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FISCAL IMPACT REPORT

SPONSOR Ivey-Soto/Louis **ORIGINAL DATE** 01/24/17
LAST UPDATED 03/16/17 **HB** _____

SHORT TITLE Termination of Certain Parental Rights **SB** 45/aSJ/aHJC

ANALYST Daly

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY17	FY18	FY19	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		Minimal	Minimal	Minimal	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
 Attorney General’s Office (AGO)

SUMMARY

Synopsis of HJC Amendment

The House Judiciary Committee amendment to Senate Bill 45 directs that this new section of law be codified in Chapter 40, NMSA 1978 (Domestic Affairs) rather than in the Children’s Code.

As provided in the original bill and contrary to this amendment, it appears that compilation of this new section in the Children’s Code would be consistent with existing provisions in the Children’s Code that already address termination of parental rights proceedings related to adoption and in cases of child abuse and neglect. See Sections 32A-5-15, 16 NMSA 1978 and Sections 32A-4-28 through 30, NMSA 1978. Further, previous adoption provisions in Article 7, Chapter 40 have been repealed, and the laws governing adoption generally were recompiled effective July 1, 1993 and now appear in the Children’s Code at Section 32A-5-1 through 45, NMSA 1978.

Synopsis of SJC Amendment

The Senate Judiciary Committee amendment to Senate Bill 45 adds language creating a presumption, upon a determination terminating the parental rights of a biological parent who has been convicted of criminal sexual penetration, that such termination is in the best interests of the

child. The amendment also adds language defining criminal sexual penetration to include aggravated criminal sexual penetration in the first degree (as well as criminal sexual penetration in the first, second or third degree).

Aggravated criminal sexual penetration is criminal sexual penetration perpetrated on a child under 13 years of age with an intent to kill or with a depraved mind regardless of human life.

Synopsis of Original Bill

Senate Bill 45 enacts a new section of the Children’s Code. It provides that a biological parent may petition for and the court shall grant termination of parental rights of the other biological parent when the court determines by clear and convincing evidence that that other parent has been convicted of criminal sexual penetration and that that criminal act resulted in the conception and birth of the affected child. If the child is subject to the federal Indian Child Welfare Act of 1978, the grounds for termination shall be proved beyond a reasonable doubt and shall meet the requirements of that act; 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, 2017.

FISCAL IMPLICATIONS

Although LFC staff anticipates only minimal fiscal impact to the State, AOC does note that terminations of parental rights proceedings generally are resource-intensive for the courts and the involved parties.

SIGNIFICANT ISSUES

AOC reports:

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.* SB 45 does not specifically require that the court find that the TPR be in the “best interests of the child.” (See, for contrast, New Hampshire’s statute governing TPR in cases of sexual assault, @ <http://www.gencourt.state.nh.us/rsa/html/XII/170-C/170-C-5-a.htm>)

It is that standard—the best interests of the child—that CYFD suggested in its analysis of a substantially similar bill during the 2016 sessions (CS/HB 50) could address concerns raised by the failure of HB 50 to allow for judicial discretion (a concern also previously raised by AGO).

AGO also suggests that in some cases it might be appropriate to consider the issue of child support and the right of the child to inherit.

Further, AGO points out that in the event of the early death or incapacity of one biological parent, there is no mechanism for a custodian or guardian of the child to seek termination of parental rights of the other biological parent who has been convicted of criminal sexual penetration if the custodian or guardian is not CYFD.

OTHER SUBSTANTIVE ISSUES

AOC advises that a similar provision governing adoptees 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 that adoptee who is conceived as a result of rape or incest in a 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. AOC reports that 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 held that (1) Section 32A-5-19 NMSA 1978, declaring that paternal consent for adoption of a minor child conceived as a result of rape or incest was not required, was rationally related to the state's legitimate interest in protecting children and preventing their exploitation; and (2) the other parent (here, the father) was not denied procedural due process by trial court's failure to accord him a hearing on his fitness as a parent before terminating his parental rights.

AOC also reports that the New Mexico Court of Appeals has held that sexual intercourse with a 16-year-old does not constitute criminal sexual penetration (CSP) as a basis for termination of the father's parental rights without his consent and procedural due process under that same adoption statute. See *Paul P., Jr.*, 1999-NMCA-077. The court further held that denying the father the right to defend against termination in a full evidentiary hearing following the procedures required by law deprived him of his right to procedural due process. 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 reports that according to the National Center for State Legislatures, there are approximately 34 states that have statutes addressing parental rights and sexual assault, and 22 states allow for termination of parental rights if the sexual assault resulted in the birth of a child. See

<http://www.ncsl.org/research/human-services/parental-rights-and-sexual-assault.aspx#1>.

MD/jle