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 Committee on Judiciary

BILL:	SB 250
INTRODUCER:	Senator Lee
SUBJECT:	Family Law
DATE:	January 25, 2016
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Brown	Cibula	JU	**Pre-meeting**
2.			ACJ	
3.			AP	

I. Summary:

SB 250 makes various changes to laws relating to the amount and duration of alimony awards, grounds, and procedures for modifying an alimony award due to a substantial change in circumstances, and timesharing with children. The bill also establishes the collaborative law process in statute, which is an alternative dispute resolution mechanism for family law and paternity matters.

Alimony

Regarding alimony awarded to assist a party with legal fees and costs in a dissolution of marriage case, this bill requires the court to consider need and ability to pay, and the same bases for alimony required of all alimony determinations in dissolution cases.

With respect to alimony amounts, the bill establishes presumptive alimony ranges, for courts to use in determining the amount and duration of alimony awards. The presumptive amounts are determined by formulas based in part on the difference between the parties' gross incomes and the duration of their marriage. However, the combination of alimony and child support may not exceed 55 percent of the obligor's income. The bill also generally limits the duration of an alimony award to 25 to 75 percent of the duration of the parties' marriage.

The bill specifies events that constitute a substantial change in circumstances which are grounds for modifying or terminating an alimony award. These grounds include increases in the recipient's income, the involuntary underemployment or unemployment of the obligor, and the obligor's retirement. This bill authorizes an obligor to request that the court preapprove the customary retirement date for the obligor's profession 1 year in advance of retirement. The bill also lessens the proof required to show the existence of a supportive relationship between an alimony recipient and another person.

To protect an award of alimony, the court may order an obligor to purchase a security, such as a life insurance policy or a bond. Security is modifiable if the underlying alimony award is modified.

Timesharing

With respect to timesharing with a child, the bill establishes a presumption that approximately equal timesharing with a child by both parents is in the child's best interest. However, a court may establish an unequal timesharing arrangement if after the consideration of a number of factors, unequal timesharing is supported by written findings of fact.

The bill provides that it does not affect the duration of existing alimony awards.

The bill applies to:
- All initial alimony determinations and all alimony modification actions pending as of its October 1, 2015 effective date; and
- All future initial determinations of alimony and alimony modification actions.

Collaborative Law Process

The bill establishes the Collaborative Law Process Act as the framework for a collaborative law process to facilitate the out-of-court settlement of dissolution of marriage cases and paternity cases. The process is a type of alternative dispute resolution, which employs collaborative attorneys, mental health professionals, and financial specialists to help the parties reach a consensus. The terms of the process are contained in a collaborative law participation agreement between the parties.

Under the bill, issues appropriate for resolution through the collaborative process include alimony and child support; marital property distribution; child custody and visitation; parental relocation with a child; premarital, marital, and postmarital agreements; and paternity.

The bill also defines the circumstances in which the collaborative law process begins and ends. Parties may enter into a collaborative law participation agreement before filing a petition with the court or while an action is pending. The bill also allows for the partial resolution of issues collaboratively, with the remainder to be resolved through the traditional adversarial process.

Under the bill, communications made as part of the collaborative process are generally confidential and privileged from disclosure, not subject to discovery in a subsequent court proceeding, and inadmissible as evidence. However, the bill provides exceptions to the privilege.

II. Present Situation:

Alimony Pendente Lite

Alimony pendente lite is temporary alimony awarded after a marital party files for dissolution of marriage. The right to temporary alimony ends when the divorce becomes final, which is after

the appeal process has run.[1] Florida law stipulates that a party may request alimony pendente lite through petition or motion, and if well-founded, the court must order a reasonable amount.[2]

Bases for Alimony

Chapter 61, F.S., addresses dissolution of marriage proceedings. Alimony is based on both financial need and the ability to pay.[3] After making an initial determination to award alimony, the court must consider:

- The standard of living established during the marriage.
- The length of marriage.
- Ages and physical and emotional condition of the parties.
- Financial resources of the parties.
- Earning capacity, education level, vocational skill, and employability of the parties.
- Marital contributions, including homemaking, child care, and education and career building of the other party.
- Responsibilities of each party towards minor children.
- Tax treatment and consequences of alimony awards.
- All sources of income.
- Any other factor that advances equity and justice.[4]

The court may consider adultery by either spouse in a decision to award alimony.[5]

To protect an alimony award, the court may order an obligor to maintain a life insurance policy.[6]

Determination of Alimony Based on Length of Marriage

Limitations on Alimony in Florida

In determining the duration or form of an alimony award, the court applies presumptions based on the duration of the marriage. The length of marriage runs from the date of marriage until the date of the filing for dissolution of marriage.[7]

Florida law categorizes marriage lengths as follows:

- A short-term marriage is a marriage of less than 7 years.
- A moderate-term marriage is a marriage of more than 7 but less than 17 years.
- A long-term marriage is a marriage of 17 years or more.[8]

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[1] 24A AM. JR. 2D *Divorce and Separation* §615.
[2] Section 61.071, F.S.
[3] Section 61.08(2), F.S.
[4] Section 61.08(2)(a) through (j), F.S.
[5] Section 61.08(1), F.S.
[6] Section 61.08(3), F.S.
[7] *Id*.
[8] Section 61.08(4), F.S.

Florida law appears to create a presumption in favor of permanent periodic alimony following a long-term marriage.[9] A similar presumption appears to exist in favor of durational alimony following a moderate-term marriage or following a long-term marriage if permanent alimony is not appropriate. Durational alimony generally may not exceed the length of the marriage.[10]

The law appears to disfavor permanent alimony following a moderate-term marriage by requiring clear and convincing evidence for an award of permanent alimony. Permanent alimony for a short-term marriage is reserved for exceptional circumstances.

