

**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.)

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Prepared By: The Professional Staff of the Committee on Rules

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BILL: CS/CS/SB 1796

INTRODUCER: Rules Committee; Judiciary Committee; and Senator Gruters, and others

SUBJECT: Dissolution of Marriage

DATE: March 2, 2022

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Bond</u>	<u>Cibula</u>	<u>JU</u>	<b>Fav/CS</b>
2.	<u>Dale</u>	<u>Sadberry</u>	<u>AP</u>	<b>Fav/1 amendment</b>
3.	<u>Bond</u>	<u>Phelps</u>	<u>RC</u>	<b>Fav/CS</b>

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

COMMITTEE SUBSTITUTE - Substantial Changes

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**I. Summary:**

CS/CS/SB 1796 amends laws related to dissolution of marriage. Changes to alimony applicable to any final judgment entered on or after July 1, 2022 include:

- Permanent (lifetime) alimony is eliminated, leaving bridge-the-gap, rehabilitative, and durational forms of alimony.
- Rehabilitative alimony is limited to 5 years.
- Durational alimony may not be awarded for a marriage of less than 3 years, is scaled based on duration of marriage, with an exception if the obligee is disabled or is a full-time caretaker of a totally disabled child of both spouses, and may not exceed the lesser of the obligee's reasonable need or 35 percent of the difference between the parties' net incomes.
- The bill creates a presumption that both parties will have a lower standard of living after dissolution of the marriage.
- Alimony may not be awarded to a party whose net income exceeds the net income of the other party.
- A court may not require an obligor to purchase life insurance to secure the award of alimony.
- The concept of a supportive relationship is expanded to allow consideration of a supportive relationship when first setting alimony in the dissolution of marriage case. The criteria defining a supportive relationship at the time of dissolution is the same as for a later modification.

Current case law allows for modification or termination of alimony upon “reasonable retirement,” a loosely-defined court-created concept. The bill codifies standards and procedures related to retirement of a party to a dissolution of marriage case:

- A proposed obligor who is retired at the time of the dissolution of marriage may not be required to pay any form of alimony unless one of the safeguards applies, and the party seeking alimony does not qualify for any Social Security benefits.
- If the obligor seeks to retire in the future (final judgment after July 1, 2022), the obligor must give 1 years’ prior notice of the planned retirement. The retirement will be effective and durational alimony will end when the obligor reaches the Social Security full retirement age unless the obligee timely objects by showing any of the following:
  - A safeguard applies; or
  - The obligor continues to work beyond the planned retirement and earns active gross income of more than 50 percent of the past 3-year average.
- If the obligor seeks to retire in the future after reaching age 65 or later (modification of a final judgment entered before July 1, 2022), the obligor must give 1-years’ prior notice of the planned retirement. The retirement will be effective and the alimony will phase out (25 percent a year) starting no sooner than age 65, unless the obligee timely objects by showing any of the following:
  - A safeguard applies; or
  - The obligor continues to work beyond the planned retirement and earns active gross income of more than 50 percent of the past 3-year average.
- Alternatively, there will be no phase-out and alimony may be modified or terminated based on a reasonable retirement.
- Current law provides that a court should not modify alimony for a payor’s retirement where the effect of modification would be to leave the recipient “in peril of poverty.” The bill codifies peril of poverty in the form of safeguards that allow a court to extend alimony, in part or in whole, beyond the obligor’s planned retirement, if:
  - The party receiving alimony is full-time caregiver to a disabled common child;
  - The party receiving alimony would have an income of less than 130 percent of the federal poverty level;
  - The party receiving alimony would be unable to meet the basic needs of life; or
  - The marital settlement agreement, if one was entered into, prohibits the modification.

The bill creates a rebuttable presumption that equal time-sharing with minor children is in the best interests of a child, and provides that a parent moving to a residence within 50 miles of the primary residence of a child is a substantial change in circumstances.

Bifurcation refers to the process where the court dissolves the marriage, reserving other matters such as property distribution, alimony, time-sharing, and child support for future court action. The bill gives either party to a dissolution of marriage the right to bifurcation if the case has been pending for longer than 2 years from the date the respondent received the summons, effective for petitions filed on or after July 1, 2022.

The bill will have no fiscal impact on state government.

The bill is effective July 1, 2022, and applies to cases pending on the effective date except as noted.

## II. Present Situation:

Dissolution of marriage may involve many different but related matters. The matters related to dissolution addressed by this bill are alimony, time-sharing with minor children, and bifurcation. Changes to time-sharing may result in different results from the child support formula, but the base child support formula and laws are not affected by this bill.

### **Alimony**

Alimony is a court-ordered allowance that one spouse pays to the other spouse for maintenance and support while they are separated, while they are involved in a matrimonial lawsuit, or after they are divorced.<sup>1</sup> Alimony may be agreed to by the parties or awarded by the court after an evidentiary hearing. While child support is determined primarily through a statutory formula, alimony is determined at the discretion of the trial court based on statutory and equitable factors.

