

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 Appropriations Subcommittee on Criminal and Civil Justice

BILL: CS/SB 668

INTRODUCER: Judiciary Committee and Senator Stargel

SUBJECT: Family Law

DATE: February 29, 2016 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Brown</u>	<u>Cibula</u>	<u>JU</u>	Fav/CS
2.	<u>Harkness</u>	<u>Sadberry</u>	<u>ACJ</u>	Recommend: Favorable
3.	<u>Harkness</u>	<u>Kynoch</u>	<u>AP</u>	Pre-meeting

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 668 makes various changes to laws relating to the amount and duration of alimony awards, grounds, and procedures for modifying an alimony award due to a substantial change in circumstances, and timesharing with children.

Alimony

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

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

The bill specifies events that constitute a substantial change in circumstances which are grounds for modifying or terminating an alimony award. These grounds include increases in the

recipient's income, the involuntary underemployment or unemployment of the obligor, and the obligor's retirement. This bill authorizes an obligor to request that the court preapprove the customary retirement date for the obligor's profession 1 year in advance of retirement. The bill also lessens the proof required to show the existence of a supportive relationship between an alimony recipient and another person.

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

Time-sharing

Current law provides that the public policy of the state is for each minor to have frequent and continuing contact with both parents after the parents separate or divorce. The bill provides instead that the public policy of the state is that absent good cause, substantially equal time-sharing with both parents is in the best interest of the child. A court must include written findings in an order that establishes an initial permanent time-sharing schedule that provides other than substantially equal time-sharing.

Current law provides a list of factors for the court to apply in determining or modifying time-sharing, based on the best interests of the child. The bill requires a court to use these factors, which are slightly modified, along with two new ones in determining whether a party has overcome the presumption favoring equal time-sharing. The new factors are:

- The amount of time-sharing requested by each parent; and
- The frequency with which a parent would likely leave the child in the care of a nonrelative on evenings and weekends when the other parent would otherwise provide care.

The bill has an indeterminate impact on state court workload and, therefore, an indeterminate fiscal impact.

The bill has an effective date of October 1, 2016.

II. Present Situation:

Alimony Pendente Lite

Alimony pendente lite is temporary alimony awarded after a marital party files for dissolution of marriage. The right to temporary alimony ends when the divorce becomes final, which is after the appeal process has run.¹ Florida law stipulates that a party may request alimony pendente lite through petition or motion, and if well-founded, the court must order a reasonable amount.²

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

² Section 61.071, F.S.

Bases for Alimony

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

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

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

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

Determination of Alimony Based on Length of Marriage

Limitations on Alimony in Florida

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

Florida law categorizes marriage lengths as follows:

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

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

³ Section 61.08(2), F.S.

⁴ Section 61.08(2)(a) through (j), F.S.

⁵ Section 61.08(1), F.S.

⁶ Section 61.08(3), F.S.

⁷ *Id.*

⁸ Section 61.08(4), F.S.

⁹ Section 61.08(8), F.S.

¹⁰ Section 61.08(4), F.S.

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

Limitations on Alimony Based on Duration of Marriage in Other States

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

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

Forms of Alimony

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

¹¹ Colo. Rev. Stat. Ann. s. 14-10-114.

¹² Del. Code Ann. title 14, s. 1512

¹³ Me. Rev. Stat. Ann. title 19-A, s. 951A.

¹⁴ N.Y. Dom. Rel. Law s. 236.

¹⁵ Tex. Fam. Code Ann. Sections 8.054 and 8.055.

¹⁶ Mass. Gen. Laws Chapter 208, Section 49.

¹⁷ Utah Code Ann. s. 30-3-5.

¹⁸ Section 61.08(1), F.S.

Forms of Alimony				
	<i>Bridge-the-gap</i>	<i>Rehabilitative</i>	<i>Durational</i>	<i>Permanent</i>
<i>Purpose</i>	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.
<i>Length of Time</i>	Up to 2 years.	Temporary.	Set period of time but not to exceed length of marriage.	Permanent.
<i>Modifiable/ Termination</i>	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.
<i>How Established</i>		Requires inclusion of a specific and defined rehabilitative plan.		Awardable if appropriate for a marriage of long duration, upon a showing of clear and convincing evidence for a marriage of moderate duration, and with written findings of exceptional circumstances for a marriage of short duration.

