

Fiscal impact reports (FIRs) are prepared by the Legislative Finance Committee (LFC) for standing finance committees of the Legislature. LFC does not assume responsibility for the accuracy of these reports if they are used for other purposes.

FISCAL IMPACT REPORT

SPONSOR <u>SJC</u>	LAST UPDATED <u>02/09/2023</u>
	ORIGINAL DATE <u>01/20/2023</u>
SHORT TITLE <u>Guardianship Changes</u>	BILL NUMBER <u>CS/Senate Bill 31/SJCS/aSfI#1</u>
	ANALYST <u>Chilton</u>

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT* (dollars in thousands)

	FY23	FY24	FY25	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
	Indeterminate but moderate	Indeterminate but moderate	Indeterminate but moderate	Indeterminate but moderate	Recurring	General Fund

Parentheses () indicate expenditure decreases.
*Amounts reflect most recent analysis of this legislation.

Related to House Bills 34 and 129 and Senate Bills 107 and 128.

Sources of Information

LFC Files

Responses Received From

Children, Youth and Families Department (CYFD)
Office of the Attorney General (NMAG)
Administrative Office of the Courts (AOC)

SUMMARY

Synopsis of SFI#1 Amendment

The Senate floor amendment removes the definition of “fictive kin” in the first instance of that definition; in a second instance, it reinstates the previously-deleted definition of fictive kin as a “person not related by birth, adoption or marriage with whom a child has an emotionally significant relationship.” The amendment also removes the requirement that a child’s care-giver seek CYFD approval to file a petition seeking the appointment of a guardian.

Synopsis of Original SJC Substitute for Senate Bill 31

The Senate Judiciary Committee substitute for Senate Bill 31 amends the Family Services Act, renaming it the Voluntary Placement and Family Services Act. The proposed amendments address terminology, including that for Native American children; processes for children surrendered to the state, including reunification with the family; kinship care; and financial subsidies, and other issues related to guardians.

The bill newly defines “fictive kin” as a person with a family-like relationship to a child over the age of 14 and chosen by that child to be considered as such. The bill also adds definitions of “guardianship assistance agreement,” “guardianship assistance payments,” “voluntary placement agreement” and “kinship.” The bill removes “a person authorized to care for the child by a parental power of attorney as permitted by law” from the definition of “guardian.”

Section 4 names the act, as above. Section 5 establishes definitions as used in the Voluntary Placement and Family Services Act.

Section 6 of the act requires CYFD to assign legal representation to any parent considering voluntary placement of a child with the agency and enumerates the required notifications by that legal representative to the parent. A guardian ad litem for the child is to be provided. As before, according to Section 7 of the bill, children may be placed in voluntary placement for up to 180 days, but new provisions in the bill would establish procedures for extension of that placement for up to an additional 180 days, given a court order to that effect. A parent could request the return of a child in voluntary placement, and CYFD, if it opposed return, would need to file a court action within 48 hours.

According to Sections 8 and 9 of the bill, CYFD would be required to ascertain the following in the case of a child unable to return a family:

- Make reasonable attempts to place the child back with the parent or guardian, including
 - Services provided to the family to improve conditions,
 - Making a department plan to add services for the family,
 - Assessing the family situation with a goal of reunification,
 - Providing appropriate services to the family to facilitate reunification,
 - Involving other family members in the plan for reunification in a culturally appropriate way, and
 - Identifying needed or helpful community services.
- Report to the court on these efforts.

Without CYFD filing a petition with a court opposing the move, a child may be returned to the custody of his parents if they demand that be done.

Parent and guardians of children placed voluntarily would continue to have visitation rights, would need to be informed of changes in a child’s placement, would continue to have decision-making capacity over important medical and nonmedical decisions except those needed during emergency situations or those where the department decided parent or guardian decision-making would not be in the interest of the child.

A new Section 10 on required confidentiality is added, with limited exceptions enumerated. According to Section 11, hearings before a court would be open only to those with a direct interest in the proceedings, enumerated in that section.

Section 12 of the bill established criteria for voluntary placement, including placement in a least restrictive environment, especially for children with special needs, giving preference to family care, a licensed foster care home, or facilities operated by a child welfare agency or Children’s Shelter Care Act facility. The home or facility should be as close as possible to the child’s home and cannot be in a site of adult incarceration. Siblings should be placed together where possible.