### *Calculation of the Amount of Alimony*

There is no fixed formula for alimony. Alimony is based on both financial need and the ability to pay.<sup>2</sup> After making an initial determination to award alimony, the court must consider ten factors:

- 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.<sup>3</sup>

The income tax factor has less relevance than in the past. Beginning January 1, 2019, alimony or separate maintenance payments are not deductible from the income of the obligor, or includable in the income of the obligee, if made under a divorce or separation agreement executed after December 31, 2018. This also applies to a divorce or separation agreement executed on or before December 31, 2018, and modified after December 31, 2018, as long as the modification changes the terms of the alimony or separate maintenance payments and states that the alimony or separate maintenance payments are not deductible by the obligor or includable in the income of the obligee. On the other hand, alimony or separate maintenance payments are generally deductible from the income of the obligor and includable in the income of the obligee, if made under a divorce or separation agreement executed on or before December 31, 2018, even if the

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<sup>1</sup> Alimony, BLACK'S LAW DICTIONARY (11th ed. 2019).

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

<sup>3</sup> Section 61.08(2)(a)-(j), F.S.

agreement was modified after December 31, 2018, so long as the modification is not one described in the preceding sentence.<sup>4</sup>

The court may also consider adultery by either spouse in a decision to award alimony.<sup>5</sup> That consideration is dependent upon the circumstances of each particular case. Absent a showing of a related depletion of marital assets, a party's adulterous misconduct is not a valid reason to award a greater share of those marital assets to the innocent spouse or to deny the adulterous spouse alimony. Furthermore, despite evidence of adultery, need and ability to pay remain the primary considerations in awarding alimony.<sup>6</sup>

To protect an alimony award, the court may order an obligor to maintain a life insurance policy.<sup>7</sup> A court making the requirement must first make specific findings regarding the availability and cost of insurance, the obligor's ability to pay, and the special circumstances that warrant the requirement for security of the obligation.<sup>8</sup> The special circumstances required to support an order mandating life insurance include "a spouse potentially left in dire financial straits after the death of the obligor spouse due to age, ill health and/or lack of employment skills, obligor spouse in poor health, minors living at home, supported spouse with limited earning capacity, obligor spouse in arrears on support obligations, and cases where the obligor spouse agreed on the record to secure an award with a life insurance policy."<sup>9</sup>

An award of alimony may not result in the obligor with significantly less net income than the net income of the obligee absent exceptional circumstances.<sup>10</sup> What qualifies as exceptional circumstances is undefined.

### ***Types of Alimony***

For purposes of determining the appropriate type of alimony to award, marriages are classified by term or length of marriage, based on the time from the date of marriage to the date the dissolution of marriage action is filed:

- Short-term means less than 7 years.
- Moderate-term means greater than 7 years but less than 17 years.
- Long-term means greater than 17 years.<sup>11</sup>

The length of the marriage does not include time spent cohabitating prior to marriage.<sup>12</sup>

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<sup>4</sup> IRS, *CLARIFICATION: Changes to deduction for certain alimony payments effective in 2019*, (updated March 24, 2021), available at <https://www.irs.gov/forms-pubs/clarification-changes-to-deduction-for-certain-alimony-payments-effective-in-2019> (last viewed Jan. 24, 2022).

<sup>5</sup> Section 61.08(1), F.S.

<sup>6</sup> *Williamson v. Williamson*, 367 So. 2d 1016, 1019 (Fla.1979); *Noah v. Noah*, 491 So. 2d 1124, 1127 (Fla. 1986); *Keyser v. Keyser*, 204 So. 3d 159, 161 (Fla. 1st DCA 2016).

<sup>7</sup> Section 61.08(3), F.S.

<sup>8</sup> *O'Neill v. O'Neill*, 305 So. 3d 551, 554 (Fla. 4th DCA 2020).

<sup>9</sup> *Kotlarz v. Kotlarz*, 21 So. 3d 892, 893 (Fla. 1st DCA 2009).

<sup>10</sup> Section 61.08(9), F.S.; *Rabadan v. Rabadan*, 322 So. 3d 660 (Fla. 4th DCA 2021).

<sup>11</sup> Section 61.08(4), F.S. This triad was first enacted in 2010. Ch. 2010-199, Laws of Fla.

<sup>12</sup> *Taylor v. Davis*, 324 So. 3d 570 (Fla. 1st DCA 2021) (couple cohabitated for 24 years prior to 3 year marriage, court denied an award of permanent alimony because it was a short-term marriage).

Florida law recognizes four forms of alimony: bridge-the-gap, rehabilitative, durational, and permanent periodic alimony.<sup>13</sup>

Bridge-the-gap alimony:<sup>14</sup>

- Is designed to assist a party in his or her transition from being married to being single.
- May be awarded in a marriage of any term.
- Cannot exceed 2 years in duration.
- May not be modified.
- Terminates upon death or remarriage.

Rehabilitative alimony:<sup>15</sup>

- Is designed 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.
- May be awarded in a marriage of any term.
- Can be of any duration.
- May be modified based upon a substantial change in circumstances, upon noncompliance with the rehabilitative plan, or upon completion of the rehabilitative plan.
- Does not automatically terminate upon remarriage.

