

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 455 Alimony

SPONSOR(S): Judiciary Committee; Burton and others

TIED BILLS: None **IDEN./SIM. BILLS:** SB 668

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR or BUDGET/POLICY CHIEF |
|-------------------------------|---------------------|----------|------------------------------------------|
| 1) Civil Justice Subcommittee | 9 Y, 4 N | Robinson | Bond |
| 2) Judiciary Committee | 14 Y, 3 N, As CS | Robinson | Havlicak |

SUMMARY ANALYSIS

Alimony is a court-ordered payment from one spouse to another for support or maintenance. Florida courts may currently award one, or a combination, of five different types of alimony: temporary alimony, bridge-the-gap alimony, rehabilitative alimony, durational alimony, and permanent alimony. A court has broad discretion to determine the type, amount, duration, and later modification or termination of the alimony award.

The bill:

- Provides factors to assist a court in awarding temporary alimony during dissolution proceedings.
- Repeals the current categorization of post-dissolution alimony awards as bridge-the-gap, rehabilitative, durational, or permanent and creates one form of post-dissolution alimony.
- Limits judicial discretion in post-dissolution alimony awards by establishing a formula to determine a presumptive range for the amount and duration of the award, effectively ending permanent alimony.
- Provides factors to assist a court in determining a post-dissolution alimony award within the presumptive range.
- Authorizes a court to deviate from the presumptive range if the resulting alimony award would be inappropriate or inequitable.
- Revises procedures to initiate payment of alimony awards through the clerk of court depository.
- Provides that certain changes in actual income, or, an obligor's retirement after reaching the retirement age for social security or the obligor's profession, constitute a substantial change in circumstances for purposes of modifying or terminating an alimony award.
- Revises the criteria to determine the existence of a supportive relationship for purposes of modifying or terminating an alimony award, including the consideration of relationships that may have recently ended and repealing the cohabitation requirement.
- Creates a rebuttable presumption that modification or termination of an alimony award is retroactive to the date of the petition for relief.
- Prohibits a party who unreasonably pursues or defends a modification action from recovering attorney's fees and costs and requiring that such party pay the fees and costs of the prevailing party.

The bill also codifies current provisions of law relating to:

- Required adjustments for single support orders.
- Tax treatment of alimony awards.
- Consideration of the income of a successor spouse in an alimony modification proceeding.

This bill does not appear to have a fiscal impact on local governments, but may have an indeterminate fiscal impact on state government.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

ALIMONY

Alimony is a court-ordered payment from one spouse to another for support or maintenance. Alimony is most commonly awarded in an action for dissolution of marriage,¹ but may also be awarded to a spouse in an action for support that does not seek marital dissolution.²

While there is some statutory guidance regarding alimony, much of the law governing alimony is common law (that is, established through case precedent). The leading case, *Canakaris v. Canakaris*,³ set forth many general concepts of alimony but also confirmed that ultimately the setting of alimony is a matter within the broad discretion of a trial court. Writing in favor of broad discretion, the Florida Supreme Court explained:

Dissolution proceedings present a trial judge with the difficult problem of apportioning assets acquired by the parties and providing necessary support. The judge possesses broad discretionary authority to do equity between the parties and has available various remedies to accomplish this purpose, including lump sum alimony, permanent periodic alimony, rehabilitative alimony, child support, a vested special equity in property, and an award of exclusive possession of property. As considered by the trial court, these remedies are interrelated; to the extent of their eventual use, the remedies are part of one overall scheme.⁴

However, the Court acknowledged problems with the exercise of such broad discretion:

...[B]oth appellate and trial judges should recognize the concern which arises from substantial disparities in domestic judgments resulting from basically similar factual circumstances. The appellate courts have not been helpful in this regard. Our decisions and those of the district courts are difficult, if not impossible, to reconcile. The trial court's discretionary power is subject only to the test of reasonableness, but that test requires a determination of whether there is logic and justification for the result. The trial courts' discretionary power was never intended to be exercised in accordance with whim or caprice of the judge nor in an inconsistent manner. Judges dealing with cases essentially alike should reach the same result. Different results reached from substantially the same facts comport with neither logic nor reasonableness.⁵

In the 35 years since *Canakaris*, little has changed in the law governing alimony. The legislature has provided some statutory guidance and case law has somewhat narrowed the exercise of judicial discretion. Nevertheless, the application of the law to similar cases has continued to lead to varied and inconsistent alimony awards throughout the state. Expressing frustration with the concept of broad discretion, and the resulting inconsistent decisions of courts within the state regarding the appropriate award of alimony in similar cases, one appellate judge wrote in 2002:

Broad discretion in the award of alimony is no longer justifiable and should be discarded in favor of guidelines, if not an outright rule.⁶

ALIMONY AWARDS

¹ s. 61.08(2), F.S.

