

**HOUSE OF REPRESENTATIVES  
FINAL BILL ANALYSIS**

<b>BILL #:</b>	HB 639	<b>FINAL HOUSE FLOOR ACTION:</b>		
<b>SUBJECT/SHORT TITLE</b>	Equitable Distribution of Marital Assets and Liabilities	112	Y's 1	N's
<b>SPONSOR(S):</b>	Perez	<b>GOVERNOR'S ACTION:</b>		Approved
<b>COMPANION BILLS:</b>	CS/SB 676			

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**SUMMARY ANALYSIS**

HB 639 passed the House on February 21, 2018, and subsequently passed the Senate on March 6, 2018.

In a proceeding for dissolution of marriage, the court must determine an equitable distribution of assets and liabilities between the parties. Passive appreciation of a nonmarital asset encumbered with a mortgage paid down with marital funds may be one such asset. Case law establishes a method for determining the marital portion of passive appreciation that is subject to equitable distribution by dividing the amount of the mortgage at the time of marriage by the fair market value of the asset at the same time and multiplying that fraction by the amount of passive appreciation during the marriage.

HB 639 establishes a statutory formula to calculate the marital portion of passive appreciation of a nonmarital asset subject to equitable distribution. The bill uses the same methodology established in case law, but uses the amount of mortgage principal paid down during the marriage instead of the amount of the mortgage at the time of marriage. The bill sets a limit on the value of the marital portion of passive appreciation and allows a party to argue use of the formula would be inequitable under the facts of a specific case.

The bill also allows a court to require a party authorized to make installment payments to satisfy a judgment of equitable distribution to provide security and pay reasonable interest on those payments.

The bill does not appear to have any fiscal impact on state or local government.

The bill was approved by the Governor on March 21, 2018, ch. 2018-56 L.O.F., and will become effective on July 1, 2018.

# I. SUBSTANTIVE INFORMATION

## A. EFFECT OF CHANGES:

### Background

#### Equitable Distribution of Marital Assets and Liabilities

In a proceeding for dissolution of marriage, a court must determine what assets and liabilities are marital and distribute those assets and liabilities equitably between the parties.<sup>1</sup> Marital assets and liabilities include:<sup>2</sup>

- Assets acquired and liabilities incurred during the marriage, individually or jointly;
- The enhancement in value and appreciation of nonmarital assets resulting either from the efforts of either party or from the contribution of marital funds;
- Interspousal gifts;
- All vested and nonvested benefits, rights, and funds accrued during the marriage in retirement, pension, profit-sharing, annuity, deferred compensation, and insurance plans and programs; and
- All real or personal property held or titled as tenants by the entireties, whether acquired prior to or during the marriage.

#### *Passive Appreciation as a Marital Asset*

Passive appreciation<sup>3</sup> of an unencumbered nonmarital asset is not subject to division in a proceeding for dissolution of marriage.<sup>4</sup> Section 61.075, F.S., does not address passive appreciation of an encumbered nonmarital asset when the mortgage principal has been paid down with marital funds. The First District Court of Appeal, in *Stevens v. Stevens*, addressed this issue directly for the first time in 1995, holding:

"If an asset is financed entirely by borrowed money which marital funds repay, the entire asset should be included in the marital estate. In general, in the absence of improvements, the portion of the appreciated value of a separate asset which should be treated as a marital asset will be the same as the fraction calculated by dividing the indebtedness with which the asset was encumbered at the time of the marriage by the value of the asset at the time of the marriage."<sup>5</sup>

In 2010, the Fifth District Court of Appeal briefly adopted a different formula to calculate the marital share of passive appreciation.<sup>6</sup> In *Leider v. Leider*, the court calculated the marital share of passive appreciation as the total amount of mortgage principal reduction made with marital funds, divided by the amount of the unpaid mortgage principal balance at the time of marriage, multiplied by the amount of passive appreciation during the marriage. The *Leider* court later withdrew the decision in light of the Florida Supreme Court's ruling in *Kaaa v. Kaaa*.<sup>7</sup>

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<sup>1</sup> S. 61.075, F.S.

<sup>2</sup> S. 61.075(6)(a), F.S.

