

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 534

INTRODUCER: Senator Grall

SUBJECT: Equitable Distribution of Marital Assets and Liabilities

DATE: January 21, 2024

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Collazo</u>	<u>Cibula</u>	<u>JU</u>	Favorable
2.	<u>Hall</u>	<u>Tuszynski</u>	<u>CF</u>	Pre-meeting
3.	_____	_____	<u>RC</u>	_____

I. Summary:

SB 534 amends s. 61.075, F.S., which governs the equitable distribution of marital assets and liabilities in dissolution of marriage actions, to establish consistency regarding what qualifies as good cause for an interim partial distribution and to clarify and expand upon existing lists of marital and non-marital assets and liabilities identified in the statute.

Specifically, the bill provides that when determining whether extraordinary circumstances, and therefore good cause, exist for an interim partial distribution, the court must consider the need to:

- Prevent the loss of important assets or defaults on marital debts.
- Pay for dependent child-related expenses.
- Pay for dissolution of marriage proceeding-related expenses, including attorney fees.
- Address any other circumstances justifying entry of an order for interim partial distribution.

With respect to the statutory list of marital assets and liabilities, the bill:

- Clarifies that interspousal gifts of real property must be made consistent with statutory real estate conveyance requirements.
- Provides that joinder of a spouse in the execution of a deed conveying homestead real property to a third party does not change the property's character, or proceeds from its sale, to marital property.
- Includes marital interests in a closely held business as marital assets, and prescribes a method for establishing the value of those interests.

With respect to the statutory list of non-marital assets and liabilities, the bill includes real property acquired separately by either spouse by non-interspousal gift, bequest, devise, or descent, for which legal title has not been transferred to the parties as tenants by the entireties.

The bill takes effect on July 1, 2024.

II. Present Situation:

Dissolution of Marriage

In Florida, a divorce is called a “dissolution of marriage.”¹ Fault has been abolished as a ground for a dissolution of marriage;² the person seeking dissolution only needs to show either that the marriage is “irretrievably broken,” or that the other spouse has been adjudged mentally incapacitated under state law for a period of at least three years.³

Either spouse can file for a dissolution of marriage.⁴ The spouse seeking the dissolution must demonstrate that a marriage exists, one party has been a state resident for at least six months immediately preceding the filing of the petition,⁵ and the marriage is irretrievably broken.⁶ The reason for the irretrievable breakdown may be considered under certain limited circumstances in the determination of alimony, equitable distribution of marital assets and liabilities, and the development of a parenting plan.⁷

Equitable Distribution

Like in most states,⁸ Florida has enacted a statute, s. 61.075, F.S., which requires the equitable distribution of marital assets in dissolution of marriage proceedings. The court is required to conduct a hearing and make certain written findings regarding any contested property, including its value and status as a marital or non-marital asset, after which it can equitably distribute the marital property.⁹

In distributing the marital assets and liabilities between the parties, the court must begin with the premise that the distribution should be equal, unless there is a justification for an unequal distribution based on all relevant factors,¹⁰ including:

- The contribution to the marriage by each spouse, including contributions to the care and education of the children, and services as homemaker.
- The economic circumstances of the parties.
- The duration of the marriage.
- Any interruption of personal careers or educational opportunities of either party.
- The contribution of one spouse to the personal career or educational opportunity of the other spouse.

¹ The Florida Bar, *Consumer Pamphlet: Divorce in Florida*, available at <https://www.floridabar.org/public/consumer/pamphlet010/> (last visited Jan. 18, 2024).

² *Id.*

³ Section 61.052(1), F.S.

⁴ See s. 61.043, F.S. (noting that proceedings are commenced when one party files a petition in circuit court and serves a copy of same with a copy of the summons upon the other party to the marriage).

⁵ Section 61.021, F.S.

⁶ Section 61.052(2), F.S.

⁷ The Florida Bar, *Consumer Pamphlet: Divorce in Florida*, <https://www.floridabar.org/public/consumer/pamphlet010/> (last visited Jan. 18, 2024).

⁸ 25A FLA. JUR. 2D, *Family Law* s. 844.

