

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 549 Dissolution of Marriage

SPONSOR(S): Judiciary Committee; Civil Justice Subcommittee; Workman and others

TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 748

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	10 Y, 2 N, As CS	Caridad	Bond
2) Judiciary Committee	17 Y, 1 N, As CS	Caridad	Havlicak

SUMMARY ANALYSIS

Alimony provides financial support to a financially dependent former spouse. The primary basis for determining alimony is whether there is need and ability to pay. There are four different types of alimony: bridge-the-gap alimony, rehabilitative alimony, durational alimony, and permanent alimony.

A court may grant a request to modify alimony where there is a change in circumstances or the financial ability of the parties. It may also reduce or terminate an award of alimony based on its specific written findings that the spouse receiving alimony has entered into a supportive relationship with another person.

The bill amends current law on alimony and divorce to:

- Change the term "permanent alimony" to "long-term" alimony.
- Provides that the court shall make written findings regarding the basis for awarding a combination of alimony (i.e. the type and length of time to be awarded).
- Provides that a court can consider adultery by a spouse in determining alimony, but only to the extent that the adultery caused a depletion in marital assets or a reduction in the income of a party.
- Require written findings as to various court determinations, including the factors a court must consider in awarding alimony.
- Modifies several of the factors a court must consider in awarding alimony (i.e. a court may only consider nonmarital assets that were relied upon and used by the parties during the marriage).
- Create a presumption that the parties will have a lower standard of living after divorce.
- Require that an award of security of the award can only be made upon a showing of special circumstances and the court must make findings regarding the availability, cost, and financial impact on the obligated party.
- Modify the line between moderate-term and long-term marriage from 17 to 20 years.
- Require that an alimony award may not require the person paying the award to have a lower standard of living than the person receiving alimony.
- Provide that an increase in an obligor's income is not considered permanent unless the increase has been maintained for at least a year.
- Require retroactive modification or termination of alimony to the date the petition was filed.
- Allow the court to award attorneys fees if the obligee unnecessarily or unreasonably litigated the petition for modification or termination based on the existence of a supportive relationship.
- Create a presumptive retirement age of 67.
- Prohibit factoring the income or assets of a new spouse of the obligor.
- Prohibit modification based solely on a reduction in child support.
- Require a court to impute income to a spouse receiving alimony according to existing statutory factors where the parties were in a short-term or moderate-term marriage.
- Provide requirements related to bifurcation, including time limitations for when a court may grant a dissolution of marriage and reserve jurisdiction regarding the property settlement.

This bill does not appear to have a fiscal impact on state or local governments.

This bill provides an effective date of July 1, 2012.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h0549b.JDC

DATE: 2/20/2012

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Alimony - In General

Alimony provides financial support to a financially dependent former spouse.¹ In Florida, the primary basis for determining alimony is whether there is need and ability to pay; alimony is not appropriate when the requesting spouse has no need for support or when the other spouse does not have the ability to pay.² Before a court can make an award of alimony, equitable distribution of the former spouse's assets must occur.³

Section 61.08(2), F.S., provides factors that a court must consider in awarding alimony. These factors include:

- 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 nonmarital 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, 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 to both parties of any alimony award, including the designation of all or a portion of the payment as a nontaxable nondeductible payment;
- All sources of income available to either party, including income available to either party through investments of any asset held by that party; and
- Any other factor necessary to do equity and justice between the parties.

For purposes of determining alimony, there is a rebuttable presumption that:

- A short-term marriage is a marriage having a duration of less than seven 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.⁴

Florida law provides for four types of alimony; bridge-the-gap alimony,⁵ rehabilitative alimony,⁶ durational alimony,⁷ and permanent alimony.⁸

- Bridge-the-gap alimony may be awarded to assist a party by providing support to allow the party to make a transition from being married to being single.⁹

¹ Victoria Ho & Jennifer Johnson, *Overview of Florida Alimony Law*, 78 Fla.B.J. 71, 71 (Oct. 2004).

