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SFA**BILL ANALYSIS**

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Senate Bill 1356 (Substitute S-1 as reported by the Committee of the Whole)
Senate Bill 1447 (Substitute S-1 as reported by the Committee of the Whole)
Sponsor: Senator Bev Hammerstrom
Committee: Judiciary

Date Completed: 10-3-02

RATIONALE

Public Acts 44 and 45 of 1987 amended the Revised Judicature Act (RJA) and the juvenile code, respectively, to allow special accommodations for a witness who is under 15 years old or developmentally disabled, and who is an alleged victim of abuse or criminal sexual conduct. (Public Acts 324 and 325 of 1998 extended the special accommodations provisions to children under the age of 16.) The special accommodations apply to criminal prosecutions and juvenile proceedings and include, among other things, videotaping witness statements. These accommodations resulted from concerns that the criminal justice system was insensitive to the needs of abused children, who may be bewildered or scared by the procedures that take place throughout the course of an investigation and trial.

Although videotaping witness statements has been allowed since the beginning of 1988, when Public Acts 44 and 45 took effect, videotape statements reportedly are not used very often. Evidently, concerns about the protection of witnesses' privacy, the confidentiality of their statements, and the availability of the videotapes have discouraged some investigators from using this tool. The Governor's Task Force on Children's Justice, a group that examines various issues related to children in the justice system and recommends policies and procedures relating to those issues, has recommended that confidentiality protections and restrictions on the release or disclosure of video witness statements be added to the RJA and the juvenile code.

CONTENT

Senate Bills 1356 (S-1) and 1447 (S-1) would amend the Revised Judicature Act and the juvenile code, respectively, to revise the procedures for securing and using videotape statements of witnesses in some cases. The bills would do all of the following:

- Refer to "videorecorded", rather than "videotape", statements.
- Expand the allowable uses of a videorecorded statement.
- Require that a videorecorded statement conform to the protocol implemented under the Child Protection Law (CPL).
- Allow a videorecorded statement to be used for training the custodians of the statement on the CPL protocol, if authorized by the prosecuting attorney.
- Allow the release of a videorecorded statement for law enforcement purposes.
- Revise the conditions under which a defendant or, under the juvenile code, a respondent, and his or her attorney may view a videorecorded statement.
- Provide that a videorecorded statement that became part of a court record would be subject to an order to protect the privacy of the witness.
- Specify that a videorecorded statement would not be subject to release under any other statute or to disclosure under the Michigan Court Rules governing discovery.
- Establish a criminal penalty for releasing a videorecorded statement in violation of the RJA or the juvenile code.

The bills are tie-barred.

Videorecorded Statement

The RJA allows a law enforcement agency to take a videotape statement of a witness before the normally scheduled date of the defendant's preliminary examination and the juvenile code provides that the investigating agency may take a witness's videotape statement. "Witness" means a person who is under 16 years of age or who is 16 or older with a developmental disability, and who is an alleged victim of any of the following:

- First-, second-, third-, or fourth-degree child abuse.
- Involvement in child sexually abusive activity or material.
- First-, second-, third-, or fourth-degree criminal sexual conduct (CSC).
- Assault with intent to commit CSC.

The bills would refer to a "videorecorded" statement rather than a "videotape" statement. "Videorecorded statement" would mean a witness's statement taken by a custodian of the videorecorded statement as provided in the RJA or the juvenile code, but would not include a videorecorded deposition taken instead of live testimony. "Custodian of the videorecorded statement" would mean the Family Independence Agency (FIA), investigating law enforcement agency, prosecuting attorney, or Department of Attorney General or another person designated under the county protocols established under the CPL. (The Child Protection Law requires that, in each county, the prosecuting attorney and the FIA establish procedures for involving law enforcement officials in cases of suspected child abuse or child neglect reported to the FIA. In each county, the prosecuting attorney and the FIA must adopt and implement standard child abuse and neglect investigation and interview protocols using as a model protocols developed by the Governor's Task Force on Children's Justice.)

Use and Release of Videorecorded Statements

Taking a Statement. The RJA provides that, in order to avoid excessive questioning of a witness, the investigating law enforcement agency may take a videotape statement of a witness before the normally scheduled date for

the defendant's preliminary examination. The juvenile code provides that, in order to avoid excessive questioning, the investigating agency may take a videotape statement of a witness. The bills specify, instead, that a custodian of the videorecorded statement could take a witness's videorecorded statement.

Consideration in Court Proceedings. The RJA allows a videotape statement to be considered in court proceedings only for one or more of the following:

- Admission as evidence at all pretrial proceedings, except that it may not be introduced at the preliminary examination instead of the witness's live testimony.
- Admission for impeachment purposes.
- Consideration by the court in determining the sentence.

Senate Bill 1356 (S-1) would allow a videorecorded statement to be considered in court proceedings for those purposes and as a factual basis for a no-contest plea or to supplement a guilty plea.

Content of a Statement. The RJA and juvenile code provide that, in a videotape statement, the questioning of the witness should be full and complete and must include, but is not limited to, all of the following:

- The time and date of the alleged offense or offenses.
- The location and area of the alleged offense or offenses.
- The relationship, if any, between the witness and the accused.
- The details of the offense or offenses.
- The names of any other people known to the witness who may have personal knowledge of the alleged offense or offenses.