⁹ *Lord v. Lord*, 220 So. 3d 575, 576 (Fla. 4th DCA 2017).

¹⁰ The equitable distribution of marital assets is based on fairness. *Weimer v. Weimer*, 677 So. 2d 86, 88 (Fla. 4th DCA 1996).

- The desirability of retaining any asset, including an interest in a business, corporation, or professional practice, intact and free from any claim or interference by the other party.
- The contribution of each spouse to the acquisition, enhancement, and production of income or the improvement of, or the incurring of liabilities to, both the marital assets and the non-marital assets of the parties.
- The desirability of retaining the marital home as a residence for any dependent child of the marriage, or any other party, when:
 - It would be equitable to do so;
 - It is in the best interest of the child or that party; and
 - It is financially feasible for the parties to maintain the residence until the child is emancipated or until exclusive possession is otherwise terminated by a court of competent jurisdiction.
- The intentional dissipation, waste, depletion, or destruction of marital assets after the filing of the petition or within two years prior to the filing of the petition.
- Any other factors necessary to do equity and justice between the parties.¹¹

Marital and Non-Marital Assets and Liabilities

Generally, “marital assets” are assets acquired by the parties during their marriage from their work efforts, services, and earnings.¹² The equitable distribution statute includes a list of what, for purposes of the statute, are deemed marital assets and liabilities:

- Assets acquired and liabilities incurred during the marriage, individually by either spouse or jointly by them.
- The enhancement in value and appreciation of non-marital assets resulting from the efforts of either party during the marriage, or from the contribution to or expenditure thereon, of marital funds or other forms of marital assets, or both.
- The paydown of principal of a note and mortgage secured by non-marital real property, and a portion of any passive appreciation in the property pursuant to a statutory formula, if the note and mortgage secured by the property are paid down from marital funds during the marriage.
- Interspousal gifts during the marriage.
- All vested and non-vested benefits, rights, and funds accrued during the marriage in retirement, pension, profit-sharing, annuity, deferred compensation, and insurance plans and programs.¹³

Certain other assets are statutorily presumed to be marital assets unless demonstrated otherwise. Specifically, all real property held by the parties as tenants by the entirety, and personal property titled jointly by the parties as tenants by the entirety – whether acquired prior to or during the marriage – are presumed to be marital assets. If a party makes a claim to the contrary, the burden of proof is on the party asserting that some or all of the property is non-marital.¹⁴

The equitable distribution statute also includes a list of what, for purposes of the statute, are deemed non-marital assets and liabilities:

¹¹ Section 61.075(1)(a)-(j), F.S.

¹² *Hooker v. Hooker*, 220 So. 3d 397, 402 (Fla. 2017). In this context, it does not matter which party holds title to the asset. *Id.*

¹³ Section 61.075(6)(a)1., F.S.

¹⁴ Section 61.075(6)(a)2.-3., F.S.

- Assets acquired and liabilities incurred by either party prior to the marriage, and assets acquired and liabilities incurred in exchange for such assets and liabilities.
- Assets acquired separately by either party by non-interspousal gift, bequest, devise, or descent, and assets acquired in exchange for such assets.
- All income derived from non-marital assets during the marriage unless the income was treated, used, or relied upon by the parties as a marital asset.
- Assets and liabilities excluded from marital assets and liabilities by valid written agreement of the parties, and assets acquired and liabilities incurred in exchange for such assets and liabilities.
- Any liability incurred by forgery or unauthorized signature of one spouse signing the name of the other spouse. Any such liability is a non-marital liability only of the party having committed the forgery or having affixed the unauthorized signature.¹⁵

All assets acquired and liabilities incurred by either spouse subsequent to the date of the marriage, and not specifically established as non-marital assets or liabilities, are presumed to be marital assets and liabilities. Such presumption may be overcome by a showing that the assets and liabilities are non-marital assets and liabilities.¹⁶

Notable in this context is the 2017 Florida Supreme Court decision, *Hooker v. Hooker*.¹⁷ The *Hooker* decision upheld a trial court decision concluding that a property owner's spouse had gifted certain non-marital real property to the other spouse by the owner spouse's actions, even though the real property was originally non-marital and there was no written instrument conveying the property to the other spouse.¹⁸

