

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 Judiciary Committee

BILL: CS/SB 1474

INTRODUCER: Judiciary Committee and Senator Joyner

SUBJECT: Marital Assets/Distribution

DATE: April 9, 2008

REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|---------|----------------|-----------|--------|
| 1. | Daniell | Maclure | JU | Fav/CS |
| 2. | _____ | _____ | _____ | _____ |
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Please see Section VIII. for Additional Information:

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

I. Summary:

This bill allows a court to enter an interim order during the pendency of a dissolution of marriage proceeding to allow an interim partial distribution of marital assets and liabilities if good cause is shown. The bill defines “good cause” for purposes of a motion for an interim order.

This bill provides that all real *or personal* property titled jointly by the parties as tenants by the entireties is presumed to be a marital asset. The bill provides that this presumption can be overcome by clear and convincing evidence that the property is nonmarital.

This bill abolishes special equity claims and provides that such claims are to be asserted as claims for unequal distribution of marital property or claims of enhancement in value or appreciation of nonmarital property.

This bill also makes technical and conforming changes.

This bill substantially amends sections 61.075 and 741.0306, Florida Statutes.

II. Present Situation:

Marital versus Nonmarital Assets and Liabilities

Florida law provides that all assets acquired and liabilities incurred by either spouse following their marriage are presumed to be marital assets and liabilities, unless they are specifically established as nonmarital.¹ This presumption, which can be overcome by a showing that the assets and liabilities are nonmarital, does not vest title to the assets.²

Current law provides that marital assets and liabilities include:

- Assets acquired and liabilities incurred during the marriage, individually by either spouse or jointly by them;
- The enhancement in value and appreciation of nonmarital assets resulting from the efforts of either party during the marriage or from the contribution to or expenditure thereon of marital funds;
- Interspousal gifts during the marriage;
- All vested and nonvested benefits, rights, and funds accrued during the marriage in retirement, pension, profit-sharing, annuity, deferred compensation, and insurance plans and programs; and
- All real property held by the parties as tenants by the entireties, whether acquired prior to or during the marriage.³

Additionally, nonmarital assets and liabilities include:

- Assets acquired and liabilities incurred by either party prior to the marriage, and any assets and liabilities that result from the exchange for such assets and liabilities;
- Assets acquired separately by either party by noninterspousal gift, bequest, devise, or descent, and assets acquired in exchange for such assets;
- All income derived from nonmarital assets during the marriage unless the income was treated, used, or relied upon by the parties as a marital asset;
- Assets and liabilities excluded from marital assets and liabilities by valid written agreement of the parties; and
- Any liability incurred by forgery or unauthorized signature of one spouse signing the name of the other spouse, unless the forged or unauthorized signature is later ratified by the other spouse.⁴

The cut-off date for determining whether assets or liabilities are marital is the date the parties enter into a separation agreement, any other date expressly established by the separation agreement, or the date of the filing of a petition for dissolution of marriage, whichever occurs

¹ Section 61.075(7), F.S.

² *Id.*

³ Section 61.075(5)(a), F.S.

⁴ Section 61.075(5)(b), F.S.

first.⁵ The judge determines the date for determining the value of the assets and the amount of the liabilities, based on what is just and equitable under the circumstances.⁶

Marital Gift Presumption

There is a general presumption that transfers between a husband and wife are gifts.⁷ In Florida, “[i]nterspousal gifts during marriage are deemed marital assets for purposes of equitable distribution of property in a dissolution of marriage proceeding.”⁸ This presumption exists even if one spouse provided every penny of consideration for the purchase of the property that is titled jointly.⁹ In order to overcome this statutory presumption, the party seeking a special equity¹⁰ has the burden of proving that a gift was not intended.¹¹

In response to the creation of s. 61.075, F.S.,¹² the Florida Supreme Court said:

One important difference between case law and the statute is the treatment of real estate that is held by the parties as tenants by the entireties. The statute provides that the conveyance of premarital real estate to entireties ownership changes the character of the premarital property and creates a presumption that the parties intended the property to be subject to equitable distribution on divorce. In contrast, *Ball v. Ball* and subsequent cases held that once a spouse proved that property was originally nonmarital, a presumption arose that the property remained nonmarital, unless the other spouse could show that a gift was intended. Thus, the 1988 statute has shifted the burden of proof by creating a presumption that property transferred to a tenancy by the entireties is marital, regardless of its original acquisition. It is up to the spouse who claims a special equity interest to prove that a gift of that interest was not intended.¹³

There is conflicting case law in Florida regarding the burden of proof required to defeat the gift presumption. Several courts have said that the party trying to prove that no gift was intended must do so beyond a reasonable doubt,¹⁴ while others have required clear and convincing

⁵ Section 61.075(6), F.S.

