The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Children, Families, and Elder Affairs Committee

BILL:	CS/SB 904
INTRODUCER:	Children, Families, and Elder Affairs Committee and Senator Deutch
SUBJECT:	Parenting Plans and Domestic Violence
DATE:	March 12, 2009 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Toman	Walsh	CF	**Fav/CS**
2.			JU	
3.			WPSC	
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS.....		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

The bill amends ch. 61, F.S., relating to dissolution of marriage and parental responsibility for minor children. The bill amends the definition of parenting plan, and allows the court to establish a parenting plan with or without the use of a court-ordered parenting plan recommendation. The bill also amends the definition of parenting plan recommendation to allow not only psychologists, but also court-appointed mental health practitioners and other professionals to make parenting plan recommendations.

The bill clarifies that there is no presumption in favor of any particular time-sharing schedule in a parenting plan, and provides that modification of a parenting plan requires a showing of a substantial, material and unanticipated change in circumstances and a determination that the modification is in the child's best interests.

The bill makes significant amendments to s. 61.13001, F.S., relating to parental relocation.

Current law establishes a rebuttable presumption that it is detrimental to a child in a proceeding to establish or modify a parenting plan to allow a parent convicted of a third degree felony or higher involving domestic violence to have shared parenting responsibility for the child. The bill

amends the current law to provide that the rebuttable presumption arises if the parent is convicted of a first degree misdemeanor or higher involving domestic violence.

In addition, the bill amends s. 741.30, F.S., to allow the court in an *ex parte* temporary injunction proceeding to create a temporary parenting plan, including a time-sharing schedule that may award the petitioner with up to 100 percent time-sharing.

The bill clarifies that the parents, not the "adult parties" to a dissolution proceeding, are responsible for the costs of a social investigation.

This bill substantially amends, creates, or repeals the following sections of the Florida Statutes: 61.046; 61.13; 61.13001; 61.183; 61.20; 61.21; 61.30 and 741.30.

II. Present Situation:

Parenting Plans

It is the public policy of the state to encourage parents to share the rights, responsibilities, and joys of child-rearing, and to ensure that children have frequent and continuing contact with both parents, even after divorce.[1] The concept of shared parental responsibility is intended to protect a child's right to an ongoing relationship with both parents.

Research shows that children are negatively affected when they experience limited contact with either parent following separation or divorce.[2] As a result, the widespread use of traditional visitation guidelines, in particular the visiting schedule of every other weekend with the non-resident parent, is in decline.[3] Parenting plans, which provide multiple ways to allocate time between mother and father, and which take into account the children's ages and developmental and psychological needs, are becoming more common.[4] The terms custody and visitation have been criticized as unnecessarily negative and outdated, and the concept of "visiting" with one's child is unappealing to many parents.

In 2008, the Legislature amended ch. 61, F.S., to reflect this trend.[5] The following definitions were deleted from ch. 61, F.S.:

- Custodial parent;
- Primary residential parent;
- Noncustodial parent;
- Person entitled to be the primary residential parent of a child; and
- Principal residence of a child.

In addition, references to custody, visitation, and primary residence were replaced with the concepts of parenting plans and time-sharing schedules, and the term "child custody evaluation"

[1] Section 61.13(2)(b), F.S.
[2] Joan Kelly, Psychologist, *Keynote Address: The United States Experience* (Dec. 1, 2005) (transcript available at http://www.aifs.gov.au/institute/pubs/frtforum/kelly.doc) (last visited March 5, 2009).
[3] *Id*.
[4] *Id*.
[5] Chapter 2008-61, L.O.F.

was replaced with the term "parenting plan recommendation." Section 61.046 (14), F.S., defines a parenting plan recommendation as a nonbinding recommendation made by a psychologist licensed under chapter 490, F.S.[6]

A parenting plan is defined as a document created to govern the relationship between the parties to a dissolution proceeding with respect to their minor child(ren). A parenting plan may address issues such as the child's education, health care, and physical, social, and emotional well-being, and must include a time-sharing schedule.[7] A time-sharing schedule is a timetable that specifies the time that a minor child will spend with each parent.[8] A parenting plan is either (1) agreed to by the parties and approved by the court; or (2) established by the court, if the parents cannot agree.

