

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Safeguard Individual Liberty: The bill increases options of an individual regarding conduct of his/her own affairs.

B. EFFECT OF PROPOSED CHANGES:

Present Situation:

In determining distribution practitioners should first determine whether an asset and the appreciation thereon is marital, nonmarital, or some combination of both. Second, look at whether the presumptions of gift apply through title to real estate or commingling of assets. Third, determine whether an argument for unequal distribution of a marital asset is appropriate. A thorough and thoughtful application of the criteria and definitions set forth in [F.S. §61.075](#) support this reasoning, akin to past efforts of practitioners and courts to establish special equities in assets.¹

Marital vs Nonmarital Assets:

According to s.61.075(7), F.S., all assets acquired and liabilities incurred by either spouse subsequent to the date of the marriage and not specifically established as nonmarital assets or liabilities are presumed to be marital assets and liabilities. Such presumption is overcome by a showing that the assets and liabilities are nonmarital assets and liabilities. The presumption is only for evidentiary purposes in the dissolution proceeding and does not vest title. Title to disputed assets shall vest only by the judgment of a court. This section does not require the joinder of spouses in the conveyance, transfer, or hypothecation of a spouse's individual property; affect the laws of descent and distribution; or establish community property in this state.

"Marital assets and liabilities" include:²

1. Assets acquired and liabilities incurred during the marriage, individually by either spouse or jointly by them;
2. 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;
3. Interspousal gifts during the marriage;
4. 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
5. *All real property held by the parties as tenants by the entireties, whether acquired prior to or during the marriage, shall be presumed to be a marital asset. If, in any case, a party makes a claim to the contrary, the burden of proof shall be on the party asserting the claim for a special equity.*

"Nonmarital assets and liabilities" include:³

1. Assets acquired and liabilities incurred by either party prior to the marriage, and assets acquired and liabilities incurred in exchange for such assets and liabilities;

¹ Ho and Zung, *Special Equity and Unequal Distribution of Assets*, Florida Bar Journal, Page 79, November 2001.

² Section 61.075(5)(a), F.S.

³ Section 61.075(5)(b), F.S.

2. Assets acquired separately by either party by noninterspousal gift, bequest, devise, or descent, and assets acquired in exchange for such assets;
3. All income derived from nonmarital assets during the marriage unless the income was treated, used, or relied upon by the parties as a marital asset;
4. Assets and liabilities excluded from marital assets and liabilities by valid written agreement of the parties, and assets acquired and liabilities incurred in exchange for such assets and liabilities; and
5. Any liability incurred by forgery or unauthorized signature of one spouse signing the name of the other spouse. Any such liability shall be a nonmarital liability only of the party having committed the forgery or having affixed the unauthorized signature.

According to s.61.075(6), F.S., the cut-off date for determining assets and liabilities to be identified or classified as marital assets and liabilities is the earliest of the date the parties enter into a valid separation agreement, such other date as may be expressly established by such agreement, or the date of the filing of a petition for dissolution of marriage. The date for determining value of assets and the amount of liabilities identified or classified as marital is the date or dates as the judge determines is just and equitable under the circumstances. Different assets may be valued as of different dates, as, in the judge's discretion, the circumstances require.

The Gift Presumption:

In Florida, all real property held by tenants by the entireties is presumed to be a marital asset regardless of who paid for it.⁴ In order to overcome the statutory presumption, the party seeking a special equity has the burden of proving that a gift was *not* intended.⁵

The Burden of Proof to Defeat the Gift Presumption:

There are conflicting cases regarding the burden of proof (several courts require beyond a reasonable doubt,⁶ and others require clear and convincing evidence⁷) required to defeat the gift presumption.⁸

The key to determining which portion of a separate asset remains nonmarital often is whether the funds remain traceable. If funds become so commingled within marital funds or assets that they lose their original characteristics, no special equity will be granted. In other words, separate property is transmuted into marital property.⁹

A dichotomy exists between the treatment of personal property and the treatment of real property.¹⁰ By statute, while there is no presumption of a gift for personal property, there is, conversely, a strong presumption of a gift for real property held as tenants by entireties.¹¹ Today, there is a presumption of a gift for entireties property, even if one spouse provided every penny of consideration for its purchase. The burden has been shifted to the original owner spouse to prove that a gift was not intended.¹²

⁴ Section 61.075(5)(a)5, F.S.