² s. 61.09, F.S.

³ *Canakaris v. Canakaris*, 382 So. 2d 1197 (Fla. 1980).

⁴ *Id.* at 1202.

⁵ *Id.* at 1203.

⁶ *Bacon v. Bacon*, 819 So. 2d 950, 954 (Fla. 4th DCA 2002)(Farmer, J., concurring).

Types of Alimony

Florida law recognizes five forms of alimony: temporary, bridge-the-gap, rehabilitative, durational, and permanent periodic alimony as illustrated by **Figure 1**.

Figure 1: Types of Alimony Awards under Florida Law

| <u>Type of Alimony Award</u> | <u>Purpose</u> | <u>Duration</u> | <u>Modification or Termination</u> | <u>Automatic Termination</u> |
|-------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------|
| Temporary ⁷ | May be requested by petition or motion after the initiation of dissolution proceedings for support during the dissolution action. | Length of the dissolution action. | Good Cause | Entry of final judgment in dissolution action (including appeals). ⁸ |
| Bridge-the-Gap ⁹ | May be awarded to provide support necessary to make the transition from married to single. Designed to assist with legitimate short-term needs. | Varies, but may not exceed 2 years. | Not modifiable in amount or duration | Remarriage of Recipient or Death of Either Party. |
| Rehabilitative ¹⁰ | May be awarded to assist in establishing the capacity for self-support through the redevelopment of previous skills or credentials; or the acquisition of education, training, or work experience necessary to develop employment skills or credentials. Requires a specific and defined plan. ¹¹ | Varies | Substantial Change in Circumstances or Non-Compliance with Rehabilitation Plan or Completion of the Rehabilitation Plan. ¹² | Death of Either Party. |
| Durational ¹³ | May be awarded if permanent alimony is inappropriate. Provides economic assistance for a set period of time following a marriage of short or moderate duration. ¹⁴ | Varies, but may not exceed the length of the marriage. | Substantial Change in Circumstances (Amount Only) or Exceptional Circumstances (Duration Only) | Remarriage of Recipient or Death of Either Party. |
| Permanent ¹⁵ | May be awarded to provide for the needs and necessities of life as they were established during the marriage for a party who lacks the financial ability to meet such needs following the divorce. May be awarded following a marriage of long duration, moderate duration or short duration under certain circumstances. | Perpetual | Substantial Change in Circumstances, including the existence of a supportive relationship. | Remarriage of Recipient or Death of Either Party. |

⁷ s. 61.071, F.S.

⁸ 24A AM. JR. 2D *Divorce and Separation* §615.

⁹ s. 61.08(5), F.S.

¹⁰ s. 61.08(6)(a), F.S.

¹¹ s. 61.08(6)(b), F.S.

¹² s. 61.08(6)(c), F.S.

¹³ s. 61.08(7), F.S.

¹⁴ For purposes of determining the appropriateness of a particular award of alimony, there is a rebuttable presumption that a short-term marriage is a marriage having a duration of less than 7 years; a moderate-term marriage is a marriage having a duration of greater than seven years but less than seventeen years; and a long-term marriage is a marriage having a duration of seventeen years or greater. s. 61.08(4), F.S.

¹⁵ s. 61.08(8), F.S.

Determining an Award of Alimony

A court may order the payment of one, or a combination, of the types of alimony authorized under current law. Unlike child support obligations which are established by a fairly strict formula and expire after a statutorily defined period, the amount and duration of alimony awards are largely within the discretion of the court.

Before a court may make an award of alimony, it must equitably distribute the former spouse's assets.¹⁶ If subsequent to the distribution the requesting spouse has no need for support or the other spouse does not have the ability to pay, an alimony award is inappropriate. The court must make a specific factual determination regarding whether there remains a need for and ability to pay alimony.¹⁷ If an alimony award is appropriate under the circumstances, to determine the proper alimony award the court must consider all relevant factors, including:¹⁸

- The standard of living established during the marriage.
- The duration of the marriage.
- The age and the physical and emotional condition of each party.
- The financial resources of each party, including the non-marital and the marital assets and liabilities distributed to each.
- The earning capacities, educational levels, vocational skills, and employability of the parties and, when applicable, the time necessary for either party to acquire sufficient education or training to enable such party to find appropriate employment.
- The contribution of each party to the marriage, including, but not limited to, services rendered in homemaking, child care, education, and career building of the other party.
- The responsibilities each party will have with regard to any minor children they have in common.
- The tax treatment and consequences of any alimony award, including the designation of alimony as nontaxable and nondeductible.
- All sources of income¹⁹ available to either party, including income available through investments. Income may be imputed to a voluntarily unemployed or underemployed spouse, whether the spouse is the payor or payee.²⁰
- Any other factor necessary to do equity and justice between the parties.