Any parenting plan approved by the court must address at least the following issues:

- Details about how parents will share daily tasks;
- Time-sharing schedule;
- Designation of who will be responsible for health care, school-related matters, and other activities; and
- Methods and technologies parents will use to communicate with each other and with the child.[9]

Section 61.13(3), F.S., requires the court to evaluate many factors concerning the best interests of the child for purposes of establishing or modifying parental responsibility and a parenting plan. Among the factors is evidence of domestic violence, sexual violence, child abuse, child abandonment, or child neglect.

Domestic Violence and Parental Responsibility for Minor Children

It is estimated that between almost one and three million adults in the United States are victims of intimate partner violence each year.[10] In Florida, over 115,000 incidents of domestic violence were reported in 2007.[11] Of those incidents, 214 resulted in murder or manslaughter.[12]

In recent years, states have begun to recognize that domestic violence is an important consideration in child custody decisions. Every state identifies the existence of domestic violence

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[6] A parenting plan recommendation is distinguishable from the social investigation prescribed by s. 61.20, F.S. A social investigation may be ordered by the court when parents are unable to agree and may be conducted by conducted by staff of the court, a child-placing agency, a psychologist, or a clinical social worker, marriage and family therapist, or mental health counselor. Unless the parties are indigent, they are responsible for the cost of the investigation.

[7] Section 61.046(13), F.S.

[8] Section 61.046(22), F.S.

[9] Section 61.13(2)(b), F.S.

[10] Legal Momentum, *Understanding the Effects of Domestic Violence, Sexual Assault and Stalking on Housing and the Workplace*, available at http://action.legalmomentum.org/site/DocServer/statistics.pdf?docID=556 (last visited March 5, 2009).

[11] Florida Statistical Analysis Center, *County and Jurisdictional Domestic Violence Offenses, 2007*, available at http://www.fdle.state.fl.us/Content/getdoc/92676f14-48ff-406a-87d6-523d1b3820cb/dvoff_jur07.aspx (last visited March 5, 2009). Domestic violence crimes include murder, manslaughter, forcible rape, sodomy and fondling, aggravated assault and stalking, simple assault, stalking, threat/intimidation.

[12] *Id.*

as a factor to be considered in a custody decision, and at least ten states (including Florida) recognize a rebuttable presumption[13] that it is detrimental to a child to be placed in the custody of the perpetrator of family violence.[14]

Social science data supports the need to consider domestic violence in child custody cases. Statistics show:

- Men who batter their partners are likely to abuse their children as well;
- Parental separation or divorce does not prevent violence and, in fact, abuse, harassment and stalking, as well as threats to kidnap or hurt children, often escalate after separation;
- Over half of men who batter go on to batter again; and
- Successful completion of a batterer's intervention program does not always eliminate risk to the victim or the children.[15]

The majority of family violence defendants are never prosecuted, and one-third of the cases that would be considered felonies if committed by a stranger are filed as misdemeanors when they involve domestic violence.[16]

Section 61.13(2)(c)2., F.S., requires the court in a dissolution of marriage proceeding to order shared parental responsibility for a minor child, unless shared responsibility is detrimental to the child. Evidence that a parent has been convicted of a felony of the third degree or higher involving domestic violence[17] creates a rebuttable presumption of detriment to the child. If the presumption is not rebutted, shared parental responsibility, including time-sharing, may not be granted to the convicted parent. In addition, whether or not there is a conviction of any offense of domestic violence or child abuse, the court must consider evidence of domestic violence or child abuse as evidence of detriment to the child.

