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FISCAL IMPACT REPORT

ORIGINAL DATE 02/23/11

SPONSOR Boitano & Park LAST UPDATED _____ HB _____

SHORT TITLE Custody of Child Clarifications & Regulations SB 396

ANALYST Daly

APPROPRIATION (dollars in thousands)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY11	FY12	FY13	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total	NFI	*	*	*	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

*It is not possible to quantify the fiscal impact of this bill, so costs are indeterminate, but there will be additional costs and operating expenses. See Fiscal Implications below.

May conflict with HB 108.

SOURCES OF INFORMATION

LFC Files

Responses Received From

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

SUMMARY

Synopsis of Bill

Senate Bill 396 amends existing law to limit custody of a child or children to a parent unless there has been a determination of unfitness of the parent. It expressly denies standing to a nonparent to seek child custody absent a determination of unfitness of the parent, and sets out procedures for a nonparent to obtain standing from the court. Any determination that a nonparent has standing is immediately appealable and all custody proceedings are stayed until the standing decision is finally decided on appeal.

The bill also restricts visitation rights to parents and others who are expressly granted visitation rights by statute, sets standards for an award of visitation rights to a nonparent and limits such rights to occasional contact only if that contact does not create undue conflict. In no case can visitation rights granted a nonparent be comparable to visitation awarded to a parent.

The effective date of this bill is July 1, 2011.

FISCAL IMPLICATIONS

The AOC anticipates increases in judicial caseloads:

Because SB 396 creates procedures that are in direct conflict with current law (the Kinship Guardianship Act, NMSA 1978, §§ 40-10B-1-15), the district and appeals courts are likely to experience additional hearings at the district level and cases at the appellate level when considering the conflicting provisions related to legal custody in SB 396 and that Act. The additional work may require additional resources to handle the increase, depending on the number of such hearings conducted and cases filed and appealed. Furthermore, the additional court hearings to determine standing to seek custody *before* ruling on the actual custody of the child(ren) will increase the court's workload. Immediate appeals may also increase the workload of the New Mexico Court of Appeals and Supreme Court. It is not possible to accurately estimate the number of hearings related to standing to seek custody that will be conducted, or cases appealed afterwards.

SIGNIFICANT ISSUES

The AOC raises these issues:

District courts have relied since 2001 on the guidance provided in the Kinship Guardianship Act regarding the custody of children by nonparents. That Act sets forth state policy that (1) it is the policy of the state that the interests of children are best served when they are raised by their parents, but when neither parent is able or willing to provide appropriate care, guidance and supervision to a child, then (2) it is the policy of the state that, whenever possible, a child should be raised by family members or kinship caregivers. (§ 40-10B-2.) Furthermore, the Act is intended to address those cases where a parent has left a child or children in the care of another for 90 consecutive days and that arrangement leaves the child or children without appropriate care, guidance or supervision.

In reality, married parents with joint custody may both be working away from their homes – out of town or even overseas – and their child(ren) are left in the care of a grandparent or aunt or uncle during that period. In such a case, the parents are still “fit” to assume parental responsibilities, but as a result of their employment are unable to provide day-to-day care for their offspring. The procedures set out in the Act allow the courts to recognize a stable and consistent relationship with a family member or other kinship caregiver that will allow the child to continue to thrive when parents are able but unavailable to provide daily oversight for the child. The Act specifies procedures to allow nonparents to effect a legal relationship between a child and those kinship caregivers when the child is not residing with either parent.

This bill, however, requires family members and other nonparents to apply for standing to pursue a court order relating to custody, and to show that the parents are unfit. If the SB 396 procedures were not pursued, the nonparent would be unable legally to care for a child: not include the child on their health care policy or make decisions about needed medical care, school enrollment or the general welfare of the child. A nonparent's

inability to make routine decisions will likely drive up the state's costs to provide social services, such as Medicaid, emergency care, income support, and free lunches.

In the situation where both parents are able but unavailable to provide the appropriate level of care for a child, the court is hamstrung in making a decision in the best interests of the child. In such case, would these children become wards of the state?

As to Section 2 of SB 396, which creates and limits visitation rights, the AOC advises:

The law has remained silent in this aspect of determining the best interests of the child, assigning that duty and responsibility to the courts for determination. This bill would remove much of the court's discretion in determining the best interests of the child in each case by limiting the court to awarding visitation with a child only to a biological or adoptive parent or to a person granted visitation rights by statute. Visitation with a nonparent may be awarded only if the court finds by clear and convincing evidence that: (1) the parent permitted the nonparent's formation of a parent-like relationship with the child; (2) the nonparent and the child lived together in the same household for a significant time; (3) the nonparent assumed the obligations of parenthood and took significant responsibility for the child's care and support, without financial compensation; (4) the nonparent established a bonded, dependent relationship with child, and (5) visitation with the nonparent is in the best interest of the child. These five criteria may not have been fully established by the nonparent with regard to a child when an assignment comes to quickly transfer the parent overseas to an armed conflict, for example. SB 396 creates a high bar for parents to reach when they need help from nonparents for their children.

Even if those criteria are reached, SB 396 limits visitation with a nonparent to occasional contact for the purpose of maintaining the relationship with the child, and only if it does not create undue conflict. However, in no case shall the court award visitation to a nonparent that is comparable to a parent's visitation rights.

ADMINISTRATIVE IMPLICATIONS

The AOC reports there will be an administrative impact on the courts due to additional judicial time needed to hear and decide child custody cases involving nonparents in the manner provided under the legislation.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

The AOC notes that this bill may conflict with HB 108, which enacts the Service Member Child Custody Act. Section 7 of HB 108 provides for the delegation of visitation rights, which would allow the deploying parent or his/her family member to ask the court for a temporary order to delegate all or part of that parent's visitation rights to a family member with a close and substantial relationship to the child for the duration of the deployment if in the best interest of the child. That family member would have "full legal standing" to enforce the temporary order. SB 396 appears to conflict with the language in HB 108 by limiting the period of visitation to "occasional contact" with the family member for the purpose of maintaining the relationship with the child.

OTHER SUBSTANTIVE ISSUES

Since SB 396 stays all custody proceedings until the question of standing has been finally decided on appeal, unintended consequences may result in the child not being able to obtain the care he or she needs, making the child, parents and family wait on time-sensitive decisions until the matter of standing is finally decided months later by the appellate courts. Such delay could become even more serious if the district court recognized the nonparent's standing to seek custody after determining the parent to be unfit. Who will take responsibility for the daily care of the child while the case works its way through the appeals process? Who could ensure medical services and school enrollment are provided in a timely fashion?

Additionally, the mandate for an "immediate" appeal of a determination that a nonparent has standing may conflict with appellate rules that require that only "final orders" are appealable, and could lead to additional litigation.

ALTERNATIVES

The AOC recommends that the concerns raised by SB 396 be addressed through an interim committee process where all interested parties work together to resolve the inherent conflicts within the law, social policy and justice for children who are caught in the middle of custody conflicts, and propose legislation that addresses the issues without creating confusion with existing law. The Supreme Court's Domestic Relations Rules Committee would be willing to assist a legislative committee by conducting an in-depth study on all the issues.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

The AOC advises the courts will continue to follow state policy and established procedures regarding custody of children set forth in the Kinship Guardianship Act of 2001. They will determine the best interests of the child and make custody and visitation decisions based solely on those interests.

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