Public Policy Materials for the July 2020 Meeting of the Board of Commissioners

Public Policy Committee……………………………Robert J. Buchanan, Chairperson

A. Opening Statements

(Each member's "good news," whether personal, business, or State Bar of Michigan-related.)

B. Reports

1. Approval of June 11, 2020 minutes

C. Court Rule Amendments

1. ADM File No. 2002-37: Proposed Addition of MCR 2.226

The proposed addition of MCR 2.226 would clarify the process for change of venue and transfer orders.

Status: 09/01/20 Comment Period Expires.

Referrals: 05/27/20 Access to Justice Policy Committee; Civil Procedure & Courts Committee; All Sections.

Comments: Civil Procedure & Courts Committee.

Liaison: E. Thomas McCarthy, Jr.

2. ADM File No. 2019-47: Proposed Amendments of MCR 3.804, 5.140, and 5.404 and Proposed Addition of MCR 3.811

The proposed amendments of MCR 3.804, 5.140, and 5.404 and proposed new MCR 3.811 would allow greater use of videoconferencing equipment in cases involving Indian children.

Status: 08/01/20 Comment Period Expires.

Referrals: 04/28/20 Access to Justice Policy Committee; American Indian Law Committee; American Indian Law Section; Children's Law Section.

Comments: Access to Justice Policy Committee.

Liaison: Hon. Shauna L. Dunnings

3. ADM File No. 2019-41: Proposed Amendment of MCR 4.201

The proposed amendment of MCR 4.201 would require disclosure of the right to object to venue in actions brought under the Summary Proceedings Act for landlord/tenant proceedings in district court, consistent with MCL 600.5706.

Status: 09/01/20 Comment Period Expires.

Referrals: 05/27/20 Access to Justice Policy Committee; Civil Procedure & Courts Committee; Access to Justice Policy Committee; Real Property Law Section.

Comments: Access to Justice Policy Committee; Civil Procedure & Courts Committee.

Liaison: Hon. Cynthia D. Stephens

4. ADM File No. 2020-04: Proposed Amendment of Rule 4 of the Rules for the Board of Law Examiners
The proposed amendment of BLE Rule 4 would explicitly state that a passing bar exam score is valid for three years, which is consistent with the character and fitness clearance expiration.
Status: 08/01/20 Comment Period Expires.
Referrals: 05/27/20 Young Lawyers Section.
Comments: None at this time.
Liaison: Thomas G. Sinas

D. Legislation
1. HB 5444 (Liberati) Children; services; kinship caregiver navigator program; create. Creates new act.
Status: 03/12/20 Referred to the Senate Families, Seniors & Veterans Committee after passing the House 99 to 6 on 03/10/20.
Referrals: 02/10/20 Access to Justice Policy Committee; Children's Law Section; Family Law Section; Probate & Estate Planning Section.
Comments: Access to Justice Policy Committee.
Comments provided to the February 5 & 19 meetings of the House Families, Children & Seniors Committee are included in materials.
Liaison: Suzanne C. Larsen

2. HB 5488 (Lightner) Criminal procedure; sentencing; certain permissible costs; extend sunset. Amends sec. 1k, ch. IX of 1927 PA 175 (MCL 769.1k).
Status: 05/20/20 Referred to the Senate Judiciary & Public Safety Committee after passing the House 101 to 4 on 05/19/20.
Referrals: 02/28/20 Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee; Criminal Law Section.
Comments: Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee; Criminal Law Section.
Liaison: Joseph J. Baumann

3. HB 5795 (Filler) Probate; wills and estates; electronic signature of wills; allow. Amends sec. 2502 of 1998 PA 386 (MCL 700.2502) & adds sec. 2504a.
Status: 06/25/20 Referred to the Senate Judiciary & Public Safety Committee after passing the House 57 to 51 on 6/24/20.
Referrals: 05/28/20 Access to Justice Policy Committee; Civil Procedure & Courts Committee; Elder Law & Disability Rights Sections; Probate & Estate Planning Section.
Comments: Access to Justice Policy Committee; Civil Procedure & Courts Committee; Elder Law & Disability Rights Section; Probate & Estate Planning Section.
Liaison: Suzanne C. Larsen

4. HB 5805 (Berman) Courts; judges; hearings on emergency motions by defendant in criminal cases; provide for. Amends sec. 1, ch. I of 1927 PA 175 (MCL 761.1) & adds sec. 12 to ch. III.
Status: 05/20/20 Referred to House Judiciary Committee.
Referrals: 05/28/20 Criminal Jurisprudence & Practice Committee; Criminal Law Section; Judicial Section.
Comments: Criminal Jurisprudence & Practice Committee.
Liaison: Valerie R. Newman

5. HB 5806 (Berman) Courts; records; online attorney access to court actions and filed documents without fees; provide for. Amends secs. 1985 & 1991 of 1961 PA 236 (MCL 600.1985 & 600.1991) & adds sec. 1991a.

Status:	05/20/20 Referred to House Judiciary Committee.
Referrals:	05/28/20 Access to Justice Policy Committee; Civil Procedure & Courts Committee; Criminal Jurisprudence & Practice Committee; All Sections.
Comments:	Access to Justice Policy Committee; Civil Procedure & Courts Committee; Criminal Jurisprudence & Practice Committee; Appellate Practice Section; Family Law Section.
Liaison:	Thomas G. Sinas

6. SB 0682 (Lucido) Juveniles; juvenile justice services; juvenile records; require to be confidential. Amends sec. 28, ch. XIIA of 1939 PA 288 (MCL 712A.28).

Status:	12/05/19 Referred to the Senate Judiciary & Public Safety Committee.
Referrals:	01/06/20 Access to Justice Policy Committee; Civil Procedure & Courts Committee; Children's Law Section; Probate & Estate Planning Section.
Comments:	Access to Justice Policy Committee. Comments provided to the Senate Judiciary & Public Safety Committee on 06/24/20 are included in the materials.
Liaison:	Kim Warren Eddie

7. SB 0865 (Lucido) Courts; other; procedures and regulations related cellular telephones in courtrooms; provide restrictions and penalties.

Status:	04/24/20 Referred to Senate Judiciary & Public Safety Committee.
Referrals:	05/08/20 Access to Justice Policy Committee; Civil Procedure & Courts Committee; Criminal Jurisprudence & Practice Committee; All Sections.
Comments:	Access to Justice Policy Committee; Civil Procedure & Courts Committee; Criminal Jurisprudence & Practice Committee; Family Law Section; Member Comment.
Liaison:	Valerie R. Newman

8. SB 0895 (Runestad) Civil procedure; other; new trial; revise procedure for granting. Amends 1961 PA 236 (MCL 600.101 to 600.9947).

Status:	04/28/20 Referred to Senate Judiciary & Public Safety Committee.
Referrals:	05/08/20 Civil Procedure & Courts Committee; Criminal Jurisprudence & Practice Committee; All Sections.
Comments:	Civil Procedure & Courts Committee; Criminal Jurisprudence & Practice Committee; Appellate Practice Section; Member Comment.
Liaison:	Mark A. Wisniewski

E. Consent Agenda

To support the positions submitted by the Criminal Jurisprudence and Practice Committee on each of the following item:

Model Criminal Jury Instructions

1. M Crim JI 37.8, 37.8a, 37.8b, 37.9, 37.9a, 37.10, 37.11 and 37.11a

The Committee proposes instructions M Crim JI 37.8, 37.8a, 37.8b, 37.9, 37.9a, 37.10, 37.11 and 37.11a, where the prosecutor has charged an offense found in MCL 750. 483a, which addresses withholding evidence, preventing the report of a crime, retaliating for reporting a crime, influencing a crime report, defenses, or evidence tampering. The instructions are entirely new.

Minutes
Public Policy Committee
June 11, 2020

Committee Members: Robert J. Buchanan, Joseph J. Baumann, Kim Warren Eddie, Suzanne C. Larsen, E. Thomas McCarthy, Jr., Valerie R. Newman, Thomas G. Sinas, Hon. Cynthia D. Stephens, Mark A. Wisniewski
SBM Staff: Janet Welch, Peter Cunningham, Elizabeth Goebel, Kathryn Hennessey, Carrie Sharlow

A. Opening Statements

B. Reports
1. Approval of April 24, 2020 minutes
The minutes were unanimously approved.

2. Public Policy Report
The Governmental Relations staff offered a written report.

C. Court Rule Amendments
1. ADM File No. 2015-21: Proposed Amendments of MCR 3.971, 3.972, 3.973, 3.977, 3.993, 7.202, and 7.204
The proposed amendments of MCR 3.971, 3.972, 3.973, 3.977, 3.993, 7.202 and 7.204 would make the appeal process for child protective cases uniform (instead of having a separate process for cases involving termination of parental rights). The amendments also would make the appeal period uniform (21 days) for all child protections cases.
The following groups offered recommendations: Access to Justice Policy Committee; Appellate Practice Section.
The committee voted unanimously (9) to support ADM File No. 2015-21 with the amendment that would retain the language in the current MCR 7.204 (A)(1) that allows trial courts to extend the 21-day period of appeal if during those 21 days, the trial court finds "good cause" for doing so.

2. ADM File No. 2020-06: Proposed Amendments of MCR 2.403, 2.404, and 2.405
The proposed amendments were in large part produced by a workgroup convened by the State Court Administrative Office to review and offer recommendations about case evaluation.
The following groups offered recommendations: Civil Procedure & Courts Committee.
The committee voted unanimously (9) to support the ADM File No. 2020-06 as drafted.

3. ADM File No. 2019-33: Proposed Administrative Order No. 2020-X
This proposed administrative order would establish a mandatory continuing judicial education program for the state's justices, judges, and quasi-judicial officers.
The committee voted 6 to 2 to take no position on ADM File No. 2019-33.

4. ADM File Nos. 2018-33/2019-20/2019-38: Proposed Amendments of MCR 6.310, 6.425, 6.428, 6.429, 6.431, 7.204, 7.205, 7.208, 7.211, 7.305, and Proposed Addition of MCR 1.112
The proposed amendments were submitted by the State Appellate Defender Office and would address several issues. First, it would expand the prisoner mailbox rule to all legal filings (not just claims of appeal and postjudgment motions) made by a person incarcerated in prison or jail (not just prison, as under the current rule). This part of the proposal includes a new MCR 1.112, and elimination of specific prison mailbox provisions in MCR 6.310(C)(5), MCR 6.429(B)(5), MCR 6.431(A)(5), MCR 7.204(A)(2)(e), MCR 7.205(A)(3), and MCR 7.305(C)(5). One difficulty with this expansion is the fact that most jails do not have a mail log

system like that in place in prisons. Second, the proposal would expand certain time frames for filing and deciding postjudgment motions in criminal cases, as reflected in the amendments of MCR 7.208 and MCR 7.211. Third, the proposal would reconfigure and expand the "Reissuance of Judgment" rule, as shown in the proposed amendments of MCR 6.428. Finally, the proposal (as shown in proposed amendments of MCR 6.425) would require a probation officer to give defendant's attorney notion and a reasonable opportunity to attend the presentence interview, require a probation agent to not only correct a report but certify that the correction has been made, and "ensure that no prior version of the report is used for classification, programming, or parole purposes." This portion of the proposal also would require the Michigan Department of Corrections to provide the prosecutor, defendant, or defense lawyer with a copy of the presentence investigation report, and further require the court to provide to the parties any documents presented for consideration at sentencing, including any PSIR considered before corrections were made.
The following groups offered recommendations: Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee; Appellate Practice Section; Criminal Law Section.
The committee voted unanimously (8) to adopt the Access to Justice Policy Committee's position to support MCR 1.112, MCR 6.310(C)(5), MCR 6.429(B)(5), MCR 6.431(A)(5), MCR 7.204(A)(2)(e), MCR 7.205(A)(3), and MCR 7.305(C)(5).
The committee voted unanimously (8) to adopt the Access to Justice Policy Committee's position to support with amendments new rule 1.112. The Access to Justice Committee's proposed amendments to new rule1.112 would limit the rule so that it would apply only upon the "trigger" of an untimely pleading having been submitted by an unrepresented individual who is incarcerated at the time of submitting the pleading, when the pleading deemed untimely would result in the individual submitting the pleading losing a right..
The committee voted unanimously (8) to support the proposed amendments to MCR 6.425, MCR 6.428, MCR 7.208, and 7.211.

5. ADM File No. 2019-27: Proposed Amendments of MCR 6.310, 6.429, 6.431, 6.509, and 7.205 and Proposed Addition of MCR 6.126

The proposed amendments of MCR 6.310, 6.429, 6.431, 6.509, and 7.205 and proposed addition of MCR 6.126 would clarify and simplify the rules regarding procedure in criminal appellate matters.
The following groups offered recommendations: Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee; Appellate Practice Section; Criminal Law Section.
The committee voted unanimously (7) to support new rule 6.126 and proposed amendments to MCR 6.310, 6.429, 6.431, 6.509.
The committee voted to support MCR 7.205 (A)(4)(b) with the amendment proposed by the Michigan Coalition of Family Law Appellate Attorneys that "a delayed application for leave to appeal may be filed within <u>the later of 6 months from entry of the order appealed, 21 days after entry of the dismissal order, or 21 days after entry of an order</u> denying reconsideration of the dismissal order . . . "

6. ADM File No. 2019-29: Proposed Amendments of MCR 7.212 and 7.312

The proposed amendments of MCR 7.212 and 7.312 would allow practitioners to efficiently produce an appendix for all appellate purposes by making the appendix rule consistent within the Court of Appeals and Supreme Court.
The following groups offered recommendations: Civil Procedure & Courts Committee; Appellate Practice Section.
The committee voted unanimously (7) to support this rule change in so for as it would make the appendix rule consistent within the Court of Appeals and the Supreme Court and adopt the Civil Procedure and Court's recommendation asking the Court to consider whether the exclusions as currently proposed in MCR 7.212(J)(1)(a)-(f) for the Court of Appeals should also apply to the Supreme Court.

7. ADM File No. 2019-31: Proposed Amendment of MCR 7.216

The proposed amendment of MCR 7.216 would enable the Court of Appeals to impose filing restrictions on a vexatious litigator, similar to the Supreme Court's rule (MCR 7.316).

The following groups offered recommendations: Civil Procedure & Courts Committee; Criminal Jurisprudence & Practice Committee.

The committee voted unanimously (7) to **adopt** the position of the Civil Procedure & Courts Committee **with amendments** to ensure symmetry between the vexatious litigator rules and definitions in the Court of Appeals and in the Supreme Court.

The committee recommended that Rule 7.216(C)(1)(a) be amended as follows (with additional changes to the Civil Procedure Committee's proposed language shown in strike through and bold):

Rule 7.216(C)(1)(a) the appeal was taken for purposes of hindrance or delay **~~or without any reasonable basis~~** **or is not reasonably well-grounded in fact or warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law;** ~~or belief that there was a meritorious issue to be determined on appeal;~~

8. ADM File No. 2019-26: Proposed Amendment of MCR 7.314

The proposed amendment of MCR 7.314 would eliminate the oral argument time period and instead provide for an amount of time established by the Court in the order granting leave to appeal.

The following groups offered recommendations: Civil Procedure & Courts Committee; Criminal Jurisprudence & Practice Committee; Criminal Law Section.

The committee voted unanimously (7) to support the proposed amendment to rule 7.314.

9. ADM File No. 2020-03: Proposed Administrative Order Regarding Election-Related Litigation

This administrative order would provide requirements and procedural rules to promote the efficient and timely disposition of election-related litigation.

The following groups offered recommendations: Civil Procedure & Courts Committee.

The committee voted unanimously (7) to support the proposed administrative order.

D. Other

1. Request for Funding from the Coronavirus Relief Fund to provide Disaster Relief Legal Help for Michiganders

The following groups offered recommendations: Access to Justice Policy Committee.

The committee agreed that this is *Keller* permissible in affecting the availability of legal services to society.

The committee voted unanimously (7) to support the Michigan State Bar Foundation's request for CARES Act funding to support Civil Legal Aid issues created by the COVID-19 pandemic.

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June 30, 2020

Larry S. Royster
Clerk of the Court
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

RE: ADM File No. 2015-21 – Proposed Amendments of Rules 3.971, 3.972, 3.973, 3.977, 3.993, 7.202, and 7.204 of the Michigan Court Rules

Dear Clerk Royster:

At its June 12, 2020 meeting, the Board of Commissioners of the State Bar of Michigan (Board) considered the above-referenced proposed rule amendments published for comment. In its review, the Board considered recommendations from the Access to Justice Policy Committee and the Appellate Practice Section.

After this review, the Board voted unanimously to support the rule changes with an amendment that the current language in Rule 7.204(A) be retained to allow trial courts to extend the 21-day period for filing an appeal upon a finding of good cause.

We thank the Court for the opportunity to convey the Board's position.

Sincerely,

Janet K. Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
Dennis M. Barnes, President

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RE: ADM File No. 2020-06 – Proposed Amendments of Rules 2.403, 2.404, and 2.405 of the Michigan Court Rules

Dear Clerk Royster:

At its June 12, 2020 meeting, the Board of Commissioners of the State Bar of Michigan (Board) considered the above-referenced proposed rule amendments published for comment. In its review, the Board considered recommendations from the Civil Procedure & Courts Committee.

The Board appreciates the significant efforts taken by the Case Evaluation Court Rules Review Committee in formulating its recommendations to the Michigan Supreme Court. In recognition of the Committee's expertise and long-standing examination of the myriad of issues surrounding the case evaluation process, the Board supports the proposed changes to that process.

We thank the Court for the opportunity to comment on the proposed amendments.

Sincerely,

Janet K. Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
Dennis M. Barnes, President

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RE: ADM File Nos. 2018-33, 2019-20, and 2019-38 – Proposed Amendments of Rules 6.310, 6.425, 6.428, 6.429, 6.431, 7.204, 7.205, 7.208, 7.211, 7.305, and Proposed Addition of Rule 1.112 of the Michigan Court Rules

Dear Clerk Royster:

At its June 12, 2020 meeting, the State Bar of Michigan Board of Commissioners (Board) considered the above-referenced proposed rule amendments published by the Court for comment. As part of its review, the Board considered recommendations from the Criminal Law Section, Appellate Practice Section, Prisons & Corrections Section, and the Access to Justice Policy Committee. The Criminal Law and Appellate Practice Sections both supported the rule amendments; the Prisons & Corrections Section supported the rule amendments but recommended that Rule 6.425(D)(2)(a) be amended to put the onus on the probation officer to correct the report and transmit to the Department of Corrections; and the Access to Justice Policy Committee supported the rule proposal with an amendment to the new prison mailbox rule.

After this review, the Board voted to support the rule proposal with an amendment to the new prison mailbox rule (Rule 1.112) as proposed by the Access to Justice Policy Committee.[1] As currently proposed, the rule is overbroad and creates unnecessary risks that the opposing party does not receive adequate notice of the incarcerated individual's filing. This is particularly troubling when the opposing party is involved in a family law dispute and/or is the victim of domestic violence, harassment, or sexual assault. Without ensuring that the opposing party has received adequate notice, the opposing party may miss filing deadlines or be forced to proceed with a hearing without having adequate time to prepare.

The rule should be limited to only apply when an unrepresented individual submits an untimely pleading that would result in the individual losing a right. This limitation would more properly balance the need to protect incarcerated individuals' rights with the need to provide the opposing party with adequate notice of a court filing. In addition, this limitation is consistent with other rules that apply when the court receives a pleading that involves the loss of a right by unrepresented individuals. See Rules 6.310(C)(5), 6.431(C)(5), 7.204(A)(2)(e), 7.205(A)(3), and 7.305(C)(5).

[1] The Criminal Law, Appellate Practice, and Prisons & Corrections Sections did not have the opportunity to consider the Access to Justice Policy Committee's position prior to submitting their positions to the Board.

The Board supports the remainder of the proposed rule amendments contained in these administrative files because they protect defendants' rights and streamline litigation by helping to ensure that the courts remain accessible to incarcerated individuals; eliminate unfair and potentially unconstitutional limitations on the court's ability to reinstate a defendant's appellate rights when such rights have been forfeited for circumstances beyond the defendant's control; and increase accountability and transparency throughout the presentence interview process.

We thank the Court for the opportunity to convey the Board's position on this rule proposal.

Sincerely,

Janet K. Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
Dennis M. Barnes, President, State Bar of Michigan

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June 30, 2020

Larry S. Royster
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RE: ADM File No. 2019-27 – Proposed Amendments of Rules 6.310, 6.429, 6.431, 6.509, and 7.205 and Proposed Addition of Rule 6.126 of the Michigan Court Rules

Dear Clerk Royster:

At its June 12, 2020 meeting, the Board of Commissioners of the State Bar of Michigan (Board) considered the above-referenced proposed rule amendments published for comment. In its review, the Board considered recommendations from the Access to Justice Policy Committee, the Criminal Jurisprudence & Practice Committee, the Appellate Practice Section, and the Criminal Law Section.

The Board voted unanimously to support the proposed rule changes with amendments to Rule 7.205(A)(4)(b) to clarify the time deadline for filing a delayed application for leave to appeal, as follows: [additions shown in bold and underline, and deletions shown in strikethrough].

> (b) For appeals governed by subrule (A)(1) or (2), if the Court of Appeals dismisses a claim of appeal for lack of jurisdiction, a delayed application for leave to appeal may be filed within **the later of 6 months from the entry of the order appealed,** 21 days **after** ~~of the~~ entry of the dismissal order**,** or **21 days after entry of** an order denying reconsideration of ~~that~~ **the dismissal** order, provided that:
>
> (i) the delayed application is taken from the same lower court judgement or order as the claim of appeal, and
>
> (ii) the claim of appeal was filed within the applicable time period in subrule (A)(1) or (2).

We thank the Court for the opportunity to comment on the proposed amendments.

Sincerely,

Janet K. Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
Dennis M. Barnes, President

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June 30, 2020

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RE: ADM File No. 2019-29 – Proposed Amendments of Rules 7.212 and 7.312 of the Michigan Court Rules

Dear Clerk Royster:

At its June 12, 2020 meeting, the Board of Commissioners of the State Bar of Michigan (Board) considered the above-referenced proposed rule amendments published for comment. In its review, the Board considered recommendations from the Civil Procedure & Courts Committee and the Appellate Practice Section.

Based on this review, the Board voted unanimously to support the proposed rule amendments. The proposed rule changes will make the appendix rule more consistent within the Court of Appeals and the Supreme Court.

In addition, the Board is providing additional suggestions from its Civil Procedure & Courts Committee for the Court's consideration.

We thank the Court for the opportunity to comment on the proposed amendments.

Sincerely,

Janet K. Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
Dennis M. Barnes, President

Public Policy Position
ADM File No. 2019-29

The Civil Procedure & Courts Committee is comprised of members appointed by the President of the State Bar of Michigan. The position expressed is that of the Civil Procedure & Courts Committee only and is not an official position of the State Bar of Michigan, nor does it necessarily reflect the views of all members of the State Bar of Michigan. The State Bar's position in this matter is to support the proposed amendments and provide the Court with the comments from the Civil Procedure & Courts Committee.

The Civil Procedure & Courts Committee has a public policy decision-making body with 27 members. On May 21, the Committee adopted its position after a discussion and vote at a scheduled meeting. 20 members voted in favor of the Committee's position on ADM File No. 2019-29, 0 members voted against this position, 0 members abstained, 7 members did not vote.

Support with Amendments

Explanation
The committee voted unanimously to support ADM File No. 2019-29 with amendments. The committee supports the proposed rules because they would make the appendix rule consistent within Court of Appeals and the Supreme Court; however, the committee raises questions and concerns regarding the proposed rule amendments.

- The committee is concerned that as currently proposed MCR 7.212(J)(2)(B) imposes electronic format and booking requirements on appendices before the Court's pilot program on electronic briefs has concluded. Section 7.212(J)(2)(B) appears to get ahead of the pilot program – a program that is currently evaluating whether the electronic brief technology is affordable and accessible to all practitioners.

- The committee recommends clarification on whether practitioners need a separate Table of Contents for each volume of appendices or whether one full Table of Contents is sufficient.

- The committee recommends consideration of whether exclusions as currently proposed in MCR 7.212(J)(1)(a)-(f), should also apply to briefs in the Supreme Court, rather than being carved out.

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June 30, 2020

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RE: ADM File No. 2019-31 – Proposed Amendment of Rule 7.216 of the Michigan Court Rules

Dear Clerk Royster:

At its June 12, 2020 meeting, the Board of Commissioners of the State Bar of Michigan (Board) considered the above-referenced proposed rule amendment published for comment. In its review, the Board considered recommendations from the Civil Procedure & Courts Committee and the Criminal Jurisprudence & Practice Committee.

Based on this review, the Board voted unanimously to support the proposed rule amendments with additional amendments to Rule 7.216(C)(1)(a) to make it consistent with Rule 7.316(C)(1)(a): [additional amendments are shown in bolded underline and deletions are shown in strike-through].

> the appeal was taken for purposes of hindrance or delay ~~or without any reasonable basis~~ **or is not reasonably well-grounded in fact or warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law**; ~~for belief that there was a meritorious issue to be determined on appeal;~~ or

We thank the Court for the opportunity to comment on the proposed amendments.

Sincerely,

Janet K. Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
Dennis M. Barnes, President

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June 30, 2020

Larry S. Royster
Clerk of the Court
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

RE: ADM File No. 2019-26 – Proposed Amendment of Rule 7.314 of the Michigan Court Rules

Dear Clerk Royster:

At its June 12, 2020 meeting, the Board of Commissioners of the State Bar of Michigan (Board) considered the above-referenced proposed rule amendment published for comment. In its review, the Board considered recommendations from the Civil Procedure & Courts Committee, the Criminal Jurisprudence & Practice Committee, and the Criminal Law Section.

After this review, the Board voted unanimously to support the amendment as it provides the Court with discretion in establishing appropriate time limits for oral arguments.

We thank the Court for the opportunity to comment on the proposed amendment.

Sincerely,

Janet K. Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
Dennis M. Barnes, President

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June 30, 2020

Larry S. Royster
Clerk of the Court
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

RE: ADM File No. 2020-03 – Proposed Administrative Order Regarding Election-Related Litigation

Dear Clerk Royster:

At its June 12, 2020 meeting, the Board of Commissioners of the State Bar of Michigan (Board) considered the above-referenced proposed administrative order published for comment. In its review, the Board considered recommendations from the Civil Procedure & Courts Committee. Based on this review, the Board voted unanimously to support the proposed administrative order.

We thank the Court for the opportunity to convey the Board's position.

Sincerely,

Janet K. Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
Dennis M. Barnes, President

Order

Michigan Supreme Court
Lansing, Michigan

May 20, 2020

ADM File No. 2002-37

Proposed Addition of Rule 2.226 of the Michigan Court Rules

Bridget M. McCormack,
Chief Justice

David F. Viviano,
Chief Justice Pro Tem

Stephen J. Markman
Brian K. Zahra
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh,
Justices

On order of the Court, this is to advise that the Court is considering a proposed addition of Rule 2.226 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at Administrative Matters & Court Rules page.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[New] Rule 2.226 Change of Venue; Transfer of Jurisdiction; Orders.

(A) The court ordering a change of venue or transfer of jurisdiction shall enter all necessary orders pertaining to the certification and transfer of the action to the court to which the action is transferred on a form approved by the State Court Administrative Office.

(B) If a change of venue or transfer of jurisdiction order is not prepared as required under subrule (A), and the order lacks the information necessary for the receiving court to determine under which rule the transfer was ordered, the receiving court may refuse to accept the transfer.

(C) If a receiving court refuses to accept a transfer because of lack of necessary information under subrule (B), the clerk of the court in the receiving court shall prepare a notice of refusal on a form approved by the State Court Administrative Office and promptly return the case to the transferring court for a proper order.

(D) If a transferring court receives a refusal to accept a transferred case under subrule (C), the transferring court shall prepare a proper order in accordance with subrule (A) and retransfer the case within three business days.

Staff comment: The proposed addition of MCR 2.226 would clarify the process for change of venue and transfer orders.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by September 1, 2020, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2002-37. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

May 20, 2020

Clerk

Public Policy Position
ADM File No. 2002-37

Support with Recommendations

Explanation
The committee voted unanimously support the idea behind the proposed court rule; however, the committee offers the following recommendations:

1. In Section (3), rather than using the term "promptly," set forth a specific number of days in which the receiving court must provide notice of refusal and return the case to the transferring court.
2. Consistent with the Court's efforts to modify time periods to be in seven-day increments, for Section (4), consider modifying the three-day time period to a seven-day time period.
3. Provide chief judges authority to exercise their discretion to oversee and administer transfers to help ensure that the rules are being followed.
4. Provide an electronic process for courts to submit transfer orders and refusals of those orders to help expedite the process.

Position Vote:
Voted For position: 22
Voted against position: 0
Abstained from vote: 0
Did not vote (due to absence): 5

Contact Person: Randy J. Wallace
Email: rwallace@olsmanlaw.com

Order

Michigan Supreme Court
Lansing, Michigan

April 8, 2020

ADM File No. 2019-47

Proposed Amendments of Rules 3.804, 5.140, and 5.404 and Proposed Addition of Rule 3.811 of the Michigan Court Rules

Bridget M. McCormack,
Chief Justice

David F. Viviano,
Chief Justice Pro Tem

Stephen J. Markman
Brian K. Zahra
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh,
Justices

On order of the Court, this is to advise that the Court is considering amendments of Rules 3.804, 5.140, and 5.404 and a proposed addition of Rule 3.811 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at Administrative Matters & Court Rules page.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining
and deleted text is shown by strikeover.]

Rule 3.804 Consent and Release

(A) [Unchanged.]

(B) Hearing on Consent to Adopt.

(1)-(2) [Unchanged.]

(3) Use of Videoconferencing Technology. Videoconferencing technology may not be usedExcept for a consent hearing under this subrule involving an Indian child pursuant to MCL 712B.13, the court may allow the use of videoconferencing technology under this subchapter in accordance with MCR 2.407.

(C)-(D) [Unchanged.]

[New] Rule 3.811 Use of Videoconferencing Technology

Except as otherwise provided, the court may allow the use of videoconferencing technology for proceedings under this subchapter in accordance with MCR 2.407.

Rule 5.140 Use of Videoconferencing Technology

(A)-(C) [Unchanged.]

~~(D) The court may not use videoconferencing technology for a consent hearing required to be held pursuant to the Michigan Indian Family Preservation Act and MCR 5.404(B).~~

(~~E~~D) [Relettered but otherwise unchanged.]

Rule 5.404 Guardianship of Minor

(A) [Unchanged]

(B) Voluntary Consent to Guardianship of an Indian Child.

A voluntary consent to guardianship of an Indian child must be executed by both parents or the Indian custodian.

(1) Form of Consent. To be valid, the consent must contain the information prescribed by MCL 712B.13(2) and be executed on a form approved by the State Court Administrative Office, in writing, recorded before a judge of a court of competent jurisdiction, and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given before, or within 10 days after, the birth of the Indian child is not valid. The court may ~~not~~ use videoconferencing technology for the guardianship consent hearing required to be held under MCL 712B.13(1)~~the Michigan Indian Family Preservation Act~~ and this subrule.

