

HOUSE BILL No. 5402

January 11, 2018, Introduced by Reps. Farrington, Frederick, Marino, Gay-Dagnogo, Garrett and Guerra and referred to the Committee on Judiciary.

A bill to amend 1961 PA 236, entitled
"Revised judicature act of 1961,"
by amending section 2163a (MCL 600.2163a), as amended by 2012 PA
170.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

1 Sec. 2163a. (1) As used in this section:

2 (a) "Custodian of the videorecorded statement" means the
3 department of **HEALTH AND** human services, investigating law
4 enforcement agency, prosecuting attorney, or department of attorney
5 general or another person designated under the county protocols
6 established as required by section 8 of the child protection law,
7 1975 PA 238, MCL 722.628.

8 (b) "Developmental disability" means that term as defined in
9 section 100a of the mental health code, 1974 PA 258, MCL 330.1100a,

except that, for the purposes of implementing this section, developmental disability includes only a condition that is attributable to a mental impairment or to a combination of mental and physical impairments and does not include a condition attributable to a physical impairment unaccompanied by a mental impairment.

(C) "NONOFFENDING PARENT OR LEGAL GUARDIAN" MEANS A NATURAL PARENT, STEPPARENT, ADOPTIVE PARENT, OR LEGALLY APPOINTED OR DESIGNATED GUARDIAN OF A WITNESS WHO IS NOT ALLEGED TO HAVE COMMITTED A VIOLATION OF THE LAWS OF THIS STATE, ANOTHER STATE, THE UNITED STATES, OR A COURT ORDER THAT IS CONNECTED IN ANY MANNER TO A WITNESS'S VIDEORECORDED STATEMENT.

(D) ~~(e)~~—"Videorecorded statement" means a witness's statement taken by a custodian of the videorecorded statement as provided in subsection (5). Videorecorded statement does not include a videorecorded deposition taken as provided in subsections (18) and (19).

(E) ~~(d)~~—"Vulnerable adult" means that term as defined in section 145m of the Michigan penal code, 1931 PA 328, MCL 750.145m.

(F) ~~(e)~~—"Witness" means an alleged victim of an offense listed under subsection (2) who is any of the following:

(i) A person under 16 years of age.

(ii) A person 16 years of age or older with a developmental disability.

(iii) A vulnerable adult.

(2) This section only applies to the following:

(a) For purposes of subsection ~~(1)(e)(i)~~ **(1) (F) (i)** and (ii),

1 prosecutions and proceedings under section 136b, 145c, 520b to
2 520e, or 520g of the Michigan penal code, 1931 PA 328, MCL
3 750.136b, 750.145c, 750.520b to 750.520e, and 750.520g. ~~or under~~
4 ~~former section 136 or 136a of the Michigan penal code, 1931 PA 328.~~

5 (b) For purposes of subsection ~~(1)(e)(iii)~~, **(1) (F) (iii)**, 1 or
6 more of the following:

7 (i) Prosecutions and proceedings under section 110a, 145n,
8 145o, 145p, 174, or 174a of the Michigan penal code, 1931 PA 328,
9 MCL 750.110a, 750.145n, 750.145o, 750.145p, 750.174, and 750.174a.

10 (ii) Prosecutions and proceedings for an assaultive crime as
11 that term is defined in section 9a of chapter X of the code of
12 criminal procedure, 1927 PA 175, MCL 770.9a.

13 (3) If pertinent, the witness ~~shall~~**MUST** be permitted the use
14 of dolls or mannequins, including, but not limited to, anatomically
15 correct dolls or mannequins, to assist the witness in testifying on
16 direct and cross-examination.

17 (4) A witness who is called upon to testify ~~shall~~**MUST** be
18 permitted to have a support person sit with, accompany, or be in
19 close proximity to the witness during his or her testimony. A
20 notice of intent to use a support person ~~shall~~**MUST** name the
21 support person, identify the relationship the support person has
22 with the witness, and give notice to all parties to the proceeding
23 that the witness may request that the named support person sit with
24 the witness when the witness is called upon to testify during any
25 stage of the proceeding. The notice of intent to use a named
26 support person ~~shall~~**MUST** be filed with the court and ~~shall~~**MUST** be
27 served upon all parties to the proceeding. The court shall rule on

1 a motion objecting to the use of a named support person before the
2 date at which the witness desires to use the support person.