Limitations on Alimony Based on Duration of Marriage in Other States

Some states have limited alimony based on the duration of the marriage:

- Colorado: Provides a table that calculates the term of support for marriages of at least 3 years and up to 20 years in length. After 20 years of marriage, the court may award an indefinite term of alimony.[11]
- Delaware: Permits alimony for a period of up to 50 percent of the length of marriage, except that if a party is married for 20 years or longer, alimony may be indefinite.[12]
- Maine: Provides a rebuttable presumption that general support may not be awarded if the parties were married for less than 10 years as of the date of the filing of the petition.[13]
- New York: Establishes an advisory schedule for alimony maintenance, expressed as a percentage of the length of marriage for which alimony is payable. Length of marriage of up to and including 15 years of marriage, 15 to 30 percent; more than 15 and up to and including 20 years of marriage, 30 to 40 percent; more than 20 years, 35 to 50 percent.[14]
- Texas: Disfavors alimony for marriages of less than 10 years unless the obligee meets certain conditions and if so, caps the duration of alimony at 5 years. Alimony is capped at 20 percent of the payor's gross income, or $2,500 a month, whichever is less.[15]
- Massachusetts: No longer authorizes permanent alimony in most dissolution of marriage cases. Limits permanent alimony awards to marriages of 20 years or longer if the award is otherwise appropriate. Reserves the possibility of permanent alimony for shorter marriages if an award is in the interests of justice.[16]
- Utah: Prohibits alimony awards for a duration longer than the length of the marriage, unless the court finds extenuating circumstances.[17]

Forms of Alimony

Florida law recognizes various forms of alimony, including bridge-the-gap, rehabilitative, durational, and permanent periodic alimony.[18] See the table on the next page for additional information on the various types of alimony authorized under current law.

[9] Section 61.08(8), F.S.
[10] Section 61.08(4), F.S.
[11] Colo. Rev. Stat. Ann. s. 14-10-114.
[12] Del. Code Ann. title 14, s. 1512
[13] Me. Rev. Stat. Ann. title 19-A, s. 951A.
[14] N.Y. Dom. Rel. Law s. 236.
[15] Tex. Fam. Code Ann. Sections 8.054 and 8.055.
[16] Mass. Gen. Laws Chapter 208, Section 49.
[17] Utah Code Ann. s. 30-3-5.
[18] Section 61.08(1), F.S.

Types of Alimony				
	Bridge-the-gap	***Rehabilitative***	***Durational***	***Permanent***
Purpose	Allows a party to transition from being married to being single upon showing legitimate short-term need.	Assists a party in becoming self-sufficient through skills training, education, or work experience.	Provides a party with economic assistance for a set period of time after a marriage of short or moderate duration, or a marriage of long duration if no need exists for a permanent award.	Provides for the needs and necessities of life as established during the marriage for a party who lacks the financial ability to maintain needs.
Length of Time	Up to 2 years.	Temporary.	Set period of time but not to exceed length of marriage.	Permanent.
Modifiable/ Termination	Not modifiable in amount or duration. Can terminate upon death or remarriage of recipient.	Modifiable upon a showing of a substantial change in circumstances, including cohabitation. Can be terminated upon noncompliance or completion of the rehabilitative plan.	Modifiable or terminated based on a substantial change in circumstances, including cohabitation. Length of award may not change unless exceptional circumstances are shown. Terminates upon death or remarriage of recipient.	Modifiable upon a substantial change in circumstances, including cohabitation. Terminates upon death or remarriage of recipient.
How Established		Requires inclusion of a specific and defined rehabilitative plan.		Awardable if appropriate for a marriage of long duration, upon a showing of clear and convincing evidence for a marriage of moderate duration, and with written findings of exceptional circumstances for a marriage of short duration.

Modification and Termination of Alimony

Four bases exist for a court to reconsider an alimony award, including whether to terminate alimony:

- A substantial change in circumstances of either party;
- Cohabitation by the obligee;
- Remarriage by the obligee; or
- Death of either party.[19]

Substantial Change of Circumstance

A motion for modification may be made by either party for the court to consider a substantial change in circumstances.[20] If the court modifies support on this basis, the court may modify support retroactively to the date of the filing of the action.[21]

Cohabitation

To modify alimony on an assertion of cohabitation between the alimony obligee and a third party, the court must find:

- The existence of a supportive relationship between the recipient and a third party; and
- That the recipient lives with the third party.

To determine whether a relationship is supportive, the court will examine:

- The extent to which the obligee and the third party hold themselves out as a married couple;
- The length of time that the third party has resided with the obligee;
- Whether the obligee and the third party have jointly purchased property;
- The extent to which the obligee and third party commingle financial assets; and
- The extent to which one of the parties supports the other party.[22]

The burden is on the obligor to show by a preponderance of evidence that a supportive relationship exists.[23]

[19] Section 61.08(8), F.S.

[20] Section 61.14(1)(a), F.S. Courts have found a substantial change in circumstance where an obligor's health deteriorated due to two heart attacks. He was unable to continue gainful employment and received social security disability income as his full income (*Scott v. Scott*, 2012 WL 5621672, 1 (Fla. 5th DCA 2012)). An obligor demonstrated a showing of a substantial change in circumstance through a detrimental impact on his business in manufacturing cathode ray television tubes due to advancing technology that made his product obsolete. The court also noted that the obligor was forced to remove money from family trust accounts to meet his alimony obligation. (*Shawfrank v. Shawfrank*, 97 So. 3d 934, 937 (Fla. 1st DCA 2012)). The court found a substantial change in circumstance where financial affidavits showed that the obligee's income jumped from $1,710 to $4,867 a month, making her income higher than the obligor's income of $3,418 a month. (*Koski v. Koski*, 98 So. 3d 93, 94 (Fla. 4th DCA 2012)).

[21] Section 61.14(1)(a), F.S.

[22] Section 61.14(b), F.S.

[23] Section 61.14(1)(b)1., F.S.

Parenting and Time-sharing

Florida Law

The public policy of the state is for each minor child to have "frequent and continuing contact with both parents."[24] Additionally, a court must order shared parental responsibility for a minor child unless the court finds that shared responsibility would be detrimental to the child.[25] In determining timesharing with each parent, a court must evaluate the relative fitness of each parent on 19 specific statutory factors plus "any other factor that is relevant" to the court's determination.

