

FGM SURVIVOR'S GUIDE

— TO —

LEGAL REMEDIES

IN THE STATE OF
MICHIGAN

DEVELOPED FOR [AHA](#) FOUNDATION

THROUGH THE PRO BONO ASSISTANCE OF

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DISCLAIMER

THE CONTENTS OF THIS MEMORANDUM ARE INTENDED TO CONVEY GENERAL INFORMATION ONLY AND ARE NOT INTENDED TO PROVIDE LEGAL ADVICE OR OPINIONS FOR ANY PURPOSE OR PARTICULAR CIRCUMSTANCE.

THE CONTENTS OF THIS MEMORANDUM SHOULD NOT BE CONSTRUED AS NOR RELIED UPON FOR LEGAL ADVICE IN ANY PARTICULAR CIRCUMSTANCE OR SITUATION.

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INTRODUCTION

THIS GUIDE AIMS TO PROVIDE SURVIVORS OF FEMALE GENITAL MUTILATION (“FGM”) WITH AN UNDERSTANDING OF THE THREE MAIN REMEDIES AVAILABLE TO THEM IN THE COURTS OF MICHIGAN.¹

FIRST, Michigan has enacted strong anti-FGM laws creating criminal and civil causes of action against FGM’s perpetrators.

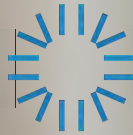
SECOND, survivors can potentially pursue recourse under several Michigan state laws not directly related to FGM.

THIRD, Michigan law provides survivors with various rights and protections in Michigan’s criminal justice system.

PLEASE NOTE THAT MICHIGAN LAW PROVIDES THAT MINORS CANNOT SUE ON THEIR OWN AND MUST BE REPRESENTED BY AN ADULT.²

HOW DO I KNOW IF I AM A SURVIVOR OF FGM?

FGM is a practice that spans many different countries and communities, each with their own customs that occur at different ages. For example, in the Somali community, most girls are cut between the ages of 5 and 10 years old, while in some Nigerian communities, girls are often cut when they are christened at 8 days old. A description of the different types of FGM can be found at www.who.int, and the different practices in various communities and countries of origin can be found at www.28toomany.org. If you are unsure whether you have been the victim of FGM, you should consult your OB/GYN or contact help@theahafoundation.org.



REMEDIES AVAILABLE TO SURVIVORS UNDER MICHIGAN ANTI-FGM LAW

IN 2017, THE MICHIGAN STATE LEGISLATURE ENACTED COMPREHENSIVE ANTI-FGM LEGISLATION PROVIDING SURVIVORS WITH THE ABILITY BOTH TO BRING A **CIVIL** ACTION AND TO ASSIST IN THE **CRIMINAL** PROSECUTION OF FGM PERPETRATORS. HOWEVER, THE NEW LEGISLATION DOES NOT APPEAR TO APPLY RETROACTIVELY, MEANING THAT VICTIMS OF MUTILATIONS PERPETRATED BEFORE 2017 MUST RELY ON OTHER **CIVIL** AND **CRIMINAL** LAWS.

CIVIL LAW AND **CRIMINAL** LAW OFFER DIFFERENT FORMS OF JUSTICE TO SURVIVORS OF FGM. A **CIVIL** LAWSUIT IS BROUGHT BY A PRIVATE CITIZEN (THE “PLAINTIFF”). IN THE CASE OF FGM, THE PLAINTIFF IS USUALLY THE VICTIM, AND THE PERSON BEING SUED (THE “DEFENDANT”) IS USUALLY THE CUTTER OR SOMEONE WHO ASSISTED THE CUTTER. IF THE DEFENDANT IS FOUND LIABLE IN A **CIVIL** CASE, HE OR SHE MAY BE ORDERED TO PAY MONEY TO THE PLAINTIFF. A **CRIMINAL** CASE IS A LAWSUIT BROUGHT BY A PUBLIC PROSECUTOR, WHO IS AN EMPLOYEE OF EITHER THE FEDERAL, STATE OR LOCAL GOVERNMENT. VICTIMS MAY PARTICIPATE IN THE TRIAL, BUT ONLY AS WITNESSES AND ONLY IF THE PROSECUTOR ALLOWS THEM TO. IF THE DEFENDANT IS FOUND GUILTY IN A **CRIMINAL** CASE, HE OR SHE MAY BE PUNISHED WITH FINES OR TIME IN PRISON. THE SAME WRONGFUL CONDUCT MAY GIVE RISE TO BOTH **CRIMINAL** AND **CIVIL** CHARGES, AND SO SURVIVORS SHOULD ALWAYS CONSIDER PURSUING BOTH FORMS OF RELIEF.

