Report on Public Policy Position

Name of Section:
Prisons and Corrections Section

Contact Person:
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Bill Number:
HB 4542 (Waters) Family law; child support; graduated penalties for unpaid support; enact. Amends sec. 165 of 1931 PA 328 (MCL 750.165).

Date position was adopted:
6/4/05

Process used to take the ideological position:
Vote at in-person meeting with 11 committee members in attendance

Number of members in the decision-making body:
14 voting members

Number who voted in favor and opposed to the position:
10 in favor, 1 opposed

FOR SECTIONS ONLY:

- ✓ **This subject matter of this position is within the jurisdiction of the section.**
- ✓ **The position was adopted in accordance with the Section's bylaws.**
- ✓ **The requirements of SBM Bylaw Article VIII have been satisfied.**

If the boxes above are checked, SBM will notify the Section when this notice is received, at which time the Section may advocate the position.

Position:
Conditionally oppose HB 4542 unless the bill is amended to provide that a person's inability to pay is a defense to a charge of nonpayment of child support.

The text (may be provided by hyperlink) of any legislation, court rule, or administrative regulation that is the subject of or referenced in this report:
http://www.legislature.mi.gov/mileg.asp?page=getObject&objName=2005-HB-4542

RECOMMEND STATE BAR ACTION ON THIS ISSUE:

Arguments for the position:

Under current law, MCL 750.165, a person who does not pay child support in the amount or at the time stated in the order is guilty of a felony punishable by four years of imprisonment. Although under the statute it appears that even a single late payment is a felony, in practice prosecutors rarely bring non-support cases unless the amount owed is substantial.

This bill would establish a graduated series of criminal penalties in non-payment cases. In cases where a payor has an arrearage of $20,000 or more, has failed to make payments for five years, or has an arrearage of between $3,000-$20,000 and at least two prior non-support convictions, the payor would be guilty of a 10-year felony. In cases where the payor has an arrearage of between $3,000-$20,000, has failed to pay support for between three and five years, or owes less than $3,000 and at least two prior non-support convictions would be guilty of a five-year felony. Finally, an individual who owes less than $3,000 or has failed to pay support for between 90 days and three years would be guilty of a misdemeanor and subject to one year's imprisonment. The past due support amount is calculated prior to any reductions as a result of a petition for modification. Thus, an individual who was charged with felony non-support for owing $4,000 and then successfully brought a motion to reduce this amount to $0, would still appear to be guilty of a felony.

It is appropriate to punish individuals who willfully ignore their child support obligations. However, neither the bill nor the statute it seeks to modify are limited to situations in which individuals intentionally do not pay support, but rather criminalize unemployment and poverty. *See People v. Adams*, 262 Mich. App. 89 (2004) (holding that inability to pay is not a defense to charges of failing to pay child support). An individual who fails to pay support because he loses his job or is hospitalized after a car accident is just as guilty as an individual who is making good money but refuses to pay. In other words, under the both the bill and the statute, non-payment of child support is a strict liability offense.

Of particular concern to the Prison and Corrections Section are arrearages owed by prisoners and former prisoners. On average, Michigan prisoners owe almost $28,000 in child support, which, under the bill, would make them automatically guilty of a ten-year felony. It is not uncommon for prisoners who have large support orders and long sentences to owe between $50,000 and $100,000 in back support. While the arrearage amounts set out in the bill may appear large at first glance, in fact many individuals, including many prisoners, can quickly accumulate such substantial arrearages as a result of an inability to make payments for several years.

One of the main reasons that prisoners have such huge arrearages is that support continues to be charged while the individual is incarcerated. Incarcerated individuals typically have no ability to pay, and therefore cannot be required to pay support unless they have the income or assets to do so. *See Pierce v. Pierce*, 162 Mich. App. 367 (1987). However, once child support has been charged and the arrearage has accrued, that arrearage cannot be retroactively modified. *See McLaughlin v. McLaughlin*, 255 Mich. App. 475 (2003) (holding child support order not subject to retroactive modification for the time father was incarcerated). Therefore, in most cases former prisoners are stuck with the tens of thousands of dollars of child support debt that accrued while they were incarcerated.

It is true that an individual who does not have the ability to pay child support can file a motion to modify his or her child support obligation. Unfortunately, very few prisoners are aware of this opportunity, and those that are often

have great difficulty filing such motions. Approximately half of Michigan prisoners lack a high school education. Even those with more schooling cannot easily obtain information about how to modify their child support. And of course prisoners cannot simply go to court. While the Department of Corrections is seeking, as part of the Michigan Prisoner Reentry Initiative, to make prisoners more aware of the need to modify their child support orders, and the State Court Administrative Office has launched a pilot program to assist prisoners in modifying their support orders, the fact remains that very few current prisoners or former prisoners have requested such modifications. Moreover, even those prisoners who find out that they should modify their child support and attempt to do so are not always successful. The Prison and Corrections Section has heard reports of prisoners who filed motions to modify their support, only to have the motions dismissed when the prisoner failed to appear for a court date.