Durational alimony:<sup>16</sup>

- Is designed to provide a party with economic assistance for a set period of time.
- May be awarded following a marriage of short or moderate duration, or following a marriage of long duration if there is no ongoing need for support on a permanent basis.
- May not exceed the length of the marriage.
- May be modified as to amount, based upon a substantial change in circumstances; but the length may not be modified except under exceptional circumstances.
- Terminates upon the death of either party or upon the remarriage of the party receiving alimony.

Permanent alimony:<sup>17</sup>

- Is designed 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 a dissolution of marriage.
- May be awarded only after a finding that no other form of alimony is fair and reasonable under the circumstances of the parties, following a marriage of:
  - Long duration, if such an award is appropriate upon consideration of the ten factors by a preponderance of the evidence;
  - Moderate duration, if such an award is appropriate based upon clear and convincing evidence after consideration of the 10 factors; or
  - Short duration, if there are written findings of exceptional circumstances.

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<sup>13</sup> Section 61.08(1), F.S.

<sup>14</sup> Section 61.08(5), F.S.

<sup>15</sup> Section 61.08(6), F.S.

<sup>16</sup> Section 61.08(7), F.S.

<sup>17</sup> Section 61.08(8), F.S.

- Is not for a fixed period of time.
- May be modified or terminated based upon a substantial change in circumstances, including retirement of the obligor or upon the existence of a supportive relationship benefiting the obligee.
- Terminates upon the death of either party or upon the remarriage of the party receiving alimony.

### ***Modification or Termination of Alimony - In General***

Where allowed, either party may seek modification (up to termination) of an alimony award on the grounds of a substantial change in circumstances.<sup>18</sup> To obtain a modification of alimony, the party seeking modification must allege, and the trial court must find, that:

- There has been a substantial change in circumstances.
- The change was not contemplated at the time of the final judgment of dissolution.
- The change is sufficient, material, permanent, and involuntary.<sup>19</sup>

The mere existence of a substantial change in circumstances does not automatically lead to a modification or termination of alimony, it merely opens up the question of the appropriate amount of alimony based on the new situation and on the normal equitable factors, namely need and ability to pay. The court may modify support retroactively to the date of the filing of the motion.<sup>20</sup> If the parties to a dissolution of marriage settled the case and have designated alimony as non-modifiable in the marital settlement agreement, the court may not thereafter modify the alimony.<sup>21</sup>

### ***Modification Based on a Supportive Relationship***

To avoid termination of an alimony award because of remarriage, it was once common for an obligee former spouse to simply “live with” someone else in a committed but non-marital arrangement. Today, the existence of a supportive relationship between the obligee and a third party may be a substantial change in circumstances that warrants a modification (up to termination) of alimony. To modify alimony on an assertion of cohabitation between the obligee and a third party, the court must find:

- The existence of a supportive relationship between the obligee and a third party; and
- That the obligee 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.<sup>22</sup>

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<sup>18</sup> Section 61.14(1)(a), F.S.

<sup>19</sup> *Golson v. Golson*, 207 So. 3d 321, 325 (Fla. 5th DCA 2016); *Tanner v. Tanner*, 2021 WL 4877772 (Fla. 2nd DCA 2021).

<sup>20</sup> Section 61.14(1)(a), F.S.

<sup>21</sup> *Dills v. Perez*, 2021 WL 5140865 (Fla. 5th DCA 2021) (“[P]arties to a marital dissolution are free to enter into contractual agreements that include provisions no court of law could impose.”).

<sup>22</sup> Section 61.14(b), F.S.

The burden is on the obligor to show by a preponderance of evidence that a supportive relationship exists.<sup>23</sup>

### ***Modification of Alimony Based on Retirement***

Retirement of a party in a pending dissolution of marriage case falls within the “need and ability to pay” framework. Voluntary retirement may qualify as a substantial change in circumstances which warrants a modification or termination of an existing alimony award. It is an exception to the general rule that a substantial change in circumstances must result from an involuntary action.

Retirement, whether related to an initial award of alimony or as a substantial change in circumstances for modification, is not addressed in statute. In deciding whether to modify or terminate alimony based on retirement of the obligor, the courts look to whether the retirement is reasonable. There are no fixed standards for reasonable. The leading case in this area ruled:

In determining whether a voluntary retirement is reasonable, the court must consider the payor’s age, health, and motivation for retirement, as well as the type of work the payor performs and the age at which others engaged in that line of work normally retire. . . . [A] payor spouse should not be permitted to unilaterally choose voluntary retirement if this choice places the receiving spouse in peril of poverty. Thus, the court should consider the needs of the receiving spouse and the impact a termination or reduction of alimony would have on him or her. In assessing those needs, the court should consider any assets which the receiving spouse has accumulated or received since the final judgment as well as any income generated by those assets.<sup>24</sup>

### **Timesharing with Minor Children**

Determination of a time-sharing schedule for minor children is of vital importance to the children and their parents. Time-sharing also affects the calculation of child support.

