

STORAGE NAME: h3301.flc

DATE: March 6, 1998

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

BILL #: HB 3301

RELATING TO: Domestic Violence

SPONSOR(S): Representative Betancourt

COMPANION BILL(S): SB 494

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

- (1) Family Law and Children
 - (2) Civil Justice and Claims
 - (3) Criminal Justice Appropriations
 - (4)
 - (5)
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I. SUMMARY:

HB 3301 amends the definition of "domestic violence" regarding the standards for instruction of circuit and county court judges in handling domestic violence cases. The bill prohibits the court from ordering visitation rights to a parent convicted of a capital felony or a felony of the first degree which involved domestic violence against another parent of the child, and enumerates specified exceptions.

The bill provides that the Supreme Court shall require each judge in the state who is responsible for or hears cases that involve domestic violence to attend educational programs on domestic violence. The bill requires the Office of the State Courts Administrator (OSCA) to maintain records of all judges who attend educational programs. HB 3301 requires OSCA to provide an annual report to the Governor, the President of the Senate, and the Speaker of the House of Representatives.

The bill requires the Florida Bar to report by September 1, 1998, to the Governor, the President of the Senate, and the Speaker of the House of Representatives, on the courses on domestic violence which the Florida Bar approves for continuing legal education credits for members of the Florida Bar.

Provides an effective date of July 1, 1998.

II. SUBSTANTIVE RESEARCH:

A. PRESENT SITUATION:

DEFINITIONS

“Domestic violence” is defined in a number of places in the Florida Statutes:

- F.S. section 25.385, relating to instruction of judges, defines “domestic violence” as “any assault, battery, sexual assault, sexual battery, or any criminal offense resulting in physical injury or death of one family or household member by another who is or was residing in the same single dwelling unit.”
- F.S. section 415.602, relating to domestic violence centers, and rehabilitation of victims and perpetrators defines domestic violence in the identical manner as F.S. 25.385.
- F.S. section 741.28(1), relating to the investigation and injunction process, defines domestic violence as: “any assault, **aggravated assault**, battery, **aggravated battery**, sexual assault, sexual battery, **stalking, aggravated stalking, kidnaping, false imprisonment**, or any criminal offense resulting in physical injury or death of one family or household member by another who is or was residing in the same single dwelling unit.” This definition is identical to the changes made by HB 3301 to F.S. section 25.385.
- F.S. section 943.171(2), relating to standards for instruction of law enforcement officers, defines domestic violence in the identical manner as F.S. 25.385.

CHILD CUSTODY AND VISITATION

Paragraph 61.13(2)(b), Florida Statutes, requires the court to order parental responsibility to be shared unless the court finds that shared parental responsibility would be detrimental to the child. As amended by chapter 97-226, Laws of Florida (HB 1111), Florida Statute paragraph 61.13(2)(b) allows courts to prohibit visitation with a convicted parent if the presumption of detriment to the child is not rebutted. The rebuttable presumption of detriment to the child is created upon a showing of evidence that a parent has been convicted of a felony of the third degree or higher involving:

- domestic violence, as defined in s. 741.28 and chapter 775; or
- meets the criteria of paragraph 39.464(1)(d): when the parent of a child is incarcerated in a state or federal correctional institution and:
 1. the period of time for which the parent is expected to be incarcerated will constitute a substantial portion of the period of time before the child will attain the age of 18 years;
 2. the incarcerated parent has been determined by the court to be a violent career criminal, a habitual violent felony offender, or a sexual predator; has been convicted of first degree or second degree murder, or a sexual battery that constitutes a capital, life, or first degree felony violation, or has been convicted of an offense in another jurisdiction which is substantially similar to one of the offenses listed in the paragraph; and

3. the court determines by clear and convincing evidence that continuing the parental relationship with the incarcerated parent would be harmful to the child.

If the presumption of detriment to the child is not rebutted, shared parental responsibility, including visitation, may not be granted to the convicted parent. However, the convicted parent is not relieved of any obligation to provide financial support. If the court determines that shared parental responsibility would be detrimental to the child, it may order sole parental responsibility and make such arrangements for visitation as will best protect the child from further harm. Whether or not there is a conviction of any offense of domestic violence or child abuse or the existence of an injunction for protection against domestic violence, the court shall consider evidence of domestic violence or child abuse as evidence of detriment to the child. F.S. 61.13(2)(b).