3 (5) A custodian of the videorecorded statement may take a
4 witness's videorecorded statement before the normally scheduled
5 date for the defendant's preliminary examination. The videorecorded
6 statement ~~shall~~**MUST** state the date and time that the statement was
7 taken; ~~shall~~**MUST** identify the persons present in the room and
8 state whether they were present for the entire videorecording or
9 only a portion of the videorecording; and ~~shall~~**MUST** show a time
10 clock that is running during the taking of the videorecorded
11 statement.

12 (6) A videorecorded statement may be considered in court
13 proceedings only for 1 or more of the following:

14 (a) It may be admitted as evidence at all pretrial
15 proceedings, except that it may not be introduced at the
16 preliminary examination instead of the live testimony of the
17 witness.

18 (b) It may be admitted for impeachment purposes.

19 (c) It may be considered by the court in determining the
20 sentence.

21 (d) It may be used as a factual basis for a no contest plea or
22 to supplement a guilty plea.

23 (7) A videorecorded deposition may be considered in court
24 proceedings only as provided by law.

25 (8) In a videorecorded statement, the questioning of the
26 witness should be full and complete; ~~shall~~**MUST** be in accordance
27 with the forensic interview protocol implemented as required by

1 section 8 of the child protection law, 1975 PA 238, MCL 722.628, or
2 as otherwise provided by law; and, if appropriate for the witness's
3 developmental level or mental acuity, ~~shall~~**MUST** include, but is
4 not limited to, all of the following areas:

5 (a) The time and date of the alleged offense or offenses.

6 (b) The location and area of the alleged offense or offenses.

7 (c) The relationship, if any, between the witness and the
8 accused.

9 (d) The details of the offense or offenses.

10 (e) The names of any other persons known to the witness who
11 may have personal knowledge of the alleged offense or offenses.

12 (9) A custodian of the videorecorded statement may release or
13 consent to the release or use of a videorecorded statement or
14 copies of a videorecorded statement to a law enforcement agency, an
15 agency authorized to prosecute the criminal case to which the
16 videorecorded statement relates, or an entity that is part of
17 county protocols established under section 8 of the child
18 protection law, 1975 PA 238, MCL 722.628, or as otherwise provided
19 by law. The defendant and, if represented, his or her attorney has
20 the right to view and hear a videorecorded statement before the
21 defendant's preliminary examination. Upon request, the prosecuting
22 attorney shall provide the defendant and, if represented, his or
23 her attorney with reasonable access and means to view and hear the
24 videorecorded statement at a reasonable time before the defendant's
25 pretrial or trial of the case. In preparation for a court
26 proceeding and under protective conditions, including, but not
27 limited to, a prohibition on the copying, release, display, or

1 circulation of the videorecorded statement, the court may order
2 that a copy of the videorecorded statement be given to the defense.

3 (10) If authorized by the prosecuting attorney in the county
4 in which the videorecorded statement was taken **AND WITH THE CONSENT**
5 **OF A MINOR WITNESS'S NONOFFENDING PARENT OR LEGAL GUARDIAN IF THE**
6 **MINOR WITNESS IS LESS THAN 12 YEARS OF AGE, OR WITH THE CONSENT OF**
7 **THE WITNESS IF HE OR SHE IS MORE THAN 12 YEARS OF AGE, a**
8 videorecorded statement may be used for purposes of training the
9 custodians of the videorecorded statement in that county, **OR FOR**
10 **PURPOSES OF TRAINING PERSONS IN ANOTHER COUNTY THAT WOULD MEET THE**
11 **DEFINITION OF CUSTODIAN OF THE VIDEORECORDED STATEMENT HAD THE**
12 **VIDEORECORDED STATEMENT BEEN TAKEN IN THAT OTHER COUNTY** on the
13 forensic interview protocol implemented as required by section 8 of
14 the child protection law, 1975 PA 238, MCL 722.628, or as otherwise
15 provided by law.

16 (11) Except as provided in this section, an individual,
17 including, but not limited to, a custodian of the videorecorded
18 statement, the witness, or the witness's parent, guardian, guardian
19 ad litem, or attorney, shall not release or consent to release a
20 videorecorded statement or a copy of a videorecorded statement.

21 (12) A videorecorded statement that becomes part of the court
22 record is subject to a protective order of the court for the
23 purpose of protecting the privacy of the witness.

24 (13) A videorecorded statement ~~shall~~**MUST** not be copied or
25 reproduced in any manner except as provided in this section. A
26 videorecorded statement is exempt from disclosure under the freedom
27 of information act, 1976 PA 442, MCL 15.231 to 15.246, is not

1 subject to release under another statute, and is not subject to
2 disclosure under the Michigan court rules governing discovery. This
3 section does not prohibit the production or release of a transcript
4 of a videorecorded statement.