The court may also consider the adultery of either spouse and the circumstances surrounding the adultery.²¹ However, adultery is not a bar to entitlement to alimony²² and marital misconduct may not be used as a basis for alimony unless the misconduct causes a depletion of marital assets.²³

It is within these general guidelines that courts may exercise broad discretion in determining the type, amount, and duration of an alimony award, if any, although the award may not leave the obligor with significantly less net income than the obligee unless there are exceptional circumstances.²⁴ The court

¹⁶ *Canakaris v. Canakaris*, 382 So. 2d 1197, 1202 (Fla. 1980).

¹⁷ See s. 61.08(2), F.S.; *Payne v. Payne*, 88 So.3d 1016 (Fla. 2d DCA 2012).

¹⁸ s. 61.08(2), F.S.

¹⁹ Defined very broadly as "any form of payment to an individual, regardless of source, including, but not limited to: wages, salary, commissions and bonuses, compensation as an independent contractor, worker's compensation, disability benefits, annuity and retirement benefits, pensions, dividends, interest, royalties, trusts, and any other payments, made by any person, private entity, federal or state government, or any unit of local government. s. 61.046(7), F.S. Case law has expanded the definition to include in-kind payments and regular gifts and clarified that the source of income must be "available" to the party. See *Fitzgerald v. Fitzgerald*, 912 So. 2d 363 (Fla. 2d DCA 2005); *Weiser v. Weiser*, 782 So. 2d 986 (Fla. 4th DCA 2000), and *Zold v. Zold*, 880 So. 2d 779 (Fla. 5th DCA 2004). However, a party may not voluntarily make income unavailable in order to reduce his or her annual income. See *Geoghegan v. Geoghegan*, 969 So. 2d 482 (Fla. 5th DCA 2007).

²⁰ *Kovar v. Kovar*, 648 So. 2d 177 (Fla. 4th DCA 1994); *Rojas v. Rojas*, 656 So. 2d 563 (Fla. 3d DCA 1995).

²¹ s. 61.08(1), F.S.

²² See *Coltea v. Coltea*, 856 So. 2d 1047 (Fla. 4th DCA 2003).

²³ See *Noah v. Noah*, 491 So. 2d 1124 (Fla. 1986)(holding that the trial court erred in distributing virtually all assets to the wife on the basis of her husband's adultery where there was no evidence that the adultery depleted the family resources or that the emotional devastation visited on the wife translated into her having a greater financial need).

²⁴ s. 61.08(9), F.S.

must only make findings of fact relative to the factors enumerated supporting its award or denial of alimony.²⁵ A party may be ordered to pay an alimony award in periodic payments, payments in lump sum,²⁶ or a combination of the two. The court may also require the obligor to purchase life insurance or post a bond to secure the actual payment of the alimony award.²⁷

Nominal alimony may be awarded when the court finds the requisite entitlement to alimony, but due to insufficient resources available at the time of the final hearing, the court cannot award sufficient alimony to meet the needs of the obligee. Nominal alimony is not a form of alimony, but rather is an award of a de minimis amount, such as \$1, to serve as a "placeholder" for one of the five types of alimony currently recognized by the state. The award of nominal alimony reserves jurisdiction for the court to later modify the amount of alimony upon petition of the obligee, should the financial conditions of the obligor improve.²⁸

EFFECT OF THE BILL – ALIMONY AWARDS

The bill repeals the current classification scheme of alimony awards and creates one category of alimony, similar to what is currently called "durational alimony." It may be awarded in an amount and duration within a range based on a mathematical formula illustrated by **Figure 2**. The concept of using such alimony for bridging the gap or rehabilitative purposes is retained in the guidelines that judges may use to determine the award within the presumptive range. The new guidelines effectively eliminate permanent alimony.

The bill does not change the categorization or form of temporary alimony and the formula may not be used to calculate temporary alimony.