Equal Time-sharing in other States

No state has required the court to order equal time-sharing or joint custody of minor children. A number of states, in addition to Florida, provide in law a presumption that joint custody is in the best interest of the child. These states are the District of Columbia, Idaho, Minnesota, New Mexico, South Dakota, Texas, Utah, Virginia, West Virginia, and Wisconsin. Other states provide the presumption only if the parents agree. These states are Alabama, California, Connecticut, Maine, Michigan, Mississippi, Nevada, New Hampshire, and Vermont.[26]

Several state legislatures recently amended laws on child custody to encourage equal time-sharing. Arkansas codified a preference for joint custody. [27] The South Dakota Legislature passed a law that permits the court to order joint physical custody when the court has awarded joint legal custody if it is in the best interest of the child.[28] The Utah Legislature enacted a rebuttable presumption for joint legal custody. Grounds for rebutting the presumption include domestic violence and physical or mental needs of a parent or child.[29]

Child Support Enforcement

Congress passed into law Title IV-D of the Social Security Act[30] to require states to provide specific child support enforcement services to receive federal funding under the Aid for Dependent Children (AFDC) Program.[31] Services are available to single-parent families on public assistance who are entitled to child support from the other parent.

Florida established the Child Support Enforcement Application and Program Revenue Trust Fund to provide a trust fund for deposits of Title IV-D program income.[32] The trust fund is administered by the state Department of Revenue.[33] The clerk of the court of each circuit

[24] Section 61.13(2)(c)1., F.S.
[25] Section 61.13 (2)(c)2., F.S.
[26] National Conference of State Legislatures, *Shared/Joint Custody Enactments 2012* (Feb. 2015).
[27] AR s. 901.
[28] South Dakota House Bill 1055 (Chapter 141).
[29] Utah HB 88 (Chapter 269); HB 107 (Chapter 271).
[30] 42 USC §§ 651-669 (1988).
[31] Ashish Prasad, *Rights Without Remedies: Section 1983 Enforcement of Title IV-D of the Social Security Act*, 60 U.CHI. L. REV. 197, 197 (1993).
[32] Section 61.1814(1), F.S.
[33] *Id*.

operates a depository for alimony transactions, support, maintenance, and support payments.[34] A fee is collected for payments made in non-Title IV-D cases to fund the depository.[35]

Collaborative Law Process

The collaborative law process, a type of alternative dispute resolution, is designed to facilitate the out-of-court settlement of dissolution of marriage cases. The process employs collaborative attorneys, mental health professionals, and financial specialists to help the parties reach consensus. The parties, attorneys, and team of professionals negotiate various terms, such as the distribution of property, alimony, and child visitation and support. A collaborative law participation agreement provides the structure for how the parties will proceed.

Once the parties reach agreement on a disputed matter, they sign and file with the court the marital settlement agreement.

The purported benefits of a collaborative divorce are that the process hastens resolution of disputed issues and that the total expenses of the parties are less than the parties would incur in traditional litigation. Although a comparison of costs is not available, the International Academy of Collaborative Professionals (IACP) studied 933 cases in which the parties agreed to the collaborative process.[36]

The IACP found that:
- Eighty percent of all collaborative cases resolved within 1 year;
- Eighty six percent of the cases studied were resolved with a formal agreement and no court appearances; and
- The average fees for all professionals totaled $24,185.[37]

Some jurisdictions disfavor the collaborative process for cases involving domestic violence, substance abuse, or severe mental illness.[38]

History of Collaborative Law Movement

The collaborative law movement, starting in 1990, began to significantly expand after 2000.[39] Known as an interdisciplinary dispute resolution process, collaborative law envisions a collaborative team of professionals assembled to assist the divorcing couple in negotiating resolution of their issues.

[34] Section 61.181(1)(a), F.S.
[35] Section 61.181(2)(a) and (b), F.S.
[36] The International Academy of Collaborative Professionals has more than 4,000 professionals as members from 24 countries. John Lande, *The Revolution in Family Law Dispute Resolution*, 24 J. AM. ACAD. MATRIM. LAW. 411, 430 (2012).
[37] Glen L. Rabenn, Marc R. Bertone, and Paul J. Toohey, *Collaborative Divorce – A Follow Up*, 55-APR Orange County Law 32, 36 (Apr. 2013).
[38] *Id*. at 36.
[39] John Lande and Forrest S. Mosten, *Family Lawyering: Past, Present, and Future*, 51 FAM. CT. REV. 20, 22 (Jan. 2013).

In the United States, at least 30,000 attorneys and family professionals have been trained in the collaborative process.[40]

Uniform Collaborative Law Act of 2009

In the United States, the Uniform Law Commission established the Uniform Collaborative Law Act of 2009 (amended in 2010). According to the ULC:

> Collaborative Law is a voluntary dispute-resolution process in which clients agree that, with respect to a particular matter in dispute, their named counsel will represent them solely for purposes of negotiation, and, if the matter is not settled out of court that new counsel will be retained for purposes of litigation. The parties and their lawyers work together to find an equitable resolution of a dispute, retaining experts as necessary. The process is intended to promote full and open disclosure and, as is the case in mediation, information disclosed … is privileged against use in any subsequent litigation. … Collaborative Law is governed by a patchwork of state laws, state Supreme Court rules, local rules, and ethics opinions. The Uniform Collaborative Law Rules/Act (UCLR/A) is intended to create a uniform national framework for the use of Collaborative Law; one which includes important consumer protections and enforceable privilege provisions.[41]

Thirteen states, Alabama, Arizona, District of Columbia, Hawaii, Maryland, Michigan, Montana, Nevada, New Jersey, Ohio, Texas, Utah, and Washington have enacted the Uniform Collaborative Law Act.[42] Nine states, including Florida, address the collaborative process through local court rules.[43]

An essential component of the Uniform Collaborative Law Act (UCLA) is the mandatory disqualification of the collaborative attorneys if the parties fail to reach an agreement or intend to engage in contested litigation. Once both collaborative lawyers are disqualified from further representation, the parties must start again with new counsel. "The disqualification provision thus creates incentives for parties and Collaborative lawyers to settle."[44]