#### ***Timesharing - In General***

The public policy of the state is for each minor child to have “frequent and continuing contact with both parents.”<sup>25</sup> 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.<sup>26</sup> In setting a time-sharing award, there is no presumption for or against the father or mother of the child or for or against any specific time-sharing schedule when creating or modifying the parenting plan of the child.<sup>27</sup> In determining time-sharing with each parent, a court must consider the best interests of the child based on statutory factors, namely:

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<sup>23</sup> Section 61.14(1)(b)1., F.S.

<sup>24</sup> *Pimm v. Pimm*, 601 So. 2d 534, 537 (Fla. 1992).

<sup>25</sup> Section 61.13(2)(c)1., F.S.

<sup>26</sup> Section 61.13 (2)(c)2., F.S.

<sup>27</sup> Section 61.13(2)(c)1., F.S.

- The demonstrated capacity of each parent to have a close and continuing parent-child relationship, honor the time-sharing schedule, and be reasonable when changes are required.
- The demonstrated capacity and disposition of each parent to determine, consider, and act upon the needs of the child, including developmental needs.
- The length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity.
- The geographic viability of the parenting plan, with special attention paid to the needs of school-age children and the amount of time to be spent traveling to effectuate the parenting plan.
- The moral fitness and the mental and physical health of the parents.
- The reasonable preference of the child, if the child is of sufficient intelligence, understanding, and experience to express a preference.
- The demonstrated capacity and disposition of each parent to provide a consistent routine for the child, such as discipline, and daily schedules for homework, meals, and bedtime, and to be involved in the child's school and extracurricular activities.
- The demonstrated capacity of each parent to keep the other parent informed about the minor child, and the willingness of each parent to adopt a unified front on major issues.
- Evidence of domestic violence, sexual violence, child abuse, child abandonment, or child neglect, or that either parent has knowingly provided false information about these issues. If the court accepts evidence of prior or pending actions on these issues, the court must acknowledge in writing that the evidence was considered in evaluating best interests.
- The particular parenting tasks customarily performed by each parent and the division of parental responsibilities before and during litigation, including the extent to which parenting responsibilities were undertaken by third parties.
- The demonstrated capacity and disposition of each parent to maintain an environment for the child which is free from substance abuse.<sup>28</sup>

A final factor provides the court with flexibility to consider any other factor relevant in establishing a parenting plan, including a time-sharing schedule.<sup>29</sup>

### ***Modification of a Timesharing Award***

Times change and circumstances change. Just like alimony, timesharing with a minor child is subject to future modification by the court. Either party to a final judgment of dissolution or final order regarding timesharing and child support may seek modification of the timesharing or child support award on the grounds of a substantial change in circumstances.<sup>30</sup> The party seeking modification of a timesharing order must allege, and the trial court must find, that:

- Circumstances have substantially and materially changed since the original custody determination;
- The change was not reasonably contemplated by the parties; and
- The child's best interests justify changing custody.<sup>31</sup>

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<sup>28</sup> Section 61.13(3), F.S.

<sup>29</sup> Section 61.13(3)(t), F.S.

<sup>30</sup> Section 61.14(1)(a), F.S.

<sup>31</sup> *Korkmaz v. Korkmaz*, 200 So. 3d 263, 265 (Fla. Dist. Ct. App. 2016)



The court may modify support retroactively to the date of the filing of the motion.<sup>32</sup> Unlike alimony, timesharing is always modifiable while the child is a minor and the parties may not enter into an agreement that prohibits modification in the future.

### ***Studies on Equal Time-sharing***

A paper reviewing 40 studies on equal time-sharing found in part that:

While acknowledging that some studies were more methodologically sophisticated and used more valid and reliable measures than the others, the fact remains that the 40 studies reached similar conclusions. First, shared parenting was linked to better outcomes for children of all ages across a wide range of emotional, behavioral, and physical health measures. Second, there was not any convincing evidence that overnighting or shared parenting was linked to negative outcomes for infants or toddlers.<sup>33</sup>

### **Bifurcation of a Dissolution Case**

Normally, a dissolution of marriage case is resolved when the court issues an omnibus final judgment of dissolution, which judgment dissolves the marriage, splits the debts and property of the couple, and where required, resolves time-sharing with the children, child support, and alimony. The term “bifurcation” refers to the process whereby the court grants the dissolution of marriage but reserves jurisdiction to resolve the remaining issues between the parties at a later date.

Parties seek bifurcation mostly for purposes of remarriage. Bifurcation is allowed but its use is discouraged by the courts. The Florida Supreme Court explained why:

[W]e believe the trial court 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.<sup>34</sup>

The Florida Supreme Court has established trial court time standards for the most common types of cases. The time standards are not deadlines, but represent the time within which most cases should be resolved. The time standard for a contested domestic relations case is 180 days from filing to final disposition.<sup>35</sup>

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<sup>32</sup> Section 61.14(1)(a), F.S.

<sup>33</sup> Neilson, *Shared Physical Custody: Summary of 40 Studies on Outcomes for Children*, Journal of Divorce & Remarriage, 55:613–635, 2014

<sup>34</sup> *Cloughton v. Cloughton*, 393 So. 2d 1061, 1062 (Fla. 1980).

