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FISCAL IMPACT REPORT

SPONSOR Gallegos, DM **ORIGINAL DATE** 01/21/16
LAST UPDATED 02/12/16 **HB** 27/aSPAC

SHORT TITLE Family Violence Act Extended Protection Order **SB** _____

ANALYST Daly

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY16	FY17	FY18	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		Minimal	Minimal	Minimal	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Duplicates SB 84.

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)
Children, Youth & Families Department (CYFD)
New Mexico Corrections Department (NMCD)

SUMMARY

Synopsis of SPAC Amendment

The Senate Public Affairs Committee Amendment to House Bill 27 adds "out-of-state" in an attempt to allow a conviction for criminal sexual penetration from another state to be considered by the court as cause to grant an order of protection to the victim of the crime under this new section of the FVPA.

However, the language of the provision being amended (Section 1B) requires that an order of protection had already been granted in the sentencing phase of the underlying criminal prosecution under the section of the New Mexico criminal code that defines this crime, so an out-of-state conviction by definition may not satisfy that requirement. Further, AOC advises that sexual offense crimes in other states are often identified differently (like sexual assault and rape), with different classification (like felony or first degree) to differentiate the level of offense, all of which may make it harder for a judge to take judicial notice of crime that is not identified as

criminal sexual penetration but may be comparable to our statute governing that offense. In addition, AOC points out that the defendant in the out-of-state case must have some minimum contact with New Mexico for the court to have personal jurisdiction over that offender and thus be able to issue an order of protection.

Synopsis of Bill

House Bill 27 enacts a new section of the Family Violence Protection Act (FVPA). In a sentencing proceeding for a person convicted of criminal sexual penetration (CSP), the prosecutor may request the criminal court grant the victim an order of protection that would remain in effect for the remaining duration of that court's jurisdiction over the offender.

Once the criminal court's jurisdiction has expired, the victim may petition for an order of protection against the offender if a previous order of protection was granted. Based on the evidence submitted by the victim in the petition of the offender's conviction of criminal sexual penetration, the court may take judicial notice of the facts which led to such a conviction, and the victim shall not be required to appear in person at the hearing on the petition. If the court allows the victim not to appear, another person may appear on the victim's behalf. If the court grants the petition, it may issue an order of protection for the victim's lifetime, or any other length of time.

The effective date of this bill is July 1, 2016.

FISCAL IMPLICATIONS

AODA notes that district attorneys will be seeking orders pursuant to Subsection A of HB 27. Although it is not clear whether district attorneys will be involved in petitions filed by the victim under Subsection B, they do enforce violations of orders issued under the FVPA (a violation is a misdemeanor). To the extent the provisions in HB 27 are litigated, AODA anticipates district attorneys will incur additional expenses. NMCD reports no or only minimal fiscal impact, since contact is normally prohibited as a condition of probation or parole.

SIGNIFICANT ISSUES

AOC points out that HB 27 eliminates the burden on victims of CSP from having to face the perpetrator of the crime in a separate hearing seeking an order of protection by allowing the court to take judicial notice of facts that led to the conviction, rather than requiring testimony from the victim; thus, the victim does not have to appear. Although HB 27 allows a victim to file a petition at any time after expiration of a criminal court's jurisdiction over the offender, AOC expresses concern that because HB 27 does not specify a more specific time period for filing, that lack of specificity may inadvertently create a situation where a court may deny a petition since the CSP may have occurred years before. AOC predicts some courts may issue orders of protection only if the incident occurred within a specific time period prior to the petition being filed, and comments that it is not uncommon for courts to only consider domestic violence incidents that occurred within the past 30 days.