At least three sections of the American Bar Association have approved the UCLA—the Section of Dispute Resolution, the Section of Individual Right & Responsibilities, and the Family Law Section.[45] However, in 2011 when the ULC submitted the UCLA to the American Bar

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[40] Lande, *supra* note 1, at 430.
[41] Uniform Law Commission, *Uniform Collaborative Law Rules/Act Short Summary* (on file with the Senate Judiciary Committee).
[42] *Legislative Fact Sheet*, http://www.uniformlaws.org/Act.aspx?title=Collaborative%20Law%20Act (last visited Jan. 5, 2016).
[43] Alabama, California, Florida, Indiana, Kansas, Louisiana, Maryland, Minnesota, and Wisconsin. Email correspondence with Meghan McCann, National Conference of State Legislatures (Feb. 19, 2015). At least four judicial circuits in Florida have adopted local court rules on collaborative law. These are the 9th, 11th, 13th, and 18th judicial circuits. Other circuits may however recognize the collaborative process in the absence of issuing a formal administrative order.
[44] Lande, *supra* note 4 at 429.
[45] New Jersey Law Revision Commission, *Final Report Relating to New Jersey Family Collaborative Law Act*, 5 (Jul. 23, 2013), http://www.lawrev.state.nj.us/ucla/njfclaFR0723131500.pdf.

Association's House of Delegates for approval, it was rejected. The disqualification provision appears to have been the primary basis for the ABA's decision. Those within the ABA who objected to the UCLA have stated that the disqualification provision unfairly enables one party to disqualify the other party's attorney simply by terminating the collaborative process or initiating litigation.[46]

Florida Court System

In the 1990s, the court system began to move towards establishing family law divisions and support services to accommodate families in conflict. In 2001, the Florida Supreme Court adopted the Model Family Court Initiative. This action by the Court combined all family cases, including dependency, adoption, paternity, dissolution of marriage, and child custody into the jurisdiction of a specially designated family court. The Court noted the need for these cases to have a "system that provide[s] nonadversarial alternatives and flexibility of alternatives; a system that preserve[s] rather than destroy[s] family relationships; … and a system that facilitate[s] the process chosen by the parties."[47] The court also noted the need to fully staff a mediation program, anticipating that mediation can resolve a high percentage of disputes.[48]

In 2012, the Florida Family Law Rules committee proposed to the Florida Supreme Court a new rule 12.745, to be known as the Collaborative Process Rule.[49] In declining to adopt the rule, the court explained:

> Given the possibility of legislative action addressing the use of the collaborative law process and the fact that certain foundations, such as training or certification of attorneys for participation in the process, have not yet been laid, we conclude that the adoption of a court rule on the subject at this time would be premature.[50]

Although the Florida Supreme Court has not adopted rules on collaborative law, at least four judicial circuits in Florida have adopted local court rules on collaborative law through an administrative order. These are the 9th, 11th, 13th, and 18th judicial circuits. Each of the administrative orders includes the requirement that an attorney disqualify himself or herself if the collaborative process is unsuccessful. Other circuits have recognized the collaborative process in the absence of issuing a formal administrative order.

III. Effect of Proposed Changes:

This bill makes various changes to laws applicable to dissolution of marriage cases in the areas of alimony, support, and time-sharing with children. The bill also establishes the Collaborative Law Process Act to facilitate the out-of-court settlement of dissolution of marriage cases and paternity cases.

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[46] Andrew J. Meyer, *The Uniform Collaborative Law Act: Statutory Framework and the Struggle for Approval by the American Bar Association*, 4 Y.B. ON ARB. & MEDIATION 212, 216 (2012).
[47] *In re Report of Family Court Steering Committee*, 794 So. 2d 518, 523 (Fla. 2001).
[48] *Id*. at 520.
[49] *In Re: Amendments to the Florida Family Law Rules of Procedure*, 84 So. 3d 257 (March 15, 2012).
[50] *Id*.

Alimony Awarded During a Pending Suit—Alimony Pendente Lite

Alimony pendente lite is temporary alimony awarded after a marital party files for dissolution of marriage. The bill requires the court to consider the bases for alimony (without the formula) after determining a need for alimony pendente lite and an ability to pay.

Alimony Awarded through a Final Court Order

Under the bill, a court must determine the amount of an alimony award in a multi-step process, from making initial findings, applying guidelines, and considering other factors, including factors which might justify a deviation from guidelines. The bill also establishes presumptive alimony duration ranges which range from 25 to 75 percent of the length of the marriage. The bill does not maintain the distinctions in current law relating to the duration or purposes of bridge-the-gap, rehabilitative, durational, or permanent alimony.

Initial Findings

In determining alimony, a court must make initial written findings based on:

- The amount of each party's monthly gross income, including potential income and actual or potential income from nonmarital property distributed to each party; and
- The years of marriage.

The courts must look at net income, rather than gross income, in calculating alimony and support. In instances in which trial courts have erroneously used a party's gross income, the appellate courts have routinely reversed those decisions.[51] In instances in which an obligor is self-employed, the court may start with gross income and subtract from it ordinary business expenses to arrive at net income.

This bill specifies that income considered in alimony calculations is gross income. Gross income is recurring income from any source and includes:

- Income from salaries, overtime pay, and wages, including tips declared to the IRS or tips imputed to bring the employee's gross earnings to the minimum wage for the number of hours worked, whichever is greater, commissions, bonuses; and dividends, and severance pay;
- Pension pay and retirement benefits actually received;
- Spousal support received from a previous marriage;
- Trust income and distributions regularly received, relied upon, or readily available to the beneficiary, royalties, income from estates, annuity payments, capital gains, recurring gains derived from dealings in property, rental income (gross receipts minus ordinary and necessary expenses required to produce the income), interest, and continuing monetary gifts;
- Payments received as an independent contractor for labor or services, which must be considered income from self-employment; money drawn by a self-employed person for personal use that is deducted as a business expense, and expense reimbursements or in-kind payments or benefits received by a party in the course of employment, self-employment, or operation of a business which reduces personal living expenses;

[51] *Kingsbury v. Kingsbury*, 116 So. 3d 473, 474(Fla. 1st DCA 2013); *Vanzant v. Vanzant*, 82 So. 3d 991, 993 (Fla. 1st DCA 2011); *Vega v. Vega*, 877 So. 2d 882, 883 (Fla. 3d DCA 2004).

