

SESSION OF 2020

SUPPLEMENTAL NOTE ON SENATE BILL NO. 404

As Amended by Senate Committee on Judiciary

Brief*

SB 404, as amended, would create and amend law related to the termination of parental rights (TPR) in cases where a child is conceived as a result of sexual assault, as follows.

New TPR Procedure (Sections 1-7)

The bill would create a new procedure allowing TPR when a child is alleged to have been conceived as a result of various acts of sexual assault, as follows.

Definitions (Section 1)

For purposes of the new TPR procedure, the bill would define “aggravated indecent liberties,” “child,” “conviction,” “incest,” “petitioner,” “rape,” “respondent,” and “this act.”

Action and Petition (Section 2)

The bill would state a petitioner could bring an action at any time during the child’s minority to terminate the parental rights of the respondent, if the child is alleged to have been conceived as a result of the act of rape, aggravated indecent liberties, or incest, whether or not a conviction has occurred.

Except as otherwise provided in the bill, such proceedings would be in accordance with the Kansas Code of

*Supplemental notes are prepared by the Legislative Research Department and do not express legislative intent. The supplemental note and fiscal note for this bill may be accessed on the Internet at <http://www.kslegislature.org>

Civil Procedure. Trial of all issues under the bill would be to the court. Venue would lie in the county in which the child, petitioner, or respondent resides or is found, and a petition could be filed only in a court with jurisdiction to make a child-custody determination regarding the child under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). If the child is an Indian child, the court would be required to ensure compliance with the Indian Child Welfare Act.

The bill would specify the required caption for pleadings and require filings to include the first and last name of the petitioner and respondent. The bill would require the child to be referred to in filings by initials only or by given name and last initial.

The verified petition would be required to allege facts sufficient to show:

- The respondent is the parent of the child;
- The respondent committed rape, aggravated indecent liberties, or incest against the petitioner;
- The child was conceived as a result of the act of rape, aggravated indecent liberties, or incest; and
- Termination of the parent-child legal relationship of the respondent with the child is in the best interests of the child.

The bill would require the petition or an attached affidavit to include certain information required under the UCCJEA.

The bill would include provisions for sealing identifying information if there are allegations that the health, safety, or liberty of a party or child would be jeopardized by disclosure. These provisions would expire on July 1, 2025, unless reviewed and continued by the Legislature prior to that date.

The bill would prohibit assessment of a docket fee in an action brought under the new TPR procedure and would provide for various methods of service of summons, notice of hearings, and other process.

Privacy and Confidentiality (Section 3)

The bill would provide, in order to protect the privacy of the child, that court records for these proceedings would be confidential and not disclosed except to the court having jurisdiction over the proceeding (including the presiding judge and court personnel designated by the judge), the parties to the proceeding and their attorneys, the child, the child's appointed guardian *ad litem*, and any other person or entity when authorized by a court order, subject to any conditions imposed by the order.

Similarly, proceedings would be closed to all persons except the parties, the parties' attorneys, the guardian *ad litem*, and officers of the court. Other persons could be permitted to attend with the consent of the parties or by order of the court, if the court determines it would be in the best interests of the child or the conduct of the proceedings, subject to such limitations the court could determine. The court could exclude any person if the court determines such exclusion would be in the best interests of the child or the conduct of the proceedings.

The provisions of this section would expire on July 1, 2025, unless reviewed and continued by the Legislature prior to that date.

Representation (Section 4)

The bill would state the respondent is entitled to be represented by an attorney in connection with all proceedings under the bill and would allow the court to appoint an attorney to represent the respondent if, at any stage, the respondent desires but is financially unable to employ an attorney. The

bill would require the court appoint an attorney for a respondent who is a minor, a mentally ill person, or a disabled person, unless the court determines there is an attorney retained who will appear and represent the interests of the respondent in the proceedings. A respondent who is not a minor, a mentally ill person, or a disabled person could waive counsel either in writing or on the record.

If requested, or on the court's own motion, the court could appoint an attorney to serve as guardian *ad litem* for the child. The guardian *ad litem* would be required to make an independent investigation of the facts and appear for and represent the best interests of the child. The bill would provide for appointment of a second attorney for the child if the child's position is not consistent with the guardian *ad litem*'s determination regarding the child's best interests.

An appointed attorney would be allowed a reasonable fee for services, and the section would define "mentally ill person" and "disabled person" by reference to current statutory definitions.

Temporary Orders (Section 5)

The bill would provide, after the filing of a petition, the court, on motion of the petitioner, could enter an order temporarily restraining the respondent from following, harassing, telephoning, contacting, or otherwise communicating with the petitioner or the child during the pendency of the action. The order could be granted *ex parte* and could be served on the respondent by personal service. The respondent could request a hearing to modify the temporary order.

The bill would require the court to enter temporary orders regarding service of pleadings, motions, and other documents between the parties.