The court in a domestic violence proceeding is permitted to grant a temporary injunction that provides the petitioner with 100 percent time-sharing, "on the same basis as provided in s. 61.13, [F.S.]."[18] According to the Family Law Section of the Florida Bar (Family Law), the current law "fails to recognize that in many instances, notwithstanding *ex parte* allegations of

[13] A rebuttable presumption is an inference, drawn from certain facts that establish a *prima facie* case, which may be overcome by the introduction of contrary evidence. Black's Law Dictionary (8th ed. 2004).
[14] Daniel G. Saunders, in consultation with Karen Oehme, *Child Custody and Visitation Decisions in Domestic Violence Cases: Legal Trends, Risk Factors, and Safety Concerns* 1 (revised 2007).
[15] *Id*. *See also*, South Florida Sun-Sentinel, *Man Sets Fire to House, Killing Children He lost in Custody Battle* (December 23, 2006), a story about Tony Camacho who, after losing a custody battle against his wife, set fire to his house, killing himself and his two children. According to the article, Mr. Camacho had been arrested two years earlier for domestic violence battery, but the charges were dropped. Despite the arrest, however, Mr. Camacho was apparently allowed unsupervised visitation with their children.
[16] The Black Church and Domestic Violence Institute, *Domestic Violence Facts* (2003), available at http://www.bcdvi.org/facts.htm (last visited March 5, 2009).
[17] Domestic violence is defined in s. 741.28, F.S., as "any assault, aggravated assault, battery, aggravated battery, sexual assault, sexual battery, stalking, aggravated stalking, kidnapping, false imprisonment, or any criminal offense resulting in physical injury or death of one family or household member by another family or household member."
[18] Section 741.30(5)(a), F.S.

domestic violence, the children benefit from some form of a relationship with both parties no matter their faults."[19]

Relocation

Before 2006, a primary residential parent's attempt to relocate was addressed in two ways, with only one codified by statute.

If *a residency restriction clause was provided in the final judgment of divorce*, the statute "impose[d] a fact-specific framework that allow[ed] the trial court to base a relocation decision 'on what is best for the child, even though a result may not be best for the primary residential parent seeking to relocate.'"[20]

However, *in the absence of a residency restriction clause in the final judgment*, many times the primary residential parent simply moved without authorization. The following excerpt from the Fourth District Court of Appeal, in *Leeds v Adamse*, 832 So. 2d 125, 127-28 (Fla. 4th DCA 2002), describes this scenario as a "catch 22."

> The "catch 22" scenario unfolds as follows. Absent a residency restriction clause, the custodial parent is free to move the children without the consent of, or even notice to, the non-custodial parent. A trial court is prohibited from including a residency restriction clause in a final judgment unless the custodial parent seeks to relocate. An intent to relocate is often first revealed when the move takes place. At that point, the non-custodial parent's only option is to seek a modification of custody. However, to secure a modification of custody, he or she must show a substantial change of circumstances, and that the modification will be in the best interest of the children. [Section] 61.13(1)(a), Fla. Stat. (2001). Until recently, relocation of the children without notice or consent was not a substantial change of circumstances that would support modification of the custody provisions of a final judgment. The non-custodial parent is up the custody creek without the proverbial paddle.
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> . . .
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> *For a non-custodial parent to be guaranteed of notification before a relocation takes place, a residency restriction clause must be in existence by agreement or order. All that an inclusion of such a provision will do is allow the parties to either agree to the move or request leave of court to relocate.* This will allow the trial court to review the factors outlined in section 61.13(2)(d), Florida Statutes (2001), in an objective and thoughtful manner instead of having to address these sensitive issues after the fact. It will prevent the infamous flights in the night that send families into the land of panic, chaos, and hostility, and which cause such disruption in the lives of children. [Emphasis added.]

[19] *Talking Points for Children's Issues Bills*, provided in e-mail correspondence from Nelson Diaz, Becker & Poliakoff, P.A. (Thu 3/5/2009 10:32 AM) (on file with the Senate Committee on Children, Families and Elder Affairs).
[20] *Berrebbi v. Clarke*, 870 So. 2d 172, 174 (quoting *Flint v. Fortson*, 744 So. 2d 1217, 1218 (Fla. 4th DCA 1999).