- Workers' compensation; unemployment benefits, social security benefits, including those actually received based on disability, disability insurance benefits and funds paid from health, accident, disability, or casualty insurance if the insurance replaces wages; and
- Income from general partnerships, limited partnerships, closely held corporations, or limited liability companies, except that if the party is a passive investor with a minority interest in the company, income is limited to actual cash distributions received.

Gross income does not include:
- Child support payments received;
- Public assistance benefits;
- Social security benefits received by a parent on behalf of a minor child due to death or disability of a parent or stepparent; and
- Earnings or gains on retirement accounts, including individual retirement accounts, except that the earnings or gains are income if a party takes a distribution from the account, and if a party is able to take a distribution tax-free and chooses not to, the court may consider as income the distribution that could have been taken.

For income from self-employment, rent, royalties, proprietorship of a business, or joint ownership of a partnership or closely held corporation, gross income equals gross receipts minus ordinary and necessary expenses. Ordinary and necessary expenses do not include amounts allowable by the IRS for the accelerated component of depreciation expenses or investment tax credits or any other business expenses determined by the court to be inappropriate for determining gross income for purposes of calculating alimony.

The bill defines "potential income" as income which could be earned by a party using best efforts, and includes potential income from employment, investment of assets, or use of property in a financially prudent manner. Potential income from employment is income a party could reasonably expect to earn working at a locally available, full-time job based on the person's education, training, and experience. A person is considered to be underemployed if he or she is not working full-time in a position which is appropriate based on his or her education, training, and experience, and which is available in the local area. A person is not underemployed if he or she is enrolled in an educational program that can reasonably expect to result in a degree or certification and higher income within the foreseeable future. A court generally must impute income to a party who is voluntarily unemployed or underemployed.

The court must consider years of marriage based on whole years, calculated from the date of marriage until the date of the filing for dissolution.

This bill creates a rebuttable presumption against alimony for marriages of 2 years or less. The party seeking alimony may rebut the presumption by showing:
- The party seeking alimony has a clear and convincing need for alimony;
- The party from whom alimony is sought has an ability to pay alimony; and
- An inequity would result if the court does not award alimony.

If the court finds that the party rebuts the presumption, the court must provide written findings. Alimony will then be awarded under the formula.

Alimony Guidelines

This bill establishes formulas for use by the court after making its initial findings in alimony determinations, unless the parties agree to an amount otherwise. After making initial findings, the court will calculate the presumptive alimony ranges based upon two formulas. The formulas provide a presumptive range for alimony as follows:

- At the low end of the range: 0.015 x the years of marriage x the difference between the monthly gross income of the parties; and
- At the high end of the range: 0.020 x the years of marriage x the difference between the monthly gross income of the parties.

The formula bases the years of marriage at 20 for both the low and the high end of the range. However, if a court establishes the duration of the alimony award at 50 percent or less of the length of the marriage, the court is required to use the actual years of marriage, up to 25 years to calculate the high end of a presumptive alimony amount range.

Difference in the Parties' Monthly Incomes	**Presumptive Alimony Amount Ranges**							
$20,000	High	$1,200	$2,000	$4,000	$4,800	$6,000	$8,000	$8,000
	Low	$900	$1,500	$3,000	$3,600	$4,500	$6,000	$6,000
$15,000	High	$900	$1,500	$3,000	$3,600	$4,500	$6,000	$6,000
	Low	$675	$1,125	$2,250	$2,700	$3,375	$4,500	$4,500
$10,000	High	$600	$1,000	$2,000	$2,400	$3,000	$4,000	$4,000
	Low	$450	$750	$1,500	$1,800	$2,250	$3,000	$3,000
$8,000	High	$480	$800	$1,600	$1,920	$2,400	$3,200	$3,200
	Low	$360	$600	$1,200	$1,440	$1,800	$2,400	$2,400
$7,000	High	$420	$700	$1,400	$1,680	$2,100	$2,800	$2,800
	Low	$315	$525	$1,050	$1,260	$1,575	$2,100	$2,100
$6,000	High	$360	$600	$1,200	$1,440	$1,800	$2,400	$2,400
	Low	$270	$450	$900	$1,080	$1,350	$1,800	$1,800
$5,000	High	$300	$500	$1,000	$1,200	$1,500	$2,000	$2,000
	Low	$225	$375	$750	$900	$1,125	$1,500	$1,500
$4,000	High	$240	$400	$800	$960	$1,200	$1,600	$1,600
	Low	$180	$300	$600	$720	$900	$1,200	$1,200
$3,000	High	$180	$300	$600	$720	$900	$1,200	$1,200
	Low	$135	$225	$450	$540	$675	$900	$900
$2,000	High	$120	$200	$400	$480	$600	$800	$800
	Low	$90	$150	$300	$360	$450	$600	$600
Length of Marriage		**3 Years**	**5 Years**	**10 Years**	**12 Years**	**15 Years**	**20 Years**	**25 Years**

The court retains flexibility to determine alimony within the presumptive alimony ranges.

Bases for Alimony (Considered by the Court after Presumptive Alimony is Calculated):

Presumptive alimony may then be established by the court within the presumptive ranges, based on the following:

- The financial resources of the obligee and the obligor, including the actual or potential income from nonmarital or marital property or any other source and the ability of each spouse to meet his or her reasonable needs;
- The standard of living of the parties during the marriage considering that there will be two households to maintain after the dissolution of marriage and that neither party may be able to maintain the same standard of living they had while married;
- The equitable distribution of marital property, including whether an unequal distribution of marital property was made to reduce or alleviate the need for alimony;
- Both parties' income, employment, and employability, obtainable through reasonable diligence and additional training or education, and any necessary reduction in employment due to parenting or circumstances of the parties;
- Whether a party could reduce the need for alimony by pursuing additional educational or vocational training, including the length of time required and anticipated costs of training;
- Whether one party has historically earned higher or lower income than that at the time of trial;
- Whether a party has foregone or postponed economic, educational, or employment opportunities during the course of the marriage;
- Whether either party has caused the unreasonable depletion or dissipation of marital assets;
- The amount of temporary alimony and the number of months temporary alimony was paid to the recipient spouse;
- The age, health, and physical and mental condition of the parties, including health care needs and costs;
- Significant economic or noneconomic contributions to the marriage or to the economic, educational, or occupational advancement of a party, including services rendered in homemaking, child care, education, and career building of the other party, payment by one spouse of the other spouse's separate debts, or enhancement of the other spouse's personal or real property;
- The tax consequence of the alimony award; and
- Any other factor necessary to provide equity and justice between the parties.