WE WILL DISCUSS THE **CRIMINAL** AND **CIVIL** OPTIONS IN TURN.

CRIMINAL PROSECUTION OF FGM PERPETRATORS

M.C.L. §§ 750.136 AND 750.136A

Criminal prosecutions against perpetrators of FGM under Michigan law can be brought only by state prosecutors. However, while victims of FGM cannot themselves bring criminal actions, they can provide valuable assistance to the prosecuting attorneys bringing those actions.

Michigan law defines FGM as the circumcising, excising or infibulating of the whole or part of any labia majora or labia minora or clitoris of another person who is less than 18 years of age.⁴ The Michigan penal code punishes with up to 15 years' imprisonment anyone who knowingly performs FGM or knowingly transports a person for purposes of FGM.⁵ Importantly, the fact that the operation was performed as a matter of custom or ritual, of that the perpetrator had the consent of the survivor or of her parents or guardians, are not defenses to criminal prosecution.⁶

The most important way a survivor can assist a prosecuting attorney is by providing evidence, especially in the form of live testimony at trial. However, there are other forms of evidence that prosecuting attorneys may request from the survivor, including medical records, documented correspondence with the defendant, the names of other witnesses, the identities of other victims, and information about the defendant.

CIVIL CAUSES OF ACTION AVAILABLE TO SURVIVORS

M.C.L. §600.2978

Unlike with criminal actions, Michigan law provides survivors of FGM with the ability to bring civil actions against their victimizers directly. Under Michigan law, a victim of FGM is a person who, while a minor, suffered from the circumcision, excision, or infibulation of the whole or part of any labia majora or labia minora or clitoris. The survivor of FGM may bring an action at any time before she reaches the age of 28 years.⁷

Survivors bringing actions in civil courts must show one of the following: the defendant (1) unlawfully performed FGM; (2) unlawfully facilitated FGM; (3) unlawfully transported plaintiff from Michigan to another state to perform FGM; or (4) unlawfully facilitated the transportation of plaintiff from Michigan to another state to perform FGM.

In order to recover damages, the survivor must establish each of the following:

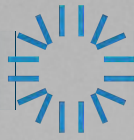
1. The defendant performed FGM on the plaintiff;
2. The plaintiff was less than 18 years old at the time of the operation;
3. The procedure was not a surgical operation necessary for the plaintiff's health or to assist the plaintiff in giving birth;
4. The plaintiff sustained damages as a result of the procedure (pain and suffering, reconstructive surgery, inconvenience, physical impairment or disfigurement); and
5. The defendant either knowingly performed or facilitated FGM, or knowingly transported or facilitated the transportation of the plaintiff from Michigan to another state where FGM was to be performed.

If the survivor is successful in her action, she may be awarded the following by the court:

1. Three times the amount of any monetary damages suffered;
2. Damages for noneconomic loss (including damages or loss due to pain, suffering, inconvenience, physical impairment, or physical disfigurement); and
3. Costs and reasonable attorney fees.⁸

In order to be successful, the plaintiff will have to submit to the court evidence demonstrating that the defendant committed the act that caused the injury.

This evidence can include, among other things, a medical expert's report assessing the injury, witness testimony, correspondence between the cutter and the survivor or her parents, and/or business logs reflecting the date of cutting.⁹



OTHER CRIMINAL AND CIVIL CAUSES OF ACTION AVAILABLE TO SURVIVORS OF FGM IN MICHIGAN

ADDITIONAL CRIMINAL LAWS

IN ADDITION TO THE FGM STATUTE, THERE ARE SEVERAL OTHER CRIMINAL LAWS FOR WHICH A PERPETRATOR OF FGM MAY BE CONVICTED:¹⁰

1. TORTURE (M.C.L. § 750.85)

The defendant commits torture when they deliberately cause cruel or extreme pain and suffering (physical or mental) and have caused bodily injury or mental pain to the victim. The victim must show that they were not free to move about as they wished, or that their movements were forcibly restricted by the defendant.

2. FELONIOUS ASSAULT (M.C.L. § 750.82)

Felonious assault occurs when an individual threatens to injure another person (i) with a gun, knife, iron bar, club, brass knuckles or (ii) with another dangerous weapon.

3. ASSAULT WITH INTENT TO MAIM (M.C.L. § 750.86)

Assault with intent to maim occurs when the defendant assaults the victim with the intent to maim or disfigure her body by cutting off or disabling a limb, organ or body part (among others).

