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BILL ANALYSIS



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House Bill 4851 (Substitute H-7 as passed by the House)
Sponsor: Representative Philip M. Cavanagh
House Committee: Judiciary
Senate Committee: Judiciary

Date Completed: 6-12-12

CONTENT

The bill would amend the Michigan Medical Marihuana Act (MMMA) to do the following:

- **Revise the definition of a physician's "written certification" of a patient's debilitating medical condition, and define "bona-fide physician-patient relationship".**
- **Expand the definition of "enclosed, locked facility" where a qualifying patient or primary caregiver may keep cultivated marihuana plants.**
- **Exclude anyone ever convicted of an assaultive crime from the definition of "primary caregiver".**
- **Preclude people who committed certain violations of the Act from asserting an affirmative defense.**
- **Specify that a showing of the elements required for an affirmative defense in a motion for dismissal would have to be by a preponderance of the evidence.**
- **Allow a person to assert an affirmative defense to the trier of fact regardless of whether he or she asserted it in a motion to dismiss, unless no reasonable factfinder could find in favor of the person.**

Physician-Patient Relationship

The MMMA authorizes the Department of Licensing and Regulatory Affairs to issue a registry identification card to a qualifying patient who submits a "written certification", a fee, and specified information. A qualifying patient who possesses a registry identification card is not subject to arrest, prosecution, or penalty for the medical use of marihuana if the amount does not exceed quantities specified in the Act and the possession and use of marihuana meet specified standards.

Also, under the MMMA, a physician is not subject to arrest, prosecution, or penalty, and may not be denied any right or privilege solely for providing a written certification, in the course of a "bona fide physician-patient relationship" after the physician has completed a full assessment of the qualifying patient's medical history, or for otherwise stating that, in the physician's professional opinion, a patient is likely to receive therapeutic or palliative benefit from the medical use of marihuana as allowed under the Act.

The Act defines "written certification" as a document signed by a physician stating the patient's debilitating medical condition and that, in the physician's professional opinion, the

patient is likely to receive therapeutic or palliative benefit from the medical use of marijuana to treat or alleviate the patient's debilitating medical condition or symptoms associated with it. The bill also would require the signed document to state that the physician had completed a full assessment of the patient's medical history and current medical condition, including a relevant, in-person, medical evaluation.

The bill would define "bona fide physician-patient relationship" as a treatment or counseling relationship between a physician and patient in which all of the following are present:

- The physician has reviewed the patient's relevant medical records and completed a full assessment of his or her medical history and current medical condition, including a relevant in-person, medical evaluation of the patient.
- The physician has created and maintained records of the patient's condition in accord with medically accepted standards.
- The physician has a reasonable expectation that he or she will provide follow-up care to the patient to monitor the efficacy of the use of medical marijuana as a treatment of the patient's debilitating medical condition.
- If the patient has given permission, the physician has notified his or her primary care physician of the patient's debilitating medical condition and certification for the use of medical marijuana to treat it.

Enclosed, Locked Facility

The MMMA provides that a registered qualifying patient and a registered primary caregiver are not subject to arrest, prosecution, or penalty and may not be denied any right or privilege for possession or cultivation of certain amounts of marijuana. A patient who has not specified a primary caregiver may cultivate up to 12 marijuana plants kept in an "enclosed, locked facility". A caregiver may cultivate up to 12 marijuana plants kept in an enclosed, locked facility, for each registered qualifying patient who has specified the primary caregiver. (Each qualifying patient may have only one primary caregiver, and a primary caregiver may assist not more than five qualifying patients with their medical use of marijuana.)

The MMMA defines "enclosed, locked facility" as a closet, room, or other enclosed area equipped with locks or other security devices that permit access only by a registered primary caregiver or registered qualifying patient.

