

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 718

INTRODUCER: Senator Stargel and Others

SUBJECT: Dissolution of Marriage

DATE: March 11, 2013

REVISED: _____

ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1. Brown	Cibula	JU	Pre-meeting
2.		CF	
3.		RC	
4.			
5.			
6.			

I. Summary:

This bill amends the law on alimony awarded in dissolution of marriage cases.

The bill revises the factors a court must consider in awarding alimony:

- The court must consider the same factors in awarding temporary alimony, alimony sought without a concurrent filing of a dissolution of marriage, and alimony required upon entry of a final order.
- The bill deletes as a factor the standard of living enjoyed during a marriage, and replaces it with the net income and standard of living of each party in light of the alimony award.
- The bill also creates a rebuttable presumption that both parties will have a reduced standard of living after a dissolution of marriage.
- Nonmarital assets may be considered.
- The bill requires the court to impute income to an unemployed obligee based on the obligee's prior income and duration of unemployment.

In securing an alimony award, the bill limits to declining life insurance, the type of life insurance that a court may order an obligor to purchase. The death benefit of declining term life insurance declines over time.

The bill amends presumptions relating to alimony based on length of a marriage:

- The bill increases the number of years of marriage required for a marriage to qualify as a short-term, mid-term, or long-term marriage.

- The bill creates a rebuttable presumption against alimony for short-term marriages, and in favor of alimony for long-term marriages.
- The bill specifies percentage caps on an obligor's income that may be awarded as alimony, which are based on length of the marriage, and specifies exceptions to the caps.

The bill amends the forms of alimony:

- Permanent, periodic alimony is eliminated.
- Forms of alimony are prioritized in order of bridge-the-gap, followed by rehabilitative alimony, and lastly, durational alimony.
- The court may not award alimony for a period of time longer than 50 percent of the length of the marriage, unless exceptional circumstances justify a longer award.
- The bill limits the circumstances under which a court may award combinations of alimony forms.

The bill changes the way in which alimony is modified based on a substantial change in circumstances:

- The retirement of the obligor is a substantial change in circumstances.
- Alimony automatically terminates upon an obligor's normal retirement age.
- A court must reduce or terminate an alimony award based on a supportive relationship between the obligee and another person.
- An obligee who is in a supportive relationship and who challenges a modification petition must prove by clear and convincing evidence that the obligee's need for alimony is not reduced by the relationship.
- The modification of an alimony award is presumed to apply retroactively to the date of filing of a petition for modification.

The bill restricts the court's ability to reserve jurisdiction for a separate adjudication of issues after entry of a final judgment in a dissolution of marriage case.

The bill applies to awards of alimony and agreements for alimony in effect before the effective date of the bill. As such, the bill itself effectively is a substantial change in circumstance warranting the modification or termination of an alimony award. The bill provides a schedule for obligors to file modification actions based on length of marriage and type of alimony award.

This bill substantially amends the following sections of the Florida Statutes: 61.071, 61.08, 61.09, 61.14, and 61.19.

II. Present Situation:

Alimony as Other Than Alimony Awarded through a Final Court Order

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

Alimony Requested Without a Filing of Dissolution

The court may consider a request for alimony or child support from a party without a filing for a dissolution of marriage in place, based on the ability of the other party to contribute.³

Bases for Alimony

Chapter 61, F.S., addresses dissolution of marriage proceedings. Alimony is based on financial need and the ability to pay.⁴ 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.⁵

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

Presumptions that Favor or Disfavor Alimony Based on Length of Marriage

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 provides that:

- 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

¹ 24A AM. JR. 2D *Divorce and Separation* §615.

² Section 61.071, F.S.

³ Section 61.09, F.S.

⁴ Section 61.08(2), F.S.

⁵ Section 61.08(2)(a) through (j), F.S.

⁶ Section 61.08(3), F.S.

⁷ *Id.*

⁸ Section 61.08(4), F.S.

As shown in the table below, the statutes appear 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 only exceptional circumstances.

Forms of Alimony

Florida law recognizes various forms of alimony, including bridge-the-gap, rehabilitative, durational, and permanent periodic alimony.¹¹

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

⁹ Section 61.08(8), F.S.

¹⁰ Section 61.08(7), F.S.

¹¹ Section 61.08(1), F.S.

				written findings of exceptional circumstances for a marriage of short duration.
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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.¹²

Substantial Change of Circumstance

A motion for modification may be made by either party for the court to consider a substantial change in circumstances.¹³ If the court modifies support on this basis, the court is authorized to modify support retroactively to the date of the filing of the action.¹⁴

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.¹⁵

¹² Section 61.08(5) through (8), F.S.

¹³ 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 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.

¹⁴ *Id.*

¹⁵ Section 61.14(b), F.S.