(2)-(3) [Unchanged.]

(C)-(H) [Unchanged.]

Staff comment: The proposed amendments of MCR 3.804, 5.140, and 5.404 and proposed new MCR 3.811 would allow greater use of videoconferencing equipment in cases involving Indian children.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by August 1, 2020, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2019-47. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

April 8, 2020

Clerk

Public Policy Position
ADM File No. 2019-47

Support

Explanation
The committee overall supports the amendments and proposed new rule set forth in ADM 2019-47 because they reflect a compromise between the permissible use of video-technology in proceedings such as in the voluntary consent in guardianship matters, where the potential permanent loss of parental rights does not exist, and the impermissible use video-technology in matters such as adoption, where the potential exists for the permanent loss of parental rights. The amended rules and proposed rule address the committee's concern with American Indian children being "adopted out" without their parents understanding their parental rights and/or that the release of their rights is permanent.

The committee, however, would oppose the use of videoconference technology in the permanent voluntary release or termination of parental rights in ICWA and MIFPA. Physical appearance by the parties remains the best avenue for a judge to determine if a permanent release is both informed and voluntary and if the requirements, goals, and principals under ICWA and MIFPA have been met.

Position Vote:
Voted for position: 17
Voted against position: 0
Abstained from vote: 0
Did not vote (due to absence): 10

Contact Persons:
Lorray S.C. Brown lorrayb@mplp.org
Valerie R. Newman vnewman@waynecounty.com

To: Access to Justice Committee

From: Kenneth C. Penokie; Melissa L. Pope

Date: May 11, 2020

RE: Amendments of MCR 3.804, 5.140 & 5.404 with Proposed Addition of Rule 3.811

Summary

The proposed amendments to the Michigan Court Rules would permit use of video conferencing in guardianship matters involving American Indian children, matters governed by the Indian Child Welfare Act (ICWA) and the Michigan Indian Family Preservation Act (MIFPA), but not permit videoconferencing in consent to adoptions.

ICWA & MIFPA

ICWA was adopted in 1978 after extensive study of and testimony on the existence of the unlawful taking of American Indian children with permanent placement and/or adoption of American Indian children in non-American Indian homes and without a relationship to their Native Nations. As stated in ICWA, the purpose of ICWA is "...to protect the best interest of Indian Children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children and placement of such children in homes which will reflect the unique values of Indian culture... "(25 U.S. C. 1902). ICWA provides requirements for placement of American Indian children in child abuse and neglect cases and adoption cases, including preferences for American Indian placement, sets minimum standards for the handling of these cases, including establishing the goal of reunification with the measure towards that goal being that active efforts must be made, and notice to the child's Tribe(s) so that the Tribe may intervene in the matter, among other requirements. In January 2013, Michigan enacted MIFPA to ensure Michigan prioritized the goals and terms of ICWA in state law while providing higher standards to reunify the family, where possible, and keep an American Indian child connected to his or her Native Nation.

Amendments of MCR 3.804, 5.140 & 5.404 with Proposed Addition of Rule 3.811

MCR 3.811 proposes the use of videoconferencing technology in consent hearings under the sub-rule while also prohibiting consent to adoption via videoconference technology.

Substantive Analysis

The proposed amendments and new MCR have a long history that has involved SCAO, the Court Improvement Program Tribal Court Relations Committee, the SBM American Indian Law Standing Committee, the Tribal State Federal Judicial Forum, the Michigan Indian Judicial Association, individual Tribal Courts, the Michigan Department of Health and Human Services, and other Tribal and non-Tribal agencies and individuals. While the proposed MCR 3.811 is characterized as permitting "greater use of videoconferencing equipment" in cases involving American Indian children, it also simultaneously prohibits consent to adoption via videoconference technology; a reflection of the conflicting viewpoints.

Those supporting the use of videoconferencing in ICWA and MIFPA cases have expressed concern over the time it takes to obtain a physical appearance, the cost to courts in facilitating physical appearance, such as when an American Indian parent is incarcerated, and the challenge to permanency for American Indian children with an American Indian parent having to personally appear for the voluntary relinquishment of parental rights. Of particular concern in seeking the use of videoconference technology in ICWA and MIFPA cases is to have an avenue for permanency when the American Indian parent lives or is residing outside of Michigan, including when serving in the military. Most Tribal Courts, MIJA, and the SBM American Indian Law Standing Committee recognize these challenges but find the

physical appearance of an American Indian parent critical to determining whether a release is actually voluntary and understood with frequent reports from American Indian parents that they experienced pressure to release their parental rights or did not understand that it would be a permanent release. With the historical destruction of American Indian families and the long-term harm experienced by those who were "adopted out" that was caused by the US policies that established the need for ICWA – and there being insufficient improvement since 1978 despite ICWA, a contributing factor to the adoption of MIFPA – Michigan has recognized the ongoing need for the principles of ICWA to be continued and expanded, including the reunification of American Indian families, the critical connection of an American Indian child to his or her Native Nation to support their long-term wellbeing, and the critical need to the existence of that Native Nation to be connected to its Tribal Citizens. Requiring the physical appearance of an American Indian parent provides the best avenue for a judge to evaluate whether a permanent release is informed and actually voluntary in fulfillment of ICWA and MIFPA.

The adoption of the proposed and new MCRs would directly reflect the concerns: permit the the use of videoconference technology in the voluntary consent in guardianship matters as guardianship matters do not involve the permanent loss of parental rights while prohibiting the use in adoption matters thereby providing the best avenue possible of personal appearance for a judge to determine if the consent to adoption by the American Indian parent is both voluntary and informed.

Recommendation

Support the Amendments to MCR 3.804, 5.140 & 5.404 with Proposed Addition of Rule 3.811 with comment that the Access to Justice Policy Committee does not support the use of videoconference technology in the permanent voluntary release or termination of parental rights in ICWA and MIFPA cases with physical appearance the best avenue for a judge to determine if a permanent release is both informed and voluntary, as well as determine whether all requirements under ICWA and MIFPA have been met in support of the principles and goals of ICWA and MIFPA in promoting the reunification of American Indian families, promoting the long-term wellbeing of American Indian children by facilitating the relationship between the American Indian child and his or her Tribe, and supporting Native Nations by keeping them connected to their children, the future Leaders of their Tribal Governments and Citizens of their Nations.

Order

Michigan Supreme Court
Lansing, Michigan

May 20, 2020

ADM File No. 2019-41

Proposed Amendment of
Rule 4.201 of the Michigan
Court Rules

Bridget M. McCormack,
Chief Justice

David F. Viviano,
Chief Justice Pro Tem

Stephen J. Markman
Brian K. Zahra
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh,
Justices

On order of the Court, this is to advise that the Court is considering an amendment of Rule 4.201 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at Administrative Matters & Court Rules page.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

Rule 4.201 Summary Proceedings to Recover Possession of Premises

(A)-(B) [Unchanged.]

(C) Summons.

(1) [Unchanged.]

(2) The summons must state whether or not the action is brought in the county or district in which the premises or any part of the premises is situated.

(3~~2~~) The summons must also include the following advice to the defendant:

(a)-(d) [Unchanged.]

(e) The defendant has a right to have the case tried in the proper county, district, or court. The case will be transferred to the proper county, district, or court if the defendant moves the court for such transfer.

(D)-(E) [Unchanged.]

(F) Appearance and Answer; Default.

(1)-(2) [Unchanged.]

(3) Right to Proper Venue. If the plaintiff has indicated on the summons that the premises or any part of the premises is situated in a different county or district, the court must inform the defendant, at the hearing scheduled pursuant to section (C)(1) of this rule, of the right to motion the court to transfer the case to the county or district where the premises or any part of the premises is situated and that such a motion will be granted.

(a) The court may order change of venue on its own motion.

(b) A motion to change venue pursuant to this subrule and MCL 600.5706(4) may be made in writing before the date listed on the summons, pursuant to section (C)(1) of this rule, or orally in response to the court's advisement in this subrule.

(c) Transfer of the case shall be pursuant to MCR 2.223.

(3)-(5) [Renumbered (4)-(6) but otherwise unchanged.]

(G)-(O) [Unchanged.]

Staff comment: The proposed amendment of MCR 4.201 would require disclosure of the right to object to venue in actions brought under the Summary Proceedings Act for landlord/tenant proceedings in district court, consistent with MCL 600.5706.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by September 1, 2020, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No.

2019-41. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

May 20, 2020

Clerk

Public Policy Position
ADM File No. 2019-41

Support

Explanation
The committee voted unanimously to support the proposed amendment to Rule 4.201.

Position Vote:
Voted for position: 17
Voted against position: 0
Abstained from vote: 0
Did not vote (due to absence): 10

Contact Persons:

Lorray S.C. Brown lorrayb@mplp.org
Valerie R. Newman vnewman@waynecounty.com

Public Policy Position
ADM File No. 2019-41

Support

Explanation
The committee voted unanimously to support the proposed amendment to Rule 4.201 as the rule provides notice to defendant-tenants of their right to have the venue changed to the district court in which the rental property is located. Many tenants are unrepresented and this rule amendment provides additional protections to safeguard their rights and to facilitate their access to the courts.

Position Vote:
Voted For position: 22
Voted against position: 0
Abstained from vote: 0
Did not vote (due to absence): 5

Contact Person: Randy J. Wallace
Email: rwallace@olsmanlaw.com

Order

Michigan Supreme Court
Lansing, Michigan

April 8, 2020

ADM File No. 2020-04

Proposed Amendment of
Rule 4 of the Rules for the
Board of Law Examiners

Bridget M. McCormack,
Chief Justice

David F. Viviano,
Chief Justice Pro Tem

Stephen J. Markman
Brian K. Zahra
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh,
Justices

On order of the Court, this is to advise that the Court is considering an amendment of Rule 4 of the Rules for the Board of Law Examiners. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at Administrative Matters & Court Rules page.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

Rule 4 Post-Examination Procedures

(A)-(C) [Unchanged.]

(D) A passing bar examination score is valid for three years.

Staff comment: The proposed amendment of BLE Rule 4 would explicitly state that a passing bar exam score is valid for three years, which is consistent with the character and fitness clearance expiration.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by August 1, 2020, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2020-04. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

April 8, 2020

Clerk

STATE BAR OF MICHIGAN

To: Members of the Public Policy Committee
Board of Commissioners

From: Governmental Relations Staff

Date: July 15, 2020

Re: HB 5444 – Kinship Caregiver Navigator Program

Background

HB 5443 and 5444 would create, respectively, the Kinship Caregiver Advisory Council Act, and the Kinship Caregiver Navigator Program in the Department of Health and Human Services (DHHS). The bills are tie-barred. The Kinship Caregiver Navigator Program would provide resources and services, including legal services, to relatives who care for children who may otherwise be directed towards the foster care system. These "kinship caregivers" are defined as relatives who are 18 years of age or older and have fully undertaken an unequivocal, committed, and responsible parental and caregiving role for a child not their own, whether informally arranged among relatives or formally supported by the child welfare system.

HB 5444 identifies the provision of legal services as a key component in supporting kinship caregivers and specifically references the State Bar of Michigan. The bill requires a "navigator services provider" (with whom DHHS would contract for services) to establish a website that lists resources and services available to kinship caregivers. Among the services that must be listed are "[l]egal services, including, but not limited to, pro bono and low bono legal aid providers, forms needed to file a petition in court, [and] guides to kinship care legal issues." Furthermore, the bill specifically allows kinship navigator service providers to, "identify and maintain relationships with the State Bar of Michigan, law school clinics, and other nonprofit legal service agencies." Service providers may "develop and maintain training materials and training programs designed to educate pro bono, low bono, or both, attorneys on how to provide legal advices, assistance, and representation specific to kinship caregivers." The bill seeks to harness the resources of legal organizations, agencies, and institutions to increase the availability of and improve the access to legal services for kinship caregivers.

***Keller* Considerations**

The Access to Justice Policy Committee reviewed HB 5444 and agreed that it was *Keller*-permissible because the bill affects the availability of legal services by specifically identifying the role the State Bar of Michigan, pro bono, and low bono legal aid providers would fulfill in supporting kinship caregivers seeking legal representation in child custody or similar matters.

Although the underlying question of what distinct rights, privileges, and services, if any, the state should grant to the class of relatives caring for minor children is not within *Keller* boundaries, there are aspects of the bill that would potentially increase the availability of legal services to society, i.e., the

bill's designation of legal services by a navigator services provider; in this provision, the bill itself specifically references the State Bar of Michigan. And indeed, one could argue for a practical rule of thumb that any bill that specifically references the State Bar of Michigan should *per se* be considered *Keller*-permissible.

The carefully delineated role for SBM is in keeping with the *Keller*-permissible activity of increasing the availability of legal services to society. The role of SBM as set forth in HB 5444 is not one that requires a stance with respect to the policy or merits of a kinship navigator program. Rather, the legislation taps SBM to fulfill an important role in further developing low cost or no cost legal service programs - a role that the SBM has a long, storied history of occupying.

***Keller* Quick Guide**

	THE TWO PERMISSIBLE SUBJECT-AREAS UNDER *KELLER*: Regulation of Legal Profession	Improvement in Quality of Legal Services
As interpreted by AO 2004-1	• Regulation and discipline of attorneys • Ethics • Lawyer competency • Integrity of the Legal Profession • Regulation of attorney trust accounts	• Improvement in functioning of the courts ✓ Availability of legal services to society

Staff Recommendation

The legislation satisfies the requirements of *Keller* and may be considered on its merits for the purpose of taking a position on the provisions of the legislation that are *Keller*-permissible.

House Bill 5444 (2020) rss?

Friendly Link: http://legislature.mi.gov/doc.aspx?2020-HB-5444

Sponsors
Frank Liberati (district 13)
Kathy Crawford, Julie Brixie, Jim Ellison, Donna Lasinski, Leslie Love, Terry Sabo, Cynthia Johnson, Jim Haadsma, Kevin Coleman, Tim Sneller, Mari Manoogian, Tenisha Yancey, Lori Stone, Rachel Hood, William Sowerby, Padma Kuppa, Sarah Anthony, Kyra Harris Bolden, Robert Wittenberg, Sheryl Kennedy, John Chirkun, Kara Hope, Jack O'Malley, Michael Webber, LaTanya Garrett, Alex Garza, Cara Clemente, Abdullah Hammoud, Nate Shannon, Laurie Pohutsky, Daire Rendon, Hank Vaupel, Douglas Wozniak, Julie Calley, Bronna Kahle, Sarah Anthony, Kathy Crawford
(click name to see bills sponsored by that person)

Categories
Children: services; Children: foster care; State agencies (existing): health and human services;

Children: services; kinship caregiver navigator program; create. Creates new act. TIE BAR WITH: HB 5443'20

Bill Documents
Bill Document Formatting Information
[x]
The following bill formatting applies to the 2019-2020 session:
- New language in an amendatory bill will be shown in **BOLD AND UPPERCASE.**
- Language to be removed will be ~~stricken~~.
- Amendments made by the House will be blue with square brackets, such as: [House amended text].
- Amendments made by the Senate will be red with double greater/lesser than symbols, such as: <<Senate amended text>>.

(gray icons indicate that the action did not occur or that the document is not available)

Documents

House Introduced Bill
Introduced bills appear as they were introduced and reflect no subsequent amendments or changes.

As Passed by the House
As Passed by the House is the bill, as introduced, that includes any adopted House amendments.

As Passed by the Senate
As Passed by the Senate is the bill, as received from the House, that includes any adopted Senate amendments.

House Enrolled Bill
Enrolled bill is the version passed in identical form by both houses of the Legislature.

Bill Analysis
House Fiscal Agency Analysis

Summary As Introduced (2/11/2020)
This document analyzes: HB5443, HB5444

Summary for Committee (2/25/2020)
This document analyzes: HB5443, HB5444

Summary as Referred to Second Committee (3/2/2020)
This document analyzes: HB5443, HB5444

Summary as Reported From Committee (3/3/2020)
This document analyzes: HB5443, HB5444

History
(House actions in lowercase, Senate actions in UPPERCASE)

Date ▲	Journal	Action
2/4/2020	HJ 12 Pg. 173	introduced by Representative Frank Liberati
2/4/2020	HJ 12 Pg. 173	read a first time
2/4/2020	HJ 12 Pg. 173	referred to Committee on Families, Children, and Seniors
2/5/2020	HJ 13 Pg. 186	bill electronically reproduced 02/05/2020
2/26/2020	HJ 21 Pg. 371	referred to Committee on Ways and Means
3/3/2020	HJ 23 Pg. 398	reported with recommendation without amendment
3/3/2020	HJ 23 Pg. 398	referred to second reading
3/10/2020	HJ 26 Pg. 457	placed on immediate passage
3/10/2020	HJ 26 Pg. 457	read a third time
3/10/2020	HJ 26 Pg. 457	passed; given immediate effect Roll Call # 145 Yeas 99 Nays 6 Excused 0 Not Voting 4
3/10/2020	HJ 26 Pg. 457	transmitted
3/10/2020	HJ 26 Pg. 451	read a second time
3/10/2020	HJ 26 Pg. 451	placed on third reading

3/12/2020	SJ 28 Pg. 367	REFERRED TO COMMITTEE ON FAMILIES, SENIORS, AND VETERANS

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HOUSE BILL NO. 5444

February 04, 2020, Introduced by Reps. Liberati, Crawford, Brixie, Ellison, Lasinski, Love, Sabo, Cynthia Johnson, Haadsma, Coleman, Sneller, Manoogian, Yancey, Stone, Hood, Sowerby, Kuppa, Anthony, Bolden, Wittenberg, Kennedy, Chirkun, Hope, O'Malley, Webber, Garrett, Garza, Clemente, Hammoud, Shannon, Pohutsky, Rendon, Vaupel, Wozniak, Calley and Kahle and referred to the Committee on Families, Children, and Seniors.

A bill to create the kinship caregiver navigator program; to provide for resources and services for kinship caregivers; to make appropriations for the kinship caregiver navigator program; and to prescribe the powers and duties for certain state departments and agencies.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 1. This act shall be known and may be cited as the "kinship caregiver navigator act".

Sec. 2. As used in this act:

(a) "Advisory council" means "council" as that term is defined in the kinship caregiver advisory council act.

(b) "Department", "kinship caregiver", "kinship family", and "relative" mean those terms as defined in the kinship caregiver advisory council act.

(c) "Navigator" means an individual, knowledgeable about the social and child welfare system, who is hired by the navigator services provider to provide support services to kinship caregivers.

(d) "Navigator program" means the kinship caregiver navigator program established in section 3.

(e) "Navigator services provider" or "provider" means the entity with whom the department contracts under section 3 to provide navigator services to kinship caregivers.

Sec. 3. (1) The department shall establish and maintain the kinship caregiver navigator program.

(2) Before participating in the navigator program, the department must submit to the United States Department of Health and Human Services Administration on Children, Youth and Families an attachment to the state title IV-E plan. The attachment must include, at a minimum, all of the following:

(a) The kinship navigator model the department shall utilize to create the program. The department must provide an assurance that this model meets the requirements of federal law.

(b) The date the navigator program began or will begin.

(c) Information describing the navigator program target population and service area.

(d) Information on how the department will implement the navigator program.

(3) The department shall enter into a contract with a third party to provide navigator services to kinship caregivers.

(4) In addition to providing navigator services, the navigator services provider shall establish a website regarding local support groups, resources, and services for kinship caregivers. The website must provide, at a minimum, information on the following:

(a) Outreach.

(b) Educational information.

(c) Training materials.

(d) Financial assistance.

(e) Legal services, including, but not limited to, pro bono and low bono legal aid providers, forms needed to file a petition in court, guides to kinship care legal issues, and any other information the provider considers necessary.

(f) Health care, mental health, and substance use disorder services.

(g) Child and respite care.

(h) Support groups.

(i) Parenting tips.

(j) Resources for caring for children with special needs.

(5) The navigator services provider shall establish and maintain a single statewide toll-free telephone number for kinship caregivers to call for information or services.

Sec. 4. The navigator services provider shall do all of the following:

(a) Consult with the advisory council on the design and continuation of the navigator program.

(b) Consult with the advisory council on developing outreach and educational material to provide to kinship families.

(c) Promote partnerships between public and private agencies to increase knowledge of the needs of kinship families and to increase responsiveness to those needs. This includes working with other navigation systems for foster care and adoption, as well as for general information and referral systems.

(d) Develop training material for navigators that is based on industry best practices.

(e) Share aggregate data with the advisory council regarding who is being served under the navigator program and what services are being provided. The provider shall not share information on individual identification under this subdivision.

Sec. 5. The navigator program shall do all of the following:

(a) Assist kinship caregivers in learning about, finding, and using programs and services to meet the needs of the children they are raising.

(b) Work with state, local, and nonprofit agencies that promote service coordination or provide information and referral services.

(c) Establish information and referral systems that link, by toll-free access, kinship caregivers, kinship support group facilitators, and kinship caregiver service providers to each other. This information and referral systems shall include, but are not limited to, the following:

(*i*) Eligibility and enrollment information.

(*ii*) Relevant training to assist kinship caregivers in caregiving.

(*iii*) Connections to legal aid and assistance providers.

(d) Comply with all federal regulations and statutes, including the provisions of 42 USC 627 and 671, to qualify for reimbursement of 50% of the costs for the kinship caregiver navigator program.

Sec. 6. The navigator services provider may do all of the following:

(a) Identify and maintain relationships with the State Bar of Michigan, law school clinics, and other nonprofit legal services agencies. These relationships shall facilitate developing a county or regional pro bono or low bono legal representation referral program.

(b) Develop and maintain training materials and training programs designed to educate pro bono, low bono, or both, attorneys on how to provide legal advice, assistance, and representation specific to kinship caregivers.

(c) Apply for and accept grants from other public or private entities to develop legal services initiatives.

Sec. 7. (1) The kinship caregiver navigator fund is created within the state treasury.

(2) The state treasurer may receive money or other assets from any source for deposit into the fund. The state treasurer shall direct the investment of the fund. The state treasurer shall credit to the fund interest and earnings from fund investments.

(3) Money in the fund at the close of the fiscal year shall remain in the fund and shall

not lapse to the general fund.

(4) The department's children's services agency shall be the administrator of the fund for auditing purposes.

(5) The department's children's services agency shall expend money from the fund, upon appropriation, only for the purpose of carrying out the provisions of this act.

Enacting section 1. This act takes effect October 1, 2020.

Enacting section 2. This act does not take effect unless Senate Bill No.____ or House Bill No. 5443 (request no. 03728'19 *) of the 100th Legislature is enacted into law.

KINSHIP CAREGIVER NAVIGATOR PROGRAM

AND KINSHIP CAREGIVER ADVISORY COUNCIL

House Bill 5443 (H-1) as reported from committee

Sponsor: Rep. Kathy Crawford

House Bill 5444 as reported from committee

Sponsor: Rep. Frank Liberati

1st Committee: Families, Children and Seniors

2nd Committee: Ways and Means

Complete to 3-3-20

SUMMARY:

House Bills 5443 and 5444 would create new acts called, respectively, the Kinship Caregiver Advisory Council Act and the Kinship Caregiver Navigator Act. Both bills would employ the following defined terms:

Kinship family would mean a ***kinship caregiver*** and the child with whom he or she has taken on the caregiving role.

Kinship caregiver would mean a ***relative*** who is 18 years of age or older and has fully undertaken an unequivocal, committed, and responsible parental and caregiving role for a child who is not his or her own, whether informally arranged among relatives or formally supported by the child welfare system.

Relative would mean an individual who is 18 years of age or older and is related to the child within the fifth degree by marriage, blood, or adoption, including step relationships and the spouse of an individual related to the child within the fifth degree, even after the marriage has ended by death or divorce, or an individual who has a close family-like relationship with the child.

<u>House Bill 5443</u> would create the Kinship Caregiver Advisory Council within Department of Health and Human Services (DHHS). The council would consist of the following members:

- The director of the Children Services Agency in DHHS or his or her designee.
- The director of Aging and Adult Services in DHHS or his or her designee.
- The superintendent of public instruction or his or her designee.
- The state court administrator or his or her designee.
- Nineteen public members with experience and knowledge in kinship caregiver issues, appointed by the governor with the advice and consent of the Senate as follows:
    - Three who are kinship caregivers (one representing caregivers over 60 years old, one representing caregivers in the formal child welfare system, and one representing caregivers who had children informally placed with them).
    - One who is an adult who was raised by a kinship caregiver.
    - Two representing nonprofit child advocacy organizations.
    - Four representing private agencies that contract with the state to provide child welfare services (one each representing agencies that make foster care placements, provide postadoption or postguardianship services, provide adoption services, and provide prevention and family preservation services).
    - Two representing mental health professionals (one with expertise in adverse childhood experiences and one with expertise in substance use disorder). One member would have to be a licensed psychologist or psychiatrist, and the other would have to be a licensed master's social worker.

- Two who are licensed attorneys.
- One representing local Area Agencies on Aging.
- One representing all the federally recognized tribes in this state.
- One representing an agency that provides kinship navigation services.
- One parent who previously had a child in a kinship care arrangement but has since been reunited with that child.
- One who has demonstrated expertise in domestic violence victim services and advocacy.

Members would be first appointed to the council within 90 days after the act took effect. To the extent practicable, the council would have to be composed of geographic, ethnic, age, and gender diversity and represent the demographic composition of this state.

Public members of the council would serve for three years or until a successor was appointed, whichever is later. Of those first appointed, six would serve for one year, six for two years, and five for three years. If a vacancy occurred on the council, the governor would make an appointment for the unexpired term in the same manner as the original appointment.

The governor would designate a chairperson of the council, who would serve in that position at the pleasure of the governor. The council could elect other officers and establish committees as it considered appropriate.

The council could remove a member for misfeasance, malfeasance, or nonfeasance in office, after hearing. Missing three or more consecutive meetings would be malfeasance and grounds for removal.

Council members could be reimbursed for actual and necessary expenses incurred in the performance of their official duties. The compensation, reimbursement, and all actual and necessary operating expenses of the council would need to be appropriated by the legislature.

Council Meetings

The council would have to meet at least four times per year and would have to hold at least two public meetings across the state to address local issues regarding kinship caregiving and to provide a process that incorporates the public in the development of the council's recommendations. The council would establish its own procedures and requirements with respect to quorum, place, and conduct of its meetings and other matters.

The council would have to conduct its business at a public meeting held in compliance with the Open Meetings Act. A writing prepared, owned, used, possessed, or retained by the council in the performance of an official function would be subject to the Freedom of Information Act.

Council Powers and Duties

The council could do all of the following:

- Establish a public awareness campaign to educate the public about kinship caregivers.
- Consult and coordinate with the kinship caregiver navigator program (proposed by HB 5444) to collect aggregate data on individuals being served by the kinship caregiver navigator program.
- Consult and collaborate with the provider of the kinship caregiver navigator program on the design and administration of that program.
- Establish, maintain, and update a list of local support groups and programs that provide services to kinship families, and devise a plan of action for engaging with the groups and programs on the list to better understand issues facing kinship families.
- Develop methods to promote and improve collaboration between state, county, and local governments and agencies and private stakeholders.

To carry out its duties, the council could accept federal money and gifts, grants, bequests, or donations from individuals, private organizations, or foundations. It could also conduct a campaign to solicit gifts, bequests, grants, or donations of money or property or pledges of gifts, bequests, grants, or donations. Money received in this manner would have to be transmitted to the state treasurer for deposit in the general fund and made available only to the council for carrying out its duties under the act.

Assessment on Kinship Caregivers

Subject to receiving grants from nonprofit entities or other third parties or appropriations from the legislature, the council would have to conduct an assessment on kinship caregivers and children being raised by them. The council could contract with a third party to conduct the assessment. The assessment would have to be submitted to the council within 12 months after the date of the council's first meeting and would have to do all of the following:

- Address the prevalence, challenges, and needs of kinship families.
- Identify and evaluate current state and federal policies, programs, and services for kinship caregivers in this state and other states.
- Investigate the benefits of creating a program dedicated to providing support and assistance to kinship families utilizing child placing agencies or similar agencies.
- Provide policy options for supporting and empowering kinship caregivers.

Reports

Within 18 months after the council's first meeting, subject to receiving grants from nonprofit entities or other third parties or appropriations from the legislature, the council would have to provide an initial report to the legislature, the governor, DHHS, the Foster Care Review Board Program, the Children's Trust Fund, and the Governor's Task Force on Child Abuse and Neglect that includes all of the following:

- The findings of the assessment.
- Barriers that block access to services for kinship families, best practices, or other challenges identified that kinship caregivers and kinship families encounter.
- Concerns or public comments from kinship caregivers.
- Identification of applicable policy areas, including federal and state guidelines.
- Recommendations on how to improve services, systems, programs, state law, executive policy, and administrative rules.

The council would have to provide an annual follow-up report to the same parties that includes all of the following:

- A summary of previous report recommendations, including action taken to implement the recommendations.
- An update on the status and characteristics of kinship families.
- An update on the public awareness campaign and the kinship caregiver navigator program.
- A description of ongoing projects regarding local support groups.
- New recommendations.

DHHS would have to provide support and coordinated services to the council sufficient to carry out its duties, powers, and responsibilities and would have to promulgate rules to implement the act.

House Bill 5444 would require DHHS to establish and maintain the Kinship Caregiver Navigator Program. Before participating in the program, DHHS would have to submit to the United States Department of Health and Human Services Administration on Children, Youth and Families an attachment to the state Title IV-E Plan that included at least all of the following:

- The kinship navigator model DHHS will utilize to create the navigator program. The department would be required to provide an assurance that this model meets the requirements of federal law.
- The date the program began or will begin.
- Information describing the program target population and service area.
- Information on how the department will implement the program.

DHHS would have to enter into a contract with a third party to provide ***navigator*** services to kinship caregivers.

> ***Navigator*** would mean an individual who is knowledgeable about the social and child welfare system and who is hired by the navigator services provider to provide support services to kinship caregivers.

Navigator Service Provider Powers and Duties

In addition to providing navigator services, the navigator services provider would have to establish a website regarding local support groups, resources, and services for kinship caregivers. The website would need to provide information on at least all of the following:

- Outreach.
- Educational information.

- Training materials.
- Financial assistance.
- Legal services, including pro bono and "low bono" legal aid providers, forms needed to file a petition in court, guides to kinship care legal issues, and any other information the provider considers necessary.
- Health care, mental health, and substance use disorder services.
- Child and respite care.
- Support groups.
- Parenting tips.
- Resources for caring for children with special needs.

The bill would require the navigator service provider to do all of the following:

- Establish and maintain a single statewide toll-free number for kinship caregivers to call for information or services.
- Consult with the advisory council (proposed by HB 5443, described below) on the design and continuation of the navigator program.
- Consult with the advisory council on developing outreach and educational material for kinship families.
- Promote partnerships between public and private agencies to increase knowledge of the needs of kinship families and to increase responsiveness to those needs, including working with other navigation systems for foster care and adoption and for general information and referral systems.
- Develop training material for navigators that is based on industry best practices.
- Share aggregate data with the advisory council regarding who is being served under the navigator program and what services are being provided. (The provider could not share information on individual identification.)