Under the bill, "enclosed, locked facility" would mean a closet, room, or other comparable, stationary, and fully enclosed area equipped with secured locks or other functioning security devices that permit access only by a registered primary caregiver or registered qualifying patient. Marijuana plants grown outdoors would be considered to be in an enclosed, locked facility if they were grown within a stationary structure that was all of the following:

- Anchored, attached, or affixed to the ground.
- Located on land that was owned, leased, or rented by either the registered qualifying patient to whom the marijuana plants belonged or the person designated through the registration process as the primary caregiver for the registered patient or patients.
- Equipped with functioning locks or other security devices that permitted access only by the registered primary caregiver or registered qualifying patient upon whose property the structure was located.
- Enclosed on all sides, except for the base, by chain-link fencing, wire mesh, wooden slats, or a similar material that prevented access by the general public.

Under the proposed definition, "enclosed, locked facility" also includes a motor vehicle if both of the following are met:

- The vehicle is being used temporarily to transport living marihuana plants from one location to another with the intent to retain the plants permanently at the second location.
- A person is not in the vehicle unless he or she is either the registered qualifying patient to whom the plants belong or the person designated through the registration process as the primary caregiver for the registered qualifying patient.

Primary Caregiver

The MMMA defines "primary caregiver" as a person who is at least 21 years old and who has agreed to assist with a patient's medical use of marihuana and who has never been convicted of a felony involving illegal drugs. Under the bill, the person also could never have been convicted of an assaultive crime as defined in Section 9a of Chapter X of the Code of Criminal Procedure.

(Section 9a, which deals with detention and denial of bail, defines "assaultive crime" as any of the following:

- Felonious assault; assault with intent to commit murder; assault with intent to do great bodily harm; assault with intent to maim; assault with intent to commit a felony; unarmed or armed assault with intent to rob and steal; or assault against a pregnant woman.
- Attempted murder; first-degree murder; second-degree murder; or manslaughter.
- Kidnapping; kidnapping of a child under 14 years of age; or a prisoner's taking another person as a hostage.
- Stalking or aggravated stalking.
- First-, second-, third-, or fourth-degree criminal sexual conduct (CSC) or assault with intent to commit CSC.
- Carjacking.
- Use of force or possession of a dangerous weapon in the course of committing a larceny or robbery.
- A violation of Chapter 33 (Explosives and Bombs, and Harmful Devices) or Chapter 83-A (the Michigan Anti-Terrorism Act) of the Michigan Penal Code.
- Threats of assault against an employee of the Department of Human Services.)

Affirmative Defense & Dismissal

Under the MMMA, except as provided in Section 7, a patient and a patient's primary caregiver, if any, may assert the medical purpose for using marihuana as a defense to any prosecution involving marihuana, and the defense must be presumed valid where the evidence shows certain circumstances. (Section 7 defines the scope and limitations of the MMMA.)

Under the bill, the affirmative defense could not be asserted by a patient or primary caregiver who did any of the following:

- Sold marihuana to someone who was not allowed to use marihuana for medical purposes.
- Undertook any task under the influence of marihuana, when doing so would constitute negligence or professional malpractice.
- Possessed marihuana, or otherwise engaged in the medical use of marihuana, in a school bus, on the grounds of any preschool or primary or secondary school, or in any correctional facility.
- Smoked marihuana on any form of public transportation or in any public place.
- Operated, navigated, or was in actual physical control of any motor vehicle, aircraft, or motorboat while under the influence of marihuana.

- Used marihuana without having a serious or debilitating medical condition.
- Fraudulently represented to a law enforcement official any fact or circumstance relating to the medical use of marihuana to avoid arrest or prosecution.

Currently, a person may assert the medical purpose for using marihuana in a motion to dismiss, and charges must be dismissed following an evidentiary hearing where the person shows the required elements for asserting an affirmative defense. The bill would require that showing to be by a preponderance of the evidence.

Under the bill, regardless of whether a person asserted the medical purpose in a motion to dismiss, he or she could assert the medical purpose for using marihuana to the trier of fact unless no reasonable factfinder could find in favor of the person on the elements required for asserting an affirmative defense.

MCL 333.26423 & 333.26428

Legislative Analyst: Patrick Affholter

FISCAL IMPACT

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

Fiscal Analyst: Dan O'Connor

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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.