

**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 Judiciary Committee

**BILL:** CS/CS/SB 2166

**INTRODUCER:** Judiciary Committee, Children, Families, and Elder Affairs Committee, and Senator Hill

**SUBJECT:** Spousal and Child Support

**DATE:** April 16, 2009                      **REVISED:** \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Ray	Walsh	CF	<b>Fav/CS</b>
2.	Daniell	Maclure	JU	<b>Fav/CS</b>
3.			GA	
4.				
5.				
6.				

**Please see Section VIII. for Additional Information:**

A. COMMITTEE SUBSTITUTE.....  Statement of Substantial Changes

B. AMENDMENTS.....  Technical amendments were recommended

Amendments were recommended

Significant amendments were recommended

**I. Summary:**

This bill amends provisions of law dealing with spousal support and child support. Specifically, the bill:

- Requires that after October 1, 2009, all child support and income deduction orders must provide for termination of support upon a child’s 18th birthday, unless certain exceptions apply, and for a schedule stating the amount of support that will be owed for the remaining children, if any;
- Provides that a court must make certain findings when ordering deferred payment of a distribution of marital assets;
- Specifies how payments of alimony or spousal support judgments are to be applied;
- Requires the court to make specific findings of fact if the court wants to impute income to a parent beyond the minimum wage;
- Places the burden on the party seeking to impute income to present certain evidence;
- Creates a rebuttable presumption when imputing income to an unemployed or underemployed parent;
- Provides situations when a court may not impute income beyond the minimum wage;

- Amends specified allowable deductions from net income;
- Amends the child support guidelines schedule;
- Removes the requirement that certain child care costs are reduced by 25 percent before being added to the basic support obligation;
- Requires child care costs and health insurance costs to be added to the minimum child support need;
- Changes the overnight time-sharing threshold from 40 percent to 20 percent;
- Allows the court to adjust the total minimum child support award based upon whether the application of the child support guidelines leaves a party with a net income lower than the federal poverty guidelines;
- Provides that interest on child support and alimony or spousal support judgments is enforceable using all methods available to enforce support orders; and
- Makes technical and conforming changes.

This bill substantially amends the following sections of the Florida Statutes: 61.075, 61.13, 61.14, 61.30, 409.2563, and 742.08.

## II. Present Situation:

### History of Child Support Obligations

In 1984, Congress recognized the potential value of requiring states to implement guidelines to be used in the determination of the amount of child support obligations. The federal Child Support Enforcement Amendments of 1984 required states to establish non-binding child support guidelines either by law or judicial or administrative action no later than October 1, 1987.<sup>1</sup> The Family Support Act of 1988 made state child support guidelines presumptive and required states to review their child support guidelines at least once every four years in order to ensure that their application results in child support award amounts that are appropriate. As a part of the review process, states must analyze case data related to the application of, and deviations from, the guidelines, and they must also consider economic data related to the cost of raising children.<sup>2</sup> With the exception of these two requirements, states have broad discretion and latitude in conducting guideline reviews.

The Florida schedule of obligations was reviewed in 1992 and updated in 1993 to reflect changes in the Consumer Price Index. The guidelines were reviewed again in 1997 and in 2004, both times with recommendations for significant changes in the schedule and the underlying methodology.<sup>3</sup> Neither set of recommendations was adopted by the Legislature. Although specific provisions of the guidelines have been modified, the schedule that specifies the dollar amount of child support obligation for each income level has remained unchanged since 1993. The most recent review was conducted in 2008 by Florida State University, under contract with

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<sup>1</sup> Child Support Enforcement Amendments of 1984, 42 U.S.C. ss. 657-662 (1984).

<sup>2</sup> Family Support Act of 1988, 42 U.S.C. ss. 654, 666-667 (1988).

<sup>3</sup> Thomas S. McCaleb et al., *Review and Update of Florida's Child Support Guidelines, Report to the Florida Legislature*, Dep't of Economics, Florida State University (Mar. 5, 2004).

the Legislature, and includes a recommendation to adopt an updated schedule of child support obligation to replace the 1993 schedule.<sup>4</sup>

### **Chapter 61, Florida Statutes**

In a ch. 61, F.S., proceeding, the court may order either or both parents to pay support in accordance with the guidelines in s. 61.30, F.S., and the court initially entering the support order shall have continuing jurisdiction to modify the amount, terms, and conditions of the child support payment.<sup>5</sup>