The bill would allow the navigator service provider to do any of the following:

- Identify and maintain relationships with the State Bar of Michigan, law school clinics, and other nonprofit legal services agencies that facilitate developing a county or regional pro bono or "low bono" legal representation referral program.
- Develop and maintain training materials and training programs designed to educate pro bono and/or "low bono" attorneys on how to provide legal advice, assistance, and representation specific to kinship caregivers.
- Apply for and accept grants from other public or private entities to develop legal services initiatives.

Navigator Program Requirements

The bill would require the navigator program to do all of the following:

- Assist kinship caregivers in learning about, finding, and using programs and services to meet the needs of the children they are raising.
- Work with state, local, and nonprofit agencies that promote service coordination or provide information and referral services.
- Establish information and referral systems that link, by toll-free access, kinship caregivers, kinship support group facilitators, and kinship caregiver service providers to each other. The systems would have to include at least the following:
    - Eligibility and enrollment information.
    - Relevant training to assist kinship caregivers in caregiving.
    - Connections to legal aid and assistance providers.
- Comply with all federal regulations and statutes, including 42 USC 627 and 671, to qualify for reimbursement of 50% of the costs for the navigator program.

Kinship Caregiver Navigator Fund

The bill would create the Kinship Caregiver Navigator Fund in the state treasury. The state treasurer could receive money or other

assets from any source for deposit into the fund and would direct the investment of the fund and credit to the fund interest and earnings from fund investments. Money in the fund at the close of the fiscal year would remain in the fund and not lapse to the general fund. The Children's Services Agency would be the administrator of the fund for auditing purposes and could expend money from the fund, upon appropriation, only to implement the new act.

Tie-bars and effective date: The bills are tie-barred to each other, which means that neither could take effect unless both were enacted. The bills would take effect October 1, 2020.

FISCAL IMPACT:

The bills would likely increase costs to DHHS. Any increased costs to DHHS from these bills would be dependent upon additional administrative, staffing, and contractual costs that would be incurred under the bills' provisions. There would be no significant fiscal impact to local units of government.

House Bill 5443 would require the Kinship Caregiver Advisory Council to be created and for DHHS to provide support and services to the council, as well as the possible reimbursement of council members' expenses. According to DHHS, these costs are estimated to be between $150,000 and $200,000 annually and would include the costs of one DHHS staff member. Depending upon the decisions of the council concerning activities and projects, these costs could be higher.

House Bill 5444 would require DHHS to create the Kinship Caregiver Navigator Program and would require the department to enter into a contract with a third party to provide services to kinship caregivers. According to DHHS, Michigan currently has a contract with a third party, Michigan State University, to provide kinship caregiver navigator services. The current contract will end soon. In FY 2019-20, this program receives $427,658 in funding. The department estimates that under the bill's provisions, establishing the Kinship Caregiver Navigator Program and continuing similar level of services as the current contract, the program would cost approximately $450,000 to $500,000—which could be an annual increase of $50,000 to $75,000 over current expenditures.

POSITIONS:

A representative of Michigan State University Kinship Care Resource Center testified in support of the bills. (2-19-20)

The following entities indicated support for the bills:

- Department of Health and Human Services (3-3-20)
- AARP Michigan (3-3-20)
- Area Agency on Aging Association (2-19-20)
- Elder Law of Michigan (2-19-20)
- Michigan's Children (2-19-20)
- Michigan Family Forum (3-3-20)
- Michigan Federation for Children and Families (2-19-20)

The Michigan Poverty Law Program indicated a neutral position on the bills. (2-28-20)

The Michigan Coalition to End Domestic and Sexual Violence indicated opposition to the bills as introduced. (2-19-20)

Legislative Analyst: E. Best

Fiscal Analyst: Viola Bay Wild

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

Public Policy Position
HB 5444

Explanation
Consistent with the State Bar of Michigan's long-standing position of supporting and facilitating access to quality legal services, the Access to Justice Committee supports the spirit of Sections 3 (4)(e), 6 (a), 6 (b), and 6 (c), as they prioritize access to well-trained pro bono and low bono legal services for kinship caregivers to protect and improve the lives of children.

However, the Access to Justice Committee does not support the above Sections as written without greater clarification needed regarding implementation. To provide this clarification, the Committee offers the following comments:

- First, the Committee recommends that Section 6(c) be clarified to indicate that the legal services initiatives shall be integrated into the current system of legal service providers.
- Second, to ensure quality pro bono and low bono legal services, the Committee further recommends that required training include legal services to marginalized communities, when applicable, such as immigration laws for documented and undocumented children, and training to ensure compliance with the Indian Child Welfare Act and Michigan Indian Family Preservation Act for kinship caregivers of children enrolled or eligible for enrollment in a federally recognized Tribe.

Position Vote:
Voted For position: 19
Voted against position: 0
Abstained from vote: 0
Did not vote (due to absence): 8

***Keller* Permissibility:**
The committee agreed that HB 5444 is *Keller*-permissible in part. One focus of this bill is to "[i[dentify and maintain relationships with the State Bar of Michigan, law school clinics, and other nonprofit legal services agencies" to "facilitate county or regional pro bono or low bono legal representation referral program [6(a)]. Another focus is to "[d]evelop and maintain training materials and training programs designed to provide legal advice, assistance, and representation specific to kinship caregivers." [6(b). With this partial focus on legal representation, the committee believes comment on this bill is *Keller*-permissible.

Contact Persons:
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25 A SECOND CHANCE INC.

1994/2019

An Agency Overview

A Second Chance, Inc. (ASCI) is a nationally recognized model, pioneer and leader in the provision of kinship care. We are the only known organization in America that exclusively engages in kinship case management and support services to the entire kinship triad of the child, caregiver and birth parents.

We believe the best placement for children is with their relatives, family friends or others with whom they have existing positive relationships, when they are unable to remain in the homes of their birth parents—this is kinship care.

Strength and capacity of the ASCI model:	28,000 Children we have serviced
30,000 Birth parents we have serviced	10,000 Caregivers we have serviced
195 Pittsburgh corporate staff	115 Philadelphia regional staff

Innovations in Practice and Content

Case management specific to the kinship triad

Point of Contact (POC) is a full-service case management model designed for kinship care. This model empowers the family to ensure safety for the child, maintain family well-being and plan for permanency, concurrently certifying that the placement meets the requirements of the respective federal, state and local oversight authorities.

Kinship caregiver training through enrichment

Standards for Assessing and Recognizing Kinship Strengths (SARKS)™ is an experienced-based curriculum designed specifically for kinship caregivers. It is compatible with the requirements of other states and highly adaptable to any region or jurisdiction in the nation. It is fully compliant with federal requirements under Title IV-E regulations.

Funding the Model

We believe in public-private partnerships as a means to strengthen a kinship care response.

Allegheny County DHS	Kinship care/case management
Philadelphia DHS	Foster care services & FGDM
Berks County	Foster care services
Mercer County	Kinship care/case management
Diakon-SWAN	Adoption services
Delaware County	FGDM
Westmoreland County	Kinship care/case management
Washington County	Stepping Into Families & placement
Elk County	Kinship care/case management
Wayne County	Home study/case management
Bradford County	Kinship care/case management
Cambria County	Kinship care/case management
Clinton County	Kinship care/case management

A National Presence

ASCI provides technical assistance, training and assessment. Contracts include:

- Los Angeles County, CA
- West Virginia
- Georgia
- Washington, DC
- New York, NY
- Northern Virginia
- Colorado Springs, CO.
- Arizona
- Tennessee

A nonprofit recognized for setting standards in public-private partnerships

We have raised the practice of Kinship Care in Allegheny County from 10% to 67% (with a goal of 70%). Before the implementation of IOC (Improving Outcomes for Children) in Philadelphia, we had taken Kinship Care from 5% to 47% (with a goal of 55%).

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Innovations in Assessment and Placement

Assessment tools designed for kinship care

The Kinship Strength Assessment (KSA) ™ is a tool used to assess and plan for the permanency needs of the child. We designed the tool to evaluate the kinship triad from a strength-based approach. Using this tool is vital in helping the family identify their strengths.

Integrated approaches to kinship care placements

Our Kinship Navigation program is a placement process where the family can accumulate knowledge, confidence and thus, self-determination for the planning of out-of-home care for a child/youth. It is family-driven and a multi-dynamic process that empowers the entire triad so that every voice is heard and all options are explored. The program coordinates well with POC case management.

Building Relationships to Better Serve Families

Committed to local growth

We believe that kinship care is a community-based response. As such, we have built relationships with the Pittsburgh Foundation community to strengthen this response.

- Eden Hall Foundation - capital and programming
- Heinz Endowment - programming
- Hillman Foundation - capital and programming
- PNC Foundation - programming
- A Second Chance Charitable Foundation - programming

Dedicated to a national response

We believe we must change the narrative of how children in the child welfare system are treated, as we know through research and data that those in kinship care experience better outcomes. Our relationship to these foundations support this belief.

- The Annie E. Casey Foundation: R&D, capacity, national curriculum
- Casey Family Programs: national engagement with states
- Kresge Foundation: succession planning in organizations of color
- Kellogg Foundation: capacity building
- The Ralph M. Parsons Foundation: system change in Los Angeles County

A case study perspective...

From Pa. to L.A., a Gold Standard Process for kinship care

ASCI has been providing technical assistance, training and coaching through a contract with Los Angeles County. The original scope of work was to assist the county in reducing a backlog of relative caregivers requiring foster care certification. ASCI continues to work with L.A. in adapting their Gold Standard Process (GSP) of family engagement Developed by ASCI, the GSP is a start-to-finish practice for kinship home approval that maximizes caseworker engagement through timelines, due diligence and accountability measures.

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Outcome Snapshot

Outcome	National Average	A Second Chance, Inc. Average
Length of stay for youth discharged to **reunification**	7.6 Months	**6.2 Months**
Length of stay for children discharged to **adoption**	29.4 Months	**21.3 Months**
Children subjected to **substantiated abuse** in care	.34%	**0%** Statistically less than 1%
Period of time to ***SPLC***	24 Months (Legal)	**17.9 Months**
Youth in care who **graduate** high school	50%	***95%***
Youth who **change schools** when first entering care	56%	**5%**
Kinship Homes **licensed**	90 - 180 Days on Average	**92% in 45 - 60 Days on Average**
Female **pregnancy rates** for foster youth	33%	**1%** Following entry to ASCI

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#5

Memorandum

To: Members of the Committee on Families, Children, and Seniors

From: Office of State Rep. Frank Liberati

Date: February 19, 2020

Re: Kinship Caregiver Legislation – House Bills 5443 and 5444

Issue:

As a result of the opioid crisis, thousands of relative caregivers have shouldered the responsibility of caring for children whose parents are unable to care for them. However, even though Michigan has made it a priority to place children in out-of-home care with relatives, our child welfare system was never designed to support informal kinship families and remains ill-equipped to help them meet the needs of the children in their care.

Whether they took in children through informal arrangements or through the formal state foster care system, all kinship caregivers struggle with emotional, physical, and financial strain of raising children in their care. Additionally, children in out-of-home, kinship care as a result of substance abuse face a range of unique social, physical and mental health challenges, especially as it relates to overcoming their Adverse Childhood Experiences (ACEs).

Legislation:

Our goal is to frame child welfare policy in a way that better supports children and caregivers in kinship families, inside or outside the formal foster care system, while offering services to birth parents in order to keep children safely with their parents whenever possible.

House Bill 5443 would create the Kinship Caregiver Advisory Council within the Department of Health and Human Services to bridge the gap in service delivery between the Children's Services Agency and the Adult and Aging Services Agency by bringing together caregivers, providers, and state bureaucracy to devise and advocate for systemic change to create a better coordinated, family-centered child welfare system that is responsive to the needs of kinship families.

The Council's first objective is to identify the prevalence and needs of kinship caregivers and the children they care for because we currently have a limited understanding of the geographic dispersion, status and characteristics of Michigan's kinship families. Then, in conjunction with presenting its findings to the Legislature, the Council will also provide policy recommendations and advocate for improvements to services, systems, and programs so they are responsive to kinship families.

House Bill 5444 would require the Department of Health and Human Services to establish a Kinship Navigator Program. When kinship caregivers take on this responsibility, they often

receive little to no financial support or advice regarding how to navigate the many systems that they might need to access to help them meet the needs of the children in their care. Navigators fill the gap by assisting kinship caregivers in learning about, finding, and using programs and services that meet the needs of the children they are raising and their own needs, while also promoting effective partnerships among public and private agencies to ensure kinship families are served.

Kinship navigators help ameliorate the needs of the kinship families and maximize the caregivers' ability to build a safe and caring environment by identifying safety goals and introducing trauma-informed practices as well as guide caregivers through permanency plans that are in the best interest of the child.

What is Kinship Caregiving?

Kinship caregiving is when extended relatives, like grandparents or aunts and uncles, or close family friends step-up to become the primary caregiver for a child when their own parents are unable or unwilling to raise them. This can occur through the formal child welfare system when a child is placed with a licensed relative foster care parent by a child placing agency; or informally when family members make voluntary arrangements to care for a child without the involvement of a social services agency.

A 2017 study of two national surveys conducted by the National Center for Health Statistics, revealed that 49% of children in non-parental care were in private/informal kinship, occurring outside of the context of formal foster care. On the other hand, 19% were in private/informal kinship care with some involvement with Child Protective Services (CPS), while 21.1% were in private/informal kinship care with an active CPS case and 11.1% were in formally placed by the child welfare system. [1]

There is limited understanding of the characteristics of children raised in informal kinship situations, however, Generations United estimates that across the country there are 2.6 million children are raised by a relative, with 139,000 children raised in the formal foster care system.[2] In Michigan, the **Annie E. Casey Foundation estimates that there were 61,000 children in informal kinship care, while at the same time there were just over 4,000 children being cared for by relatives in the foster care system.**[3]

While many children in out-of-home care establish legal permanency with their kinship caregiver, kinship caregiving as a whole should not be viewed as an end-point for a child. Kinship caregiving should be viewed as an opportunity for a family to remove a child from a traumatic living situation while keeping them out of a potentially traumatizing foster care system and allowing the family to figure out what is best for the children and how to help their parents.

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[1] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5798622/pdf/nihms921155.pdf pg 5

[2] https://www.gu.org/app/uploads/2018/09/Grandfamilies-Report-SOGF-Updated.pdf

[3] https://datacenter.kidscount.org/data/tables/10455-children-in-kinship-care?loc=24&loct=2#detailed/2/24/false/1757/any/20160,20161

Kinship Caregiving, the Opioid Crisis and ACEs

The role of kinship caregiving has been growing over the last decade as it has become widely regarded as the best form of out-of-home, non-parental care because it uses a child's existing connections with family for placement instead of strangers they might have trouble integrating with.

Casey Family Programs has found that youth in out-of-home care who spend more than half of their time with family are three times more likely to find permanency, while youth who spend all of their time with family are 11 times more likely to find permanency when compared to youth with no contact with family. [4] They also found that 87% of children in out-of-home care who spent all of their time with family developed a strong relationship with a caring adult, while the same is true for 57% of youth who did not spend any time with family. In addition, 83% children in out-of-home care who spent all of their time with family were able to find legal permanency compared to only 38% of children who had no contact with family.[5]

Kinship caregivers play a critical role in helping traumatized children heal by maintaining close ties to family, community and culture.[6] While traditional foster care can introduce its own pain on children when they are removed from their home, which can re-traumatize children who are already dealing with ACEs.

Through providing a positive child-caregiver relationship, a stable living environment, and maintaining relationships with extended family, kinship caregivers can promote family-based resiliency factors among traumatized children.[7] Abundant research has illustrated that a positive, supporting relationship with a loving adult can buffer the effects of a child's stress response and help them learn how to cope with stress brought out by their ACEs.[8]

This is especially critical for children in out-of-home care who are more likely to have ACEs. For example, Generations United found that **51% of children in foster care have experienced at least four ACEs and at least 38% of children in foster care have experienced four or more ACEs before their third birthday**, while only 13% of children in the general population have had at least four ACEs.[9]

Adverse Childhood Experiences describes all of the types of abuse, neglect, and other traumatic experiences that occur to individuals under the age of 18. The groundbreaking ACEs Study, conducted in 1997 by Kaiser Permanente and the CDC, analyzed the impact of ACEs on an individual's overall health and well-being in adulthood.

The study specifically examined the prevalence of 10 adverse experiences ranging from physical and sexual abuse; emotional and physical neglect, and family dysfunction which included

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[4] https://caseyfamilypro-wpengine.netdna-ssl.com/media/1896-CS-From-Data-to-Practice-2018.pdf
[5] https://caseyfamilypro-wpengine.netdna-ssl.com/media/1896-CS-From-Data-to-Practice-2018.pdf
[6] In Loving Arms: https://www.gu.org/app/uploads/2018/05/Grandfamilies-Report-SOGF-2017.pdf
[7] In Loving Arms: https://www.gu.org/app/uploads/2018/05/Grandfamilies-Report-SOGF-2017.pdf
[8] In Loving Arms: https://www.gu.org/app/uploads/2018/05/Grandfamilies-Report-SOGF-2017.pdf
[9] In Loving Arms: https://www.gu.org/app/uploads/2018/05/Grandfamilies-Report-SOGF-2017.pdf

substance abuse, mental illness, domestic violence and parental incarceration. They found that 63% of adults in the US experienced at least one ACE and 12% had four or more ACEs. **In Michigan, it is estimated that roughly 22% of children or (479,000) have experienced at least two ACEs in 2017.**[10] Kaiser Permanente concluded that childhood trauma has a tremendous impact on an individual's development and that individuals with higher ACE scores are more likely to have negative physical and mental health outcomes and engage in risky behaviors.

Further research by the American Academy of Pediatrics found that adolescents with ACEs are more likely to use tobacco, abuse drugs, and initiate drinking alcohol to cope with stress. In addition, they found that childhood adversity driven by toxic stress disrupts developing brain structures and adversely affects the development of other organ systems and regulatory functions. [11] **These physiologic disruptions result in higher levels of stress-related chronic diseases and can lead to permanent changes in behavior as well as linguistic, cognitive and social-emotional learning.**[12]

The Illinois ACEs Response Collaborative supported these findings and found that ACEs are the root cause of many health impairments. They found that 25% of the risk of being diagnosed with heart disease is attributable to ACEs, individuals with four or more ACEs are twice as likely to be diagnosed with cancer and over four times more likely to suffer from depression compared to those without any ACEs.[13]

The financial impact of ACEs are directly felt by the individuals impacted by their childhood trauma as well as society at large. The American Journal of Preventative Medicine found that out-of-pocket healthcare spending is $184 more for individuals with one to two ACEs. While adults with three or more ACEs spend on average $311 more per year in healthcare costs and are more likely to have medical expenses that exceed 10% of their household income.[14] Single adults with three or more ACEs and without any children spend on average $505 more out-of-pocket healthcare costs than those without any ACEs.

Furthermore, although this has not been studied in Michigan, an analysis of the economic impact of AECs on the state of Tennessee found that **ACEs contributed to $5.2 billion in direct medical costs and lost employee productivity in 2017.**[15] Specifically, they found that 49% of individuals suffering from depression were caused by ACEs, while 32% of smoking, 21% of

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[10] https://datacenter.kidscount.org/data/tables/9709-children-who-have-experienced-two-or-more-adverse-experiences?loc=24&loct=2#detailed/2/24/false/1603/any/18961,18962

[11] https://pediatrics.aappublications.org/content/pediatrics/129/1/e232.full.pdf

[12] https://pediatrics.aappublications.org/content/pediatrics/129/1/e232.full.pdf

[13] http://www.hmprg.org/wp-content/themes/HMPRG/backup/ACEs/Health%20Policy%20Brief.pdf

[14] https://www.ajpmonline.org/article/S0749-3797(18)32445-0/fulltext

[15] https://www.sycamoreinstitutetn.org/wp-content/uploads/2019/02/2019.02.01-FINAL-The-Economic-Cost-of-ACEs-in-Tennessee.pdf

COPD patients and 13% of cardiovascular disease patients were attributable to ACEs in Tennessee.[16]

As a result, they estimated that smoking attributed to ACEs cost Tennessee $2.1 billion, while depression, cardiovascular disease, obesity and diabetes costed the state $923 million, $730 million, $532 million, and $371 million, respectively.[17]

This research has also found a clear connection between ACEs and household substance abuse, which has only increased with the opioid crisis that has continued to ravage communities across the country. The Tennessee study found that **substance abuse by a household member during childhood was the third most common ACE**, with 47% of Tennessean adults, with at least one ACE, identifying it as a cause of their childhood trauma.[18] The original ACE Study, conducted 20 years before the Tennessee study, found that 28% of Americans with at least one ACE reported experiencing substance abuse in their household as a child.[19]

In addition, relative caregivers have been on the front-line shouldering the responsibility of caring for the children that have been traumatized by the opioid epidemic. For example, **the percentage of children entering foster care because of substance abuse increased from 26% in 2006 to 35% in 2016.**[20] Generations United conducted a survey of kinship providers across the country and found that 70% of providers reported that opioids and heroin use was among the most common reasons children entered kinship care.[21]

Supporting Arguments:

To ensure that children are kept safely with their families and avoid the traumatic experience of entering foster care we must begin working toward reforming our entire child welfare system to be responsive and supportive of kinship caregivers. The Advisory Council is the first step in devising the most effective child welfare system by incorporating the lived experience of kinship caregivers as well as insight from child welfare services providers, mental health and legal experts into state policymaking.

Kinship caregiving is the most cost effective way to care for children who need to be removed from their homes. Evaluations of kinship navigator programs in Florida found that non-relative foster care was 6 times more expensive and group home care was 21 times more expensive than navigator supported kinship caregiving programs.[22]

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[16] https://www.sycamoreinstitutetn.org/wp-content/uploads/2019/02/2019.02.01-FINAL-The-Economic-Cost-of-ACEs-in-Tennessee.pdf

[17] https://www.sycamoreinstitutetn.org/wp-content/uploads/2019/02/2019.02.01-FINAL-The-Economic-Cost-of-ACEs-in-Tennessee.pdf

[18] https://www.sycamoreinstitutetn.org/wp-content/uploads/2019/02/2019.02.01-FINAL-The-Economic-Cost-of-ACEs-in-Tennessee.pdf

[19] https://www.michigan.gov/documents/mdhhs/Adverse_Childhood_Experiences_Infographic-CDC_508995_7.pdf

[20] https://www.gu.org/app/uploads/2018/09/Grandfamilies-Report-SOGF-Updated.pdf

[21] https://www.gu.org/app/uploads/2018/09/Grandfamilies-Report-SOGF-Updated.pdf

[22] https://caseyfamilypro-wpengine.netdna-ssl.com/media/SF_Kinship-navigator-programs.pdf

By supporting kinship caregivers we are empowering them to serve as the caring, consistent adult for a traumatized child, and allows them to establish a safe and stable environment, which is critical in building resiliency among children with ACEs. Early intervention with family-based protective factors is vital to stemming the long-term costs associated with childhood trauma, including poor physical and mental health, generational poverty, incarceration and drug dependency.

Our child welfare system is already overburdened and could not handle caring for the estimated 61,000 children currently being cared for in the informal kinship setting. In Michigan, kinship caregivers are saving the state over $380 million per year in child maintenance payments by caring for the children outside of the foster care system. Navigator programs have proven effective at keep children out of or reentering the child welfare system.

With the passage of the Family's First Prevention Services Act of 2018, the federal government has committed to reimbursing states for 50% of the costs of implementing and maintaining evidenced based kinship navigator programs. By not creating a navigator program the state of Michigan is missing out on federal Title IV-E dollars.

Answers you can trust
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November 2019

Challenges and Solutions for Grandparents Raising Grandchildren and Relatives as Parents

A report by the Area Agency on Aging 1-B Grandparents Raising Grandchildren Advisory Council Study Committee

A call for:

- Aging Network Action
- Education
- Technical Assistance

Introduction

The Area Agency on Aging 1-B (AAA 1-B) was established in 1974 under a federal mandate of the Older Americans Act and the state Older Michiganians Act to serve the needs of approximately 760,000 older adults who reside in the southeast Michigan counties of Livingston, Macomb, Monroe, Oakland, St. Clair, and Washtenaw. The AAA 1-B is dedicated to: 1) educating and advocating on issues of concern to older persons; 2) allocating federal and state funding for social and nutritional services; 3) developing new older adult services; 4) coordinating activities with other public and private organizations; and 5) assessing the needs of vulnerable older persons and providing access to community-based and long term care services. The AAA 1-B Advisory Council helps achieve the agency mission by identifying needs and concerns of Region 1-B residents, and planning and developing appropriate actions that assure older persons have access to high quality, efficient and effective services. Each summer, the AAA 1-B establishes an ad hoc study committee to explore selected issues of concern to older adults.

A growing number of grandparents are faced with the responsibility of parenting their grandchildren at a time in their lives when they expected to be planning and enjoying their retirement. Beyond the obvious drain on their leisure time and retirement income, these grandparents must deal with social, emotional, and practical problems inherent in raising grandchildren at their stage of life. These challenges are often compounded by the fact that many of the children have emotional and/or behavioral challenges often related to the trauma experienced when they are unable to remain in their homes with their birthparents—whether because of child abuse or neglect, the death of a parent, parental incarceration, substance abuse, or other reasons. Coping and parenting skills that they developed through years of raising their own children may not be appropriate or effective for raising children in society today.

Grandparents raising grandchildren were a strong presence at the 2019 Listening Sessions conducted by the Area Agency on Aging 1-B (AAA 1-B) in preparation for development of the region's FY 2020 – 2022 Area Plan. They shared the struggles they face managing their child rearing responsibilities while coping with new financial constraints, legal obstacles and social barriers. Consistent themes of their comments were that they felt alone in their struggle, were often unaware of the resources available to them, and that the legal and social services systems often did not offer decipherable or desirable support options.

To address these issues the AAA 1-B formed an Ad Hoc Study Committee on Grandparents Raising Grandchildren to:

- Identify pain points for grandparents raising grandchildren.
- Identify barriers to successful child rearing.
- Assess the adequacy of community resources in the aging and child welfare systems.
- Identify and recommend policy and programmatic solutions to improve support options for grandparents raising grandchildren.
- Produce a written report that includes findings and recommended actions for approval by the AAA 1-B Board of Directors.

This report represents the results of the Committee's research and recommended actions that can be taken by the AAA 1-B, service organizations and policy makers to address identified concerns. While the phrase 'grandparents raising grandchildren' is used in the report and implies the findings are only applicable adults who are age 55 and older caring for their grandchildren, as used in this report this group includes other older relatives who are acting as parents of children who are relatives.

Two grandparents in Monroe County could not enroll their 2nd grade grandson in school. The child's mother could not be located until 5 (five) weeks into the school year! The child missed over half a marking period of his 2nd grade. The grandparents repeatedly tried to enroll the grandson but could not enroll because they did not have custody or guardianship.

- The experience of a grandparent raising grandchildren

Acknowledgements

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Volunteer

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AAA 1-B Staff

Findings of Unmet Needs and Solutions

Grandparents Raising Grandchildren in Region 1-B

The American Community Survey, conducted by the US Census Bureau, provides limited information on the prevalence and demographics of grandparents raising grandchildren population in Region 1-B. The 2017 5-year American Community Survey estimates that there are 14,850 grandparents responsible for grandchildren in Region 1-B. 54.2% of grandparents raising grandchildren are under the age of 60, and 31% of grandparents raising grandchildren live in households where the parent of the grandchild is not present. Grandparents raising grandchildren make up 1.05% of the total 60+ population in Region 1-B, up from .85% in 2010. Monroe and Livingston counties have the highest proportions of older adults raising grandchildren. 70% of all grandparents raising grandchildren in Region 1-B live in Oakland and Macomb counties.

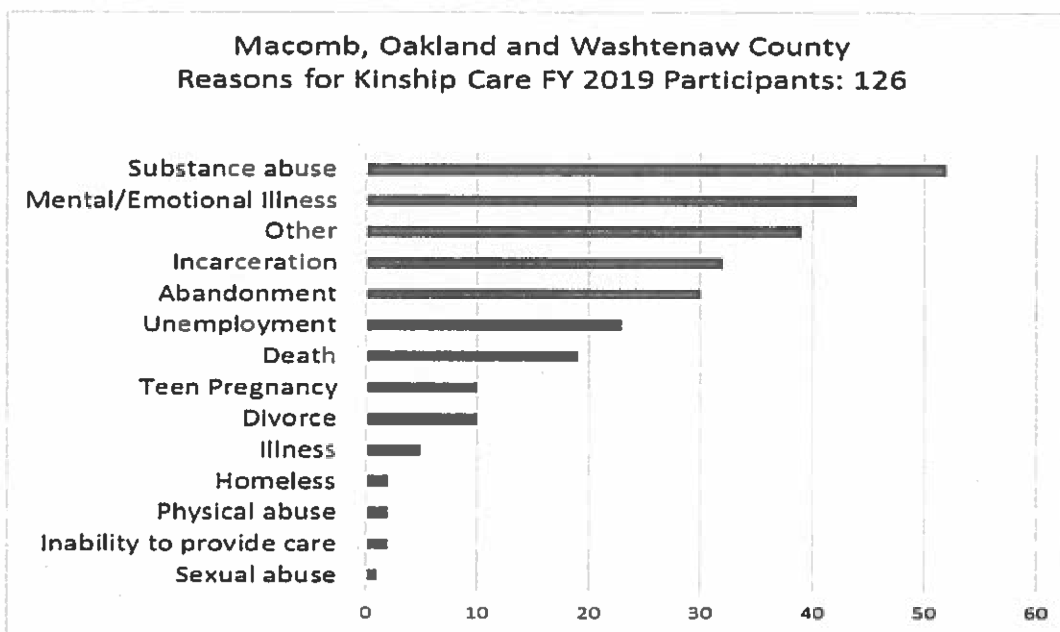
Grandparents Raising Grandchildren by Age of Grandparent

County	Total GRG Population	GRG Age 30-59	GRG Age 60 +	Total 60+ Population	% 60+ Population that are GRG
Livingston	910	421	489	41,663	1.17%
Macomb	4,587	2,737	1,850	192,997	0.96%
Monroe	1,111	632	479	35,206	1.36%
Oakland	5,727	2,744	2,983	273,867	1.09%
St. Clair	1,147	735	412	38,914	1.06%
Washtenaw	1,368	779	589	65,781	0.90%
Region 1-B Total	14,850	8,048	6,802	648,428	1.05%

Younger grandparents raising grandchildren (aged 35-59) are more likely to be in the labor force (75%) than grandparents aged 60+ (35%). A higher proportion of younger grandparents (13%) live in poverty compared with older grandparents (10%). Older grandparents have higher rates of disability, with 35% of older grandparents reporting that they are disabled, while 17% of younger grandparents are disabled. Additional demographic data about grandparents raising grandchildren by county can be found in Appendix B.