4. CHILD ABUSE IN THE SECOND DEGREE (M.C.L. § 750.136(B))

Child abuse in the second degree contains the following elements: (i) the person's act or omission causes serious physical or mental harm to a child; (ii) the person knowingly commits an act likely to cause serious physical or mental harm to a child (regardless of whether harm actually results); or (iii) the person

knowingly commits an act that is cruel to a child (regardless of whether harm actually results). The victim does not need to show that the defendant intended to cause injury.¹¹

The victim must provide some evidence of the crime, such as photographs of injuries, testimony, expert witnesses and medical reports.¹²

5. UNLAWFUL IMPRISONMENT (M.C.L. § 750.349(B))

Unlawful imprisonment is the knowing restraint of another person in order to facilitate another felony. The victim must establish the required elements of another felony crime (in addition to unlawful imprisonment) in order to obtain a conviction for unlawful imprisonment.

ADDITIONAL CIVIL CAUSES OF ACTION

IN ADDITION TO THE CRIMES SUMMARIZED ABOVE, VICTIMS MAY COMMENCE A CAUSE OF ACTION IN CIVIL COURT. CIVIL COURT MAY BE MORE CONVENIENT, AS VICTIMS ONLY NEED TO SHOW THAT IT IS MORE LIKELY THAN NOT THAT THE DEFENDANT IS RESPONSIBLE FOR THE ALLEGED FGM. ADDITIONALLY, CIVIL COURTS MAY BE MORE WILLING TO ALLOW CERTAIN TYPES OF EVIDENCE THAT WOULD NOT BE PERMITTED IN A CRIMINAL TRIAL.

WHILE VICTIMS CAN RECEIVE COMPENSATION IN CIVIL COURT FOR THE HARMS THEY HAVE SUFFERED, SUCH COMPENSATION IS GENERALLY LIMITED TO THE DEFENDANT'S ACTUAL RESOURCES. NOTE THAT VICTIMS OF FGM MAY CHOOSE TO PURSUE BOTH CRIMINAL AND CIVIL CAUSES OF ACTION.

1. ASSAULT

Assault happens when the defendant (i) deliberately caused a harmful or offensive contact to the plaintiff, or an imminent apprehension of such contact and (ii) the plaintiff was aware of such threat.¹³ Assault doesn't even require the FGM procedure to have been performed, provided that the defendant made an intentional and unlawful threat to cause bodily injury to the plaintiff, the plaintiff had a well-founded fear of immediate danger, and the defendant appeared readily able to carry out the act if not prevented.¹⁴

In Michigan, the statute of limitations for assault is two years. It may be extended to five years if the defendant was a former husband or wife, or a person with whom the victim lived.

2. BATTERY

Battery is a touching of the victim's body which was (i) intentional, (ii) against her will and (iii) by another person or by an object put in motion by that person.¹⁵ Intent refers only to the defendant's intent for there to be contact. It does not matter if the defendant was acting under so-called "good intentions."¹⁶

The statute of limitations for battery is two years. It can be extended to five years if the defendant was a former husband or wife, or a person with whom the victim lived.

3. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Intentional infliction of emotional distress happens when the defendant has engaged in extreme and outrageous conduct which causes severe emotional distress to the plaintiff.¹⁷ The distress caused by the defendant must go beyond "annoyance" and must be so extreme that no reasonable person could be expected to endure it.¹⁸ For example, in one case a defendant was found liable for intentional infliction of emotional distress when their actions caused the plaintiff to suddenly lose weight, become extremely nervous and irritable and be unable to even perform housework.¹⁹ The victim does not need to show physical harm, although this may be helpful to their case.²⁰ The statute of limitations is three years.²¹

4. NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

The elements of negligent infliction of emotional distress are (i) severe injury threatened or inflicted on a person that is not the plaintiff, (ii) the harm witnessed by the plaintiff is so severe that the plaintiff suffers from shock which results in the plaintiff's actual physical harm, (iii) a close relationship between the plaintiff and the injured person and (iv) presence of the plaintiff at the location of the incident at the time the accident occurred.²²

Any claim for negligent infliction of emotional distress must be brought by a close relative of the survivor, not the survivor herself. Parents, children and spouses are all examples of individuals who could potentially bring such a cause of action.²³ Also, the plaintiff must have either witnessed the FGM or have entered into shock around the same time as when it happened.²⁴ It should be

noted that this is a separate and independent cause of action, which may be maintained regardless of if the victim has recovered against the defendant.²⁵ The statute of limitations is three years.²⁶

