

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 565 Family Law

SPONSOR(S): Judiciary Committee; Civil Justice Subcommittee; Porter

TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 752

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR or BUDGET/POLICY CHIEF |
|-------------------------------|------------------|---------|--|
| 1) Civil Justice Subcommittee | 14 Y, 0 N, As CS | Caridad | Bond |
| 2) Judiciary Committee | 18 Y, 0 N, As CS | Caridad | Havlicak |

SUMMARY ANALYSIS

This bill (1) creates a formula for a court to use in determining the value of certain real property which is subject to equitable distribution in a divorce proceeding; and (2) makes changes to provisions relating to alimony and divorce proceedings.

In a contested marital dissolution, the court must identify which assets are nonmarital and those that are marital. In general, marital assets are divided equitably between the parties, whereas nonmarital assets remain as property of a spouse.

Under current law, passive appreciation of real property that accrues during the marriage is subject to equitable distribution even though the property itself is a nonmarital asset. Courts determine the value of the passive appreciation of nonmarital real property to be equitably distributed according to a formula created by the courts. The bill establishes a statutory formula for determining the value of the marital portion of nonmarital real property which is subject to equitable distribution in a divorce proceeding.

The bill also amends current law on alimony and divorce. Alimony provides financial support to a financially dependent former spouse. A court may grant a request to modify alimony where there is a change in circumstances or the financial ability of the parties. It may also reduce or terminate an award of alimony based on its specific written findings that the spouse receiving alimony has entered into a supportive relationship with another person.

The bill amends current law on alimony and divorce to:

- Require a court awarding durational alimony to: (1) provide written findings that an award of rehabilitative and/or bridge-the-gap alimony is inappropriate; and (2) if the award is for a length of time greater than half the time the parties were married, make written findings to justify the length of the award.
- Require retroactive modification or termination of alimony to the date the petition was filed and, if the court determines the obligee unreasonably and unnecessarily litigated the issue, it may award the obligor reasonable attorney fees and costs.
- Require a court to impute income to a spouse receiving alimony according to existing statutory factors where the parties were in a short-term or moderate-term marriage.
- Provide requirements related to bifurcation, including time limitations for when a court may grant a dissolution of marriage and reserve jurisdiction regarding the property settlement.

The bill may have an indeterminate fiscal impact on state courts. This bill does not appear to have a fiscal impact on local governments.

This bill provides an effective date of July 1, 2012.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Equitable Distribution

Statutory Framework for the Equitable Distribution of Marital Assets and Liabilities

Chapter 61, F.S., governs proceedings for the dissolution of marriage in Florida. Current law provides that a court must distribute the marital assets and liabilities based on the premise that the distribution be equal.¹ The court must do so unless justification exists for an unequal distribution based on relevant factors specified in s. 61.075(1), F.S. In a contested marital dissolution in which a stipulation and agreement has not been entered and filed, the distribution of marital assets or liabilities must be supported by factual findings based on competent substantial evidence with reference to the relevant statutory factors.² The court's findings must identify which assets are nonmarital and those that are marital.³

"Marital assets and liabilities" generally include:

- Assets acquired and liabilities incurred during the marriage, individually by either spouse or jointly by them.⁴
- The enhancement in value and appreciation of nonmarital assets resulting 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.⁵
- Interspousal gifts during the marriage.⁶
- 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.⁷
- Real property held by the parties as tenants by the entireties.⁸
- All personal property titled jointly by the parties as tenants by the entireties.⁹

"Nonmarital assets and liabilities" generally include:

- Assets acquired and liabilities incurred by either party prior to marriage, and assets acquired and liabilities incurred in exchange for such assets and liabilities.¹⁰
- Assets acquired separately by either party by noninterspousal gift, bequest, devise, or descent, and assets acquired in exchange for such assets.¹¹
- All income derived from nonmarital assets during the marriage unless the income was treated, used, relied upon by the parties as a marital asset.¹²
- 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.¹³
- Any liability incurred by forgery or unauthorized signature by one spouse signing the name of the other spouse. Any such liability shall be a nonmarital liability only of the party having committed forgery or having affixed the unauthorized signature.¹⁴

¹ Section 61.075(1), F.S.

² Section 61.075(3), F.S.

³ Section 61.075(3)(a) and (b), F.S.