#### ***Child Support***

When considering a child support obligation, the net income of the parents is added together to determine the combined monthly net income of the parents. The child support guideline chart has \$50 increments starting at a \$650 combined net income.<sup>6</sup> The chart provides calculations for whether there are between one and six children. If the combined monthly net income of the parents is less than the lowest level on the chart, the court is directed to determine child support on a “case-by-case” basis.<sup>7</sup> The child support guideline chart also provides that if the combined monthly net income is greater than the amounts set on the chart, then the child support need is set at the minimum amount of support provided by the guidelines, plus an additional percentage set out in statute.<sup>8</sup>

In general, child support ends as the child reaches the age of majority, that is, upon the child reaching 18 years of age. However, a child support obligation may be extended beyond the 18th birthday in two different circumstances:

- If the child will continue to be dependent upon his or her parents for support beyond his or her 18th birthday because of a physical or mental incapacity that existed prior to the child turning 18; and
- If the child is still in high school, performing in good faith and with a reasonable expectation of graduation before the age of 19.<sup>9</sup>

An order establishing child support is a continuing obligation owed by the parent paying support. A child support obligation does not automatically end by operation of law. Instead, the parties must obtain a court order modifying the support obligation when a child reaches the age at which support should end. When one child reaches the age of majority, the parties must return to court and re-litigate child support based on current incomes and the number of children remaining to whom child support applies.

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<sup>4</sup> Thomas S. McCaleb et al., *Review and Update of Florida’s Child Support Guidelines, Report to the Florida Legislature*, Dep’t of Economics, Florida State University, iv (Nov. 17, 2008).

<sup>5</sup> Section 61.13(1)(a), F.S.

<sup>6</sup> Section 61.30(6), F.S.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Section 743.07(2), F.S.

### ***Application of Payments***

Section 61.14(6)(d), F.S., provides that a payment of a past due child support obligation is first applied to current child support due, then to any delinquent principal, and then to interest due on the support judgments. There is no corresponding rule regarding how to apply similar alimony payments.

### ***Imputed Income***

A court determines support obligations of the parties based on their incomes.<sup>10</sup> Child support is based primarily on an income-based formula. In some circumstances, the current income of a party does not give an accurate picture of the party's ability and duty to make support payments. Where this occurs, s. 61.30(2)(b), F.S., allows the court to impute income to that party. Imputed income is an estimate of what the party should be earning. The imputed income is then used in determining child support rather than actual income. Income is usually imputed as if the parent earned minimum wage.<sup>11</sup>

### ***Child Support Formula***

It is possible under the current child support formula for a parent to have most of the overnights with a child and still be required to pay child support payments to the other parent.

Section 61.30(11), F.S., provides a list of factors that a court may take into account in adjusting the amount of child support after application of the base formula. The court may adjust child support levels when application of the formula requires a person to pay more than 55 percent of his or her gross income for child support in a single child support order.<sup>12</sup>

### ***Dependency Exemption***

One item that reduces the federal income tax liability of an individual or legally married couple is the dependency deduction. In general, the parent with whom the child resided for more than half of the year is entitled to the deduction unless the court orders that the dependency deduction is to be waived in favor of the other parent. While the child tax credit provides the same benefit to either parent, the dependency deduction is often a greater benefit to a parent with a higher income as that parent will likely be in a higher income tax bracket.<sup>13</sup> The court may adjust a child support award to account for the impact of the dependency exemption, and may order a parent to waive the deduction to the benefit of the other if the other is current in child support payments.<sup>14</sup>

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<sup>10</sup> Section 61.30(6), F.S.

<sup>11</sup> Thomas S. McCaleb, *supra* note 4, at iv.

<sup>12</sup> Section 61.30(11)(a)9., F.S.

<sup>13</sup> A deduction reduces a taxpayer's gross income. The value of a deduction increases as income rises, as the actual benefit is reduced to the effective income tax rate of the taxpayer. For instance, a person in the 15-percent tax bracket only receives a \$525 benefit from a single dependency deduction, whereas a person in the 25-percent tax bracket receives an \$875 benefit.

<sup>14</sup> Section 61.30(11)(a)8., F.S.