⁶ *Id.*

⁷ 41 C.J.S. *Husband and Wife* s. 195.

⁸ 25 FLA. JUR. 2D *Family Law* s. 409; *see also* s. 61.075(5)(a)5., F.S.

⁹ Victoria M. Ho and Rebecca Y. Zung, *Special Equity and Unequal Distribution of Assets*, 75 FLA. B.J. 79, 80 (Nov. 2001).

¹⁰ A “special equity” is defined as “a vested interest in property brought into the marriage or acquired during the marriage from a source unconnected with the marital relationship.” 25A FLA. JUR. 2D *Family Law* s. 724.

¹¹ *Robertson v. Robertson*, 593 So. 2d 491, 493 (Fla. 1991); *Zangari v. Cunningham*, 839 So. 2d 918, 920-21 (Fla. 2d DCA 2003) (finding that, standing alone, evidence that one party made the down payment for the parties’ marital home with his nonmarital assets was insufficient to prove that the party did not intend a gift).

¹² Chapter 88-98, Laws of Fla.

¹³ *Robertson*, 593 So. 2d at 494 (quoting 2 FLA. FAM. L. s. 34.24 (Mar. 1990)).

¹⁴ *See Lindley v. Lindley*, 84 So. 2d 17, 20 (Fla. 1955); *Singer v. Singer*, 262 So. 2d 731, 732 (Fla. 3d DCA 1972); *Antonini v. Antonini*, 473 So. 2d 739, 741 (Fla. 1st DCA 1985); *Terrerros v. Terreros*, 531 So. 2d 1058, 1059 (Fla. 3d DCA 1988); *Smith v. Smith*, 597 So. 2d 370, 371 (Fla. 3d DCA 1992). “Beyond a reasonable doubt” is considered the “doubt that prevents one from being firmly convinced of a defendant’s guilt, or the belief that there is a real possibility that a defendant is not guilty.” BLACK’S LAW DICTIONARY (8th ed. 2004). This standard is mainly used in criminal trials.

evidence.¹⁵ More recently, some courts have held that the party claiming that jointly held real property is not a marital asset must present such proof by a preponderance of the evidence or by the greater weight of the evidence.¹⁶

A dichotomy appears to exist between the treatment of personal property and the treatment of real property.¹⁷ Section 61.075(5)(a)5., F.S., provides that *real* property held by the parties as tenants by the entireties is presumed to be a marital asset. However, the statute does not mention whether there is a presumption for personal property. Case law has found that the key to determining whether separate assets are to remain nonmarital depends on whether the personal property (usually funds) remains traceable. Specifically, one court has held:

When a joint account, originally established with non-marital property, is intermingled with marital property so that the property becomes non-traceable, that is, it becomes incapable of being specifically identified as the earlier separate property, such property is properly categorized as marital. The *commingling* of the marital and non-marital property creates a presumption, similar to the one set forth in section 61.075(5)(a)5 for real property, that a gift of one-half of the jointly held funds was made to the other spouse.¹⁸

Based on the conflicting case law regarding the standard of proof required to show that *real* property held as tenants by the entireties is nonmarital, it is equally unclear what the standard of proof is for *personal* property.

Equitable Distribution and Special Equity

In a dissolution of marriage or disposition of assets proceeding, the court must first set apart each spouse's nonmarital assets and liabilities.¹⁹ Then, in distributing the marital assets and liabilities, the court must begin with the premise that the distribution should be equal, unless there is justification for an unequal distribution.²⁰ Some factors a court may consider when determining whether to award an unequal distribution are:

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

¹⁵ See *Abbott v. Abbott*, 297 So. 2d 608, 609 (Fla. 2d DCA 1974), *abrogated by Landay v. Landay*, 400 So. 2d 43 (Fla. 2d DCA 1981); *Harrison v. Harrison*, 314 So. 2d 812, 814 (Fla. 3d DCA 1975). "Clear and convincing evidence" is "evidence indicating that the thing to be proved is highly probable or reasonably certain." BLACK'S LAW DICTIONARY (8th ed. 2004).