Modification and Termination of Alimony

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

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

Substantial Change of Circumstance

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

Cohabitation

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

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

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

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

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

¹⁹ Section 61.08(8), F.S.

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

²¹ Section 61.14(1)(a), F.S.

²² Section 61.14(b), F.S.

²³ Section 61.14(1)(b)1., F.S.

Child Support Enforcement

Congress passed into law Title IV-D of the Social Security Act²⁴ to require states to provide specific child support enforcement services to receive federal funding under the Aid for Dependent Children (AFDC) Program.²⁵ Services are available to single-parent families on public assistance who are entitled to child support from the other parent.

Florida established the Child Support Enforcement Application and Program Revenue Trust Fund to provide a trust fund for deposits of Title IV-D program income.²⁶ The trust fund is administered by the state Department of Revenue.²⁷ The clerk of the court of each circuit operates a depository for alimony transactions, support, maintenance, and support payments.²⁸ A fee is collected for payments made in non-Title IV-D cases to fund the depository.²⁹

privileged against use in any subsequent litigation. . . . Collaborative Law is governed by a patchwork of state laws, state Supreme Court rules, local rules, and ethics opinions. The Uniform Collaborative Law Rules/Act (UCLR/A) is intended to create a uniform national framework for the use of Collaborative Law; one which includes important consumer protections and enforceable privilege provisions.³⁰

Parenting and Time-sharing

Florida Law

The public policy of the state is for each minor child to have “frequent and continuing contact with both parents.”³¹ 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.³² In determining timesharing with each parent, a court must consider the best interests of the child based on a specific list of statutory factors. These factors include:

- 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.

²⁴ 42 USC §§ 651-669 (1988).

²⁵ Ashish Prasad, *Rights Without Remedies: Section 1983 Enforcement of Title IV-D of the Social Security Act*, 60 U.CHI. L. REV. 197, 197 (1993).

²⁶ Section 61.1814(1), F.S.

²⁷ *Id.*

²⁸ Section 61.181(1)(a), F.S.

²⁹ Section 61.181(2)(a) and (b), F.S.

³⁰ Uniform Law Commission, *Uniform Collaborative Law Rules/Act Short Summary* (on file with the Senate Judiciary Committee).

³¹ Section 61.13(2)(c)1., F.S.

³² Section 61.13 (2)(c)2., F.S.

- 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.³³

A final factor provides the court with flexibility to consider any other factor relevant in establishing a parenting plan, including a time-sharing schedule.³⁴

Time-sharing in other States

No state statutes require a court to order equal time-sharing or joint custody of minor children. However, a number of states, in addition to Florida, provide in law a presumption that joint custody is in the best interest of the child. These states are the District of Columbia, Idaho, Minnesota, New Mexico, South Dakota, Texas, Utah, Virginia, West Virginia, and Wisconsin. Other states provide the presumption only if the parents agree. These states are Alabama, California, Connecticut, Maine, Michigan, Mississippi, Nevada, New Hampshire, and Vermont.³⁵

Several state legislatures recently amended laws on child custody to encourage equal time-sharing. Arkansas codified a preference for joint custody.³⁶ The South Dakota Legislature passed a law that permits the court to order joint physical custody when the court has awarded joint legal custody if it is in the best interest of the child.³⁷ The Utah Legislature enacted a rebuttable presumption for joint legal custody. Grounds for rebutting the presumption include domestic violence and physical or mental needs of a parent or child.³⁸

³³ Section 61.13(3), F.S.

³⁴ Section 61.13(3)(t), F.S.

³⁵ National Conference of State Legislatures, *Shared/Joint Custody Enactments 2012* (Feb. 2015).

³⁶ AR s. 901.

³⁷ South Dakota House Bill 1055 (Chapter 141).

³⁸ Utah HB 88 (Chapter 269); HB 107 (Chapter 271).

III. Effect of Proposed Changes:

This bill makes various changes to laws applicable to dissolution of marriage cases in the areas of alimony, support, and time-sharing.