### *Alimony*

Under Florida law, in a dissolution of marriage proceeding, the court may grant alimony to either party, either to balance an inequitable property division or to ensure support to a financially dependent spouse.<sup>15</sup> Alimony is based primarily on need and ability to pay, so an alimony award is not appropriate when the requesting spouse has no need for support or when the paying spouse does not have the ability to pay.<sup>16</sup>

In determining a proper award of alimony, the court is required to consider all relevant factors including:

- The standard of living established during the marriage;
- The duration of the marriage;<sup>17</sup>
- The age and physical and emotional condition of each party;
- The financial resources and liabilities of each party, both marital and nonmarital;
- If applicable, the time necessary for either party to acquire the education or training necessary for the party to find employment;
- Each party's contribution to the marriage, including, but not limited to, homemaking services, child care, education, and career building of the other party; and
- All sources of income available to either party.<sup>18</sup>

The court may consider any other factor necessary to do equity and justice between the parties,<sup>19</sup> and may order that the alimony be secured with life insurance or other assets.

Alimony may be temporary or permanent, paid periodically or in a lump sum or both.<sup>20</sup> Lump sum alimony may take the form of “bridge-the-gap” alimony, which is intended only for short-term assistance with legitimate, identifiable short-term needs, or rehabilitative alimony, which requires the party seeking support to provide the court with a rehabilitative plan including the purpose of the rehabilitation, the areas in which rehabilitation is needed, and the actual amount of money necessary for rehabilitation. Lump sum alimony may be paid in periodic payments.<sup>21</sup>

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<sup>15</sup> Section 61.08(1), F.S. *See also* Victoria Ho & Jennifer Johnson, *Overview of Florida Alimony Law*, 78 FLA. BAR J. 71 (Oct. 2004).

<sup>16</sup> *See Schlagel v. Schlagel*, 973 So. 2d 672, 676 (Fla. 2d DCA 2008). *See also* Victoria Ho & Jennifer Johnson, *supra* note 11.

<sup>17</sup> In a long-term marriage, there is a presumption in favor of permanent alimony. *See Schlagel v. Schlagel*, 973 So. 2d 672, 676 (Fla. 2d DCA 2008). The definition of a long-term marriage is not settled, although several courts have held that seventeen years or longer is considered long-term. *See Hill v. Hooten*, 776 So. 2d 1004, 1007 (Fla. 5th DCA 2001). *See also Zeigler v. Zeigler*, 635 So. 2d 50, 54 (Fla. 1st DCA 1994) (holding that a marriage of 13.5 years is “neither a short-term nor a long-term marriage, but rather falls in the ‘grey area’ where a determination of entitlement to permanent alimony will be decided based upon a review of the other pertinent factors without the benefit of a presumption in favor or against permanent alimony”).

<sup>18</sup> Section 61.08(2), F.S.

<sup>19</sup> *Id.*

<sup>20</sup> Section 61.08(1), F.S.

<sup>21</sup> Victoria Ho & Jennifer Johnson, *supra* note 11.

### **III. Effect of Proposed Changes:**

#### **Section 1**

The bill amends s. 61.075, F.S., to provide that when a court orders a deferred payment of a distribution of marital assets, the court must require security and provide a reasonable rate of interest, or recognize the time value of money. The bill further requires that the court make written findings of fact relating to any deferred payment, security or lack thereof, and interest or lack thereof.

#### **Section 2**

The bill amends s. 61.13, F.S., requiring that all child support and income deduction orders entered on or after October 1, 2009, shall provide the following:

- Termination of child support upon a child's 18th birthday, unless the court finds that s. 743.07(2), F.S., applies or unless otherwise agreed to by the parties;
- A schedule stating the amount of the monthly child support obligation for all minor children at the time of the order and the amount of child support that will be owed for the remaining children for whom child support will continue when any child is no longer entitled to receive child support; and
- The month and year that the reduction or termination of child support becomes effective.

#### **Section 3**

The bill amends s. 61.14, F.S., providing that past due alimony or spousal support payments are applied first to the current alimony or spousal support due, then to the delinquent principal amount due, and finally to any interest that has accrued on the past due amount.

The bill also provides that interest on child support and alimony or spousal support arrearage payments is enforceable through the same methods used to enforce a support order, including contempt of court. The bill specifies that no interest will accrue on postjudgment interest.

#### **Section 4**

The bill amends s. 61.30, F.S., to remove a provision allowing for child support to vary from the guideline amount whenever any of the children are required by a mediation agreement to spend a substantial amount of time with either parent. By removing mediation agreements, the bill may discourage parties from negotiating and reaching their own agreement.

The bill further amends s. 61.30(2), F.S., to address the imputation of income by providing more specific guidance to the court. In order for the court to impute income beyond minimum wage, the bill requires that the court make specific findings of fact and provides that the person seeking to impute income has the burden to present competent, substantial evidence showing the following:

- That the unemployment or underemployment is voluntary; and

- The amount and source of the imputed income, with evidence of the party's education, experience, current licensure, or geographic location, and the parties' time-sharing schedule.