5 (14) If, upon the motion of a party made before the
6 preliminary examination, the court finds on the record that the
7 special arrangements specified in subsection (15) are necessary to
8 protect the welfare of the witness, the court shall order those
9 special arrangements. In determining whether it is necessary to
10 protect the welfare of the witness, the court shall consider all of
11 the following:

12 (a) The age of the witness.

13 (b) The nature of the offense or offenses.

14 (c) The desire of the witness or the witness's family or
15 guardian to have the testimony taken in a room closed to the
16 public.

17 (d) The physical condition of the witness.

18 (15) If the court determines on the record that it is
19 necessary to protect the welfare of the witness and grants the
20 motion made under subsection (14), the court shall order both of
21 the following:

22 (a) All persons not necessary to the proceeding ~~shall~~**MUST** be
23 excluded during the witness's testimony from the courtroom where
24 the preliminary examination is held. Upon request by any person and
25 the payment of the appropriate fees, a transcript of the witness's
26 testimony ~~shall~~**MUST** be made available.

27 (b) In order to protect the witness from directly viewing the

1 defendant, the courtroom ~~shall~~**MUST** be arranged so that the
2 defendant is seated as far from the witness stand as is reasonable
3 and not directly in front of the witness stand. The defendant's
4 position ~~shall~~**MUST** be located so as to allow the defendant to hear
5 and see the witness and be able to communicate with his or her
6 attorney.

7 (16) If upon the motion of a party made before trial the court
8 finds on the record that the special arrangements specified in
9 subsection (17) are necessary to protect the welfare of the
10 witness, the court shall order those special arrangements. In
11 determining whether it is necessary to protect the welfare of the
12 witness, the court shall consider all of the following:

13 (a) The age of the witness.

14 (b) The nature of the offense or offenses.

15 (c) The desire of the witness or the witness's family or
16 guardian to have the testimony taken in a room closed to the
17 public.

18 (d) The physical condition of the witness.

19 (17) If the court determines on the record that it is
20 necessary to protect the welfare of the witness and grants the
21 motion made under subsection (16), the court shall order 1 or more
22 of the following:

23 (a) All persons not necessary to the proceeding ~~shall~~**MUST** be
24 excluded during the witness's testimony from the courtroom where
25 the trial is held. The witness's testimony ~~shall~~**MUST** be broadcast
26 by closed-circuit television to the public in another location out
27 of sight of the witness.

1 (b) In order to protect the witness from directly viewing the
2 defendant, the courtroom ~~shall~~**MUST** be arranged so that the
3 defendant is seated as far from the witness stand as is reasonable
4 and not directly in front of the witness stand. The defendant's
5 position ~~shall~~**MUST** be the same for all witnesses and ~~shall~~**MUST** be
6 located so as to allow the defendant to hear and see all witnesses
7 and be able to communicate with his or her attorney.

8 (c) A questioner's stand or podium ~~shall~~**MUST** be used for all
9 questioning of all witnesses by all parties and ~~shall~~**MUST** be
10 located in front of the witness stand.

11 (18) If, upon the motion of a party or in the court's
12 discretion, the court finds on the record that the witness is or
13 will be psychologically or emotionally unable to testify at a court
14 proceeding even with the benefit of the protections afforded the
15 witness in subsections (3), (4), (15), and (17), the court shall
16 order that the witness may testify outside the physical presence of
17 the defendant by closed circuit television or other electronic
18 means that allows the witness to be observed by the trier of fact
19 and the defendant when questioned by the parties.

20 (19) For purposes of the videorecorded deposition under
21 subsection (18), the witness's examination and cross-examination
22 ~~shall~~**MUST** proceed in the same manner as if the witness testified
23 at the court proceeding for which the videorecorded deposition is
24 to be used. The court shall permit the defendant to hear the
25 testimony of the witness and to consult with his or her attorney.

26 (20) This section is in addition to other protections or
27 procedures afforded to a witness by law or court rule.

1 (21) A person who intentionally releases a videorecorded
2 statement in violation of this section is guilty of a misdemeanor
3 punishable by imprisonment for not more than 93 days or a fine of
4 not more than \$500.00, or both.

5 Enacting section 1. This amendatory act takes effect 90 days
6 after the date it is enacted into law.