Alimony Awarded During a Pending Suit—Alimony Pendente Lite

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

Alimony Awarded through a Final Court Order

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

Initial Findings

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

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

The courts must look at net income, rather than gross income, in calculating alimony and support. In instances in which trial courts have erroneously used a party's gross income, the appellate courts have routinely reversed those decisions.³⁹ In instances in which an obligor is self-employed, the court may start with gross income and subtract from it ordinary business expenses to arrive at net income.

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

- Income from salaries, overtime pay, and wages, including tips declared to the IRS or tips imputed to bring the employee's gross earnings to the minimum wage for the number of hours worked, whichever is greater, commissions, bonuses; and dividends, and severance pay;
- Pension pay and retirement benefits actually received;
- Spousal support received from a previous marriage;
- Trust income and distributions regularly received, relied upon, or readily available to the beneficiary, royalties, income from estates, annuity payments, capital gains, recurring gains derived from dealings in property, rental income (gross receipts minus ordinary and necessary expenses required to produce the income), interest, and continuing monetary gifts;

³⁹ *Kingsbury v. Kingsbury*, 116 So. 3d 473, 474 (Fla. 1st DCA 2013); *Vanzant v. Vanzant*, 82 So. 3d 991, 993 (Fla. 1st DCA 2011); *Vega v. Vega*, 877 So. 2d 882, 883 (Fla. 3d DCA 2004).

- Payments received as an independent contractor for labor or services, which must be considered income from self-employment; money drawn by a self-employed person for personal use that is deducted as a business expense, and expense reimbursements or in-kind payments or benefits received by a party in the course of employment, self-employment, or operation of a business which reduces personal living expenses;
- Workers' compensation; unemployment benefits, social security benefits, including those actually received based on disability, disability insurance benefits and funds paid from health, accident, disability, or casualty insurance if the insurance replaces wages; and
- Income from general partnerships, limited partnerships, closely held corporations, or limited liability companies, except that if the party is a passive investor with a minority interest in the company, income is limited to actual cash distributions received.

Gross income does not include:

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

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

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

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

This bill creates a rebuttable presumption against alimony for marriages of two years or less. The party seeking alimony may rebut the presumption by showing:

- The party seeking alimony has a clear and convincing need for alimony;

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

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

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

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

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

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

Under no circumstance may a court order alimony and child support that, when combined, constitutes more than 55 percent of the obligor's net income. This change appears to codify case law, as appellate courts have reversed awards of trial courts where the percent of income

awarded as support is considered unreasonable. The Fourth District Court of Appeal found that the trial court committed an abuse of discretion in awarding combined alimony and child support totaling 58 percent of the obligor's net income.⁴⁰ The appellate court noted that the trial court had legitimate grounds on which to order permanent alimony. The former wife earned only a two-year college degree and supported her husband as a teacher's aide while he secured a law school education. She then became a homemaker. However, the court noted that the excessive award left the obligor with just \$330 a month on which to live after paying for rent and a car loan.⁴¹

In *Casella v. Casella*, the same appellate court ruled clearly excessive an award of combined alimony and child support that approached 70 percent of the husband's net income.⁴² A 1990 case, the court reversed the trial court on the basis that the award left the obligor with just \$800 a month on which to live.

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

Deviation from Guidelines

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

In addition to generally authorizing the court to award alimony outside the presumptive alimony amount, the bill establishes a specific basis for the court to do so. The bill authorizes a deviation from guidelines for a long-term homemaker spouse who forewent education and career opportunities if:

- The duration of the marriage was at least 20 years;
- Pursuant to agreement, one spouse substantially refrained from economic, educational, or employment opportunities primarily to contribute to the marriage as a homemaker or child care provider; and
- Even with additional education, the spouse seeking alimony faces dramatically reduced opportunities to advance a career.

If the court orders a departure from guidelines on this basis, the court may order alimony in an amount that equalizes the income of the parties until the obligor either retires upon reaching:

- The age for eligibility for full retirement benefits; or
- The customary retirement age for his or her occupation.

⁴⁰ *Thomas v. Thomas*, 418 So. 2d 316, (Fla. 4th DCA 1982).

⁴¹ *Id.* at 316-317.

