

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

BILL: SB 1176

SPONSOR: Senator Silver

SUBJECT: Domestic Violence

DATE: March 9, 1999

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Matthews</u>	<u>Johnson</u>	<u>JU</u>	<u>Favorable</u>
2.	_____	_____	<u>CF</u>	_____
3.	_____	_____	<u>FP</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

I. Summary:

This bill provides comprehensive guidelines, plans, and direction for the Florida Court Education Council regarding instructional standards and educational programs for circuit and county court judges on the issue of domestic violence. It requires the State Courts Administrator to maintain records related to the instruction and judicial attendance at these programs. It requires certain information to be included in the Council's annual report to the Governor and the Legislature. It prohibits court-ordered visitation to parents convicted of felony offenses involving domestic violence. It requires the Florida Supreme Court to report annually to the Legislature regarding its legal education program on domestic violence. It removes the co-residency prerequisite for persons seeking an injunction against domestic violence. It lowers the threshold for the degree of "danger" required for a court-ordered injunction. It authorizes the court to order protection for minor children against domestic violence. Finally, it allows the court to extend an injunction during the period for continuance of a hearing on the basis of necessity rather than good cause shown.

This bill substantially amends the following sections of the Florida Statutes: 25.385, 61.13, 741.28, 741.30, and 784.046.

II. Present Situation:

Domestic Violence

Domestic violence is now widely recognized to be a criminal act and increasingly garners national attention. The Florida Legislature has expressed its intent that "domestic violence be treated as a criminal act rather than a private matter." *See* § 741.2901(2), F.S. Consequently, a number of provisions are set forth in chapter 741, F.S., relating to domestic relations, address the issue of domestic violence.

There is no criminal offense called domestic violence. Instead, domestic violence is an umbrella term encompassing a variety of criminal acts committed against a family or household member:

- ▶ assault and aggravated assault;
- ▶ battery and aggravated battery;
- ▶ sexual assault and sexual battery;
- ▶ stalking and aggravated stalking;
- ▶ kidnaping and false imprisonment; and
- ▶ any criminal offense resulting in physical injury or death. *See* § 741.28(1), F.S.

The definition for “domestic violence” requires prior or present co-residency between the offender and the family or householder member. The definition for “family or household member” includes a) a spouse, b) former spouse, c) a person related by blood or marriage, d) a person who is presently residing with another as if a family or who has resided together in the past with another as a family, and e) a person who has a child in common with the offender regardless of whether they have been married or have resided together at any time. *See* § 741.28(1), F.S. [Note: No relationship is required for an injunction if the person is a victim of repeated violence. *See* § 784.046, F.S.] A recommendation to resolve the apparent residency conflict between the definition for “domestic violence” and “family or household member” in cases involving relatives by blood or marriage was made in a recent interim report. *See* 97-P-21, *An Overview of Florida’s Criminal Justice Specialized Courts: Treatment-based Drug courts, Domestic Violence Courts and Repeat Offender Courts*.

There is a cause of action for injunctive relief against domestic violence. *See* § 741.30(1)(a), F.S. If there is an “immediate and present danger” of domestic violence, the court may grant an ex parte temporary injunction without prior notice to the respondent, pending a full hearing on the petition. Such temporary injunction provides appropriate relief, including restraining the respondent, awarding the petitioner exclusive temporary use and possession of the shared home, and granting the petitioner temporary custody of the child(ren). *See* § 741.30(5)(a), F.S. If the temporary injunction was granted ex parte, it remains in effect for up to 15 days and a full hearing must set on that date until continued for good cause shown, including the need to obtain service of process. *See* § 741.30(5)(a), F.S. The injunction may similarly be extended if necessary during the continuance period. Domestic violence injunctions may be enforced and violations sanctioned by either indirect contempt or through a criminal prosecution for violation of a first degree misdemeanor. *See* §§ 741.2901, F.S. and 741.31(4), F.S. Under certain circumstances, the court must order the respondent to a domestic violence injunction to attend a batterer’s intervention program unless it makes written findings stating that such a program is inappropriate. *See* § 741.30, F.S.¹