If the court awards alimony, the court must include in written findings that the obligor has the financial ability to pay alimony.

Under no circumstance may a court order alimony and child support that, when combined, constitutes more than 55 percent of the obligor's net income. This change appears to codify case law, as appellate courts have reversed awards of trial courts where the percent of income awarded as support is considered unreasonable. The Fourth District Court of Appeal found that the trial court committed an abuse of discretion in awarding combined alimony and child support totaling 58 percent of the obligor's net income.[52] The appellate court noted that the trial court had legitimate grounds on which to order permanent alimony. The former wife earned only a

[52] *Thomas v. Thomas*, 418 So. 2d 316, (Fla. 4th DCA 1982).

two-year college degree and supported her husband as a teacher's aide while he secured a law school education. She then became a homemaker. However, the court noted that the excessive award left the obligor with just $330 a month on which to live after paying for rent and a car loan.[53]

In *Casella v. Casella*, the same appellate court ruled clearly excessive an award of combined alimony and child support that approached 70 percent of the husband's net income.[54] A 1990 case, the court reversed the trial court on the basis that the award left the obligor with just $800 a month on which to live.

To protect an award of alimony, the court may require an obligor to purchase or maintain a decreasing term life insurance policy or a bond, or provide other security to protect the alimony award. To award security, a court must find the existence of special circumstances and make specific evidentiary findings about the availability, cost, and financial impact on the obligor. Security is modifiable if the underlying alimony award is reduced.

Deviation from Guidelines

The court may determine an award of alimony that is outside the presumptive alimony amount or alimony duration ranges only if the court makes specific written findings that the application of the ranges is inappropriate or inequitable after considering all the factors used as the bases of alimony.

Even if the court does not intend to award alimony at the time, the court may reserve the issue of alimony by awarding alimony of $1.00 a year under the durational guidelines if:

- A party who has traditionally been the breadwinner temporarily lacks the ability to pay support but is reasonably anticipated to have the ability to pay in the future; or
- A party is presently able to work but for whom a medical condition with a reasonable degree of medical certainty may inhibit the ability to pay in the future.

The courts routinely award nominal alimony to reserve the issue of alimony at a later date.[55]

Tax and Alimony

Unless otherwise stated in the agreement between the parties or by the court through judgment or order, alimony is deductible from income by the obligor and included in the income of the obligee for tax purposes.

The agreement between the parties may provide or the court, after considering equities and tax efficiencies, may order alimony to be nondeductible from income by the obligor and not includable in the income of the obligee.

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[53] *Id*. at 316-317.

[54] *Casella v. Casella*, 569 So. 2d 848, 849 (Fla. 4th DCA 1990). The court stopped short of ruling that a particular percentage constitutes a bright-line rule, and instead, ruled that each case must be determined individually.

[55] *Lightcap v. Lightcap*, 14 So. 3d 259, 260 (Fla. 3d DCA 2009). "Here the trial court did not abuse its discretion when it granted the former wife nominal alimony. Nominal alimony would permit her to apply for modification upon a proper showing if and when the former husband achieves his full earning potential in the future."

Payment of Alimony in Depository

Under the bill, for orders on alimony entered into on or after January 1, 1985, the court must order that payments of alimony be made through a depository. For orders on alimony entered before January 1, 1985, upon appearance by one or both parties before the court to modify or enforce the order, the court must modify the order require that alimony payments to be made through the depository.

Alimony payments do not need to be directed through the depository:
- If there is no minor child; or
- If there is a minor child and both parties agree to payment without the depository.

However, a payee may subsequently file an affidavit with the clerk of the court a verified motion that an obligor has been in default or arrearages in payment. No later than 15 days after receiving the motion, the court must:
- Hold an evidentiary hearing establishing the default and arrearages;
- Issue an order that the clerk establish or amend an existing family law case history account; and
- Advise the parties that future payments must be directed through the depository.

A Title IV-D agency, currently the Department of Revenue, can also request payments to be made through the depository.

Timesharing with Children

This bill creates a rebuttable presumption that approximately equal timesharing with a minor child by both parents is in the best interest of the child. A party may overcome the presumption by providing evidence based on factors that affect the welfare and interests of the child and the circumstance of the family.

In addition to the factors currently in law, this bill adds the following:
- The amount of timesharing requested by each parent; and
- The frequency that a parent would likely leave the child in the care of a nonrelative on evenings and weekends when the other parent would be available and willing to provide care.

If the initial permanent timesharing schedule does not provide for approximately equal time-sharing the court order must include written findings of fact justifying its order for unequal timesharing.

Substantial Change in Circumstance Justifying the Modification of Alimony

Existing law authorizes the court to modify alimony upon a showing of a substantial change in circumstances. However, a court may not decrease or increase the duration of alimony provided for in the agreement or order.

Under the bill, upon the filing of a petition by the obligor, the court may temporarily reduce or suspend the obligor's payment of alimony while the petition is pending. However, if either party

unreasonably pursues or defends an action, the other party is entitled to pay reasonable attorney fees and costs of the prevailing party.

Rebuttable Presumption

This bill creates a rebuttable presumption that alimony must be modified or terminated if the courts finds that the obligor's retirement is a substantial change in circumstance.

The presumption can be rebutted by the following factors:
- The age of the parties;
- The health of the parties;
- Assets and liabilities of the parties;
- Earned or imputed income of the parties;
- The ability of the parties to maintain part-time or full-time employment; and
- Any other factor deemed relevant by the court.