¹⁶ See *Dix v. Dix*, 400 So. 2d 1294, 1295 (Fla. 4th DCA 1981); *Knecht v. Knecht*, 629 So. 2d 883, 886 (Fla. 3d DCA 1994); *Heim v. Heim*, 712 So. 2d 1238, 1239 (Fla. 4th DCA 1998) (noting that the scope of *Lindley v. Lindley*, 84 So. 2d 17 (Fla. 1955), was limited to the facts of that case); *Stough v. Stough*, 933 So. 2d 603, 606 (Fla. 1st DCA 2006). Preponderance of the evidence is the standard used in most civil trials and is less than the clear and convincing evidence burden. BLACK'S LAW DICTIONARY (8th ed. 2004), see "evidence."

¹⁷ See *Archer v. Archer*, 712 So. 2d 1198 (Fla. 5th DCA 1998).

¹⁸ *Id.* at 1199 (emphasis in original).

¹⁹ Section 61.075(1), F.S.

²⁰ *Id.*

- The contribution of one spouse to the personal career or educational opportunity of the other spouse;
- The desirability of retaining any asset, including an interest in a business, corporation, or professional practice;
- The contribution of each spouse to the acquisition, enhancement, and production of income or the improvement of, or the incurring of liabilities to, both the marital and nonmarital assets of the parties;
- The desirability of retaining the marital home as a residence for any dependent child of the marriage, when it is equitable to do so, it is in the best interest of the child, and it is financially feasible;
- The intentional dissipation, waste, depletion, or destruction of marital assets after the filing of the petition or within two years prior to the filing of the petition; and
- Any other factors necessary to do equity and justice between the parties.²¹

In a contested dissolution action, the distribution of marital assets and liabilities must be supported by factual findings in the judgment.²²

The term “special equity” was judicially created in 1932²³ to circumvent the statutory rule that prohibited alimony to an adulterous wife.²⁴ In 1980, the Florida Supreme Court further defined “special equity” to mean “a vested interest which a spouse acquires because of a contribution of funds, property, or services made over and above the performance of normal marital duties.”²⁵ According to some practitioners, special equity is an “antiquated” term and is synonymous with “unequal distribution.”²⁶

Regarding the issue of special equity, some practitioners have said:

Special equity is a concept that seemingly illustrates a justification for unequal distribution, *i.e.*, services or contributions over and above normal marital contributions. However, with the advent of the equitable distribution statute ... a simple request for an unequal distribution of marital assets is more clear and in line with the definition set forth in the statute.

....

The burden of proof for a special equity claim is two-fold. First, the party claiming a special equity must prove the funds or property came from a nonmarital source, and second that a gift was not intended. The burden to show a special equity is upon the party claiming it.

....

²¹ *Id.*

²² Section 61.075(3), F.S. This subsection lists the specific written findings of fact required.

²³ *Heath v. Heath*, 103 Fla. 1071 (Fla. 1932).

²⁴ Victoria M. Ho and Rebecca Y. Zung, *supra* note 9, at 79.

²⁵ *Id.* (quoting *Duncan v. Duncan*, 379 So. 2d 949, 952 (Fla. 1980)).

²⁶ *Id.* at 81.

Family law practitioners should first determine whether an asset and the appreciation thereon is marital, nonmarital, or some combination of both. Second, look at whether the presumptions of gift apply through title to real estate or commingling of assets. Third, determine whether an argument for unequal distribution of a marital asset is appropriate.²⁷

Interim Partial Distribution

Under current Florida law, parties in a dissolution of marriage action are precluded from seeking a partial disbursement of assets during the pendency of the case. The following is one reason cited in favor of allowing courts to award an interim award of marital assets:

[P]ending a final outcome of the equitable distribution proceeding, one spouse could retain control of all the cash and income-generating assets belonging to the marital estate, receiving the benefit of those assets, while the other retained nothing and derived no benefit from the marital estate. This resulted in hardship to the spouse who did not control the assets. It also gave the controlling spouse an incentive to delay the equitable distribution proceedings.²⁸

In construing another provision in ch. 61, F.S., Florida courts have found that “[t]he equitable considerations underlying our dissolution law ... compel the trial court to mitigate the harm an impecunious spouse would suffer where the other spouse’s financial advantage accords him or her an unfair ability to obtain legal assistance.”²⁹

Family Law Handbook

In 1998, the Legislature enacted a law creating a family law handbook to explain portions of Florida law pertaining to the rights and responsibilities of marital partners to each other and their children, both during the marriage and upon dissolution.³⁰ The family law handbook is to be created by the Family Law Section of The Florida Bar and shall be reviewed for accuracy by the Family Court Steering Committee of the Florida Supreme Court.³¹ The family law handbook shall be available, in hard copy or electronic media, from the clerk of the circuit court.³² The family law handbook must be reviewed and updated annually.³³

The family law handbook may include, but is not limited to, the following information:

- Prenuptial agreements;
- Shared parental responsibility for children;

²⁷ *Id.* at 79-82.

²⁸ *Brown v. Brown*, 434 S.E.2d 873, 876 (N.C. App. 1993).

²⁹ *Emmel v. Emmel*, 671 So. 2d 282, 286 (Fla. 5th DCA 1996) (Cobb, J., concurring in part, dissenting in part) (quoting *Nichols v. Nichols*, 519 So. 2d 620, 621 (Fla. 1988)).

³⁰ Chapter 98-403, s. 7, Laws of Fla., codified in s. 741.0306, F.S. An example of the family law handbook can be found at <http://www.pbcountyclerk.com/pdf/FamilyLawHandbook%20English.pdf> (last visited April 7, 2008).

³¹ Section 741.0306(1), F.S.

³² Section 741.0306(2), F.S.

³³ Section 741.0306(4), F.S.

- Permanent relocation restrictions on parents with primary residential responsibility;
- Child support for minor children;
- Property rights, including equitable distribution, special equity, premarital property, and nonmarital property;
- Alimony;
- Domestic violence and child abuse and neglect;
- Court process for dissolution with or without legal assistance;
- Parent education course requirements for divorcing parents with children;
- Community resources that are available for separating or divorcing persons and their children; and
- Women's rights specified in the Battered Women's Bill of Rights.³⁴

III. Effect of Proposed Changes:

The bill provides for the interim partial distribution of marital assets and liabilities during the pendency of the dissolution action, upon a showing of good cause³⁵ and a sworn motion establishing a specific factual basis for the motion. The motion may be filed by either party and must demonstrate good cause why the matter should not be deferred until the final hearing. The bill provides that an interim order may be entered at any time after the date the dissolution of marriage is filed and served and before the final distribution of the marital assets and liabilities. The bill requires the court to specifically take into account and give appropriate credit for any partial distribution of marital assets and liabilities in its final allocation of marital assets and liabilities. Additionally, the court is required to make specific findings in any interim order under this section that a partial distribution will not cause inequity or prejudice to either party.

The bill provides that all personal property, as well as real property, titled jointly by the parties as tenants by the entireties, whether acquired before or during the marriage, shall be presumed to be a marital asset. The bill further provides that the burden of proof to overcome the gift presumption is by clear and convincing evidence.

The bill abolishes all claims for special equity and instead provides that the claim may be asserted as a claim for unequal distribution of marital property, or as a claim of enhancement in value or appreciation of nonmarital property.

The bill amends s. 741.0306, F.S., to delete the reference to special equity in the Florida family law handbook.

The bill also makes technical and conforming changes.

The bill provides that the act shall take effect July 1, 2008.

³⁴ Section 741.0306(3), F.S.

³⁵ The bill provides that "good cause" is when "extraordinary circumstances" exist.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

This bill provides that a court may enter an order for an interim partial distribution of assets in a dissolution of marriage proceeding. This may help impecunious spouses from having to liquidate their assets to support themselves during a dissolution proceeding.

C. Government Sector Impact:

According to the Family Law Section of the Florida Bar, if a court is able to enter an interim order during dissolution of marriage proceedings, it may obviate the need for costly temporary relief hearings.³⁶

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)**CS by Judiciary on April 8, 2008:**

The committee substitute:

³⁶ E-mail correspondence from a representative of the Family Law Section of the Florida Bar to the Senate Committee on Judiciary, April 2, 2008 (on file with the Senate Committee on Judiciary).

- Removes reference to special equity claims in the statute relating to the Florida family law handbook, to conform to other changes made by the bill;
- Changes the effective date to July 1, 2008 (rather than upon becoming law); and
- Makes technical and conforming changes.

B. Amendments:

None.

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