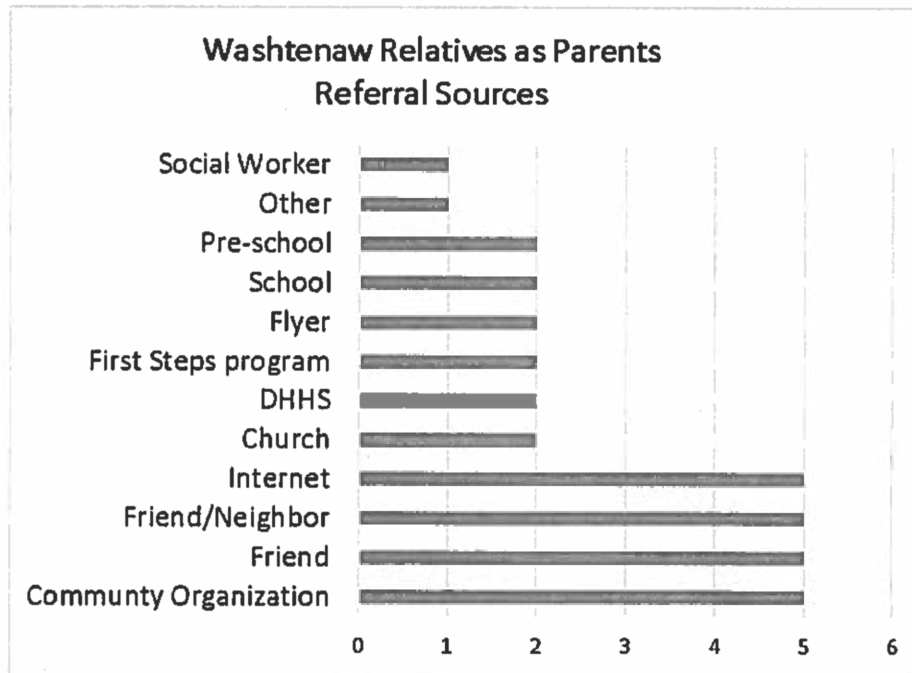
Reasons for Caregiving and Referral Sources

Data in the charts below was provided by the Catholic Social Services of Washtenaw County Relatives as Parents and OLHSA (Oakland Livingston Human Service Agency) programs on the types of problems that caused the need for kinship care, and the referral sources to the program.

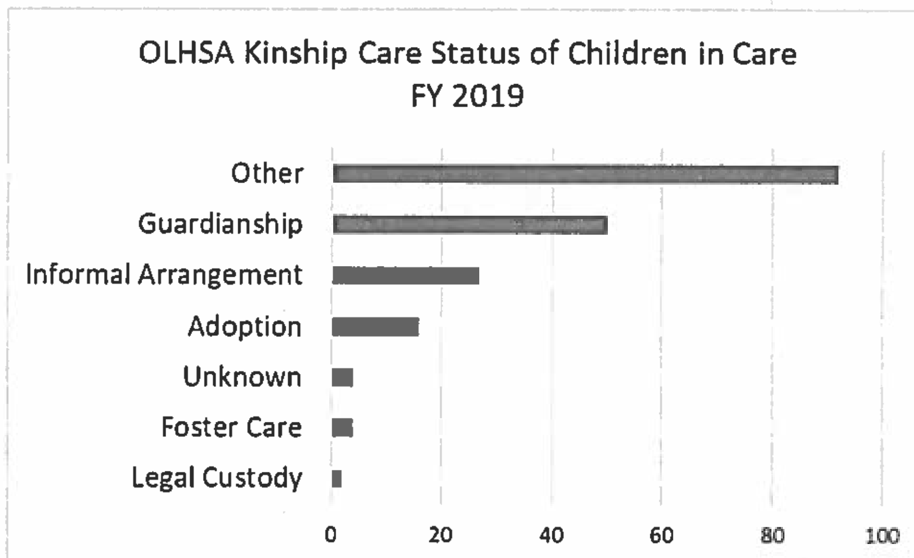


Children's Protective Services in most cases adds additional unwanted and unnecessary stumbling blocks for grandparents. CPS has their own agenda and causes more problems than necessary when dealing with kinship care cases.

- The experience of a grandparent raising grandchildren



OLHSA also reported the status of the care relationship of grandparents raising grandchildren and the children they are raising, which is reflected in the chart below.



Unmet Needs and Solutions

The impetus for this study was the feedback provided by an unprecedented number of grandparents raising grandchildren at the 2019 Community Listening Sessions held by the AAA 1-B in preparation for the development of its FY 2020 – 22 Area Plan. Testimony by attendees described the struggles they face in fulfilling the obligations they have made to care for their grandchildren and requested help to better assist them in meeting the challenges they face. The Study Committee engaged several stakeholders who work with the grandparents raising grandchildren/relatives as parents population in a process of identifying service and policy gaps, solutions and recommended actions to address identified concerns. The following matrix summarizes the Committee findings.

Service/Policy Gaps	Solutions/Recommendations	Actions
There are many grandparents and other relatives under age 55 who wish to participate in GRG (grandparents raising grandchildren) programs, but low-income individuals are excluded and often unable to participate in activities with a cost.	Identify alternative resources or policy solutions that support the inclusion of age-ineligible individuals.	Collect data on prevalence of age-ineligible GRGs from AAA 1-B contractors. Advocate with Wilson Fund about supporting younger GRG inclusion demonstration.
The 'Grandparents Raising Grandchildren' label excludes other kinship caregivers.	Identify more inclusive program name by surveying GRG program participants on their preference.	Survey results found that program participants prefer the GRG program name.
The guardianship renewal process is inconsistent, varies by county, and is confusing causing anxiety.	Discuss with court officials concerns about court processes, rules, and expectations. Identify best practices.	Identify best practices and advocate with probate courts to adopt practices that address GRG concerns.
GRGs often struggle with parenting children in today's social environment, which is different from their first parenting experience.	Parenting training is needed that is customized to the unique circumstances of GRGs.	Identify entity to develop and provide customized parenting curriculum classes for GRGs. Identify resources to support.
GRGs often unable to meet school technology requirements for communications such as email.	Advocate for more responsive education policies that provide accommodations and training on digital communications.	Raise awareness with school systems about this unmet need and advocate for appropriate accommodations.

GRG program advocates state that there is no easily accessible data on GRGs to support grant proposals and program planning.	Query and publish GRG data available from Census. Conduct GRG need assessment survey. Encourage Probate Courts to add data collection point of relationship of child to guardian.	Produce Census GRG data report to county level. Identify leadership and a funding source to support a GRG need assessment survey.
Traveling with many grandchildren on public transportation can be costly and create expense burden.	Transit providers can adopt discount fare policies for low-income individuals and for children.	Create a model GRG-friendly transit fare discount program and advocate for its adoption.
GRGs need respite from caregiving, and emergency respite.	Identify providers and resources to support GRG regular and emergency respite.	Investigate provider resources. Investigate potential funding sources.
Becoming a GRG often creates unsustainable financial burdens and eligibility restrictions of foster care can make that support unavailable.	There is a new little-known state Family Independence Program that provides a $78 monthly benefit available for certain low-income GRGs.	Increase public awareness of the Family Independence Program Child Only Grant benefit to support eligible GRGs.
The Aging and Adult Services Agency (AASA) service standard for Kinship Support Services states age eligibility is 60 and older, causing confusion because the Older Americans Act states age eligibility is 55 and older.	The published AASA Kinship Support Services standard needs to be updated to be consistent with the Older Americans Act.	Advocate that the AASA Kinship Support Services standard be updated and corrected on the AASA web site.
Some state court and children's services program policies are the source of restricted options and impede problem solving for GRGs.	Many state policy issues that frustrate and restrict GRG options are being addressed in a bi-partisan package of legislation being developed by members of the House of Representatives.	Collaborate with legislators in the development of proposed legislation and advocate for its passage.

Many GRGs report child rearing is an overwhelming experience and identify a need for respite to help prevent burnout and in emergencies when the GRG cannot be present and has no other caregivers as their backup.	Older Americans Act funding under the National Family Caregiver Support Program can be used to provide GRG respite.	Investigate the possibility of supporting a GRG respite model in Region 1-B with AAA 1-B or alternate funds.
The Michigan State University Kinship Care Resource Center (KCRC) is a valuable statewide resource center for training, information, program development and advocacy. It is developing a Kinship Navigator program that will require a state fund match to draw down federal dollars beginning in FY2020-2021.	Promote the value proposition of the KCRC and its Kinship Navigator program.	Advocate for state matching fund support required to sustain the federal grant utilized to support the KCRC Kinship Navigator program. Advocate to secure support for Kinship Navigator program legislation and funding as part of the Older Michiganians Day platform.
GRG support programs and resources are not available in all counties of Region 1-B.	The KCRC training and Kinship Navigator services can be made available to GRGs in areas of Region 1-B where no AAA 1-B services exist, and enhance the service delivered by existing programs.	Collaborate with the KCRC to address unmet training and resource navigation assistance needs in Region 1-B.

Conclusions

The Committee review found that unmet needs which are unique to the grandparents raising grandchildren population have not changed much since the AAA 1-B published its 1998 study Grandparents as Parents: A Survey of Incidence and Need. These five areas of need continue to be:

Social and Emotional Supports

Support groups, counseling and socialization events continue to be essential to the emotional health of grandparents and services should be made more available or enhanced to meet this need.

Financial Resources

Many grandparents, particularly those with a low fixed income, face overwhelming financial burdens as they take on the responsibility of raising their grandchildren. Financial assistance for expenses such as clothing, food, school, and health insurance are priorities.

Education and Informational Resources

This includes enhancing public awareness, as well as specific education and information sessions targeted to grandparents raising grandchildren, service providers and policy makers.

Coping/Parenting Skills Training

There appears to be a gap for training which includes coping skills for grandparents on dealing with drug abuse issues of grandchildren and/or their parents, difficult behaviors of the grandchildren, and how to appropriately raise children in today's social environment, which has different norms and expectations than when they raised their children.

Respite

Grandparents Raising Grandchildren report that high levels of stress and burnout are associated with child rearing. Respite for the grandparents is needed as an essential component of healthy and successful child rearing.

A new sixth area of need appears to be *systems change*. Many of the frustrations expressed by grandparents raising grandchildren at community forums were directed toward public benefit program and probate court policies and procedures that do not offer assured rights and benefits without risks to continued child custody. Many individuals are forced to choose between adoption, foster care or

guardianship for the children in their care. Each option has significant risks and disadvantages that vary depending on the household situation. Systems change is needed that creates a more grandparent raising grandchildren-friendly environment.

Recommendations

1. Resource Guide for Grandparents Raising Grandchildren

Collaborate with the Michigan State University Kinship Care Resource Center to produce and disseminate a set of print and digital county-specific resource guides for grandparents raising grandchildren that provides information on 1) understanding available benefits and resources, 2) information on legal issues and options, and 3) how to connect with available resources in each county.

Rationale

In 2001 the AAA 1-B printed and disseminated copies of a Grandparents' Guide to Raising Grandchildren for each Region 1-B county. Committee members, AAA 1-B providers of Kinship Care services and guest presenters agreed that an updated version of the guide would be a valuable resource for older adults. The Kinship Care Resource Center is in the process of developing a comparable resource guide that will contain information on benefits and legal issues, but with no local resources. The Center has indicated they can work with the AAA 1-B to help develop guides that combine their educational content with local community resource information.

2. Family Independence Program Child Only Grant FAQ

Create a brief informational flyer on the Michigan Department of Health and Human Services Child Only Grant and other financial resources that offer a payment benefit to eligible grandparents raising grandchildren.

Rationale

There is limited information and considerable confusion and about the new Family Independence Program that potentially offers a monthly cash benefit starting at $158 (higher depending on eligibility status and number of children) to grandparents raising grandchildren and other relatives acting as parents. Clarification on the extent of the benefit, eligibility criteria and application information, and potential consequences of program participation is needed to assist potential participants to decide whether to apply for the benefit. A brief document is needed that includes a description of the program and a Frequently Asked Question section and is targeted to low-income grandparents raising grandchildren.

3. Grandparent Raising Grandchildren Friendly Probate Courts

Identify and distribute recommendations for probate court actions that can make them more user friendly for grandparents raising grandchildren.

Rationale

Grandparents raising grandchildren and their advocates identify many examples of interactions with probate courts that cause confusion, frustration and fear. Areas of concern include communications,

fees, age discrimination, reporting requirements and expectations. The Committee believes a constructive compilation of concerns and suggestions could prompt changes that will make probate court interactions more sensitive to the unique needs of grandparents raising grandchildren and more user friendly. The heading for such a compilation should state something comparable to Ten Things Grandparents Raising Grandchildren Think Probate Courts Should Know.

4. Update State Kinship Care Services Definition

Advocate that the Michigan Aging and Adult Services Agency change the age of eligibility on their published service definition to be consistent with the Older Americans Act eligibility age of 55 and older.

Rationale

The age of eligibility for Older Americans Act National Family Caregiver Support Program services to grandparents raising grandchildren was lowered from 60 and older to age 55 and older in the 2016 reauthorization. However, the Michigan Aging and Adult Services Agency Kinship Services service definition published on the state web site still states eligibility is for those who are age 60 and older. This inconsistency has caused confusion and should be corrected.

5. Parenting Training Targeted to Grandparents Raising Grandchildren

Collaborate with the Kinship Care Resource Center to sponsor training and educational programs in Region 1-B including the provision of parenting training that is targeted to grandparents raising grandchildren

Rationale

Grandparents raising grandchildren have needs and challenges that are unique from other older adults. Educational information and training to address their needs is uncommon. One identified gap is for parenting skills training that accounts for the differences in parenting norms when grandparents raised their children and raising children in the current social environment. The Kinship Care Resource Center has developed trainings for caregivers on legal and other applicable issues, and should be engaged to provide parenting training in Region 1-B.

6. Grandparent Raising Grandchildren Respite

Secure support for a demonstration program that provides respite from child raising responsibilities for grandparents raising grandchildren.

Rationale

Grandparents Raising Grandchildren report that high levels of stress and burnout are associated with child rearing. Respite for the grandparents is needed as an essential component of healthy and

successful child rearing. This is an allowable use of National Family Caregiver Support Program funds however no such program exists in Region 1-B. The AAA 1-B should investigate the need for respite and potential community resources, and program models to assess the feasibility of demonstrating the viability of grandparent raising grandchildren respite.

7. Emergency Respite

Investigate the feasibility of establishing an emergency respite/child care resource for grandparents raising grandchildren.

Rationale

The Committee learned of a few examples of emergencies where grandparents were unable to provide for the care of their grandchildren for short periods and were unable to arrange for alternative child care. These emergencies usually involved health care crisis including hospitalizations. The AAA 1-B should determine the frequency of such emergencies and whether the problem is significant enough to develop a strategy to address the need.

8. Advocate for Legislative Changes to Support Kinship Caregivers

Identify and advocate for legislation that aims to create systemic change that is supportive of the needs of grandparents raising grandchildren.

Rationale

The proposals listed below would increase the amount of available support for grandparents raising grandchildren.

Kinship Caregiver Navigator Legislation

This act would establish the framework for state maintenance of the Kinship Care Navigation Center after federal grant funding is reduced in FY 2021. The navigator program would provide information and referral services to grandparents raising grandchildren throughout the state.

Kinship Caregiver Legal Aid Legislation

This bill would establish a kinship caregiver legal aid program in Michigan. The program would enable grandparents raising grandchildren of any age to receive legal advice from licensed attorneys for issues including navigating the civil court system, assistance with applying for services, and understanding the continuum of custodial relationships. This proposal would close a gap in current legal aid programs that makes it difficult for kinship caregivers under age 60 to receive free legal assistance.

Kinship Caregiver Advisory Council Legislation

This act would instruct the Michigan Department of Health and Human Services to create a kinship caregiver advisory council. The council would be charged with studying the prevalence and needs of

kinship caregiver, advocating for system changes that support kinship caregivers, and preventing child abuse and neglect by supporting kinship caregivers in the formal child welfare system. The council would include membership from the Children Services Agency, the Aging and Adult Services Agency, the state court administrator, kinship caregivers, child welfare service agencies, and mental health professionals. This council would provide an opportunity for ongoing monitoring of the needs of grandparents raising grandchildren and identify future opportunities for advocates to support systems change to benefit kinship caregivers.

De Facto Custody for Kinship Caregivers

De Facto Custody, often referred to as De Facto Guardianship or De Facto Parent Status, addresses the need for a legal mechanism used by many states to grant legal status to caregivers who have assumed the role of a parent without first establishing legal standing. De Facto laws allow these caregivers to petition the court for legal status over the minor child; these laws often require that the child's biological parents be absent for a set period before a caregiver can petition the court for de facto status. Michigan is one of six states that does not have any established policy for recognizing de facto parents.[1] Establishing a De Facto Custody mechanism in Michigan would enable grandparents raising grandchildren to secure their legal status over a minor if they have been consistently providing care, enabling them to access programs and services that may not otherwise be available to them. However, creating such an option may require an overhaul of Michigan law for Circuit and Probate Courts as well as the legal presumptions which the courts must apply in each case. Further discussion is needed to develop a legislative proposal that provides adequate options and protections.

Federal Older Americans Act Reauthorization- Remove the Title III E Funding Cap on Kinship Caregivers

Title III E of the Federal Older Americans Act established the National Family Caregiver Support Program (NFCSP). This program provides funding to support older caregivers and family members caring for older adults, but funding for grandparents raising grandchildren is currently capped at 10% of total program funds. To better address the caregiving needs of grandparents raising children, AAAs should be allowed to exceed the 10 percent cap on Title III E National Family Caregiver Support

[1] http://www.lgbtmap.org/img/maps/citations-parents-de-facto.pdf

Program funding available to serve this population based on local needs. HR 4334, The Dignity in Aging Act includes the removal of this funding cap.

I have said "get involved' more times than I could keep track. Raising grandchildren or other related children involved so much more than standing before the judge.

- Advice from a grandparent raising grandchildren

Appendix A

Demographics

Characteristics of Grandparents Raising Grandchildren, Grandparent aged 60+														
	Race & Ethnicity							Gender		Marital Status				
	White	Black	American Indian/ Alaskan Native	Asian	Other	Two or more Races	Hispanic or Latino	Male	Female	Married	Unmarried	In Labor Force	With any disability	In Poverty
Livingston	98.2	0	0	1.8	0	0	0	52.4	47.6	82.8	17.2	38.4	28.4	0.8
Macomb	69.9	23.9	2.1	2.7	1.4	0	2.3	37.5	62.5	60.5	39.5	26.5	30.5	22.1
Monroe	97.9	0	0	0	1	1	5.2	52.2	47.8	84.6	15.4	30.7	40.9	4.2
Oakland	54.4	36.9	1.2	2.6	1.2	3.7	1.1	45.6	54.4	68.2	31.8	38.4	35.6	8.3
St. Clair	91	3.4	1.2	0	1.5	2.9	1.5	40.8	59.2	76.2	23.8	44.9	31.3	9.5
Washtenaw	48.4	44	0	7.6	0	0	0	34.3	65.7	65.2	34.8	29.2	38.7	14.8
**All numbers are percentages Source: American Community Survey 2017 5-Year														

Characteristics of Grandparents Raising Grandchildren, Grandparent aged 30-59														
	Race & Ethnicity							Gender		Marital Status				
	White	Black	American Indian/ Alaskan Native	Asian	Other	Two or more Races	Hispanic or Latino	Male	Female	Married	Unmarried	In Labor Force	With any disability	In Poverty
Livingston	100	0	0	0	0	0	0	47.3	52.7	97.6	2.4	84.1	13.1	0
Macomb	75.8	17.9	1.6	1.4	1	2.3	0.9	39	61	75.7	24.3	71.4	18	17.5
Monroe	91.3	8.7	0	0	0	0	0.8	38.6	61.4	63.9	36.1	71.4	18.8	16
Oakland	62.8	32	0.6	0.9	0.3	3.5	4.5	30.1	69.9	68.3	31.7	73.1	22.2	17.5
St. Clair	99.9	0	0	0	0	0.1	0	41.5	58.5	75.6	24.4	74	15.2	21.9
Washtenaw	73.6	22.1	4.4	0	0	0	5.4	29.7	70.3	60.8	39.2	78.3	16.8	8
**All numbers are percentages Source: 2017 American Community Survey 5-year														

S T A T E B A R O F M I C H I G A N

To: Members of the Public Policy Committee
Board of Commissioners

From: Government Relations Team

Date: July 15, 2020

Re: HB 5488 – Costs Sunset

Background
House Bill 5488 stems from the Michigan Supreme Court's decision in *People v. Cunningham* (SC docket No. 147427) and the subsequent Public Act 352 of 2014 and Public Acts 64 and 65 of 2017.

In 2014, the Michigan Supreme Court unanimously held that trial courts can impose court costs on defendants only when specifically authorized by the statute the defendant was found guilty (*People v. Cunningham*). Across Michigan, local governmental units rely upon the collection of court costs to provide a significant portion of their funding for trial courts. With the *Cunningham* decision threatening to blow a large hole in county and municipal budgets, HB 5785 of 2014, which allowed permissible costs to continue to be collected, was signed into law. (HB 5785 was supported unanimously by the Board of Commissioners.)

Because of concerns raised by numerous groups, including SBM, the legislature imposed a three-year sunset on the 2014 law with the hope that stakeholders could work together to develop an alternative funding system for trial courts. Because there was no progress made through informal workgroups during that three-year period, the legislature extended the sunset an additional three years with Public Act 64 of 2017 and created a formal commission to review and recommend changes to the trial court funding system with Public Act 65 of 2017. (Both of these pieces of legislation were supported unanimously by the Board of Commissioners.)

Although the Trial Court Funding Commission created in 2017 completed its report with recommended changes before the legislatively mandated deadline last year, the legislature has not been able to enact the recommendations before the three-year sunset on court costs is set to expire. This is due both to the complexity of the recommendations and delays caused by the COVID-19 pandemic. (The Board of Commissioners unanimously supported the recommendations of the Trial Court Funding Commission.)

By extending the sunset provision, HB 5488 would allow trial courts to continue to impose costs on criminal defendants who either plead or are determined guilty that are reasonably related to actual costs incurred by courts for operation. According to the State Court Administrative Office, in FY 2018, courts imposed $53.3 million in costs and collected $44.8 million. If the sunset provision were not extended, trial courts would lose this revenue.

Keller Considerations
The bill concerns an area that historically has been considered presumptively *Keller*-permissible, in that it would directly affect 1) the funding of state courts and 2) the imposition of costs on court-users. Both areas have been considered to fall within the "improvement in the quality of legal services." Historically, the State Bar has taken a leadership role in advocating for adequate and fair funding for the court system and has emphasized that imposing too many costs on users of the court system can degrade the availability of legal services to society overall. Our position is consistent with the general principle that the basic funding of the justice system is a core societal responsibility whose costs should be borne principally by taxpayers rather than court users.

Keller Quick Guide

THE TWO PERMISSIBLE SUBJECT-AREAS UNDER *KELLER*:	Regulation of Legal Profession	Improvement in Quality of Legal Services
As interpreted by AO 2004-1	• Regulation and discipline of attorneys • Ethics • Lawyer competency • Integrity of the Legal Profession • Regulation of attorney trust accounts	✓ Improvement in functioning of the courts ✓ Availability of legal services to society

Staff Recommendation
This bill satisfies the requirements of *Keller* and can be considered on its merits.

MICHIGAN LEGISLATURE(www.legislature.mi.gov)
Printed on Monday, July 6, 2020
Michigan Compiled Laws Complete Through PA 101 of 2020

House Bill 5488 (2020) rss?

Friendly Link: http://legislature.mi.gov/doc.aspx?2020-HB-5488

Sponsors
Sarah Lightner (district 65)
Douglas Wozniak
(click name to see bills sponsored by that person)

Categories
Criminal procedure: sentencing; Criminal procedure: other;

Criminal procedure; sentencing; certain permissible costs; extend sunset. Amends sec. 1k, ch. IX of 1927 PA 175 (MCL 769.1k).

Bill Documents
Bill Document Formatting Information
[x]
The following bill formatting applies to the 2019-2020 session:
- New language in an amendatory bill will be shown in **BOLD AND UPPERCASE.**
- Language to be removed will be ~~stricken~~.
- Amendments made by the House will be blue with square brackets, such as: [House amended text].
- Amendments made by the Senate will be red with double greater/lesser than symbols, such as: <<Senate amended text>>.

(gray icons indicate that the action did not occur or that the document is not available)

Documents

House Introduced Bill
Introduced bills appear as they were introduced and reflect no subsequent amendments or changes.

As Passed by the House
As Passed by the House is the bill, as introduced, that includes any adopted House amendments.

As Passed by the Senate
As Passed by the Senate is the bill, as received from the House, that includes any adopted Senate amendments.

House Enrolled Bill
Enrolled bill is the version passed in identical form by both houses of the Legislature.

Bill Analysis
House Fiscal Agency Analysis

Summary As Introduced (5/5/2020)
This document analyzes: HB5488

Summary of Proposed H-1 Substitute (5/12/2020)
This document analyzes: HB5488

Analysis as Reported From Committee (5/19/2020)
This document analyzes: HB5488

History
(House actions in lowercase, Senate actions in UPPERCASE)

Date ▲	Journal	Action
2/13/2020	HJ 16 Pg. 226	introduced by Representative Sarah Lightner
2/13/2020	HJ 16 Pg. 226	read a first time
2/13/2020	HJ 16 Pg. 226	referred to Committee on Judiciary
2/18/2020	HJ 17 Pg. 246	bill electronically reproduced 02/18/2020
5/13/2020	HJ 41 Pg. 795	reported with recommendation with substitute (H-1)
5/13/2020	HJ 41 Pg. 795	referred to second reading
5/19/2020	Expected in HJ 42	read a second time
5/19/2020	HJ 42 Pg. 806	substitute (H-1) adopted
5/19/2020	HJ 42 Pg. 806	placed on third reading
5/19/2020	Expected in HJ 42	placed on immediate passage
5/19/2020	Expected in HJ 42	read a third time
5/19/2020	HJ 42 Pg. 812	passed; given immediate effect Roll Call # 204 Yeas 101 Nays 4 Excused 0 Not Voting 4
5/19/2020	Expected in HJ 42	transmitted
5/20/2020	SJ 43 Pg. 748	REFERRED TO COMMITTEE ON JUDICIARY AND PUBLIC SAFETY

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SUBSTITUTE FOR
HOUSE BILL NO. 5488

A bill to amend 1927 PA 175, entitled
"The code of criminal procedure,"

by amending section 1k of chapter IX (MCL 769.1k), as amended by 2017 PA 64.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

CHAPTER IX

Sec. 1k. (1) If a defendant enters a plea of guilty or nolo contendere or if the court determines after a hearing or trial that the defendant is guilty, both of the following apply at the time of the sentencing or at the time entry of judgment of guilt is deferred by statute or sentencing is delayed by statute:

(a) The court shall impose the minimum state costs as set forth in section 1j of this chapter.

(b) The court may impose any or all of the following:

(*i*) Any fine authorized by the statute for a violation of which the defendant entered a plea of guilty or nolo contendere or the court determined that the defendant was guilty.

(*ii*) Any cost authorized by the statute for a violation of which the defendant entered a plea of guilty or nolo contendere or the court determined that the defendant was guilty.

(*iii*) Until October ~~17, 2020,~~ **1, 2022**, any cost reasonably related to the actual costs incurred by the trial court without separately calculating those costs involved in the particular case, including, but not limited to, the following:

(A) Salaries and benefits for relevant court personnel.

(B) Goods and services necessary for the operation of the court.

(C) Necessary expenses for the operation and maintenance of court buildings and facilities.

(*iv*) The expenses of providing legal assistance to the defendant.

(*v*) Any assessment authorized by law.

(*vi*) Reimbursement under section 1f of this chapter.

(2) In addition to any fine, cost, or assessment imposed under subsection (1), the court may order the defendant to pay any additional costs incurred in compelling the defendant's appearance.

(3) Subsections (1) and (2) apply even if the defendant is placed on probation, probation is revoked, or the defendant is discharged from probation.

(4) The court may require the defendant to pay any fine, cost, or assessment ordered to be paid under this section by wage assignment.

(5) The court may provide for the amounts imposed under this section to be collected at any time.

(6) Except as otherwise provided by law, the court may apply payments received on behalf of a defendant that exceed the total of any fine, cost, fee, or other assessment imposed in the case to any fine, cost, fee, or assessment that the same defendant owes in any other case.

(7) ~~Beginning January 1, 2015, the~~ **The** court shall make available to a defendant information about any fine, cost, or assessment imposed under subsection (1), including information about any cost imposed under subsection (1)(b)(*iii*). However, the information is not required to include the calculation of the costs involved in a particular case.

(8) If the court imposes any cost under subsection (1)(b)(*iii*), no later than March 31 of each year the clerk of the court shall transmit a report to the state court administrative office in a manner prescribed by the state court administrative office that contains all of the following information for the previous calendar year:

(a) The name of the court.

(b) The total number of cases in which costs under subsection (1)(b)(*iii*) were imposed by that court.

(c) The total amount of costs that were imposed by that court under subsection (1)(b)(*iii*).

(d) The total amount of costs imposed under subsection (1)(b)(*iii*) that were collected by that court.

(9) No later than July 1 of each year, the state court administrative office shall compile all data submitted under subsection (8) during the preceding calendar year and submit a written report to the governor, the secretary of the senate, and the clerk of the house of representatives. The report described in this subsection must be made available to the public by the secretary of the senate and the clerk of the house of representatives.

(10) A defendant ~~shall~~ **must** not be imprisoned, jailed, or incarcerated for the nonpayment of costs ordered under this section unless the court determines that the defendant has the resources to pay the ordered costs and has not made a good-faith effort to do so.

Legislative Analysis

HOUSE FI$CAL AGENCY

EXTEND SUNSET ON COURT IMPOSITION OF COSTS

Phone: (517) 373-8080
http://www.house.mi.gov/hfa

Analysis available at
http://www.legislature.mi.gov

House Bill 5488 (H-1) as reported from committee
Sponsor: Rep. Sarah L. Lightner
Committee: Judiciary
Complete to 5-19-20

BRIEF SUMMARY: House Bill 5488 would amend the Code of Criminal Procedure to extend by two years the ability of trial courts to impose certain costs on criminal defendants.

FISCAL IMPACT: House Bill 5488 would amend section 1k of Chapter IX of the Code of Criminal Procedure to extend the sunset provision on imposing costs related to actual costs incurred by trial courts for court operations. The sunset would be extended for two years, from October 2020 to October 2022. Extending the sunset would allow trial courts to continue to impose costs reasonably related to actual costs incurred by the courts for operation. According to the State Court Administrative Office, in FY 2018, courts imposed $53.3 million in costs and collected $44.8 million under section 1k. The bill would have no fiscal impact on the state but would have a fiscal impact on local courts. If the sunset provision were not extended, trial courts would lose this revenue.

THE APPARENT PROBLEM:

2014 PA 352 allowed trial courts to assess additional costs on defendants after conviction of a crime. Under the legislation, for a period of three years, courts could impose fines to help defray costs related to prosecution of a case, such as utilities (e.g., electricity and water) anf the salaries and benefits of court employees. The 2017 sunset was extended for another three years by 2017 PA 64 and will expire October 17, 2020. Legislation has been offered to again extend the ability of local courts to assess the additional costs.