⁴² *Casella v. Casella*, 569 So. 2d 848, 849 (Fla. 4th DCA 1990). The court stopped short of ruling that a particular percentage constitutes a bright-line rule, and instead, ruled that each case must be determined individually.

Nominal Alimony

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

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

The courts routinely award nominal alimony to reserve the issue of alimony at a later date.⁴³

Tax and Alimony

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

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

Payment of Alimony in Depository

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

Alimony payments do not need to be directed through the depository:

- If there is no minor child; or
- If there is a minor child and both parties agree to payment without the depository.

However, a payee may subsequently file an affidavit with the clerk of the court a verified motion that an obligor has been in default or arrearages in payment. No later than 15 days after receiving the motion, the court must:

- Hold an evidentiary hearing establishing the default and arrearages;
- Issue an order that the clerk establish or amend an existing family law case history account; and
- Advise the parties that future payments must be directed through the depository.

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

⁴³ *Lightcap v. Lightcap*, 14 So. 3d 259, 260 (Fla. 3d DCA 2009). “Here the trial court did not abuse its discretion when it granted the former wife nominal alimony. Nominal alimony would permit her to apply for modification upon a proper showing if and when the former husband achieves his full earning potential in the future.”

Substantial Change in Circumstance Justifying the Modification of Alimony

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

Under the bill, upon the filing of a petition by the obligor, the court may temporarily reduce or suspend the obligor's payment of alimony while the petition is pending. However, if either party unreasonably pursues or defends an action, the other party is entitled to pay reasonable attorney fees and costs of the prevailing party.

Rebuttable Presumption

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

The presumption can be rebutted by the following factors:

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

New Grounds for a Substantial Change in Circumstance

This bill establishes new substantial changes in circumstance:

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

At least one court has refused modification of alimony on the basis that an obligor voluntarily retired early. Here the court held that the obligor did not establish voluntary retirement as a

circumstance beyond his control.⁴⁴ In this case, the obligor retired early at the age of 63, after 40 years of steady employment.⁴⁵

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

Remarriage of Obligor is not a Substantial Change in Circumstance

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

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

Supportive Relationship

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

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

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

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

Advancing Trial

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

Time-sharing

The bill provides additional guidelines for the court to use in determining a time-sharing schedule of a minor child.

⁴⁴ *Ward v. Ward*, 502 So. 2d 477, 478 (FLA. 3D DCA 1987).

⁴⁵ *Id.*

Current law provides that the public policy of the state is for each minor to have frequent and continuing contact with both parents after the parents separate or divorce. The bill provides instead that the public policy of the state is that absent good cause, substantially equal time-sharing with both parents is in the best interest of the child. A court must include written findings in an order that establishes an initial permanent time-sharing schedule that provides other than substantially equal time-sharing.

Current law provides a list of factors for the court to consider in establishing or modifying time-sharing schedule, based on the best interests of the child. In addition to the factors presently provided in law, this bill adds the following:

- The amount of timesharing requested by each parent; and
- The frequency that a parent would likely leave the child in the care of a nonrelative on evenings and weekends when the other parent would be available and willing to provide care.

The bill also revises several existing factors. Under existing law, a court must consider and favor the parent having the “demonstrated capacity” of performing various parenting duties. The bill requires a court to also consider the disposition of a parent to perform new parenting roles after a divorce.

Under the bill, if the initial permanent time-sharing schedule does not provide for substantially equal time-sharing, the court order must include written findings of fact justifying the departure.

Application of the Bill to Alimony Awards

The provisions of the bill apply to:

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

The enactment of the bill may not serve as the sole basis for a party to seek modification of an alimony award which existed prior to October 1, 2016.⁴⁶

The bill takes effect October 1, 2016.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

⁴⁶ The application of the bill to existing alimony awards is substantially different than the application of CS/CS/SB 718, 2nd Engrossed (2013), an alimony reform bill that was vetoed by Governor Scott. The prior alimony reform bill provided that the bill itself constituted a “substantial change in circumstances for which an obligor may seek . . . a modification of the amount or duration of alimony.” CS/CS/SB 718, 2nd Engrossed (2013), lines 936-939.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Most alimony awards are based on marital settlement agreements (MSAs), which are incorporated into final judgments in dissolution of marriage cases. Courts consider these MSAs as contracts. Courts interpret challenges to MSAs on the same basis as other forms of contract.⁴⁷

