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

SPONSOR Louis **ORIGINAL DATE** 02/14/13 **LAST UPDATED** **HB** 508

SHORT TITLE Termination of Parental Rights for Rape **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

Relates to HB 38 and 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)

SUMMARY

Synopsis of Bill

House Bill 508 (HB 508) enacts a new section of the Children's Code to provide for termination of parental rights when criminal sexual penetration (CSP) results in conception of a child. In proceedings to terminate parental rights pursuant to this section, the court shall give primary consideration to the physical, mental, and emotional welfare and needs of the child and the circumstances of the child's conception. The court shall terminate parental rights with respect to a child when it is shown that the child was conceived as a result of CSP. 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 parental rights may be filed at any time by a parent or a guardian of the child. The motion must contain certain information delineated in the bill, including the relationship of the moving party to the child, the facts and circumstances of the child's conception, the name and address of the parent whose rights are to be terminated, if known, and the names and addresses of the persons retaining legal custody of the child upon such termination. 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, 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 on all other parties. The notice shall state that a written response must be filed within 20 days by a party who intends to contest the termination. If the case involves a child subject to ICWA, notice shall be sent by certified mail to the tribes of the child's parents and upon any Indian custodian. When a motion to terminate parental rights is filed, the moving party 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 must be proved by clear and convincing evidence. The circumstances of conception may be proved by evidence of conviction for criminal sexual penetration or by other evidence that indicates that crime was committed when the child was conceived. If the proceeding involves a child subject to ICWA, the grounds for termination of parental rights shall be proved beyond a reasonable doubt.

In a termination proceeding involving a child subject to ICWA, the court shall make specific findings that the requirements of the ICWA have been met. A judgment terminating parental rights must include the name of the person retaining custody of the child and include a determination of responsibility for the child's support. The judgment of termination divests that parent of all legal rights and privileges, including any receipt of notice of or consent to subsequent adoption proceedings concerning the child, but shall not affect the child's inheritance rights from and through that parent.

If a court denies a motion to terminate under HB 508, it must issue appropriate orders immediately, and a party may file a request for hearing within thirty days of the hearing at which the motion was denied.

All records and information concerning a party to the proceeding to terminate shall be confidential and closed to the public, subject to certain exceptions including those for persons and entities involved in the proceeding, law enforcement, those specifically authorized to inspect the records under the ICWA, those involved in the care or custody of the child and any others by order of the court who have a legitimate interest in the case or the work of 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.

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

FISCAL IMPLICATIONS

The Administrative Office of the Courts (AOC) suggests that a separate termination section for children conceived as a result of CSP may lead to additional cases filed by adoption agencies or

private persons, in which case judges might appoint an attorney to protect the best interest of the child in those cases as well as for the respondent parent to ensure due process. Costs to the judiciary would increase as a result.

SIGNIFICANT ISSUES

This 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 analysis of a related bill (HB 38), 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 maintains that parental rights allow a convicted rapist to assert some level of control over the victim of the crime.

The AOC 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. Further, the AOC calls attention to the provision in Section 1(K) which directs a court to address child support responsibility in the event of a termination of parental rights under this bill. Currently, child support is not assessed against persons whose parental rights have been terminated, as in a kinship guardianship. The AOC speculates that such a requirement may give rise to constitutional issues.

Likewise, the Administrative Office of the District Attorneys (AODA) predicts legal challenges, both as to the child support requirement and standard of proof to be satisfied in the termination proceeding:

> The obligation of the parent whose rights are terminated to support the child will surely be challenged in the courts. If a parent has no legal rights, why does the parent have legal obligations? If the child tries to claim an inheritance in the future, other relatives may challenge the child's right to inherit since the parent was never allowed to parent the child.
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> If there has not already been a criminal conviction at the time the petition for termination of parental rights is heard, this bill provides for other evidence to be presented to the court that indicates that CSP was committed during the time the child was conceived. The standard of proof will not be beyond a reasonable doubt as is required in the criminal case, but will be the clear and convincing evidence standard used in civil child abuse cases. This lower standard will certainly be challenged at some point by a parent whose rights have been terminated, especially if there is never a criminal prosecution or an acquittal or hung jury if there is a prosecution.