<sup>3</sup> Appreciation of an asset due to market forces, without any active effort or marital labor for its acquisition, improvement, or maintenance

<sup>4</sup> *Stevens v. Stevens*, 651 So 2d 1306 (Fla. 1st DCA 1995); Dawn D. Nichols and Sean K. Ahmed, *Nonmarital Real Estate: Is the Appreciation Marital, Nonmarital, or a Combination of Both?*, 81 Fla. B.J. 75, 75 (Oct. 2007).

<sup>5</sup> *Stevens v. Stevens*, 651 So. 2d 1306, 1307-08 (Fla. 1st DCA 1995).

<sup>6</sup> *Leider v. Leider*, 48 So.3d 901 (Fla. 5th DCA 2010).

<sup>7</sup> *Kaaa v. Kaaa*, 58 So. 3d 867,870 (Fla. 2010).

In 2010, the Florida Supreme Court held that “passive appreciation of a nonmarital asset ... is properly considered a marital asset where marital funds or the efforts of either party contributed to the appreciation.”<sup>8</sup> Payment of a mortgage with marital funds subjects the passive appreciation in the value of the real property to equitable distribution.<sup>9</sup> The *Kaaa* court recognized that the marital portion of nonmarital property encumbered by a mortgage paid down with marital funds includes two components: (1) a portion of the enhanced value of the marital asset resulting from the contributions of the nonowner spouse and (2) a portion of the value of the passive appreciation of that asset that accrued during the marriage.<sup>10</sup> The Supreme Court provided a methodology for courts to use in determining the value of the passive appreciation of nonmarital real property to be equitably distributed.<sup>11</sup> Pursuant to the methodology, a court must determine:

1. The overall current fair market value of the home;
2. Whether there has been passive appreciation in the home's value;
3. Whether the passive appreciation is a marital asset;<sup>12</sup>
4. The value of the passive appreciation that accrued during the marriage; and
5. How that value is to be allocated.<sup>13</sup>

To determine how to allocate the passive appreciation, the Supreme Court adopted the formula from *Stevens*. The *Kaaa* court divided the amount of mortgage at the time of the marriage by the fair market value of the asset at the same time, which is known as the "coverture fraction." The court then multiplied that fraction by the amount of passive appreciation of the asset at the time of the divorce.

$$\frac{\text{Amount of Mortgage at Marriage}}{\text{Fair Market Value at Marriage}} \times \text{Amount of Passive Appreciation During Marriage}$$

Example of the *Kaaa* court's methodology:

Facts
<ul style="list-style-type: none"><li>• Fair market value of home at Marriage: \$162,500</li><li>• Mortgage on home at Marriage: \$125,000</li><li>• Fair market value of home at Divorce: \$245,000<ul style="list-style-type: none"><li>○ Appreciation: \$82,500<ul style="list-style-type: none"><li>▪ Passive: \$78,000</li><li>▪ Active: \$4,500</li></ul></li></ul></li></ul>
Application
<ul style="list-style-type: none"><li>• Mortgage at Marriage / Fair Market Value at Marriage = Coverture fraction<ul style="list-style-type: none"><li>○ \$125,000 / \$162,500 = .77</li></ul></li><li>• Coverture fraction x Passive appreciation = Passive Appreciation Considered a Marital Asset<ul style="list-style-type: none"><li>○ .77 x \$78,000 = <span style="border: 1px solid black; padding: 2px;">\$60,060</span></li></ul></li></ul> <p>\$60,060 of the passive appreciation is a marital asset subject to equitable distribution.</p>

<sup>8</sup> Id.

<sup>9</sup> Id. at 871.

<sup>10</sup> Id. at 871-872.

<sup>11</sup> Id. at 872.

<sup>12</sup> S. 61.075(5)(a)2., F.S.; This step must include findings of fact by the trial court that marital funds were used to pay the mortgage and that the nonowner spouse made contributions to the property. Moreover, the trial court must determine to what extent the contributions of the nonowner spouse affected the appreciation of the property.

<sup>13</sup> *Supra*, FN 7.