Nonetheless, existing s. 61.14, F.S., purports to give courts broad authority to modify marital settlement agreements. Courts interpreting these agreements have also found that the parties to a marital settlement agreement may waive their statutory rights to seek modification of alimony by providing that the agreement is nonmodifiable.⁴⁸

Any interpretation of the bill which would allow the modification of a non-modifiable marital settlement agreement would likely be constrained 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.” Moreover, courts have “refused to apply a statute retroactively if the statute impairs vested rights, creates new obligations, or imposes new penalties.”⁴⁹

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

None.

B. Private Sector Impact:

CS/SB 668 more clearly defines gross income, provides guidelines for alimony, and establishes new bases for a substantial change in circumstance justifying a modification of alimony. In addition to the changes in alimony law, the bill revises public policy on time-sharing to provide for substantially equal time-sharing. These changes may reduce litigation time and costs.

⁴⁷ The First District Court of Appeal applied contract law in determining whether to admit parol evidence, or evidence outside the contract (MSA), on the basis that the contract language contains a latent ambiguity (*Toussaint v. Toussaint*, 107 So. 3d 474, 477-478 (Fla. 1st DCA 2013)). A latent ambiguity, requiring extrinsic evidence, existed where an MSA failed to address financing of college education and the contract otherwise provided for equal payments for education costs (*Riera v. Riera*, 86 So. 3d 1163, 1166—67 (Fla. 3d DCA 2012)). The court found no breach of contract from the plain language of the MSA. (*McCord v. McCord*, 94 So. 3d 719 (Fla. 2nd DCA 2012)).

⁴⁸ *Elbaum v. Elbaum*, 141 So. 3d 658, 661 (Fla. 4th DCA 2014) (quoting *Hahamovitch v. Hahamovitch*, 133 So. 3d 1008, 1016 (Fla. 4th DCA 2014), rev. granted, No. SC14-277, 2014 WL 1682898 (Fla. Apr. 22, 2014) (citing *Tapp v. Tapp*, 887 So.2d 442, 444 (Fla. 2d DCA 2004)); *Cook v. Cook*, 94 So. 3d 683, 685 (Fla. 4th DCA 2012)).

⁴⁹ *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55, 61 (Fla. 1995) (citing *Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So. 2d 1352, 1358 (Fla.1994); *State v. Lavazzoli*, 434 So.2d 321, 323 (Fla.1983); *Seaboard Sys. R.R. v. Clemente*, 467 So.2d 348, 357 (Fla. 3d DCA 1985)).

C. Government Sector Impact:

The Office of the State Courts Administrator (OSCA) expects an increase in judicial workload from various provisions of the bill; however the extent of the impact is unknown. Specifically, this bill requires a court to calculate alimony based upon a formula. Additionally, the bill imposes attorney fees and costs on a party who unreasonably pursues or defends an action for modification of alimony, if the party prevails. This requirement may necessitate additional hearings for a court to determine the reasonableness of a modification request. OSCA, however, cannot accurately determine the fiscal impact of the bill at this time.⁵⁰

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 61.071, 61.08, 61.13, 61.14, 61.1827, 61.30, and 409.2579.

This bill creates section 61.192 of the Florida Statutes.

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

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

CS by Judiciary on February 16, 2016:

The CS authorizes the court to deviate from the alimony guidelines of the bill:

- For a spouse who forewent education and career opportunities to contribute to the family through providing homemaking or child care if:
 - The duration of the marriage was at least 20 years;
 - Pursuant to agreement, one spouse substantially refrained from economic, educational, or employment opportunities primarily to contribute to the marriage as a homemaker or child care provider; and
 - Even with additional education, the spouse seeking alimony faces dramatically reduced opportunities to advance a career.
- In an amount that equalizes the income of the parties until the obligor either retires upon reaching:
 - The age for eligibility for full retirement benefits; or
 - The customary retirement age for his or her occupation.

⁵⁰ Office of the State Courts Administrator, *2016 Judicial Impact Statement* (Dec. 21, 2015).

B. Amendments:

None.

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