THE CONTENT OF THE BILL:

Currently, if a defendant enters a plea of guilty or no contest, or if the court determines after a hearing or trial that the defendant is guilty, the court is required to impose the minimum state costs as set forth by statute and is authorized to impose any or all of the following:

- Any fine authorized by the statute for a violation of which the defendant entered a plea of guilty or no contest or the court determined that he or she was guilty.
- Any cost authorized by that statute.
- The expense of providing legal assistance to the defendant.
- Any assessment authorized by law.
- Reimbursement for expenses incurred in responding to certain violations.

- **Until October 17, 2020,** any cost reasonably related to actual costs incurred by the trial court, including salaries and benefits for relevant court personnel, goods and services necessary for the operation of the court, and necessary expenses for the operation and maintenance of court buildings and facilities.

House Bill 5488 would extend the sunset (expiration date) provision on imposing costs related to actual costs incurred by trial courts for court operations. The sunset would be extended for about two years, from October 17, 2020, to October 1, 2022.

MCL 769.1k

ARGUMENTS:

For:

The bill would enable a trial court to continue to impose on criminal defendants, for another two years, costs reasonably related to the actual costs incurred by the court in trying a case. Many agree that funding for local courts is in need of reform to develop a stable funding source. Indeed, 65 PA 2017 created the Trial Court Funding Commission to study the issue and make recommendations. The Commission's final report was released in September 2019.[1] However, the COVID-19 pandemic and resulting efforts to stem the spread of the virus have delayed the opportunity for stakeholders and policymakers to review and debate the Commission's findings and recommendations. Now there simply isn't time for the Commission's report to be vetted and solutions debated before the October 17, 2020, sunset date. Enactment of the bill would provide an additional two years to study the report, conduct public hearings on the issues, and make any necessary statutory changes. Without the extension of the sunset date, local funding units would lose a significant amount of revenue at a time when costs related to the pandemic response will likely result in a decrease of revenue from other sources.

Response:

Although no formal opposition to the sunset extension was raised, many believe the current system presents conflict-of-interest issues, as a judge should be focused solely on the guilt or innocence of a defendant rather than concerned with a revenue source to pay the courthouse's utilities or the salaries of court employees.

Rebuttal:

Originally, House Bill 5488 would have extended the sunset for another three years. The bill represents a compromise, and an acknowledgement that, although a serious reform is needed for how trial courts are funded, time is also needed for economic recovery at the state and local levels. A two-year extension would allow cash-strapped courts to continue to assess certain costs on defendants yet provide a workable time frame for policymakers to develop a better, and sustainable, funding system for local courts.

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[1]Trial Court Funding Commission Final Report:
https://www.michigan.gov/documents/treasury/TCFC_Final_Report_9-6-2019_665923_7.pdf

POSITIONS:

A representative of the Trial Court Funding Commission testified in support of the bill. (5-6-20)

The following entities indicated support for the bill:

- City of Hazel Park (5-12-20)
- Prosecuting Attorneys Association of Michigan (5-6-20)
- Michigan Association of Counties (5-6-20)
- Monroe County Finance Department (5-6-20)
- Michigan Municipal League (5-6-20)

Legislative Analyst: Susan Stutzky
Fiscal Analyst: Robin Risko

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

Legislative Analysis

HOUSE FI$CAL AGENCY

EXTEND SUNSET ON COURT IMPOSITION OF COSTS

Phone: (517) 373-8080
http://www.house.mi.gov/hfa

Analysis available at
http://www.legislature.mi.gov

House Bill 5488 (proposed substitute H-1)
Sponsor: Rep. Sarah L. Lightner
Committee: Judiciary
Complete to 5-12-20

SUMMARY:

House Bill 5488 would amend the Code of Criminal Procedure to extend by two years the ability of trial courts to impose certain costs on criminal defendants.

Currently, if a defendant enters a plea of guilty or no contest, or if the court determines after a hearing or trial that the defendant is guilty, the court is required to impose the minimum state costs as set forth by statute and is authorized to impose any or all of the following:

- Any fine authorized by the statute for a violation of which the defendant entered a plea of guilty or no contest or the court determined that he or she was guilty.
- Any cost authorized by that statute.
- The expense of providing legal assistance to the defendant.
- Any assessment authorized by law.
- Reimbursement for expenses incurred in responding to certain violations.
- **Until October 17, 2020,** any cost reasonably related to actual costs incurred by the trial court, including salaries and benefits for relevant court personnel, goods and services necessary for the operation of the court, and necessary expenses for the operation and maintenance of court buildings and facilities.

House Bill 5488 would extend the sunset provision on imposing costs related to actual costs incurred by trial courts for court operations. The sunset would be extended for about two years, from October 17, 2020, to October 1, 2022.

MCL 769.1k

FISCAL IMPACT:

House Bill 5488 would amend section 1k of Chapter IX of the Code of Criminal Procedure to extend the sunset provision on imposing costs related to actual costs incurred by trial courts for court operations. The sunset would be extended for two years, from October 2020 to October 2022. Extending the sunset would allow trial courts to continue to impose costs reasonably related to actual costs incurred by the courts for operation. According to the State Court Administrative Office, in FY 2018, courts imposed $53.3 million in costs and collected $44.8 million under section 1k. The bill would have no fiscal impact on the state but would have a fiscal impact on local courts. If the sunset provision were not extended, trial courts would lose this revenue.

Legislative Analyst: Susan Stutzky
Fiscal Analyst: Robin Risko

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

Public Policy Position
HB 5488

Support with amendment

Explanation
The committee is disappointed that the "temporary fix" legislation to impose court fees on criminal defendants that was enacted in 2014 with a 2017 sunset needs to be extended once again. The committee noted that the Trial Court Funding Commission (TCFC), that was created when the sunset was extended in 2017, completed their report early, which should have given the legislature ample time to begin implementing the recommendations in the report. However, the committee is aware that the Covid-19 pandemic has placed significant pressure on the state's budget, making it unlikely that the TCFC's recommendations can be implemented in any meaningful way prior to the sunset of the statute.

Although the committee supports HB 5488 in order to maintain the status quo and allow for more time for the TDFC recommendations to be implented, the committee recommends a two-year rather than a three-year extension of the sunset provision. The committee recommends extending the sunset provision by two (2) years for the following reasons:

- No justification was supplied to support why three (3) years is the appropriate length of time to extend the current law, other than trial courts would lose the significant amount of revenue generated under the subsection.

- A two-year extension makes more sense than a three year extension because that is the length of one legislative session, ensuring that legislators who are familiar with the issue will implement the TCFC's recommendations rather than merely passing the task on to the next group of lawmakers.

Position Vote:
Voted for position: 12
Voted against position: 3
Abstained from vote: 2
Did not vote (due to absence): 10

***Keller* Permissibility:**
The committee agreed that the legislation is *Keller* permissible because it affects the improvement of the functioning of the courts.

Contact Persons:
Lorray S.C. Brown lorrayb@mplp.org
Valerie R. Newman vnewman@waynecounty.com

Public Policy Position
HB 5488

Support

Explanation
The Committee supports HB 5488 as it extends the time during which a court imposes minimum state costs upon a defendant who has entered a plea of guilty of nolo contendere. The bill extends the sunset provision until October 1, 2023.

Position Vote:
Voted For position: 12
Voted against position: 0
Abstained from vote: 1
Did not vote (absent): 7

***Keller* Permissibility**
The committee agreed that the legislation is *Keller* permissible in affecting the functioning of the courts.

Contact Persons:
Mark A. Holsomback mahols@kalcounty.com
Sofia V. Nelson snelson@sado.org

SBM
STATE BAR OF MICHIGAN

CRIMINAL LAW SECTION

Public Policy Position
HB 5488

Support

Position Vote:
Voted For position: 12
Voted against position: 4
Abstained from vote: 1
Did not vote (absent): 9

Contact Person: Christina B. Hines
Email: chines@waynecounty.com

S T A T E B A R O F M I C H I G A N

To: Members of the Public Policy Committee
Board of Commissioners

From: Governmental Relations Staff

Date: July 16, 2020

Re: HB 5795 – Electronic Signature of Wills

Background
House Bill 5795 would amend the Estates and Protected Individuals Code (EPIC) to allow for electronic wills and for certified paper copies of electronic wills. According to the House Fiscal Agency's legislative analysis, "[t]he bill would amend EPIC to include as a valid will, as an alternative to being in writing, a record that is readable as text at the time the testator or person directed by the testator and the witnesses sign the will. In addition, the witnesses could sign the will either in person or in electronic presence." *Electronic presence* is defined in the bill as "the relationship of 2 or more individuals in different locations communicating in real time to the same extent as if the individuals were physically present in the same location**.**" The bill would also allow an individual to print a copy of an electronic will and affirm that it is a "complete, true, and accurate copy of the electronic will." If an individual sought to make the certified copy of an electronic will self-proving, then he or she would be required to attach separate self-proving affidavits.

***Keller* Considerations**
The Civil Procedure & Courts Committee determined that this bill was *Keller*-permissible because it affects the availability of legal services to society. The Access to Justice Policy Committee and the Elder Law & Disability Rights Section agree that the bill would affect the availability of legal services, but also state that the bill would affect the functioning of the courts presumably because the bill does not provide enough evidentiary and protective functions which will lead to increased litigation in Probate Courts.

The use of electronic wills would make legal services more accessible to society. Individuals, particularly those with simple estates and/or limited ability to leave their homes, would be able to create basic wills utilizing the internet and obtaining remote notary services, with or without the assistance of an attorney. The projected affordability and relative ease of use associated with electronic wills would overall increase the ability of legal services to society.

***Keller* Quick Guide**

	THE TWO PERMISSIBLE SUBJECT-AREAS UNDER *KELLER*: Regulation of Legal Profession	Improvement in Quality of Legal Services
As interpreted by AO 2004-1	• Regulation and discipline of attorneys • Ethics • Lawyer competency • Integrity of the Legal Profession • Regulation of attorney trust accounts	• Improvement in functioning of the courts ✓ Availability of legal services to society

Staff Recommendation

The bill satisfies the requirements of *Keller* and may be considered on its merits.

House Bill 5795 (2020)

Friendly Link: http://legislature.mi.gov/doc.aspx?2020-HB-5795

Sponsors
Graham Filler (district 93)
Brian Elder
(click name to see bills sponsored by that person)

Categories
Probate: wills and estates;

Probate; wills and estates; electronic signature of wills; allow. Amends sec. 2502 of 1998 PA 386 (MCL 700.2502) & adds sec. 2504a.

Bill Documents
Bill Document Formatting Information
[x]
The following bill formatting applies to the 2019-2020 session:
- New language in an amendatory bill will be shown in **BOLD AND UPPERCASE.**
- Language to be removed will be ~~stricken~~.
- Amendments made by the House will be blue with square brackets, such as: [House amended text].
- Amendments made by the Senate will be red with double greater/lesser than symbols, such as: <<Senate amended text>>.
(gray icons indicate that the action did not occur or that the document is not available)
Documents

House Introduced Bill
Introduced bills appear as they were introduced and reflect no subsequent amendments or changes.

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As Passed by the House is the bill, as introduced, that includes any adopted House amendments.

As Passed by the Senate
As Passed by the Senate is the bill, as received from the House, that includes any adopted Senate amendments.

House Enrolled Bill
Enrolled bill is the version passed in identical form by both houses of the Legislature.

Bill Analysis
House Fiscal Agency Analysis

Summary As Introduced (6/2/2020)
This document analyzes: HB5795

Summary of Proposed H-1 Substitute (6/9/2020)
This document analyzes: HB5795

Summary as Reported From Committee (6/17/2020)
This document analyzes: HB5795

History
(House actions in lowercase, Senate actions in UPPERCASE)

Date ▲	Journal	Action
5/20/2020	HJ 43 Pg. 869	introduced by Representative Graham Filler
5/20/2020	HJ 43 Pg. 869	read a first time
5/20/2020	HJ 43 Pg. 869	referred to Committee on Judiciary
5/21/2020	HJ 44 Pg. 873	bill electronically reproduced 05/20/2020
6/16/2020	HJ 54 Pg. 1048	reported with recommendation with substitute (H-1)
6/16/2020	HJ 54 Pg. 1048	referred to second reading
6/17/2020	Expected in HJ 55	read a second time
6/17/2020	HJ 55 Pg. 1086	substitute (H-1) adopted
6/17/2020	HJ 55 Pg. 1086	placed on third reading
6/24/2020	HJ 58 Pg. 1164	read a third time
6/24/2020	HJ 58 Pg. 1164	passed; given immediate effect Roll Call # 268 Yeas 57 Nays 51 Excused 0 Not Voting 1
6/24/2020	Expected in HJ 58	transmitted
6/25/2020	Expected in SJ 58	REFERRED TO COMMITTEE ON JUDICIARY AND PUBLIC SAFETY

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SUBSTITUTE FOR
HOUSE BILL NO. 5795

A bill to amend 1998 PA 386, entitled
"Estates and protected individuals code,"

by amending section 2502 (MCL 700.2502) and by adding section 2504a.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 2502. (1) Except as provided in subsection (2) and in sections 2503, 2506, and 2513, a will is valid only if it is all of the following:

(a) Either of the following:

(*i*) ~~(a)~~ In writing.

(*ii*) A record that is readable as text at the time of the signing under subdivision (b).

(b) Signed by the testator or in the testator's name by some other individual in the testator's conscious presence and by the testator's direction.

(c) Signed by at least 2 individuals, **either in person or in electronic presence**, each of whom signed within a reasonable time after he or she witnessed either the signing of the will as described in subdivision (b) or the testator's acknowledgment of that signature or acknowledgment of the will.

(2) A will that does not comply with subsection (1) is valid as a holographic will, whether or not witnessed, if it is dated, and if the testator's signature and the document's material portions are in the testator's handwriting.

(3) Intent that the document constitutes a testator's will can be established by extrinsic evidence, including, for a holographic will, portions of the document that are not in the testator's handwriting.

(4) As used in this section:

(a) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(b) "Electronic presence" means the relationship of 2 or more individuals in different locations communicating in real time to the same extent as if the individuals were physically present in the same location.

(c) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(d) "Sign" means with present intent to authenticate or adopt a record to do either of the following:

(*i*) Execute or adopt a tangible symbol.

(*ii*) Affix to or logically associate with the record an electronic symbol or process.

Sec. 2504a. An individual may create a certified paper copy of an electronic will by affirming under penalty of perjury that a paper copy of the electronic will is a complete, true, and accurate copy of the electronic will. If the electronic will is made self-proving, the certified paper copy of the will must include the self-proving affidavits. As used in this section, "electronic will" means a will that is both of the following:

(a) Readable under section 2502(1)(a)(*ii*).

(b) Signed under section 2502(4)(d)(*ii*).

HOUSE FI$CAL AGENCY

Legislative Analysis

ELECTRONIC WILLS

Phone: (517) 373-8080
http://www.house.mi.gov/hfa

Analysis available at
http://www.legislature.mi.gov

House Bill 5795 (H-1) as reported from committee
Sponsor: Rep. Graham Filler
Committee: Judiciary
Complete to 6-17-20

SUMMARY:

House Bill 5795 would amend the Estates and Protected Individuals Code (EPIC) to allow for an electronic will and for a certified paper copy of that electronic will to be made.

With some exceptions, for a will to be valid, Michigan law requires that the document meet all of the following:

- Be in writing.
- Be signed by the testator (the one making the will) or be signed in his or her name by another individual in his or her conscious presence and at his or her direction.
- Be signed by at least two individuals. A witness must sign the will within a reasonable time after witnessing the testator sign it or the testator's acknowledgment of that signature or of the will.

The bill would amend EPIC to include as a valid will, as an alternative to being in writing, a ***record*** that is readable as text at the time the testator or person directed by the testator and the witnesses ***sign*** the will. In addition, the witnesses could sign the will either in person or in ***electronic presence***.

Record would mean information that is inscribed on a tangible medium or that is stored in an ***electronic*** or other medium and is retrievable in perceivable form.

Electronic would mean relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

Electronic presence would mean the relationship of two or more individuals in different locations communicating in real time to the same extent as if they were physically present in the same location.

Sign would mean to do either of the following with present intent to authenticate or adopt a record:

- Execute or adopt a tangible symbol.
- Affix to or logically associate with the record an electronic symbol or process.

The bill would also add a new section to EPIC to allow an individual to create a certified paper copy of an electronic will by affirming under penalty of perjury that the paper copy of the electronic will is a complete, true, and accurate copy of it. If the electronic copy is made self-proving, the certified paper copy would have to include the self-proving

affidavits. (“Self-proving” refers to including with the will separate affidavits, or statements, signed by the testator and the witnesses in the presence of a notary public. The affidavits confirm that each signed the will and that it is, in fact, the testator’s will.)

As used in this new section, “electronic will” would mean readable as text and signed with an electronic symbol or process, as described above.

MCL 700.2502 and proposed MCL 700.2504a

BRIEF DISCUSSION:

By some estimates, up to 55% of adults have no will or estate plan in place. This is especially true for lower income individuals and minority communities. Without a will, a person does not have control over how his or her assets will be distributed after death. It has been noted that millennials, as well as future generations, have and will continue to become comfortable with conducting personal business online and in electronic formats. In addition, many elderly people, especially in light of the ongoing COVID-19 pandemic, are loath to leave the safety of home and travel to a lawyer’s office to draft a will. At least two states, Nevada and Indiana, already recognize electronic wills, and several more states are considering adopting legislation authorizing them. In light of what some see as the inevitability of recognizing electronic wills, the Uniform Law Commission (ULC) has offered a model act, the Uniform Electronic Will Act,[1] that states can use as a guide. According to the ULC, the model act contains provisions to maintain safeguards against fraud. Although House Bill 5795 is not the same as the model act, it is similar, and some portions, such as the definitions of terms, are virtually identical. Electronic wills may not be for everyone, but for those with minimal assets and an uncomplicated situation, an electronic will may be an affordable alternative and may decrease the number of people who die intestate (without a will), thus saving heirs time and money going to court to probate the estate or to litigate over how the deceased intended the assets to be distributed.

Not all are as enthusiastic about the rush for states to legalize electronic wills. Many cite concerns that the process to create an electronic will and forward it to an online notary leaves ample room for such things as undue influence, fraud, and coercion, among other problems. The elderly are especially vulnerable to abuse if the bill’s protections are weak. Indeed, two sections of the State Bar of Michigan have stated opposition to the bill as not adequately meeting statutory requirements for formalities and functions that provide protections from undue influence, forgery, perjury, delusion, and coercion. Because of the opportunity for abuse, the language of the bill must be carefully crafted to ensure that proper protections are in place. Further, it should be noted again that electronic wills are not for everyone or every situation. Those with significant assets, or whose wishes may be more complex to implement, will be better served working with an attorney in person.

[1] https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=8529b916-8ede-67e4-68eb-e0f7b1cb6528

FISCAL IMPACT:

House Bill 5795 would have no fiscal impact on the state or on local units of government.

POSITIONS:

A representative of Legal Zoom testified in support of the bill. (6-3-20)

The Elder Law and Disability Rights Section of the State Bar of Michigan indicated opposition to the bill. (6-11-20)

The Probate and Estate Planning Section of the State Bar of Michigan adopted a position opposing the bill.[2] (6-5-20)

Legislative Analyst: Susan Stutzky
Fiscal Analyst: Robin Risko

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

[2] http://www.michbar.org/file/publicpolicy/documents/Probate%20Position%20on%20HB%205795.pdf

Public Policy Position
HB 5795

Oppose

Explanation
The committee voted to oppose HB 5795. Although supportive of the legislation's priniciples, the committee opposes HB 5795 for the reasons stated in the Civil Procedure & Courts Committee's position, including the recommendation that the Probate and Estate Planning Section and the Elder Law and Disability Rights Section work with the bill sponsor to modify the legislation to address procedural issues not currently contemplated in the bill.

Position Vote:
Voted for position: 16
Voted against position: 0
Abstained from vote: 1
Did not vote (due to absence): 10

***Keller* Permissibility:**
The committee agreed the legislation is *Keller* permissible in affecting the functioning of the courts and the availability of legal services to society.

Contact Persons:
Lorray S.C. Brown lorrayb@mplp.org
Valerie R. Newman vnewman@waynecounty.com

Public Policy Position
HB 5795

Oppose

Explanation
The committee voted unanimously to oppose the bill as drafted for the reasons stated by Elder Law & Disability Rights Section and Probate & Estate Planning Section. The committee also supports these two sections working with the bill sponsor to modify the legislation to address procedural issues not currently contemplated in the bill.

Position Vote:
Voted For position: 20
Voted against position: 0
Abstained from vote: 0
Did not vote (due to absence): 7

***Keller* Permissibility:**
HB 5795 is *Keller* permissible in that is affects the availability of legal services to society.

Contact Person: Randy J. Wallace
Email: rwallace@olsmanlaw.com

Public Policy Position
HB 5795

Oppose

Explanation:
ELDRS Council opposes HB 5795 as drafted. Current statutory will formalities and functions [evidentiary, protective (e.g. protected from undue influence, fraud, delusion, coercion, forgery or perjury) etc.] are not adequately addressed in this bill. The Section is willing to work with the sponsor and other Sections and colleagues to formulate and support a proposal that addresses the will formalities and functions missing in the current bill.

Position Vote:
Voted for position: 16
Voted against position: 0
Abstained from vote: 0
Did not vote (absent): 5

***Keller* Permissibility:**
The improvement of the functioning of the courts
The availability of legal services to society

Contact Person: Robert Mannor
Email: bob@mannorlaw.com

Public Policy Position
HB 5795

Oppose

Explanation:
The Probate and Estate Planning ("PEP") Section of the State Bar of Michigan opposes HB 5795 as drafted. Will formalities requirements provide evidentiary, channeling, ritual and protective (e.g., protections from undue influence, fraud, delusion, coercion, forgery or perjury) functions. The PEP Section believes that HB 5795 as drafted, does not adequately serve these functions. The PEP Section wishes to work with the sponsor to formulate a proposal that better serves those functions.

Position Vote:
Voted for position: 19
Voted against position: 0
Abstained from vote: 0
Did not vote (absent): 0

Contact Person: Christopher A. Ballard
Email: caballard@varnumlaw.com

Gongwer – Volume 59, Report 114

[House Judiciary Mulls Electronic Signatures On Wills, Remote Witnessing]

Changes to a law regulating last wills and testaments were considered by the House Judiciary Committee on Wednesday.

Sponsored by Committee Chair Rep. Graham Filler (R-DeWitt), HB 5795 would amend PA 386 of 1998 to allow for electronic signatures on wills. The bill would, in Mr. Filler's view, create a 21st century approach to improving access to making wills. The option is especially timely considering the limited contact Michiganders have had and may continue to have as the new coronavirus pandemic continues.

Mr. Filler said it was his intent to help residents create better and consistently updated wills by making the process easier and to protect the wishes of those creating wills after they pass.

"It's a major issue. It always has been in Michigan and throughout the nation," Mr. Filler said. "When an individual passes with no will, it leads to litigation and it leads to fighting. We think this bill, which gives the ability to electronically sign your will instead of only being allowed to sign physically in the presence of an attorney, will improve access to making wills."

Mr. Filler also said that he expects a substitute at some point to allow for remote witnessing.

The timing couldn't be more perfect for such a bill, he said, as face-to-face meetings or excessive travel to attorneys' offices could pose a significant danger for elderly residents – situations that could be prevented through HB 5795.

Regarding electronic signatures, the committee heard testimony from Ken Friedman, vice president of Legal and Government Affairs with LegalZoom.com. He said his company supports the bill. LegalZoom is committed to increasing affordable access to the law for its customers, he said, and HB 5795 helps further that goal.

Mr. Friedman also said that the American Bar Association estimates that 95 percent of adults do not currently have a will or an estate plan in place. That's especially true for residents living in rural areas, low income adults and members of minority communities, he added.

The pandemic crisis also has created a swelling demand for wills, Mr. Friedman said, but current law requires the execution of a will only with pen, paper and in person.

"Allowing for electronic wills would help Michigan citizens make and execute a will in the comfort and safety of their homes now during this crisis, and moving forward, all without them or their attorney traveling potentially long distances," Mr. Friedman said. "Michigan allows for these electronic signatures and has authorized remote notarization, and during this health crisis, Michigan has promoted the prevalent use of these technologies to ensure legal needs can be met while keeping everyone safe."

While it does facilitate electronic signatures, Mr. Friedman said it does not mandate their use, nor does it change current laws regarding wills signed traditionally.

A substitute for remote witnessing would be a logical addition to the bill, Mr. Friedman added.

Rep. Tenisha Yancey (D-Harper Woods) asked Mr. Friedman if he were aware of the rates of fraudulent wills signed over the last five years and would this bill increase fraud.

Mr. Friedman said HB 5795 would likely have the opposite effect, as electronic signatures are often more secure than traditional signatures because it takes many more resources and sophistication to forge or alter an electronic signature than a wet one. The legislation at hand still requires witnesses, remote notarization and auditable signature trails.

Rep. Doug Wozniak (R-Shelby Township) said he agreed with the spirit of the bill but questioned its intent as personal property is the only thing that can be transferred through a will, unlike real estate or other estate items. He also said that bank beneficiary disputes are often disputed played out in probate court as it is.

Rep. David LaGrand (D-Grand Rapids) said he thought it was a great idea, but the Legislature should take the bolder step in creating a central database for documents like wills and advanced directives to assist hospitals and grieving loved ones.

"All over the country right now, there are variations of this conversation going on," Mr. LaGrand said. "I think we have a real opportunity to essentially allow people to submit wills and advanced directives to a secure central database that would searchable for hospitals, so if they wanted to know if you had an advance directive, and it would be searchable by kids if they couldn't find their parents' wills. But all of this is premised on our ability to do this electronically."

MIRS News Service, June 25, 2020

Online Signatures For E-Wills Approved in House, Narrowly

Since the COVID-19 pandemic began, there are some nursing home residents who have been unable to get to an attorney's office to update or make out their wills, according to Rep. Graham **FILLER** (R-DeWitt).

"I think we should acknowledge we are moving toward electronic signing, toward Zoom communication going forward, and update our laws to follow that."

His HB 5795 would allow for wills to be signed online using electronic signatures. Wills can already be drawn up on a variety of legal form sites online, but currently have to be signed in front of a notary.

HB 5795 passed the House this week, but it faced some strong headwinds in a 57-51 vote.

Filler said he believed the bill had strong support until "for some reason, 30 Dems went no." He attributed that to it being "the silly season."

But one of the no votes was Rep. Douglas **WOZNIAK** (R-Shelby Twp.), an elder law attorney himself. He said he supports the bill in concept, but was concerned the online will industry may commercialize the process to the point it convinces people they have to have wills when they really don't.

"Some of the clients I have do not have wills because they really don't need them if they have done other proper preparation. Other proper preparation means having beneficiaries on financial accounts, on all insurance policies, making sure that the deed to any real property is a life estate deed. The only thing a will will transfer is personal property," Wozniak contended.

He said that if people have put beneficiaries on their bank accounts, the bank will honor that before it will honor what is said in the will, if there is a difference.

The deed to a home can't be transferred through a will. To transfer real estate after death, Wozniak said, a "life estate deed" or "Lady Bird deed" is needed.

Other financial accounts, like 401(k)s, require the holder to name beneficiaries when signing up.

Another concern, Wozniak said, is if wills are proliferated over the internet, clients may not be given a proper explanation of how their assets are going to be transferred after their death.

"Woz is my buddy and I'd go to war for Woz, but he is just wrong here on this one," Filler said in response. "It's law school 101 that the more people that fill out accurate, updated wills, the more accurate their wishes become after death, so there is less fighting in court."

People can do almost every end-of-life transfer or real estate transaction legally electronically now, Filler said. His bill would put e-wills in line with very similar probate or real estate documents.

"This is a good bill. The purpose of it is so more people fill out their wills, number one. And number two, so we have a way during COVID times when you have individuals who can't leave, who can't go to an attorney's office or to a friend's house, or leave the nursing home because of physical (limitations) or because of COVID issues, we want these people to still fill out an accurate, updated wills, and e-wills will allow them to. So I think this is perfect timing," Filler said.

A key component of the legislation is that a notary would still have to witness the signing, but it would be done online through a video conferencing program like Zoom. A recording of the signing would be made and attached to the electronic version of the document.

Wozniak said that requirement didn't make it into the final bill, another concern for him.

Filler said electronic signing would be included, so that if for some reason that's not correct in the bill, it would be made part of the legislation going forward.

Filler said he is flexible on the wording of the bill and is open to suggestions for improvement. He said he is working with the Elder Law and Probate Law sections of the Michigan State Bar on the legislation.

In the 57-51 vote, Republicans generally supported the bill while Democrats generally opposed. But there was plenty of crossover.

Republicans who voted no included Reps. Sue **ALLOR** (R-Wolverine), Ann **BOLLIN** (R-Brighton Twp.), Tommy **BRANN** (R-Wyoming), Phil **GREEN** (R-Millington), Beth **GRIFFIN** (R-Mattawan), Pamela **HORNBERGER** (R-Chesterfield Twp.), Sarah **LIGHTNER** (R-Springport), Matt **MADDOCK** (R-Milford), Mike **MUELLER** (R-Linden), Brad **PAQUETTE** (R-Niles), Pauline **WENDZEL** (R-Watervliet), Wozniak, and Jeff **YAROCH** (R-Richmond)

Democrats who voted yes included Reps. Wendell **BYRD** (D-Detroit), Sara **CAMBENSY** (D-Marquette), John **CHIRKUN** (D-Roseville), Brian **ELDER** (D-Bay City), Jim **ELLISON** (D-Royal Oak), Vanessa **GUERRA** (D-Saginaw), David **LAGRAND** (D-Grand Rapids), Kristy **PAGAN** (D-Canton), Terry **SABO** (D-Muskegon), William **SOWERBY** (D-Clinton Twp.), Joe **TATE** (D-Detroit), and Angela **WITWER** (D-Delta Twp.).

Rep. Karen **WHITSETT** (D-Detroit) was absent.

No. 58

STATE OF MICHIGAN

JOURNAL

OF THE

House of Representatives

100th Legislature

REGULAR SESSION OF 2020

House Chamber, Lansing, Wednesday, June 24, 2020.

House Bill No. 5795, entitled

A bill to amend 1998 PA 386, entitled “Estates and protected individuals code,” by amending section 2502 (MCL 700.2502) and by adding section 2504a.

Was read a third time and passed, a majority of the members serving voting therefor, by yeas and nays, as follows:

Roll Call No. 268 Yeas—57

Afendoulis	Farrington	Kahle	Sabo
Albert	Filler	LaFave	Schroeder
Alexander	Frederick	LaGrand	Sheppard
Bellino	Glenn	Leutheuser	Slagh
Berman	Guerra	Lilly	Sowerby
Byrd	Hall	Lower	Tate
Calley	Hauck	Marino	VanSingel
Cambensy	Hernandez	Markkanen	VanWoerkom
Chatfield	Hoitenga	Meerman	Vaupel
Chirkun	Howell	Miller	Wakeman
Cole	Huizenga	O’Malley	Webber

Crawford	Iden	Pagan	Wentworth
Eisen	Inman	Reilly	Whiteford
Elder	Johnson, S.	Rendon	Witwer
Ellison			

Nays—51

Allor	Garza	Jones	Peterson
Anthony	Gay-Dagnogo	Kennedy	Pohutsky
Bolden	Green	Koleszar	Rabhi
Bollin	Greig	Kuppa	Shannon
Brann	Griffin	Lasinski	Sneller
Brixie	Haadsma	Liberati	Stone
Camilleri	Hammoud	Lightner	Warren
Carter, B.	Hertel	Love	Wendzel
Carter, T.	Hoadley	Maddock	Wittenberg
Cherry	Hood	Manoogian	Wozniak
Clemente	Hope	Mueller	Yancey
Coleman	Hornberger	Neeley, C.	Yaroch
Garrett	Johnson, C.	Paquette	

The House agreed to the title of the bill.