Many current and former prisoners would automatically be guilty of felonies if this bill passes. They could face additional prison time simply because they had no ability to pay their child support while incarcerated. It makes no sense to return people to prison for failing to pay the child support they were unable to pay because they were in prison.

The Section supports the principle that there should be graduated sanctions for non-support, and the principle that low levels of non-support should be classified as a misdemeanor, not a felony. However, the Section cannot support the bill because it imposes harsher penalties on arrearages over $3,000, without considering the defendant's ability to pay. (In the past, arrearages under $3,000 were not likely to be prosecuted. Thus the fact that small arrearages would result in a misdemeanor rather than a felony has limited value, and does not outweigh the problems created by increasing the punishment of individuals who accumulate substantial arrearages as a result of their inability to pay.) The Section believes that enforcement of this bill could lead to debtors' prisons. The Section also believes that strict liability is inappropriate in this context: while the willful nonpayment of a support is a criminal act, the mere inability to pay should not be criminalized. Finally, incarcerating individuals for nonpayment – particularly when those individuals did not have the ability to pay – represents an unwise allocation of scarce prison beds.

Arguments against the position (if any):
The Family Law Section supports the bill. The Section did not think the current criminal statute, which allows a conviction without any evidence of past or current ability to pay, was appropriate. The Section felt, however, that the graduated penalties in the bill are a "slight improvement to an unfair situation."

If the State Bar currently has a position on this subject matter, state the position, and an analysis of whether the recommended position and the current State Bar position are in conflict.
To the knowledge of the Section, the State Bar has not adopted a position on this matter. As noted above, the Family Law Section has adopted a position in support of the bill.

Fiscal implications of the recommended policy to the State Bar of Michigan:
There are no fiscal implications.

<u>FOR LEGISLATIVE ISSUES ONLY</u>:

This position falls within the following Keller-permissible category:

The regulation and discipline of attorneys

The improvement of the functioning of the courts

The availability of legal services to society

The regulation of attorney trust accounts

The regulation of the legal profession, including the education, the ethics, the competency, and the integrity of the profession.

Keller- permissible explanation:

Statement of Support for House Bill 4327, as Substituted[1]
Prison and Corrections Section of the State Bar of Michigan

Disclosure pursuant to Administrative Order 2004-1: The Prison and Corrections Section is a voluntary section of the State Bar, not the State Bar itself. Members of the Section include corrections officials, attorneys involved with the criminal justice system, and others interested in the effective functioning of Michigan prisons. The position expressed here is that of the Section. The State Bar has no position on HB 4327. The Prison and Corrections Section has a membership of about 145. The Section's governing body, a Council elected by the membership, is composed of 14 voting members. This policy position was adopted, after due notice, at a meeting of the Section's Council on April 2, 2005. The vote was 11 yes, 0 no, 0 abstentions.

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In the 2003-2004 legislative session, the Prison and Corrections Section of the State Bar submitted a statement in support of modifications to HB 5493. That bill initially provided for conditional expungements in situations where an individual with a criminal record has not satisfied the waiting period required for a traditional expungement. The Section supported the objective of the bill, which was to encourage more individuals with criminal records to reintegrate into the community by removing legal and social barriers that result from criminal records. However, the Section argued that the bill did not address the primary obstacle faced by individuals seeking expungements, namely the requirement that the individual be convicted of "not more than 1 offense." A substitute bill, which did address the single offense issue, was eventually introduced. That bill was passed by the House, but was not passed by the Senate.

This session's HB 4327 squarely addresses the "one offense" issue. Under the bill, a person is eligible to apply for an expungement if the individual has been convicted of no more than one felony or no more than two misdemeanors. Since individuals who have only one conviction, whether a felony or a misdemeanor, are currently eligible for an expungement, the effect of the bill will be to allow many, but not all, individuals with two misdemeanors to apply for an expungement.[2] The bill also alters the time frame for applying for an expungement. Effectively the bill lengthens the waiting period for individuals with felony convictions (by starting the clock after completion of parole/probation rather than at the date of sentence or release from imprisonment), but shortens the waiting period for individuals with misdemeanor convictions (by reducing the waiting period to two years).

