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FISCAL IMPACT REPORT

SPONSOR Gallegos ORIGINAL DATE 01/23/14
LAST UPDATED _____ HB 91
SHORT TITLE Unattended Children in Car Penalties SB _____
ANALYST Klundt

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY14	FY15	FY16	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		NFI				

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Children, Youth and Families Department (CYFD)

Administrative Office of the Courts (AOC)

Department of Health (DOH)

Attorney General's Office (AGO)

SUMMARY

Synopsis of Bill

House Bill 91 creates the misdemeanor crime of "Leaving a Child Unattended in a Motor Vehicle." The crime consists of intentionally or knowingly leaving a child unattended in a motor vehicle for longer than five minutes, knowing that the child is younger than ten years of age and not attended by an individual in the vehicle who is fourteen years of age or older.

The Act provides the following penalties:

- First offense: petty misdemeanor
- Second or subsequent offense: misdemeanor

The bill also provides that if leaving a child unattended in a motor vehicle results in injury requiring hospitalization or the death of the child, it is prima facie evidence of abuse of the child under Section 30-6-1 NMSA 1978.

The effective date of the Act is July 1, 2014.

FISCAL IMPLICATIONS

The Administrative Office of the Courts (AOC) reports that there will be a minimal administrative cost for statewide update, distribution and documentation of statutory changes. Additionally, the courts state that amendments to existing laws have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase.

SIGNIFICANT ISSUES

National statistics indicate that an average of 38 children die each year from heat-related deaths after being trapped inside motor vehicles. This bill makes the deliberate act of leaving a child in a motor vehicle a petty misdemeanor for a first offense, and a misdemeanor for a second or subsequent offense.

The Department of Health provided the following information regarding this bill.

Heat stroke may occur any time the body temperature goes over 104 degrees Fahrenheit, causing dizziness, agitation, confusion, loss of consciousness and even death. Children are at higher risk for heat-related injury than adults because their bodies make more heat relative to their size. There is no amount of time that it is safe to leave a child unattended in a car, even if the window is open. On a day that is just 72 degrees, the temperature inside a car can increase by 30 to 40 degrees in an hour, and most of that increase occurs in the first 30 minutes. (<http://www.webmd.com/parenting/features/hot-cars-and-child-death-prevention>).

There were 9 heat-related deaths among New Mexicans aged 0-14 in the 1990-2010 time period and an additional death reported in 2012 (NM Bureau of Vital Records and Health Statistics).

The AOC reports the following sections are relevant to this bill.

1) Section 30-6-1 NMSA 1978, subsections (I) and (J) list evidence and circumstances that shall be deemed prima facie evidence of abuse of a child. Although referenced in the Act, HB 91 does not amend Section 30-6-1 NMSA 1978 to list the additional circumstances as constituting prima facie evidence of abuse of the child.

Section 30-6-1(D) NMSA 1978 provides that abuse of a child consists of a person knowingly, intentionally or negligently, and without justifiable cause, causing or permitting a child to be: placed in a situation that may endanger the child's life or health; tortured, cruelly confined or cruelly punished; or exposed to the inclemency of the weather. Abuse that does not result in the child's death or great bodily harm carries a third degree felony penalty for a first offense and a second degree felony penalty for a second or subsequent offense. A person is guilty of a first degree felony when the abuse results in great bodily harm or death. Intentional abuse of a child under 12 that results in the death of the child is a first degree felony resulting in the death of a child.

2) Section 30-6-1(B) NMSA 1978 provides that abandonment of a child consists of a parent, guardian or custodian of a child intentionally leaving or abandoning a child under circumstances whereby the child may or does suffer neglect, as defined in the statute.

Abandonment of a child is a misdemeanor offense, unless the abandonment results in the child's death or great bodily harm, in which case the offense is a second degree felony. It appears that the conduct resulting in conviction for the new crime of "Leaving a Child Unattended in a Motor Vehicle" could result in conviction for the existing crime of abandonment of a child and/or the existing crime of abuse of a child. It is unclear whether creating the specific, new crime of "Leaving a Child Unattended in a Motor Vehicle" would result in fewer tragic deaths or harm to children left in cars.

PERFORMANCE IMPLICATIONS

The AOC reports that this bill may have an impact on the measures of the district courts in the following areas:

- 1) Cases disposed of as a percent of cases filed
- 2) Percent change in case filings by case type

OTHER SUBSTANTIVE ISSUES

The AGO has reported several possible scenarios which may be left unaddressed by the enactment of this bill:

- 1) A defendant leaving a child (perhaps an infant) alone in a motor vehicle on a blisteringly hot day, where even in mere minutes the temperature can grow to dangerous levels, for only 4 minutes and thirty seconds;
- 2) A defendant accidentally (or negligently) leaving a child in their care unattended in a motor vehicle on a blisteringly hot (or extremely cold) day for any period of time sufficient to cause the child to be exposed to a situation that may endanger the child's life or health, or to be exposed to the inclemency of the weather, would remain a third degree felony. This would lead to the anomalous situation where a person who intentionally (or knowingly) leaves their child in a hot car for more than 5 minutes would be subject to only a petty misdemeanor (for a first offense), while a person similarly situated who, not intentionally or knowingly, but merely accidentally (or negligently) leaves their child in the same conditions faces a third degree felony.
- 3) Courts have interpreted the Legislature's requirement that a defendant have knowledge of a child's age be such that the defendant be shown to have had *actual* knowledge of the child's age. [In interpreting NM's statutory rape law, for example, the Supreme Court in *Perez v. State*, 1990-NMSC-115, 111 N.M. 160, 803 P.2d 249, indicted the requirement the Defendant have knowledge of the victim's age is indeed a "numbers game," whose outcome is determined not only by the child's age, but by the relative age of the defendant. The Court stated in that case, "When the law requires a mathematical formula for its application, we cannot say that being provided the wrong numbers is immaterial."] It could be a defense that the person was told by either the victim or the person attending the child wrong information concerning their age(s).
- 4) Leaving a child unattended in a vehicle (not a motor vehicle), such as a trailer, could be subject to felony-level prosecution, depending on the circumstances, whereas if the vehicle has an engine (such as a motor home), the defendant would be subject to only a misdemeanor.

