

STORAGE NAME: h0447.flc

DATE: April 2, 1999

**HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON
FAMILY LAW AND CHILDREN
ANALYSIS**

BILL #: HB 447

RELATING TO: Domestic Violence

SPONSOR(S): Rep. Lynn & others

COMPANION BILL(S): SB 1176(c)

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

- (1) JUDICIARY YEAS 9 NAYS 0
- (2) FAMILY LAW AND CHILDREN
- (3) CRIMINAL JUSTICE APPROPRIATIONS
- (4)
- (5)

I. SUMMARY:

HB 0447 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. Allows a court, upon the court's own motion, not to refer any case to mediation if it finds there has been a history of domestic violence that would compromise the mediation process.

The bill requires the Florida Court Education Council to establish standards for domestic violence instruction and a comprehensive education plan to ensure that each circuit and county court judge who has responsibility for cases of domestic violence has the opportunity to attend education programs. The Council shall develop and make available specified education tools, and shall provide a specified annual report. The Office of the State Court Administrator shall maintain specified records.

The bill requires the Supreme Court, through The Florida Bar, to provide a specified annual report regarding courses offered or sponsored by The Florida Bar that in their brochure outline contain a reference to domestic violence.

Provides an effective date of July 1 of the year in which enacted.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Definitions

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

- (1)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.”
- (2)F.S. section 39.902, relating to domestic violence centers, and rehabilitation of victims and perpetrators defines domestic violence in the identical manner as current F.S. 25.385.
- (3)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 adopted by specific reference to F.S. section 741.28 in the proposed changes made by HB 447 to F.S. section 25.385.
- (4)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)(2), 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. 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:

- (5)domestic violence, as defined in s. 741.28 and chapter 775; or
- (6)meets the criteria of paragraph 39.806(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 has adopted 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) has promulgated Rule 33.507, Florida Administrative Code, which implements F.S. 944.09(1)(n) and prohibits visitation except when: (a) visitation is approved by the superintendent after a determination that the visitation is in the best interests of the child; (b) in cases in which the court has previously imposed visiting restrictions and such restrictions are modified by the court ordering those prison visitation restrictions.

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. *Article IV, Section 8, Florida Constitution*. 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, approximately 500 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 0447 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, concerning 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; or 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 visitation is in the manifest best interests of the child.

Judicial Education

The bill provides that the Florida Court Education Council shall establish standards for domestic violence instruction and a comprehensive education plan to ensure that each circuit and county judge who has responsibility for cases of domestic violence has the opportunity to attend education programs. The Council shall develop and make available education tools so that judges can obtain information timely and efficiently before hearing cases where domestic violence may be involved. The education programs must include training on: governing laws, prevalence; characteristics and impacts of domestic violence on children or other dependents; custody and visitation issues; if and under what conditions mediation may be appropriate; information on community resources and referral services; and any other information that the Council deems appropriate. The bill requires the Office of the State Courts Administrator to maintain records including the date and curriculum of the programs, of all judges who attend the programs, and the current assignment of each attendee, and on request make the records available to the public. The Council must provide an annual report to the Governor, the President of the Senate, and the Speaker of the House of Representatives detailing the educational programs on domestic violence, and the number of judges who attend.

Continuing Legal Education for Members of the Florida Bar

HB 447 requires the Supreme Court, through The Florida Bar, to provide an annual report beginning September 1, 1999 regarding the courses on domestic violence offered or sponsored by The Florida Bar. The report must include course materials; references; names of instructors; a description of the courses offered; the section or committee which sponsors the course; the number of attorneys who attend such courses, if available; and any other information that describes or assesses the continuing legal education courses.

Mediation

HB 447 allows a court, upon its own motion, not to refer any case to mediation if it finds there has been a history of domestic violence that would compromise the mediation process. Currently, F.S. 44.102 allows restriction of referral to mediation upon motion or request of a party.

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 Florida Court Education Council shall establish standards for domestic violence instruction and a comprehensive education plan to ensure that judges who have the responsibility for hearing domestic violence cases have the opportunity to attend education programs. Requires the Council to develop educational tools, and submit an annual report. Requires the Office of the State Courts Administrator to maintain specified records. Requires the Supreme Court, through The Florida Bar, to submit a specified annual report.