The Prison and Corrections Section supports HB 4327 because it would facilitate the reintegration of former offenders into the community. Individuals with criminal records face significant legal and social barriers. Many employers will not hire individuals with even minor criminal records. Indeed, national research suggests that two-thirds of employers will not knowingly hire an ex-offender.[3] Individuals with criminal records are frequently denied licenses for such jobs as barbering, and are completely barred from a large number of occupations. As a result, individuals with criminal records are chronically underemployed, making it difficult or impossible for them to support their families or pay child support. Taxpayers must pick up the slack through welfare, food stamps, and other government services for former offenders and their families.

In addition to difficulties finding employment, individuals with criminal records face many other obstacles. For example, college students who have old drug convictions cannot get federal educational grants to help them pay for school. Moreover, many former offenders are ineligible for public housing, and cannot find landlords who will rent to them.

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[1] H00895'05 (H-2).

[2] In certain cases an individual will still be unable to expunge two misdemeanors. For example if the individual was convicted of two domestic violence misdemeanors, two assault cases, two child abuse cases, or two acts of indecent exposure, only one of the convictions would be expungable.

[3] Jeremy Travis et al., FROM PRISON TO HOME: THE DIMENSIONS AND CONSEQUENCES OF PRISONER REENTRY 35 (2001).

Expungements provide a tremendously valuable opportunity to lift these barriers for deserving individuals. A former offender who can demonstrate rehabilitation can set aside the conviction and obtain a clean criminal record. As a result, that individual is much more likely to find work, find housing, and participate fully in our society.

Unfortunately, under current law expungements are rarely available. The primary obstacle faced by ex-offenders seeking expungements is the requirement that the applicant be convicted of "no more than 1 offense." While many individuals with criminal records successfully turn their lives around, this often only happens after several brushes with the law. But the mere fact that an applicant has multiple convictions does not mean that the applicant should never get a second chance. For example, simply because a person shoplifted not just once, but a couple of times as a teenager, does not mean that the person should be dogged by those convictions throughout his or her adult life. The Prison and Corrections Section supports HB 4327 because it would relax, albeit only slightly, the criteria for expungement by allowing two misdemeanors to be expunged.

The Prison and Corrections Section also supports HB 4327 because it would address one of the oddities that exists under current expungement law. At present expungements are only available if the applicant has a single offense, whether a felony or misdemeanor. Thus, an individual can get a single felony charge, say for burglary, removed from his or her record, but cannot get two minor misdemeanors, say for trespassing, expunged.

The law contains many safeguards to ensure that expungements are not granted inappropriately. The most serious offenses cannot be expunged. Notice must be given to the prosecutor, the attorney general, and the victim, if there was one. Most importantly, a hearing is held before a judge who determines on a case by case basis whether an expungement should be granted. In cases where an applicant seeks to expunge two misdemeanor convictions, the judge will have the opportunity to weigh the fact that there were two offenses, along with information about the applicant's subsequent conduct, in determining whether an expungement is appropriate.

Passage of this bill would make a significant difference in the lives of individuals who have been convicted of two misdemeanors. At the same time, the Section wishes to emphasize that the vast majority of individuals with criminal records will remain ineligible for expungement. An individual with two or more felonies, three or more misdemeanors, or a combination of felonies and misdemeanors will not be able to get his or her record set aside, even if decades have passed since the convictions and the person has led an exemplary life thereafter. While many individuals with longer or more serious records may be inappropriate candidates for expungement, certainly some such individuals can demonstrate that they have successfully turned their lives around. Those individuals too deserve a second chance.

The Section would propose two possible approaches to deal with cases not covered under the current bill. First, the legislature might consider a graduated system whereby former offenders have to wait for longer periods to expunge multiple offenses. For example, an individual could expunge one felony after five years, two felonies after ten years, and three or more felonies after fifteen years.

Second, the legislature should consider developing a mechanism, in addition to expungements, that would remove the civil legal barriers faced by individuals who have committed more than one offense but have since been rehabilitated. Several other states provide "Certificates of Good Conduct," "Certificates of Rehabilitation" or "Certificates of Relief from Disabilities," which lift statutory barriers to jobs or licenses, and remove other civil disabilities that follow upon a conviction. While an expungement erases a person's criminal record for most purposes, a certificate simply restores the individual's civil rights while leaving the criminal record intact. The Prison and Corrections Section believes that a system allowing for the issuance of Certificates of Rehabilitation would complement the existing expungement system, because it would facilitate the reintegration of ex-offenders who have multiple or more serious convictions.

In summary, the Prison and Corrections Section welcomes Bill 4327 as an important first step in moving former offenders into the workforce, and helping them to become productive members of our society.