Presumptive Range

Figure 2: Alimony Formula

| | <u>Low End</u> | <u>High End</u> |
|-----------------|--------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------|
| <u>Amount</u> | (0.015 x YOMA) x GI If a negative number results, the presumptive amount is \$0. | (0.020 x YOMA) x GI If a negative number results, the presumptive amount is \$0. |
| <u>Duration</u> | 0.25 x YOMD | 0.75 x YOMD |

YOMA = Years of marriage (measured from date of marriage through the date of filing the action for dissolution) for purposes of determining the presumptive amount of alimony. For marriages of 20 years or more, 20 years is used in calculating the low end and high end. If the court establishes the duration of an alimony award at 50% percent or less than the actual years of marriage, then the court must use the actual years of marriage, up to a maximum of 25 years, to calculate the high end.

YOMD = Years of marriage (measured from date of marriage through the date of filing the action for dissolution) for purposes of determining the presumptive duration of alimony.

GI = Monthly gross income of the potential payor minus the monthly gross income of the party seeking alimony. If a party is voluntarily unemployed or underemployed, GI is calculated using the party's potential income.

Under the new alimony guidelines created by the bill, the court must first establish the presumptive range of the amount and duration of an alimony award pursuant to the mathematical formula illustrated by **Figure 2**. To determine the range, the court must make initial written findings regarding the monthly

²⁵ s. 61.08, F.S.

²⁶ For lump sum alimony to be awarded, there must be a showing of need and ability to pay as well as unusual circumstances which require non-modifiable support and justification that does not substantially endanger the payor's economic status. *Rosario v. Rosario*, 945 So. 2d 629, 632 (Fla. 4th DCA 2006).

²⁷ s. 61.08(3), F.S.

²⁸ *Ellis v. Ellis*, 699 So. 2d 280 (Fla. 5th DCA 1997)(award of \$1.00 in permanent alimony to wife to leave open the possibility of increasing the alimony should the value of the husband's pension increase, since husband could then pay increased alimony from his social security disability income which was then being used for his own support).

gross income of each party and the total years of marriage. Income, for purposes of determining the presumptive range, is consistent with income for purposes of determining an order of child support.²⁹

After making such initial findings, the court must use the information to calculate the presumptive alimony amount and duration range pursuant to the formula in **Figure 2**.

Example 1: Spouse 1 and Spouse 2 were married for 6 years (**YOMD** and **YOMA**). Spouse 1 has a monthly gross income of \$5,000. Spouse 2 has a monthly gross income of \$1,800. The difference between their income is \$3,200 (**GI**). Spouse 2 requests alimony. The presumptive alimony range is \$288 - \$384 for a period of 1.5 years to 4.5 years.

Example 2: Spouse 1 and Spouse 2 were married for 32 years (**YOMD**)(**YOMA** is capped at 20 years). Spouse 1 has a monthly gross income of \$2,000. Spouse 2 has a monthly gross income of \$12,000. The difference between their income is \$10,000 (**GI**). Spouse 1 requests alimony. The presumptive alimony range is \$3,000 - \$ 4,000 for a period of 8 years to 24 years.

Determining Alimony Award within Presumptive Range

Marriages less than 2 years

There is a rebuttable presumption for marriages 2 years or less that no alimony may be awarded regardless of the presumptive range determined pursuant to the alimony formula in **Figure 2**. The court may award alimony for such marriages in accordance with the standards for awarding alimony for marriages in excess of 2 years if the court makes written findings that:

- There is clear and convincing need for alimony;
- There is ability to pay alimony; and
- The failure to award alimony would be inequitable.

Marriages longer than 2 years

For marriages longer than 2 years, if there is no agreement between the parties, alimony is presumptively awarded within the range calculated under the formula in **Figure 2**. In determining the amount and duration of the alimony award within the presumptive range, the court retains broad discretion, but must consider all of the following factors:

- The financial resources (including actual and potential income) and ability of each spouse to meet his or her reasonable needs independently.
- The standard of living of the parties during the marriage, but with the consideration that neither party may be able to maintain that standard of living after the divorce.
- Whether there was an equitable distribution of marital property.
- Both parties' income, employment, and employability, obtainable through reasonable diligence and additional training or education, and the details of such additional training or education plans.
- Reduction in employment due to the needs of an unemancipated child of the marriage or the circumstances of the parties.
- Whether either 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 period of time it was paid to the recipient spouse.
- The age, health, and physical and mental condition of the parties, including health care needs and unreimbursed health care expenses.
- Significant economic or noneconomic contributions to the marriage or to the economic, educational, or occupational advancement of a party.

²⁹ Compare lines 78-157 of the bill with s. 61.30(2) and (3), F.S.

- The tax consequence of the alimony award.
- Any other factor necessary to do equity and justice between the parties.