New Grounds for a Substantial Change in Circumstance

This bill establishes new substantial changes in circumstance:
- If the actual income of a party exceeds by at least 10 percent the amount the court imputed to the party when the court initially determined alimony, the other party may seek an immediate modification of alimony. An increase in an obligor's income alone does not constitute a basis for modification unless at the time the court established alimony, the court determined that the obligor was underemployed or unemployed but did not impute income at his or her maximum potential income.
- If an obligor becomes involuntarily underemployed or unemployed for 6 months after the court enters its final order for alimony, the obligor is entitled to pursue an immediate modification of alimony.
- Retirement is a substantial change in circumstance if:
  - The obligor has reached the age for eligibility to receive full retirement benefits under the Social Security Act and has retired;
  - The obligor has reached the customary retirement age for his or her occupation and has retired from that occupation; or
  - The obligor retires early and the court determines that the retirement is reasonable based upon the obligor's age, health, motivation for retirement, and impact on the obligee.

At least one court has refused modification of alimony on the basis that an obligor voluntarily retired early. Here the court held that the obligor did not establish voluntary retirement as a circumstance beyond his control.[56] In this case, the obligor retired early at the age of 63, after 40 years of steady employment.[57]

An obligor may file an action within a year of his or her anticipated retirement date for the court to determine the customary retirement date for the obligor's profession. Allowing the obligor to file in advance of retirement helps the obligor to plan.

[56] *Ward v. Ward*, 502 So. 2d 477, 478 (FLA. 3D DCA 1987).
[57] *Id*.

Remarriage of Obligor is not a Substantial Change in Circumstance

The bill clarifies that remarriage of the obligor is not a substantial change in circumstance.

Financial information of a subsequent spouse of a party paying or receiving alimony is inadmissible and may not be considered as part of any modification action unless a party is claiming that his or her income has decreased since the marriage. If the party makes this claim, financial information is admissible for a limited purpose.

Supportive Relationship

Regarding the change in circumstance that is the presence of a supportive relationship between an obligee and another person, this bill expands the requirement that the relationship currently exist, to one which existed within the previous year before the date of the filing of the petition for modification or termination of alimony.

The bill adds as a factor for the court to use in determining to modify alimony based on a supportive relationship whether the obligor's failure, in whole or in part, to comply with all court-ordered financial obligations contributed to the need to have a supportive relationship.

This bill requires the obligor to demonstrate by a preponderance of the evidence that a supportive relationship exists or has existed within the previous year before the filing date of the petition for modification. The obligor is not required to prove the cohabitation of the obligee. These changes reduce the burden on an obligor to show a supportive relationship.

If an obligor prevails in a showing of a supportive relationship, reduction or termination of alimony is retroactive to the date of the filing of the petition.

Advancing Trial

The court must give priority to cases that have remained pending for more than 2 years from the initial date a party files a petition if a party requests that the case advance to trial.

Collaborative Law Process

This bill establishes the Collaborative Law Process Act as a basic framework for the collaborative law process, for use in dissolution of marriage and paternity cases. The collaborative law process, a type of alternative dispute resolution, is designed to facilitate the out-of-court settlement of dissolution of marriage cases. The process employs collaborative attorneys, mental health professionals, and financial specialists to help the parties reach agreement.

By placing the Act in law, the bill offers another kind of alternative dispute resolution, besides mediation, to parties involved in dissolution of marriage and parentage cases. However, unlike mediation, which may be court-ordered, participation in the collaborative process is voluntary.[58]

[58] Section 61.183(1), F.S., provides, in part: "In any proceeding in which the issues of parental responsibility, primary residence, access to, visitation with, or support of a child are contested, the court may refer the parties to mediation … ."

The authority for the collaborative process provided in the bill is limited to issues governed by chapter 61, F.S. (Dissolution of Marriage; Support; Time-sharing) and chapter 742, F.S. (Determination of Parentage). More specifically, the following issues are proper issues for resolution through the collaborative law process:

- Marriage, divorce, dissolution, annulment, and marital property distribution;
- Child custody, visitation, parenting plan, and parenting time;
- Alimony, maintenance, child support;
- Parental relocation with a child;
- Premarital, marital, and postmarital agreements; and
- Paternity.

Beginning and End of Collaborative Process

The bill defines the circumstances in which a collaborative law case begins and ends. The collaborative law process begins when the parties enter into a collaborative law participation agreement. The agreement governs the terms of how the process will proceed. Parties may enter into the agreement before or after petitioning a court for the dissolution of marriage or determination of parentage.

The collaborative law process concludes when issues are resolved and the parties sign the agreement. But the bill also allows for the collaborative law process to partially resolve the issues. If partially resolved, parties agree to reserve remaining issues for the judicial process.

Alternatively, a collaborative law process may terminate before any issues are resolved. The collaborative law process terminates when a party:

- Provides notice to the other parties that the process has ended;
- Begins a court proceeding without consent of the other party, or asks the court to place the proceeding on a court calendar;
- Initiates a pleading, motion, order to show cause, or requests a conference with a court; or
- Discharges a collaborative attorney or a collaborative attorney withdraws as counsel.

The bill allows the process to continue if a party hires a successor collaborative attorney to replace his or her previous attorney. The unrepresented party must hire, and identify in the agreement, a successor collaborative attorney within 30 days after providing notice that the party is unrepresented.

In allowing parties to begin the process before or after filing a petition, partially resolve issues, and hire successor collaborative attorneys, parties can customize the process as they see fit.

Mandatory Disqualification

This bill does not provide for mandatory disqualification of the collaborative attorneys if the process does not result in an agreement. Therefore, the primary incentive to encourage resolution is not in the bill. Although the bill conforms to the Uniform Collaborative Law Act in other respects, the failure to include mandatory disqualification is a significant departure from the

UCLA. However, the Supreme Court could include the disqualification requirement in its implementing rules.