<sup>35</sup> Fla. R. Jud. Admin. 2.250(a)(1)(C).

## Presumptions

A presumption in a legal proceeding is an assumption of the existence of a fact that is in reality unproven by direct evidence. A presumption is derived from another fact or group of facts that has been proven in the action. If a presumption is recognized, the presumed fact must be found to be present if the trier of fact finds that the underlying facts which give rise to the presumption exist. Presumptions usually assist in managing circumstances in which direct proof is rendered difficult. Presumptions arising out of considerations of fairness, public policy, and probability, as well as judicial economy, are also useful devices for allocating the burden of proof.<sup>36</sup> There are two types of presumption applicable to civil actions -- a presumption affecting the burden of producing evidence and a presumption affecting the burden of proof.<sup>37</sup>

Presumptions that are recognized primarily to facilitate the determination of an action, rather than to implement public policy, are presumptions affecting the burden of producing evidence. These so-called bursting bubble presumptions are recognized when the underlying facts are proved to exist and they remain in effect until credible evidence is introduced to disprove the presumed fact. Once the evidence of the nonexistence of the presumed fact is offered, the presumption disappears.<sup>38</sup>

Any presumption not falling within the category of presumptions affecting the burden of producing evidence is a presumption affecting the burden of proof.<sup>39</sup> These presumptions are recognized because they express a policy that society deems desirable. When proof is introduced of the basic facts giving rise to a presumption affecting the burden of proof, the presumption operates to shift the burden of persuasion regarding the presumed fact to the opposing party.<sup>40</sup>

## Social Security Retirement Age

The original Social Security Act of 1935 set the age for receiving full retirement benefits at 65.<sup>41</sup> Citing improvements in the health of older people and increases in average life expectancy as primary reasons for increasing the normal retirement age, Congress has increased the age for full retirement. On the effective date of this bill, the full retirement age for Social Security purposes will be 66 years and 4 months of age. It will increase gradually in the future until it reaches 67 years of age on January 1, 2027.<sup>42</sup>

The minimum age for claiming Social Security retirement benefits is 62. Benefits are reduced when a person elects to take early benefits.<sup>43</sup> The act increasing the age for full benefits did not change the minimum age for claiming benefits.

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<sup>36</sup> *Presumptions—Generally*, 1 Fla. Prac., Evidence s. 301.1 (2020 ed.).

<sup>37</sup> Section 90.302, F.S.

<sup>38</sup> *Types of presumptions which affect the burden of producing evidence*, 1 Fla. Prac., Evidence s. 303.1 (2020 ed.).

<sup>39</sup> Section 90.304, F.S.

<sup>40</sup> *Types of presumptions which affect the burden of proof*, 1 Fla. Prac., Evidence § 304.1 (2020 ed.).

<sup>41</sup> U.S. Social Security Administration, *Social Security Fact Sheet: Increase in Retirement Age*, <https://www.ssa.gov/pressoffice/IncRetAge.html> (last viewed Feb. 23, 2022).

<sup>42</sup> U.S. Social Security Administration, *Retirement Benefits*, <https://www.ssa.gov/benefits/retirement/planner/agereduction.html> (last viewed Feb. 23, 2022).

<sup>43</sup> *Id.*

### III. Effect of Proposed Changes:

#### **Alimony**

##### *Forms of Alimony*

The bill eliminates permanent alimony as a form of alimony that a court may award. If the court orders a combination of forms of alimony, it must make written findings regarding the basis for the award. A combination may be awarded only to provide greater economic assistance for the purpose of rehabilitation of the obligee.

##### *Criteria for an Award of Alimony*

The bill repeals current law that allows a court to consider the adultery of either spouse when determining the amount, if any, of alimony to award.

The bill requires the court to make specific written findings of the need for alimony. The bill amends the 10 factors for consideration in determining the amount of an award of alimony as follows:

- The standard of living established during the marriage factor is limited. In looking at the standard of living during the marriage, the court must take into account the needs and necessities of life for each party after dissolution. The bill also creates a rebuttable presumption that both parties will have a lower standard of living after the dissolution.
- The tax treatment factor is modified by repeal of the portion regarding the tax treatment of the alimony. This reflects a change in the federal tax code effective January 1, 2019.
- A court using the “any other factor” language must specify the other factor and the findings of fact justifying the factor.

The bill prohibits a court from requiring that the obligor purchase life insurance or secure a bond or other security naming the obligee as beneficiary. The bill adds that the obligee may purchase life insurance on the obligor, and that the obligor must cooperate with the application and underwriting process. The bill implies that an obligee has an insurable interest in the life of obligor.

The bill changes the length of time married as a classification of a marriages being either short-term, moderate-term, or long-term. A short-term marriage is changed to 0-10 years, a moderate-term marriage is changed to 10-20 years, and a long-term marriage is changed to 20 or more years duration. The bill also repeals references to these three terms of marriage; thus, the changes in length of marriages has no effect.