After consideration of the enumerated factors, the court may establish an alimony award within the presumptive range. The order establishing the award must clearly set forth both the amount and duration of the award. The bill does not authorize the court to order payment of alimony in lump sum. The court must also make a written finding that the obligor has the financial ability to pay the award.

A court retains the authority to order an obligor to secure the actual payment of the alimony award, but only upon a showing of special circumstances. The court must make specific evidentiary findings regarding the availability, cost, and financial impact on the obligated party for the security. The permissible methods of security include the purchase or maintenance of a decreasing term life insurance policy or a bond, or any other assets that may be suitable. The security may be modified if the underlying alimony award is modified and must also be reduced in an amount commensurate with any reduction in the alimony award.

Nominal Alimony

The bill reserves the right of a court to award nominal alimony in the amount of \$1 per year if:

- At the time of trial, a party who traditionally provided the primary source of financial support to the family temporarily lacked the ability to pay support but was reasonably anticipated to have the ability to pay support in the future; or
- An alimony recipient is presently able to work but has a medical condition that with a reasonable degree of certainty may inhibit or prevent his or her ability to work during the duration of the alimony period.

The duration of nominal alimony must be established in accordance with the presumptive alimony formula illustrated in **Figure 2**. Before the expiration of the durational period, the amount of the nominal alimony award may be modified to a full award using the presumptive alimony formula in **Figure 2**.

Deviations from the Presumptive Alimony Range

The court may establish an award of alimony that is outside either or both of the presumptive alimony amount and duration range. In such cases, the court must consider all the enumerated factors applicable to determining an award of alimony within the presumptive range and make specific written findings concerning the factors that justify the finding that the application of the presumptive alimony amount and duration range is inappropriate or inequitable.

Determining Award of Temporary Alimony

Current law does not specify guidelines for the court to consider in awarding temporary alimony. This bill requires the court to first determine whether there is a need for temporary alimony and the ability to pay alimony, which restates and codifies the current standard for determining awards of other types of alimony. If both conditions are met, the court must consider the factors used to determine an award of alimony within the presumptive alimony guidelines and make specific written findings of fact regarding the factors that justify an award of temporary alimony. However, a court may not use the presumptive alimony formula in **Figure 2** to calculate temporary alimony.

COMBINED ALIMONY AND CHILD SUPPORT ORDERS

A court may enter a combined order for alimony and child support in a dissolution proceeding.³⁰ The child support guidelines³¹ provide for the adjustment of a party's share of child support if an application of the child support guidelines results in an obligation that is 55% or more of the party's gross income

³⁰ s. 61.1301, F.S.

³¹ s. 61.30, F.S.

for a single support order.³² Florida courts have reversed combined support orders that totaled 58%-70% of the obligor's net income as "clearly excessive."³³

The federal Consumer Credit Protection Act also prohibits the deduction of more than 50-65% of an individual's maximum disposable earnings³⁴ pursuant to a combined order of support.³⁵

Effect of the bill

The bill provides that the 55% adjustment cap applies to a single combined order of alimony and child support. If the calculation of an award of combined support exceeds 55% of the payor's net income, the court must adjust the award of child support to ensure that the cap is not exceeded as consistent with current law.

PAYMENT OF ALIMONY AWARDS

Section 61.08(10), F.S. requires that any alimony order entered after January 1, 1985, direct that the payment of alimony be made through a depository operated by the clerk of court. Parties may opt out of the depository if they have no minor child or if the parties request that the court not direct payment through the depository. If the court does not direct payment through the depository, either party may subsequently apply to initiate payments through the depository by filing an affidavit with the depository alleging default or arrearages in payment.³⁶ The moving party must provide copies of the affidavit to the court and the other party or parties.³⁷ Fifteen days after receipt of the affidavit, the depository must notify all parties that future payments must be made through the depository.³⁸ The depository collects a fee equal to 4% of the alimony payment, except that no fee may exceed \$5.25.³⁹

Effect of the bill

The bill revises the procedures parties must use to opt in to the depository program. Instead of filing an affidavit with the depository alleging a default or arrearage, a party must file a verified motion with the court and serve a copy on the non-moving party. An evidentiary hearing must be conducted within 15 days after the filing of the motion to establish the default and arrearages, if any. The court must thereafter issue an order directing the clerk of the circuit court to establish or amend a Family Law Case History account for the parties, and directing that the obligor make future payments through the depository.

INCOME TAX TREATMENT OF ALIMONY PAYMENTS

Gross income for federal income tax purposes includes amounts received as alimony or separate maintenance payments.⁴⁰ The payment to, or for the benefit of, a spouse or former spouse under a divorce or separation instrument⁴¹ will qualify and be deemed and treated by the Internal Revenue Service (IRS) as "alimony" for income tax purposes. Alimony is deductible from the obligor's gross income and taxable income to the obligee, if:⁴²

³² s. 61.30(11)(a)9., F.S.