The bill also departs from local court rules on collaborative divorce. All circuits in which courts have adopted local rules on the collaborative process require counsel to withdraw from further representation if the process breaks down and an agreement is not reached.[59]

Confidentiality and Privilege

The bill generally provides that collaborative law communications are confidential and privileged from disclosure. As such, communications made during the collaborative law process are not subject to discovery or admissible as evidence.

The bill identifies a number of exceptions to the privilege. The privilege does not apply to communications if:

- The parties agree to waive privilege.
- A person makes a prejudicial statement during the collaborative law process. In this instance, preclusion applies to enable the person prejudiced to respond to the statement.
- A participant makes statements available to the public under the state's public records law or made during a meeting of the process that is required to be open to the public.
- A participant makes a threat, or describes a plan to inflict bodily injury.
- A participant makes a statement that is intentionally used to plan, commit, attempt to commit, or conceal a crime.
- A person seeks to introduce the statement in a claim or complaint of professional misconduct or malpractice arising from the collaborative law process.
- A person seeks to introduce the statement to prove or disprove abuse, neglect, abandonment, or exploitation of children or adults unless the Department of Children and Families is involved.
- A court finds that the evidence is not otherwise available, the need for the evidence substantially outweighs the interest in confidentiality, and the communication is sought or offered in a felony proceeding or a proceeding involving contract disputes.

Other than the discrete categories of exceptions to the privilege, the bill provides a broad level of confidentiality and protection from disclosure to collaborative law communications. Additionally, disclosure is limited to only the part of the communication needed for the purpose of the disclosure. Parties will be encouraged to communicate openly during the collaborative law process.

[59] Order Authorizing Collaborative Process Dispute Resolution Model in the Ninth Judicial Circuit of Florida, Fla. Admin. Order No. 2008-06 (Mar. 28, 2008); *In re:* Authorizing the Collaborative Process Dispute Resolution Model in the Eleventh Judicial Circuit of Florida, Fla. Admin Order No. 07-08 (Oct. 2007); Collaborative Family Law Practice, Fla. Admin. Order No. S-2012-041 (Jul. 31, 2012); *In re:* Domestic Relations—Collaborative Conflict Resolution in Dissolution of Marriage Cases, Fla. Admin. Order No. 14-04 Amended (Feb. 23, 2014) (on file with the Senate Judiciary Committee).

Application of the Bill

Collaborative Law Provisions

Although the bill becomes law July 1, 2016, the Collaborative Law Process Act does not take effect until 30 days after the Florida Supreme Court implements the act by adopting rules of procedure and professional responsibility.

Alimony Provisions

The provisions of the bill relating to alimony apply to:

- All initial alimony determinations and all alimony modification actions pending as of October 1, 2016; and
- All future initial determinations of alimony and alimony modification actions.

The enactment of the bill may not serve as the sole basis for a party to seek modification of an alimony award which existed prior to October 1, 2016.[60]

The bill takes effect July 1, 2016.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The bill does not affect cities or counties.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Most alimony awards are based on marital settlement agreements (MSAs), which are incorporated into final judgments in dissolution of marriage cases. Courts consider these MSAs as contracts. Courts interpret challenges to MSAs on the same basis as other forms

[60] The application of the bill to existing alimony awards is substantially different than the application of CS/CS/SB 718, 2nd Engrossed (2013), an alimony reform bill that was vetoed by Governor Scott. The prior alimony reform bill provided that the bill itself constituted a "substantial change in circumstances for which an obligor may seek . . . a modification of the amount or duration of alimony." CS/CS/SB 718, 2nd Engrossed (2013), lines 936-939.

of contract.[61] "A marital settlement agreement entered into by the parties and ratified by a final judgment is a contract, subject to the laws of contract."[62]

Although, existing s. 61.14, F.S., gives courts broad authority to modify MSAs, the power of the legislature to reach back to existing contracts is restricted by Article I, s. 10, of the Florida Constitution which provides, in part: "No … ex post facto law or law impairing the obligation of contracts shall be passed." As such, the extent to which the Legislature may authorize the provisions of the bill to apply to preexisting alimony awards is not clear.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Alimony Provisions

To the extent that the bill more clearly defines gross income, provides guidelines for alimony, and establishes new bases for a substantial change in circumstance justifying a modification of alimony, this bill may reduce time spent in litigation which will reduce costs.

Collaborative Law Provisions

Although some family law attorneys already practice collaborative law in the state, the bill could theoretically expand the use of collaborative law as an alternative to traditional litigation in dissolution of marriage cases. To the extent that collaborative law reduces costs of litigation, parties undergoing divorce could benefit financially from electing to proceed in a collaborative manner.

C. Government Sector Impact:

The bill provides a collaborative law process. The OSCA indicates that the bill could potentially decrease judicial workload due to fewer filings, hearings, and contested issues. Some judicial workload, however, could result from *in camera* hearings regarding privilege determinations. Due to the unavailability of data needed to quantifiably establish the impact on judicial or court workload, fiscal impact is indeterminate.[63]

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[61] The First District Court of Appeal applied contract law in determining whether to admit parol evidence, or evidence outside the contract (MSA), on the basis that the contract language contains a latent ambiguity (*Toussaint v. Toussaint*, 107 So. 3d 474, 477-478 (Fla. 1st DCA 2013). A latent ambiguity, requiring extrinsic evidence, existed where an MSA failed to address financing of college education and the contract otherwise provided for equal payments for education costs (*Riera v. Riera*, 86 So. 3d 1163, 1166—67 (Fla. 3d DCA 2012)). The court found no breach of contract from the plain language of the MSA. (*McCord v. McCord*, 94 So. 3d 719 (Fla. 2nd DCA 2012).

[62] *Ferguson v. Ferguson*, 54 So. 3d 553, 556 (Fla. 3d DCA 2011).

[63] Office of the State Courts Administrator, *2016 Judicial Impact Statement* (Dec. 21, 2015).

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 61.071, 61.08, 61.13, 61.14, and 61.30.

This bill creates the following sections of the Florida Statutes: 61.192, 61.55, 61.56, 61.57, and 61.58.

This bill reenacts the following sections of the Florida Statutes: 61.14, 61.052, 409.2563, and 742.031.

IX. 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.