⁴ Section 61.075(6)(a)1.a., F.S.

⁵ Section 61.075(6)(a)1.b., F.S.

⁶ Section 61.075(6)(a)1.c., F.S.

⁷ Section 61.075(6)(a)1.d., F.S.

⁸ Section 61.075(6)(a)2., F.S.

⁹ Section 61.075(6)(a)3., F.S.

¹⁰ Section 61.075(6)(b)1., F.S.

¹¹ Section 61.075(6)(b)2., F.S.

¹² Section 61.075(6)(b)3., F.S.

¹³ Section 61.075(6)(b)4., F.S.

In *Kaaa v. Kaaa*, the Florida Supreme Court held that “passive appreciation of the marital home that accrues during the marriage is subject to equitable distribution even though the home itself is a nonmarital asset.”¹⁶ For instance, passive appreciation in the value of nonmarital real property is subject to equitable distribution where the mortgage is paid with marital funds.¹⁷ The 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 enhancement 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.¹⁸

In *Kaaa*, 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 and in allocating that value to both owner and nonowner spouse.¹⁹ Pursuant to the methodology, a court must make several steps:

First, the court must determine the overall current fair market value of the home. Second, the court must determine whether there has been a passive appreciation in the home's value. Third, the court must determine whether the passive appreciation is a marital asset under section 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. Fourth, the trial court must determine the value of the passive appreciation that accrued during the marriage and is subject to equitable distribution. Fifth, after the court determines the value of the passive appreciation to be equitably distributed, the court's next step is to determine how the value is allocated.²⁰

The Supreme Court adopted the following formula used in *Stevens v. Stevens*, for the allocation of the appreciated value of nonmarital real property:

If a separate asset is unencumbered and no marital funds are used to finance its acquisition, improvement, or maintenance, no portion of its value should ordinarily be included in the marital estate, absent improvements effected by marital labor. 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.²¹

Passive appreciation of a nonmarital asset that is unencumbered is not subject to equitable distribution, absent the use of any marital funds or marital labor for its acquisition, improvement, or maintenance.²²

¹⁴ Section 61.075(6)(b)5., F.S.

¹⁵ *Kaaa v. Kaaa*, 58 So. 3d 867 (Fla. 2010).

¹⁶ *Id.* at 868.

¹⁷ *Id.* at 869.

¹⁸ *Id.* at 871-72.

¹⁹ *Id.* at 872.

²⁰ *Id.*

²¹ *Id.* at 872 (quoting *Stevens v. Stevens*, 651 So.2d 1306, 1307-08 (Fla. 1st DCA 1995).

²² *Stevens v. Stevens*, 651 So.2d 1306, 1307 (Fla. 1st DCA 2006); 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).

Security and Interest for Installment payments

In equitably distributing marital assets and liabilities, pursuant to s. 61.075(10), F.S., a court may order a party to pay a monetary payment in a lump sum or in installments paid over a fixed period. Section 61.075(10), F.S., does not currently give courts the discretion to require the payor to provide security or pay a reasonable rate of interest if installments are ordered.

Effect of Proposed Changes

The bill establishes a formula for a court to use in determining the value of the marital portion of nonmarital real property which is subject to equitable distribution in a divorce proceeding. Under the bill, the value of the marital portion of nonmarital real property is the sum of the following:

- The mortgage principal paid during the marriage from marital funds.
- A portion of the passive appreciation in the property which is related to the amount of marital funds used to pay the mortgage.
- Any active appreciation of the property resulting from the efforts or contributions of either party during the marriage.

Under the formula, the passive appreciation in the marital property, which is subject to equitable distribution, must be determined by multiplying the marital fraction by the passive appreciation of the property during the marriage.

The passive appreciation is determined by subtracting the gross value of the property on date of the marriage or the date of 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 of the property during the marriage and less any additional debts secured by the property during the marriage.

The numerator of the marital fraction consists of the amount of mortgage principal paid on any mortgage on the property from marital funds. The denominator consists of 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 total marital portion of the property consists of the marital portion of the passive appreciation, the mortgage principal paid during the marriage from marital funds, and any active appreciation of the property. The value of the marital portion of nonmarital real property may not exceed the total net equity of the property on the valuation date in the dissolution action.

