

II. Present Situation:

It is estimated that between almost one and three million adults in the United States are victims of intimate partner violence each year, and more than 85 percent of the victims are women.² In Florida, over 115,000 incidents of domestic violence were reported in 2006.³ Domestic violence accounted for 176 (20%) of the state's 881 murders during 2005.⁴

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 as a factor to be considered in a custody decision, and at least ten states (including Florida) recognize a rebuttable presumption that it is detrimental to a child to be placed in the custody of the perpetrator of family violence.⁵

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.⁶

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.⁷

Section 61.13(2)(b)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

² Legal Momentum, *Understanding the Effects of Domestic Violence, Sexual Assault and Stalking on Housing and the Workplace*.

³ Florida's Crime Rate at a Glance, Total Domestic Violence for Florida, 1997-2006 available at http://www.fdle.state.fl.us/fsac/Crime_Trends/domestic_violence/index.asp (last visited March 21, 2008). Domestic violence crimes include murder, manslaughter, forcible rape, sodomy and fondling, aggravated assault and stalking, simple assault and stalking, threat/intimidation and arson.

⁴ Domestic Violence Fatality Review Team, *2006 Annual Report*, available at http://www.fdle.state.fl.us/publications/domestic_violence_fatality_report_2006.pdf (last visited March 21, 2008).

⁵ Daniel G. Saunders, in consultation with Karen Oehme, *Child Custody and Visitation Decisions in Domestic Violence Cases: Legal Trends, Risk Factors, and Safety Concerns* (revised 2007) at p. 1. The rebuttable presumption language comes from the Model Code on Domestic and Family Violence developed by the National Council of Juvenile and Family Court Judges (1994).

⁶ Daniel G. Saunders, in consultation with Karen Oehme, *Child Custody and Visitation Decisions in Domestic Violence Cases: Legal Trends, Risk Factors, and Safety Concerns* (revised 2007). 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.

⁷ See, <http://www.bcdvi.org/facts.htm>.

involving domestic violence⁸ creates a rebuttable presumption of detriment to the child. If the presumption is not rebutted, shared parental responsibility, including visitation, 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.

Section 61.13(3), F.S., requires the court to evaluate at least the following factors concerning the best interests of the child for purposes of shared parental responsibility and primary residence:

- The parent who is more likely to allow the child frequent and continuing contact with the nonresidential parent;
- The love, affection, and other emotional ties existing between the parents and the child;
- The capacity and disposition of the parents to provide for the child;
- The length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity;
- The permanence, as a family unit, of the existing or proposed custodial home;
- The moral fitness of the parents;
- The mental and physical health of the parents;
- The home, school, and community record of the child;
- The reasonable preference of the child;
- The willingness and ability of each parent to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent;
- Evidence that any party has knowingly provided false information to the court regarding a domestic violence proceeding; and
- Evidence of domestic violence or child abuse.

III. Effect of Proposed Changes:

Senate Bill 2552 amends s. 61.13, F.S., lowering the threshold for the application of a rebuttable presumption of detriment to a child in a custody proceeding from conviction of a third degree felony involving domestic violence, to conviction of a first degree misdemeanor involving domestic violence.

The bill provides that when a court considers the best interests of a child in a custody case, it may consider evidence of sexual violence, child abandonment and child neglect, in addition to evidence of domestic violence and child abuse. The court may consider such evidence regardless of whether an action regarding these issues has been brought.

The bill also provides that, if a court accepts evidence of 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.

⁸ 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."

The bill provides an effective date of July 1, 2008.

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, 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 an award of primary residential custody), the provision may be less likely to be subject to challenge.⁹

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, the fiscal impact of the bill cannot be determined because there is no means to measure the increase in judicial time that might result from requiring courts to make written findings as proposed by the bill.¹⁰

VI. Technical Deficiencies:

None.

⁹ See, e.g., *Monacelli v. Gonzalez*, 883 So.2d 361 (Fla. 4th DCA 2004).

¹⁰ See State Courts Administrator, *Senate Bill #2552* (March 3, 2008) (received March 24, 2008).

VII. Related Issues:

None.

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 26, 2008:

Allows courts in a custody case to consider evidence of sexual violence, child abandonment and child neglect, *in addition to* evidence of domestic violence and child abuse. Deletes provision allowing courts to consider arrests and attempts to obtain injunctions as evidence of domestic violence and child abuse, but allows the court to consider evidence of the specified offenses, regardless of whether an action has been brought. Deletes the requirement that the court must make written findings in every case that it considered evidence of domestic violence and child abuse, but provides that if the court does accept the specified evidence, the court must specifically acknowledge, in writing, that it considered such evidence.

- B. **Amendments:**

None.