² *Id.*

³ *Id.*

⁴ Section 61.08(4), F.S.

⁵ Section 61.08(5), F.S.

⁶ Section 61.08(6), F.S.

⁷ Section 61.08(7), F.S.

⁸ Section 61.08(8), F.S.

⁹ Section 60.08(5), F.S.

- Rehabilitative alimony may be awarded to assist a party in establishing the capacity for self-support through either the redevelopment of previous skills or credentials; or the acquisition of education, training, or work experience necessary to develop appropriate employment skills or credentials.¹⁰
- Durational alimony may be awarded when permanent periodic alimony is inappropriate. The purpose of durational alimony is to provide a party with economic assistance for a set period of time following a marriage of short or moderate duration.
- Permanent alimony may be awarded to provide for the needs and necessities of life as they were established during the marriage of the parties for a party who lacks the financial ability to meet his or her needs and necessities of life following dissolution of marriage.

Permanent alimony may be awarded following a marriage of long duration if such an award is appropriate upon consideration of the factors set forth in s. 61.08(2), following a marriage of moderate duration if such an award is appropriate based upon clear and convincing evidence after consideration of the factors set forth in s. 61.08(2), or following a marriage of short duration if there are written findings of exceptional circumstances. In awarding permanent alimony, the court shall include a finding that no other form of alimony is fair and reasonable under the circumstances of the parties.¹¹

The bill changes divorce and alimony laws as follows:

Award of Multiple Types of Alimony

Current law at s. 61.08(1), F.S., provides that a court may award multiple forms of alimony. This bill provides that a court may award multiple forms of alimony "where appropriate." However, the court must make written findings regarding the basis for awarding multiple forms of alimony, including the types of alimony and the length of time for each award. The bill specifies that the purpose of combining multiple forms of alimony is to assist the recipient spouse in achieving rehabilitation or contributing to the needs and necessities of life.

Adultery

Section 61.08(1), F.S., provides that a court may also consider the adultery of either party and the circumstances surrounding that adultery in determining an award of alimony.¹² However, adultery is not a bar to entitlement to alimony¹³ and marital misconduct may not be used as a basis for alimony unless the misconduct causes a depletion of marital assets.¹⁴ This bill codifies current case law and provides that adultery may be considered only to the extent that the adultery causes a significant depletion in marital assets or a significant reduction in the income of a party.

Alimony Awards and Written Findings

This bill requires that a court awarding alimony must make written findings regarding:

- The need for and ability to pay alimony.
- Application of the factors listed in s. 61.08(2), F.S.
- Additional equitable factors relied upon by the court in making an alimony award.
- The relative incomes and standards of living of the parties.

¹⁰ Section 61.08(6)(a), F.S.

¹¹ Section 61.08(8), F.S.

¹² Section 61.08(1), F.S.

¹³ See *Coltea v. Coltea*, 856 So.2d 1047 (Fla. 4th DCA).

¹⁴ 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).

Modification of Factors Regarding Alimony

Section 61.08(2), F.S., lists 10 factors that a court must consider when determining any alimony award (see above for comprehensive list of the factors). This bill amends the factors as follows:

- The financial resources factor is amended to specify that only nonmarital assets relied upon and used by the parties during the marriage may be considered.
- The tax treatment factor is amended to require a court to be consistent with applicable state and federal taxes.
- The sources of income factor is amended to limit the court to only considering income from assets acquired during the marriage.
- The bill adds a new factor to require that a court must consider the standard of living of each party after the application of the alimony award. In addition, the bill creates a rebuttable presumption that both parties will have a lower standard of living after divorce than the standard of living enjoyed during the marriage.

