F I S C A L I M P A C T R E P O R T

SPONSOR HJC **ORIGINAL DATE** 02/28/13 **LAST UPDATED** 03/10/13 **HB** CS/38 & 508/aSPAC

SHORT TITLE Remove Rights from Certain Rape Convictions **SB**

ANALYST Daly

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY13	FY14	FY15	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	NFI	TBD*	TBD*	TBD*	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)
*See Fiscal Implications

Conflicts with HB 39

SOURCES OF INFORMATION
LFC Files

Responses Received From
Administrative Office of the Courts (AOC)
Administrative Office of the District Attorneys (AODA)
Attorney General's Office (AGO)
New Mexico Sentencing Commission (NMSC)
Indian Affairs Department (IAD)
Human Services Department (HSD)
Children, Youth & Families Department (CYFD)
Public Defender Department (PDD)

SUMMARY

Synopsis of SPAC Amendment

The Senate Public Affairs Committee Amendment to the House Judiciary Committee Substitute for House Bills 38 & 508 makes the court's obligation to appoint counsel upon request for a victim or a respondent that the court determines is indigent mandatory (rather than permissive, as in the original substitute bill).

Synopsis of Original Bill

The House Judiciary Committee substitute for House Bill 38 & 508 (hereinafter CS/HB 38) enacts a new section of Chapter 40 (Domestic Affairs) to provide for termination of parental rights or permanent suspension of legal and physical custody and visitation rights when criminal sexual penetration (CSP) results in conception of a child. Upon a finding that the child was conceived as a result of CSP, the court shall terminate or permanently suspend certain parental rights of the respondent (the biological father of the child) if, having considered the relationship between the child's biological parents and the circumstances of conception, the court finds that termination or suspension is necessary to protect the physical, mental and emotional welfare of the victim. Proceedings to terminate parental rights that involve a child subject to the Indian Child Welfare Act (ICWA) shall comply with the requirements of that act.

A motion to terminate all or permanently suspend certain parental rights may be filed only by the victim within six years from the date the victim knew or had reason to know her pregnancy with the child resulted from CSP perpetrated by the respondent. The motion must contain certain information delineated in the substitute bill, including whether the victim seeks termination of the respondent's parental rights or permanent suspension of respondent's legal and physical custody and visitation rights, the facts and circumstances of the child's conception, the date and place of the child's birth, the name and address of the respondent, if known, and the name and address of the person who would retain legal custody of the child upon such termination or suspension. A motion must also set forth whether the child is subject to the ICWA, and if so must include the tribal affiliation of the child's parents, the specific actions taken by the moving party to notify the parents' tribes and the results of the contacts including specific information related to the persons contacted, along with copies of any correspondence with the tribes, and the specific efforts made to comply with the placement preferences set forth in the ICWA or the placement preferences of the appropriate Indian tribes.

Notice of the filing of such a motion, along with a copy of the motion, must be served by the victim on all other parties in the manner described in the bill. The notice shall state that a written response must be filed within 30 days by a party who intends to contest the termination or suspension. If the case involves a child subject to ICWA, notice shall be sent by certified mail to the tribes of the child's biological parents and upon any Indian custodian. After a motion is filed, the court shall advise the victim and respondent of the right to counsel, if any, and the court may appoint counsel from the CYFD upon request for a person the court determines is indigent. The court may also appoint a guardian ad litem for the child if there is a significant cause, and the court shall make a record of its reasons for the appointment. No party or employee or representative of a party may be appointed as guardian ad litem. Upon filing a motion to terminate or suspend, the victim shall request a hearing on the motion. The hearing shall take place at least 30 days but no more than 60 days after service.

The grounds for termination or suspension must be proved by clear and convincing evidence, except when the proceeding involves a child subject to ICWA.

In a termination or suspension proceeding involving a child subject to ICWA, the grounds for termination or suspension must be proved beyond a reasonable doubt and shall meet the requirements of ICWA, and the court in its judgment shall make specific findings to that effect.

A judgment permanently suspending a respondent's legal and physical custody and visitation rights must provide that the respondent has no rights to legal or physical custody or visitation with the child; the respondent has no right to consent to or receive notice of a subsequent

adoption proceeding concerning the child; the judgment does not affect the ability of the victim, the child or the state to seek child support for the child from the respondent, nor the child's right of inheritance from and through the respondent but the respondent has no right of inheritance from the child; and the name of the person who retains custody of the child.

A judgment terminating a respondent's parental rights must provide that the respondent has no rights to legal or physical custody or visitation with the child; the respondent has no right to consent to or receive notice of a subsequent adoption proceeding concerning the child; the respondent is divested of all legal rights and privileges with respect to the child; no party may seek child support for the child from the respondent; and the name of the person retaining custody of the child.

The court shall issue appropriate orders within 30 days after the hearing on a motion filed pursuant to this section.