¹The order must also mandate either attendance in a batterer’s intervention program as a condition of probation or attendance in a pre-trial diversion program for defendants charged with a domestic violence related offense. § 741.281, F.S. The Office for Certification and Monitoring of Batterer’s Intervention Programs resides in the Department of Corrections which coordinates and monitors the programs. According to the DOC, 19 of the 20 judicial circuits have at least one certified batterer’s intervention program for a total of 109 certified programs. The Sixteenth Judicial Circuit’s program in Key West recently lost certification.

Judicial Education Regarding Domestic Violence

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 continuing education requirements. A minimum of 30 credit-hours of approved judicial education must be completed ever every 3 years, of which two hours must be in the area of judicial ethics. The Florida Supreme Court additionally requires that every new judge complete 5 instructional hours in the area of domestic violence and 2 instructional hours on related subjects, such as contempt and other means of enforcement of court orders, as part of the Florida Judicial College program. This 80-hour mandatory training program is required in the first year of judicial service following appointment to the Court.

The Florida Court Education Council, in consultation with the judicial conferences, is responsible for developing approved courses for each state court jurisdiction. Each judge is required to submit to the Legal Affairs and Education Division of the Office of State Courts Administrator (OSCA), an annual report showing the judge's attendance at approved courses. The Chief Justice of the Supreme Court may take administrative action against the judge or justice and may also report the matter to the Judicial Qualifications Commission. The Council is also responsible for establishing standards of instruction of circuit and county judges who have responsibility for domestic violence cases; and for providing such instruction on a periodic and timely basis. See § 25.385, F.S.

According to the OSCA, over 900 instructional hours a year are provided to judges. Since 1991, a significant number of hours have been dedicated to domestic violence education for purposes of increasing judicial awareness of family violence, developing necessary knowledge and skills for handling these types of cases, and sensitizing judicial attitudes towards interrupting the cycle of violence. The OSCA reports that since 1991, 454 new trial judges have attended the Florida Judicial College and have met the initial domestic violence training requirements. The 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 a semi-annual meeting at least once in each 3-year reporting period since 1991. Judges who attend these conferences may attend these sessions, although it is not mandatory. In addition, for the past 7 years, the Family Law track of the Florida Conference of Circuit Judges has presented at least one 3-hour course on domestic violence issues every year.

Visitation Rights of Criminal or Violent Non-Custodial Parents

Under current law regarding child visitation, there is a rebuttable presumption of harm to the child if: a) a parent has been convicted of a felony of third degree or higher involving domestic violence; b) the parent will be incarcerated for a considerable period of the child's life; c) the parent is a career criminal or d) the court determines that there is clear and convincing evidence that visitation with the incarcerated parent would be harmful to the child. See § 61.13(2)(b), F.S. The court must order shared parental responsibility *unless the court finds that shared parental responsibility would be detrimental to the child.* See § 61.13(2)(b), F.S. 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.

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 considers evidence of domestic violence or child abuse as evidence of detriment to the child. *See* § 61.13(2)(b), F.S. Florida courts have ruled that the provisions of s. 61.13, F.S., apply to all modifications on child custody, whether or not the parents of the children have been married. *Arthur v. Anderson*, 681 So.2d 796 (Fla. 3d DCA 1996).

III. Effect of Proposed Changes:

Section 1 amends s. 25.385, F.S., relating to standards for judicial education and instructions in handling of domestic violence cases.

Specifically, subsection (1) is amended to offer directives to the Florida Court Education Council (Council) to develop further standards for domestic violence instruction and to establish a comprehensive education plan to provide “judges with responsibility for cases of domestic violence” with the opportunity to attend domestic violence educational programs on a regular basis. A definition is provided for “judges with responsibility for cases of domestic violence” in subsection (2).