Florida courts have ruled that the provisions of section 61.13 apply to all modifications on child custody, whether or not the parents of the children have been married to one another. *Arthur v. Anderson*, 681 So2d. 796 (Fla. 3rd DCA 1996).

DEPARTMENT OF CORRECTIONS AND VISITATION

Pursuant to F.S. 944.09(1)(n), the Department of Corrections shall adopt rules that provide that any inmate with a current or prior conviction for any sexual battery offense, lewdness, indecent exposure, abuse of children, or committing or attempting to commit a sex act on, in the presence of, or against a child under the age of 16 years, shall not be allowed visitation with anyone under the age of 18 years, unless special visitation is approved by the superintendent. The authorization for special visitation shall be based on extenuating circumstances that serve the best interest of the children. If visiting is restricted by court order, permission for special visitation may be granted only by the judge issuing the order.

The Department of Corrections (DOC) is in the final stages of promulgating rules that implement F.S. 944.09(1)(n). However, the Department of Corrections reports that it is their general practice in exercising its authority to regulate sex offender visitation to defer to decisions of family law courts which have jurisdiction over the children, and which courts have made decisions regarding the best interests of the children based upon appropriate testimony and evidence presented. The DOC further reports that criminal sentencing courts do not have jurisdiction over children and in no instance where such order has been entered has there been evidence or expert testimony present as to what may be in the best interest of the child.

In the Survey Report on Inmate Visitation released in March 1996, the Department of Corrections cited major concerns with visitors attempting to introduce weapons, illegal drugs and nuisance contraband, intoxicated visitors, attempted sex acts between visitor and inmate, and lack of staff available to monitor visitation.

SELF DEFENSE

Although the term "self defense" is not defined in Florida Statutes, the use of force in defense of person is provided for in F.S. 776.012. A person is justified in the use of force, except deadly force, against another when and to the extent that the person reasonably believes that such conduct is necessary to defend himself or herself or another against such other's imminent use of unlawful force. However, the person is justified in the use of deadly force only if he or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself, herself, or another or to prevent the imminent commission of a forcible felony. A forcible felony is defined in F.S. 776.08.

EXECUTIVE CLEMENCY

The Florida Constitution authorizes the Governor, by executive order filed with the secretary of state, and with the approval of three members of the cabinet, to grant full or conditional pardons, restore civil rights, commute punishment, and remit fines and forfeitures for offenses. *Fla. Const. art. 8*. The constitutional language is mirrored in F.S. section 940.01. A person who seeks a pardon must request an application from the Parole Commission, and may be required to send a copy of the application to the judge and the prosecuting attorney of the court in which the applicant was convicted, notifying them of the applicant's intent to apply for executive clemency. The Florida Bar Foundation has funded the Battered Women's Clemency Project to identify and represent battered women who are eligible for clemency and have been incarcerated for killing their intimate partners.

JUDICIAL EDUCATION

The Florida Rules of Judicial Administration, promulgated by the Florida Supreme Court, address judicial education requirements. Specifically, Rule 2.150, Fla. R. Jud. Admin., requires all Florida county, circuit, and appellate judges, retired judges who have been approved by the supreme court to be assigned to temporary active duty, and Florida supreme court justices to comply with the continuing education requirements. Each judge and justice shall complete a minimum of 30 credit hours of approved judicial education programs every 3 years. Two hours must be in the area of judicial ethics. In addition, every judge new to the level of trial court must complete the Florida Judicial College program in that judge's first year of judicial service following selection to that level of the court. The Florida Court Education Council, in consultation with the judicial conferences, shall develop approved courses for each state court jurisdiction. The Council is also responsible for establishing a procedure for considering and acting upon waiver and extension requests. Each judge is required to submit to the Legal Affairs and Education Division of the Office of the State Courts Administrator an annual report showing the judge's attendance at approved courses. Failure to comply will be reported to the chief justice of the supreme court for such administrative action as is deemed necessary. The chief justice may consider a judge's or justice's failure to comply as neglect of duty and report the matter to the Judicial Qualifications Commission.