5. NEGLIGENT SUPERVISION

If the victim is a minor, and the negligence of their parent allowed for the FGM to occur, the victim may have a cause of action against that parent for negligent supervision of a child. The victim must show (i) that a duty was owed to plaintiff by the defendant, (ii) defendant breached this duty, (iii) injury, and (iv) that the breach was a proximate cause of the injury.²⁷



RIGHTS OF ALL SURVIVORS UNDER THE MICHIGAN CRIMINAL JUSTICE SYSTEM

Survivors of FGM are provided numerous protections under both the Michigan Constitution and state law. The Michigan Constitution requires that crime victims be treated with fairness and respect during the criminal justice process and guarantees them the rights to (i) reasonable protection from their defendant, (ii) consultation with the prosecution, (iii) potential compensation and (iv) notification of court proceedings, among others.²⁸ Further, Michigan state law requires law enforcement to provide victims with information about emergency medical services, victim's compensation benefits and the contact information for the prosecuting attorney.²⁹

The prosecuting attorney must provide victims with a summary of the phases of the criminal case, an action plan in case of threats or intimidation, and details about potential compensation from the state. The prosecuting attorney must consult with the victim prior to completing any negotiation that may result in a plea or dismissal of the charges against the defendant.³⁰

Finally, victims (or any other witness) who have a reasonable fear of physical violence by the defendant may be exempt from having to testify at trial, upon request of the prosecuting attorney.³¹

CONCLUSION

FOR MORE INFORMATION, PLEASE CONTACT AHA FOUNDATION AT INFO@THEAHAFOUNDATION.ORG.



ENDNOTES



1. In November 2018, the District Court of the Eastern District of Michigan held that 18 U.S.C. § 116, the federal criminal statute prohibiting and criminally punishing FGM, was unconstitutional. *United States v. Jumana Nagarwala, et al.*, No. 17-cr-20274 (E.D. Mich. Nov. 20, 2018).
2. Minors can institute and prosecute a legal action through the representation of a “next friend.” A next friend is a “competent and responsible person” appointed by the court either upon the minor’s nomination (if the minor is 14 years old or older) or on the nomination of the minor’s next of kin or of another relative or friend the court deems suitable (if the minor is younger than 14 years old). The next friend is responsible for the costs of the action. See M.C.R. §§ 2.201(E)(1) and (2).
3. See M.C.L. §§ 750.136 and 750.136a (criminal prosecution); M.C.L. § 600.2978 (civil cause of action).
4. M.C.L. § 750.136 (1).
5. M.C.L. §§ 750.136 and 750.136a. Note that a surgical operation (i) necessary to the health of the person or (ii) performed for medical purposes on a person in labor or who has just given birth is not considered FGM. M.C.L. § 750.136(2).
6. M.C.L.S. § 750.136(5).
7. M.C.L. § 600.5851a.
8. M.C.L. § 600.2978.
9. It is unclear from the language of the statute whether survivors of FGM performed prior to 2017 can bring a civil action under the new law.
10. The statute of limitations for each of these criminal laws is six years. M.C.L. § 767.24.
11. *People v. Todd*, 196 Mich. App. 357, 492 N.W. 2d 521, 1992.
12. See *People v. Murphy*, 321 Mich. App. 355, 910 N.W. 2d 374, 2017.
13. *Mitchell v. Daly*, 133 Mich. App. 414, 427, 350 N.W.2d 772 (1984).
14. M. Civ. JI 115.20.
15. *Tinkler v. Richter*, 295 Mich. 396, 401, 295 N.W. 201 (1940).
16. *Doe v. Johnson*, 817 F. Supp. 1382, 1396 (WD Mich. 1993).
17. *Bowen v. Nelson Credit Centers, Inc.*, 137 Mich. App. 76, 357 N.W. 2d 811 (1984).
18. *Daly v. Lacroix*, 384 Mich. 4, 179 N.W. 2d 390 (1970).
19. *Cassise v. Walled Lake Consol. Schools*, 2006 WL 445960 (Mich. Ct. App. 2006).
20. *Hilden v. Hurley Medical Center*, 831 F. Supp. 2d 1024 (E.D. Mich. 2011).
21. M.C.L. § 600.5805.
22. *Hesse v. Ashland Oil Inc.*, 466 Mich 21, 33; 642 N.W. 2d 330 (2002).
23. Id.
24. Id.
25. Id.
26. M.C.L. § 600.5805.
27. *Johnson v. Bobbie’s Party Store*, 189 Mich App 652, 473 NW2d 796 (1991).
28. M.C.L. Const. Art. I, § 24.
29. M.C.L. § 780.753.
30. M.C.L. § 780.756.
31. M.C.L. § 780.758.