## Criticism of the Kaaa Formula

Some family law practitioners believe that the formula adopted by the Supreme Court in *Kaaa* is flawed because there is no relationship between the amount of marital funds utilized to pay down the mortgage during the marriage and the passive appreciation of the property.<sup>14</sup> They further argue that *Kaaa* is inconsistent with s. 61.075(6)(a)1.b., F.S., by requiring a nonowner spouse to have made contributions to the property as a prerequisite to sharing in the passive appreciation of the property.<sup>15</sup>

Section 61.075(6)(a)1.b., F.S., states that marital assets and liabilities include “the enhancement in value and appreciation of nonmarital assets resulting either from the efforts of either party during the marriage **or** from the contribution to or expenditure thereon of marital funds or other forms of marital assets, or both.”

### **Effect of Proposed Changes**

HB 639 establishes a statutory formula for a trial court to use in determining the value of the marital portion of the passive appreciation of a nonmarital asset with a mortgage that has been paid down with marital funds. The formula calculates the value of the marital portion of passive appreciation subject to equitable distribution by determining the passive appreciation of the asset during the marriage and multiplying that by the "coverture fraction" to determine the portion of the passive appreciation during marriage that is a marital asset. This determination does not require the nonowner spouse to have made contributions to the property, as required under the *Kaaa* calculation.

Passive appreciation of the asset during marriage is determined by subtracting the value of the property on the date of the marriage or acquisition of the property, whichever is later, from the value of the property on the valuation date in the dissolution action, less any active appreciation or additional debts secured by the property during the marriage.

The coverture fraction is calculated by dividing the amount of mortgage principal paid from marital funds by the value of the real property on the date of marriage, the date of acquisition of the property, or the date the property was first encumbered by a mortgage on which principal was paid from marital funds, whichever is later.

The marital portion of passive appreciation subject to equitable distribution is determined by multiplying the coverture fraction by the passive appreciation of the property during the marriage.

$$\frac{\text{Total Reduction of Mortgage Principal by Marital Funds During Marriage}}{\text{Fair Market Value at marriage, date of acquisition, or date first encumbered, whichever is later}} \times \text{Amount of Passive Appreciation During Marriage}$$

<sup>14</sup> Meeting between Civil Justice & Claims Subcommittee staff and David Manz, former Chairman of Family Law Section (Dec. 6, 2017)

<sup>15</sup> *Id.*

Example of the proposed methodology:

Facts
<ul style="list-style-type: none"><li>• Fair market value of home at Marriage: \$162,500</li><li>• Mortgage on home at Marriage: \$125,000</li><li>• Mortgage on home at Divorce: \$59,000<ul style="list-style-type: none"><li>○ Mortgage paydown: \$66,000</li></ul></li><li>• Fair market value of home at Divorce: \$245,000<ul style="list-style-type: none"><li>○ Appreciation of \$82,500<ul style="list-style-type: none"><li>▪ Passive: \$78,000</li><li>▪ Active: \$4,500</li></ul></li></ul></li></ul>
Application
<ul style="list-style-type: none"><li>• Mortgage Paydown / Fair Market Value at Marriage = Coverture Fraction<ul style="list-style-type: none"><li>○ <math>\\$66,000 / \\$162,500 = .405</math></li></ul></li><li>• Coverture Fraction x Passive appreciation = Passive Appreciation considered a Marital Asset<ul style="list-style-type: none"><li>○ <math>.405 \times \\$78,000 = \\$31,590</math></li></ul></li></ul> <p>\$31,590 of the passive appreciation is a marital asset subject to equitable distribution.</p>

The bill bars the marital portion of nonmarital real property from exceeding the total net equity of the property on the valuation date in the dissolution action. The bill also allows a party to argue that the formula would be inequitable and therefore should not apply to the particular circumstances of the case.

The bill also authorizes the court to require security and a reasonable rate of interest, or otherwise recognize the time value of money in an equitable distribution judgement or order requiring installment payments. The bill does not preclude the recipient of installment payments from taking action pursuant to ch. 55, F.S., to enforce the judgement.

The bill is effective July 1, 2018.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill will have an indeterminate negative fiscal impact on non-owner spouses and an indeterminate positive fiscal impact on owner spouses of non-marital property when marital assets helped pay down the mortgage of such property. The new calculation requires a smaller portion of passive appreciation to be considered in the equitable distribution of assets. This will lead to a smaller share to the non-owner spouse and a larger share to the owner spouse.

D. FISCAL COMMENTS:

None.