The bill limits the length of an alimony award:

- Bridge-the-gap alimony is not changed by the bill, and remains limited to 2 years.
- Rehabilitative alimony is limited to the lesser of 5 years or upon early completion of the rehabilitation plan.

- No durational alimony may be awarded if the marriage lasted fewer than 3 years.<sup>44</sup> Durational alimony may end upon retirement of the obligor (see discussion below). With two exceptions, durational alimony of a marriage of over 3 years is limited in duration to:
  - 50 percent of the length of the marriage if the length of the marriage was between 3 and 10 years.
  - 60 percent of the length of the marriage if the length of the marriage was between 10 and 20 years.
  - 75 percent of the length of the marriage if the length of the marriage was over 20 years.
- The two exceptions regarding the maximum length of durational alimony, which thereby allow durational alimony to extend beyond the maximum length above, only apply so long as there is a need for the special exception. The exceptions are:
  - Where the party seeking alimony is permanently mentally and physically disabled; or
  - Where the party seeking alimony is the full-time caregiver to a fully and permanently mentally or physically disabled child who is common to the parties.

The bill also changes durational alimony to:

- Limit the amount of durational alimony to the lesser of the obligee's reasonable need or no more than 35 percent of the difference between the parties' net incomes.
- Add that proof of a supportive relationship between the obligee and another person, at any time starting 180 days before the filing of the action for dissolution, may be considered by the court. The factors that a court must consider in finding whether a supportive relationship exists are the same factors used in current law applicable to a modification based on a supportive relationship.
- Repeal the requirement to show "exceptional circumstances" in order to modify the length of the alimony.
- Codify standards for retirement by an obligor (see retirement discussion below).

The term "net income" is defined by the bill as gross income<sup>45</sup> minus allowable deductions, which are:

- Federal, state, or local income tax deductions, adjusted for actual filing status and allowable dependents and income tax liabilities.
- Federal insurance contributions or self-employment tax.
- Mandatory union dues.
- Mandatory retirement payments.
- Health insurance payments, excluding payments for coverage of a minor child.
- Court-ordered support for other children which is actually paid.
- Spousal support paid pursuant to a court order from a previous marriage.

The bill makes the following additional changes to, and limits on, an alimony award:

- The court may not use potential Social Security benefits in calculating imputed income.

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<sup>44</sup> The length of the marriage is calculated as follows: the time period starts on the date of the marriage, and ends on date of the filing of the petition for dissolution of the marriage.

<sup>45</sup> The bill references the definition of "gross income" in the child support law at s. 61.30(2), F.S. That subsection broadly includes all forms of income, including imputed income, but excluding public support payments.

- For a spouse to claim disability as grounds for not imputing income to that spouse, the spouse must either be actually qualified for federal Social Security benefits or must show that he or she would qualify as disabled under that program.
- The court must consider all alimony payments made prior to the final hearing, whether voluntary or court-ordered, when determining the amount and duration of alimony awarded in the final judgment of dissolution.
- The bill repeals the provision providing that an award of alimony may not leave the obligor with significantly less net income than the obligee, except with exceptional circumstances. Instead, the bill provides that, notwithstanding any other statute regarding alimony, alimony may not be awarded to a party who has a monthly net income that is equal to or more than the other party's monthly net income.

### ***Retirement - Cases First Adjudicated After July 1, 2022***

When an obligor reaches the Social Security full retirement age, durational alimony ends, provided that:

- Notice of retirement was personally served on the obligee, and his or her last known attorney of record if the attorney is still practicing law in the county, at least 1 year before the intended date of retirement.
- The obligee has not objected, or if the retirement was objected to, the court has approved the retirement.

Any of the following are grounds for objection to retirement:

- That the obligee's income after the modification or termination would be less than 130 percent of the federal poverty guidelines for a one-person household, as published by the United States Department of Health and Human Services, based on the obligee's income and investable assets, including any retirement assets from which the obligee can access income without incurring early withdrawal penalties.<sup>46</sup>
- That the party seeking alimony would be left with the inability to meet the basic needs and necessities of life, such as housing, utilities, food and transportation.
- That the retirement is a violation of the terms of the marital settlement agreement between the parties because the marital settlement agreement either does not allow for modification or termination of the alimony award or the proposed reduction in alimony does not comply with applicable terms for modification of alimony specified in the agreement.
- That the obligee is the full-time in-home caregiver to a fully and permanently mentally or physically disabled child who is common to the parties.
- That the obligee is permanently mentally or physically disabled and unable to provide for his or her own support, either partially or fully.

If the obligor continues to work beyond the noticed retirement date and earns active gross income of more than 50 percent of the 3 year average preretirement active gross income, the court must extend durational alimony to the end of its previously-ordered termination or the point at which the obligor reduces his or her active gross income to less than 50 percent.

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<sup>46</sup> The 2022 HHS Poverty Guideline for a one-person household is \$13,590. <https://aspe.hhs.gov/topics/poverty-economic-mobility/poverty-guidelines>. 130% of that figure is \$17,667. The guidelines are adjusted annually.