⁵ *Stough v. Stough*, 933 So.2d 603, 607 (Fla. 1st DCA 2006); see also *Robertson v. Robertson*, 593 So.2d 491, 494 (Fla.1991); *Zangari v. Cunningham*, 839 So.2d 918, 921 (Fla. 2d DCA 2003) (finding that, standing alone, evidence that one party made the down payment for the parties' marital home with his nonmarital assets was insufficient to prove that the party did not intend a gift).

⁶ "Beyond a reasonable doubt" means fully satisfied, entirely convinced, satisfied to moral certainty. Blacks Law Dictionary, page 204 (1968).

⁷ "Clear and convincing" is an intermediate level of proof, being more than mere preponderance, but not to the extent of such certainty as required beyond reasonable doubt as in criminal cases. Blacks Law Dictionary, page 227 (1979).

⁸ **Beyond a Reasonable Doubt** (the Supreme Court, First and Third DCA's), *Lindley v. Lindley*, 84 So.2d 17 (Fla. 1955); *Antonini v. Antonini*, 473 So.2d 739 (Fla. 1st DCA 1985); *Smith v. Smith*, 597 So.2d 370 (Fla. 3d DCA 1992); *Terreros v. Terreros*, 531 So.2d 1058 (Fla. 3d DCA 1988); *Dutton v. Dutton*, 379 So.2d 111 (Fla. 3d DCA 1979); *Storer v. Storer*, 353 So.2d 152 (Fla. 3d DCA 1977); *Singer v. Singer*, 262 So.2d 731 (Fla. 3d DCA 1972); **Clear and Convincing** (the Second and Third DCA's), *Harrison v. Harrison*, 314 So.2d 812 (Fla. 3d DCA 1975); *Abbott v. Abbott*, 297 So.2d 608 (Fla. 2d DCA 1974).

⁹ *Bashem v. Bashem*, 541 So. 2d 118 (Fla. 3d DCA 1989).

¹⁰ *Archer v. Archer*, 712 So. 2d 1198 (Fla. 5th DCA 1998).

¹¹ Ho and Zung, *Special Equity and Unequal Distribution of Assets*, Florida Bar Journal, Page 79, November 2001.

¹² The Robertson opinion continues by quoting a commentator: "One important difference between case law and the statute is the treatment of real estate that is held by the parties as tenants by the entireties. The statute provides that the conveyance of premarital real estate to entireties ownership changes the character of the premarital property and creates a presumption that the parties intended

The standard of proof for a party who is claiming that real property held as tenants by the entirety is different than the treatment of personal property. The Fourth District Court of Appeal explained that the standard of proof is the “greater weight of the evidence and not that of beyond a reasonable doubt.”¹³

Unequal Distribution:

Section 61.075, F.S., provides for the equitable distribution of marital assets and liabilities. Specifically, in a proceeding for the dissolution of marriage or in a proceeding for disposition of assets the court shall set apart to each spouse that spouse’s nonmarital assets and liabilities. In distributing the marital assets and liabilities between the parties, the court must begin with the premise that the distribution should be equal, unless there is justification for an unequal distribution based on the following relevant factors:¹⁴

- (a) The contribution to the marriage by each spouse, including contributions to the care and education of the children and services as homemaker.
- (b) The economic circumstances of the parties.
- (c) The duration of the marriage.
- (d) Any interruption of personal careers or educational opportunities of either party.
- (e) The contribution of one spouse to the personal career or educational opportunity of the other spouse.
- (f) The desirability of retaining any asset, including an interest in a business, corporation, or professional practice, intact and free from any claim or interference by the other party.
- (g) The contribution of each spouse to the acquisition, enhancement, and production of income or the improvement of, or the incurring of liabilities to, both the marital assets and the nonmarital assets of the parties.
- (h) The desirability of retaining the marital home as a residence for any dependent child of the marriage, or any other party, when it would be equitable to do so, it is in the best interest of the child or that party, and it is financially feasible for the parties to maintain the residence until the child is emancipated or until exclusive possession is otherwise terminated by a court of competent jurisdiction. In making this determination, the court shall first determine if it would be in the best interest of the dependent child to remain in the marital home; and, if not, whether other equities would be served by giving any other party exclusive use and possession of the marital home.
- (i) The intentional dissipation, waste, depletion, or destruction of marital assets after the filing of the petition or within 2 years prior to the filing of the petition.
- (j) Any other factors necessary to do equity and justice between the parties.

the property to be subject to equitable distribution on divorce. In contrast, *Ball v. Ball* and subsequent cases held that once a spouse proved that property was originally nonmarital, a presumption arose that the property remained nonmarital, unless the other spouse could show that a gift was intended. Thus, the 1988 statute has shifted the burden of proof by creating a presumption that property transferred to a tenancy by the entirety is marital, regardless of its original acquisition. It is up to the spouse who claims a special equity interest to prove that a gift of that interest was not intended.” [Robertson v. Robertson, 593 So. 2d 491, 494 \(Fla. 1991\)](#) citing 2 FLA. FAM. L. (MB)) §34.24 (Mar. 1990).