³³ See *Thomas v. Thomas*, 418 So. 2d 316, (Fla. 4th DCA 1982); *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).

³⁴ "Disposable earnings" means that part of the earnings of any individual remaining after the deduction from those earnings of any amounts required by law to be withheld. 15 U.S.C. § 1672(b).

³⁵ 15 U.S.C. § 1673(b).

³⁶ s. 61.08, F.S.

³⁷ *Id.*

³⁸ *Id.*

³⁹ s. 61.181(2)(b), F.S.

⁴⁰ 26 U.S.C. § 71(a).

⁴¹ A divorce or separation instrument means a decree of divorce or separate maintenance or a written instrument incident to such a decree, or a written separation agreement, or a decree requiring a spouse to make payments for the support or maintenance of the other spouse. 26 U.S.C. § 71(b)(2).

⁴² 26 U.S.C. § 71(b)(1).

- The payment is made in cash;
- The divorce or separation instrument does not designate the payment as a payment that is not includable in gross income under the Internal Revenue Code and not allowable as a deduction under the Internal Revenue Code;
- The spouses are not members of the same household at the time the payment is made; and
- There is no requirement to make any payment (in cash or property) after the death of the obligee.

Florida courts may override the default IRS rule by providing in the judgment of dissolution or support that alimony payments are excluded from the gross income of the obligee and not deductible by the obligor.⁴³ However, the usual treatment of alimony has been to make the alimony taxable to the recipient and deductible by the payor.⁴⁴ The spouses may also validly override the default taxability rules of the IRS by designating that payments otherwise qualifying as alimony or separate maintenance payments under the Internal Revenue Code be nondeductible by the obligor and excludable from the gross income of the obligee in a marital settlement agreement or related agreement.⁴⁵

Effect of the Bill

The bill codifies and restates current law.

MODIFICATION AND TERMINATION OF ALIMONY

Section 61.14, F.S. provides that either party may request modification of an award of alimony, whether such award was agreed to by the parties in a marital settlement agreement⁴⁶ or ordered by the court, if the circumstances or the financial ability of either party changes. The moving party must show a substantial change in circumstances, that the change was not contemplated at the time of the final judgment of dissolution, and that the change is sufficient, material, involuntary and permanent in nature.⁴⁷ The change in circumstances must be alleged to have occurred subsequent to the last judgment or order awarding alimony.⁴⁸ The court has jurisdiction to modify an award of alimony as equity requires.⁴⁹ A modification order may be retroactive to the date of the filing of the action, or the filing of the petition for modification.⁵⁰

⁴³ *Rykiel v. Rykiel*, 838 So. 2d 508, 511-12 (Fla. 2003).

⁴⁴ See generally *Garcia v. Garcia*, 696 So. 2d 1279 (Fla. 2d DCA 1997); *Rihl v. Rihl*, 727 So. 2d 272 (Fla. 3d DCA 1999).

⁴⁵ 26 CFR. § 1.71-1T, Q8 & A8.

⁴⁶ Despite such statutory authorization, a marital settlement agreement becomes a contractual duty which, when endorsed by court order, may not be set aside or revisited, according to principles of collateral estoppel and res judicata. Florida courts do not take lightly agreements made by husband and wife concerning spousal support. A marital settlement agreement as to alimony or property rights which is entered before the dissolution of marriage is binding upon the parties. See, e.g., *Perry v. Perry*, 976 So. 2d 1151 (Fla. 4th DCA 2008) and *Griffith v. Griffith*, 860 So. 2d 1069, 1073 (Fla. 1st DCA 2003).

⁴⁷ *Townsend v. Townsend*, 585 So. 2d 468 (Fla. 2d DCA 1991); 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*, 109 So. 3d 804 (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. (*Koski v. Koski*, 98 So. 3d 93, 94 (Fla. 4th DCA 2012)).

⁴⁸ *Johnson v. Johnson*, 537 So. 2d 637 (Fla. 2d DCA 1998).

⁴⁹ s. 61.14(1)(a), F.S.