Another notable issue is how goodwill should be categorized in connection with the valuation of business interests in dissolution of marriage proceedings. While not explicitly identified in statute, business interests in a closely held business acquired by a spouse during a marriage are marital assets, which must be valued and distributed pursuant to state law. The Fair Market Value standard is used to value the business or business interest; in this context, Fair Market Value is the price at which property would change hands between a willing and able buyer and a willing and able seller with neither party under compulsion to buy or sell, and when both parties have reasonable knowledge of the relevant facts.¹⁹ The value of a business in excess of the value of its assets less its liabilities is its goodwill. There are two kinds of goodwill – enterprise goodwill, which is a marital asset, and personal or professional goodwill, which is not a marital asset.²⁰

¹⁵ Section 61.075(6)(b), F.S.

¹⁶ Section 61.075(8), F.S.

¹⁷ 220 So. 3d 397 (Fla. 2017).

¹⁸ See *id.*; see also Family Law Section of the Florida Bar, *Untitled White Paper regarding Florida Statute s. 61.075, Equitable Distribution of Marital Assets and Liabilities*, undated (on file with the Senate Committee on Judiciary) (emphasizing that no written instrument comporting with s. 689.01, F.S., which regulates how real estate may be conveyed, has been executed).

¹⁹ See Large Business and International Division NRC Industry, Engineering Program, and the Small Business/Self-Employed Division, Estate and Gift Tax Program, *Valuation of Non-Controlling Interests in Electing S Corporations – A Job Aid for IRS Valuation Analysts*, Oct. 29, 2014, available at <https://www.irs.gov/businesses/valuation-of-assets> (attaching IRS Rev. Ruling 59-60 as Appendix A).

²⁰ See generally *Thompson v. Thompson*, 576 So. 2d 267 (Fla. 1991); *Schmidt v. Schmidt*, 120 So. 3d 31 (Fla. 4th DCA 2013).

In a 2013 Fourth District Court of Appeal decision, *Schmidt v. Schmidt*,²¹ the court concluded that if a potential buyer of a business requires a non-compete or non-solicitation agreement from a seller, then the goodwill involved is personal and not a marital asset, and therefore should not be included in the equitable distribution.²²

Interim Partial Distributions

If, during the pendency of a dissolution of marriage action, the court finds good cause that there should be an interim partial distribution, the court is authorized to enter an interim order identifying and valuing the marital and non-marital assets and liabilities, setting apart the non-marital assets and liabilities, and providing for a partial distribution of the marital assets and liabilities.²³

The interim order may be entered any time after the date the dissolution of marriage is filed and served, and before the final distribution of marital and non-marital assets and marital and non-marital liabilities.²⁴ It may only be entered upon good cause shown and upon a sworn motion establishing the specific factual bases for the motion. Either party may file the motion and must demonstrate why the matter should not be deferred until the final hearing.²⁵ In this context, “good cause” means extraordinary circumstances that require an interim partial distribution.²⁶ According to the Family Law Section of The Florida Bar, courts have inconsistently construed this “extraordinary circumstances” standard.²⁷

The court must specifically take into account and give appropriate credit for any partial distribution of marital assets or liabilities in its final allocation of marital assets or liabilities. It must also make specific findings in its interim order that any partial distribution will not cause inequity or prejudice to either party as to either party’s claims for support or attorney’s fees.²⁸ Any interim order partially distributing marital assets or liabilities must be pursuant to, and be consistent with, the factors in the statute²⁹ to the extent they relate to the assets or liabilities identified in the sworn motion.³⁰

III. Effect of Proposed Changes:

The bill amends s. 61.075, F.S., which governs the equitable distribution of marital assets and liabilities in dissolution of marriage actions, to establish consistency regarding what qualifies as good cause for an interim partial distribution, and to clarify and expand upon existing lists of marital and non-marital assets and liabilities identified in the statute.

²¹ 120 So. 3d 31 (Fla. 4th DCA 2013).

