

<b>LFC Requester:</b>	
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**AGENCY BILL ANALYSIS  
2015 REGULAR SESSION**

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*and*

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*{Include the bill no. in the email subject line, e.g., HB2, and only attach one bill analysis and related documentation per email message}*

**SECTION I: GENERAL INFORMATION**

*{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}*

Check all that apply:  
**Original**     **Amendment**      
**Correction**     **Substitute**   

**Date** 1-12-16  
**Bill No:** HB27

**Sponsor:** David Gallegos  
**Short Title:** Family Violence Extended Protection Orders

**Agency Code:** 264  
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**SECTION II: FISCAL IMPACT**

**APPROPRIATION (dollars in thousands)**

Appropriation		Recurring or Nonrecurring	Fund Affected
FY16	FY17		
0	0	n/a	n/a

(Parenthesis ( ) Indicate Expenditure Decreases)

**REVENUE (dollars in thousands)**

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY16	FY17	FY18		
0	0	0	n/a	n/a

(Parenthesis ( ) Indicate Expenditure Decreases)

**ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)**

	<b>FY16</b>	<b>FY17</b>	<b>FY18</b>	<b>3 Year Total Cost</b>	<b>Recurring or Nonrecurring</b>	<b>Fund Affected</b>
<b>Total</b>	0	minimal	minimal	minimal	recurring	General fund

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to:  
Duplicates/Relates to Appropriation in the General Appropriation Act n/a

**SECTION III: NARRATIVE**

**BILL SUMMARY**

Synopsis:

HB27 creates a new section of the Family Violence Protection Act (NMSA 1978, Section 40-13-1 *et seq.*) providing for the issuance of extended orders of protection in criminal sexual penetration cases.

Subsection A of HB27 provides that during sentencing proceedings for a person convicted of criminal sexual penetration, the prosecutor may ask the court to issue an order of protection, which is to remain in effect for the duration of the criminal court’s jurisdiction over the person.

Subsections B-D of HB27 allow the victim to seek an order of protection any time after the order issued under Subsection A expires. The victim may file a petition, and submit evidence of the person’s conviction as cause for the issuance of the order. The court may take judicial notice of the facts that led to the conviction. The victim need not appear before the court. The court may issue an order for any length of time including for the victim’s lifetime.

Subsection E of HB27 provides that an order granted under its provisions shall continue until the expiration provided in the order, if any, or until modified or rescinded upon a motion by the victim.

**FISCAL IMPLICATIONS**

Note: major assumptions underlying fiscal impact should be documented.

Note: if additional operating budget impact is estimated, assumptions and calculations should be reported in this section.

District attorneys will be seeking orders pursuant to Subsection A of HB27. It is not clear whether district attorneys will be involved in petitions filed by the victim under Subsection B. District attorneys enforce violations of orders issued under the Family Violence Protection Act (a violation is a misdemeanor). To the extent the provisions in HB27 are litigated, the district attorneys will incur additional expenses.

**SIGNIFICANT ISSUES**

The Family Violence Protection Act applies to situations involving domestic abuse, which is

defined to include sexual assault (whether or not the crime is committed by a household member). As currently written, the act provides procedures for obtaining ex parte emergency orders of protection, and temporary orders of protection.

HB27 provides a new process for obtaining long-term orders after a conviction of criminal sexual penetration, without the victim having to appear in court. Currently, victims seeking a protective order or the continuance of a protective order may have to appear in court in close proximity to the very person from whom they are seeking protection. Depending on the particular situation, however, keeping the victim out of the proceeding may raise due process or confrontation clause issues. The conviction for criminal sexual penetration is more than enough to justify issuance of an order of protection – it shows beyond a reasonable doubt that a sexual assault occurred, and typically a protection order requires only a showing of probable cause that abuse occurred. But issuance of a protection order may require more information than can be found in the criminal case. The victim may seek reimbursement for medical costs or counseling costs, for example, and the defendant may be ordered into counseling. See NMSA 1978, Section 40-13-5, which sets out the contents of a protection order. This may require additional testimony. If sufficient information can be obtained through the testimony of persons other than the victim, an order can be granted. But it is possible that there will be situations in which the victim will need to testify. Statements made in the petition, or in a sworn affidavit, cannot be used to support an order if the person making those statements is not available to testify.

HB27 does not contain many provisions setting out the procedure to be followed in obtaining an extended order, and does not refer to other procedural provisions in the Act. This leaves legal and practical questions that will very likely be litigated. For example:

- Subsection A provides that a prosecutor may request an order of protection during the sentencing proceeding in a criminal sexual penetration case. But the Subsection does not set out what showing, if any, is needed to obtain the order, and does not refer to another section that might provide that information. Presumably, the court will take judicial notice of the evidence from the trial to determine the need for an order, but that is not clear from Subsection A of HB27. There is no information on the process to be followed once a request is made. Is there a separate hearing to determine the scope of the order? May the defendant be heard on the issue? The provision stating that a victim need not appear applies only to petitions filed by the victim under Subsection B, so may the victim be required to appear at a hearing on a request filed under Subsection A?
- Subsection A provides that the order may remain in effect “for the duration of the criminal court’s jurisdiction over the person,” but that term is not defined.
- Subsection B allows the victim to seek an order after an order issued under Subsection A expires. May a victim seek an order if the prosecutor did not seek (or the court did not issue) an order at time of sentencing?
- Subsection B is silent on the procedure for issuing an order. It is not clear whether there is a hearing, and whether any hearing will be an evidentiary hearing. It is not clear what notice and opportunity to be heard is given to the defendant. Finally, it is not clear whether the prosecutor participates in the process for issuing an order at the victim’s request.
- Subsection E provides that an order shall continue until the expiration provided in the order, if any, or until modified or rescinded upon a motion of the victim. HB27 does not provide any remedy for a defendant who seeks to have an order modified or rescinded, and provides no process for either party to appeal a decision of the court on a petition for a protection order. Protective orders may severely limit the freedom of the restrained

person and may have serious financial consequences. (A protection order issued as a result of criminal sexual penetration of a child by a family member may also affect child custody, and whether the perpetrator can live in the family residence.) There are also criminal consequences -- a violation of an order is a misdemeanor. Orders issued under HB27, the order may last for the life of the victim. Not providing a process for review or appeal is impractical from an administrative standpoint and will likely result in due process challenges from the restrained party.

#### **PERFORMANCE IMPLICATIONS**

See Significant Issues, above.

#### **ADMINISTRATIVE IMPLICATIONS**

See Significant Issues, above.

#### **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

None noted.

#### **TECHNICAL ISSUES**

See Significant Issues, above.

#### **OTHER SUBSTANTIVE ISSUES**

None.

#### **ALTERNATIVES**

None.

#### **WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

The Family Violence Protection Act will not provide for the issuance of an extended order of protection against a person convicted of criminal sexual penetration.

#### **AMENDMENTS**

None proposed.