



grounds for termination shall be proved beyond a reasonable doubt and shall meet the requirements of Section 25 in that act and the court in its termination order shall make specific findings that those requirements were met.

Subsection C defines criminal sexual penetration to include criminal sexual penetration in the first, second and third degree under New Mexico law, as well as an equivalent offense under the laws of another jurisdiction, territory or possession of the United States or an Indian nation, tribe or pueblo.

This bill carries an effective date of July 1, 2016.

## **FISCAL IMPLICATIONS**

LFC staff does not anticipate any fiscal impact to the State.

## **SIGNIFICANT ISSUES**

In its analysis of this substitute, AGO (as did CYFD in its analysis of an earlier version of this bill) raises a question concerning the standard of proof necessary in termination of parental rights proceedings:

The United States Supreme Court has held that due process requires a state to require proof, by clear and convincing evidence, in proceedings concerning the termination of parental rights. See Santosky v. Kramer, 455 U.S. 745, 102 S. Ct. 1388 (1982). As currently drafted, it is unclear if a parent's conviction of criminal sexual penetration alone would meet this burden of proof.

Further, AOC reported in its analysis of an earlier version of this bill:

Numerous U.S. Supreme Court and New Mexico Supreme Court cases explain “a parent has a fundamental interest in the care, custody, and control of his or her children.” *In the Matter of Grace H.*, 2014-NMSC-034. Thus, actions to terminate a parent's rights in this regard “must be conducted with scrupulous fairness.” *State ex rel. Children, Youth & Families Dep't v. Ruth Anne E.*, 1999-NMCA-035. However, the NM Supreme Court also held that the “right is prima facie and not an absolute right.” *Roberts v. Staples*, 1968-NMSC-109, ¶ 20. Therefore, the right “must yield when the best interests and welfare of the child are at issue.” *Id.*

It is that standard—the best interests of the child—that CYFD suggested could address concerns raised by the failure of HB 50 to allow for judicial discretion (a concern also previously raised by AGO). CYFD also suggested that in some cases it might be appropriate to consider the issue of child support.

## **OTHER SUBSTANTIVE ISSUES**

As both AOC and AGO advised in their analyses of an earlier version of this bill, a similar provision in the Adoption Act (part of the Children's Code) that dispenses with the requirement of consent or relinquishment of parental rights from a biological father of an adoptee conceived as a result of rape or incest in an adoption proceeding has been upheld in the face of substantive due process and equal protection challenges, including the failure to accord the father a hearing

on his fitness as a parent before terminating his parental rights. As AGO summarizes the court's ruling in Christian Child Placement Serv. of New Mexico Christian Children's Home v. Vestal, 1998-NMCA-098, 125 N.M. 426, 962 P.2d 1261, :

The Court found no substantive due process violation when the court terminated the parental rights of a father who pled guilty to criminal sexual penetration of a child, and stated that Section 32A-15-19(C) was “rationally related to the State's legitimate interest in protecting children and preventing their exploitation.” The Court also stated that “[a]n individual who has committed criminal sexual penetration of a child, thereby impregnating her...is not similarly situated to an unmarried man who has fathered a child by a consenting adult woman.” It explained that “the Legislature has a legitimate statutory purpose in seeking to protect minor children from sex offenders and sexual abuse, and can properly deprive such perpetrators of the fruits of their misconduct.”

AOC also advised that the New Mexico Court of Appeals has held that sexual intercourse with a 16-year-old does not constitute CSP as a basis for termination of the father's parental rights without his consent and procedural due process under the same adoption statute that exempts the parental consent requirement for adoption of a minor child conceived as a result of rape or incest. See *Paul P., Jr.*, 1999-NMCA-077. AOC cites both this and the Christian Child Placement case as illustrative of the challenge courts face in balancing the various interests of the penal and public welfare interests of the state, interests of fathers, interests of women as both mothers and victims, and interests of children. These cases also demonstrate the complexity of applying a CSP conviction.

In addition, AOC reported that according to the National Center for State Legislatures, there are 33 states that have statutes addressing parental rights and sexual assault, and 21 states allow for TPR if the sexual assault resulted in the birth of a child. The majority of these statutes are codified in the sections of law generally related to the child parent relationship, like New Mexico's Children's Code. There are several states whose statutes might be useful models that meet policy goals while providing for safeguards to balance the interest of all parties: Montana, New Hampshire, North Carolina, Oregon, Colorado and West Virginia. See <http://www.ncsl.org/research/human-services/parental-rights-and-sexual-assault.aspx#1>.

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