The bill also allows a court to deviate from the formula if a party proves that application of the formula is not equitable under the circumstances of the case.

Additionally, the bill authorizes the court to require a person who is ordered to make installment payments as part of the equitable distribution of marital assets and liabilities to provide security and a reasonable rate of interest, or otherwise recognize the time value of money in determining the amount of the installments. If a court requires security or interest, the court must make written findings relating to any deferred payments, the amount of any security required, and the interest. The bill does not preclude the intended recipient of the installment payments from taking action under the procedures to enforce a judgment, in ch. 55, F.S., to collect any funds from a person who fails to make the court-ordered payments.

Alimony and Divorce Proceedings

Alimony provides financial support to a financially dependent former spouse.²³ In Florida, the primary basis for determining alimony is whether there is need and ability to pay; alimony is not appropriate when the requesting spouse has no need for support or when the other spouse does not have the

²³ Victoria Ho & Jennifer Johnson, *Overview of Florida Alimony Law*, 78 Fla.B.J. 71, 71 (Oct. 2004).

ability to pay.²⁴ Section 61.08(2), F.S., provides factors that a court must consider in awarding alimony (i.e. the standard of living established during the marriage; duration of the marriage).

Florida law provides for four types of alimony; bridge-the-gap alimony,²⁵ rehabilitative alimony,²⁶ durational alimony,²⁷ and permanent alimony.²⁸

- Bridge-the-gap alimony may be awarded to assist a party by providing support to allow the party to make a transition from being married to being single.²⁹
- Rehabilitative alimony may be awarded to assist a party in establishing the capacity for self-support through either the redevelopment of previous skills or credentials; or the acquisition of education, training, or work experience necessary to develop appropriate employment skills or credentials.³⁰
- Durational alimony may be awarded when permanent periodic alimony is inappropriate. The purpose of durational alimony is to provide a party with economic assistance for a set period of time following a marriage of short or moderate duration.
- Permanent alimony may be awarded to provide for the needs and necessities of life as they were established during the marriage of the parties for a party who lacks the financial ability to meet his or her needs and necessities of life following dissolution of marriage.

Permanent alimony may be awarded following a marriage of long duration if such an award is appropriate upon consideration of the factors set forth in s. 61.08(2), following a marriage of moderate duration if such an award is appropriate based upon clear and convincing evidence after consideration of the factors set forth in s. 61.08(2), or following a marriage of short duration if there are written findings of exceptional circumstances. In awarding permanent alimony, the court shall include a finding that no other form of alimony is fair and reasonable under the circumstances of the parties.³¹

Modification of Alimony Based on the Existence of a Supportive Relationship

A court may grant a request to modify alimony where the moving party shows "a permanent, unanticipated, substantial change in financial circumstances in one or both of the parties."³² One form of change of circumstances warranting modification of an alimony award is the existence of a supportive relationship. A court may reduce or terminate an award of alimony based on its specific written findings that, since the granting of a divorce and the award of alimony, the spouse receiving alimony, or the obligee, has entered into a supportive relationship with a person with whom he or she resides. Section 61.14(1), F.S., enumerates factors a court must consider when determining whether a supportive relationship exists between the obligee and the individual with whom such former spouse resides (i.e. the extent to which the obligee and the person hold themselves out as a married couple). The spouse paying spousal support, or the obligor, has the burden to prove that a supportive relationship exists.

The bill requires retroactive modification or termination of alimony to the date the petition for modification or termination was filed. In addition, if the court determines the obligee unreasonably and unnecessarily litigated the issue, the court may award the obligor reasonable attorney fees and costs.

²⁴ *Id.*

²⁵ Section 61.08(5), F.S.

²⁶ Section 61.08(6), F.S.

²⁷ Section 61.08(7), F.S.

²⁸ Section 61.08(8), F.S.

²⁹ Section 60.08(5), F.S.

³⁰ Section 61.08(6)(a), F.S.

³¹ Section 61.08(8), F.S.

³² *Townsend v. Townsend*, 585 So.2d 468 (Fla. 2d DCA 1991).

