

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: SB 752

INTRODUCER: Senator Flores

SUBJECT: Equitable Distribution of Marital Assets and Liabilities

DATE: January 11, 2012

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Munroe	Cibula	JU	Pre-meeting
2.			BI	
3.			BC	
4.				
5.				
6.				

I. Summary:

The bill establishes formulas 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 comprised of the following:

- The mortgage principal paid during the marriage from marital funds.
- A portion of the passive appreciation of 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.

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 chapter 55, F.S., to collect any funds from a person who fails to make the court-ordered payments.

This bill amends section 61.075, Florida Statutes.

II. Present Situation:

Statutory Framework for the Equitable Distribution of Marital Assets and Liabilities

Chapter 61, F.S., governs proceedings for the dissolution of marriage in Florida. Under s. 61.075, F.S., 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 in the court order based on competent substantial evidence with reference to the relevant statutory factors. The court's findings must identify which assets are nonmarital and those that are marital.²

“Marital assets and liabilities” generally include:

- Assets acquired and liabilities incurred during the marriage, individually by either spouse or jointly by them.³
- 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.⁴
- Interspousal gifts during the marriage.⁵
- 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.⁶
- Real property held by the parties as tenants by the entireties.⁷
- All personal property titled jointly by the parties as tenants by the entireties.⁸

“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.⁹
- Assets acquired separately by either party by noninterspousal gift, bequest, devise, or descent, and assets acquired in exchange for such assets.¹⁰
- All income derived from nonmarital assets during the marriage unless the income was treated, used, relied upon by the parties as a marital asset.¹¹
- 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.¹²

¹ Section 61.075(1), F.S.

² Section 61.075(3)(a) and (b), F.S.

³ Section 61.075(6)(a)1.a., F.S.

⁴ Section 61.075(6)(a)1.b., F.S.

⁵ Section 61.075(6)(a)1.c., F.S.

⁶ Section 61.075(6)(a)1.d., F.S.

⁷ Section 61.075(6)(a)2., F.S.

⁸ Section 61.075(6)(a)3., F.S.

⁹ Section 61.075(6)(b)1., F.S.

¹⁰ Section 61.075(6)(b)2., F.S.

¹¹ Section 61.075(6)(b)3., F.S.

¹² Section 61.075(6)(b)4., F.S.

- 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.¹³

Equitable Distribution of Marital Assets and Liabilities under *Kaaa v. Kaaa*¹⁴

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.”¹⁵ Payment of a mortgage for real property with marital funds subjects the passive appreciation in the value of the real property to equitable distribution.¹⁶ 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.¹⁷

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.¹⁸ 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.¹⁹

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

¹³ Section 61.075(6)(b)5., F.S.

¹⁴ *Kaaa v. Kaaa*, 58 So. 3d 867 (Fla. 2010).

¹⁵ *Kaaa*, 58 So. 3d at 868.

¹⁶ *Id.* at 869.

¹⁷ *Id.* at 871-872.

¹⁸ *Id.* at 872

¹⁹ *Id.*

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.*²⁰

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.²¹

Family Law Section's Concern with *Kaaa v. Kaaa*

The Family Law Section of The Florida Bar believes that “the formula adopted by the Supreme Court to quantify the marital portion of the passive appreciation 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 subject property.”²² According to the Family Law Section of The Florida Bar, “the formula adopted by the Florida Supreme Court in *Kaaa*, if applied to certain factual scenarios, would result in grossly inequitable results.”²³

The Family Law Section of The Florida Bar additionally argues that the *Kaaa* decision 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.²⁴ 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.”²⁵

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.

²⁰ *Kaaa* at 872 (quoting *Stevens v. Stevens*, 651 So. 2d 1306, 1307-08 (Fla. 1st DCA 1995)).

²¹ *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).

²² Correspondence to committee staff from David Manz, Chairman of Family Law Section, Florida Bar and John W. Foster, Sr., Chairman of Equitable Distribution Committee, Family Law Section, Florida Bar, (Dec. 19, 2011) (on file with the Senate Committee on Judiciary).

²³ *Id.*

²⁴ *Id.*

²⁵ (Emphasis added).

Coverture Fraction

The term “coverture fraction”²⁶ is not used in the Florida Statutes. However, the term is described in case law as:

a formula used by the trial court to determine the marital portion of a retirement or pension fund. To determine the amount of a retirement or pension fund accumulated during the marriage, the trial court ‘creat[es] a fraction where *the numerator is the amount of time the employee was married while participating in the plan*, and the denominator is the total time the employee has in the plan. The trial court then multiplies the plan’s present value by the coverture fraction to calculate the total present value of the retirement fund which accrued during the marriage.²⁷

III. Effect of Proposed Changes:

The bill establishes formulae 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 comprised of the following:

- The mortgage principal paid during the marriage from marital funds.
- A portion of the passive appreciation of 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 a coverture fraction²⁸ 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 encumbrances secured by the property during the marriage in excess of the first note and mortgage on which principal is paid from marital funds.

The numerator of the coverture fraction consists of the total paydown of principal from marital funds of all notes and mortgages secured by the property during the marriage. The denominator

²⁶ The term “coverture” means “the condition of being a married woman. BLACK’S LAW DICTIONARY 373 (7th ed., 1995). “[U]nder former law, a woman under coverture was allowed to sue only through the personalty of her husband.” *Id.*

²⁷ *Horton v. Horton*, 62 So. 3d 689, 691 (Fla. 2d DCA 2011) (citations omitted).

²⁸ See the Present Situation section of the analysis for an explanation of the term, “coverture fraction.” The fraction used in the bill is not used to determine the marital portion of retirement or pension benefits. The fraction used in bill is a ratio between the total principal paid down from marital funds of all notes and mortgages secured by the property during the marriage and value of the subject real property as of a certain date.

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 encumbered by the first note and 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 which may not exceed the total net equity in the property at the date of value.

The bill permits a party to argue to a court that the formula would be inequitable, and therefore should not apply to factual circumstances presented.

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 chapter 55, F.S., to collect any funds from a person who fails to make the court-ordered payments.

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:

Under the bill, in order to receive a portion of the value of the real property titled in the other spouse's name, the nonowner spouse must show the enhancement in value and appreciation of the nonmarital asset 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. A court in a divorce proceeding which finds that marital

funds were used to pay the mortgage on property that is alleged to be a marital asset, will no longer have to find that the nonowner spouse made contributions to the property in order for that spouse to receive a portion of equitable distribution of the property titled in the other spouse's name.

C. Government Sector Impact:

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.

VI. Technical Deficiencies:

On lines 38, 49, and 58, the bill refers to "coverture fraction." The term "coverture fraction" as defined in the bill is not used to determine the marital portion of a retirement or pension fund.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.