Any statements made in a proceeding under this section are not available for use in any other legal proceeding or action. All records and information concerning a party to the proceeding to terminate or suspend shall be confidential and closed to the public, and shall be disclosed only to the parties and any other person or entity having a legitimate interest in the case or the work of the court, as ordered by the court. Intentional unlawful release of these records constitutes a petty misdemeanor punishable by up to six months imprisonment in a county jail or a fine of not more than $500 or both.

This new section of law shall not affect the requirements set forth in the Abuse and Neglect Act or the Adoption Act as those acts may relate to a child who is the subject of a proceeding under this section.

HB 38 also amends the section of the Adoption Code governing consents to clarify that consent is not required from a biological parent of an adoptee conceived as a result of CSP when the parent has been convicted of CSP (in New Mexico or in another jurisdiction if the law in that jurisdiction is equivalent to New Mexico law) and when the parent's rights have been terminated or permanently suspended pursuant to this bill.

The effective date of this bill is July 1, 2013.

FISCAL IMPLICATIONS

The Administrative Office of the Courts (AOC) notes that this substitute bill may cause fiscal impact on the judiciary proportional to its implementation and the number of civil actions filed pursuant to it. Additionally, as provided for in this substitute bill, a judge might appoint an attorney to protect the best interest of the child in these cases (as guardian ad litem), as well as for an indigent victim or indigent respondent parent to ensure due process. The AOC advises that it currently administers a fund for attorneys appointed under the Children's Code, but there is no fund for attorneys appointed under Chapter 40. Since counsel to a victim or respondent parent is to be provided by the Children, Youth & Families Department under CS/HB 38, costs to that Department might also increase. Further, there is no direction in the substitute bill which agency is to provide or pay for a guardian ad litem should one be appointed, but any such appointment would also increase costs.

SIGNIFICANT ISSUES

This substitute bill may have financial impacts on the State and should be referred to the House Appropriations and Finance Committee.

It is estimated that there are about 25,000 rape-related pregnancies in the U.S. each year. See Kara N. Bitar, "The Parental Rights of Rapists", the Duke Journal of Gender Law & Policy (Spring, 2012). In its previous analysis, the New Mexico Sentencing Commission (NMSC) reports that 31 states have enacted some form of legislation addressing the parental rights of convicted rapists. Connecticut, Missouri, Montana, Oregon, Tennessee and Texas give courts the discretion to terminate all parental rights if the child resulted from sexual assault or forcible rape and the father has been convicted of that offense. Absent such legislation, the NMSC suggests that parental rights may allow a convicted rapist to assert some level of control over the victim of the crime.

The AOC in its previous analysis cautions that the question of whether rape resulted in a child is fact-specific and may require a full evidentiary hearing. See State ex rel. Children, Youth & Families Dep't. v. Paul P., 1999-NMCA-077, 983 P.2d 1011, finding that a father was denied due process when he was denied a full evidentiary hearing on the issue of CSP.

The Attorney General's Office (AGO) concludes that because the committee substitute bill contains thorough and meaningful due process for all parties, it is unlikely to face serious challenge. On the other hand, the Administrative Office of the District Attorneys (AODA) warns that segregating the civil and criminal cases, and protecting the respondent/offender's right in the criminal case could be challenging. It expresses particular concern with the differing standards used in a criminal case (beyond a reasonable doubt) and in a proceeding under CS/HB 38 (clear and convincing evidence):

> a person might be acquitted in criminal court of a CSP charge but a (different?) judge could determine in the civil case filed by the victim that that there was a CSP, and could decide the offender should lose his parental rights. If a criminal conviction was proffered to prove the CSP in a later hearing on the victim's motion to terminate or suspend the offender's parental rights, it is possible that the criminal conviction might be reversed on appeal.

The AODA suggests that a victim might have to face multiple proceedings in such an instance. Further, it notes that proving paternity (the child was conceived as a result of CSP) can be difficult and costly: in incest cases, the local crime lab does not accept or analyze paternity test samples; rather, an out-of-state laboratory does the analysis. CS/HB 38 does not address the costs of testing and experts for either side in the proceedings it authorizes.

The AOC also notes in its previous analysis that existing provisions in the Abuse and Neglect and Adoption Acts already address some of the matters included in this substitute bill. For example, Section 23A-4-29 NMSA 1978 sets out procedures for termination of parental rights in abuse and neglect cases, and Section 32A-5-19 NMSA 1978 prohibits the biological parent from withholding consent to adoption when the child is conceived by rape or incest (which language is changed to CSP in HB 39). It suggests that it may be possible to incorporate CSP into the existing termination procedures since these issues may arise and be addressed in the context of abuse or neglect and adoption cases.

The CYFD in an earlier analysis noted that its Protective Services Division is required by state and federal law to make reasonable efforts to locate fathers as well as paternal relatives as possible resources for the child. The impact of CS/HB 38 on that requirement remains unclear. The Department also points out that a conflict of interest may arise if a CYFD attorney is appointed for an indigent respondent parent if he is also a respondent in an abuse or neglect case brought in Children's Court. Further, in the event of CSP within marriage, the CYFD questions the effect of CS/HB 38 on the relationship of the respondent father to other children of the marriage.