²² *Id.* at 33.

²³ Section 61.075(5), F.S.

²⁴ *Id.*

²⁵ Section 61.075(5)(a), F.S.

²⁶ Section 61.075(5)(d), F.S.

²⁷ Family Law Section of the Florida Bar, *Untitled White Paper regarding Florida Statute s. 61.075, Equitable Distribution of Marital Assets and Liabilities*, undated (on file with the Senate Committee on Judiciary).

²⁸ Section 61.075(5)(b), F.S.

²⁹ Specifically, ss. 61.075(1) and (3), F.S.

³⁰ Section 61.075(5)(c), F.S.

Interim Partial Distributions

Under existing law, in order to make an interim partial distribution during the pendency of a dissolution action, the court must find that there is good cause for the interim partial distribution. Good cause means that extraordinary circumstances must exist that require the interim partial distribution. However, there has been a lack of consistency in state courts regarding what constitutes “extraordinary circumstances.”

To address this problem, the bill directs the court to consider the following criteria when determining whether extraordinary circumstances exist for purposes of the statute:

- Whether there is a need for funds in order to avoid or prevent the loss of an asset through repossession or foreclosure, the loss of housing, the default by either party of a marital debt, or the levy of a tax lien.
- Whether there is a need for funds to pay an expense for a dependent child if nonpayment of the expense would be detrimental to the child.
- Whether one or both parties have a need to access funds in order to pay a reasonable amount of the attorney fees, court costs, or other suit money for maintaining or defending a proceeding under the dissolution of marriage statute.
- Any other circumstances that justify the entry of an order granting an interim partial equitable distribution.

Marital Assets and Liabilities

In order to address some of the issues raised by the *Hooker* and *Schmidt* decisions, the bill amends the list of marital assets and liabilities in the statute to:

- Clarify that an interspousal gift of real property may not be made in the absence of a writing that complies with certain statutory real estate conveyance requirements.³¹ The joinder of a spouse in the execution of a deed with the sole purpose of the conveyance of homestead real property to any person or entity other than the other spouse, or both spouses jointly, does not change the character of the real property being conveyed, or any proceeds from the sale thereof, to marital property.
- Include the marital interests in a closely held business. The court must determine the value of the marital interests in a closely held business as follows:
 - The standard of value of a closely held business is fair market value. The term “fair market value” means the price at which property would change hands between a willing and able buyer and a willing and able seller, with neither party under compulsion to buy or sell, and when both parties have reasonable knowledge of the relevant facts.
 - If there is goodwill separate and distinct from the continued presence and reputation of the owner spouse, it is considered enterprise goodwill, which is a marital asset that must be valued by the court.
 - The court must consider evidence that a covenant not to compete or a similar restrictive covenant may be required upon the sale of the closely held business, but such evidence alone does not preclude the court from finding enterprise goodwill.

³¹ Specifically, the requirements of s. 689.01, F.S.

Non-Marital Assets and Liabilities

The bill also amends the list of nonmarital assets and liabilities in the statute to include real property acquired separately by either party by noninterspousal gift, bequest, devise, or descent for which legal title has not been transferred to the parties as tenants by the entirety in accordance with the statute.³²

Effective Date

The bill takes effect on July 1, 2024.

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

The bill will reduce litigation costs to the private parties involved in dissolution of marriage proceedings by clarifying the extraordinary circumstances standard in connection with interim partial distribution requests; clarifying the circumstances under which non-marital real property becomes marital real property; and expressly identifying business interests in closely-held businesses as marital assets and providing for a proper valuation of the goodwill associated with them.

³² Section 61.075, F.S.

C. Government Sector Impact:

The bill will reduce litigation and improve judicial economy by amending state law to clarify the extraordinary circumstances standard in connection with interim partial distribution requests; clarifying the circumstances under which non-marital real property becomes marital real property; and expressly identifying business interests in closely-held businesses as marital assets, and providing for a proper valuation of the goodwill associated with them.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 61.075 of the Florida Statutes.

IX. Additional Information:**A. Committee Substitute – Statement of Changes:**

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

None.

B. Amendments:

None.