Subsection (2) also redefines the term “domestic violence.” Domestic violence is redefined to have the same meaning ascribed to the term in s. 741.28, F.S., which is revised later in the bill to eliminate the present or past co-residency requirement for purposes of securing a domestic violence injunction.

Subsection (3) creates new provisions to direct the Council to develop a range of educational and instructional training tools, plans, and programs relating to domestic violence. Subsection (4) requires the Office of State Courts Administrator to maintain records for the Council’s educational programs and other attendance information. Subsection (5) requires the Council to submit its own annual report to the Governor and include certain information relating to its educational program.

Section 2 amends s. 61.13(2)(b)2, F.S. (Supp. 1998.), relating to custody, support and visitation of children, to strengthen the provisions against granting visitation to parents convicted of certain crimes. It provides the court with direction regarding visitation rights in cases where one parent has been convicted of a capital felony or a first degree felony involving domestic violence. It prohibits the court from granting visitation in such cases unless: a) the child is over 16 years of age and agrees to the visitation; b) the convicted parent acted in self-defense and was granted executive clemency or is petitioning for clemency; or c) the court determines that visitation is in the “manifest best interest of the child.”

Section 3 creates a yet unnumbered section to require the Florida Supreme Court, through the Florida Bar², to submit an annual report to the Governor, the Senate President, and the House Speaker on the courses and continuing legal education credits offered on domestic violence. The report shall contain the course materials, references, instructors names, course descriptions, the name of the Florida Bar section or committee sponsors, the number of attorney attendees, and any other information on these courses.

Section 4 amends s. 741.28, F.S., to redefine “domestic violence” to eliminate the present or past co-residency requirement for purposes of securing a domestic violence injunction.

Section 5 amends s. 741.30, F.S., to lower the degree of danger required for a court-ordered injunction against domestic violence by eliminating the terms “imminent” “imminently” and “immediate and present” throughout several subsections of this section. Specifically, subsection (1) is amended to delete the restriction that evidence relating to the domestic violence action may only be made during a hearing at which all parties are present. Rather the presentation of such evidence may be made at a hearing at which all parties were *noticed* to be present.

Subsection (5) is amended to allow the court to grant a temporary injunction if it appears that “it is necessary for the protection of the petitioner” rather than on the current basis that there appears to be “an immediate and present danger of domestic violence.” However, the relief available is limited to the three enumerated in the statute, i.e., restraining the respondent, awarding exclusive use and possession of the home, and granting temporary custody of the children.

Subsection (6) is amended to provide that the court may grant a permanent injunction on the grounds that it is necessary for the protection of minor children as is currently allowed for the protection of a victim of domestic violence. [Note: This provision for relief to protect minor children under a permanent injunction is not expressly provided in the relief available under a temporary injunction.]

Subsection (7) is amended to allow a temporary injunction to be converted into a permanent injunction without further notice under certain conditions: a) the respondent had to have already been previously served notice; b) the respondent failed to appear at the hearing, and c) the relief granted in the permanent injunction is the exact same relief granted in the temporary injunction.

Section 6 amends s. 784.046, F.S., relating to action by victims of repeat violence, to redefine “violence” to include domestic violence as defined in s. 741.28, F.S.. It also redefines “repeat violence” to include any repeat incident of violence against a petitioner’s household member. This

²The Florida Bar is an official arm of the Court, as established by the Supreme Court of Florida. Its membership consists of all persons admitted by the Supreme Court to the practice of law in this state, and who maintain their membership in accordance with the Florida Bar rules. Unless exempted, members are required to complete a minimum of 30 credit-hours of approved continuing legal education (CLE) 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. Failure to complete and report compliance with the requisite CLE hours places a member in delinquency. See Rule 6-10.5(a), Rules Regulating The Florida Bar. Delinquent members are prohibited from the practice of law in Florida, and are not entitled to any privileges and benefits accorded to members of The Florida Bar in good standing. Rule 1-3.6, Rules Regulating The Florida Bar.]

section adds that a continuance of a hearing may be granted, for good cause shown, for the purpose of obtaining service of process which is consistent with the Rule 12.610(c)(4)A of the Florida Family Law Rules of Procedure. During the period of continuance, the injunction may also be extended “if necessary”, rather than “for good cause shown” as is currently provided in law.³ It expressly states that the terms of an injunction that restrain a respondent remain in effect until modified or dissolved. This relief is in addition to other civil and criminal remedies that may be available.