The burden is on the obligor to show by a preponderance of evidence that a supportive relationship exists.¹⁶

Premarital Agreements

Premarital agreements must be in writing and signed by both parties.¹⁷ Parties may contract on all aspects of spousal support, including addressing how alimony is established, modified, waived, or eliminated.¹⁸ Florida law does not require consideration for a court to uphold and enforce a premarital agreement.¹⁹ The agreement takes effect upon the event of marriage.²⁰ Agreements can be overturned on the same bases that other sorts of contracts are rendered unenforceable, including that a party did not enter the agreement voluntarily; a party effected the agreement under fraud, duress, coercion, or overreaching; or the agreement was unconscionable.²¹

III. Effect of Proposed Changes:

This bill amends Florida law on alimony awards in dissolution of marriage cases.

Alimony Pendente Lite

Current law does not specify guidelines for the court to consider in awarding temporary alimony. This bill requires the court to calculate temporary alimony using the same statutory factors required for other alimony awards.

Alimony Requested Without a Filing of Dissolution

This bill requires the court to calculate alimony requested without a filing of dissolution of marriage using the same statutory factors required for other alimony awards.

Bases for Alimony

The bill establishes that a party seeking alimony has the burden of proving a need for alimony and that the other party has the ability to pay alimony. If the need and ability to pay are established, the court must consider the revised statutory factors in determining the type and amount of alimony.

This bill removes the standard of living established during the marriage as a factor for the court to consider in awarding alimony. The bill adds a new factor, which is the net income and standard of living of each party in light of the alimony award. Moreover, the bill creates a rebuttable presumption that both parties will have a reduced standard of living after dissolution of marriage, which a party may overcome by a preponderance of the evidence.

¹⁶ Section 61.14(1)(b)1., F.S.

¹⁷ Section 61.079(3), F.S.

¹⁸ Section 61.079(4)(a)4., F.S.

¹⁹ *Id.*

²⁰ Section 61.079(5), F.S.

²¹ Section 61.079(7)(a), F.S.

The bill appears to allow the court to consider nonmarital assets as a factor if the assets were relied upon by the parties during the marriage.

Imputing Income

The bill requires a court to impute income to the obligee in dissolution cases for marriages other than long-term marriages. However, a court may not impute social security retirement benefits as income to an obligor of alimony.

A court must impute income to the obligee in varying percentages of the obligee's income before becoming unemployed, based on the length of time that an obligee is unemployed. An obligee can dispute imputed income by a showing of a preponderance of evidence that the obligee does not have the ability to earn the imputed income through reasonable means. The bill does not address situations in which an obligee is underemployed.

Presumptions that Favor or Disfavor Alimony Based on Length of Marriage

The bill increases the amount of time for a marriage to qualify as a short-term, moderate-term, or long-term marriage.

The bill increases the length of time for each category of marriage by 3 years as follows:

- The duration of a short-term marriage is increased to 10 years.
- The duration of a moderate-term marriage is increased to more than 10 years but less than 20 years.
- The duration of a long-term marriage is increased to 20 years or more.²²

The increased length of time within each category has the effect of increasing the threshold number of years of marriage required for an obligee to be eligible to qualify for alimony.

Short-term Marriage

The bill creates a rebuttable presumption against any award of alimony for a short-term marriage. The party seeking alimony may overcome the presumption by a showing of clear and convincing evidence. Any monthly award is capped at 20 percent of the obligor's net income.

Mid-term Marriage

The bill stipulates that no presumption applies for a mid-term marriage, unless overcome by the party seeking alimony by a preponderance of the evidence. Any monthly award is capped at 30 percent of the obligor's net income.

²² Section 61.08(4), F.S.

Long-term Marriage

The bill applies a rebuttable presumption in favor of alimony for a long-term marriage, unless the party opposing alimony establishes by clear and convincing evidence that no needs exists. Any monthly award is capped at 33 percent of the obligor's net income.

The court may enter an order exceeding the monthly caps on income if the court provides a written finding of a need for additional alimony. The court may not award alimony to a party with a monthly net income equal to or greater than the other party.

Forms of Alimony

This bill eliminates permanent periodic alimony. Instead, the court prioritizes bridge-the-gap alimony, followed by rehabilitative alimony, and lastly, durational alimony. In rare instances, the court may award a party alimony for longer than 50 percent of the length of the marriage. However, the party must establish by clear and convincing evidence that exceptional circumstances justify the need for a longer period of alimony. The bill authorizes the court to award a combination of forms of alimony, but only to provide greater economic assistance towards rehabilitation.

This bill aligns life insurance requirements with duration of an alimony award. Specifically, the bill requires the court to order a decreasing term life insurance policy when life insurance is ordered as security for alimony. The death benefit of a decreasing term life insurance policy decreases over time. Requirements for life insurance in orders are modifiable if a court modifies an alimony award.

Modification and Termination of Alimony

This bill imposes a burden of proof, clear and convincing evidence, on the party seeking an increase in alimony based on an increased ability to pay. An increase is only considered permanent in nature when the obligor maintains it consistently for 2 years.

The bill creates a rebuttable presumption that a modification or termination of an alimony award is retroactive to the date of the petition filing. If the court finds that the obligee unnecessarily or unreasonably litigated modification, the court may award the obligor reasonable attorney fees and costs.

