

STORAGE NAME: h0189.flc

DATE: February 28, 1997

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
Family Law and Children
BILL ANALYSIS & ECONOMIC IMPACT STATEMENT**

BILL #: HB 189 (as amended)

RELATING TO: Child Support

SPONSOR(S): Representative Effman

STATUTE(S) AFFECTED: s. 61.13

COMPANION BILL(S):

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

(1) Family Law and Children

(2)

(3)

(4)

(5)

I. SUMMARY:

This bill amends s. 61.13, F.S., 1996 Supplement, to give courts the discretion to award child support retroactive to the date the petitioner became the primary residential parent, regardless of whether that date precedes the filing of the petition. The court is to have this discretion whether the question arises in a paternity action, dissolution of marriage action, or petition for support during the marriage.

The bill also provides criteria that the court is to consider in determining the retroactive award in such cases, including the guidelines that were in effect during the time for which retroactive support is sought.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Currently, there is no statutory authority for the courts to award retroactive child support in either paternity actions or actions for dissolution of marriage. The question of whether a party is entitled to child support retroactive to the date of filing a petition in dissolution of marriage actions and to dates preceding the petition in paternity actions has caused considerable controversy in the courts. Although each of Florida's five district courts of appeal (DCAs) has addressed the issue of retroactive child support and has allowed these awards, the authority for these decisions is unclear. The appellate circuits are in conflict as to:

1. whether such a right exists at all.
2. if so, to whom the right belongs - the child, the custodian, or a third party obligee.
3. the degree of proof necessary to determine the parent's retroactive liability.
4. the method to be used in calculating any such award which may be due.

Commentators have noted that agreement on a uniform approach to retroactive child support without legislation is not likely to occur. (see Reis, J.W., Retroactive Child Support Awards: Reimbursement Versus Needs and Ability, The Florida Bar Journal, July/August 1993, pp. 71-74.)

In the first case to address the issue of an award of retroactive child support **preceding** the date of a petition for dissolution of marriage, *Warren v. Warren*, 306 So. 2d 197 (Fla 1st DCA 1974), the First DCA ruled that such an award "does not comport with our understanding of the law of Florida and no other statutory nor case authority has been called to our attention, nor has independent research revealed any." The court also criticized an earlier Third DCA decision, *Weinstein v. Weinstein*, 148 So. 2d 737 (Fla. 3d DCA 1963), for allowing an award that predated the final judgment but not the initial petition.

In cases after *Warren*, the courts have relied upon judicial creativity in efforts to justify the award of retroactive child support. These earlier cases have been cited as authority in spite of their questionable beginnings, but no case found discussed whether the criteria for determining a retroactive award should be distinct from the criteria for a prospective award. The only cases to address the necessary proof at all simply stated that the criteria for determining child support are the child's needs and the parent's ability to pay.

While there is a growing body of cases awarding retroactive child support, the Fifth DCA in *Valdes v. Lambert*, 568 So. 2d 117, (Fla. 5th DCA 1990), reversed a trial court that awarded child support to the mother in a paternity action retroactive to a date preceding the commencement of the action. The court reasoned that a child, whether legitimate or illegitimate, has no right to child support for periods preceding the time of the filing of an action. This opinion appeared to eliminate the right to retroactive child support which had developed after *Warren*.

This case also raised an equal protection issue. The court reasoned as follows: It is established that the rights of illegitimate children are to be considered on an equal basis with the rights of legitimate children. It is also established that the parent of a legitimate

child may obtain support only from the time of the filing of the action seeking support. Therefore, if support for illegitimate children may be awarded retroactively to a time earlier than the filing of an action for paternity, then there is a disparate treatment of legitimate and illegitimate children and a violation of the principle of equal protection of the law.

According to this case, even if an action for retroactive child support were available, the right to bring that action belongs only to the person who actually supported the child.

A year later the Fifth DCA allowed retroactive support back to the date of birth in a paternity case *Williams v. Johnson*, 584 So. 2d 90 (Fla. 5th DCA 1991). The court stated that when retroactive child support is sought it is not the right of the child, or his or her current need for support, that is at issue. Instead, what is to be decided is the right of the third party (whether parent, stepparent, friend or state agency) who furnished the support to be reimbursed for discharging the obligation of the natural parent. Thus, the amount of such retroactive support is limited to reimbursement for the obligee's actual past expenditures on behalf of the child. On this basis, *Williams* reversed the trial court's decision awarding retroactive support in an amount greater than the mother's actual expenses and established a new evidentiary standard for retroactive awards.

In a departure from the reasoning of the Fifth DCA, the First DCA in *Fowhand V. Piper*, 611 So. 2d 1308 (Fla. 1st DCA 1992), ruled that the trial court did not err in awarding retroactive child support. It also ruled the support is a right which belongs to the child, not the parent, and neither the mother nor any third party need show actual expenses to recover. The measures are needs and ability to pay (needs-abilities), not reimbursement for expenditures. The *Fowhand* court reasoned that the obligation for child support should arise from something more sacrosanct than a contract and apparently based the right to retroactive support on natural law and public policy.

In 1994, the Second DCA in *Golden v. Lewis*, 647 So. 2d 979, (Fla. 2nd DCA 1994), held that the reimbursement theory is not applicable in determining retroactive child support payments in paternity proceedings. The court cited a ruling by the First DCA that child support is a right which belongs to the child. It is not a requirement imposed by one parent on the other; rather it is a dual obligation imposed on the parents by the State. (*Armour v. Allen*, 377 So. 2d 800) The Second DCA also cited a ruling by the Third DCA that the criteria to be considered in awarding child support are the child's needs and the parents' ability to pay. *Coleman v. Mackey*, 424 So2d 170,171,(Fla. 3rd. DCA 1983).