Hearing; Parentage; Findings; Termination (Section 6)

The bill would require the court to hold a hearing on the petition no more than 60 days after service of the petition or from the first appearance date, whichever is later, unless both parties consent to or the court finds good cause for an extension.

Parentage would be determined pursuant to the Kansas Parentage Act. Upon the finding of parentage, the court would be required to terminate the parent-child legal relationship of the respondent and issue a protective order preventing respondent from having future contact with the petitioner and the child if the court finds by clear and convincing evidence, and states the reasons for its decision, that:

- The respondent committed an act of rape, aggravated indecent liberties, or incest against the petitioner, as evidenced by the underlying factual basis for a criminal conviction or by clear and convincing evidence of such an act;
- The child was conceived as a result of the act; and
- Termination of the parent-child relationship is in the best interests of the child. There would be a rebuttable presumption that the TPR of the parent who committed the act is in the best interests of the child, and the court would not presume that having only one remaining parent is contrary to the child's best interests.

If parentage cannot be established and the court finds by clear and convincing evidence that the child was conceived as a result of the act, the court would be required to enter an order granting sole legal custody to the petitioner and denying all contact between the child and the respondent.

Termination of the parent-child legal relationship pursuant to this section would be an independent basis for TPR, and the court would not be required to make any of the considerations or findings described in other statutory provisions regarding TPR.

If the parties consent, the court could enter an order of termination with a finding of the above required elements.

Effect of Termination (Section 7)

The bill would state TPR under the new procedure would not terminate the right of a child to inherit from or through a parent.

A respondent whose parental rights are terminated pursuant to the new procedure would have no right to:

- The allocation of parental responsibilities, including legal custody, resident, parenting time, or decision-making responsibilities for the child;
- Make medical treatment decisions or any other decisions on behalf of the child;
- Inherit either from or through the child; and
- Notification of, or standing to object to, the adoption of the child.

TPR under the new procedure would not relieve the respondent of any obligation to pay child support, unless waived by the petitioner and approved by the court. The bill would include provisions for determination, payment, modification, enforcement, and registration of child support.

The court could order a respondent whose parent-child legal relationship has been terminated to provide the respondent's genetic, medical, and social history to be shared with the child, as appropriate, and with the petitioner. The

court could order that a failure to comply with the request for such information in a timely manner constitutes contempt of court. The bill would require the Kansas Department for Children and Families (DCF) to adopt rules and regulations establishing procedures to determine how the information is collected, who can access the information, when the information can be accessed, when and how the information is updated, and how the information is stored.

Amendments to Current Law (Sections 8-10)

The bill would amend the statute in the Kansas Family Law Code – Revised setting forth factors to be considered in determining the issue of legal custody, residency, and parenting time of a child, to add “evidence of an act of sexual assault” as a factor.

In the Revised Kansas Code for Care of Children (CINC Code), the bill would replace language allowing a finding of unfitness to be made if a person is convicted of a felony in which sexual intercourse occurred and a child is conceived as a result with language allowing the same finding to be made if the court finds by clear and convincing evidence that a parent has committed one of the following acts (or a comparable act in another jurisdiction), which resulted in the conception of the child:

- Rape, as defined in the Kansas Criminal Code;
- Aggravated indecent liberties, as defined in the Kansas Criminal Code, unless the court finds by clear and convincing evidence that the act involved non-forcible conduct, both parties were at least 14 years of age, and neither party was more than four years older than the other party; or
- Incest, as defined in the Kansas Criminal Code.

The bill would also replace language in the CINC Code establishing a presumption of parental unfitness if the state establishes by clear and convincing evidence that a parent has been convicted of rape, resulting in the conception of the child, with language establishing the same presumption if the state establishes by clear and convincing evidence that a parent has been shown to have committed one of the acts listed in the above paragraph, resulting in the conception of the child.

Background

The bill was introduced by the Senate Committee on Judiciary at the request of the Kansas Judicial Council.

In the Senate Committee hearing, representatives of the the Kansas Judicial Council and the Kansas Coalition Against Sexual and Domestic Violence provided proponent testimony, stating the bill would help protect a victim of sexual assault from being required to co-parent with the other biological parent, when a child is conceived as a result of the assault.

No neutral or opponent testimony was provided.

The Senate Committee made technical amendments to the bill to correct a statutory reference and remove redundant language.

According to the fiscal note prepared by the Division of the Budget on the bill, as introduced, DCF states enactment of the bill could result in more children entering foster care. The monthly average cost for one child to be placed in foster care is \$2,701 or \$32,412 annually. However, DCF is unable to determine the number of children the bill could affect.

The Office of Judicial Administration indicates enactment of the bill could increase the number of cases filed in district courts relating to TPR and would also reduce docket fee assessments, as the courts would not be allowed to collect

docket fees for TPR cases. However, it is not possible to estimate the number of additional court cases that would arise of the resulting loss of revenue. Any fiscal effect associated with enactment of the bill is not reflected in *The FY 2021 Governor's Budget Report*.