Pursuant to F.S. section 25.385, the Florida Court Educational Council shall establish standards for instruction of circuit and county judges who have

responsibility for domestic violence cases, and the council is responsible for providing such instruction on a periodic and timely basis. Regarding the judicial education, domestic violence is defined as: "any assault, battery, sexual assault, sexual battery, or any criminal offense resulting in physical injury or death of one family or household member by another, who is or was residing in the same single dwelling unit." A definition for "family or other household member" is also included as a part of F.S. 25.385.

The Office of the State Courts Administrator (OSCA) reports that since 1991, 426 new trial judges have attended the Florida Judicial College and met the initial domestic violence training requirement. Also, all three judicial conferences, The Florida Conference of Circuit Judges, the Florida Conference of County Court Judges, and the Florida Conference of District Court of Appeal Judges, have conducted 3-hour plenary sessions on domestic violence at one of their semi-annual meetings at least once in each three year reporting period since 1991. Participation in the plenary session is mandatory for all judges in attendance at the conference. In addition, for the past seven years, the Family Law track of the Florida Conference of Circuit Judges has presented at least one three-hour course on domestic violence issues every year.

Recommendation number 136 of the Governor's Task Force on Domestic and Sexual Violence states that: "The Florida Supreme Court should enforce the current mandate for judicial education in domestic violence for every judge who has responsibility for domestic violence cases, as provided for in Section 25.385. F.S."

CONTINUING LEGAL EDUCATION FOR MEMBERS OF THE FLORIDA BAR

The Florida Bar is an official arm of the court, as established by the Supreme Court of Florida. The purpose of the Florida Bar is to inculcate in its members the principles of duty and service to the public, to improve the administration of justice, and to advance the science of jurisprudence. *Rule 1-2, Rules Regulating the Florida Bar*. The membership of The Florida Bar is composed of all persons who are admitted by the Supreme Court of Florida to the practice of law in this state, and who maintain their membership pursuant to the Rules Regulating the Florida Bar. Every member, except those exempt (active military service, undue hardship, nonresident members not delivering legal services, judges, justices, and inactive members) are required to complete a minimum of 30 credit hours of approved continuing legal education every 3 years. Two of the hours must be in the area of legal ethics. *Rule 6-10.3(b), Rules Regulating the Florida Bar*. Each member is required to file a report showing compliance or noncompliance with the CLE requirement. If a member fails to complete and report the minimum required continuing legal education hours by the end of the applicable reporting period, the member shall be deemed delinquent. *Rule 6-10.5(a)*. Delinquent members are prohibited from the practice of law in Florida, and not entitled to any privileges and benefits accorded to members of The Florida Bar in good standing. *Rule 1-3.6*.

B. EFFECT OF PROPOSED CHANGES:

DEFINITIONS

Section 1 of HB 3301 amends the definition of "domestic violence" with regards to standards for instruction of circuit and county judges in handling domestic violence cases. The new language brings the definition into conformance with the definition of domestic violence found in F.S. 741.28, with regards to the injunction process.

CHILD VISITATION

The bill prohibits courts from ordering visitation to a convicted parent if the parent of the child is convicted of a capital felony or a felony of the first degree which involved domestic violence against another parent of the child, unless the child is over 16 years of age and agrees to the order of visitation, unless the convicted parent acted in self-defense and is granted executive clemency or a petition for such executive clemency is pending, or unless the court finds that extraordinary circumstances warrant such visitation.

JUDICIAL EDUCATION

The bill provides that the Supreme Court shall require each judge in this state who hears cases that involve domestic violence to attend educational programs on domestic violence. The programs must include training on the laws governing domestic violence, the prevalence and dynamics of domestic violence, and the impact of domestic violence on children. Judges must attend regardless of whether a judge hears cases on a temporary, part-time, or emergency basis, and applies to any judge who hears civil, criminal, or juvenile cases that involve domestic violence. The bill requires the Office of the State Courts Administrator to provide an annual report which includes a description of the educational programs, the proficiency of the judges in understanding domestic violence, the number of judges who attend, and the cases assigned to the judges who attend.

CONTINUING LEGAL EDUCATION FOR MEMBERS OF THE FLORIDA BAR

HB 3301 requires The Florida Bar to provide a report by September 1, 1998 regarding the courses on domestic violence approved for continuing legal education credits, names of instructors, descriptions of courses, sponsors, and the number of attorneys who attend.