The bill provides that alimony automatically terminates upon:

- The date in which the durational limit is reached; or
- The obligee's normal retirement age for social security benefits.²³

Supportive Relationship

The bill authorizes an obligee in a supportive relationship to show by clear and convincing evidence that his or her long-term need has not reduced.

²³ The bill allows an obligor to file a petition for termination or modification of alimony effective upon the earlier of the retirement age or the date the obligor reaches the normal retirement age for social security benefits.

Retirement

Currently, the event of retirement alone does not change the continuation of alimony, unless the obligor can demonstrate a concurrent substantial change in circumstance. In addition to providing for automatic termination, the bill defines as a substantial change in circumstance:

- That an obligor has reached reasonable retirement age; has retired; and has no intent to return to work; or
- Has reached the normal retirement age for social security benefits.

Therefore, under the second basis, the bill does not appear to require the obligor to actually retire to qualify as a substantial change in circumstance.

When an obligor retires before normal retirement age, the court must consider whether the retirement age was reasonable, based on the obligor's age, health, work, and normal retirement age for that type of work.

Normal retirement age is not defined.

Adjudication of Issues Separate from Dissolution of Marriage

This bill limits the court's ability to reserve jurisdiction for a separate adjudication of issues after entry of a final judgment in a dissolution of marriage case.

Effective Date and Retroactive Application of Bill

The bill takes effect July 1, 2013. The provisions of the bill apply retroactively to all initial awards of, and agreements for, alimony entered before July 1, 2013, and to modifications of awards or modifiable agreements made before July 1, 2013.

An agreement may also be modified if it is modifiable and if it is 25 percent or more in duration or amount than an alimony award calculated under the provisions of the bill.

Obligors may file a modification action subject to a schedule provided in the bill based on the length of the marriage and type of alimony awarded.

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

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Unlawful Impairment of Contract

The bill applies retroactively to premarital agreements and marital settlement agreements incorporated into a judgment or other post nuptial agreements executed before the effective date of the bill. However, the power of the legislature to provide for the retroactive application of laws 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 bill may violate Article I, s. 10 of the Florida Constitution.

Premarital Agreements

It is well-settled that premarital agreements are contracts.²⁴

Formerly, premarital agreements providing for a division of property and alimony ... were considered as being made in contemplation of divorce and therefore void as against public policy. In recent years, many courts have abandoned the view that premarital agreements are void as against public policy; this change has resulted from a recognition of the increasing number of divorces and from the growing belief that the public policy favoring enduring marriages may be fostered rather than frustrated by allowing the parties to determine by contract their expectations as to property division and support in the event of the dissolution of the marriage.²⁵

Florida law refers to premarital agreements as contracts, expressly provides that agreements do not require consideration, and provides the same bases for unenforceability of premarital agreements as other forms of contract.²⁶

Postnuptial Agreements

Courts treat postnuptial agreements as contracts.²⁷

Marital Settlement Agreements (MSA)

Likewise, courts consider as contracts marital settlement agreements incorporated into final judgments in dissolution of marriage cases. Courts interpret challenges

²⁴ 7 Am. Jur. *Proof of Facts*, 3d 581 (Originally published in 1990).

²⁵ *Id.*

²⁶ Section 61.079(5) and (7), F.S.

²⁷ Where MSA terms are clear and unambiguous, the court must glean party intent from the four corners of the document. (*Macleod v. Macleod*, 82 So. 3d 147, 149 (Fla. 4th DCA 2012)).

to MSAs on the same basis as other forms of contract.²⁸ “A marital settlement agreement entered into by the parties and ratified by a final judgment is a contract, subject to the laws of contract.”²⁹

Separation of Powers

Article II, section 3 of the Florida Constitution provides: “The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.”

The retroactive application of this bill may be challenged on the basis that the bill would have the impact of undoing final judgments entered into by the judicial branch.³⁰

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Alimony obligors may benefit from the provisions of this bill. Alimony recipients may be adversely affected by the changes in the bill.

C. Government Sector Impact:

To the extent that the retroactive application of this bill creates an opening for modification or termination of alimony, judicial workload may increase.

VI. Technical Deficiencies:

The provisions of the bill apply retroactively to all initial awards of, and agreements for, alimony entered before July 1, 2013, and to modifications of awards or modifiable agreements made before July 1, 2013.

Under the bill, an agreement may also be modified if it is 25 percent or more in duration or amount than an alimony award calculated under the provisions of the bill. It is unclear whether

²⁸ 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*, 2013 WL 264190, 2-3 (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)).

²⁹ *Ferguson v. Ferguson*, 54 So. 3d 553, 556 (Fla. 3d DCA 2011).

³⁰ *Bush v. Schiavo*, 885 So. 2d 321, 332, 337 (Fla. 2004). “It is without question an invasion of the authority of the judicial branch for the Legislature to pass a law that allows the executive branch to interfere with the final judicial determination in a case. The continuing vitality of our system of separation of powers precludes the other two branches from nullifying the judicial branch’s final orders.”

the second provision requires a court to reach back to awards that are nonmodifiable, as it appears that the second basis for modifying an award is already subsumed in the first provision.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
