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PRESUME COMPETENCY OF CHILD UNDER AGE 10 AS WITNESS

Senate Bill 880 as passed by the Senate First Analysis (5-13-98)

Sponsor: Sen. Joel D. Gougeon
House Committee: Judiciary
**Senate Committee: Families, Mental Health
and Human Services**

THE APPARENT PROBLEM:

One of the changes recommended by the State Bar of Michigan's Task Force on Children's Justice was the repeal of the child competency statute. Unlike other persons, children under the age of ten are presumed to be incompetent to testify as witnesses in court proceedings. All other potential witnesses are presumed to be competent and anyone who believes that the potential witness is not competent to testify bears the burden of proving that incompetency. On the other hand, a child under the age of ten must be proven to be competent before he or she may testify. It is suggested that this law is archaic and unfair, that the presumption should be in favor of the potential witness and the party who does not believe that the witness is competent should have the burden of proving the witness is not competent.

THE CONTENT OF THE BILL:

The bill would repeal a section of the Revised Judicature Act that requires a court to determine through public or private questioning whether a child under the age of 10, when offered as a witness, has sufficient intelligence and sense of obligation to the truth to be competent to testify. The section being repealed also provides that the child's testimony may be given on a promise to tell the truth instead of upon oath or affirmation, and is to be given such credit as it appears to deserve.

MCL 600.2163

BACKGROUND INFORMATION:

In September of 1993, the State Bar of Michigan established the Task Force on Children's Justice, which began a two-year study of the state's existing rules, statutes, standards and procedures in order to

make recommendations to improve the effect of the judicial system on matters that involve children.

The task force's mission was to improve the delivery of justice to Michigan's children. The group was made up of three committees: 1) officers of the court, who developed standards of practice for professionals and para-professionals who represent the interests of children in court proceedings; 2) court users, who recommended procedures and policies to guide professionals who, as a result of serving children and families, interact with the court system; and 3) court administration and jurisdiction, a committee that addressed a range of issues pertaining to the treatment of children in court proceedings and made recommendations aimed at making Michigan's court system more child-focused.

In September of 1995 the task force issued its final report. Some of the task force's recommendations necessitate legislative action.

FISCAL IMPLICATIONS:

According to the Senate Fiscal Agency, the bill would have an indeterminate fiscal impact. The effect the bill could have on the number of trials and convictions is speculative. (2-24-98)

ARGUMENTS:

For:

Only two states have laws that presume children of a certain age are incompetent to testify and require that the child prove his or her competence. This means that a child must undergo a competency hearing as well as the trauma of testifying. Competency is the

ability to observe and remember events, to describe those events, to understand the difference between the truth and falsehood, and to appreciate the duty to tell the truth. There is no scientific data to support the law's conclusion that children under the age of 10 are unable to meet these requirements. Under the Michigan Rules of Evidence all witnesses are presumed competent unless proven otherwise. The bill would properly place the burden on the party seeking to establish incompetence, even where the witness was a child.

The bill would eliminate an inconsistency between the statute and the rules of evidence, and would leave Mississippi as the last state clinging to the arbitrary distinction between children under the age of 10 and all other witnesses.

Against:

The presumption of incompetence for children under the age of ten is hardly arbitrary; if anything, the presumption that all children under the age of 10 are *competent* to provide testimony is arbitrary. Anyone who has ever attempted to question a child of five or less about what has happened to him or her is aware of the difficulties that such children have with distinguishing between actual and imagined events. Although age 10 may not be the best place to draw the line, there is certainly a point at which children lack the ability to competently testify. Perhaps the placement of the line should be adjusted, but to remove it entirely seems excessive.

POSITIONS:

The State Bar of Michigan supports the bill. (5-13-98)

The Prosecuting Attorneys Association of Michigan supports the bill. (5-13-98)

Analyst: W. Flory

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