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 restricts the ability of Florida courts to order visitation with certain convicted parents under specified circumstances.

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

The bill provides that the Supreme Court shall require judges who handle domestic violence cases to attend educational programs regarding domestic violence. It also requires the Office of the State Courts Administrator and the Florida Bar to provide reports involving educational opportunities offered, judicial proficiency regarding domestic violence, and numbers of members attending.

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

No.

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

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

N/A

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

N/A

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

N/A

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?

No.

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?

The bill prohibits courts from ordering visitation for a parent convicted of a capital felony or a felony of the first degree which involved domestic violence against another parent of the child, unless certain exceptions apply.

5. Family Empowerment:

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

(1) Who evaluates the family's needs?

N/A.

(2) Who makes the decisions?

N/A.

(3) Are private alternatives permitted?

N/A

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

N/A

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

N/A

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

Yes.

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?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

HB 3301 amends ss. 25.385 and 61.13, Florida Statutes.

E. SECTION-BY-SECTION RESEARCH:

Section 1: Amends subsection 25.385(2)(a) to include the terms “aggravated assault,” “aggravated battery,” “stalking,” “aggravated stalking,” “kidnapping,” and “false imprisonment” to the definition of “domestic violence” in regards to standards for instruction for circuit and county judges in handling domestic violence cases.

Section 2: Amends subsection 61.13(2)(b)1. to prohibit court ordered visitation for a parent convicted of a capital felony or a felony of the first degree which involved domestic violence against another parent of the child, unless:

- the child is over 16 years of age and agrees to the order of visitation;
- the convicted parent acted in self defense and is granted executive clemency or a petition for such executive clemency is pending; or
- the court finds that extraordinary circumstances warrant such visitation.

Section 3: Creates new statutory language which provides that the Supreme Court require each judge in the state who is responsible for or who hears cases that involve domestic violence to attend educational programs on domestic violence. The educational programs may be a part of the programs offered by the Office of the State Court Administrator, and developed by the Florida Court Education Council, and must include training on the laws governing domestic violence, the prevalence and dynamics of domestic violence, and the impact of domestic violence on children. Every judge who hears civil, criminal, or juvenile cases is required to attend the educational program, regardless if a judge hears a case on a temporary, part-time, or emergency basis. The bill also requires OSCA to maintain records of all judges who attend the educational programs, and provide an annual report to the Governor, the President of the Senate, and the Speaker of the House of Representatives. The report must include a description of the type of programs, the proficiency of the judges in understanding domestic violence, the number of judges listed by circuit and county who attend, the cases assigned to the judges who attend, and any other information that is relevant to a full description of the educational programs on domestic violence.

Section 4: Creates new statutory language which requires the Florida Bar to report to the Governor, the President of the Senate, and the Speaker of the House of Representatives on the courses which the Florida Bar approves for continuing legal education credits for members of the Florida Bar. The report must be submitted by September 1, 1998, and must include course materials, references, names of instructors, a description of courses offered, sponsors, the number of attorneys who attend, and any other information that describes or assesses the continuing legal education courses on domestic violence which are offered by the Florida Bar.

Section 5: Provides an effective date of July 1, 1998.

III. FISCAL RESEARCH & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

Judicial Education: The Office of the State Courts Administrator reports a cost of \$33 per instructional hour. To provide a four- hour training for all 799 judges, the first-year cost would be \$105,468. Start-up costs for this training have been estimated to cost between \$79,000 for 3 hours of training, and \$158,200 for 6 hours of training.

Maintenance of records: The Office of the State Courts Administrator reports that the maintenance of records of all judges who attend educational programs on domestic violence in the detail delineated in HB 3301 will require substantial enhancements and upgrades to the judicial education automation system, and require the addition of 2 FTE's for data gathering and entry. The estimated cost to contract the necessary software upgrades and compile the data reporting elements is \$65,000.