(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 0447 amends ss. 25.385, 39.902, 44.102, and 943.71, Florida Statutes.

E. SECTION-BY-SECTION ANALYSIS:

Section 1: Amends s. 25.385, F.S., to require the Florida Court Education Council to establish standards for domestic violence instruction and a comprehensive education plan to ensure that each circuit and county court judge who has responsibility for cases of domestic violence has the opportunity to attend education programs on a periodic, regular, and timely basis. Defines the terms "domestic violence" and "judge who has responsibility for cases of domestic violence." Requires the Florida Court Education Council to develop and make available specified education tools, and provide an annual report. Requires the Office of the State Courts Administrator to maintain specified records.

Section 2: Amends s. 39.902, F.S., to conform the definition of “domestic violence” and “family or household member” to those in s. 741.28, F.S.

Section 3: Amends s. 44.102(2)(b), F.S., to allow a court, upon the court’s own motion, not to refer any case to mediation if it finds there has been a history of domestic violence that would compromise the mediation process.

Section 4: Amends s. 61.13(2)(b)1., F.S., 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:

- (1)the child is over 16 years of age and agrees to the order of visitation;
- (2)the convicted parent acted in self defense and is granted executive clemency or a petition for such executive clemency is pending; or
- (3)the court finds that visitation is in the manifest best interests of the child.

Section 5: Amends s. 943.171, F.S., to conform “domestic violence” and “family or household member” to s. 741.28, F.S.

Section 6: Creates new statutory language which requires the Supreme Court, through 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 in their brochure outline contain a reference to domestic violence, and which the Florida Bar approves for continuing legal education credits for members of the Florida Bar. The report must be submitted annually, beginning September 1, 1998, and must include course materials; references; names of instructors; a description of courses offered; sponsors; the number of attorneys who attend, if available; and any other information that describes or assesses the continuing legal education courses on domestic violence which are offered or sponsored by the Florida Bar.

Section 7: Provides an effective date of July 1, 1999.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

The Office of the State Courts Administrator reports that the anticipated fiscal impact of the bill could be absorbed within existing resources.

3. Long Run Effects Other Than Normal Growth:

N/A

4. Total Revenues and Expenditures:

N/A

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

N/A

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:

There is no fiscal impact anticipated as the result of this bill.

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 Committee on Judiciary

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

Section 4 of the bill amends Section 61.13, F.S., to prohibit visitation rights to the parent of a child convicted of a capital felony or a felony of the first degree which involved domestic violence against another parent of the child in most cases. This could result in denial of visitation rights to a parent convicted of one of these crimes before the effective date of the legislation.

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 Constitutional Considerations

The Fiscal Comments from the State Court Administrator's office include the following:

Section 1 of this bill may raise constitutional concerns, since it addresses policy regarding the qualifications and training of judges, which under Florida's Constitution falls within the province of the Judicial Branch.

The Committee on Family Law and Children

The parent-child relationship is protected under the state and federal constitutions. This bill may raise constitutional concerns regarding a parent's fundamental right to parent a child free from governmental interference as protected under the Fourteenth Amendment to the United States Constitution, and under the explicit right of privacy provision in article I, section 23 of the Florida Constitution. The Florida Supreme Court has made clear that the State cannot 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.

It is unclear why the term "manifest best interests of the child" as is used in s. 39.810, Florida Statutes, 1998 Supplement, was chosen over the term "best interests of the child" as is used in s. 61.13, Florida Statutes, 1998 Supplement. Each term represents a list of factors to be considered by the court when making certain specific determinations related to children and the factors are not interchangeable.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

The Committee on Judiciary adopted two amendments, Amendment 1 changes the definition of domestic violence in Section 741.28, F.S., to eliminate the requirement in (1) that the individuals must be residing in the same single dwelling unit. The second amendment changes the date for the first report from the Supreme Court, through the Florida Bar, to the Governor, the President of the Senate and the Speaker of the House from September 1998 to September 1999.

VII. SIGNATURES:

COMMITTEE ON JUDICIARY:

Prepared by:

Jo Ann Levin

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Don Rubottom

AS REVISED BY THE COMMITTEE ON FAMILY LAW AND CHILDREN:

Prepared by:

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