The bill provides for an effective date of July 1, 1999.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

- A number of provisions in the bill arguably involve matters of judicial practice and procedure. This raises the issue of legislative encroachment upon judicial authority regarding matters of practice and procedure in violation of the state constitutional separation of powers provision. *See* art. II, s. 3, Fla. Const. Whereas the Legislature has authority to create substantive law, the Florida Supreme Court has sole and preemptive constitutional authority to promulgate court rules of practice and procedure. *See* art. V, s.2(a), Fla. Const. However, the Legislature can repeal the court rules by a 2/3 vote. *See* art. V, s.2(a), Fla. Const. The Legislature cannot enact law that amends or supersedes existing court rules, it can only repeal them. *See Market v. Johnston*, 367 So.2d 1003 (Fla. 1978).

What constitutes practice and procedure versus substantive law has been decided by the courts on a case by case basis. With few exceptions, it is not entirely clear or definitive. Generally substantive laws create, define and regulate rights. Court rules of practice and procedure prescribe, the method of process by which a party seeks to enforce or obtain redress. *See Haven Federal Savings & Loan Assoc v. Kirian* 579 So.2d 730 (Fla. 1991). In addition, the administration of the courts and oversight of the judicial officers of the judiciary including eligibility and qualifications of judges fall within the province of the

³This is consistent with language already existing in s. 741.30, F.S., regarding extensions of ex parte temporary injunctions if necessary during any period of continuance of a hearing.

Supreme Court under the Florida Constitution. *See* art. V, § 2, Fla. Const. Based on current law, the courts tend to find certain provisions on court rules of practice and procedure as unconstitutional such as those regarding timing and sequence of court procedures, creating expedited proceedings, issuing mandates to the courts to perform certain functions, and attempting to supersede or modify existing rules of court or otherwise intrude in areas of practice and procedure within the province of the court.

- The parent-child relationship is protected under the state and federal constitution. *See In the Matter of the Adoption of Doe v. Doe*, 543 So.2d 741, 746 (Fla. 1989). This bill may raise constitutional issues regarding a parent’s fundamental right to parent a child free from governmental interference as protected under the Fourteenth Amendment of the United States Constitution, and under the explicit right of privacy provision in article 1, section 23 of the Florida Constitution. *See Santosky v. Kramer*, 455 U.S. 745 (1982); *Beagle v. Beagle*, 678 So.2d 1271 (Fla. 1996). The Florida Supreme Court has made clear that the State can not satisfy a compelling state interest standard absent a showing of “a substantial threat of demonstrable harm to the child’s health or welfare” to warrant government intervention into a parent’s constitutional right of privacy. *See Von Eiff v. Azicri*, 23 Fla. L. Weekly S583, S584 (Fla. Nov. 12, 1998)] (regarding a parent’s right to limit or exclude a grandparent’s visitation with a child). It is not clear whether there has to be a showing of demonstrable harm to the minor children before the court may order injunctive relief for the protection of the children in the domestic violence scenarios.
- This bill may raise some constitutional due process issues regarding notice and opportunity to be heard. *See* art. I, § 9, Fla. Const. (“no person shall be deprived of life, liberty or property without due process of law”). Under the bill, unless additional relief is being granted, it appears that the courts may extend, under certain circumstances, the relief granted in a temporary injunction into a permanent injunction against domestic violence without providing the respondent further notice or hearing although such respondent must have been previously served with notice of the temporary injunction and have failed to appear at the hearing. The bill’s provisions are also in direct conflict with Rule 12.610 of the Florida Family Law Rules of Procedure which requires a full evidentiary hearing in the issuance of a permanent injunction.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill may provide extra protections for domestic violence victims by lowering the threshold necessary to obtain an injunction and by granting relief for those persons whose offenders avoid perpetually process of service and other attendance at court. It also may provide protection to children in domestic violence familial situations where one parent has committed a capital felony or third degree felony involving domestic violence.