Rep. Cole moved that the bill be given immediate effect.

The motion prevailed, 2/3 of the members serving voting therefor.

Rep. Kuppa, having reserved the right to explain her protest against the passage of the bill, made the following statement:

“Mr. Speaker and members of the House:

This bill may lead to an increase in fraudulent wills and potential exploitation of Michigan’s elderly.”

Rep. Lightner, having reserved the right to explain her protest against the passage of the bill, made the following statement:

“Mr. Speaker and members of the House:

To preserve the integrity of Will signatures, and to protect our seniors from fraud, I had to vote no. Chair Filler agreed to work with me to amend the probate code to help remove opportunities for fraud and coercion in signing wills.”

S T A T E   B A R   O F   M I C H I G A N

To: Members of the Public Policy Committee
Board of Commissioners

From: Governmental Relations Staff

Date: July 16, 2020

Re: HB 5805 – Hearings on Emergency Motions by Defendant in Criminal Cases

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Background

House Bill 5805 would require state courts to hear emergency motions by criminal defendants on an accelerated basis. As defined by the legislation, "emergency motion" means a motion that is filed by the defendant alleging the need for an emergency hearing for any of the following reasons:

(i) Deprivation of liberty;
(ii) A constitutional violation, including, but not limited to, a due process or cruel and unusual punishment violation; or
(iii) A matter that would result in irreparable harm to the defendant if not heard on an emergency basis.

Courts would be required hear emergency motions within 24 hours after filing for alleged deprivations of liberty, and within 48 hours after filing for all other emergency motions made by defendants in criminal cases. A court would also be able to hear emergency motions ex parte under certain circumstances, provided that appropriate notice and opportunity to be heard was given to the prosecution. Under the legislation, a defendant seeking an emergency motion would need to: 1) successfully state the basis of the emergency motion, 2) provide a statement of whether the defendant or his or her attorney provided the prosecution with notice of the motion, and 3) state the remedy requested by the defendant from the court.[1]

The bill would require the court to quickly adjust its calendar to grant precedence to emergency motions. Furthermore, if an assigned judge were unable to hear the case, the chief judge would be required, pursuant to MCL 761.12(5), to hear the motion; if chief judge were unable, "any available judge shall hear the motion."

Courts would retain discretion to deny a defendant's subsequent attempts to pursue an emergency motion based on the same set of facts as informed the initial motion.

***Keller* Considerations**

The Criminal Practice & Jurisprudence Committee considered this legislation and found it to be *Keller*-permissible in affecting the functioning of the courts. HB 5805 would require courts to develop

[1] MCL 761.12(4)(a)-(c).

expedited procedures to address defendants' allegations concerning the loss of liberty, constitutional violations, and/or similarly serious matters involving "irreparable harm." By mandating specific operations of the courts, the bill's subject matter directly impacts the functioning of courts.

***Keller* Quick Guide**

	THE TWO PERMISSIBLE SUBJECT-AREAS UNDER *KELLER*: Regulation of Legal Profession	Improvement in Quality of Legal Services
As interpreted by AO 2004-1	• Regulation and discipline of attorneys • Ethics • Lawyer competency • Integrity of the Legal Profession • Regulation of attorney trust accounts	✓ Improvement in functioning of the courts • Availability of legal services to society

Staff Recommendation
This bill satisfies the requirements of *Keller* and may be considered on its merits.

MICHIGAN LEGISLATURE(www.legislature.mi.gov)
Printed on Thursday, July 2, 2020
Michigan Compiled Laws Complete Through PA 101 of 2020

House Bill 5805 (2020)

rss?

Friendly Link: http://legislature.mi.gov/doc.aspx?2020-HB-5805

Sponsors
Ryan Berman (district 39)
Douglas Wozniak, Jeff Yaroch, Brian Elder, Rebekah Warren
(click name to see bills sponsored by that person)

Categories
Courts: judges;

Courts; judges; hearings on emergency motions by defendant in criminal cases; provide for. Amends sec. 1, ch. I of 1927 PA 175 (MCL 761.1) & adds sec. 12 to ch. III.

Bill Documents
Bill Document Formatting Information
[x]
The following bill formatting applies to the 2019-2020 session:
- New language in an amendatory bill will be shown in **BOLD AND UPPERCASE.**
- Language to be removed will be ~~stricken~~.
- Amendments made by the House will be blue with square brackets, such as: [House amended text].
- Amendments made by the Senate will be red with double greater/lesser than symbols, such as: <<Senate amended text>>.

(gray icons indicate that the action did not occur or that the document is not available)

Documents

House Introduced Bill
Introduced bills appear as they were introduced and reflect no subsequent amendments or changes.

As Passed by the House
As Passed by the House is the bill, as introduced, that includes any adopted House amendments.

As Passed by the Senate
As Passed by the Senate is the bill, as received from the House, that includes any adopted Senate amendments.

House Enrolled Bill
Enrolled bill is the version passed in identical form by both houses of the Legislature.

Bill Analysis

History
(House actions in lowercase, Senate actions in UPPERCASE)

Date ▲	Journal	Action
5/20/2020	HJ 43 Pg. 869	introduced by Representative Ryan Berman
5/20/2020	HJ 43 Pg. 869	read a first time
5/20/2020	HJ 43 Pg. 869	referred to Committee on Judiciary
5/21/2020	HJ 44 Pg. 873	bill electronically reproduced 05/20/2020

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Firefox

HOUSE BILL NO. 5805

May 20, 2020, Introduced by Reps. Berman, Wozniak, Yaroch, Elder and Warren and referred to the Committee on Judiciary.

A bill to amend 1927 PA 175, entitled
"The code of criminal procedure,"

by amending section 1 of chapter I (MCL 761.1), as amended by 2017 PA 2, and by adding section 12 to chapter III.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

CHAPTER I

Sec. 1. As used in this act:

(a) "Act" or "doing of an act" includes an omission to act.

(b) "Clerk" means the clerk or a deputy clerk of the court.

(c) "Complaint" means a written accusation, under oath or upon affirmation, that a felony, misdemeanor, or ordinance violation has been committed and that the person named or described in the accusation is guilty of the offense.

(d) "County juvenile agency" means that term as defined in section 2 of the county juvenile agency act, 1998 PA 518, MCL 45.622.

(e) "Emergency motion" means a motion that is filed by the defendant alleging a need for an emergency hearing for any of the following reasons:

(*i*) Deprivation of liberty.

(*ii*) A constitutional violation including, but not limited to, a due process or a cruel and unusual punishment violation.

(*iii*) A matter that would result in irreparable harm to the defendant if not heard on an emergency basis.

(f) ~~(e)~~ "Federal law enforcement officer" means an officer or agent employed by a law enforcement agency of the United States government whose primary responsibility is enforcing laws of the United States.

(g) ~~(f)~~ "Felony" means a violation of a penal law of this state for which the offender, upon conviction, may be punished by imprisonment for more than 1 year or an offense expressly designated by law to be a felony.

(h) ~~(g)~~ "Indictment" means 1 or more of the following:

(*i*) An indictment.

(*ii*) An information.

(*iii*) A presentment.

(*iv*) A complaint.

(*v*) A warrant.

(*vi*) A formal written accusation.

(*vii*) Unless a contrary intention appears, a count contained in any document described in subparagraphs (*i*) through (*vi*).

(i) ~~(h)~~ "Jail", "prison", or a similar word includes a juvenile facility in which a juvenile has been placed pending trial under section 27a of chapter IV.

(j) ~~(i)~~ "Judicial district" means the following:

(*i*) With regard to the circuit court, the county.

(*ii*) With regard to municipal courts, the city in which the municipal court functions or the village served by a municipal court under section 9928 of the revised judicature act of 1961, 1961 PA 236, MCL 600.9928.

(*iii*) With regard to the district court, the county, district, or political subdivision in which venue is proper for criminal actions.

(k) ~~(j)~~ "Juvenile" means a person within the jurisdiction of the circuit court under section 606 of the revised judicature act of 1961, 1961 PA 236, MCL 600.606.

(*l*) ~~(k)~~ "Juvenile facility" means a county facility, an institution operated as an agency of the county or family division of the circuit court, or an institution or agency described in the youth rehabilitation services act, 1974 PA 150, MCL 803.301 to 803.309, to which a juvenile has been committed under section 27a of chapter IV.

(m) ~~(*l*)~~ "Magistrate" means a judge of the district court or a judge of a municipal court. Magistrate does not include a district court magistrate, except that a district court magistrate may exercise the powers, jurisdiction, and duties of a magistrate if specifically provided in this act, the revised judicature act of 1961, 1961 PA 236, MCL 600.101 to 600.9947, or any other statute. This definition does not limit the power of a justice of the supreme court, a circuit judge, or a judge of a court of record having jurisdiction of criminal cases under this act, or deprive him or her of the power to exercise the authority of a magistrate.

(n) ~~(m)~~ "Minor offense" means a misdemeanor or ordinance violation for which the maximum permissible imprisonment does not exceed 92 days and the maximum permissible fine does not exceed $1,000.00.

(o) ~~(n)~~ "Misdemeanor" means a violation of a penal law of this state that is not a felony or a violation of an order, rule, or regulation of a state agency that is punishable by imprisonment or a fine that is not a civil fine.

(p) ~~(o)~~ "Ordinance violation" means either of the following:

(*i*) A violation of an ordinance or charter of a city, village, township, or county that is punishable by imprisonment or a fine that is not a civil fine.

(*ii*) A violation of an ordinance, rule, or regulation of any other governmental entity authorized by law to enact ordinances, rules, or regulations that is punishable by imprisonment or a fine that is not a civil fine.

(q) ~~(p)~~ "Person", "accused", or a similar word means an individual or, unless a contrary intention appears, a public or private corporation, partnership, or unincorporated or voluntary association.

(r) ~~(q)~~ "Property" includes any matter or thing upon or in respect to which an offense may be committed.

(s) ~~(r)~~ "Prosecuting attorney" means the prosecuting attorney for a county, an assistant prosecuting attorney for a county, the attorney general, the deputy attorney general, an assistant attorney general, a special prosecuting attorney, or, in connection with the prosecution of an ordinance violation, an attorney for the political subdivision or governmental entity that enacted the ordinance, charter, rule, or regulation upon which the ordinance violation is based.

(t) ~~(s)~~ "Recidivism" means any rearrest, reconviction, or reincarceration in prison or jail for a felony or misdemeanor offense or a probation or parole violation of an individual as measured first after 3 years and again after 5 years from the date of his or her release from incarceration, placement on probation, or conviction, whichever is later.

(u) ~~(t)~~ "Taken", "brought", or "before" a magistrate or judge for purposes of criminal arraignment or the setting of bail means either of the following:

(*i*) Physical presence before a judge or district court magistrate.

(*ii*) Presence before a judge or district court magistrate by use of 2-way interactive video

technology.

(v) ~~(u)~~ "Technical parole violation" means a violation of the terms of a parolee's parole order that is not a violation of a law of this state, a political subdivision of this state, another state, or the United States or of tribal law.

(w) ~~(v)~~ "Technical probation violation" means a violation of the terms of a probationer's probation order that is not a violation of a law of this state, a political subdivision of this state, another state, or the United States or of tribal law.

(x) ~~(w)~~ "Writing", "written", or a similar term refers to words printed, painted, engraved, lithographed, photographed, copied, traced, or otherwise made visible to the eye.

CHAPTER III

Sec. 12. (1) In all criminal cases in the courts of this state, the court shall hear an emergency motion by the defendant for alleged deprivation of liberty within 24 hours after filing the motion with the court.

(2) Subject to subsection (1), in all criminal cases in the courts of this state, the court shall hear an emergency motion by the defendant within 48 hours after filing the motion with the court.

(3) In all probation violation and post-conviction contempt matters in the courts of this state, the court may allow emergency motions under subsection (1) or (2) to be heard ex parte. In the case of an ex parte hearing, notice and opportunity to be heard must be provided to the prosecution within 24 hours for a hearing under subsection (1) or 48 hours for a hearing under subsection (2).

(4) The emergency motion under subsection (1) or (2) must include the following:

(a) The basis for the emergency nature of the hearing under subsection (1) or (2).

(b) A statement of whether the defendant or his or her counsel provided a copy of the notice and motion to the prosecution.

(c) The remedy requested by the defendant from the court.

(d) The notice and motion must be provided in writing, by first-class mail, personal delivery, or electronic communication.

(5) An emergency motion must be given precedence on the court calendar. If no judge has been assigned to hear the case or the assigned judge is unable to hear the emergency motion, the chief judge shall hear the motion. If the chief judge is unable to hear the emergency motion, any available judge shall hear the motion.

(6) Emergency motions do not include standard motions for bond.

(7) An individual who knowingly and intentionally makes a false statement to the court in support of his or her emergency motion is subject to the contempt powers of the court.

(8) The court may deny without hearing a defendant's second or subsequent emergency motion based on the same allegations or facts.

Public Policy Position
HB 5805

Oppose

Explanation
The committee voted to oppose HB 5805. While supportive of the spirit of the legislation, the committee opposes HB 5805 because matters of how and when courts hear emergency motions are more appropriately addressed through court rule amendment(s) than through legislative action.

Position Vote:
Voted For position: 16
Voted against position: 2
Abstained from vote: 0
Did not vote (absent): 3

***Keller* Permissibility:**
The legislation is *Keller* permissible in affecting the functioning of the courts.

Contact Persons:
Mark A. Holsomback mahols@kalcounty.com
Sofia V. Nelson snelson@sado.org

S T A T E B A R O F M I C H I G A N

To: Members of the Public Policy Committee
Board of Commissioners

From: Governmental Relations Staff

Date: July 15, 2020

Re: HB 5806 – Online Attorney Access to Court Actions/Filed Documents Without Fees

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Background
HB 5806 seeks to expand electronic filing and reduce costs for practitioners accessing court filings. It would do so by adding municipal courts to the list of courts that would be included within the SCAO e-filing system and would require courts that currently accept documents by facsimile to also accept documents by electronic mail. Pursuant to Section 1991a, courts would provide attorneys with fee-free access to register of actions and digital images of all documents filed with the court.

Keller **Considerations**
The Civil Procedure & Courts Committee, the Access to Justice Policy Committee, the Criminal Jurisprudence & Practice Committee, and Family Law Section all found HB 5806 to be *Keller*-permissible because the legislation would impact the functioning of the courts.

The Family Law Section and the Access to Justice Policy Committee found the legislation to be *Keller*-permissible on the additional ground that it would improve the quality of legal services to society. When attorneys are unburdened from the costs associated with accessing documents, they are better able to serve their clients in an efficient and cost-effective way.

Keller **Quick Guide**

	THE TWO PERMISSIBLE SUBJECT-AREAS UNDER *KELLER*:	
	Regulation of Legal Profession	**Improvement in Quality of Legal Services**
As interpreted by AO 2004-1	• Regulation and discipline of attorneys • Ethics • Lawyer competency • Integrity of the Legal Profession • Regulation of attorney trust accounts	✓ Improvement in functioning of the courts ✓ Availability of legal services to society

Staff Recommendation
The bill satisfies the requirements of *Keller* and can be considered on its merits.

House Bill 5806 (2020)

Friendly Link: http://legislature.mi.gov/doc.aspx?2020-HB-5806

Sponsors
Ryan Berman (district 39)
Rebekah Warren
(click name to see bills sponsored by that person)

Categories
Courts: records;

Courts; records; online attorney access to court actions and filed documents without fees; provide for. Amends secs. 1985 & 1991 of 1961 PA 236 (MCL 600.1985 & 600.1991) & adds sec. 1991a.

Bill Documents
Bill Document Formatting Information
[x]
The following bill formatting applies to the 2019-2020 session:
- New language in an amendatory bill will be shown in **BOLD AND UPPERCASE.**
- Language to be removed will be ~~stricken~~.
- Amendments made by the House will be blue with square brackets, such as: [House amended text].
- Amendments made by the Senate will be red with double greater/lesser than symbols, such as: <<Senate amended text>>.

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As Passed by the Senate
As Passed by the Senate is the bill, as received from the House, that includes any adopted Senate amendments.

House Enrolled Bill
Enrolled bill is the version passed in identical form by both houses of the Legislature.

Bill Analysis

History
(House actions in lowercase, Senate actions in UPPERCASE)

Date ▲	Journal	Action
5/20/2020	HJ 43 Pg. 869	introduced by Representative Ryan Berman
5/20/2020	HJ 43 Pg. 869	read a first time
5/20/2020	HJ 43 Pg. 869	referred to Committee on Judiciary
5/21/2020	HJ 44 Pg. 873	bill electronically reproduced 05/20/2020

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HOUSE BILL NO. 5806

May 20, 2020, Introduced by Reps. Berman and Warren and referred to the Committee on Judiciary.

A bill to amend 1961 PA 236, entitled
"Revised judicature act of 1961,"

by amending sections 1985 and 1991 (MCL 600.1985 and 600.1991), section 1985 as added by 2015 PA 230 and section 1991 as added by 2015 PA 233, and by adding section 1991a.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 1985. As used in this chapter:

(a) "Authorized court" means a court accepted by the state court administrative office under section 1991 for access to the electronic filing system.

(b) "Automated payment" means an electronic payment method authorized by the state court administrative office at the direction of the supreme court, including, but not limited to, payments made with credit and debit cards.

(c) "Civil action" means an action that is not a criminal case, a civil infraction action, a proceeding commenced in the probate court under section 3982 of the estates and protected individuals code, ~~1988~~ **1998** PA 386, MCL 700.3982, or a proceeding involving a juvenile under chapter XIIA of the probate code of 1939, 1939 PA 288, MCL 712A.1 to 712A.32.

(d) "Clerk" means the clerk of the court referenced in the rules of the supreme court and includes the clerk of the supreme court, chief clerk of the court of appeals, county clerk, probate register, district court clerk, **municipal court clerk**, or clerk of the court of claims where the civil action is commenced, as applicable.

(e) "Court funding unit" means 1 of the following, as applicable:

(*i*) For circuit or probate court, the county.

(*ii*) For district court, the district funding unit as that term is defined in section 8104.

(*iii*) For the supreme court, court of appeals, or court of claims, the state.

(*iv*) For municipal court, the city in which the municipal court is located.

(f) "Electronic filing system" means a system authorized after ~~the effective date of the amendatory act that added this chapter~~ **January 1, 2016** by the supreme court for the electronic filing of documents using a portal contracted for by the state court administrative office for the filing of documents in the supreme court, court of appeals, circuit court, probate court, district court, **municipal court**, and court of claims.

(g) "Electronic filing system fee" means the fee described in section 1986.

(h) "Party" means the person or entity commencing a civil action.

(i) "Qualified vendor" means a private vendor selected by the state court administrative office by a competitive bidding process to effectuate the purpose of section 1991(3).

Sec. 1991. (1) A court may apply to the supreme court for access to and use of the electronic filing system.

(2) If the supreme court accepts a court under subsection (1), the state court administrative office shall use money from the judicial electronic filing fund established under section 176 to pay the costs of technological improvements necessary for that court to operate electronic filing.

(3) The supreme court may select a qualified vendor for the electronic filing system.

(4) A court that is not an authorized court must accept the filing of documents through electronic mail if the court accepts the filing of documents through facsimile.

Sec. 1991a. Except as otherwise prohibited by law, a court must allow an attorney to access, through a website, the register of actions and a digital image of all documents filed in any case in that court. A court or a court funding unit must not charge a fee for access to the website under this section.

Public Policy Position
HB 5806

Support with Amendments

Explanation
The committee voted to support HB 5806 with amendments. The committee recommends amending Sec. 1991a to grant pro se litigants the same rights as attorneys to access "through a court's webite, the register of actions and a digital images of all documents filed in any case in that court" on a fee-free basis.

Making a court's digitized documents available without a fee to both attorney and pro se litigants and allowing for expanded e-filings generally, would increase access to justice.

Position Vote:
Voted for position: 16
Voted against position: 0
Abstained from vote: 1
Did not vote (due to absence): 10

***Keller* Permissibility:**
The committee agreed that the legislation is *Keller* permissible because it improves the function of the courst and improves the quality of legal services.

Contact Persons:
Lorray S.C. Brown lorrayb@mplp.org
Valerie R. Newman vnewman@waynecounty.com

Public Policy Position
HB 5806

Support & Oppose

Explanation
The committee supports the proposed amendments to MCL 600.1991(4) Subsection 4 as written but opposes MCL 600.1991a because it micromanages the court's administration of its own records and would impose significant financial costs.

Position Vote:
Voted For position: 20
Voted against position: 1
Abstained from vote: 0
Did not vote (due to absence): 6

***Keller* Permissibility:**
The legislation is *Keller* permissible in affecting the functioning of the courts.

Contact Person: Randy J. Wallace
Email: rwallace@olsmanlaw.com

Public Policy Position
HB 5806

Oppose

Explanation
The committee voted oppose HB 5806. While supportive of the spirit of the bill, the committee opposes the use of the legislative process to govern the way courts administer electronic filings and document access. The committee instead recommends that such issues are more appropriately addressed through court rule amendment(s).

Position Vote:
Voted For position: 14
Voted against position: 4
Abstained from vote: 0
Did not vote (absent): 3

***Keller* Permissibility:**
The legislation is *Keller* permissible in that it affects the functioning of the courts.

Contact Persons:
Mark A. Holsomback mahols@kalcounty.com
Sofia V. Nelson snelson@sado.org

Public Policy Position
HB 5806

Support with Recommended Amendments

Explanation
The State Bar of Michigan Appellate Practice Section Council supports HB 5806 in principle because it recognizes the importance of providing electronic access to court records.

The Council does, however, have two concerns. First, it will take considerable resources for courts to implement the necessary electronic document management systems that will be required to provide access to court documents. We are hopeful that the Legislature will provide appropriate funding should the measure pass.

Second, there are privacy issues that need to be considered. Court filings may contain personal identifying information or sensitive facts or allegations that are not appropriate for widespread public dissemination. These special considerations may justify exceptions or special protections in appropriate cases or case types.

While we are hopeful that the Legislature will take these concerns into consideration, we support in principle the goals of greater public access to the courts and a more transparent judicial process.

Position Vote:
Voted for position: 21
Voted against position: 0
Abstained from vote: 0
Did not vote (absent): 3

***Keller* Permissibility:**
The improvement of the functioning of the courts

Contact Person: Bradley R. Hall
Email: bhall@sado.org

Public Policy Position
HB 5806

Support

Explanation:
The Family Law Section believes that allowing attorneys free on-line access to register of actions and digital images of filings will be of great help to attorney and promote access to justice for clients.

Position Vote:
Voted for position: 20
Voted against position: 0
Abstained from vote: 0
Did not vote (absent): 1

***Keller* Permissibility:**
The improvement of the functioning of the courts
The availability of legal services to society
Allowing free on-line access of court filings to attorneys will increase the ability of attorneys to assist client, particularly in the instance of time-sensitive matters.

Contact Person: James Chryssikos
Email: jwc@chryssikoslaw.com

S T A T E B A R O F M I C H I G A N

To: Members of the Public Policy Committee
Board of Commissioners

From: Governmental Relations Staff

Date: July 15, 2020

Re: SB 0682 – Confidentiality of Juvenile Records

Background
Senate Bill 0682 seeks to protect the privacy of juveniles involved in the juvenile justice system by changing access to juvenile case records. First, the bill establishes that records of the case are not open to the general public. Second, the bill clarifies that diversion records are only open as provided in the juvenile diversion act. Third, the bill expands the definition of "persons having a legitimate interest" in SB 0682 to include "the juvenile, the juvenile's parent, the juvenile's guardian or legal custodian, the guardian ad litem, counsel for the juvenile, the department if related to an investigation of child neglect or child abuse, law enforcement personnel, a prosecutor, and a court of this state." The bill therefore allows only those individuals most directly involved in a juvenile's case access to records of a closed hearing, pursuant to a court order and subject to the provisions of Section 49 of the William Van Regenmorter Crime Victim's Rights Act.

***Keller* Considerations**
The Access to Justice Policy Committee determined that the bill is *Keller*-permissible because the question of who has access to juvenile records affects the operational functioning of the courts and the availability of legal services to society. In supporting the bill, the committee concluded that it was *Keller*-permissible because it "provides additional privacy protections for juveniles as well as continuing to permit necessary individuals the ability access legal records. Defining who has access to documents improves the function of the courts and the availability of legal services to society."

A stricter reading of *Keller*-permissibility would be that access to court records is a policy determination outside *Keller* boundaries absent a determination that access to records advances or impedes the availability of legal services (which has not been made here); that a definition of access to records improves or degrades the operation of the courts by virtue of its clarity or obtuseness; or that access generally advances or impairs a lawyers' ability to serve clients consistent with their ethical responsibilities.

Keller **Quick Guide**

	THE TWO PERMISSIBLE SUBJECT-AREAS UNDER *KELLER*:	
	Regulation of Legal Profession	**Improvement in Quality of Legal Services**
As interpreted by AO 2004-1	• Regulation and discipline of attorneys • Ethics • Lawyer competency • Integrity of the Legal Profession • Regulation of attorney trust accounts	• Improvement in functioning of the courts • Availability of legal services to society

Staff Recommendation

The legislation does not clearly satisfy the requirements of *Keller*.

MICHIGAN LEGISLATURE(www.legislature.mi.gov)
Printed on Thursday, July 2, 2020
Michigan Compiled Laws Complete Through PA 101 of 2020

Senate Bill 0682 (2019) rss?

Friendly Link: http://legislature.mi.gov/doc.aspx?2019-SB-0682

Sponsors

Peter Lucido (district 8)
Jeff Irwin, Rosemary Bayer, Dayna Polehanki, Betty Jean Alexander, Stephanie Chang, Erika Geiss, Marshall Bullock, Mallory McMorrow, Sylvia Santana
(click name to see bills sponsored by that person)

Categories

Juveniles: juvenile justice services; Juveniles: criminal procedure; Criminal procedure: records; Courts: records;

Juveniles; juvenile justice services; juvenile records; require to be confidential. Amends sec. 28, ch. XIIA of 1939 PA 288 (MCL 712A.28).

Bill Documents

Bill Document Formatting Information
[x]
The following bill formatting applies to the 2019-2020 session:
- New language in an amendatory bill will be shown in **BOLD AND UPPERCASE.**
- Language to be removed will be ~~stricken~~.
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Senate Enrolled Bill
Enrolled bill is the version passed in identical form by both houses of the Legislature.

Bill Analysis

Senate Fiscal Analysis

SUMMARY OF INTRODUCED BILL IN COMMITTEE (Date Completed: 6-24-20)
This document analyzes: SB0681, SB0682

History

(House actions in lowercase, Senate actions in UPPERCASE)

Date ▲	Journal	Action
12/5/2019	SJ 113 Pg. 1708	INTRODUCED BY SENATOR PETER J. LUCIDO
12/5/2019	SJ 113 Pg. 1708	REFERRED TO COMMITTEE ON JUDICIARY AND PUBLIC SAFETY

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SENATE BILL NO. 682

December 05, 2019, Introduced by Senators LUCIDO, IRWIN, BAYER, POLEHANKI, ALEXANDER, CHANG, GEISS, BULLOCK, MCMORROW and SANTANA and referred to the Committee on Judiciary and Public Safety.

A bill to amend 1939 PA 288, entitled
"Probate code of 1939,"

by amending section 28 of chapter XIIA (MCL 712A.28), as amended by 1998 PA 478.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

CHAPTER XIIA

Sec. 28. (1) Before June 1, 1988, the court shall maintain records of all cases brought before it and as provided in the juvenile diversion act. The records shall be open only by court order to persons having a legitimate interest, except that diversion records shall be open only as provided in the juvenile diversion act.

(2) Beginning June 1, 1988, the court shall maintain records of all cases brought before it and as provided in the juvenile diversion act. Except as otherwise provided in this subsection, **until December 31, 2020,** records of a case brought before the court ~~shall be~~ **are** open to the general public. Diversion records ~~shall be~~ **are** open only as provided in the juvenile diversion act. Except as otherwise provided in section 49 of the **William Van Regenmorter** crime victim's rights act, 1985 PA 87, MCL 780.799, if the hearing of a case brought before the court is closed under section 17 of this chapter, the records of that hearing ~~shall be~~ **are** open only by court order to persons having a legitimate interest.

(3) Beginning January 1, 2021, records of a case brought before the court are not open to the general public. Diversion records are open only as provided in the juvenile diversion act. Except as otherwise provided in section 49 of the William Van Regenmorter crime victim's rights act, 1985 PA 87, MCL 780.799, if the hearing of a case brought before the court is closed under section 17 of this chapter, the records of that hearing are open only by court order to persons having a legitimate interest.

(4) ~~(3)~~ If the court issues an order in respect to payments by a parent under section 18(2) of this chapter, a copy ~~shall~~ **must** be mailed to the department of treasury. Action taken against parents or adults shall not be released for publicity unless the parents or adults are found guilty of contempt of court. The court shall furnish the ~~family independence agency~~ **department** and a county juvenile agency with reports of the administration of the court in a form recommended by the ~~Michigan association of probate and juvenile court judges.~~ **Michigan Probate Judges Association.** Copies of these reports shall, upon request, be made available to other state departments by the ~~family independence agency~~ **department.**

(5) ~~(4)~~ As used in this section:

(a) "Juvenile diversion act" means the juvenile diversion act, 1988 PA 13, MCL 722.821 to 722.831.

(b) "Persons having a legitimate interest" includes ~~a member of a local foster care review board established under 1984 PA 422, MCL 722.131 to 722.139a.~~ **the juvenile, the juvenile's parent, the juvenile's guardian or legal custodian, the guardian ad litem, counsel for the**

juvenile, the department if related to an investigation of child neglect or child abuse, law enforcement personnel, a prosecutor, and a court of this state.