Bifurcation of Divorce Action

Bifurcation is a split procedure in which the court grants a dissolution of marriage and reserves jurisdiction regarding property settlement, debts, alimony and child support. A party might petition the court for bifurcation of a case where the party would like to expedite the divorce so he or she can remarry. Current case law discourages the use of bifurcation. Specifically, in *Claughton v. Claughton*, the Florida Supreme Court explained:

[W]e believe trial judges should avoid this split procedure. The general law and our procedural rules at both the trial and appellate levels are designed for one final judgment and one appeal. Splitting the process can cause multiple legal and procedural problems which result in delay and additional expense to the litigants. This split procedure should be used only when it is clearly necessary for the best interests of the parties or their children. The convenience of one of the parties for an early remarriage does not justify its use.³³

The bill provides a list of instances where a court may or may not grant a petition for bifurcation.

- During the first 180 days after the dissolution of marriage petition is filed, a court may not grant a petition for bifurcation of a case unless there are exceptional circumstances justifying bifurcation and the court makes written findings of such circumstances.
- After 180 days, a court may grant a petition only if the court enters appropriate temporary orders to protect the parties and their children and makes written findings that no irreparable harm will result from the decision.
- After 365 days, the court must grant the petition once it has entered any appropriate temporary orders necessary to protect the parties, unless a party shows that granting the petition will result in irreparable harm.

The bill also includes a nonexclusive list of temporary orders which must be entered before a court may grant a dissolution of marriage without adjudicating all substantive issues: restrict the sale or disposition of property; protect and preserve the marital assets; establish temporary support; provide for maintenance of health insurance; and provide for maintenance of life insurance. However, the court is not required to enter temporary orders if it enters a final judgment of marriage which adjudicates substantially all of the substantive issues between the parties but reserves jurisdiction to address ancillary issues such as the adjudication of attorney's fees and costs.

Other Changes Regarding Alimony Awards

This bill provides that an alimony award may not leave the payor with a lower standard of living than the recipient, unless the court makes written findings of exceptional circumstances.

With respect to durational alimony, the bill:

- Requires a court awarding durational alimony to provide written findings that an award of rehabilitative and/or bridge-the-gap alimony is inappropriate.
- Provides that, if the award is for a length of time greater than half the time the parties were married, a court must make written findings to justify the length of the award.
- Provides that durational alimony is not authorized following a short-term marriage.
- Requires modification or termination upon a substantial change in circumstances or upon the existence of a supportive relationship.

The bill also provides that except in cases where the parties were in a long-term marriage, the court must impute income to the obligee using the analysis and factors in s. 61.30(2)(b), relating to the child support guidelines. Under s. 61.30(2)(b), income must be imputed to an unemployed or underemployed individual if such unemployment or underemployment is found to be voluntary. This does not apply if

³³ *Claughton v. Claughton*, 393 So.2d 1061, 1062 (Fla. 1981).

the court finds that the individual has a physical or mental incapacity or is subject to other circumstances beyond his or her control.

If a court finds that a party is voluntarily unemployed or underemployed, it must determine the party's employment potential and probable earnings level based on his or her recent work history and occupational qualifications if such information is available. If it is not available, income is automatically imputed and there is a rebuttable presumption that the party has "income equivalent to the median income of year-round full-time workers as derived from current population reports or replacement reports published by the United States Bureau of the Census."³⁴ To impute income accordingly, the court must make specific findings of fact consistent with this section.

An individual seeking to impute income has the burden to present evidence that:

- The unemployment or underemployment is voluntary; and
- Identifies the amount and source of the imputed income through evidence of income from available employment for which the other individual is qualified for given his or her education and experience; and with consideration of the parties' time-sharing schedule in the parenting plan.

In addition, income may not be imputed based on:

- 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 the level that a party has never earned in the past, unless the party has recently received a degree, license, or certification in the profession at issue. The court must also consider the parties' existing time-sharing plan when imputing income to a party.

A court may refuse to impute income to a party if it finds it necessary for the party to stay home with a child who is subject to a child support calculation.

B. SECTION DIRECTORY:

Section 1 amends s. 61.075, F.S., relating to equitable distribution of marital assets and liabilities.

Section 2 creates s. 61.0765, F.S., relating to valuation of marital portion of nonmarital real property.

Section 3 amends s. 61.08, F.S., relating to alimony.

Section 4 amends s. 61.14, F.S., relating to enforcement and modification of support, maintenance, or alimony agreements or orders.

