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**SFA**

BILL ANALYSIS

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House Bill 4187 (as reported without amendment)  
Sponsor: Representative Tony Stamas  
House Committee: Criminal Justice  
Senate Committee: Judiciary

Date Completed: 5-7-01

### **RATIONALE**

The Michigan Administrative Code contains a number of rules that govern visitation of prisoners, including a rule that limits who may visit prisoners (R 791.6609). Many people believe that this rule is overly restrictive because it precludes visits by prisoners' brothers and sisters, if the siblings are less than 18 years old. In general, a person may visit a prisoner only if the person is on the prisoner's approved list of visitors, which is limited to the prisoner's immediate family members and up to 10 other people. Although the rule's definition of "immediate family member" includes siblings, a person on an approved visitors list also must be at least 18 years old unless he or she is the child, stepchild, or grandchild of the prisoner.

The current visitation rules were promulgated in 1995 in response to various concerns of the Department of Corrections (DOC), and the DOC's desire to reduce the overall number of visits and visitors. Among the concerns was the safety of visiting children, particularly after a 1994 incident in which a prisoner molested an unrelated young child who had been brought to the facility by her mother. Apparently, however, the DOC did not anticipate the impact of its new rules on visits by prisoners' siblings, and did not have a specific penological or other substantive concern relating to this exclusion, other than the general objective to reduce the number of children visiting.

In order to preserve the opportunity of close family members to visit each other, it has been suggested that some flexibility should be built into this aspect of the DOC's visitor restrictions, through an amendment to the law governing the Department.

### **CONTENT**

The bill would amend the Department of Correction (DOC) law to allow a prisoner to receive visits from a minor brother, sister, stepbrother, stepsister, half brother, or half sister, if the minor were on the prisoner's approved visitor list. "Minor" would mean a person who was less than 18 years of age.

The DOC, however, could do any of the following:

- Place limits on visiting hours, establish reasonable rules of conduct, and establish uniform quotas at each institution for prisoner visits, in order to promote order and security in the correctional institutions and to prevent interference with institutional routine or disruption of a prisoner's programming.
- Establish requirements for who would have to accompany a minor sibling on a visit.
- Deny, restrict, or terminate visits, as the DOC determined necessary for the order and security of the institution.

Proposed MCL 791.268a

### **BACKGROUND**

Rule 791.6609 states that, except as otherwise provided, a person who is not subject to a current visitor restriction under R 791.6611 (e.g., for appearing intoxicated or being disruptive) may visit a prisoner if the following conditions are met:

- The person presents valid and adequate proof of identification.
- The person is on the prisoner's list of approved visitors.
- The visit is within the allowable quota established by the DOC.

- The visit does not constitute a threat to the prisoner's physical or mental well-being.
- Allowing the visit is not harmful to the prisoner's rehabilitation.
- The purpose of the visit is not to commit an illegal act.

An approved visitors list is subject to various restrictions. For example, a person may be on the list of only one prisoner to whom he or she is not related as an immediate family member. (The rule defines "immediate family member" as any of the following: grandparent, parent, stepparent, spouse, mother- or father-in-law, child, stepchild, grandchild, sibling, stepbrother or stepsister, or aunt or uncle who served as a surrogate parent.) In addition, a person on an approved visitors list may not be less than 18 years of age, unless he or she is the child, stepchild, or grandchild of the prisoner, or an emancipated minor. A warden may refuse to place anyone on an approved visitors list for reasons of safety or security of the institution, protection of the public, previous violations of visiting room rules, or other cause as determined by the warden.

A child who is under the age of 18 may visit a prisoner only if the child is on the prisoner's approved visitors list and is accompanied by an adult immediate family member or a legal guardian, unless the individual is an emancipated minor. A child who is under 18 may not be allowed to visit if any of the following apply:

- The parental rights of the prisoner to the child have been terminated.
- There is a court order prohibiting visits between the child and the prisoner.
- The prisoner has been convicted of child abuse, criminal sexual conduct, or any other assaultive or violent behavior against the child or a sibling of the child, unless specific approval for the visit has been granted by the DOC Director.

In addition, the Director may permanently restrict all visitation privileges, except with an attorney or member of the clergy, for a prisoner who is convicted or found guilty of certain violations, including two or more violations of the major misconduct charge of substance abuse. The Director also may reconsider and remove a permanent visitor restriction.

## **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**

When the current visitation restrictions were imposed, the DOC apparently did not foresee the impact they would have on visits between prisoners and their siblings, or realize how many inmates would have brothers and sisters under the age of 18. Although siblings are considered "immediate family" for inclusion on an approved visitors list, siblings under 18 are precluded from any and all visitation. This denies both prisoners and their siblings the opportunity to maintain an important family tie. It also might prevent a prisoner's own parents from visiting if they cannot find alternative care for other children who are minors. While incarceration necessarily limits prisoners' interactions with other people, it is widely accepted that visits from family members promote rehabilitation, reduce behavioral problems, and significantly improve a prisoner's chance for success on parole. Also, the opportunity to see an older brother or sister can be reassuring to a child who is concerned about his or her sibling's welfare behind bars.