Senate Fiscal Agency
P.O. Box 30036
Lansing, Michigan 48909-7536

Telephone: (517) 373-5383
Fax: (517) 373-1986

Senate Bills 681 and 682 (as introduced 12-5-19)
Sponsor: Senator Jeff Irwin (S.B. 681)
Senator Peter J. Lucido (S.B. 682)
Committee: Judiciary and Public Safety

Date Completed: 6-24-20

CONTENT

Senate Bill 681 would amend the juvenile code to do the following:

- **Delete a provision prohibiting a person from applying to have set aside, and a judge from setting aside, an adjudication for a traffic offense under the Michigan Vehicle Code, or a local ordinance substantially corresponding to the Vehicle Code, that involves the operation of a vehicle and at the time of the violation is a felony of misdemeanor.**
- **Modify a provision specifying when an application to set aside an adjudication may be filed.**
- **Require the adjudicating court to locate, upon application, any court records or documents necessary to conduct a hearing on the application.**
- **Delete a provision requiring a copy of an application and a $25 fee be submitted to the Department of State Police (MSP).**
- **Specify that if the Attorney General or prosecuting attorney wished to contest an application they would have 35 days after service or after the application was completed.**
- **Require an adjudication be set aside without filing an application two years after the termination of court supervision or when the individual turned 18 years of age, whichever was later.**
- **Prohibit the Attorney General and the prosecuting attorney from contesting the setting aside of an adjudication without application.**
- **Specify that, upon the entry of an order to set aside an adjudication, the person would not be considered to have been previously adjudicated, except as otherwise provided.**
- **Require the MSP to retain a nonpublic record of the order setting aside an adjudication and the record of arrest, fingerprints, adjudication, and disposition of the person in the case to which the order applied.**
- **Specify that the nonpublic record would have to be made available only to certain government entities for certain specified purposes.**
- **Specify that a person, other than the applicant, who knew or should have known that an adjudication was set aside and who divulged, used, or published information concerning an adjudication set aside would be guilty of a misdemeanor.**

Senate Bill 682 would amend the juvenile code to do the following:

- **Specify that a provision requiring records of a case brought before the court be open to the general public would apply only until December 31, 2020.**
- **Specify that, beginning January 1, 2021, records of a case brought before the court would not be open to the general public.**
- **Modify the definition of "persons having a legitimate interest".**

Senate Bill 681

Setting Aside Adjudication by Application

Generally, the juvenile code specifies that a person who has been adjudicated of not more than one juvenile offense that would be a felony if committed by an adult and not more than three juvenile offenses, of which not more than one may be a juvenile offense that would be a felony if committed by an adult, and who has no felony convictions may file an application with the adjudicating court for the entry of an order setting aside an adjudication.

A person may not apply to have set aside, and a judge may not set aside, either of the following:

- An adjudication for an offense that if committed by an adult would be felony for which the maximum punishment is life imprisonment.
- A conviction under Section 2d of the code (Section 2d generally governs juveniles to be tried as adults).

This provision does not prevent a person convicted under Section 2d from having that conviction set aside as otherwise provided by law.

Additionally, a person may not apply to have set aside, and a judge may not set aside, an adjudication for a traffic offense under the Michigan Vehicle Code, or a local ordnance substantially corresponding to the Vehicle Code, that involves the operation of a vehicle and at the time of the violation is a felony or misdemeanor. The bill would delete this provision.

Under the code, an application to set aside an adjudication may not be filed until one year following imposition of the disposition for the adjudication that the applicant seeks to set aside, or one year following the completion of any term of detention for that adjudication, or when the person reaches 18 years of age, whichever occurs later. Instead, under the bill, an application to set aside an adjudication could not be filed until one year after the termination of court supervision.

The code specifies that an application to set aside an adjudication is not valid unless it contains certain information, including a certified record of the adjudication that was to be set aside, and is signed under oath by the person whose adjudication is to be set aside. The bill would delete the reference to a certified record of the adjudication that is to be set aside. Also, upon application, the adjudicating court or adjudicating courts would have to locate any court records or documents necessary to conduct a hearing on the application.

The code requires an applicant to submit a copy of the application and two complete sets of fingerprints to the MSP.

The copy of the application submitted to the MSP must be accompanied by a $25 fee payable to the State of Michigan. The MSP must use the fee to defray the expenses incurred in processing the application. The bill would delete this provision.

The code also requires a copy of the application to be served upon the Attorney General and, if applicable, upon the office of the prosecuting attorney who prosecuted the offense. The Attorney General and the prosecuting attorney must have an opportunity to contest the application. Under the bill, if the Attorney General or prosecuting attorney wished to contest the application, they would have to do so within 35 days after service or the application was completed.

Setting Aside Adjudication without Application

Under the bill, except as otherwise provided, an adjudication would have to be set aside without filing an application two years after the termination of court supervision or when the individual turned 18 years of age, whichever was later. This requirement would not apply to an adjudication for an offense that if committed by an adult would be a felony for which the maximum punishment was life imprisonment or to an adjudication for a conviction under which the juvenile was to be tried in the same manner as an adult.

The Attorney General and the prosecuting attorney who prosecuted the offense could not contest the setting aside of an adjudication without an application.

After the entry of an order to set aside an adjudication, the person would be considered not to have been previously adjudicated, except as otherwise provided below and as follows:

-- The person would not be entitled to the remission of any fine, costs, or other money paid as a consequence of an adjudication that was set aside.
-- This provision would not affect the right of the person to rely on the adjudication to bar subsequent proceedings for the same offense.
-- This provision would not affect the right of a victim of an offense to prosecute or defend a civil action for damages.
-- This provision would not create a right to commence an action for damages for detention under the disposition that the person served before the adjudication was set aside.

After the entry of an order to set aside an adjudication, the court would have to send a copy of the order to the arresting agency and the MSP. The MSP would have to retain a nonpublic record of the order setting aside an adjudication for a juvenile offense and of the record of the arrest, fingerprints, adjudication, and disposition of the person in the case to which the order applied. Except as otherwise provided below, the nonpublic record would have to be made available only to a court of competent jurisdiction, an agency of the judicial branch of State government, a law enforcement agency, a prosecuting attorney, the Attorney General, or the Governor upon request and only for the following purposes:

-- Consideration in a licensing function by an agency of the judicial branch of State government.
-- Consideration by a law enforcement agency if a person whose adjudication had been set aside applied for employment with the law enforcement agency.
-- The court's consideration in determining the sentence to be imposed after conviction for a subsequent offense that was punishable as a felony or by imprisonment for up to one year.
-- Consideration by the Governor, if a person whose adjudication had been set aside applied for a pardon for another offense.

A copy of the nonpublic record would have to be provided to a person whose adjudication was set aside upon payment of a fee determined and charged by the MSP in the same manner as the fee prescribed in Section 4 of the Freedom of Information Act (FOIA). The nonpublic record would be exempt from disclosure under FOIA.

Except as otherwise provided, a person, other than the applicant, who knew or should have known that an adjudication was set aside and who divulged, used, or published information concerning an adjudication set aside would be guilty of a misdemeanor.

Senate Bill 682

The juvenile code requires a court to maintain records of all cases brought before it and as provided in the Juvenile Diversion Act. Except as otherwise provided, records of a case brought before the court are open to the general public. Under the bill, this provision would apply until December 31, 2020.

Additionally, under the bill, beginning January 1, 2021, records of a case brought before the court would not be open to the general public. Diversion records would be open only as provided in the Juvenile Diversion Act. Except as provided in Section 49 of the Crime Victim's Rights Act, if the hearing of a case brought before the court were closed under Section 17 of the code, the records of that hearing would be open only by court order to persons having a legitimate interest.

Under the code, "persons having a legitimate interest" includes a member of a local foster care review board established under Public Act 422 of 1984. Instead, under the bill, the term would include the juvenile, the juvenile's parent, the juvenile's guardian or legal custodian, the guardian ad litem, counsel for the juvenile, the Department of Health and Human Services if related to an investigation of child neglect or child abuse, law enforcement personnel, a prosecutor, and a Michigan court.

MCL 712A.18e et al. (S.B. 681)
712A.28

Legislative Analyst: Stephen Jackson

FISCAL IMPACT

Senate Bill 681

The bill would have an indeterminate, though likely negative, fiscal impact on local courts.

Additional costs would come from the cost of record recovery when a court received an application to set aside a minor's adjudication or conviction. Under current statute, the applicant must provide a certified copy of the criminal record to be included with the application to set aside the adjudication or conviction. The bill would shift the responsibility to provide records to the adjudicating court system, which would have to recover them, potentially from multiple State agencies, after receiving a valid application.

Additionally, an insignificant amount of revenue would be lost from the removal of the $25 fee currently required to accompany an application. The bill would remove this fee, which is statutorily dedicated to MSP for the cost of processing an application to set aside a conviction or adjudication. Only $3,525 in fees were collected in 2019.

The bill also would add an automatic procedure by which a minor's adjudication or conviction would be set aside two years after the termination of supervision. It is not clear if local courts have systems in place to set aside these adjudications or convictions automatically. Additional costs would be likely if these systems had to be implemented.

Additional costs would be incurred when adjudications or convictions were set aside, as the bill would require copies to be sent to arresting agencies and the MSP.

Additionally, new misdemeanor arrests and convictions under the bill could increase resource demands on law enforcement, court systems, community supervision, and jails. However, it is unknown how many people would be prosecuted under the bill's provisions. Any additional revenue from imposed fines would go to local libraries.

Senate Bill 682

Minor costs would be likely as a result of the bill's language. While the bill would restrict access to certain criminal records, the State and local court systems could have to amend or update current record-keeping processes to ensure compliance with the proposed statutory language.

Fiscal Analyst: Bruce Baker
Joe Carrasco
Michael Siracuse

SAS\S1920\s681sa
This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.

Public Policy Position
SB 0682

Support

Explanation

The committee voted unanimously to support the legislation. Justice-involved juveniles should be afforded significant privacy protections, especially where their charges are deferred or dismissed. The definition of "persons have a legitimate interest" in SB682 is expanded to include "the juvenile, the juvenile's parent, the juvenile's guardian or legal custodian, the guardian ad litem, counsel for the juvenile, the department if related to an investigation of child neglect or child abuse, law enforcement personnel, a prosecutor, and a court of this state." As a result, the legislation strikes a good balance between critical privacy interests and accessibility where necessary.

Position Vote:

Voted For position: 20
Voted against position: 0
Abstained from vote: 0
Did not vote (due to absence): 7

***Keller* Permissibility:**

The committee agrees that the legislation is *Keller*-permissible in providing additional privacy protections for juveniles as well as continuing to permit necessary individuals the ability access legal records. Defining who has access to documents improves the function of the courts and the availability of legal services to society.

Contact Persons:

Lorray S.C. Brown lorrayb@mplp.org
Valerie R. Newman vnewman@waynecounty.com

Juvenile Law Center
Fighting for the rights and well-being of youth

1800 JFK Boulevard, Ste. 1900B
Philadelphia, PA 19103
215-625-0551 / 800-875-8887
215-625-2808 fax
www.jlc.org

June 24, 2020

Senator Peter J. Lucido
c/o Jackie Mosher, Committee Clerk
Judiciary and Public Safety Committee
Room 1100, Binsfeld Office Building
201 Townsend Street, Lansing, MI 48933

Re: Senate Bills 681 & 682, Legislation to Increase Confidentiality Protections for Juvenile Records

Dear Senator Lucido and Members of the Senate Committee on Judiciary and Public Safety,

We write to express our strong support for SB 681 and SB 682, legislation that will significantly improve confidentiality protections for juvenile records in Michigan. When we published our national scorecard in 2014, measuring states against our core principles for optimal record protection, Michigan ranked near the bottom in terms of record confidentiality. While most states have some guarantee of non-public records for youth, Michigan does not. Youth records are available upon request from the adjudicating court, and in some cases, a youth's court date, time, and hearing location are accessible online. The ready availability of records can pose substantial and debilitating collateral consequences for youth. These two Bills are an important step in providing children who have come into contact with the law an opportunity to improve their chances at a productive future.

Juvenile Law Center advocates for rights, dignity, equity and opportunity for youth in the child welfare and justice systems through litigation, appellate advocacy and submission of amicus briefs, policy reform, public education, training, consulting, and strategic communications. Founded in 1975, Juvenile Law Center is the first non-profit, public interest law firm for children in the country. Juvenile Law Center strives to ensure that laws, policies, and practices affecting youth advance racial and economic equity and are rooted in research, consistent with children's unique developmental characteristics, and reflective of international human rights values.

The negative consequences of court involvement fall disproportionately on youth of color and reinforce the pervasive racism in our justice system. Black youth are five times more likely to be arrested and incarcerated than white youth. Over-policing of communities of color, increased police presence in schools, and historical and structural bias at every point in the justice system all contribute to persistent racial disparities. Juvenile records limit future opportunities and perpetuate mass incarceration of people of color while sustaining ongoing cycles of poverty.

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Co-Founder and Executive Director Emeritus

Research confirms that having a publicly accessible record is a hindrance to future employment. The use of juvenile records in the hiring process has not only the short-term effect of limiting a youth's employment possibilities, but also long term effects such as lower rates of employment through adulthood. While most employers run background checks on job applicants, many employers have reported that they would likely not hire an applicant with a criminal record. Having a record can also bar a youth from certain licenses required for professional employment or joining the military.

Juvenile records also lower a youth's chances of obtaining higher education. College applications typically include inquiries about criminal history. These questions can result in applicant attrition or denial of admission. While both public and private institutions ask about criminal history, private and four-year colleges and universities are most likely to include a question about criminal or disciplinary backgrounds in their applications. While many youth become discouraged by such questions from even completing and applying to college, colleges and universities use these records as either a strike against an applicant's candidacy or a reason to outright deny admission.

Although most youth are eligible for setting aside the record of their juvenile adjudications, there are significant barriers to completing the application process. Many people believe a youth's juvenile record is automatically sealed once they complete their court-ordered sanctions or once the youth turns 18, however, this is not the case. The current application process to have a juvenile adjudication set aside in Michigan is convoluted, confusing, and costly. Many youth and their families do not have the time or money to take on the task of setting aside a youth record. The proposed legislation will streamline the process by providing an automatic set aside after a specified period of time, in addition to strengthening protections for juvenile record confidentiality.

For the reasons stated above, we strongly encourage your support of these Bills.

Sincerely,

Susan Vivian Mangold, Esq.
Chief Executive Operator

Andrew Rosenthal Keats, Esq.
Staff Attorney

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Suite 900
Washington, D.C. 20005
202-525-5717

Free Markets. Real Solutions.
www.rstreet.org

Statement of Support
Emily Mooney, Resident Policy Fellow, Criminal Justice & Civil Liberties, R Street Institute
Jesse Kelley, Government Affairs Manager, Criminal Justice & Civil Liberties, R Street Institute

In SUPPORT of Senate Bills 681 and 682

June 24, 2020

Senate Judiciary and Public Safety Committee

Chairman and members of the committee:

As an institution deeply committed to limited, effective government, we at the R Street Institute strongly support legislation that seeks to keep juvenile records confidential and thus limit the lifetime harms associated with such records.

For one, juvenile records can bar young people from accessing education long after they've been adjudicated delinquent.[1] Many institutions filter applicants through the "Common Application" which asks about the applicant's criminal history, and colleges and universities have been known to dismiss potential applicants based on their criminal records. Even when a student is accepted and welcomed into a university, those adjudicated for certain drug offenses may struggle to afford school due to temporary disqualification from federal tuition assistance.

Juvenile records can also lock youth out of the employment opportunities necessary for their future success. They can disqualify youth from receiving professional licensing or serving our nation in the military. And when young people have publicly accessible records, they may be discounted from private employment opportunities without having the chance to explain their past or present circumstances.

While the overwhelming majority of states have taken steps to protect young people from such consequences, Michigan is one of less than ten states that allow the public to access most juvenile records.[2] In some counties, finding a young person's record takes little to no effort: A simple Google search can divulge a young person's name, case number, type of hearing, and the time and location of their appearance in court. Even when information is not easily found on Google, individuals can solicit it by making a request to the court.

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[1]Riya Shah and Jean Strout, "Future Interrupted: The Collateral Damage Caused by Proliferation of Juvenile Records," Juvenile Law Center, February 2016, pp. 10-11. https://juvenilerecords.jlc. org/juvenilerecords/documents/publications/future-interrupted.pdf.
[2]Joy Radice, "The Juvenile Record Myth," *The Georgetown Law Journal* 106 (2018), p. 401. https://www.law.georgetown.edu/georgetown-law-journal/wp-content/uploads/sites/26/2018/02/zt100218000365.pdf.

Fortunately, many young people in Michigan are eligible to have their record "set-aside" (cleared). However, the current process for having a juvenile adjudication set aside is confusing, complex, time-intensive and cost-inhibitive. Even if a young person successfully clears their adjudication, any publicized accounts of their court records can remain online. More needs to be done.

Senate Bills 681 and 682 will improve juvenile confidentiality, and thus young people's ability to obtain a second chance, by ensuring that no juvenile records are publicly available as of January 1, 2021. Rather, access to these records will be limited to those individuals who could actually make use of such information in a productive manner: parents or guardians, law enforcement, prosecutors, the courts, and the Department of Health and Human Services during investigations of child abuse or neglect.

This proposal would build upon this protection by removing the current age requirement to be eligible for setting aside a juvenile record; and by creating a new, streamlined, automatic set-aside process. This process would allow for automatic set-asides for young people whose cases were closed two years ago or for those who have turned 18, depending on which is later, without any cost to the individual or their loved ones. Only adjudications for felony traffic and serious, violent offenses would be ineligible.

This legislative package presents Michigan with the chance to do right by young Michiganders and ensure that government responses to youthful indiscretions do not inflict life-long penalties on education, employment and community socialization. By automating the set-aside process for eligible cases and making all juvenile records non-public, this proposal will improve the ability of young people to claim a second chance.

Thank you for your consideration,

Emily Mooney
R Street Institute
emooney@rstreet.org

Jesse Kelley
R Street Institute
jkelley@rstreet.org

STATE BAR OF MICHIGAN

To: Members of the Public Policy Committee
Board of Commissioners

From: Governmental Relations Staff

Date: July 15, 2020

Re: SB 0865 – Cellular Telephones in Courtrooms

Background
Senate Bill 0865 seeks to codify many of the same elements contained in the recently adopted Supreme Court Rule 8.115 (ADM 2018-30) governing the use of portable electronic communication devices (including cell phones) in courthouses and courtrooms. The Board of Commissioners supported the adoption of ADM 2018-30 at its July 26, 2019 meeting. In its August 29, 2019 letter the Court, the Board noted that the rule amendments would allow for a "consistent portable electronic device policy across courts and allow non-attorneys access to such devices." The Board, in recognition of the proliferation of electronic devices, supported individuals' need "to communicate and store vital information, such as documents they may need in court, calendar and contact information, and texts that are relevant to their cases." SB 0865, using language similar or identical to that appearing in MCR 8.115, would broadly control allowable and prohibited uses of electronic communication devices in courthouses and courtrooms.

***Keller* Considerations**
The simplest observation is that if the subject matter is determined to be *Keller*-permissible in relation to MCR 8.115, it must also be *Keller*-permissible subject matter in the context of legislation.

The Access to Justice Policy, Civil Procedure & Courts Committee, and Criminal Jurisprudence & Practice Committee found this legislation to be *Keller*-permissible as it affects the functioning of the courts. Society's use of and reliance upon electronic devices, particularly cellular phones, is ubiquitous and far-reaching. Without access to cellular phones in courtrooms and courthouses, individuals and attorneys may be unable to access necessary documents, communicate effectively, and share and receive information necessary to a case. To the extent that information flows more readily within the walls of a courthouse, a court's function is improved.

Allowing devices in the courtroom also improves the availability of legal services to society. Parties benefit by being able to access and share needed documents, communicate with their attorneys in real time, and schedule effectively – all of which are tasks that typically done electronically in today's world. By allowing parties to quickly and efficiently share, send, and receive documents and information electronically, the provision of legal services is improved.

Keller Quick Guide

	THE TWO PERMISSIBLE SUBJECT-AREAS UNDER *KELLER*: Regulation of Legal Profession	Improvement in Quality of Legal Services
As interpreted by AO 2004-1	• Regulation and discipline of attorneys • Ethics • Lawyer competency • Integrity of the Legal Profession • Regulation of attorney trust accounts	✓ Improvement in functioning of the courts ✓ Availability of legal services to society

Staff Recommendation

SB 0865 is *Keller*-permissible and may be considered on its merits.

MICHIGAN LEGISLATURE(www.legislature.mi.gov)
Printed on Thursday, July 2, 2020
Michigan Compiled Laws Complete Through PA 101 of 2020

Senate Bill 0865 (2020) rss?

Friendly Link: http://legislature.mi.gov/doc.aspx?2020-SB-0865

Sponsor
Peter Lucido (district 8)
(click name to see bills sponsored by that person)

Categories
Courts: other; Communications: cellular telephone;

Courts; other; procedures and regulations related cellular telephones in courtrooms; provide restrictions and penalties. Amends 1961 PA 236 (MCL 600.101 - 600.9947) by adding sec. 1746.

Bill Documents
Bill Document Formatting Information
[x]
The following bill formatting applies to the 2019-2020 session:
- New language in an amendatory bill will be shown in **BOLD AND UPPERCASE.**
- Language to be removed will be ~~stricken~~.
- Amendments made by the House will be blue with square brackets, such as: [House amended text].
- Amendments made by the Senate will be red with double greater/lesser than symbols, such as: <<Senate amended text>>.

(gray icons indicate that the action did not occur or that the document is not available)

Documents

Senate Introduced Bill
Introduced bills appear as they were introduced and reflect no subsequent amendments or changes.

As Passed by the Senate
As Passed by the Senate is the bill, as introduced, that includes any adopted Senate amendments.

As Passed by the House
As Passed by the House is the bill, as received from the Senate, that includes any adopted House amendments.

Senate Enrolled Bill
Enrolled bill is the version passed in identical form by both houses of the Legislature.

Bill Analysis

History
(House actions in lowercase, Senate actions in UPPERCASE)

Date ▲	Journal	Action
4/24/2020	SJ 33 Pg. 549	INTRODUCED BY SENATOR PETER J. LUCIDO
4/24/2020	SJ 33 Pg. 549	REFERRED TO COMMITTEE ON JUDICIARY AND PUBLIC SAFETY

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SENATE BILL NO. 865

April 24, 2020, Introduced by Senator LUCIDO and referred to the Committee on Judiciary and Public Safety.

A bill to amend 1961 PA 236, entitled
"Revised judicature act of 1961,"

(MCL 600.101 to 600.9947) by adding section 1746.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 1746. (1) Except as otherwise provided in this section, an individual may possess and use a portable electronic device in a courthouse.

(2) This section is subject to the authority of the court, clerks of the court, and court administrators to limit or terminate any activity that disrupts court operations, compromises courthouse security, or is contrary to the administration of justice.

(3) An individual shall not use a portable electronic device to photograph, record, broadcast, or live stream any juror or anyone called to the court for jury service. An individual may use a portable electronic device to photograph, record, broadcast, or live stream in a courthouse only as follows:

(a) In a courtroom if allowed by the presiding judge.

(b) In areas of the courthouse other than a courtroom with an individual's express prior consent to the photographing, recording, broadcasting, or live streaming of the individual.

(4) Subject to subsection (3), the court may adopt additional, reasonable limits on an individual's ability to photograph, record, broadcast, or live stream in a courthouse by local administrative order.

(5) A juror or prospective juror may possess and use a portable electronic device, subject to the following limitations:

(a) A portable electronic device must be turned off while present in a courtroom.

(b) If the court provides jurors with a phone number where the jurors can be reached in an emergency during deliberations, the court may require jurors to turn over their portable electronic device to the court during deliberations.

(6) A witness may possess and use a portable electronic device, subject to the following limitations:

(a) A portable electronic device must be silenced while in a courtroom.

(b) A portable electronic device may only be used by a witness while he or she is testifying with permission of the presiding judge.

(7) An individual shall not use a portable electronic device to communicate in any way with any courtroom participant including, but not limited to, a party, a witness, or a juror at any time during any court proceeding.

(8) An attorney, party, or member of the public may use portable electronic devices for the following purposes:

(a) In a courtroom to retrieve or to store information, including note taking, to access the internet, and to send and receive text messages or information, if all audible sounds have been silenced.

(b) In a courtroom to make or to receive telephone calls or for any other audible function

Firefox

while court is in session, with permission of the presiding judge.

(c) In a clerk's office to reproduce a public court document, if the device leaves no mark or impression on the document and does not unreasonably interfere with the operation of the clerk's office.

(9) The court shall use reasonable means, including posting the notice on the website, to advise courthouse visitors of the requirements of this section.

(10) This section does not modify or supersede the guidelines for media coverage of court proceedings set forth by supreme court administrative order, Administrative Order No. 1989-1.

(11) A violation of this section is punishable by sanctions as determined by the court, including, but not limited to:

(a) Contempt of court under this chapter.

(b) Confiscation of the portable electronic device from an individual for a time period not to exceed the remainder of the court day.

(c) An order that the portable electronic device be turned off, put in a location as determined by the court, or both.

(12) As used in this section:

(a) "Courthouse" includes, but is not limited to, all courtrooms, areas within the exterior walls of a court building, or if the court does not occupy the entire building, that portion of the building used for the administration and operation of the court, and areas outside a court building where a judge conducts an event concerning a court case.

(b) "Courtroom" means the portion of a courthouse where judicial proceedings take place.

(c) "Portable electronic device" means a mobile device capable of electronically storing, accessing, or transmitting information, including, but not limited to a transportable computer of any size, including a tablet, notebook, and laptop, a smart phone, cell phone, or other wireless phone, a camera, audio or video recording devices, a personal digital assistant, other devices that provide internet access, and any similar item.

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

Public Policy Position
SB 0865

Oppose

Explanation
The committee voted unanimously to oppose the legislation. The committee opposes the legislation because: 1) it represents impermissible legislative encroachment on the discretion of the court; and 2) a recent amendment of Rule 8.115 of the Michigan Court Rules, effective May 1, 2020, already addresses the use of cellular telephones in the court room, thereby making this legislation unnecessary and potentially overreaching.

Position Vote:
Voted for position: 15
Voted against position: 0
Abstained from vote: 0
Did not vote (due to absence): 12

***Keller* Permissibility:**
The committee agreed that the legislation is *Keller* permissible because it affects the functioning of the courts.

Contact Persons:
Lorray S.C. Brown lorrayb@mplp.org
Valerie R. Newman vnewman@waynecounty.com

Public Policy Position
SB 0865

Oppose

Explanation
The committee unanimously opposes SB 0865. The committee opposes the legislation because the Michigan Supreme Court has already adopted rules to address electronic devices in courts.

Position Vote:
Voted For position: 20
Voted against position: 0
Abstained from vote: 0
Did not vote (due to absence): 7

***Keller* Permissibility:**
SB 0865 is *Keller* permissible as it affects the functioning of the courts.

Contact Person: Randy J. Wallace
Email: rwallace@olsmanlaw.com

Public Policy Position
SB 0865

Oppose

Explanation
The committee opposes SB 0865. The committee opposes the legislation because a recent amendment of Rule 8.115 of the Michigan Court Rules, effective May 1, 2020, already addresses the use of cellular telephones in the court room. The legislation seeks to govern an issue that is regulated by the judicial branch and, as such, would represent an unnecessary intrusion into the judiciary's province.

Position Vote:
Voted For position: 12
Voted against position: 2
Abstained from vote: 0
Did not vote (absent): 7

***Keller* Permissibility:**
The legislation is *Keller* permissible in that it affects the functioning of the courts.

Contact Persons:
Mark A. Holsomback mahols@kalcounty.com
Sofia V. Nelson snelson@sado.org

SBM
State Bar of Michigan

FAMILY LAW SECTION

Public Policy Position
SB 0865

Oppose

Explanation:
This bill will allow individuals to bring a cell phone into courthouses, subject to rules and limitations placed by presiding judges. This seems to follow the Michigan Supreme Court amendment to court rules in January of this year, which were to take effect by May 1st. But codifying that court rule into statute seems to be legislative overreach on the operation and function of the court. The Section viewed this bill as an erosion of the separation of powers since what can and cannot be brought into a courtroom was with the authority of the judiciary not the legislature. The Administrative Order earlier this year changed the rule statewide as to cell phones and electronic devices in a courthouse, but if modifications to that order become necessary over time, the Supreme Court should be able to do so without legislative action.

Position Vote:
Voted For position: 19
Voted against position: 0
Abstained from vote: 1
Did not vote (absent): 1

***Keller* Permissibility:**
The ability of the public to bring electronic devices, including phones, into courthouses has a direct impact on the functioning of the courts. The Supreme Court issued an administrative order allowing cell phones in courts.

Contact Person: James Chryssikos
Email: jwc@chryssikoslaw.com

From: State Bar of Michigan
To: Peter Cunningham; Carrie Sharlow; Do-Not-Reply
Subject: Public Policy Member Comments [#15]
Date: Wednesday, July 8, 2020 4:15:20 PM

Member Name: *	Peter Conway
E-mail: *	pete@peterconwaylawyer.com
Bill Number:	SB 0865
Comment:	This bill would affect the ability of the Supreme Court to govern how courts should operate. There has been no showing that the Supreme Court cannot adequately and properly decide on permitting cell phones and other devices to be used, under certain circumstances, in court. This bill is a solution in search of a problem. The State Bar of Michigan should oppose it.
May the State Bar post your comment on its website?	Yes
May a member of the State Bar contact you concerning this comment?	Yes

S T A T E B A R O F M I C H I G A N

To: Members of the Public Policy Committee
Board of Commissioners

From: Governmental Relations Staff

Date: July 16, 2020

Re: SB 0895 – Revising the Procedure for Granting a New Trial

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Background
SB 0895 would alter the process for parties filing relief from judgment motions. The legislation is intended to be remedial. It would apply to a party seeking relief from a jury verdict more than 21-days after entry of judgment on the grounds set forth in Section 1473(C)(3) of the bill. Grounds for relief under the legislation would include, but would not be limited to, "mistake, inadvertence . . . [and] fraud."[1] The bill adopts much of its language from MCR 2.612 –*Relief From Judgment or Order*. For example, Section (2) of the legislation largely mirrors that of MCR 2.612(C), listing many of the same grounds upon which relief from a jury verdict could be sought.

SB 0895 would not supplant MCR 2.612, but it would significantly alter the process by which an individual would obtain relief from a judgment. Specifically, the bill would impose the following procedural elements:

- require the application of a "clear and convincing" burden of proof standard to every aspect of a relief for judgment request, and not simply to those requests based on allegations of fraud;
- mandate an evidentiary hearing on motions requested by the opposing party; and
- require that a possible total of six additional judges become involved in the review and/or adjudication stages of a motion for relief from judgment.

The bill would also affect the burdens borne by the parties for costs and reasonable attorney fees. If a reviewing panel were to order a new trial pursuant to an order granting relief from judgment, proposed Section 1473 (C)(8) would control. The subsection provides that it "is against public policy of this state" to enforce contract provisions that would require the prevailing party in a new trial to extract costs and attorney fees from the non-moving party, if the non-moving party "did not prevail in the original action."[2]

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[1] 2020 SB 0895, Sec. 1473(C)(2) "applies only to circumstances in which a party seeks relief from a circuit court judgment based on a jury verdict more than 21 days after entry of judgment on the grounds of mistake; inadvertence, surprise, or excusable neglect; of newly discovered evidence; **of fraud**, misrepresentation, or other misconduct of an adverse party; or for another reason that the party believes justifies relief from the operation of judgment." [emphasis added]
[2] 2020 SG 0895, Sec. 1473 (C)(8).

SBM staff recently participated in workgroup meeting with the sponsor in an effort to better understand the legislation. The sponsor confirmed that the bill is intended to apply only to civil cases and has pledged to clarify this ambiguity in a future substitute version of the bill.