- 5) Even where a child has been knowingly left unattended in a vehicle that is dangerously hot (or cold), so long as the child is "checked on" at less than 5 minute intervals, this could be sufficient for a person to avoid liability, although the child remains in danger.

If enacted, HB 91 would also establish as prima facie evidence of felony-level child abuse whether the child had to be hospitalized or died as a result of being knowingly left unattended in a motor vehicle. However according to the AGO, if a child were to be hospitalized or die as a result of such action, New Mexico's Child Abuse statute is may be sufficiently broad to criminalize such activity.

The NM Court of Appeals has interpreted the NM Child Abuse Statute (Sec. 30-6-1, NMSA) to uphold a parent's (or guardian's) conviction for negligent child abuse based on evidence of inadequate child supervision on several occasions:

- 1) *State v. Schaaf*, 2013-NMCA-082, --- N.M. ----, 308 P.3d 160 (holding that the defendant's admission to the danger presented by a combination of serious risks apparent in the children's living environment along with the defendant's "compromised state" arising from ongoing methamphetamine use provided sufficient evidence to prove "an ongoing and pervasive zone of imminent danger" such that it constituted criminal child endangerment);
- 2) *State v. Chavez*, 2007-NMCA-162, 11, 143 N.M. 126, 173 P.3d 48 (holding that there was sufficient evidence to find the defendant guilty of child abuse where evidence indicated that she was high on methamphetamine, "placed [her c]hild in a sleeping arrangement that was highly and obviously dangerous to an infant and then completely failed to monitor [her child]");
- 3) *State v. Watchman*, 2005-NMCA-125, 138 N.M. 488, 122 P.3d 855 (holding that there was sufficient evidence to find the defendant guilty of child abuse when she drove drunk to a bar with her child and then left the child in a dangerous parking lot alone).

In all of these cases, the defendants failed to provide supervision of their children after placing them in dangerous situations where parental supervision was necessary. See *Schaaf*, 2013-NMCA-082, ¶ 17, --- N.M. ----, 308 P.3d 160 ("[T]he evidence supports a rational inference that [the Defendant's] judgment was highly impaired in the presence of substantial risks of harm to the children and that [the D]efendant had not secured and would not secure the substantial risks from the children."); *Chavez*, 2007-NMCA-162, ¶ 11, 143 N.M. 126, 173 P.3d 48 ("[The D]efendant testified that she knew [her c]hild could fall off the bed if left alone, and agreed it was important to check on him, especially since he was sick."); *Watchman*, 2005-NMCA-125, ¶ 5, 138 N.M. 488, 122 P.3d 855 ("The child was placed in a dangerous situation, which was created by [the D]efendant because the child was in the cab of an unlocked truck, at approximately 1:30 a.m., in a high traffic area ([the bar's] parking lot, with approximately 200-240 people in the bar that night) unprotected and vulnerable to any passerby.").

"[C]riminal negligence for purposes of child endangerment is measured objectively[.]" *Chavez*, 2009-NMSC-035, ¶ 45, 146 N.M. 434, 211 P.3d 891. It occurs "when a person should be aware of a substantial and unjustifiable risk that harm will result from his conduct." *Id.* (alteration, internal quotation marks, and citation omitted). And it requires the risk to be "of such a nature and degree that the [defendant's] failure to perceive it, considering the nature . . . of [the

defendant's] conduct and the circumstances known to [the defendant], involves a gross deviation from the standard of care." Id. (internal quotation marks and citation omitted).

The Court of Appeals has stated "By classifying it as a third degree felony, our Legislature anticipated that criminal prosecution of child abuse by endangerment would be reserved for application to the most dangerous circumstances and not to 'theoretical dangers.'" *Chavez*, 2009-NMSC-035, ¶ 16.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

If HB 91 is not enacted, Chapter 30 Article 6 of NMSA 1978 will not be amended to include criminalization of intentionally leaving a child under ten years of age unattended in a motor vehicle for longer than 5 minutes.

AMENDMENTS

The AGO proposed the following amendments to the bill, which would criminalize behavior that would not otherwise be subject to felony sanction (i.e., felony-level Child Abuse), by adding language to Page 1, Paragraph A of the proposed statute, vis:

LINE 24 (2) not attended by an individual in the
LINE 25 vehicle who is fourteen years of age or older[-]; and
LINE 26 [where the child is not otherwise (a) placed in a situation that may endanger the
LINE 27 child's life or health; (b) tortured, cruelly confined or cruelly punished; or (c)
LINE 28 exposed to the inclemency of the weather.]

ADDITIONAL QUESTIONS

According to the Attorney General's Office (AGO) this bill only addresses two possible types of mental state (mens rea) required to be proven to establish commission of the crime, specifically intentionally and knowingly. The Bill leaves unaddressed other possible mental states, including if the action of leaving a child unattended in a motor vehicle is done negligently or by accident.

Additionally, HB 91 does not address what, if any, relationship must exist between the child-victim and the person who is accused of leaving the child unattended in a motor vehicle. Should the defendant be a parent, caregiver, parent, or guardian of the child, or should any person, regardless of their relationship to the child be guilty if they perform the requisite act? The relationship between the defendant and the child is of concern when felony-level Child Abuse is alleged.

KK/svb