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FISCAL IMPACT REPORT

ORIGINAL DATE 1/29/07

SPONSOR Garcia, M.H. LAST UPDATED _____ HB 141

SHORT TITLE Establishing the Offense of Giving Birth to a Child SB _____

ANALYST Ortiz

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY07	FY08		
	NFI		

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Attorney General's Office (AGO)
 Corrections Department
 Administrative Office of the Courts (AOC)
 Department of Health (DOH)
 Public Defender Department (PDD)

SUMMARY

Synopsis of Bill

House Bill 141 creates the new crime of giving birth to a child who has fetal alcohol syndrome. The bill provides definitions of the terms "birth" and "fetal alcohol syndrome". The bill makes the offense a misdemeanor, unless the fetal alcohol syndrome results in the child's death, in which case the crime would be a second degree felony.

SIGNIFICANT ISSUES

- (1) This bill creates a strict liability crime, meaning there is no intent, knowledge, or acceptance of the risk required to be guilty, only giving birth to a child who is diagnosed with fetal alcohol syndrome.
- (2) This bill does not establish a time limit for the diagnosis of fetal alcohol syndrome. Thus, a mother could be liable for this crime even if the fetal alcohol syndrome is diagnosed years after the child's birth.

(3) This bill does not address harm to a child caused by other forms of pre-natal activity, such as drug abuse, leaving an apparent disparity in the law and protection of children.

According to the Department of Health, almost 20 states have laws about the issue of maternal substance use, the incidence of the problem has not decreased. It is known that the criminalization of pregnant women does not solve their substance abuse problems; such efforts could frighten women away from needed treatment for themselves and their families. Instead, efforts could be directed at programs to educate and treatment facilities. Home visiting programs for new families, treatment programs, and male involvement programs all impact positively on women who are pregnant or may become pregnant and could reduce their substance abuse, including alcohol.

Fetal Alcohol Syndrome affects 1 per 1000 births in New Mexico. The rate increases from 1.8 to 3.09 per 1000 births among Native American tribes. Frequent or binge drinking in 3 months before pregnancy and any drinking in later pregnancy tends to be slightly greater among white non-Hispanic and Native Americans, as well as among older women. This may underlie, in turn, lower use of recommended prenatal care.

TECHNICAL ISSUES

The Public Defender Department points out that issue of proof may be difficult in enforcing this law, most notably when the child dies. Imposition of a second degree felony when the child dies will require juries to find that the child died because of the alcohol abuse by the mother. If the mother was also an abuser of other substances, causation problems may result because of the limited scope of this bill.

OTHER SUBSTANTIVE ISSUES

The Attorney General's Office reports that there is currently a case pending in the New Mexico Supreme Court on the issue of whether the mother's pre-natal consumption of cocaine that resulted in serious health problems to the child after the child's birth amounted to child abuse under the existing child abuse by endangerment statute. The case, State v. Martinez, S.Ct.No. 29,775, is in the Supreme Court on certiorari to the New Mexico Court of Appeals. The New Mexico Court of Appeals held that the child abuse by endangerment statute does not apply to pre-natal conduct of the child's mother because that conduct is directed at a fetus, which is not considered a child under the child abuse statute. The Supreme Court granted a writ of certiorari to review the Court of Appeals' decision. If the Supreme Court reverses the Court of Appeals, then the conduct addressed by this bill would be prosecutable under the child abuse statute. However, the statute proposed by this bill would be a more specific statute than the child abuse statute. Therefore, if this bill is enacted, this bill would prevent the State from prosecuting under the child abuse statute, even if the Supreme Court says that such prosecution would be allowed.

A statute, such as the one proposed by this bill, making similar conduct a separate crime could impact the current litigation.

Additionally, the PDD suggests that because of the high number of Roman Catholics in this state, this bill may be met with harsh opposition. Making the act of giving birth a crime may lead to a higher incidence of abortions, especially by mothers with substance abuse issues who would face criminal sanctions for giving birth.

ALTERNATIVES

An alternative that the Public Defender Department proposes is for counseling and treatment. While not always successful, treatment of substance addicted mothers can avoid the problems associated with delivering a Fetal Alcohol Syndrome child, while also avoiding the complex issues that would necessarily be put before a jury if charges were brought. Furthermore, the act of giving birth would not be criminalized.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

The consequence of not enacting this bill will depend on the outcome of the case in the Supreme Court. If the Supreme Court reverses the Court of Appeals, then the consequence of not enacting this bill will be that the conduct addressed in this bill would be prosecutable under the child abuse statute. If the Supreme Court does not reverse the Court of Appeals, then the consequence of not enacting this bill will be that a pregnant woman's abuse of alcohol that results in her child's diagnosis with fetal alcohol syndrome would not be prosecutable.

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