Keller Considerations

The Civil Procedure & Courts Committee found SB 0895 to be *Keller*-permissible because it affects the functioning of the courts. The Appellate Practice Section also found it to be *Keller*-permissible as it improves the functioning of the courts and the availability of legal services to society. This legislation affects the functioning of the courts by altering significantly the process by which parties seeking relief from judgment would have their motions reviewed. The bill would impact diverse aspects of court function including, but not limited to, the expanded scope of the burden of proof standard; the number of judges required to review and/or adjudicate matters related to a relief from judgment motion; and the frequency for which evidentiary hearings could be sought.

Keller Quick Guide

THE TWO PERMISSIBLE SUBJECT-AREAS UNDER *KELLER*:		
	Regulation of Legal Profession	**Improvement in Quality of Legal Services**
As interpreted by AO 2004-1	• Regulation and discipline of attorneys • Ethics • Lawyer competency • Integrity of the Legal Profession • Regulation of attorney trust accounts	✓ Improvement in functioning of the courts ✓ Availability of legal services to society

Staff Recommendation

The bill satisfies the requirements of *Keller* and may be considered on its merit.

MICHIGAN LEGISLATURE(www.legislature.mi.gov)
Printed on Thursday, July 2, 2020
Michigan Compiled Laws Complete Through PA 101 of 2020

Senate Bill 0895 (2020) rss?

Friendly Link: http://legislature.mi.gov/doc.aspx?2020-SB-0895

Sponsor
Jim Runestad (district 15)
(click name to see bills sponsored by that person)

Categories
Civil procedure: other;

Civil procedure; other; new trial; revise procedure for granting. Amends 1961 PA 236 (MCL 600.101 - 600.9947).

Bill Documents
Bill Document Formatting Information
[x]
The following bill formatting applies to the 2019-2020 session:
- New language in an amendatory bill will be shown in **BOLD AND UPPERCASE.**
- Language to be removed will be ~~stricken~~.
- Amendments made by the House will be blue with square brackets, such as: [House amended text].
- Amendments made by the Senate will be red with double greater/lesser than symbols, such as: <<Senate amended text>>.

(gray icons indicate that the action did not occur or that the document is not available)

Documents

Senate Introduced Bill
Introduced bills appear as they were introduced and reflect no subsequent amendments or changes.

As Passed by the Senate
As Passed by the Senate is the bill, as introduced, that includes any adopted Senate amendments.

As Passed by the House
As Passed by the House is the bill, as received from the Senate, that includes any adopted House amendments.

Senate Enrolled Bill
Enrolled bill is the version passed in identical form by both houses of the Legislature.

Bill Analysis

History
(House actions in lowercase, Senate actions in UPPERCASE)

Date ▲	Journal	Action
4/28/2020	SJ 34 Pg. 573	INTRODUCED BY SENATOR JIM RUNESTAD
4/28/2020	SJ 34 Pg. 573	REFERRED TO COMMITTEE ON JUDICIARY AND PUBLIC SAFETY

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SENATE BILL NO. 895

April 28, 2020, Introduced by Senator RUNESTAD and referred to the Committee on Judiciary and Public Safety.

A bill to amend 1961 PA 236, entitled
"Revised judicature act of 1961,"

(MCL 600.101 to 600.9947) by adding section 1473.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 1473. (1) The legislature finds both of the following:

(a) The right to trial by jury as preserved by the state constitution of 1963 is sacrosanct and the decisions of juries should not be lightly discarded.

(b) It is the public policy of this state that litigants be afforded the highest possible degree of certainty that jury verdicts will be respected and enforced.

(c) This section is intended to be remedial.

(2) This section applies only to circumstances in which a party seeks relief from a circuit court judgment based on a jury verdict more than 21 days after entry of the judgment on the grounds of mistake, inadvertence, surprise, or excusable neglect; of newly discovered evidence; of fraud, misrepresentation, or other misconduct of an adverse party; or that the judgment is void; or for another reason that the party believes justifies relief from the operation of the judgment.

(3) To obtain relief from a judgment under this section, a person must do all of the following:

(a) Demonstrate by clear and convincing evidence that the person is entitled to relief.

(b) Support the request for relief by describing all grounds justifying the relief, with affidavits or documentary evidence supporting each ground, and demonstrating a prima facie case for relief.

(4) A request for relief under this section must be reviewed and adjudicated by a three-judge panel of the circuit court or, for a circuit in which there are fewer than 3 circuit judges, by as many judges as is practical. The reviewing panel shall deny the request for relief unless 2 or more of the judges find clear and convincing evidence justifying the relief.

(5) The party opposing a request for relief from judgment under this section has the right to an evidentiary hearing. The evidentiary hearing must be limited to the grounds set out in the request for relief. After the completion of the evidentiary hearing, the reviewing panel shall issue detailed findings of facts and conclusions of law supporting its decision.

(6) If the reviewing panel denies a request for relief under this section, the requesting party shall pay the costs and reasonable attorney fees incurred by the party opposing the request for relief.

(7) An order granting relief from judgment under this section is subject to an immediate appeal of right to the court of appeals. Action in the circuit court must be stayed while the matter is on appeal.

(8) If a reviewing panel enters an order granting relief from judgment under this section and orders a new trial, it is against the public policy of this state to enforce a contract provision that requires a party that prevailed in the original trial to pay the costs or attorney fees of a party that did not prevail in the original action, even if the result is

different in the subsequent trial.

(9) If a reviewing panel enters an order granting relief from judgment under this section and orders a new trial, the action must be reassigned to a judge who has not participated in previous proceedings in the action.

(10) If a reviewing panel enters an order granting relief from judgment under this section and orders a new trial, the fact that a request for relief was made and granted, and the findings of the reviewing panel, are not admissible in evidence and must not be presented at the new trial. This subsection does not prohibit the admission of the factual evidence underlying the request for relief, if otherwise admissible.

(11) This section does not apply to an action to which section 6098 applies.

(12) This section applies retroactively to actions in which a request for relief from judgment was filed after May 31, 2019.

Public Policy Position
SB 0895

Oppose

Explanation
The committee strongly and unanimously opposes SB 0895. The committee opposes the bill because it represents an unnecessary attempt by the legislature to interfere with the court's ability as an equal branch of government to regulate its own procedures. Furthermore, if this bill were passed into law, it would likely be the subject of litigation.

Position Vote:
Voted For position: 20
Voted against position: 0
Abstained from vote: 0
Did not vote (due to absence): 7

***Keller* Permissibility:**
SB 0995 is *Keller* permissible because it affects the functioning of the courts.

Contact Person: Randy J. Wallace
Email: rwallace@olsmanlaw.com

Public Policy Position
SB 0895

Oppose

Explanation
The committee voted unanimously to oppose the legislation. The committee opposes the bill because the appellate process already provides the appropriate means for a party seeking relief from a judgment. Furthermore, the committee is concerned that unintended consequences may flow from this legislation by forestalling a party's ability to file certain motions, such as a MCR 6.500 motion. The legislation also suffers from vagueness; it is unclear who decides what constitutes "clear and convincing" evidence that a person is entitled to relief under the bill.

Position Vote:
Voted For position: 14
Voted against position: 0
Abstained from vote: 0
Did not vote (absent): 7

***Keller* Permissibility:**
The legislation is *Keller* permissible in increasing access to justice.

Contact Persons:
Mark A. Holsomback mahols@kalcounty.com
Sofia V. Nelson snelson@sado.org

Public Policy Position
SB 0895

Oppose

Explanation
The Section opposes SB 0895 for the reasons explained in the attached letter.

Position Vote:
Voted For position: 21
Voted against position: 0
Abstained from vote: 0
Did not vote (absent): 3

***Keller* Permissible:**
The improvement of the functioning of the courts
The availability of legal services to society

Contact Person: Bradley R. Hall
Email: bhall@sado.org

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June 5, 2020

State Bar of Michigan
Board of Commissioners
306 Townsend St
Lansing, MI 48933-2012

Re: Senate Bill No. 895

Dear Commissioners:

The State Bar of Michigan Board of Commissioners has invited comments on Senate Bill No. 895 from the Council for the Appellate Practice Section. By a unanimous vote, the Council has adopted the following comment in opposition to the Bill.

Overview of the Existing Process and Standards for Granting Relief from Judgment

Senate Bill No. 895 (2020) would dramatically alter the procedure that applies when a party files a motion for relief from judgment if:

(1) the judgment was based on a jury verdict;
(2) the request for relief is made more than 21 days after the judgment was entered; and
(3) the request is based on any of the grounds for relief from judgment stated in subsection (2) of the Bill.

The grounds for relief in subsection (2) mirror all but one of the grounds for relief from judgment under Michigan Court Rule 2.612(C). The grounds for relief in that court rule are divided into six categories (a) through (f). The Bill only mentions the grounds stated in categories (a), (b), (c), (d), and (f).

By way of background, MCR 2.612(C) provides an avenue for relief from judgment in civil cases after time has expired to request a judgment notwithstanding the verdict, a new trial, or reconsideration. These latter motions are the typical path for setting aside a jury's verdict and remain undisturbed by this Bill. A motion for relief from judgment is filed on the same docket as the judgment and therefore would typically be reviewed and decided by the same judge that entered the judgment or order. This would ordinarily be the same judge who presided over the trial and the only judge familiar with the record in the case. Except in highly unusual circumstances, the decision on a motion for relief from judgment may be appealed to the Court of Appeals only by leave granted.

The decision-making process for resolving a motion for relief from judgment is currently no different from any other motion. When there are disputed issues of fact that must be resolved to determine whether a party is entitled to relief, the court is not permitted to rely upon allegations alone. *Kiefer v Kiefer*, 212 Mich App 176, 179; 536 NW2d 873 (1995). The court will often hold an evidentiary hearing to resolve factual disputes. *Id*. But the court also may "hear the motion on affidavits presented by the parties, or may direct that the motion be heard wholly or partly on oral testimony or deposition." MCR 2.119(E)(2). In the context of a motion for relief from judgment based on fraud, the Court of Appeals has opined on the circuit court's discretion to dispense with a hearing as follows:

> While recognizing that the level of proof relating to allegations of fraud is "of the highest order," we believe that the trial court itself is best equipped to decide whether the positions of the parties (as defined by the motion and response, as well as by the background of the litigation) mandate a judicial assessment of the demeanor of particular witnesses in order to assess credibility as part of the fact-finding process. Some motions undoubtedly will require such an assessment, e.g., situations in which "swearing contests" between two or more witnesses are involved, with no externally analyzable indicia of truth. Other motions will not, e.g., situations in which ascertainable material facts are alleged, such as the contents of a bank account on a particular day. Where the truth of fraud allegations can be determined without reference to demeanor, we do not believe that the law requires a trial court to devote its limited resources to an in-person hearing.
>
> "Credibility" and "demeanor" are not synonymous. Demeanor may be one element in assessing a witness' credibility, but often demeanor plays no such role. Such things as motive to lie, lack of opportunity to observe, and prior inconsistent statements may be more important determinants of credibility. SJI2d 4.01; CJI2d 2.6.

Williams v Williams, 214 Mich App 391, 398–400; 542 NW2d 892 (1995).

Over the course of many decades, Michigan courts have established standards for granting relief under the various categories in MCR 2.612(C)(1). These standards are quite difficult to satisfy. For categories at issue here, the applicable standards are as follows:

(a) *Mistake, inadvertence, surprise, or excusable neglect.* Relief will only be granted "when the circumstances are extraordinary and the failure to grant the relief would result in substantial injustice." *Gillispie v Bd of Tenant Affairs of Detroit Hous Comm'n*, 145 Mich App 424, 428; 377 NW2d 864 (1985) (addressing GCR 1963, 528.3(1), which had language identical to MCR 2.612(C)(1)(a)). Negligence of a party or his attorney is not normally sufficient grounds for setting aside a default judgment under this rule. *Pascoe v Sova*, 209 Mich App 297, 298–299; 530 NW2d 781 (1995).

(b) *Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under MCR 2.611(B).* Four requirements must be met: "(1) the evidence, not simply its materiality, must be newly discovered, (2) the evidence must not be merely cumulative, (3) the newly discovered evidence must be such that it is likely to change the result, and (4) the party

moving for relief from judgment must be found to have not been able to produce the evidence with reasonable diligence." *S Macomb Disposal Auth v Am Ins Co*, 243 Mich App 647, 655; 625 NW2d 40 (2000). The moving party bears the burden of demonstrating that all four requirements are met. *Id.*

(c) *Fraud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.* The moving party must prove the existence of fraud by "clear and convincing evidence." *Kita v Matuszak*, 55 Mich App 288, 297; 222 NW2d 216 (1974).

(d) *The judgment is void.* This rule applies when the judgment was entered without jurisdiction over the subject matter or the person. *Abbott v Howard*, 182 Mich App 243, 248; 451 NW2d 597 (1990).

(f) *Any other reason justifying relief from the operation of the judgment.* Under this category, "the following three requirements must be fulfilled: (1) the reason for setting aside the judgment must not fall under subsections a through e, (2) the substantial rights of the opposing party must not be detrimentally affected if the judgment is set aside, and (3) extraordinary circumstances must exist that mandate setting aside the judgment in order to achieve justice." *King v McPherson Hosp*, 290 Mich App 299, 304–305; 810 NW2d 594 (2010) (quoting in *Heugel v Heugel,* 237 Mich App 471, 478–479; 603 NW2d 121 (1999)).

As an additional limitation, the relief available under provisions (a), (b), and (c) cannot be requested more than one year after the judgment was entered. MCR 2.612(C)(2).

Senate Bill No. 895's Novel Judicial Review and Fee-shifting Provisions

Senate Bill 895 does not upset the standards established above, but it would revise the process for deciding motions for relief from judgment in several unusual ways, most of them problematic:

First, the Bill requires the Court to apply a "clear and convincing evidence" burden of proof in every instance. As demonstrated above, this standard already applies to requests for relief from judgment based on fraud and would not change that standard. In other instances, burden of proof would still be inapplicable. A request for relief under category (d), for instance, may be based on lack of subject-matter jurisdiction, which is a question of law resolved only by reference to the allegations in the pleadings. *Clohset v No Name Corp*, 302 Mich App 550, 559–561; 840 NW2d 375 (2013). The clear-and-convincing-evidence standard has no meaning or application in that context. It would, however, require a higher burden of proof than may otherwise be required for newly discovered evidence (b) and other reasons justifying relief (f).

Second, as currently written, the Bill ostensibly mandates an evidentiary hearing on every motion when requested by the opposing party, even when there are no material facts in dispute. When the motion raises a question of law that can be resolved on the pleadings, the Bill would still require an evidentiary hearing. When the motion is supported with an affidavit or document, and the other side offers no countervailing evidence in response, the Bill would still require an evidentiary hearing.

Finally, the Bill requires the extensive involvement of six additional judges to grant a motion for relief from judgment. It requires a three-circuit-judge panel (or fewer if the circuit court has fewer judges) to review and adjudicate the motion, which presumably means they must all participate in the

evidentiary hearing. If the motion is granted, another three judges on the Court of Appeals would be required to review the order and issue an opinion in an appeal of right. If the decision still stands, the case will be assigned to a new judge in the circuit court, one who is likely unfamiliar with the record, and that new judge will preside over the second jury trial.

Apart from changes to the process, the Bill also creates disincentives to filing such motions. If the motion is denied, the Bill requires the moving party to pay the opposing party's attorney fees, but if the motion is granted, it takes away any contractual right to recover attorney fees and costs from the moving party. In the name of "public policy," a party who prevails in a jury trial by defrauding the court would thus be protected from any contractual obligation to pay attorney fees and costs for that trial.

The Appellate Practice Section's Reasons for Opposing the Bill

The Appellate Practice Section opposes this Bill because it improperly invades the province of our independent judiciary in determining the appropriate decision-making process for administering justice, unduly burdens the courts with unnecessary, resource-intensive procedures, derogates the freedom to contract, and protects wrongdoers.

As the case law cited above demonstrates, the court already views the granting of motions for relief from judgment as something that should occur only in extraordinary circumstances. The substantive standards for granting such motions reflect that policy, as they are quite difficult to satisfy. Thus, the current standards already favor protecting the finality of the judgment and denying the motion for relief from judgment. Moreover, circuit court judges have no personal incentive to grant such motions, as doing so only means adding another jury trial to their docket.

Imposing a "clear and convincing evidence" burden of proof and mandating an evidentiary hearing are unnecessary to prevent jury verdicts from being lightly discarded. To start, the "clear and convincing evidence" burden of proof already exists for motions based on fraud. Applying that same standard to motions challenging the court's jurisdiction or newly discovered evidence does not appear either necessary or appropriate. In any event, not every motion for relief from judgment raises questions of fact that require an evidentiary hearing. It is a waste of judicial resources to require an evidentiary hearing even when it will not assist the court in deciding the motion.

Further, the additional process of forming a three-judge panel to review the motion, offering an appeal of right for granted motions, and assigning a new judge for the second trial would consume an inordinate amount of judicial resources while offering little to no additional benefit for ensuring the stringent standards for granting relief are properly applied. The current process already provides a three-judge panel on the Court of Appeals to review orders granting relief from judgment. Though the review would be through an application for leave, that process still results in all allegations of error being reviewed by a panel of three judges with the research assistance of staff. That well-staffed appellate court is more than capable of ensuring that an evidentiary hearing was not improperly denied and that the correct burden of proof and standards for granting relief were applied.

Additionally, fee-shifting and anti-fee-shifting provisions in the Bill are bad policy. The court already has the power to award attorney fees to the opposing party if the motion is frivolous. This additional provision would only dissuade parties from bringing non-frivolous motions. Parties—particularly those of limited means—should not be discouraged from bringing meritorious motions that, for

instance, bring to the court's attention evidence that the court was defrauded or show that relevant evidence was improperly concealed from the jury by another party. At the same time, the provision that bars a court from enforcing contractual fee-shifting provisions derogates the freedom to contract and, worse, would serve to protect parties who obtained a favorable jury verdict through fraud, jury tampering, concealment of evidence, or other improper conduct.

Finally, although the proposed legislation appears intended for civil litigation, it raises serious concerns about motions for relief from judgment in criminal cases under MCR 6.502. Adopted in 1989 and amended several times since, Chapter 6.500 of the Michigan Court Rules establishes a mechanism for seeking postconviction relief from criminal convictions for reasons that could not be raised on direct appeal. While 6.500 motions often involve newly discovered evidence, that evidence typically relates to constitutional violations or other legal defects in the proceedings, rather than the weight of the evidence placed before the jury. Any heightened standards for reviewing these claims could upend criminal postconviction procedure, abrogate decades of jurisprudence, and jeopardize the due process rights of criminal defendants.

Conclusion

In sum, the current process is wholly adequate to protect jury verdicts from being lightly discarded and provide certainty that those verdicts based on a sound record will be respected and enforced. However, it is not and should not be the public policy of this state to enforce a jury verdict which turns out to be tainted by the misdeeds of another party or create barriers to determining that was the case. It does not ordinarily require a panel of three judges in the circuit court to determine when relief from judgment is warranted and when it is not. Imposing such a requirement would result in a tremendous waste of precious judicial resources that is completely unnecessary, given that a three-judge panel in the Court of Appeals is well-positioned to catch any mistakes and ensure the jury's verdict is afforded its due respect. Finally, fee-shifting provisions that dissuade a party from bringing such matters to the court's attention are bad policy. And there is no conceivable logical or moral reason why Michigan law should protect a party from a contractual obligation to pay attorney fees, particularly when that party's improper conduct tainted the initial verdict. For all of these reasons, the Council for the Appellate Practice Section adamantly opposes Senate Bill No. 895.

We thank you for this opportunity to comment.

Very truly yours,

s/Bradley R. Hall
Chair, Appellate Practice Section

From:	State Bar of Michigan
To:	Peter Cunningham; Carrie Sharlow; Do-Not-Reply
Subject:	Public Policy Member Comments [#16]
Date:	Wednesday, July 8, 2020 4:20:12 PM

Member Name: *	Peter Conway
E-mail: *	pete@peterconwaylawyer.com
Bill Number:	SB 0895
Comment:	This bill would alter Michigan Court Rule 2.611. The bill suggests that the senator who introduced it seeks to provide a specific solution for a specific constituent. There has been no showing that MCR 2.611 has not been working as intended. Court rules are better left to the Michigan Supreme Court to adjust as necessary. The State Bar of Michigan should oppose this bill.
May the State Bar post your comment on its website?	Yes
May a member of the State Bar contact you concerning this comment?	Yes

FROM THE COMMITTEE
ON MODEL CRIMINAL
JURY INSTRUCTIONS

==
The Committee on Model Criminal Jury Instructions solicits comment on the following proposal by September 1, 2020. Comments may be sent in writing to Samuel R. Smith, Reporter, Committee on Model Criminal Jury Instructions, Michigan Hall of Justice, P.O. Box 30052, Lansing, MI 48909-7604, or electronically to MCrimJI@courts.mi.gov .
==

PROPOSED

The Committee proposes instructions M Crim JI 37.8, 37.8a, 37.8b, 37.9, 37.9a, 37.10, 37.11 and 37.11a, where the prosecutor has charged an offense found in MCL 750. 483a, which addresses withholding evidence, preventing the report of a crime, retaliating for reporting a crime, influencing a crime report, defenses, or evidence tampering. The instructions are entirely new.

[NEW] M Crim JI 37.8 Withholding Evidence

(1) The defendant is charged with withholding or refusing to produce court-ordered testimony, information, documents, or things. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the [*identify court*] held a hearing on [*identify court date*].

(3) Second, that at that hearing or following that hearing, the court ordered the defendant either on the record or in writing to [testify / provide (*identify information, documents, or things ordered*)].

(4) Third, that the defendant refused to [testify / provide (*identify information, documents, or things ordered*)]. To "refuse" means that the defendant knew or was aware that the order was made, and intentionally failed to comply.

Statute

MCL 750.483a(1)(a)

[NEW] M Crim JI 37.8a Preventing Crime Report

(1) [The defendant is charged with / You may also consider the less serious offense of[1]] preventing or attempting to prevent a person from reporting a crime committed by another person [not involving (the commission or attempted commission of another crime / a threat to kill or injure any person / a threat to cause property damage)][1]. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant prevented or attempted to prevent [*name complainant*] from reporting that [*defendant / identify other person*] [*describe conduct to be reported*].[2]

(4) Third, that the defendant used physical force against [*name complainant*] when preventing or attempting to prevent [him / her] from reporting that [*describe conduct to be reported*].

[(5) Fourth, that the defendant's use of force involved [committing or attempting to commit the crime of (*identify other crime that the defendant committed*) as I have previously described to you / a threat to kill or injure any person / a threat to cause property damage].] [3]

Use Note

1. Use this bracketed language when there is a dispute whether the charge involved the aggravating factor found in MCL 750.483a(2)(b) and the court is instructing the jury on the necessarily lesser included offense that does not require proof of the aggravating factor.

2. The committee believes that the question whether the conduct that was attempted to be reported amounted to a criminal act is a question of law for the court to determine, and that the elements of a crime attempted to be reported do not have to be proven. See *People v Holley*, 480 Mich 222; 747 NW2d 856 (2008).

3. Use this paragraph where the aggravating element has been charged. Where the complementary crime in this element has also been charged, the court should instruct on that other charge before instructing for this offense.

Statute

MCL 750.483a(1)(b)

[NEW] M Crim JI 37.8b Retaliating for Crime Report

(1) The defendant is charged with retaliating or attempting to retaliate against a person for reporting criminal conduct. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that [*name complainant*] reported or attempted to report that [*defendant* / *identify other person*] [*describe conduct to be reported*].[1]

(4) Second, that the defendant [committed or attempted to commit the crime of (*identify other crime that the defendant is alleged to have committed*) as I have previously described to you[2] against (*name complainant*) / threatened to kill or injure any person / threatened to cause property damage].

(5) Fourth, that when the defendant [committed or attempted to commit the crime of (*identify other crime that the defendant committed*) against (*name complainant*) / threatened to kill or injure any person / threatened to cause property damage], [he / she] did so as retaliation for [*name complainant*]'s having reported or attempting to report the crime of [*identify crime*].

Use Note

1. The committee believes that the question whether the conduct that was attempted to be reported amounted to a criminal act is a question of law for the court to determine, and that the elements of a crime attempted to be reported do not have to be proven. See *People v Holley*, 480 Mich 222; 747 NW2d 856 (2008).

2. Where the complementary crime in this element has also been charged, the court should instruct on that other charge before instructing for this offense.

Statute

MCL 750.483a(1)(c)

[NEW] M Crim JI 37.9 Influencing Statements to Investigators by Gift

(1) [The defendant is charged with / You may also consider the less serious offense of[1]] giving or promising something of value to influence another person's statement or presentation of evidence to a police investigator [not involving the commission or attempted commission of another crime[1]]. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant gave or promised to give something of value [*identify thing given or promised*] to [*name witness / another person*].

(3) Second, that when the defendant gave or promised the [*identify thing given or promised*], [he / she] was attempting to influence what [*name witness / another person*] would tell [a police investigator / Officer (*name complainant*)] or whether [*name witness / another person*] would give some evidence to [a police investigator / Officer (*name complainant*)] who [may be / was] conducting a lawful investigation of the crime of [*identify crime*].

[(4) Third, that when giving or promising something to [*name witness / another person*], the defendant [committed or attempted to commit the crime of (*identify other crime that the defendant committed*) as I have previously described to you.] [2]

Use Note

1. Use this language when there is a dispute whether the charge involved the aggravating factor found in MCL 750.483a(4)(b) and the court is instructing the jury on the necessarily lesser included offense that does not require proof of the aggravating factor.

2. Use this paragraph where the aggravating element has been charged. Where the complementary crime in this element has also been charged, the court should instruct on that other charge before instructing for this offense.

Statute

MCL 750.483a(3)(a)

[NEW] M Crim JI 37.9a Influencing Statements to Investigators by Threat or Intimidation

(1) [The defendant is charged with / You may also consider the less serious offense of[1]] threatening or intimidating a person in order to influence that person's statement or presentation of evidence to a police investigator [not involving the commission or attempted commission of another crime / a threat to kill or injure any person / a threat to cause property damage[1]]. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant made a threat or said or did something to intimidate [*name witness*].

(3) Second, that when the defendant made the threat or used intimidating words or conduct, [he / she] was attempting to influence what [*name witness*] would tell [a police investigator / Officer (*name complainant*)] or whether [*name witness*] would give some evidence to [a police investigator / Officer (*name complainant*)] who [may be / was] conducting a lawful investigation of the crime of [*identify crime*].

[(4) Third, that when threatening or intimidating [*name witness*], the defendant [committed or attempted to commit the crime of (*identify other crime that the defendant committed*) as I have previously described to you / threatened to kill or injure any person / threatened to cause property damage.] [2]

Use Note

1. Use this language when there is a dispute whether the charge involved the aggravating factor found in MCL 750.483a(4)(b) and the court is instructing the jury on the necessarily lesser included offense that does not require proof of the aggravating factor.

2. Use this paragraph where the aggravating element has been charged. Where the complementary crime in this element has also been charged, the court should instruct on that other charge before instructing for this offense.

Statute

MCL 750.483a(3)(b)

[NEW] M Crim JI 37.10 Influencing Statements to Investigators by Gift or Intimidation – Defenses

(1) The defendant says that [he / she] is not guilty of this charge because [his / her] conduct was lawful, and [his / her] sole intent was to induce, encourage, or cause [*name complainant*] to provide truthful statements or evidence.

(2) In order to establish this defense, the defendant must prove the following two elements by a preponderance of the evidence. "A preponderance of the evidence" means that it is more likely than not that each of the elements is true.

(3) First, that the defendant's conduct was otherwise lawful.

(4) Second, that the defendant's sole intent was to induce, encourage, or cause [*name complainant*] to give truthful testimony or evidence.

(5) You should consider these elements separately. If you find that defendant has proved both of these elements by a preponderance of the evidence, then you must find [him / her] not guilty. If the defendant has failed to prove either or both elements, the defense fails and you may find the defendant guilty if the prosecutor has proved the elements of the charge beyond a reasonable doubt.

Statute

MCL 750.483a(7)

[NEW] M Crim JI 37.11 Removing, Destroying or Tampering with Evidence

(1) [The defendant is charged with / You may also consider the less serious offense of[1]] intentionally removing, altering, concealing, destroying, or tampering with evidence to be offered at an official proceeding [not involving a criminal case where (*identify crime where the punishment was more than 10 years*) was charged[1]]. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that there was some evidence to be offered in a present or future official proceeding.

> An official proceeding is a hearing held before a legislative, judicial, administrative, or other governmental agency, or a hearing before an official authorized to hear evidence under oath, including a referee, a prosecuting attorney, a hearing examiner, a commissioner, a notary or another person taking testimony in a proceeding.

(3) Second, that the defendant removed, altered, concealed, destroyed, or otherwise tampered with that evidence.

(4) Third, that when the defendant removed, altered, concealed, destroyed, or otherwise tampered with that evidence, [he / she] did so on purpose and not by accident.

[(5) Fourth, that the evidence that the defendant removed, altered, concealed, destroyed, or otherwise tampered with was used or intended to be used in a criminal case where (*identify crime where the punishment was more than 10 years*) was charged.][2]

Use Note

1. Use this language when there is a dispute whether the charge involved the aggravating factor found in MCL 750.483a(6)(b) and the court is instructing the jury on the necessarily lesser included offense that does not require proof of the aggravating factor.

2. Use this paragraph where the aggravating element has been charged.

Statute

MCL 750.483a(5)(a)

[NEW] M Crim JI 37.11a Offering False Evidence at an Official Proceeding

(1) [The defendant is charged with / You may also consider the less serious offense of[1]] offering false evidence at an official proceeding with reckless disregard to its falsity [not involving a criminal case where (*identify crime where the punishment was more than 10 years*) was charged.[1]]. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant offered [*describe evidence*] into evidence during an official proceeding.

> An official proceeding is a hearing held before a legislative, judicial, administrative, or other governmental agency, or a hearing before an official authorized to hear evidence under oath, including a referee, a prosecuting attorney, a hearing examiner, a commissioner, a notary or another person taking testimony in a proceeding.

(3) Second, that the [*describe evidence*] that defendant offered into evidence was false.

(4) Third, that when the defendant offered the false evidence, [he / she] acted with reckless disregard whether or not it was false.

[(5) Fourth, that the false evidence that the defendant offered was used or would have been used in a criminal case where (*identify crime where the punishment was more than 10 years*) was charged.][2]

Use Note

1. Use this language when there is a dispute whether the charge involved the aggravating factor found in MCL 750.483a(6)(b) and the court is instructing the jury on the necessarily lesser included offense that does not require proof of the aggravating factor.

2. Use this paragraph where the aggravating element has been charged.

Statute

MCL 750.483a(5)(b)

Public Policy Position
M Crim JI 37.8, 37.8a, 37.8b, 37.9, 37.9a, 37.10, 37.11 and 37.11a

Support

Explanation
The committee voted unanimously to support the proposed Model Criminal Jury Instructions as drafted.

Position Vote:
Voted For position: 14
Voted against position: 0
Abstained from vote: 0
Did not vote (absent): 7

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