Prior to the Fifth DCA's reimbursement theory in *Valdes and Williams*, none of the other districts had discussed whether the amount of retroactive support should be determined differently from the prospective support. Since the *Valdes* decision, however, the Second DCA, while applying the needs-abilities test, has expressed uncertainty on the issue. The Third DCA has acknowledged the approach of the Fifth DCA without rejecting it, despite its prior rulings allowing retroactive child support under a needs-abilities test. The Fourth DCA has rendered no further decisions on the issue.

Section s. 61.052(3), F.S., currently provides that during any period of continuance, the court may make appropriate orders for the support and alimony of the parties as well as the primary residence, custody, visitation, support, maintenance, and education of the

minor child of the marriage. This allows the court to award temporary child support until the judgment of dissolution of marriage is entered.

Several cases have granted an award of retroactive support for a child born outside of marriage, basing the award on the reasoning of *McQueen v. Stratton*, 389 So. 2d 1190 (Fla. 2d DCA 1980). *McQueen* relied upon section 742.041, F.S., which was repealed in 1986, as authority for an award of child support retroactive to the birth of the child. That statute, however, merely provided guidelines for trial courts in respect to amounts to be awarded for the care and support of illegitimate children at various stages of their minority ranging from birth to the age of 18. The trial judge was allowed discretion to increase or decrease such amounts depending upon the circumstances and the ability of the defendant. The statute had nothing to do with the award of retroactive child support.

Child support guidelines have been in effect in Florida since 1989. They have been revised twice since that date and are scheduled to be reviewed during the current legislative session. The guidelines are found at s. 61.30, F.S. The guidelines provide the basis for determining the combined monthly available income, provide for payments already made by the noncustodial parent to the custodial parent, and allow the courts to reduce the amount of support paid during a time of visitation for periods in excess of 28 days.

B. EFFECT OF PROPOSED CHANGES:

HB 189 gives the court considering a petition for paternity, dissolution of marriage, or support the discretion to award child support retroactive to the date the petitioner became the primary residential parent. It also provides criteria to be considered by the court in determining the award. These criteria are :

1. the guidelines which were in effect during the time for which retroactive support is sought.
2. the parties' average gross quarterly income and the deductions allowable under the guidelines in existence during such quarters.
3. all actual payments made by the noncustodial parent to the custodial parent or the child throughout the proposed retroactive period.
4. all periods in excess of 28 consecutive days in which the child resided with the noncustodial parent.
5. the extent to which the custodial parent attempted to contact the noncustodial parent regarding child support.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

The bill gives the court the authority to award retroactive child support in certain circumstances.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

The courts are already calculating child support payments in cases in which it has been determined that retroactive child support is appropriate. This bill may serve to increase the number of cases where retroactive child support is considered resulting in additional work.

(3) any entitlement to a government service or benefit?

No.

b. If an agency or program is eliminated or reduced:

This section is not applicable to this bill.

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

(2) what is the cost of such responsibility at the new level/agency?

(3) how is the new agency accountable to the people governed?

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

No.

b. Does the bill require or authorize an increase in any fees?

No.

c. Does the bill reduce total taxes, both rates and revenues?

No.

d. Does the bill reduce total fees, both rates and revenues?

No.

e. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

The bill would provide for child support collections for a cohort of individuals not previously specifically addressed by Florida Statutes. Increased collection of child support might reduce the number of children and families dependent upon public assistance.

b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

No.

4. Individual Freedom:

a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

No.

b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

No.

5. Family Empowerment:

a. If the bill purports to provide services to families or children:

(1) Who evaluates the family's needs?

The courts.

(2) Who makes the decisions?

The courts.

(3) Are private alternatives permitted?

No.

(4) Are families required to participate in a program?

Fathers would be required to pay child support.

(5) Are families penalized for not participating in a program?

Fathers would be penalized for failure to pay child support.

b. Does the bill directly affect the legal rights and obligations between family members?

Yes, it would standardize the period of time during which a non-custodial parent is obligated to pay child support and would standardize the methods of calculating retroactive child support.

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

No.

(2) service providers?

No.

(3) government employees/agencies?

The courts.

D. SECTION-BY-SECTION ANALYSIS:

This section need be completed only in the discretion of the Committee.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

See fiscal comment section.

2. Recurring Effects:

See fiscal comment section.

3. Long Run Effects Other Than Normal Growth:

See fiscal comment section.

4. Total Revenues and Expenditures:

See fiscal comment section.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

See fiscal comment section.

2. Recurring Effects:

See fiscal comment section.

3. Long Run Effects Other Than Normal Growth:

See fiscal comment section.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

See fiscal comment section.

2. Direct Private Sector Benefits:

See fiscal comment section.

3. Effects on Competition, Private Enterprise and Employment Markets:

See fiscal comment section.

D. FISCAL COMMENTS:

Neither the Department of Revenue (DOR) nor the States Court Administrator has identified a fiscal impact from this bill. It would be expected that an increase in the number of fathers paying child support would reduce the number of children and families dependent upon public assistance.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

Once the child support guidelines have been identified as the standard for the court to consider when awarding retroactive child support, the remaining criteria contained in the bill may not be necessary.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

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VII. SIGNATURES:

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