Under the bills, the information listed above would have to be included in a videorecorded statement "if appropriate for the witness's developmental level". The bills also would require that the questioning of the witness be in accordance with the forensic interview protocol implemented as required by the CPL.

Release of a Statement. The bills specify that a custodian of the videorecorded statement could release or consent to the release or use

of a videorecorded statement, or copies of it, to a law enforcement agency, an agency authorized to prosecute the criminal case to which the videorecorded statement related, or an entity that was part of the county protocols established under the CPL.

If authorized by the prosecuting attorney in the county in which the statement was taken, a videorecorded statement could be used for purposes of training the county's custodians of the videorecorded statement on the forensic interview protocol implemented under the CPL.

Defendant's Access to a Statement. Under the RJA, the defendant and his or her attorney have the right to view and hear a videotape statement at least 48 hours before the normally scheduled date for the defendant's preliminary examination. Under Senate Bill 1356 (S-1), instead, the defendant and his or her attorney would have the right to view and hear a videorecorded statement before the defendant's preliminary examination. Upon request, the prosecuting attorney would have to provide the defendant and his or her attorney with reasonable access and means to view and hear the videorecorded statement at a reasonable time before the defendant's pretrial or trial of the case.

Under the juvenile code, each respondent and his or her attorney has the right to view and hear a videotape statement at least 48 hours before it is offered into evidence. Under Senate Bill 1447 (S-1), each respondent and his or her attorney would have the right to view and hear a videorecorded statement at a reasonable time before it was offered into evidence.

Under both bills, the court could order that a copy of the videorecorded statement be given to the defense, in preparation for a court proceeding, under protective conditions including a prohibition on copying the videorecorded statement.

Limited Disclosure. A videorecorded statement that became part of the court record would be subject to a protective order of the court for the purpose of protecting the privacy of the witness. A videorecorded statement could not be copied or reproduced in any manner except as provided in the RJA or the juvenile code.

A videorecorded statement would be exempt from disclosure under the Freedom of Information Act, would not be subject to release under another statute, and would not be subject to disclosure under the Michigan Court Rules governing discovery. The production or release of a transcript of a videorecorded statement would not be prohibited, however.

Criminal Penalties

Except as provided in the RJA or the juvenile code, an individual, including a custodian of the videorecorded statement, the witness, or the witness's parent, guardian, guardian ad litem, or attorney, could not release or consent to the release of a videorecorded statement or a copy of it.

Intentionally releasing a videorecorded statement in violation of the RJA or the juvenile code would be a misdemeanor punishable by up to 93 days' imprisonment, a maximum fine of \$500, or both.

MCL 600.2163a (S.B. 1356)
712A.17b (S.B. 1447)

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

Although videotaping witness statements of children and developmentally disabled people who are victims of child abuse or CSC offenses has been allowed since 1988, few video statements reportedly are made. Advocates of Public Acts 44 and 45 of 1987 claimed that, since many children are confused and distressed by a judicial process designed for adults, special accommodations, including videotaping witness statements, would reduce the trauma involved in a child's retelling of those experiences. Apparently, though, this approach is not used very often, due at least in part to concerns about the protection of children's privacy, the confidentiality of the statements and the control of the use and distribution of the videos. To address this situation, the Governor's Task Force on Children's Justice has recommended that confidentiality issues be addressed in the RJA and the juvenile code provisions pertaining to

videotape witness statements. The bills would offer better protection to children and ensure the integrity of the chain of possession of videorecorded statements by restricting the release of the videos, subject to criminal penalty; specifying that a video statement would be subject to a protective order; and prohibiting the disclosure of video statements through the Freedom of Information Act, court rules, or other statutes.

The bills would have no fiscal impact on the courts or on State or local law enforcement agencies.

Fiscal Analyst: Bruce Baker
Bill Bowerman
Constance Cole
Bethany Wicksall

Supporting Argument

The bills would refer to videorecorded statements, rather than videotapes, reflecting advancements in technology since the time the special accommodations were enacted. Today, recording video on discs rather than tape is becoming more common, and other media for recording video may be developed and become more widely used in the future. Using the term "videorecorded" statements would encompass media other than tapes that may be used for video recordings.

Opposing Argument

The RJA and the juvenile code both assure that a defendant has the right to view and hear a videotape witness statement at least 48 hours before the preliminary examination (under the RJA) or before the video is offered into evidence (under the juvenile code). The bills' elimination of the 48-hour minimum period could be problematic. If a video statement were released on short notice, the defense might not have sufficient time to review the video and prepare for court.

Legislative Analyst: Patrick Affholter

FISCAL IMPACT

The bills would have an indeterminate fiscal impact on the State due to increased administrative costs for any additional training necessary for the custodians of the video recordings.

There are no data to indicate how many offenders would be convicted of intentionally releasing a videorecorded statement. An offender would be guilty of a misdemeanor punishable by up to 93 days' incarceration in a local facility. Local units of government would incur the costs, which vary by county from \$27 to \$65 per day.

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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.