

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.)

Date: April 21, 1998 Revised: _____

Subject: Domestic Violence

	<u>Analyst</u>	<u>Staff Director</u>	<u>Reference</u>	<u>Action</u>
1.	<u>Moody</u>	<u>Moody</u>	<u>JU</u>	<u>Favorable/CS</u>
2.	<u>_____</u>	<u>_____</u>	<u>WM</u>	<u>Withdrawn</u>
3.	<u>_____</u>	<u>_____</u>	<u>_____</u>	<u>_____</u>
4.	<u>_____</u>	<u>_____</u>	<u>_____</u>	<u>_____</u>
5.	<u>_____</u>	<u>_____</u>	<u>_____</u>	<u>_____</u>

I. Summary:

Senate Bill 494 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 (the OSCA) to maintain records of all judges who attend educational programs. The bill also requires the OSCA to provide an annual report to the Governor, the President of the Senate, and the Speaker of the House of Representatives. The bill amends the definition of “domestic violence” regarding the standards for instruction of circuit and county court judges in handling domestic violence cases.

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 courses on domestic violence that are approved by The Florida Bar for continuing legal education credits for members of The Florida Bar.

The bill amends the definition of domestic violence under s. 741.28, F.S., to eliminate the requirement that the alleged offender is or was a resident in the same single dwelling unit as the victim. Under the bill, the alleged offender need only be a family or household member.

This bill has an effective date of July 1, 1998.

This bill substantially amends sections 25.385, 61.13, and 741.28 of the Florida Statutes. This bill also creates yet unnumbered sections of the Florida Statutes.

II. Present Situation:

A. Definition of Domestic Violence

Currently, under s. 25.385, F.S., relating to the instruction of judges, 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.” *Id.* This definition is identical to the definitions provided in ss. 943.171(2) and 415.602, F.S. In s. 741.28(1), F.S., relating to the investigation and injunction process, domestic violence is defined 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 who is or was residing in the same single dwelling unit.” *Id.* The bill would amend the definition under s. 25.385, F.S., to conform to the definition provided currently under s. 741.28(1), F.S.

According to a recent Fifth District Court of Appeal’s opinion, relatives by blood or marriage must currently reside together or have resided together in the past in order to obtain a domestic violence injunction. *Sharpe v. State*, 695 So.2d 1302 (Fla. 5th DCA 1997). This opinion relies on the definition of domestic violence, which by its terms requires residency with the offender. However, as the court’s opinion acknowledges, the definition of family or household member is more broadly defined and does not appear to require residency with the offender. Moreover, a previous co-residency requirement in the definition of family or household member was deleted by the Legislature after another court opinion construed this definition to require co-residency. *Evans v. Evans*, 599 So.2d 205 (Fla. 2d DCA 1992). Nonetheless, the recent Fifth District Court of Appeal’s opinion stated that even though it might assume the Legislature intended to amend the co-residency requirement in the domestic violence definition when it did so to include the family and household member definition, it would not “amend clear and unambiguous statutory language.” *Sharpe, supra*.

The Criminal Justice Committee concluded, in a 1997 interim report, that this conflict would be resolved if current or prior residency with the offender was not required for those relatives related by blood or marriage.

Removing this requirement for relatives related by blood or marriage will expand the “net” to include some individuals with tenuous connections to a victim. For example, in *Evans*, the alleged perpetrator was the adult son estranged from the petitioner, his stepmother. The two had never lived together in the same household. In *Sharpe*, the petitioner was the widow of the respondent’s brother. If the co-residency requirement were removed, a domestic violence injunction would be available under these facts.

B. Child Visitation

Currently, in a child custody matter, the court must order that the parental responsibility for a minor child be shared by both parents *unless the court finds that shared parental responsibility would be detrimental to the child*. s. 61.13(2)(b), F.S. A 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 ch. 775, F.S., or
- Meets the criteria of s. 39.464(1)(d), F.S.

A court may prohibit visitation with a convicted parent if the presumption of detriment to the child created by the criminal conviction is not rebutted.

Section 39.464(1)(d), F.S., establishes grounds for termination of parental rights if 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;or has been convicted of:
 - A first or second degree murder;
 - A sexual battery that constitutes a capital, life, or first degree felony;
 - An offense in another jurisdiction which is substantially similar to one of the offenses listed in this 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.

Id.

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.

s. 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).

C. 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 continuing education requirements. Each judge and justice must complete a minimum of 30 credit-hours of approved judicial education every 3 years. Two hours must be in the area of judicial ethics. In addition, The Florida Supreme Court 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 selection to that level of the Court.

The Florida Court Education Council, in consultation with the judicial conferences, is responsible for developing 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 OSCA, 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 s. 25.385, F.S., the Florida Court Educational Council shall establish standards of 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.

The OSCA reports that since 1991, 426 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 one of their semi-annual meetings at least once in each 3-year reporting period since 1991. Participation in these sessions is mandatory of all judges who attend the conference. 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.

D. 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, 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), 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.