⁵⁰ *Id.*

Supportive Relationship

A court may reduce or terminate an award of alimony based on the existence of a supportive relationship.⁵¹ The court must make specific written findings that, since the granting of a divorce and the award of alimony, the obligee has entered into a supportive relationship with a person, unrelated to the obligee by consanguinity or affinity, with whom he or she resides. In determining whether a supportive relationship exists, the court may consider:⁵²

- The extent to which the obligee and the other person have held themselves out as a married couple, including referring to each other in terms such as “my husband” or “my wife.”
- The period of time that the obligee has resided with the other person in a permanent place of abode.
- The extent to which the obligee and the other person have pooled their assets or income or otherwise exhibited financial interdependence.
- The extent to which the obligee or the other person has supported the other, in whole or in part.
- The extent to which the obligee or the other person has performed valuable services for the other.
- The extent to which the obligee or the other person has performed valuable services for the other’s company or employer.
- Whether the obligee and the other person have worked together to create or enhance anything of value.
- Whether the obligee and the other person have jointly contributed to the purchase of any real or personal property.
- Evidence in support of a claim that the obligee and the other person have an express agreement regarding property sharing or support.
- Evidence in support of a claim that the obligee and the other person have an implied agreement regarding property sharing or support.
- Whether the obligee and the other person have provided support to the children of one another, regardless of any legal duty to do so.

The obligor has the burden to prove by a preponderance of the evidence that a supportive relationship exists.⁵³

Effect of the Bill – Supportive Relationship

The bill revises the criteria to determine the existence of a supportive relationship for purposes of modification or termination of alimony. Specifically, the bill provides that:

- The court may consider evidence of cohabitation, but cohabitation is not a requirement of a supportive relationship. The obligor does not have to prove cohabitation.
- The court may consider whether the obligor’s failure to comply with court ordered financial obligations to the obligee was a significant factor in the establishment of the relationship.
- The court may consider whether the parties referred to each other in the more generic term, “spouse”, rather than husband or wife.

The bill also authorizes a court to terminate or modify an alimony award based on a supportive relationship that may have existed in the year before the filing of the petition for modification, although a current supportive relationship may not exist.

A reduction or termination of alimony based on a supportive relationship is retroactive to the date of the filing of the petition for reduction or termination.

Retirement of the Obligor

⁵¹ A supportive relationship is a relationship that provides economic support equivalent to a marriage. The existence of a conjugal relationship, though it may be relevant to the nature and extent of the relationship, is not determinative of the existence of a supportive relationship.

⁵² s. 61.14(1)(b), F.S.

⁵³ s. 61.14(1)(b), F.S.

Retirement of the obligor can be considered as part of the totality of circumstances in order to determine if a substantial change in circumstances exists to warrant a modification of alimony. However, retirement does not by itself constitute a substantial change in circumstances.⁵⁴ The Florida Supreme Court directed that in modification cases based upon the retirement of the obligor courts should consider:⁵⁵

- The obligor's age, health, and motivation for retirement.
- The type of work the obligor performs and the age at which others engaged in that line of work normally retire.
- Whether the retirement placed the obligee in peril of poverty.
- The assets of the parties.

There are no additional statutory standards relating to modification or termination of alimony based upon retirement of the obligor. Any modification is strictly within the trial court's discretion subject only to the guidance provided by the Supreme Court.

Effect of the Bill – Retirement of the Obligor

The bill provides that retirement constitutes a substantial change in circumstances if the obligor has reached the full retirement age for social security benefits⁵⁶ and has retired or if the obligor has reached the customary retirement age for his or her occupation and retired. The obligor may file an action within 1 year of the anticipated retirement date and the court must determine the customary retirement age for the obligor's profession if the obligor has not reached the full retirement age for social security. However, such determination is not adjudicative of the petition for modification.

If an obligor voluntarily retires before reaching the full retirement age for social security benefits or the customary retirement age for his or her profession, the court must determine if the retirement is reasonable under the factors set out by the Supreme Court. If the voluntary retirement is reasonable it constitutes a substantial change in circumstances.

There is a rebuttal presumption that the obligor's alimony obligation must be modified or terminated upon a finding of substantial change in circumstances based upon retirement. The bill provides factors that may overcome the presumption when applied to the circumstances of the obligor and obligee, including:

- Age, health, assets, liabilities, and earned and imputed income of the parties.
- The ability of the parties to maintain full-time or part-time employment.
- Any other factor deemed relevant by the court.

Remarriage of the Obligor

The financial status of a successor spouse is ordinarily irrelevant in a modification proceeding, as it is improper for a court to consider the income of the obligor's current spouse in an action to modify the obligor's alimony obligation. An exception exists if it is determined that the obligor has deliberately limited his or her income for the purpose of reducing an alimony obligation and is living off the income of a successor spouse.⁵⁷

Effect of the Bill – Remarriage of the Obligor

The bill restates and codifies current law.

⁵⁴ *Pimm v. Pimm*, 601 So. 2d 534 (Fla. 1992).