In 2006, the Legislature codified the *Leeds* decision by amending ch. 61, F.S., to require a parent who wishes to relocate with a child to provide advance notice to the other parent and to any other persons who are entitled to visitation with the child.[21] If the other parent and others entitled to visitation agree to the relocation or do not object to it, the relocation may proceed. If the other parent or person entitled to visitation objects, a court must evaluate a number of factors to determine whether the proposed relocation will be allowed.

According to Family Law, the majority of relocation cases are resolved by the court, rather than by agreement.[22] The amendments to ch. 61, F.S., with respect to relocation, are intended to streamline the process for the benefit of the parties involved.[23]

III. Effect of Proposed Changes:

Parenting Plans
The bill amends the definition of *parenting plan*, providing that if the parents cannot agree on a plan *or* the court does not approve the plan, then the plan will be established by the court. The bill allows the court to establish a parenting plan with or without the use of a court-ordered parenting plan recommendation.

The bill also amends the definition of *parenting plan recommendation* to allow not only psychologists, but also court appointed mental health practitioners and other professionals designated pursuant to ss. 61.20, F.S.,[24] and 61.401, F.S.,[25] or the Florida Family Law Rules of Procedure 12.363[26] to make parenting plan recommendations.

The bill amends s. 61.13, F.S., to provide that any parenting plan approved by the court must include the address to be used for school-boundary determination and registration, and clarifies that there is no presumption either for or against any particular time-sharing schedule in a parenting plan and that each best interest analysis is specific to each child and each family.

In addition, the bill provides that modification of a parenting plan requires a showing of a substantial, material and unanticipated change in circumstances and a determination that modification is in child's best interests.

Domestic Violence
The bill further amends s. 61.13, F.S., lowering the threshold, in the context of assigning parental responsibility, for the application of a rebuttable presumption of detriment to a child from

[21] Chapter 2006-245 , L.O.F.
[22] Talking Points, *supra* note 19.
[23] *Id.*
[24] Section 61.20(2), F.S., allows a social investigation, when ordered by the court, to be conducted by qualified staff of the court; a child-placing agency licensed pursuant to s. 409.175, F.S.; a psychologist licensed pursuant to chapter 490, F.S.; or a clinical social worker, marriage and family therapist, or mental health counselor licensed pursuant to chapter 491, F.S..
[25] Section 61.401, F.S., permits the court to appoint a guardian ad litem in "an action for dissolution of marriage or for the creation, approval, or modification of a parenting plan . . ."
[26] Rule 12.363 (1) of the Florida Family Law Rules of Civil Procedure provides that when the issue of visitation, parental responsibility, or residential placement of a child is in controversy, the court may appoint a "licensed mental health professional or other expert for an examination, evaluation, testing, or interview of any minor child or to conduct a social or home study investigation."

conviction of a third degree felony involving domestic violence, to conviction of a first degree misdemeanor involving domestic violence.

The bill also provides that if, in its evaluation of a child's best interests, the court accepts evidence of prior or pending actions involving sexual or domestic violence, or of child abuse, neglect or abandonment, the court must specifically acknowledge, in writing, that when considering the best interests of the child, it considered such evidence.

The bill amends s. 741.30, F.S., to allow the court in an *ex parte* temporary injunction proceeding to create a temporary parenting plan, including a time-sharing schedule, which may award the petitioner 100 percent time-sharing.

Relocation
The bill makes significant amendments to s. 61.13001, F.S., relating to parental relocation.

Specifically, the bill:

- Deletes the definition of "change of residence address," which references the relocation of the child;
- Amends the definition of "relocation," referencing the relocation of the parent (rather than the child) and incorporating language from the definition of "change of residence address" (*e.g.*, change in location must be more than 50 miles from the original place);
- Amends the definition of "other person" and deletes references to visitation throughout the section, replacing them with the concept of other individuals who have access to children;
- Deletes the requirement for the pre-filing notice procedure in relocation cases and converts some of the pre-filing procedures into procedures for the petition itself, including the requirement that specific notification language be included in the petition for relocation;
- Provides that failure to respond to a petition to relocate results in a presumption that relocation is in the child's best interests and that, absent good cause, the court must enter an order allowing the relocation;
- Provides that if a response objecting to a petition to relocate is filed, the petitioner may not relocate and the matter must proceed to temporary hearing or trial;
- Prescribes the consequences for relocating without complying with the relocation procedures;
- Amends the bases upon which the court may grant a temporary order restraining relocation to include that the petition is not proper;
- Requires that a motion seeking temporary relocation must be heard within 30 days and that once the notice to set the cause for trial is filed, trial must be held within 90 days; and
- Prescribes that the relocation provisions are applicable to orders entered after October 1, 2009.