C. Government Sector Impact:

The Department of Children and Families projects no fiscal impact for the department.

According to the Office of State Courts Administrator, the fiscal impact of the bill is indeterminate at this time. OSCA anticipates that the cost for developing and making additional domestic violence materials and instruction available will depend on the availability and suitability of existing judicial education materials. Consequently, it might require the diversion of resources of existing educational services. OSCA is not able to project the number or extent of public record demands as a result of the changes in section 1 of the bill.

In 1998, in response to proposals by the Family Court Steering Committee and the Family Law Rules Committee of the Florida Bar, the Florida Supreme Court adopted some amendments to rules and forms in the Florida Family Law Rules of Procedure regarding protection against domestic violence. *See In re Amendments to the Florida Family Law Rules of Procedure*, 23 Fla. L. Weekly S573 (Fla. Oct. 29, 1998); Florida Family Law Rules of Procedure 717 So.2d 914 (Fla. 1998). This bill will necessitate further amendments to certain rules and forms in order to conform with the legislative changes. *See Fla. Fam. L. Rules Proc. 123.610.*

VI. Technical Deficiencies:

None.

VII. Related Issues:

There may be a conflict of applicable standard between the “manifest best interest of the child” in determining visitation in these violence or domestic violence cases, and the “best interest of the child” in other child-related matters under chapter 61, F.S.

The new definition for “domestic violence” would make it identical to the existing definition in s. 414.0252, F.S., (Supp. 1998), relating to the Work and Gain Economic Self-sufficiency Act (WAGES). However, the definition for “domestic violence” in s. 39.902, F.S. (Supp. 1998) relating to domestic violence centers, and s. 943.171(2), F.S., relating to law enforcement training in handling domestic violence cases, remain unchanged by the bill, and would be inconsistent with the prevailing new definition.

Additionally, the current definition for “domestic violence” in s. 741.28, F.S., is cross-referenced in a number of statutory provisions. By eliminating the co-residency requirement in the definition, certain rights, criminal sanctions, and civil liabilities under these provision may now extend to a broader class individuals as either victims or perpetrators as indicated by the following examples:

- A victim of repeated long-term domestic violence resulting in either physical or psychological injuries over a period of time has a cause of action for compensatory and punitive damages. Moreover, the punitive damages awarded under this section are not subject to the limitations in s. 768.73, F.S. *See* § 768.35, F.S.

- A person commits the felony offense of aggravated stalking, if that person knowingly, willfully, maliciously, and repeatedly follows or harasses another person, after an injunction for protection against repeat violence under s. 784.046, or an injunction for protection against domestic violence under s. 741.30, or after any other court-imposed prohibition of conduct toward the subject person or that person's property. *See* § 784.048.
- A law enforcement officer may arrest a person without a warrant if there is probable cause to believe that the person has committed an act of domestic violence, as defined in s. 741.28, F.S. *See* § 901.15, F.S.
- There are sentencing multipliers that are included in sentencing guideline worksheet for domestic violence committed in the presence of a child as follows: If the offender is convicted of the primary offense and that offense is determined to be a crime of domestic violence as defined in s. 741.28, F.S., and to have been committed in the presence of a child who is related by blood or marriage to the victim or perpetrator and who is under the age of 16, the subtotal sentence points are multiplied, at the discretion of the court, by one and a half. *See* § 921.014, F.S.
- An inmate who claims to be a victim of domestic violence as defined in s. 741.28, F.S., can receive, as part of the release orientation program, referral to the nearest domestic violence center certified under chapter 39, F.S. *See* § 944.705, F.S.

VIII. Amendments:

None.