The term “active gross income” generally means income from active work or self-employment and excludes investment and other passive income. Specifically, the bill defines “active gross income” as:

Salary, wages, bonuses, commissions, allowances, overtime, tips, and other similar payments and business income from self-employment, partnership, close corporations, independent contracts, and other similar sources. For purposes of this definition, “business income” means gross receipts minus ordinary and necessary expenses required to produce income and requires that such business income be derived in a way that meets any of the material participation tests outlined in the Internal Revenue Service’s Publication 925 (2020), Passive Activity and At-Risk Rules.

If a spouse has reached the Social Security full retirement age at the time of the final adjudication of the petition for dissolution of marriage, that spouse may not be ordered to pay any form of alimony to the other spouse unless one of these apply:

- The other spouse would, based on the outcome of the dissolution, have income less than 130 percent of the federal poverty guidelines for a one-person household;
- The obligee would be left with the inability to meet the obligee’s basic needs and necessities of life, such as housing, utilities, food and transportation.
- The party seeking alimony is the full-time caregiver to a fully and permanently mentally or physically disabled child who is common to the parties;
- The party is permanently and mentally or physically disabled and as a result thereof is unable to provide for his or her own support, whether partially or fully; or
- The party is continuing to work and earn more than 50 percent of the active gross income average for the 3 years before achieving the retirement age, but only so long as he or she continues to earn more than the 50 percent.

#### ***Retirement - Modification of an Existing Award of Alimony***

Within the 12 months before a planned retirement, an obligor may file a notice of retirement and intent to terminate alimony. A copy must be personally served on the obligee and his or her attorney if the attorney is still practicing law in the county. The obligee has 20 days after service to object to the retirement. Any of the following are grounds for objection:

- That the obligee’s income after the modification or termination would be less than 130 percent of the federal poverty guidelines for a one-person household, as published by the United States Department of Health and Human Services, based on the obligee’s income and investable assets, including any retirement assets from which the obligee can access income without incurring early withdrawal penalties.
- That the obligee would be left with the inability to meet the obligee’s basic needs and necessities of life, such as housing, utilities, food and transportation.
- That the modification or termination is a violation of the terms of a marital settlement agreement between the parties because the marital settlement agreement either does not allow for modification or termination of the alimony award or the proposed reduction in alimony does not comply with applicable terms for modification or termination of alimony specified in the agreement.

- That the obligee is the full-time in-home caregiver to a fully and permanently mentally or physically disabled child who is common to the parties.
- That the obligee is permanently mentally or physically disabled and unable to provide for his or her own support, either partially or fully.

If any of these conditions exist, the court must make written findings and must consider the following factors when deciding whether to modify the length or amount of alimony:

- The duration of the marriage.
- The financial resources of the obligee, comparing them to those distributed at divorce and in light of how the obligee has managed those assets.
- The obligee's current assets and available sources of income, including retirement accounts not subject to a tax penalty for early withdrawal.<sup>47</sup>
- The effort and sacrifices of time and leisure that would be necessary for the obligor to continue to provide such alimony.
- Consideration of the presumption that the obligor has a right to retire when attaining full retirement age as per the Social Security Administration.
- The obligor's age and health.
- The terms of a marital settlement, if any, that govern modification of alimony.

Unless the obligee objects and the court rules in favor of the obligee:

- Durational alimony is decreased by 25 percent starting on the later of one year after the notice of intent to retire was filed or the date that the obligor reaches 65 years of age.
- Durational alimony is decreased an additional 25 percent (of the initial amount) each year thereafter until termination after 4 years.
- However, if the obligor continues to work beyond the retirement age, and in so working earns more than 50 percent of the 3-year average preretirement active gross income, the court may extend the length of alimony until the obligor reduces his or her active gross income below the 50 percent threshold.

Alternatively, an obligor may seek court permission for a reasonable retirement. A petition for reasonable retirement may be filed up to 12 months before the anticipated retirement. A person may seek reasonable retirement if he or she has reached age 65 or earlier if reasonable for his or her profession or line of work. If the court finds the retirement to be reasonable, the court may allow the retirement and thereby terminate alimony, unless it finds and puts in writing cause not to allow the retirement. In determining whether the retirement is reasonable, the court must consider these factors:

- The obligor's age and health.
- The obligor's motivation for retirement.
- The obligor's profession or line of work and the typical retirement age for that profession or line of work.

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<sup>47</sup> "Generally, the amounts an individual withdraws from an IRA or retirement plan before reaching age 59½ are called 'early' or 'premature' distributions. Individuals must pay an additional 10% early withdrawal tax unless an exception applies." <https://www.irs.gov/retirement-plans/plan-participant-employee/retirement-topics-tax-on-early-distributions> (last viewed Feb. 23, 2022). The IRS recognizes 18 exceptions to the early withdrawal additional tax. The additional tax is referred to as additional because the withdrawal is ordinary income and thus is also subject to income tax.

- The impact that a termination or reduction of alimony would have on the obligee, considering assets of the obligee, income generated by such assets, retirement assets from which the obligee can access income without incurring early withdrawal penalties, and the obligee's role in the depletion or conservation of any assets.