2. Recurring Effects:

Judicial Education: This cost is dependent on the number of continuing education hours the Supreme Court would ultimately require each judge to complete on a periodic basis. If the Court mandates that all judges receive a minimum of 3 hours of continuing education in the area of domestic violence during each 3 year reporting period, the Office of the State Courts Administrator estimates that it will increase attendance at all programs in which domestic violence instruction is currently offered by 30-40%. At 1997 cost levels, this would result in an annualized increase in total education programming costs of \$45,000 - \$60,000. However, if additional training programs were required to implement the mandate and provide adequate educational opportunities, the annualized cost would exceed the above cost estimate. In addition, the cost of on-going judicial proficiency testing is estimated to cost \$30,000 - \$45,000 per year.

Maintenance of records: Recurring costs for fulfilling the reporting requirements of HB 3301 would include 2 FTE's for data entry. The total annualized cost for the salary and benefits of 2 data entry operators is estimated to be \$52,000.

3. Long Run Effects Other Than Normal Growth:

N/A

4. Total Revenues and Expenditures:

The Office of the State Courts Administrator estimates that the implementation of HB 3301 could have a total fiscal impact on the Court Education Trust Fund of between \$271,000 and \$375,000, assuming all judges would have to complete initial training requirements during the first year of implementation.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

The required reporting of the cases assigned to judges who attend domestic violence programs requires the clerks of court to track all cases assigned to individual judges. The Office of the State Court Administrator reports that in 1996 there were 68,000 petitions filed for protection against domestic violence and repeat violence. The cost to the clerks of court will vary from county to county, and depend on the level of automation in each particular county.

3. Long Run Effects Other Than Normal Growth:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

N/A

2. Direct Private Sector Benefits:

N/A

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

N/A

D. FISCAL COMMENTS:

The Office of the State Courts Administrator reports that at the present time, annual spending for judicial education exceeds trust fund revenues by approximately \$100,000 per year. If spending is maintained at current levels, the trust fund will be in a deficit posture by the end of FY 1999-2000. Consequently, the Supreme Court budget for FY 1998-99 includes a proposal to shift 3 staff positions from the trust fund to general revenue. The cost of the instructional mandate and reporting requirements contained in HB 3301 could negate the remedial effects of the cost shift.

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:

The Florida Statistical Analysis Center reports that in 1995, 1030 murders took place in Florida. Of these, 74 involved one spouse killing the other. *Florida SAC Notes, Summer 1996*. This number represents a 60.2% drop in spouse murders from 1975; during this same time period, Florida's population grew by 67%.

EX POST FACTO CONSIDERATIONS

Both the federal and state constitutions prohibit the passage of ex post facto laws. *U.S. Const. art. 1, sec. 9, cl. 3, and Fla. Const. art. 1, sec. 10*. An ex post facto law is one which is passed after the consequences of some fact or deed, and which retrospectively changes the legal consequences or relations of such act or deed. *Black's Law Dictionary, 6th edition (1990)*. The question as to whether this bill can be applied to persons who might fall under its provisions as the result of acts or convictions incurred prior to its passage requires consideration of the ex post facto prohibition.

Since the time of the decision in *Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798)*, the courts have limited the application of the ex post facto prohibition to criminal offenses. In evaluating whether a law violates the ex post facto clause, a two-prong test must be applied: elements of the test are whether the law is retrospective in its effect, and whether the law alters the definition of criminal conduct or increases the penalty by which the crime is punishable. *Gwong v. Singletary, 683 So. 2d 109, (Fla. 1996), rehearing denied; cert. denied 117 S.Ct. 1018*.

SEPARATION OF POWERS

Article II, section 3 of the Florida Constitution delineates the three branches of government: legislative, executive, and judicial. The constitution prohibits a person belonging to one branch from exercising any powers appertaining to either of the other branches unless expressly provided for in the constitution. The Florida Supreme Court has held that any legislation that hampers judicial action or interferes with the discharge of judicial function is unconstitutional. *Simmons v. State, 36 So.2d 207 (Fla. 1948)*. The court has also held that

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law practice is so intimately connected with the exercise of the judicial power in the administration of justice that the right to define and regulate the practice belongs to the judicial department of government. *Petition of Florida State Bar Ass'n, 40 So. 2d 902 (Fla. 1949)*. Pursuant to the Rules of Judicial Administration promulgated by the Supreme Court, the chief judge of each circuit is responsible for the administrative organization within that circuit, including the assignment of judges. *Rule 2.050, Rules of Jud. Admin.*

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COMMITTEE ON Family Law and Children:

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