By making it clear in statute that a prisoner could receive visits from a minor sibling, this bill would create the necessary flexibility that was omitted from the DOC's rules. At the same time, the DOC still could maintain security within prisons and protect the safety of individuals by placing necessary limits on these visits.

### **Opposing Argument**

The bill would fall far short of what is needed to expand the DOC's visitation rules, which were the subject of an April 19, 2001, Federal District Court decision (*Bazzetta, et al. v McGinnis, et al.*, U.S. District Court, Eastern District of Michigan, No. 95-CV-73540-DT). According to the Court, the restrictions that do the following are unconstitutional, in the context of noncontact visits: 1) prohibit visits by siblings, nieces, and nephews who are under 18; 2) require visiting children of prisoners to be brought by a parent or legal guardian; 3) prohibit visits by children whose incarcerated parents have had their parental rights terminated (even when that termination

is voluntary); 4) prohibit visits by former prisoners who are not immediate family; and 5) impose a permanent ban on visitation for any prisoner who has been found guilty of two substance abuse misconducts. In most instances, the Court found that the DOC's reasons for the restrictions--concerns about the safety and security of children and the possibility of smuggling or illegal activity--could be addressed if visitation were limited to noncontact visits.

Although the bill would allow minor siblings to visit prisoners, visits by nieces or nephews who are minors would still be prohibited. In addition to denying these children the opportunity to visit, the prohibition can make it difficult for prisoners' adult siblings to visit because they cannot bring their own children. The DOC's concerns about the smuggling of contraband, physical injury, and sexual assault have a weak connection, if any, to the limitations placed on minor visitors, according to the Court, while the restrictions have disrupted family relationships in a myriad of ways.

In regard to the requirement that minors be accompanied by an immediate family member or legal guardian, there was unrefuted evidence in the case that many prisoners, especially women, do not have another immediate family member available to bring their child to visit. In addition, a guardianship is a complex legal responsibility and procedure, with many risks to the future legal relationship of the parent to his or her child, and beyond the resources of many prisoners. Also, there was no evidence to support the DOC's concerns about forgery of powers of attorney, which had previously been required for an adult designated to accompany a child.

The Court pointed out that when the DOC eliminated from visits any child of a prisoner whose parental rights had been terminated, it did not consider that some prisoners voluntarily terminate parental rights to provide adoptive homes for their children. Also, according to "substantial unrefuted evidence" submitted by the plaintiffs, contact between parent and child is an important ongoing need for both individuals regardless of the basis for the termination of parental rights.

Concerning the exclusion of former prisoners who are not family members, the Court

pointed out that the DOC has the ability to screen out any problematic person on an individual basis, since nonfamily visitors on a prisoner's list must be screened and approved in advance. The Court also indicated that there are many instances in which this exclusion creates significant hardship on friends and family, including instances in which former prisoners have been completely rehabilitated and serve as social workers or governmental ombudsmen, and situations in which an in-law's prior record has made it impossible for immediate family to visit.

The Court found a number of problems with the permanent ban on visits based on two substance abuse misconducts. For example, the actual practice of imposing the restriction apparently has been inconsistent, and the time lapse between the second misconduct and the imposition of the permanent restriction may take many months or even years, while a prisoner may be misconduct-free in the meantime. In addition, the Court found that there are no standards for restoring visitation; there is no requirement that prisoners be notified of when, how, and on what basis restoration may be requested; prisoners often do not receive written notice that restoration has been denied; restoration is denied for widely disparate reasons; and there is no uniform standard for reapplication periods. "Even more egregious, permanent restrictions for substance abuse have been converted sub rosa into a tool for general behavior management, where restrictions are routinely continued on the basis of behavior for which policy does not authorize a visiting restriction in the first instance."

The Court concluded that all of the regulations discussed above violate the First Amendment of the United States Constitution, which guarantees freedom of association. The Court also ruled that the permanent ban on visits based on two substance abuse misconducts violates the Eighth Amendment, which prohibits cruel and unusual punishment, as well as the Fourteenth Amendment, which guarantees due process of law.

**Response:** Most of these restrictions are beyond the scope of this bill, which should be considered independently of the *Bazzetta* case. The State has filed a notice of appeal to the U.S. Court of Appeals for the Sixth Circuit, and a request for a stay of the District Court's decision is pending. According to the DOC,

there are still about 500,000 prison visits each year, contraband smuggling continues to be a problem, and the Department is still concerned about the number of children in visiting rooms. While it would be reasonable to allow prisoners' minor siblings to visit, since siblings are immediate family members under the DOC rule and presumably in most people's definition of the term, the same is not true of nieces and nephews. The Department must draw the line somewhere.

Legislative Analyst: S. Lowe

**FISCAL IMPACT**

The bill would have no fiscal impact on State or local government.

Fiscal Analyst: K. Firestone

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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.