AODA raises these concerns:

HB 27 provides a new process for victims to obtain long-term orders after a conviction of CSP, without the victim having to appear in court. Currently, victims seeking a protective order or the continuance of a protective order may have to appear in court in close

proximity to the very person from whom they are seeking protection. Depending on the particular situation, however, keeping the victim out of the proceeding may raise due process or confrontation clause issues. The conviction for CSP is more than enough to justify issuance of an order of protection – it shows beyond a reasonable doubt that a sexual assault occurred, and typically a protection order requires only a showing of probable cause that abuse occurred. But issuance of a protection order may require more information than can be found in the criminal case. The victim may seek reimbursement for medical costs or counseling costs, for example, and the defendant may be ordered into counseling. See NMSA 1978, Section 40-13-5, which sets out the contents of a protection order (and requires a finding of domestic abuse, which is not required in Subsection B). This may require additional testimony. If sufficient information can be obtained through the testimony of persons other than the victim, an order can be granted. But it is possible that there will be situations in which the victim will need to testify. Statements made in the petition, or in a sworn affidavit, cannot be used to support an order if the person making those statements is not available to testify.

Additionally, AODA points out that the provision allowing a court to take judicial notice of a CSP conviction does not apply to proceedings under Subsection A. Nor does Subsection B indicate whether the district attorney plays a role in proceedings under it. HB 27 does not provide any procedure or remedy for an offender who wishes to have an order modified or rescinded, and provides no process for either party to appeal a decision on a petition for a protection order. AODA advises that protective orders may severely limit the freedom of the restrained person and may have serious financial consequences, noting that a protection order issued as a result of CSP of a child by a family member may also affect child custody, and whether the perpetrator can live in the family residence. There are also criminal consequences -- a violation of an order is a misdemeanor. Since under HB 27, orders may last for the life of the victim, not providing a process for review or appeal is impractical from an administrative standpoint and AODA believes likely will result in due process challenges from the restrained party. AGO suggests the standard of proof for lifting (or modifying) an order could be substantial change in circumstance.

In addition, CYFD raises concerns concerning the impact of HB 27's orders of protection on hearings under the Children's Code. It believes such orders would not apply to CYFD hearings, so that even in situations where a permanent order of protection has been issued involving parents, both would still need to attend court hearings in Children's Code proceedings, where decisions have to be made regarding their children, as well as carrying out custody arrangements and other parenting responsibilities. Counsel for a protected party who is a parent, however, may argue when a FVPA order of protection has been issued that the protected parent does not have to personally attend a Children's Code hearing, even when the parent's testimony is necessary

PERFORMANCE IMPLICATIONS

CYFD reports it has performance measures concerning the reunification of families which may be impacted by this bill.

ADMINISTRATIVE IMPLICATIONS

AOC notes that a new Supreme Court form for orders of protection authorized under this bill may be necessary.

OTHER SUBSTANTIVE ISSUES

CYFD calls attention to state and federal laws that are directed to preserving and reunifying families, which may potentially create conflicts or difficulties in application in light of the provisions of HB 27. A declared purpose of the New Mexico Children’s Code is “...to preserve the unity of the family whenever possible.” See Section 32A-1-3, NMSA 1978. CYFD suggests that a HB 27 permanent order of protection may inhibit its ability to preserve the family unit, but points out there is an aggravated circumstances exception at Section 32A-4-22(C) (2), NMSA 1978.

Similarly, CYFD cites the federal Adoption and Safe Families Act. Section 42U.S.C.S 671(15) (B) states that “...except as provided in subparagraph (D), reasonable efforts shall be made to preserve and reunify families—(i) prior to the placement of a child in foster care, to prevent or eliminate the need for removing the child from the child’s home; and (ii) to make it possible for a child to safely return to the child’s home...” Again, there are express exceptions to this requirement at 42 U.S.C.S 671(15) (D).

AMENDMENTS

AOC suggests that HB 27 may be amended to allow a victim to request that an order of protection already issued by the criminal judge be extended. It points out that Supreme Court Form 4-968 currently allows protected parties to request the court to extend a soon-to-expire order of protection, so an amendment specifying that that court take judicial notice of the criminal conviction as grounds for extending the original order of protection would be expand this practice.

POSSIBLE QUESTIONS

Does the victim have to appear at the sentencing hearing when the prosecutor requests an order of protection pursuant to Subsection A?

MD/jle/al/jle