

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1599

Support Obligations

SPONSOR(S): Ambler

TIED BILLS: None

IDEN./SIM. BILLS: SB 1858

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Civil Justice & Courts Policy Committee		Bond	De La Paz
2)	Policy Council			
3)	Criminal & Civil Justice Policy Council			
4)				
5)				

SUMMARY ANALYSIS

Current law provides for awards of alimony and child support. Current law also provides for lawsuits to collect money from a debtor, provides for legal means to collect on such judgments, and provides that certain assets of persons are not subject to those legal means of collection.

Current case law provides that child support is the property of the child, held in trust for that child by the parent. Accordingly, such child support is not subject to claims of creditors of the parent. This bill amends the statutory definition of child support to provide that child support is the property of the child, held in trust for that child by the parent.

Bankruptcy is means by which a person's assets are liquidated in order to pay the person's debts under court supervision. Bankruptcy courts are operated by the federal government under federal law, but bankruptcy law allows the states to determine which assets are not subject to liquidation by the bankruptcy courts of their state. In Florida, in general the same assets are protected whether in or out of bankruptcy. This bill provides that, in a bankruptcy action, alimony and child support actually received is exempt from liquidation, but only to the extent that such is reasonably necessary for support.

This bill does not appear to have a fiscal impact on state or local governments.

HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Current law provides court process for the collection of lawful debts. A creditor may sue a debtor and, if the creditor prevails, the creditor may receive a final judgment awarding money damages. If the debtor does not voluntarily pay the judgment, the creditor has several legal means for forcibly collecting on the debt, including:

- Wage garnishment.
- Garnishment of money in a bank account.
- Directing the sheriff to seize assets, sell them, and give the proceeds to the creditor.

In order to protect debtors from being destitute, current law provides that certain property is exempt from being forcibly taken by a creditor. The state constitution provides that a homestead and \$1,000 worth of personal property is exempt. Statutory law provides numerous exemptions from being forcibly taken to pay a creditor claim. Federal law also provides certain exemptions that apply in all of the states.

Effect of Bill - Child Support

Where the parents of a minor child are not married and living together, current law provides that, in most circumstances, the parties should share the cost of the child by having one parent make payments to the other known as child support. Case law provides that child support payments are for the benefit of the child, not the parent. A recipient of support payments receives the monies not in his or her own right, but in trust for the child.¹ A recipient of child support cannot contract away the right to child support.² Accordingly, child support may not be taken by creditors of the recipient parent.

This bill amends the definition of "support" applicable to ch. 61, F.S., which is the chapter on dissolution of marriage, support, and time-sharing with children. The bill adds to the definition to provide that child support is considered "held in trust" for the benefit of the child or children that the support is intended to

¹ *Dorset v. Dorset*, 902 So.2d 947 (Fla. 4th DCA 2005); *Thompson v. Korupp*, 440 So.2d 68, 69 (Fla. 1st DCA 1983).

² *Sotoloff v. Sotoloff*, 745 So.2d 959 (Fla. 4th DCA 1998).

benefit, and is therefore not considered the property of the recipient parent. This conforms to current case law, and thus would have no effect on creditor rights.

However, by placing this change into statute, it is likely that this would also implicate statutory trust laws and trust requirements, and make them applicable to any parent receiving child support.

Effect of Bill - Amendment to Exemptions from Creditor Claims

Bankruptcy is means by which a person's assets are liquidated in order to pay the person's debts under court supervision. Art. 1, s. 8, cl. 4 of the United States Constitution gives Congress the right to uniformly govern bankruptcy law. Bankruptcy courts are operated by the federal government.

A debtor (a bankrupt person) is not required to give up all of his or her assets in bankruptcy. Certain property is deemed "exempt" from the bankruptcy case, and may be kept by the debtor without being subject to creditor claims. The Bankruptcy Code at 11 U.S.C. s. 522 provides for exempt property. In general, a debtor may choose to utilize the exempt property listing in state law or the exempt property of the Bankruptcy Code. 11 U.S.C. s. 522(b), however, allows a state to opt-out of the federal law and thereby insist that debtors only utilize state law exemptions. Florida, like most states, has made the opt-out election to prohibit the use of the federal exemptions and require that debtors may only use state law exemptions. See s. 222.20, F.S.