¹³ [Heim v. Heim, 712 So. 2d 1238, 1239 \(Fla. 4th DCA 1998\)](#).

¹⁴ Section 61.075(1), F.S.

Equitable Distribution and Special Equity:

According to an article published in the Florida Bar Journal entitled *Special Equity and Unequal Distribution of Assets*:¹⁵

The unequal distribution of marital assets is not often ordered by Florida courts. Although marital assets are presumed to be equally divided, this is just a starting point in the search for equity in dividing assets acquired during a marriage. Special equity is a concept that seemingly illustrates a justification for unequal distribution, *i.e.*, services or contributions over and above normal marital contributions.

First used in 1932 in the case of [Heath v. Heath](#),¹⁶ the term “special equity” was initially a judicially proffered term, created to circumvent the harsh statutory rule which prohibited any form of alimony award to an adulterous wife. That meaning has metamorphasized. The Florida Supreme Court in 1980 defined special equity, in its purest sense, as “a vested interest which a spouse acquires because of contribution of funds, property, or services made over and above the performance of normal marital duties.”¹⁷

Rendered simultaneously with *Duncan* was the Florida Supreme Court case, [Canakaris v. Canakaris](#).¹⁸ Explaining that historically there were two types of special equity, the *Canakaris* court clearly approved one form, but refuted the use of the term “special equity” for the other. The court determined that special equity was inappropriately used when considering lump sum alimony. The court opined that because this use of the term “lump sum alimony” did not actually characterize a vested interest by a spouse, but rather was used to ensure a fair result, it did not accurately convey the true meaning of special equity.

Conversely, the *Canakaris* court did embrace the more traditional definition of special equity, which describes a vested interest in either marital property or the nonmarital property of the other spouse because of the contribution of funds or services over and above normal marital duties.¹⁹

The burden of proof for a special equity claim is two-fold. First, the party claiming a special equity must prove the funds or property came from a nonmarital source, and second that a gift was not intended.²⁰ The burden to show a special equity is upon the party claiming it.²¹

Interim Partial Distribution:

At present, parties in a dissolution action are precluded from seeking a partial distribution of assets during the pendency of the case as it is not authorized under Florida Statutes.

The Bill

Interim Partial Distribution:

¹⁵ Ho and Zung, *Special Equity and Unequal Distribution of Assets*, Florida Bar Journal, Page 79, November 2001.

¹⁶ [Heath v. Heath](#), 103 Fla. 1071, 138 So. 796 (Fla. 1932).

¹⁷ [Duncan v. Duncan](#), 379 So. 2d 949, 952 (Fla. 1980).

¹⁸ [Canakaris v. Canakaris](#), 382 So. 2d 1197 (Fla. 1980).

¹⁹ [Canakaris v. Canakaris](#), 382 So. 2d 1197 (Fla. 1980).

²⁰ [Straley v. Frank](#), 585 So. 2d 334, 336 (Fla. 2d D.C.A. 1991).

²¹ [Baird v. Baird](#), 696 So. 2d 844, 845 (Fla. 2d D.C.A. 1997).

The bill provides for the interim partial distribution of assets and liabilities in dissolution of marriage actions. The bill provides that if good cause is shown (when extraordinary circumstances exist) and upon motion a court is permitted to identify, value and distribute marital and nonmarital assets and debts in the dissolution case and allocate certain of those assets and debts between the parties in order to achieve equity and justice during the pendency of the case.

The bill provides that an interim order may be entered at any time after the date the dissolution of marriage is filed and served and before the final distribution of marital and nonmarital assets and liabilities. The motion may be filed by either party and shall demonstrate good cause why the matter should not be deferred until the final hearing.

The bill requires the court to specifically take into account and give appropriate credit for any partial distribution of marital assets or liabilities in its final allocation of marital assets or liabilities. Further, the bill requires the court to make specific findings in any interim order under this section that any partial distribution will not cause inequity or prejudice to either party as to either party's claims for support or attorney's fees.

