for adoption" includes the petitioner, House Bill 6010 (S-1) would add "or petitioners" so that competing prospective adoptive parents would receive notice. Also, House Bill 6008 (S-1) specifies that, in a motion for a Section 45 hearing, the court would have to give all interested parties the opportunity for a fair hearing, and all interested parties would have to be allowed to offer testimony and documentation regarding their position on the motion or the child's adoption. In addition, if the court did find by clear and convincing evidence that the decision to withhold consent was arbitrary and capricious, House Bill 6008 (S-1) would require the court to make a written determination regarding the best interests of the child.

If these provisions had applied in the adoption proceedings regarding the Holey children, the Oakland County Circuit Court

would have been required to inform the Smiths of the Cromwells' motion for a Section 45 hearing and the Smiths would have had an opportunity to testify. Further, even if the Oakland Court had still found that the decision to withhold consent for the Cromwells to adopt the Holey children was arbitrary and capricious, that court would have had to consider the best interests of the children in making a decision.

Response: Requiring the court to determine the best interests of the child in a Section 45 hearing could be troublesome. The question in a Section 45 hearing is not whether the child should be adopted or who should adopt the child, but whether a child placing agency, the FIA, or a court made an arbitrary and capricious decision to withhold consent.

Supporting Argument

The Michigan Adoption Code generally provides for the entry of an adoption order six months after a formal placement. An order may not be entered, however, until certain actions have been taken if a petition for rehearing or an appeal as of right has been filed regarding an order terminating parental rights. House Bill 6010 (S-1) would build upon that concept by including a similar delay if an application for leave to appeal were filed with the Supreme Court. In addition, if a motion were brought for a Section 45 hearing, the bill would prohibit a court from ordering an adoption until the motion was decided and appeals of that decision had run their course or the time for appealing the decision had expired without an appeal being filed. In the case of the Holey children's adoption, this requirement, together with the notice requirements in House Bills 6008 (S-1) and 6010 (S-1), would have prevented the Clinton County Circuit Court from issuing an order of adoption while a motion for a Section 45 hearing was pending in Oakland County.

Supporting Argument

Although Public Act 220 of 1935 gives the MCI superintendent the authority to consent to the adoption, marriage, or emancipation of any child committed to the Institute, a former FIA Director apparently had prevented the MCI superintendent from exercising his authority. In addition, the MCI superintendent evidently had always had access to Attorney General representation in challenges to the superintendent's decisions and recommendations, but the former FIA Director reportedly denied the superintendent that representation in the Section 45 hearing in Oakland County regarding the Holey children and refused to have the FIA defend the superintendent's recommendation at the hearing or to object to the Cromwells' petition. To fulfill his or her duties, it is critical that the superintendent be allowed to exercise his or her statutory authority unfettered from interference from the FIA or its director and that he or she have unobstructed access to representation by Attorney General lawyers assigned to represent the FIA. Indeed, in making its decision in the Section 45 hearing, the Oakland County Circuit Court gave "significant weight" to "the fact that no one appeared on behalf of the FIA or…[the MCI superintendent] to defend his decision" (according to the U.S. District Court).

House Bill 6009 (S-1) would reiterate the authority granted to the MCI superintendent and require the Attorney General to represent the superintendent in any court proceedings in which the superintendent considered representation necessary to carry out his or her duties. If these provisions had been in place for the Section 45 hearing in Oakland County, the FIA Director could not have prevented the MCI superintendent from appearing, with Attorney General representation, to defend his decision to recommend the Smiths over the Cromwells for the adoption of the Holey children.

Legislative Analyst: Patrick Affholter

FISCAL IMPACT

House Bills 6008 (H-1) and 6010 (H-1)

No information is available from the State Court Administrative Office regarding the impact on the court system from the bills.

House Bill 6009 (H-1)

The bill would have no fiscal impact on the Family Independence Agency.

Fiscal Analyst: Bill Bowerman
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