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FISCAL IMPACT REPORT

ORIGINAL DATE 02/10/09
 SPONSOR King LAST UPDATED 02/27/09 HB 660/aHJC
 SHORT TITLE Prohibit Certain Adoption Advertisements SB _____
 ANALYST Peery-Galon

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY09	FY10	FY11	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total		Indeterminate	Indeterminate	Indeterminate	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

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

No Responses Received From

Administrative Office of the District Attorneys
 Attorney General's Office

SUMMARY

Synopsis HJC Amendment

The House Judiciary Committee amendment for House Bill 660 deletes Subsection F and replaces it with the following: "F. A violation of the provisions of this section may be treated as: (1) a misdemeanor; (2) the subject of an attorney general's petition to the court for an injunction or to recover on behalf of the state a civil penalty not exceeding five thousand dollars (\$5,000) per violation if the attorney general believes that a person has willfully violated the provisions of this section; or (3) the subject of a private right of action by a person who suffers injury or damages by reason of conduct declared in violation of the provisions of this section. Upon a showing that this section was violated, the court may award damages, order injunctive relief and may award the cost of the lawsuit, including reasonable attorney fees."

Synopsis of Original Bill

House Bill 660 enacts a new section of the Adoption Act, Section 32A-5-1 NMSA 1978, to prohibit a person who is not qualified under New Mexico law to place a child for adoption pursuant to Section 32A-5-12 NMSA 1978 from marketing adoption services. The proposed legislation lists organizations and individuals permitted to place advertising of adoption services in New Mexico, and defines “advertise” as communicating by public media originating or distributed in New Mexico. Under the proposed legislation, the Attorney General is empowered to bring an action for a violation of the provisions of the Act, which constitutes a false advertising violation pursuant to Chapter 57, Article 15 NMSA 1978. The proposed legislation provides that an advertising medium that accepts and publishes or otherwise distributes in good faith, an advertisement by a person not qualified to place a child for adoption is not subject to civil or criminal penalties under the Act.

FISCAL IMPLICATIONS

AOC reported there will be a minimal administrative cost for statewide update, distribution and documentation of statutory changes. Any additional fiscal impact on the judiciary would be proportional to the enforcement of this law and commenced civil actions and actions to enjoin. New laws, amendments to existing laws and new hearings have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase.

SIGNIFICANT ISSUES

CYFD reported adoption of children, especially infants, has become a multi-state business. Some operators may carry out this business with little regard for New Mexico laws which are designed to protect innocent children, parents with crisis pregnancies and prospective adoptive parents. The public cannot currently distinguish between unauthorized facilitators and an entity that provides legitimate adoption services when viewing the adoption advertising. Associated with this advertising, there have been questionable child-placement practices and large adoption fees charged to adoptive families. The proposed legislation provides a definition of persons or entities that are permitted to advertise; restricts unauthorized adoption advertising; and allows the Attorney General to bring action against persons violating the provisions in this bill. Violation of the provisions of this section constitutes a false advertising violation.

AOC reported the proposed legislation provides that a violation of the Act constitutes a false advertising violation pursuant to Chapter 57, Article 15 NMSA 1978. As such, the following provisions apply:

- Section 57-15-3 NMSA 1978 provides that before the AG commences an action the AG is required to give notice and an opportunity to show orally or in writing why such action should not be commenced.
- Section 57-15-4 provides for a civil penalty of not more than \$500 for each violation of the Act and to be recovered in a civil action brought by the AG or, with his consent, the DA of the district where the act is committed. Section 57-15-4 also provides that it is a complete defense that the advertisement is subject to and complies with the rules and regulations of, and the statutes administered by the FTC.

- Section 57-15-5 NMSA 1978 provides that the AG or appropriate DA or a private citizen may bring an action in the name of the state to restrain and prevent a violation. The statute also provides that in exceptional cases brought by private citizens the court may award reasonable attorney fees to the prevailing party. Costs or attorney fees may be assessed against a defendant only if the court finds that he has willfully engaged in false advertising.

Section 57-15-2 NMSA 1978 defines “false advertising” as advertising which is misleading in any material respect. AOC questioned the following:

- Does adoption advertising placed by a person not qualified under NM law to place a child for adoption qualify as misleading advertising?
- Does the Section 57-15-4 defense that the advertisement is subject to and complies with FTC rules, regulations and statutes apply to the advertising prohibited by the Act?
- Is it possible that the prohibited advertising could comply with FTC rules, regulations and statutes?
- Should application of the Section 57-15-4 complete defense be negated?

PERFORMANCE IMPLICATIONS

AOC noted the proposed legislation may have an impact on the following measures of the district courts: cases disposed of as a percent of cases filed and percent change in case filings by case type.

RELATIONSHIP

House Bill 660 has a relationship with Senate Bill 248 which also seeks to amend the adoption section of the New Mexico Children’s Code.

OTHER SUBSTANTIVE ISSUES

CYFD stated since the new section is included in the Adoption Act, a violation would be subject to 32A-5-42 penalties. These are misdemeanor penalties up to \$1,000 and one year in prison. The bill provides that violation constitutes false advertising pursuant to Chapter 57, Article 15 NMSA 1978. Civil penalties related to that are no more than \$500.

RPG/mt