Sections 13-18 provide criteria for financial subsidies for children appropriately placed in fully licensed guardianship care, including both general, recurring payments, and reimbursement for

nonrecurring expenses. Successor guardians would be entitled to these payments as well. In either case, payment would be discontinued when CYFD found them no longer to be warranted (Section 17), but the discontinuation could be contested within 30 days. These new sections of law replace some of those deleted under Section 30 of this bill.

Section 22 amends Section 40-10B-3 NMSA 1978, the Kinship Guardianship Act.

In a definitions section, “Indian,” “Indian child,” “Indian tribe,” and “Indian custodian” are added to other definitions in place. The Uniform Parentage Act, Section 40-11A NMSA 1978 is used to define “parent” here and elsewhere in the bill. The definitions of “legal custody,” “subsidized guardianship,” and “voluntary placement agreement” are removed.

In section 23, caregivers with whom CYFD has placed a child are added to those parties that can file a petition for appointment of a guardian for a child.

Sections 23 of the bill also deals with seeking petitions to establish a guardianship for a child. There are many requirements already; to those already in statute (Section 40-10B-5 NMSA 1978) is added identification of a child’s tribe and whether and which efforts have been made to comply with the Indian Family Protection Act (Section 32A-28-22 NMSA 1978).

Section 24 makes temporary guardianship pending hearings subject to Section 40-10B-6 NMSA 1978 rather than to the Kinship Guardianship Act as current statute (Section 40-10B-7 NMSA 1978) states.

Section 25 makes wording changes in Section 40-10B-7 NMSA 1978, which deals with “temporary guardianship pending hearing.”

Section 26 amends Section 40-10B-8 NMSA 1978 on burden of proof during hearings, removing a provision that a court must consider the potential impact of financial payments on child-parent relationships in deciding whether a parent will have to pay support to the kinship guardianship guardian.

Section 27 allows children more than 14 years of age to file a written objection to a person to be appointed as guardian, and Section 28 states those over 14 years of age would be among many named classes of persons who may apply for revocation of guardianship.

Section 29 repeals sections 32A-3A-9 and 40-10B-16 to 40-10B-21. The titles of these sections are as follows:

32A-3A-9	In Families Services: Right to Regain Custody.
40-10B-16	In Domestic Affairs/Kinship Guardianship: Financial subsidies; eligibility.
40-10B-17	In Domestic Affairs/Kinship Guardianship: Financial subsidies; nonrecurring expenses.
40-10B-18	In Domestic Affairs/Kinship Guardianship: Guardianship assistance agreements.
40-10B-19	In Domestic Affairs/Kinship Guardianship: Successor guardians.
40-10B-20	In Domestic Affairs/Kinship Guardianship: Discontinuance of guardianship assistance payments.
40-10B-21	In Domestic Affairs/Kinship Guardianship: Appeal of decisions.

As stated in Section 30, the effective date of this bill is July 1, 2023.

FISCAL IMPLICATIONS

There is no appropriation in House Bill 31.

The Attorney General does not anticipate a fiscal impact to that office.

CYFD does not make an estimate of the additional costs to that department related to the bill, in part because the number of children who would be placed in voluntary guardianship cannot be estimated, but the amount required, especially for legal fees and salaries, is expected to be substantial. From CYFD:

CYFD may not be able to absorb the fiscal implications discussed below with existing resources.

The provisions of Section 8 may require an increase in on-call hours for legal staff and will require a court filing system allowing for after hours, weekend, and holiday filing.

The filing deadline in this section is expressed as 48 hours. Unlike current filing deadlines for CYFD, which are expressed in days, an expression of a deadline as 48 hours will require filing during non-business hours. Currently, CYFD protective services is not staffed with after-hours legal staff (attorneys or support staff) and there are no legal support staff on call for weekends. CYFD does have one managing attorney on call for weekends who may be able to cover this expanded need for after-hours legal work.

However, section 8 requires that CYFD not only file a petition but also obtain a court order for CYFD to retain custody. This will require Judges available to review petitions and issue orders pursuant to this section after hours and on weekends and holidays.

Section 6 may also result in a need for additional legal staff. The provision of legal counsel to parents when a voluntary placement is under consideration will increase the involvement of the Children's Court Attorneys in the investigation stages. The impact of this will depend on the frequency of utilization of voluntary placements. To date, voluntary placements are utilized with a relatively small number of families. However, this could increase with parents having access to legal counsel, but there is presently insufficient data to accurately calculate the impact.