Both the CYFD and the Human Services Department (HSD) express concern that since the physical, mental and emotional welfare of the victim is the basis for termination or suspension of parental rights, after consideration of the relationship between the child's biological parents and the circumstances of the child's conception, the traditional standard of "best interest of the child" used in determining custody of a child, see section 40-4-9, NMSA 197 governing dissolution of marriage proceedings, is not employed in reaching the ultimate determination in a proceeding brought pursuant to this new section. On a somewhat related matter, the Indian Affairs Department calls attention to issues generally involving and allowing extended family members such as grandparents to assert rights, including visitation, regarding the child involved in such a proceeding.

In addition, the HSD calls attention to language in CS/HB38 that upon suspension of the biological father's legal and physical custody and visitation rights, that individual has no right to receive notice of a subsequent adoption proceeding concerning the child. (Page 7, Lines 7-10; and Page 9, Lines 19-24). This provision may cause conflict in those instances in which the biological father's rights have been suspended but he has also been ordered to pay child support. Historically, adoptions have served to terminate the obligation to pay on-going child support. The biological father might be entitled to receive notice that his child support obligation has ceased due to the adoption of the child.

PERFORMANCE IMPLICATIONS

The CYFD advises in an earlier analysis that HB 508 could affect its federal and state statutory obligations to make reasonable efforts to identify appropriate kinship resources for children.

CONFLICTS

HB 39 amends the Adoption Act to clarify that consent is not required from a biological father when a child is conceived as a result of CSP (current law uses the term rape), including convictions from other jurisdictions if the law in that jurisdiction is equivalent to New Mexico law, but does not require that the father's parental rights have been terminated or permanently suspended, as does CS/HB 38.

TECHNICAL ISSUES

Page 4, line 24: Should the respondent whose rights may be terminated or suspended be listed as one of the other parties?

Page 7, line 17 and page 8, line 6: To be consistent with Section 1(F)(5) (at page 4, line 5), should the term "legal" be inserted before "custody"?

The HSD notes the bill does not contain a venue provision. The venue provision in some Chapter 40 proceedings, including dissolution of marriage, is the county in which either of the

parties resides. Venue in an action pursuant to this new section might be the county in which the victim resides.

OTHER SUBSTANTIVE ISSUES

The AGO indicates that legislation such as this could have unintended consequences:

> There are numerous cases where a defendant could be convicted of criminal sexual penetration where the defendant is four years older than the victim, who is 16 years of age or under. For example, a 20-year-old defendant could be convicted of committing criminal sexual penetration against a 16-year-old. The underlying factual scenario could be completely devoid of force. This is known colloquially as "statutory" rape. In this scenario, the bill would stop the convicted defendant from asserting rights of parentage. This would create enormous pressure on victims of this type of criminal sexual penetration (and their families) from reporting the incident or cooperating with prosecution.

The IAD provides this additional information:

> According to Sarah Deer's "Sovereignty of the Soul: Exploring the Intersection of Rape Law Reform and Federal Indian Law": The statistics published by the Department of Justice in the last five to six years indicate that Native American women, per capita, experienced more rape and sexual assault than any other racial group in the United States. In fact, American Indian and Alaskan Native women experience a higher rate of violence than any other group, including African-American men and other marginalized groups. One Justice Department report concluded that over one in three American Indian and Alaskan Native women will be raped during their lives.
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> According to the Duke Journal of Gender Law & Policy's article "The Parental Rights of Rapists": A special report conducted by the National Institute of Justice (NIJ) found that one out of every six women has been raped at some time in her life, and in a single year, more than 300,000 women in the U.S. were raped. The Centers for Disease Control (CDC) reported that 10.6% of women have reported experiencing forced sex at some time in their lives. Rape is underreported. Along with sexual assault, rape is the least likely of all violent crimes to be reported. The NIJ report found that only 19.1% of women raped since their eighteenth birthday reported the crime to the police. Additionally, the NIJ reported that rape notification rates differ based upon whether or not the victim knew her attacker. A victim that knew her attacker was less likely to report the crime. The NIJ report found that of the rapes reported to the police, only 37% resulted in criminal prosecution of the rapist. Of prosecuted rapists, 46.2% were convicted, and of those convicted, 76% were sent to jail.

AMENDMENTS

The AOC suggests that if the cases arising under this substitute bill were brought pursuant to a new section of the Children's Code, the protections afforded by the Code would be in place. The Code may be a more functional to place this matter, perhaps adding evidence that a child was conceived as a result of CSP as a prima facie showing that the putative father cannot parent the child.

The AGO recommends language be included creating a remedy for circumstances when a conviction for CSP is later reversed.

The legislature may wish to consider a provision preventing re-release of records or information concerning a party to a proceeding to terminate or suspend by a party who is provided those records or information pursuant to the exception to the confidentiality provision contained in Section 1(Q).

MD/blm:svb