Social Investigations
The bill clarifies that the parents, not the "adult parties" to a dissolution proceeding, are responsible for the costs of a social investigation.[27]

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:

Because the bill implicates the fundamental right to parent a child by requiring a court to make a rebuttable presumption that it is a detriment to a child to be placed with his or her parent in certain circumstances, it may be subject to constitutional scrutiny. However, although parents have a fundamental right to parent their children, the State also has a compelling interest in protecting its children. In addition, because the presumption of detriment to a child is rebuttable (*i.e.*, conviction of domestic violence is not an automatic, absolute bar to placement), the provision may be less likely to be subject to challenge.[28]

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

According to the Office of the State Court Administrator (OSCA), this bill requires many of the Florida Supreme Court Approved Family Law Forms to be amended and new forms to be created, and the effective date of this bill may not provide the time necessary

[27] Under s. 61.401, F.S., a guardian ad litem is made a party to the proceedings, but should not be made responsible for the costs of a social investigation.
[28] *See, e.g., Monacelli v. Gonzalez*, 883 So.2d 361 (Fla. 4the DCA 2004).

to create new forms, amend existing forms, and seek approval and adoption of the proposed forms from the Florida Supreme Court.

In addition, the bill requires the court to specifically acknowledge in writing when evidence of domestic violence, sexual violence, child abuse, child abandonment, or child neglect is considered by the court in making its evaluating the best interest of the child.

Additionally, this bill requires that, absent good cause, a hearing must be held within 30 days after filing the petition for relocation, and a nonjury trial be held within 90 days after notice to set cause for trial is filed. Meeting such time frames in a civil case may be impossible due to limited judicial resources.

The fiscal impact of the bill cannot be accurately determined due to the unavailability of data needed to quantifiably establish the increase in judicial and staff workload as a result of the foregoing.[29]

VI. Technical Deficiencies:

At line 84 of CS/SB 904, the bill refers to Rule 12.363 of the Florida Family Law Rules of Procedure. Making specific reference to a particular rule creates the risk that, over time, the rule may be amended, thereby rendering the statute obsolete or unclear. In addition, the terms used in Rule 12.363 are not otherwise defined in the Rule and the application of those terms to the bill may, therefore, be unclear.

At line 334 of the CS, the term "visitation" is added to the definition of "other person." It is unclear why this term is added here, since it has been deleted throughout the remainder of the section.

At lines 418-419 of the CS, in its description of the notification language that must be included in a petition for relocation, the bill provides that the notice must inform the respondent that in the absence of an objection, relocation will be allowed, "*unless it is not in the best interests of the child.*" It is unclear how there could be a determination of the child's best interests if the relocation is to be allowed by default.

VII. Related Issues:

According to the Department of Revenue, s. 61.13(1)(d), F.S. conflicts with certain federal requirements for child support payments. Although the amendments to ch. 61.13, F.S., proposed by the bill do not create the nonconformance, the Legislature may wish to consider the issue in the context of this bill.[30]

[29] Office of the State Courts Administrator, *Judicial Impact Statement, SB 904* (March 6, 2009) .
[30] Department of Revenue, *2009 Bill Analysis, SB 904* (March 10, 2009).

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Children, Families and Elder Affairs on March 11, 2009
The CS for SB 904 clarifies the identity of the professionals permitted to make a parenting plan recommendation, codifies a Supreme Court decision as to modification of a parenting plan, clarifies that there is no presumption in favor of a particular time-sharing schedule in a parenting plan, requires that certain notification language (previously required in the Intent to Relocate) be included in a petition for relocation, and makes other conforming and technical amendments.

B. Amendments:

None.