The bill provides that new receipt of any Social Security, disability, or retirement payments by an obligee is considered a substantial change in circumstances that would allow the obligor to seek modification of alimony.

The bill further provides that agreements on alimony payments, whether voluntary or pursuant to a court order, which allow for modification or termination of alimony are considered agreements that are expressly modifiable or eligible for termination once the specified condition is met.

### ***Modification or Termination of Alimony Based on a Supportive Relationship***

The bill expands the qualification for the filing of a petition to modify or terminate alimony based on a supportive relationship to include the right to file the petition regarding a past relationship happening up to 180 days prior to filing the petition. If the court finds that a supportive relationship existed, the court may order equitable reimbursement of past alimony that was paid.

The bill provides that, upon proof that a supportive relationship, the obligee has the burden of proof to show that alimony should not be reduced or terminated. Thus, the bill effectively creates a presumption that alimony should be reduced or terminated if the obligee is involved in a supportive relationship.

The bill requires that a court make written findings regarding each of the factors regarding whether a supportive relationship exists.

The bill provides that a supportive relationship of the obligor is not actionable. Remarriage or cohabitation by the obligor is not grounds for either party to petition for modification of alimony.

### **Timesharing with Minor Children**

The bill creates a rebuttable presumption that equal time-sharing between the parents is in the best interest of a child common to the parties. The parties may waive the presumption and agree on a different timesharing agreement.

The bill also provides that a parent's permanent relocation to a residence within 50 miles of the primary residence of the child is a substantial, material, and unanticipated change in circumstances.

### **Bifurcation of Dissolution of Marriage Case**

Applicable to a petition for dissolution of marriage filed on or after July 1, 2022, the bill creates a statutory right to bifurcation of a dissolution of marriage case. Either party may request bifurcation if more than two years have elapsed since the respondent spouse was served with a summons. Unless the other party shows that irreparable harm will result from granting a final



judgment of dissolution of marriage, the court must grant the motion. Once granted, the court will enter a final judgment of dissolution of marriage with a reservation of jurisdiction to subsequently determine all other substantive issues.

Before granting the final dissolution reserving jurisdiction, if the court has not already done so, the court must enter temporary orders necessary to protect the parties and their children, which orders remain effective until all other issues can be adjudicated by the court.

#### **Effective Date**

The bill takes effect July 1, 2022, and applies to cases pending on that date, except that the bifurcation provision applies to cases filed on or after that date.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

The bill does not require counties or municipalities to spend funds or limit their authority to raise revenue or receive state-shared revenues as specified in article VII, section 18 of the Florida Constitution.

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

None.

##### **C. Trust Funds Restrictions:**

None.

##### **D. State Tax or Fee Increases:**

None.

##### **E. Other Constitutional Issues:**

Some commentators to the bill have alleged that the portions allowing for modification of alimony based on retirement of the payor are retroactive and thus “unconstitutional.” Note that the bill does not make changes that would require the return of alimony paid in the past, only future alimony may be affected. The bill does not create a right to modify alimony based on retirement, it merely adds parameters to the existing right to modification. A party to an existing alimony award knew, or should have known, that alimony awards are generally modifiable in the future. The bill does not affect terms of a marital settlement agreement that the parties designated as non-modifiable. The bill does not appear to be retroactive or to impair existing contracts.

Additionally, courts have ruled that “legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations.”<sup>48</sup> Even if found to be

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<sup>48</sup> *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976).

retroactive, a retroactive civil legislation violates due process only if it is particularly “harsh and oppressive” or “arbitrary and irrational.”<sup>49</sup>

**V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Indeterminate. CS/CS/SB 1796 may reduce litigation costs by making alimony awards and timesharing orders more predictable.

C. Government Sector Impact:

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 61.046, 61.08, 61.13, 61.14, and 61.19.

**IX. Additional Information:**

A. Committee Substitute – Statement of Changes:

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

**CS/CS by Rules on March 1, 2022:**

The committee substitute adds that:

- Time-sharing with minor children is changed by creation of a presumption in favor of equal timesharing between parents;
- A noncustodial parent’s move to within 50 miles of a child’s primary residence is a substantial change in circumstances;
- The minimum age at which one may retire and seek modification of an alimony award is 65, unless the court finds the retirement qualifies as a reasonable retirement; and
- If the obligee would be left with the inability to meet the obligee’s basic needs and necessities of life, including, but not limited to, housing, utilities, food, and

<sup>49</sup> *Pension Ben. Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 733 (1984).

transportation, the court may refuse to modify the obligor's alimony obligation based on retirement.

**CS by Judiciary on January 24, 2022:**

The committee substitute removes a reference to “involuntary combat-related disability benefits” as an exception to income of a party; removes the priorities of the remaining types of income; removes the ability to agree to permanent alimony; repeals current law allowing evidence of adultery; removes new limit on rehabilitative alimony of one-half of the durational alimony limit; replaces references to “medically needy” in favor of “permanently disabled”; removes statutory prohibition on court considering the income and assets of a new spouse of the obligor; changes bifurcation period from one year to two years; and makes numerous technical, grammar and style changes.

**B. Amendments:**

None.