⁵⁵ *Id.*

⁵⁶ Full retirement age (also called "normal retirement age") had been 65 for many years. However, beginning with people born in 1938 or later, that age gradually increases until it reaches 67 for people born after 1959. SOCIAL SECURITY ADMINISTRATION, <https://www.ssa.gov/planners/retire/ageincrease.html> (last visited November 12, 2015).

⁵⁷ *Harmon v. Harmon* 523 So. 2d 187 (Fla. 2d DCA 1988); *Hayden v. Hayden*, 662 So. 2d 714 (Fla. 4th DCA 1995).

Change in Actual Income

The bill provides that a party is entitled to pursue an immediate modification of alimony under the following circumstances, which constitute a substantial change in circumstances:

- If the actual income earned by a party exceeds, by at least 10 percent, the amount imputed to that party at the time an alimony award was determined. The increase in an obligor's income alone does not constitute a basis for modification unless at the time the award was established the obligor was considered unemployed or underemployed and the court did not impute income to that party at his or her maximum potential income.
- If the obligor becomes involuntarily underemployed or unemployed for a period of 6 months following the entry of the last order of alimony.

Retroactive Effect of Modification or Termination Order

The bill provides that there is a rebuttable presumption that a modification or termination of an alimony award is retroactive to the date of the filing of the petition, unless the obligee demonstrates that the result is inequitable.

Modification and Termination of an Alimony Award under the Presumptive Guidelines

The amount of an award of alimony under the presumptive guidelines may be modified consistent with current law, subject to the revisions regarding modification made by this bill. However, the duration of such awards, or an award provided for by an agreement of the parties, may not be modified.

An award of alimony under the presumptive guidelines automatically terminates upon the remarriage of the obligee or the death of either party.

ATTORNEY FEES AND COSTS IN MODIFICATION ACTIONS

Section 61.16(1), F.S., authorizes the recovery of attorney's fees and costs in alimony modification proceedings. The statute provides in relevant part:

The court may from time to time, *after considering the financial resources of both parties*, order a party to pay a reasonable amount for attorney's fees, suit money, and the cost to the other party of maintaining or defending any proceeding under this chapter, including enforcement and *modification* proceedings and appeals.

Providing for the recovery of attorney's fees and costs ensures that both parties will have similar ability to secure competent legal representation in the modification proceeding. Further, it is not necessary that one spouse be completely unable to pay attorney's fees in order for the trial court to require the other spouse to pay such fees.⁵⁸ Instead, the court views the relative disparity of financial circumstances between the spouses when awarding fees. Accordingly, a party may prevail in a modification action but, if in possession of greater financial resources relative to his or her spouse, still be required to pay the spouses' attorney's fees and costs based upon public policy considerations.

Effect of the bill

The bill provides that a party who unreasonably pursues or defends an action for modification of alimony may not recover his or her attorney's fees or costs under s. 61.16, F.S. Further such party must pay the reasonable attorney's fees and costs of the prevailing party regardless of his or her financial resources relative to the prevailing party.

APPLICABILITY

⁵⁸ *Canakaris v. Canakaris*, 382 So. 2d 1197 (Fla. 1980).
STORAGE NAME: h0455c.JDC
DATE: 2/5/2016

The revisions made by the bill apply to all initial determinations of alimony and all alimony modification actions pending or brought on or after October 1, 2016. The changes in current law do not constitute a substantial change in circumstances for purposes of modifying an alimony award and may not serve as the sole basis to seek modification of an alimony award made before October 1, 2016.

B. SECTION DIRECTORY:

Section 1 amends s. 61.071, F.S., relating to alimony pendent lite; suit money.

Section 2 amends s. 61.08, F.S., relating to alimony.

Section 3 amends s. 61.14, F.S., relating to enforcement and modification of support, maintenance, or alimony agreements or orders.

Section 4 provides for applicability and construction of the effect of the bill.

Section 5 provides an effective date of October 1, 2016.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

The bill appears to have an impact on the State Courts System which is indeterminate at this time.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill is likely to impact future alimony awards.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

It is unclear if a court may use the presumptive alimony formula in **Figure 2** to calculate an alimony award in an action for support unconnected with marital dissolution under s. 61.90, F.S. If the formula may be used, it is unclear how the court will calculate the years of marriage, as the **YOMA** and **YOMD** variables depend upon the date an action for dissolution was filed.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On February 4, 2016, the Judiciary Committee adopted one technical amendment and reported the bill favorably as a committee substitute. This analysis is drafted to the committee substitute as passed by the Judiciary Committee.