In commenting on the committee substitute, AOC reports the following in stating that there will not be a large fiscal impact on that agency:

The fiscal impact to the courts should be minimal, if any. It is not possible to know the number of VPAs [Voluntary Placement Agreements] that will be in place, but the number over the past few years has been minimal, ranging from five to ten statewide. Any potential increase in court involvement would likely be offset by a reduction in the filing of abuse/neglect petitions, which often take many months or years, and a great deal of judicial resources. In addition, moving the provisions from Chapter 40 to Chapter 32A, allows for Children's Court judges familiar with the department's practices, policies and procedures to more readily address matters involving the department, and reduces the need and costs to train family court judicial officers and staff on the same, where courts are divisionalized.

SIGNIFICANT ISSUES

The National Conference on State Legislatures notes many states have begun to update law and procedures regarding voluntary guardianship and kinship guardianship. It states:

Over the past decade, national efforts have focused on reducing the number of children involved in the public child welfare system through foster care and incentivized kinship care arrangements as more promising alternatives to mitigating child abuse and neglect and promoting family stability. Additionally, national crises have exacerbated the need for alternative caregiving: over 5.2 million children are estimated to have lost parents due to the Covid-19 pandemic and 240 thousand children have lost parents due to the opioid epidemic.

NCSL continues:

It is important to note that minor guardianship proceedings differ from state dependency and adoption proceedings. Dependency proceedings—sometimes referred to as child abuse and neglect cases—are initiated by state child welfare agencies on behalf of a child, whereas a minor guardianship proceeding can be initiated independently by private parties, usually relatives. Differences between minor guardianship and adoption are nuanced regarding the rights of the parent. Parental rights over the child, such as visitation, are often maintained under guardianship arrangements but terminated during adoptions.

ADMINISTRATIVE IMPLICATIONS

According to CYFD:

The expanded duties established for CYFD in the amended 32A-32A-8 and the implementation of a 48-hour filing deadline require changes in both CYFD and court procedure that may be difficult to implement with an effective date of July 1, 2023, due to the necessity of developing and implementing additional training, a new process, and new forms. In addition, section 18 of the bill requires expanded capacity for handling a new category of administrative appeals; and Section 19 requires additional regulation, policy, and procedure. It is unclear if CYFD will be able to absorb the administrative implications with existing staff.

RELATIONSHIPS

Relates to House Bill 34, which generally amends the Family in Need of Court-Ordered Services Act; to House Bill 129, which provides for supervision and monitoring procedures for the homes of children taken into custody on grounds of abuse or neglect; to Senate Bill 107, which generally revises the procedures for custody hearings involving children alleged to be neglected or abused; and to Senate Bill 128, which generally revises the procedures for placing children in protective custody.

TECHNICAL ISSUES

There is a five-day difference between two successive 180-day placements and the 365-day limitation on voluntary placements.

NMAG raised several issues regarding the original bill, several of which were rectified in the committee substitute. Those remaining are as follows:

Section 9 replaced the existing “right of *reasonable* visitation with the child” (emphasis added) with the “right to...have visitation with the child.” It is unclear whether the drafters intended to alter the scope of this right by removing the word “reasonable.” If they did not, they could reinsert that word so that courts do not view the change as significant.

Section 14 refers to the costs associated with a “subsidized guardianship.” This is currently a defined term for the purposes of the Kinship Guardian Act, but Section 23 proposes to remove this definition and the term does not appear to occur in the Children’s Code. To provide clarity, the bill could either remove the specialized term or define it.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

AOC points out that:

While voluntary placement agreements have not been voluminous in years past, the state should anticipate a greater percentage given the nationwide critique of ‘shadow foster care’ or other practices without oversight (see <https://www.nytimes.com/2021/12/01/magazine/shadow-foster-care.html>; <https://imprintnews.org/child-welfare-2/lawsuit-new-york-shadow-foster-care-system/64063> and <https://centerforhealthjournalism.org/fellowships/projects/hidden-foster-care-all-responsibility-none-resources>). Failing to enact this bill could create a continuing crisis which could see New Mexico facing lawsuits similar to the one New York is facing. Additionally, failure to provide clearer guidance and supports for voluntary placement with the department results in harm to vulnerable New Mexicans and leaves families without support or recourse for oversight of the department’s actions.

LAC/al/hg/rl/ne/rl/al