Section 5 amends 61.19, F.S., relating to entry of judgment of dissolution of marriage.

Section 6 provides an effective date of July 1, 2012.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

³⁴ Section 61.30(2)(b), F.S.

2. Expenditures:

The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have any direct economic impact on the private sector.

D. FISCAL COMMENTS:

There may be an indeterminate fiscal impact on state courts. The Office of the State Courts Administrator reports that the trial court's task in determining the passive appreciation of real property characterized as a marital asset will continue to be an extremely fact-intensive one. Significant judicial time will be expended in both the determination of the facts and use of the mathematical calculation. The fiscal impact on expenditures of the State Courts System cannot be accurately determined due to the unavailability of data needed to quantify any increase in judicial workload.³⁵

With respect to the changes relating to alimony and divorce proceedings, this bill may increase the courts' workload in dissolution of marriage cases. For instance, the bill requires written findings regarding the party's relative incomes and standards of living; and requires bifurcation of a case if more than 180 days have passed since the action of dissolution was filed.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The 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:

The provision of the bill relating to bifurcation of a case appears to implicate courts' rule-making authority. The Florida Supreme Court is responsible for adopting rules of practice and procedure in all state courts. The Legislature cannot modify or rewrite court-formulated rules of practice and procedure.³⁶ The Florida Supreme Court has stated that any "attempt by the Legislature to amend a

³⁵ Office of the State Courts Administrator, 2011 Judicial Impact Statement for SB 752 (Nov. 9, 2011) (on file with the House Civil Justice Subcommittee).

³⁶ See Art. V, Sec. 2(a), Fla. Const.

statute which has become a part of the rules of practice and procedure would be a nullity."³⁷ The court has invalidated statutes that the court claims violate its exclusive rulemaking authority.³⁸

The bifurcation provision of the bill provides specific time limitations and requirements in a dissolution of marriage case.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On February 16, 2012, Judiciary adopted a Proposed Committee Substitute (PCS). The PCS differs from the bill in that the PCS adds several provisions related to alimony and divorce proceedings. The committee also adopted five amendments to the PCS and reported the bill favorably as a committee substitute. The amendments:

- Require a court awarding durational alimony to: (1) provide written findings that an award of rehabilitative and/or bridge-the-gap alimony is inappropriate; and (2) if the award is for a length of time greater than half the time the parties were married, make written findings to justify the length of the award.
- Restore previous language requiring a court to provide "written findings of exceptional circumstances" where an award of alimony leaves a payor with less net income or a lower standard of living than the payee.
- Consolidate language regarding the existence of a supportive relationship to provide that: (1) there is a rebuttable presumption that a modification or termination of alimony is retroactive to the date the petition was filed; and (2) if the court determines that the obligee unnecessarily or unreasonably litigated the underlying petition, the court may award the obligor reasonable attorney fees and costs.
- Replace language requiring a person receiving alimony to maximize the potential for rehabilitation and reasonable earning capacity to provide that, except in cases of where the parties were in a long-term marriage, the court must impute income to the obligee using the analysis and factors in s. 61.30(2)(b), relating to the child support guidelines.
- Revise the provision on bifurcation to provide that: (1) during the first 180 days after the dissolution of marriage petition is filed, a court may not grant a petition for bifurcation of a case unless there are exceptional circumstances justifying bifurcation; (2) after 180 days, a court may grant a petition only if the court enters appropriate temporary orders to protect the parties and their children and makes written findings that no irreparable harm will result from the decision; and (3) after 365 days, the court must grant the petition once it has entered any appropriate temporary orders necessary to protect the parties.
- Amends the title to provide "[a]n act relating to family law."

This analysis is drafted to the committee substitute as passed by the Judiciary Committee.

³⁷ *In re Clarification of Fla. Rules of Practice and Procedure*, 281 So.2d 204, 205 (Fla. 1973).

³⁸ *See Allen v. Butterworth*, 756 So.2d 52 (Fla. 2000) (holding that time limits for the writ of habeas corpus is a matter of practice and procedure, thereby invalidating part of the Death Penalty Reform Act); *see also Haven Fed. Sav. & Loan Ass'n v. Kirian*, 579 So.2d 730 (Fla. 1991) (striking law regarding counterclaims in foreclosure proceedings).