III. Effect of Proposed Changes:

A. Definition of Domestic Violence

The bill amends the definition of “domestic violence” with regards to standards for instruction of circuit and county judges in handling domestic violence cases by adding the following to the list of enumerated crimes:

- Aggravated assault;
- Aggravated battery;
- Stalking;
- Aggravated stalking;
- Kidnapping; and
- False imprisonment.

By adding these crimes, the definition of domestic violence in s. 25.385, F.S., conforms to the definition of domestic violence found in s. 741.28, F.S., in regards to the injunction process.

The bill revises the definition of domestic violence so that it does not require the victim to live, or have ever lived, with the offender. This would clarify legislative intent and legislatively overrule an appellate court’s reading of the statute requiring that the victim have lived with the offender in order to qualify for the protections of the domestic violence provisions.

B. Child Visitation

The bill prohibits courts from awarding visitation rights to a parent convicted of a capital felony or a felony of the first degree involving domestic violence against another parent of the child. The bill provides the following exceptions:

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

The bill specifies that a parent is not deemed convicted for purposes of this prohibition until the conviction as been affirmed on appeal or the time for filing an appeal has passed and no appeal has been filed.

C. Judicial Education

The bill provides that the Supreme Court require each judge in this state who hears or is responsible for cases involving domestic violence, whether civil, criminal, or juvenile cases, to attend educational programs on domestic violence. The bill includes judges who may hear cases involving domestic violence on a temporary, part-time, or emergency basis. The implementation period is not defined, and the number of instructional hours that each judge must complete is not provided for in the bill.

The bill provides that the educational programs on domestic violence may be programs provided by the OSCA, but the programs must be developed by the Florida Court Education Council. The programs must include the following topics:

- Training on laws governing domestic violence;
- The prevalence and dynamics of domestic violence;
- The impact of domestic violence on children; and
- Any other information that the council deems appropriate.

The bill provides that the OSCA must maintain records of all judges who attend the educational programs on domestic violence. The bill also requires the OSCA to provide an annual report to the Governor, the President of the Senate, and the Speaker of the House of Representatives, that includes the following information:

- A description of the types of programs;
- The proficiency of judges in understanding domestic violence;
- The number of judges who attend the programs;
- The cases assigned to the judges who attend the programs; and
- Any other information that is relevant to a full description of the educational programs on domestic violence.

D. The Florida Bar

The bill requires The Florida Bar to provide a report by September 1, 1998, to the Governor, the Chief Justice of the Supreme Court, the President of the Senate, and the Speaker of the House of Representatives on the courses on domestic violence that are approved by The Florida Bar for continuing legal education credits for members of The Florida Bar. The report must include the following information:

- Course materials;
- References;
- Names of instructors;
- A description of courses offered;
- The section or committee of The Florida Bar which sponsors the course;

- The number of attorneys who attend such courses; and
- Any other information that describes or assesses the continuing legal education courses on domestic violence offered by The Florida Bar.

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:

1. Ex Post Facto Considerations

Both the federal and state constitutions prohibit the passage of ex post facto laws. s. 9, Art. 1, U.S. Const.; s. 10, Art. 1, Fla. Const. 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. 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 *Calder v. Bull*, 3 U.S. 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. First, determine whether the law is retrospective in its effect. Second, determine 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.

2. Separation of Powers Considerations

The Florida Constitution delineates the three branches of government as legislative, executive, and judicial. s. 3, Art. II, Fla. Const. 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

the practice of law 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 branch 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 Judicial Administration.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

1. Judicial Education

The OSCA reports that each instructional hour would cost \$33. To provide 4 hours of training to the 799 judges that would be required to take the education courses on domestic violence as required by this bill, the first year cost would be \$105,468. The OSCA estimates that start-up costs for this training will be between \$79,000 for 3 hours of training and \$158,200 for 6 hours of training.

Depending on how many hours of domestic violence education the Supreme Court would require on a yearly basis, the OSCA estimates that for all judges to receive a minimum of 3 hours during each 3-year reporting basis, an increase in total education programming costs of \$45,000 to \$60,000 would occur annually. In addition, the cost of on-going judicial proficiency testing is estimated at \$30,000 to \$45,000 per year.

2. Maintenance of Records

The OSCA reports that the maintenance of records of all judges who attend educational programs on domestic violence in the detail delineated in this bill will require substantial enhancements and upgrades to the judicial education automation system, and require the addition of two full time employees for data gathering and entry. The estimated cost to contract the necessary software upgrades and compile the data reporting elements is \$65,000. The total annual cost for the salary and benefits of two data entry operators is estimated to be \$52,000.

3. Total Fiscal Impact

The OSCA estimates that the implementation of this bill 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.

At the present time, the OSCA reports that 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 1998-1999 includes a proposal to shift three staff positions from the trust fund to general revenue. The cost of the instructional mandate and reporting requirements contained in this bill could negate the remedial effects of the cost shift.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The bill amends s. 741.28, F.S. by revising the definition of domestic violence so that it does not require the victim to live, or have ever lived, with the offender. However, the current definition in s. 741.28, F.S. amended in the bill is identical to the definitions provided in ss. 25.385, 943.171(2) and 415.602, F.S. The bill thus leaves the definition unchanged in three other locations in the statute.

VIII. Amendments:

None.