Florida has enacted a limited exception to the Florida opt-out that has the effect of allowing a debtor to utilize one of the federal bankruptcy exemptions. Section 222.201, F.S., allows a debtor to exempt in bankruptcy the property listed in 11 U.S.C. s. 522(d)(10).³ Included in the list under that paragraph is

(10) The debtor's right to receive -- (D) alimony, support, or separate maintenance, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.

Note that this section exempts the "right to receive" certain property, it does not exempt such property once received. Thus, in a bankruptcy the intangible asset of the future support payments is an exempt asset (to the extent reasonably necessary), but a bank account containing support received is an asset that belongs to the bankruptcy estate (that is, it is an asset that is taken from the bankrupt person and paid pro rata to creditors).

This bill amends s. 222.201, F.S. to provide that a bankruptcy debtor in Florida may also exempt alimony, support, or separate maintenance that has already been received, to the extent reasonably necessary for the support of the debtor or any dependent of the debtor. The exemption would only be applicable in bankruptcy court, it would not be applicable to creditor actions in state court.

B. SECTION DIRECTORY:

Section 1 amends s. 61.046, F.S., amending the definition of "support" related to child support.

Section 2 amends s. 222.201, F.S., adding alimony and child support to the list of property exempt from creditor claims in bankruptcy.

Section 3 provides an effective date of July 1, 2010.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

³ This limited opt-back-in of the opt-out has been approved by the courts. See *In re Green*, 178 B.R. 533 (Bkrcty.M.D.Fla.,1995).

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:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Section 1

The bill amends a definition to make a substantive change in the law. It is generally preferable to place substantive law in the body of the law, not in a section for definitions.

By defining in statutory law that child support is held in "trust" for the benefit of the child, it is possible that all of the trust laws may apply to any parent receiving child support.⁴ It is possible that these trust requirements may lead to unintended consequences, such as: the child support would have to be kept in a segregated account; the monies could only be spent on actual expenses of the child⁵; the parent would have to keep detailed records and provide an annual accounting; the Prudent Investor Rule would govern investment of the funds; the Uniform Principal and Income Act would govern the allocations and use of principal and interest, requiring complicated accounting; and if the parent were to

⁴ See s. 736.0102, F.S.

⁵ It is generally recognized in current law that child support is actually family support, to be used for any legitimate family expense. For instance, a parent who uses child support to buy a bigger house so that the child might have a bedroom does not, under current law, have to give the child a share of the parent's equity in the house when the child reaches majority.

make any mistake, the child would have until his or her 22nd birthday to sue the parent for breach of fiduciary duty.

Section 2

It is unclear whether the exemption created by this bill will be effective. Federal bankruptcy law creates the right of a debtor to utilize state law exemptions, and provides that a state may opt-out of a debtor's ability to choose the federal exemptions. 11 U.S.C. s. 522(b). Florida currently has a split opt-out, generally opting out of most exceptions but allowing one paragraph of the federal exemptions. One Florida bankruptcy court has sanctioned this limited opt-out.⁶ However, this bill goes a small step forward. It attempts to modify the form of one of the categories of exempt property in the list of those in the limited opt-out. The exemption would only be applicable in bankruptcy, it would not be applicable to creditor claims outside of bankruptcy. It is unclear whether the bankruptcy courts of Florida will sanction this bill that attempts to expand on a federal exemption. However, one federal court has sanctioned an exemption that only applies to California debtors in bankruptcy.⁷

This bill creates an exemption from creditors that only applies in bankruptcy proceedings. The practical effect of this may be to create a "race to the courthouse" where a creditor would race to seek state court garnishment of a bank account while a debtor races to bankruptcy court for protection.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

n/a

⁶ See *In re Green*, 178 B.R. 533 (Bkrtcy.M.D.Fla.,1995). Florida may be unique in its limited opt-out, as there are no other cases discussing the issue.

⁷ *In re David Michael Applebaum; Sticka v. Applebaum*, 422 B.R. 684 (Bankruptcy Appellate Panel, 9th Cir., 2009).