The bill creates a rebuttable presumption that enables the court to impute the Florida minimum wage on a full-time basis to a parent unless:

- The parent has a physical or mental incapacity that renders the parent unemployable or underemployed;
- The parent needs to stay home with a child who is the subject of the child support calculation proceedings and care for that child, thereby preventing the parent's employment or rendering the parent underemployed; or
- There are other circumstances over which the parent has no control, except for penal incarceration, which prevent the parent from earning an income.

If the parent is a resident of another state, the bill provides that the minimum wage law of the parent's resident state shall apply. In the absence of a state minimum wage for an out-of-state parent, the federal minimum wage shall apply.

The bill also provides that unless the court makes the appropriate findings above, income may not be imputed beyond minimum wage requirements based upon:

- Income records that are more than five years old at the time of the hearing or trial at which imputation is sought; or
- Income at a level that a party has never earned in the past, unless recently degreed, licensed, certified, relicensed, or recertified.

The Florida State University review of Florida's child support guidelines contained a recommendation that Florida reduce its reliance on imputed income.<sup>22</sup> The bill may make it more difficult to impute income other than on the basis of minimum wage.

Section 61.30(3), F.S., is amended to provide that the allowable deductions from gross income shall include federal, state, and local income taxes, which must be calculated using a parent's gross income, actual filing status, personal and dependency exemptions, applicable deductions, earned income credits, child and dependent care credits, and other tax credits.

The bill amends s. 61.30(6), F.S., eliminating the first three tiers of child support. These three tiers cover combined monthly net incomes of \$650, \$700, and \$750. The bill also amends the calculation for cases in which parents have a combined monthly net income greater than \$10,000, to find that the amount of support should not exceed the amount necessary to provide for the "reasonable needs of the child." It is unclear what is meant by "reasonable needs of the child." This provision may have the effect of limiting the amount of support provided to children of high income parents.

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<sup>22</sup> See Thomas S. McCaleb et al., *supra* note 4.

The bill amends s. 61.30(7), F.S., to eliminate the requirement that certain child care costs are reduced by 25 percent before being added to the basic support obligation.

The bill also amends s. 61.30(10), F.S., to provide that the total minimum child support need is determined by adding child care costs and health insurance costs to the minimum child support need.<sup>23</sup> In addition, the bill provides that the parent with less than 20 percent of overnight time-sharing shall pay the total minimum child support need to the parent with more than 80 percent of overnight time-sharing.

The bill amends s. 61.30(11), F.S., removing a factor the court may consider when adjusting the total minimum child support award. Specifically, the bill removes the factor relating to the impact of the Internal Revenue Service (IRS) dependency exemption and waiver of that exemption. However, the bill adds language that a court may order the parent otherwise entitled to the IRS dependency exemption to execute a waiver of that exemption to a newly created subsection (18) of s. 61.30, F.S.

The bill provides that a court may adjust the total minimum child support award when the child support guidelines indicate that a party's net income is lower than the current federal poverty guidelines.

Additionally, the bill reduces the time-sharing threshold for purposes of adjusting the total minimum child support award from 40 percent of overnights to 20 percent. The bill also amends the definition of "substantial amount of time" for purposes of adjusting a child support award from 40 percent of the overnights of the year to 20 percent of the overnights of the year.

The bill makes technical and conforming amendments.

### **Section 5**

The bill amends s. 409.2563(5)(a), F.S., adding language to mirror provisions added by the bill to s. 61.30(2), F.S. The bill provides that if there is insufficient reliable information concerning a parent's actual earnings, there shall be a rebuttable presumption that the parent had an earning capacity equal to the Florida minimum wage on a full-time basis, unless the parent resides in a different state. If the parent resides in another state, the state minimum wage applicable to the parent's state of residency shall apply. In the absence of a state minimum wage, the federal minimum wage applies.

### **Section 6**

The bill amends s. 742.08, F.S., to provide that interest on support judgments is enforceable through the same methods used to enforce a support order, including contempt of court, and that interest shall not accrue on postjudgment interest.

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<sup>23</sup> According to the Department of Revenue, adding health or medical costs after the child support amount has been set by the court is consistent with most states. Conversation with Debbie Thomas, Legislative Services, Dep't of Revenue (April 10, 2009).



**Section 7**

The bill has an effective date of October 1, 2009.