Marital versus Nonmarital Assets:

The bill provides that when a party makes a claim that real property held as tenants by the entirety is not a marital asset the party asserting the claim has the burden of proof that the subject property, or some portion thereof, is nonmarital instead of making a claim for special equity as current law requires.

The bill provides that all personal property titled jointly by the parties and held as tenants by the entirety, whether acquired prior to or during the marriage, shall be presumed to be a marital asset. In the event a party makes a claim to the contrary, the burden of proof shall be on the party asserting the claim that the subject property, or some portion thereof, is nonmarital.

Gift Presumption:

The bill provides that the burden of proof to overcome the gift presumption shall be by clear and convincing evidence.

Special Equity:

The bill abolishes special equity. All claims formerly identified as special equity, and all special equity calculations, are abolished and shall be asserted either as a claim for unequal distribution of marital property and resolved by the statutory factors set forth in s. 61.075 (1) F.S., or as a claim of enhancement in value or appreciation of nonmarital property pursuant to new s. 61.075(6)(a)1.b., F.S.

The bill removes the requirement in s. 741.0306, F.S., that the Family Law Handbook include a section regarding special equity.

C. SECTION DIRECTORY:

Section 1: Amends s. 61.075, F.S., regarding equitable distribution of marital assets and liabilities.

Section 2: Amends s.741.0306, F.S., regarding the Family Law Handbook.

Section 3: Provides for an effective date of July 1, 2008.

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:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because the bill does not appear to require counties or cities to spend funds or take action requiring the expenditure of funds; reduce the authority of counties or cities to raise revenues in the aggregate; or reduce the percentage of a state tax shared with counties or cities.

2. Other:
None.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rule making authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The Family Law Section of the Florida Bar provided the following statement regarding the bill:

ABOLISHMENT OF THE SPECIAL EQUITY DOCTRINE

The proposed statute abolishes the special equity doctrine. The special equity doctrine is an obsolete, antiquated property division mechanism created in the 1930's to correct a perceived unfairness created by Florida's divorce statutes in existence at that time. The statutes then in effect provided that a wife who was guilty of adultery and had no real property or other assets titled in her own name was totally precluded from seeking either alimony or a property distribution. The special equity doctrine was thus created to allow a wife in such a case to obtain a property distribution from property titled in her husband's name. The special equity doctrine is inconsistent with the framework of classification of

assets as provided by Florida's current equitable distribution statute, Florida Statute 61.075, and with Florida's alimony statute. Under the present statute, title to property is not critical to disposition of property in a divorce case: generally, all property obtained during marriage, however titled, is deemed marital. Further, adultery is not an absolute bar to alimony. The proposed statute provides that assets are classified either as marital or nonmarital. If assets are determined to be marital they are subject to equitable division under Florida Statute 61.075(1). If assets are determined to be nonmarital, the assets are to be returned to the party who acquired the assets. Abolishment of the special equity doctrine is thus consistent with Florida's equitable distribution scheme as provided by Section 61.075 and will remove significant uncertainty and inconsistency in the case law.

STANDARD OF PROOF TO DEFEAT THE GIFT PRESUMPTION

This statute clarifies and resolves the conflicts between the District Court of Appeals as to the issue of the burden of proof to defeat the "gift presumption" as pertains to jointly titled property in dissolution of marriage actions under Florida Statute 61.075. The "gift presumption" states that property acquired during the marriage as tenants by the entireties or transferred from one spouse to both spouses by the entireties is a gift and therefore is to be considered marital. The proposed statute states that the burden of proof to defeat the gift presumption is "clear and convincing" evidence.

PRESUMPTION OF GIFT AS PERTAINS TO PERSONAL PROPERTY

The current statute provides that the gift presumption only pertains to real property. The proposed statute abolishes the distinction, and provides that the gift presumption equally applies to personal property as it does real property. Under the new statute, personal property acquired during the marriage as tenants by the entireties or property transferred from one spouse to both spouses is a gift and therefore will be considered marital.

PARTIAL EQUITABLE DISTRIBUTION

This statute provides for the partial distribution of assets in dissolution of marriage actions. At present, parties in a dissolution action are precluded from seeking a partial distribution of assets during the pendency of the case. The new statute provides that when compelling circumstances exist, a court is permitted to identify, value and distribute marital and nonmarital assets and debts in the dissolution case and allocate certain of those assets and debts between the parties in order to achieve equity and justice during the pendency of the case.

D. STATEMENT OF THE SPONSOR

No statement submitted.

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES