

**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 Rules

**BILL:** CS/CS/SB 718

**INTRODUCER:** Rules Committee; Judiciary Committee; Senator Stargel; and Others

**SUBJECT:** Family Law

**DATE:** March 22, 2013      **REVISED:** \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Brown	Cibula	JU	Fav/CS
2.	Brown	Phelps	RC	Fav/CS
3.				
4.				
5.				
6.				

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

- |                              |                                     |   |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes        |
| B. AMENDMENTS.....           | <input type="checkbox"/>            | Technical amendments were recommended   |
|                              | <input type="checkbox"/>            | Amendments were recommended             |
|                              | <input type="checkbox"/>            | Significant amendments were recommended |

**I. Summary:**

CS/CS/SB 718 revises laws relating to the equitable distribution of marital assets and liabilities, alimony, and child custody.

The bill establishes formulas for a court to use in determining the value of the marital portion of nonmarital real property which is subject to equitable distribution in a divorce proceeding.

The bill authorizes a court to require a party to a divorce to provide security to ensure the payment of the other party's share of marital assets through installment payments. The court is also required to impose interest charges or otherwise recognize the time value of money in determining the amount of installment payments.

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 if relied upon by the parties during the marriage.
- The bill requires the court to impute income to an unemployed obligee based on the obligee's prior income and duration of unemployment.

In requiring an obligor to purchase a life insurance policy to secure an alimony award, the bill authorizes the obligor to select decreasing term life insurance or other form of term life insurance. Before a court may order security, the court must find special circumstances related to availability, cost, and financial impact on the obligated party.

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 the obligee establishes need under a preponderance of the evidence.
- The bill limits the circumstances under which a court may award combinations of alimony forms.

The bill changes the thresholds for modifying an alimony award based on a substantial change in circumstances:

- If alimony and child support are payable concurrently, a reduction or termination of child support does not singularly justify modification of alimony.
- The assets of an obligor's spouse or person with whom the obligor cohabits may not be considered in an action to modify alimony except in exceptional circumstances.
- Reaching a reasonable retirement age, retiring, and not intending to return to work constitutes a substantial change in circumstances.
- 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 expressly provides that the revised criteria for alimony are a substantial change in circumstances. The bill authorizes an obligor to seek the modification of a qualifying alimony award based on the revised criteria.

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 provides that equal time-sharing for parents of minor children is in the best interests of the child. Exceptions apply, including when a parent has a history of domestic violence or otherwise poses a danger to a child; a parent is incarcerated; the distance between residences makes equal time-sharing impracticable; or a parent does not request at least 50 percent time-sharing. The court may depart from equal time sharing under extenuating circumstances if the court provides written findings. This provision applies prospectively.

This bill substantially amends the following sections of the Florida Statutes: 61.071, 61.075, 61.08, 61.09, 61.13, 61.14, and 61.19.

## II. Present Situation:

### Equitable Distribution

#### *Equitable Distribution of Marital Assets and Liabilities under Kaaa v. Kaaa*<sup>1</sup>

In *Kaaa v. Kaaa*, the Florida Supreme Court held that “passive appreciation of a nonmarital asset ... is properly considered a marital asset where marital funds or the efforts of either party contributed to the appreciation.”<sup>2</sup> Payment of a mortgage for real property with marital funds subjects the passive appreciation in the value of the real property to equitable distribution.<sup>3</sup> The Court recognized that the marital portion of nonmarital property encumbered by a mortgage paid down with marital funds includes two components: (1) a portion of the enhancement value of the marital asset resulting from the contributions of the nonowner spouse and (2) a portion of the value of the passive appreciation of that asset that accrued during the marriage.<sup>4</sup>

In *Kaaa*, the Supreme Court provided a methodology for courts to use in determining the value of the passive appreciation of nonmarital real property to be equitably distributed and in allocating that value to both owner and nonowner spouse.<sup>5</sup> Pursuant to the methodology, a court must make several steps:

First, the court must determine the overall current fair market value of the home. Second, the court must determine whether there has been a passive appreciation in the home's value. Third, the court must determine whether the passive appreciation is a

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<sup>1</sup> *Kaaa v. Kaaa*, 58 So. 3d 867 (Fla. 2010).

<sup>2</sup> *Kaaa*, 58 So. 3d at 870.

<sup>3</sup> *Id.* at 871.

<sup>4</sup> *Id.* at 871-872.

<sup>5</sup> *Id.* at 872.

marital asset under section 61.075(5)(a)(2)[, F.S]. This step must include findings of fact by the trial court that marital funds were used to pay the mortgage and that the nonowner spouse made contributions to the property. Moreover, the trial court must determine to what extent the contributions of the nonowner spouse affected the appreciation of the property. Fourth, the trial court must determine the value of the passive appreciation that accrued during the marriage and is subject to equitable distribution. Fifth, after the court determines the value of the passive appreciation to be equitably distributed, the court's next step is to determine how the value is allocated.<sup>6</sup>

The Supreme Court adopted the following formula used in *Stevens v. Stevens*, for the allocation of the appreciated value of nonmarital real property:

If a separate asset is unencumbered and no marital funds are used to finance its acquisition, improvement, or maintenance, no portion of its value should ordinarily be included in the marital estate, absent improvements effected by marital labor. If an asset is financed entirely by borrowed money which marital funds repay, the entire asset should be included in the marital estate. In general, in the absence of improvements, *the portion of the appreciated value of a separate asset which should be treated as a marital asset will be the same as the fraction calculated by dividing the indebtedness with which the asset was encumbered at the time of the marriage by the value of the asset at the time of the marriage.*<sup>7</sup>

Passive appreciation of a nonmarital asset that is unencumbered is not subject to equitable distribution, absent the use of any marital funds or marital labor for its acquisition, improvement, or maintenance.<sup>8</sup>

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

During the 2012 Legislative Session, the Family Law Section of The Florida Bar stated “the formula adopted by the Supreme Court to quantify the marital portion of the passive appreciation is flawed because there is no relationship between the amount of marital funds utilized to pay down the mortgage during the marriage and the passive appreciation of the subject property.”<sup>9</sup> According to the Family Law Section of The Florida Bar, “the formula adopted by the Florida Supreme Court in *Kaaa*, if applied to certain factual scenarios, would result in grossly inequitable results.”<sup>10</sup>

The Family Law Section of The Florida Bar additionally argues that the *Kaaa* decision is inconsistent with s. 61.075(6)(a)1.b., F.S., by requiring a nonowner spouse to have made

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<sup>6</sup> *Id.*

<sup>7</sup> *Kaaa*, 58 So. 3d at 872 (quoting *Stevens v. Stevens*, 651 So. 2d 1306, 1307-08 (Fla. 1st DCA 1995).

<sup>8</sup> *Stevens v. Stevens*, 651 So. 2d 1306, 1307 (Fla. 1st DCA 2006); Dawn D. Nichols and Sean K. Ahmed, *Nonmarital Real Estate: Is the Appreciation Marital, Nonmarital, or a Combination of Both?*, 81 FLA. B.J. 75, 75 (Oct. 2007).

<sup>9</sup> Correspondence to committee staff from David Manz, Chairman of Family Law Section, Florida Bar and John W. Foster, Sr., Chairman of Equitable Distribution Committee, Family Law Section, Florida Bar, (Dec. 19, 2011) (on file with the Senate Committee on Judiciary).

<sup>10</sup> *Id.*

contributions to the property as a prerequisite to sharing in the passive appreciation of the property.<sup>11</sup> Section 61.075(6)(a)1.b., F.S., states that marital assets and liabilities include “the enhancement in value and appreciation of nonmarital assets resulting either from the efforts of either party during the marriage *or* from the contribution to or expenditure thereon of marital funds or other forms of marital assets, or both.”<sup>12</sup>

### ***Security and Interest for Installment Payments***

In equitably distributing marital assets and liabilities, pursuant to s. 61.075(10), F.S., a court may order a party to pay a monetary payment in a lump sum or in installments paid over a fixed period. Section 61.075(10), F.S., does not currently give courts the discretion to require the payor to provide security or pay a reasonable rate of interest if installments are ordered.

### **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.<sup>13</sup> 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.<sup>14</sup>

#### ***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.<sup>15</sup>

### **Bases for Alimony**

Chapter 61, F.S., addresses dissolution of marriage proceedings. Alimony is based on financial need and the ability to pay.<sup>16</sup> 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.

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<sup>11</sup> *Id.*

<sup>12</sup> (Emphasis added).

<sup>13</sup> 24A AM. JR. 2D *Divorce and Separation* §615.

<sup>14</sup> Section 61.071, F.S.

<sup>15</sup> Section 61.09, F.S.

<sup>16</sup> Section 61.08(2), F.S.

- Tax treatment and consequences of alimony awards.
- All sources of income.
- Any other factor that advances equity and justice.<sup>17</sup>

To protect an alimony award, the court may order an obligor to maintain a life insurance policy.<sup>18</sup>

**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.<sup>19</sup>

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.<sup>20</sup>

As shown in the table below, the statutes appear to create a presumption in favor of permanent periodic alimony following a long-term marriage.<sup>21</sup> 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.<sup>22</sup>

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.<sup>23</sup>

**Types of Alimony**

	<b>Bridge-the-gap</b>	<b>Rehabilitative</b>	<b>Durational</b>	<b>Permanent</b>
<b>Purpose</b>	Allows a party to transition from being	Assists a party in becoming self-sufficient through skills training, education,	Provides a party with economic assistance for a set period of time after	Provides for the needs and necessities of life as established during the

<sup>17</sup> Section 61.08(2)(a) through (j), F.S.

<sup>18</sup> Section 61.08(3), F.S.

<sup>19</sup> *Id.*

<sup>20</sup> Section 61.08(4), F.S.

<sup>21</sup> Section 61.08(8), F.S.

<sup>22</sup> Section 61.08(7), F.S.

<sup>23</sup> Section 61.08(1), F.S.

	married to being single upon showing legitimate short-term need.	or work experience.	a marriage of short or moderate duration, or a marriage of long duration if no need exists for a permanent award.	marriage for a party who lacks the financial ability to maintain needs.
<b>Length of Time</b>	Up to 2 years.	Temporary.	Set period of time but not to exceed length of marriage.	Permanent.
<b>Modifiable/Termination</b>	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.
<b>How Established</b>		Requires inclusion of a specific and defined rehabilitative plan.		Awardable if appropriate for a marriage of long duration, upon a showing of clear and convincing evidence for a marriage of moderate duration, and with written findings of exceptional circumstances for a marriage of short duration.

**Modification and Termination of Alimony**

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

- A substantial change in circumstances of either party;
- Cohabitation by the obligee;
- Remarriage by the obligee; or
- Death of either party.<sup>24</sup>

***Substantial Change of Circumstance***

A motion for modification may be made by either party for the court to consider a substantial change in circumstances.<sup>25</sup> 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.<sup>26</sup>

<sup>24</sup> Section 61.08(5) through (8), F.S.

<sup>25</sup> 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

### ***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.<sup>27</sup>

The burden is on the obligor to show by a preponderance of evidence that a supportive relationship exists.<sup>28</sup>

### **Premarital Agreements**

Premarital agreements must be in writing and signed by both parties.<sup>29</sup> Parties may contract on all aspects of spousal support, including addressing how alimony is established, modified, waived, or eliminated.<sup>30</sup> Florida law does not require consideration for a court to uphold and enforce a premarital agreement.<sup>31</sup> The agreement takes effect upon the event of marriage.<sup>32</sup> 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.<sup>33</sup>

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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. (*Koski v. Koski*, 98 So. 3d 93, 94 (Fla. 4th DCA 2012)).

<sup>26</sup> *Id.*

<sup>27</sup> Section 61.14(b), F.S.

<sup>28</sup> Section 61.14(1)(b)1., F.S.

<sup>29</sup> Section 61.079(3), F.S.

<sup>30</sup> Section 61.079(4)(a)4., F.S.

<sup>31</sup> *Id.*

<sup>32</sup> Section 61.079(5), F.S.

<sup>33</sup> Section 61.079(7)(a), F.S.

### **Parenting and Time-sharing**

The public policy of the state is for each minor child to have frequent and continuing contact with both parents.<sup>34</sup> The court must order shared parental responsibility for a minor child unless the court finds that shared responsibility would be detrimental to the child.<sup>35</sup>

### **III. Effect of Proposed Changes:**

This bill amends laws relating to the equitable distribution of marital assets and liabilities, alimony, and child custody.

#### **Equitable Distribution of Marital Assets and Liabilities**

The bill establishes formulas for a court to use in determining the value of the marital portion of nonmarital real property which is subject to equitable distribution in a divorce proceeding. Under the bill, the value of the marital portion of nonmarital real property is comprised of the following:

- The mortgage principal paid during the marriage from marital funds.
- A portion of the passive appreciation of the property which is related to the amount of marital funds used to pay the mortgage.
- Any active appreciation of the property resulting from the efforts or contributions of either party during the marriage.

Under the formula, the passive appreciation in the marital property which is subject to equitable distribution must be determined by multiplying the marital fraction by the passive appreciation of the property during the marriage.

The passive appreciation is determined by subtracting the gross value of the property on date of the marriage or the date of acquisition of the property, whichever is later, from the value of the property on the valuation date in the dissolution action, less any active appreciation of the property during the marriage and less any additional debts secured by the property during the marriage.

The numerator of the marital fraction consists of the amount of mortgage principal paid on any mortgage on the property from marital funds. The denominator consists of the value of the real property on the date of marriage, the date of acquisition of the property, or the date the property was first encumbered by a mortgage on which principal was paid from marital funds, whichever is later.

The value of the marital portion of nonmarital real property may not exceed the total net equity of the property on the valuation date in the dissolution action.

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<sup>34</sup> Section 61.13(2)(c)1., F.S.

<sup>35</sup> Section 61.13 (2)(c)2., F.S.

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

Additionally, the bill authorizes the court to require a person who is ordered to make installment payments as part of the equitable distribution of marital assets and liabilities to provide security and a reasonable rate of interest, or otherwise recognize the time value of money in determining the amount of the installments. If a court requires security or interest, the court must make written findings relating to any deferred payments, the amount of any security required, and the interest. The bill does not preclude the intended recipient of the installment payments from taking action under the procedures to enforce a judgment, in ch. 55, F.S., to collect any funds from a person who fails to make the court-ordered payments.

## **Alimony**

### ***Alimony Pendente Lite*** (Section 1)

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*** (Section 4)

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*** (Section 3)

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 new factors, which include:

- The needs and necessities of life after dissolution of marriage, taking into account the lifestyle of the parties during the marriage; and
- The net income and standard of living available to each party in light of the alimony award.

However, the bill creates a rebuttable presumption that both parties will have a reduced standard of living after dissolution of marriage.

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*** (s. 61.08(11), F.S.)

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. If an obligee alleges a physical disability as the cause for reduced income, the disability stated must conform to disabilities defined by the Social Security Administration. The bill does not address situations in which an obligee is underemployed. A court may not impute social security retirement benefits as income to an obligor of alimony.

***Presumptions that Favor or Disfavor Alimony Based on Length of Marriage*** (Section 3)

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 12 years.
- The duration of a mid-term marriage is increased to more than 12 years but less than 20 years.
- The duration of a long-term marriage is increased to 20 years or more.<sup>36</sup>

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*** (s. 61.08(8)(a), F.S.)

The bill creates a rebuttable presumption against any award of alimony for a short-term marriage. The party seeking bridge-the-gap or rehabilitative alimony may overcome the presumption through a showing of need under a preponderance of the evidence. For durational alimony, a party must demonstrate by clear and convincing evidence a need for alimony. Any monthly award is capped at 20 percent of the obligor's income.

***Mid-term Marriage*** (s. 61.08(8)(b), F.S.)

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

***Long-term Marriage*** (s. 61.08(8)(c), F.S.)

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 income.

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<sup>36</sup> Section 61.08(4), F.S.

The court may enter an order exceeding the monthly caps on awards 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*** (s. 61.08(2)(a), (4), and (7), F.S.)

This bill eliminates permanent periodic alimony. Instead, the bill requires the court to prioritize 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 a preponderance of the evidence that 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. In awarding any type alimony, the court must issue written findings.

This bill aligns life insurance requirements with duration of an alimony award. Specifically, the bill authorizes a person who is required to purchase life insurance to secure an alimony award to select decreasing term life insurance or another form of term life insurance. This bill requires a court to find special circumstances before it may award security. Requirements for life insurance in orders are modifiable if a court modifies an alimony award.

***Modification and Termination of Alimony*** (s. 61.14(1) and (11), F.S.)

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

If alimony and child support are payable concurrently, a reduction or termination of child support does not singularly justify a modification of alimony.

The bill provides that an obligor's remarriage or cohabitation is not a basis for the modification of an alimony award. Further, the bill prohibits in modification actions the consideration of the assets of the obligor's spouse or person with whom the obligor resides except in exceptional circumstances.

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.

***Supportive Relationship*** (s. 61.14(1)(b)2., F.S.)

The bill removes discretion for the court to decide whether to modify an alimony award based upon a supportive relationship between an obligee and a third party.

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.

**Retirement** (s. 61.14(12), F.S.)

Currently, the event of retirement alone does not change the continuation of alimony, unless the obligor can demonstrate a concurrent substantial change in circumstance. 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.

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, motivation to retire, and normal retirement age for that type of work.

An obligor may file a petition for termination or modification of alimony in advance of a retirement date.

**Parenting and Equal Time-sharing** (s. 61.13(2)(c), F.S.)

This bill provides that equal time-sharing with a minor child is in the best interests of the child unless:

- A parent has a history of domestic violence or is otherwise dangerous to a child;
- Clear and convincing evidence of extenuating circumstances justify a departure as documented by a court;
- A parent is incarcerated;
- Distance between parental residences makes equal time-sharing impracticable; or
- A parent does not request at least 50 percent time-sharing.

This provision related to equal time-sharing applies prospectively to initial final custody determinations made after the effective date of the bill.

**Adjudication of Issues Separate from Dissolution of Marriage** (s. 61.19(2), F.S.)

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** (Sections 9 and 10)

The bill expressly provides that the revised criteria for alimony are a substantial change in circumstances. The bill authorizes an obligor to seek the modification of a qualifying alimony award based on the revised criteria.

An award based on a settlement may be modified if the length of the marriage was 15 years or less and the duration of the award exceeds the length of the marriage. Awards based on a settlement which do not satisfy this criteria may be modified if the obligor proves by clear and convincing evidence that the agreement was not voluntary, was obtained through fraud, duress, coercion, overreaching, or involuntariness or, under the circumstances, the agreement was unconscionable.

However, an alimony award based on a settlement agreement that is expressly nonmodifiable may not be modified as a result of the bill.

The bill provides a schedule for obligors to file modification actions based on length of their marriages.

The bill takes effect July 1, 2013.

#### **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.<sup>37</sup>

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

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<sup>37</sup> 7 Am. Jur. *Proof of Facts*, 3d 581 (Originally published in 1990).

parties to determine by contract their expectations as to property division and support in the event of the dissolution of the marriage.<sup>38</sup>

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.<sup>39</sup>

### ***Postnuptial Agreements***

Courts treat postnuptial agreements as contracts.<sup>40</sup>

### ***Marital Settlement Agreements (MSA)***

Likewise, courts consider as contracts marital settlement agreements incorporated into final judgments in dissolution of marriage cases. Courts interpret challenges to MSAs on the same basis as other forms of contract.<sup>41</sup> “A marital settlement agreement entered into by the parties and ratified by a final judgment is a contract, subject to the laws of contract.”<sup>42</sup>

### **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.<sup>43</sup>

## **V. Fiscal Impact Statement:**

### **A. Tax/Fee Issues:**

None.

<sup>38</sup> *Id.*

<sup>39</sup> Section 61.079(5) and (7), F.S.

<sup>40</sup> 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)).

<sup>41</sup> 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)).

<sup>42</sup> *Ferguson v. Ferguson*, 54 So. 3d 553, 556 (Fla. 3d DCA 2011).

<sup>43</sup> *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.”

**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:**

None.

**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.)**CS/CS by Rules on March 21, 2013:**

The committee substitute:

- Establishes formulas for a court to use in determining the value of the marital portion of nonmarital real property which is subject to equitable distribution in a divorce proceeding.
- Authorizes a court to require a party to a divorce to provide security for installment payments of assets that were equitably distributed.
- Requires a court to impose interest charges or otherwise recognize the time value of money in determining the amount of installment payments.
- Extends by 2 years, to 12 years, the length of time that a marriage qualifies as a short-term marriage.
- Provides that a party seeking bridge-the-gap or rehabilitative alimony can rebut the presumption against an alimony award for a short-term marriage upon a showing of need by a preponderance of the evidence.
- Removes language from the bill which provided for alimony awards to automatically terminate upon the reaching of the durational limits or the obligor's normal retirement age for social security retirement benefits.
- Authorizes a person to oppose the imputation of income if the person is disabled, consistent with standards of the Social Security Administration.
- Revises language providing for equal time-sharing of minor children to reduce proof required to establish domestic violence as a basis for departure.
- Provides that an obligor's remarriage or cohabitation is not a basis for the court to modify alimony, unless an obligee establishes exceptional circumstances.

- Revises the event of reaching normal retirement age from constituting a singular basis for a substantial change in circumstances in alimony modification, to one of several factors that the obligor has reached a reasonable retirement age.
- Provides that an obligee will not have to show under a clear and convincing standard, a need for continued alimony upon an obligor's retirement, and instead, the court can make findings of fact justifying continuation of alimony at the present rate.
- Revises the requirements for existing awards to qualify for modification as the result of the bill.
- Refers to an obligor's income, rather than "net income," for the purposes of the percentage of an obligor's income that may be awarded as alimony.
- Changes the schedule for modification filings to allow a filing upon the effective date of the bill or later for an obligor subject to alimony for 15 years or longer; from July 1, 2014 for an obligor subject to alimony for at least 8 years; and from July 1, 2015 for an obligor subject to alimony for less than 8 years.

**CS by Judiciary on March 12, 2013:**

The committee substitute:

- Deletes a sentence which appeared to prohibit the award of alimony in any action other than a proceeding for dissolution of marriage.
- Provides that alimony automatically terminates on the obligor's, rather than the obligee's normal retirement age.
- Expands the circumstances that justify an alimony award having a duration of longer than 50 percent of the length of the marriage. Under the underlying bill, a party must prove the existence of exceptional circumstances. Under the committee substitute, a party need only prove the existence of circumstances.
- Provides a presumption, to apply prospectively, in favor of equal time-sharing for parents of minor children unless a parent has a history of violence or is otherwise dangerous to a child; a parent is incarcerated; the distance between residences makes equal time-sharing impracticable; or a parent does not request at least 50 percent time-sharing. The court may provide written findings for a departure from equal time-sharing in the presence of extenuating circumstances.
- Clarifies that the retroactive application of the bill does not apply to marital settlement agreements that are expressly nonmodifiable.

**B. Amendments:**

None.