**IV. Constitutional Issues:****A. Municipality/County Mandates Restrictions:**

None.

**B. Public Records/Open Meetings Issues:**

None.

**C. Trust Funds Restrictions:**

None.

**V. Fiscal Impact Statement:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

This bill amends portions of Florida's child support guidelines and will have an effect on families under the jurisdiction of the court pursuant to ch. 61, F.S. However, the exact fiscal impact is indeterminate because it will differ from family to family.

**C. Government Sector Impact:**

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

The bill requires a child support or income deduction order to provide for termination of child support upon a child's 18th birthday, unless the court finds at the time the order is entered that s. 743.07(2), F.S., applies. Section 743.07(2), F.S., provides, in part, that a child support obligation may be extended beyond the 18th birthday if the child is still in high school, performing in good faith and with a reasonable expectation of graduation before the age of 19. It appears that the bill may have a court make a determination, possibly years in advance, of future facts that may not be known at the time the order is entered, such as whether a child is performing in good faith and with a reasonable expectation of graduation.

Additionally, the bill requires all child support and income deduction orders to include a schedule that states the amount of the monthly child support obligation and the amount that will be owed for any remaining children. Under current law, a child support obligation does not automatically end, but, rather, the parties must return to court to re-litigate child support based on the current incomes and the number of children requiring support. By creating a schedule in advance that states the amount of child support that will be owed for the remaining children after a child is no longer entitled to receive child support, the bill appears to not take into account a parent's financial situation at the time the new support obligation takes effect.

This bill eliminates the three lowest income levels from the child support guideline chart. This change may create a disincentive effect. Under the bill, a parent with a monthly income of \$750 might have a child support payment of nothing or \$50, determined at the discretion of the court. However, if that parent earned an additional \$50 per month, bringing his or her monthly income to \$800 per month, his or her obligation would increase to \$190 per month for one child. The increase in the child support obligation would be more than the increase in income. This may not only give a parent an incentive to not increase his or her income, but it may also encourage a parent who already makes \$800 per month to reduce his or her income or hide a portion of it in order to lower the monthly child support obligation. This is the disincentive effect that the phase-in range was designed to prevent.<sup>24</sup>

## VIII. Additional Information:

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

#### **CS/CS by Judiciary on April 15, 2009:**

The committee substitute conforms the bill to CS/HB 467 by:

- Requiring that after October 1, 2009, all child support and income deduction orders must provide for termination of support upon a child's 18th birthday, unless certain exceptions apply, and for a schedule stating the amount of support that will be owed for the remaining children, if any;
- Requiring the court to make specific findings of fact if the court wants to impute income to a parent beyond the minimum wage;
- Placing the burden on the party seeking to impute income to present certain evidence;
- Providing that a court may not impute income beyond the minimum wage based on income records more than five years old or income at a level that a party has never earned in the past, under certain circumstances;
- Amending the child support guidelines schedule; and
- Making technical and conforming changes.

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<sup>24</sup> Thomas S. McCaleb, Associate Professor of Economics, Florida State University, *Review and Update of Florida's Child Support Guidelines* (presentation to the Senate Committee on Children, Families, and Elder Affairs) (Mar. 25, 2009).

**CS by Children, Families, and Elder Affairs on April 6, 2009:**

The committee substitute:

- Requires a court, when ordering deferred payment of a lump sum in a proceeding for dissolution of marriage, to conform to certain criteria;
- Removes language requiring that a schedule specifying the amount of child support due when one child reaches the age of majority be included in the initial support order. This language was problematic for two reasons. First, the language presumed that a court could determine, years in advance, facts that may not be known, such as whether a child was “performing in good faith with reasonable expectation of graduation.” Second, the language suggested that a change in a parent’s financial situation would have no bearing on a new support obligation;
- Removes language relating to the imputation of income. Although a recent review of Florida’s child support guidelines recommended reducing the reliance on imputed income, the language appeared to lock Florida into using minimum wage for imputation even when the courts had information on an individual’s earning ability;
- Removes language eliminating the first three levels of the support guidelines because it created an incentive for a parent to hide or not increase his or her income in order to pay a lower level of child support;
- Removes language prohibiting child support beyond the amount necessary to satisfy a child’s reasonable needs, for income levels above \$10,000 per month, because of the potential effect of limiting the amount of support provided to children of high income parents;
- Restores current law allowing the court to consider agreements between the parties reached through mediation when determining the amount of retroactive support or a modification to a child support award; and
- Changes the effective date.

**B. Amendments:**

None.