Similarly, in a related analysis (HB 38), the Attorney General's Office (AGO) advises that double jeopardy would be the likeliest challenge to this bill. New Mexico jurisprudence on double jeopardy generally imposes a bar to imposing separate criminal and civil punishments for the same offense. Few exceptions apply. Additionally, the sequence or timing of the different prosecutions is generally of no import to the analysis.

The AOC also notes that existing provisions in the Abuse and Neglect and Adoption Acts already address some of the matters included in HB 508. 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.

In addition, the Child Support Enforcement Division (CSED) of the Human Services Department (HSD) suggests two sections of HB 508 could be clarified. Section 1(K) provides "the court shall fix responsibility for the child's support," but does not offer clear guidance as to the method of calculating the support, contrary to an existing section of the Child Abuse and Neglect section of the Children's Code (§32A-4-26, NMSA 1978). Section 1(M) provides if a court denies a motion to terminate parental rights, "The parties may file a request for hearing within thirty days of the date of the hearing denying the termination of parental rights" (Page 5, Lines 17-19), but does not state the type of motion that may be filed to be heard at the hearing.

The Children, Youth and Families Department (CYFD) reports that parental termination pursuant to HB 508 could have a significant impact on many aspects of the work of CYFD Protective Services with children and families. It automatically affects the relationship between that child and that parent, as well as potentially affecting the extended family of that parent, which could impact the assessment of that relationship or the well-being of the child. In many cases of rape, such a limitation might make sense, but in others (*e.g.*, non-violent, statutory rape), the benefit of the child's relationship to that parent and the extended family could be considered by the PSD in the event of an investigation of the other parent in an abuse/neglect referral at some point after the birth of the child. This bill would preclude the consideration of that relationship. Further, the PSD 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 HB 508 on that requirement is not clear.

PERFORMANCE IMPLICATIONS

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

RELATIONSHIP

HB 38 amends the criminal sexual penetration statute to remove custody, visitation and inheritance rights from a person convicted of CSP when it results in the conception of a child. It also imposes a stay of paternity proceedings involving the child and the alleged parent, which is not lifted until final disposition of the criminal charge.

HB 39 amends the Adoption Act to clarify that consent is not required from a biological father of when a child is conceived as a result of CSP (current law uses the term rape).

TECHNICAL ISSUES

Page 3, line 15: Should the parent whose rights a moving party is seeking to terminate be listed as one of the other parties?

Page 5, line 6: To be consistent with Section 1(E)(5), should the term "legal" be inserted before "custody"?

Page 8, line 5 beginning at "or" through line 9 through the semi-colon: Should this phrase be deleted in the definition of "child" since it is repeated in the definition of "criminal sexual penetration" in Section 1Q(2)?

OTHER SUBSTANTIVE ISSUES

In a related analysis (HB 38), the AGO indicates that legislation such as this could have unintended consequences:

> First, 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.
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> Second, the bill does not seem to be concerned with the sex of the offender. As written, the bill could prohibit a female defendant convicted of criminal sexual penetration from asserting her rights to parentage, custody, visitation, and inheritance. Though rare, cases involving adult female defendants and minor male victims have resulted in pregnancy.
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> Finally, the bill assumes paternity. It is possible that a victim of criminal sexual penetration could have been impregnated contemporaneously with the criminal act, but by a different act, criminal or otherwise. By assuming paternity, this could accidentally create a defense to a child support claim for the actual father.

The Indian Affairs Department (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.

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 HSD/CSED proposes these amendments:

Page 5, Line 7: Following the existing material, insert: "The court may use the child support guidelines set forth in Section 40-4-11.1 NMSA 1978 to calculate a reasonable payment." (This language is identical to the language set forth in NMSA 1978, §32A-4-26(A)).

Page 5, Lines 17-18: Strike "~~request for hearing~~" and insert "motion for reconsideration."

In addition, the legislature may wish to consider a provision preventing re-release of records or information concerning a party to a proceeding to terminate by a party who is provided those records or information pursuant to one of the 15 exceptions to the confidentiality provision contained in Section 1(N).

MD/svb