Security for an Alimony Award

Section 61.08(3), F.S., provides that the court may protect an alimony award by requiring the obligor to purchase life insurance or post a bond. This bill provides that any such award be in an amount adequate to secure the alimony award; and security may only be awarded upon a showing special circumstances. If the court finds special circumstances, it must make findings regarding availability, cost, and financial impact on the obligated party. In addition, if the underlying alimony award is modified, the security may be reduced in an amount commensurate with any reduction of the alimony award.

Length of Marriage

Section 61.08(4), F.S., utilizes the length of the marriage in years to determine whether the marriage is considered short-term, moderate term, or long-term. The types of alimony available are dependent upon which of these categories applies. This bill:

- Removes the language creating a legal presumption, thereby making the length in years determinative (that is, eliminating judicial discretion).
- Redefines the line between moderate-term marriage and long-term marriage from 17 to 20 years.

Changes to Durational Alimony

The bill:

- Provides that durational alimony is not authorized following a short-term marriage.
- Requires a court awarding durational alimony to provide written findings that an award of rehabilitative and/or bridge-the-gap alimony is inappropriate.
- Provides that, if the award is for a length of time greater than half the time the parties were married, a court must make written findings to justify the length of the award.
- Requires modification or termination upon a substantial change in circumstances or upon the existence of a supportive relationship, unless the court makes written findings of exceptional circumstances regarding why the award should not be modified or terminated.

Changes to Permanent Alimony

Permanent alimony continues until the death of the obligor, death of the obligee, remarriage of the obligee, or termination by a court. This bill changes the term "permanent alimony" to "long-term" alimony. The bill also:

- Changes the requirement that long-term alimony provide for the needs and necessities of life as they were established during the marriage, to a requirement that such alimony provide for the needs and necessities of life.
- Requires a court to modify the award based on a substantial change in circumstances.
- Provides that in awarding long-term alimony, the court must include a finding that no other form of alimony will provide for the needs and necessities of life of the recipient and that no other form of alimony is fair and reasonable under the circumstances of the parties.

Evaluation of Relative Standards of Living

Section 61.08(9), F.S., requires that an award of alimony may not leave the payor with significantly less net income than the net income of the recipient, absent exceptional circumstances. This bill amends this provision to provide that an award may not leave the payor with less net income or with a lower standard of living than the recipient. The bill also removes the ability of a court to consider exceptional circumstances. The court must make written findings regarding the relative incomes and standards of living of the parties.

Modification of Alimony Based on the Existence of a Supportive Relationship

A court may grant a request to modify alimony where the moving party shows "a permanent, unanticipated, substantial change in financial circumstances in one or both of the parties."¹⁵ One form of change of circumstances warranting modification of an alimony award is the existence of a supportive relationship. A court may reduce or terminate an award of alimony based on its specific written findings that, since the granting of a divorce and the award of alimony, the spouse receiving alimony, or the obligee, has entered into a supportive relationship with a person with whom he or she resides. Section 61.14(1), F.S., enumerates factors a court must consider when determining whether a supportive relationship exists between the obligee and the individual with whom such former spouse resides (i.e. the extent to which the obligee and the person hold themselves out as a married couple). The spouse paying spousal support, or the obligor, has the burden to prove that a supportive relationship exists.

The bill requires retroactive modification or termination of alimony to the date the petition for modification or termination was filed. A court may not reserve jurisdiction to later reinstate alimony when it terminates alimony based on the existence of a supportive relationship. In addition, if the court determines the obligee unreasonably and unnecessarily litigated the issue, the court may award the obligor reasonable attorney fees and costs.

The bill also provides that, for purposes of modification of an alimony award, an increase in an obligor's income is not considered permanent unless the increase has been maintained without interruption for at least one year.

Retirement of the Obligor

The bill provides that the obligor reaching reasonable retirement age is a substantial change in circumstances warranting modification of an award. The bill also creates a rebuttable presumption that the normal retirement age is 67. In determining whether the obligor's retirement age is reasonable, the court must consider the obligor's: age; health; motivation for retirement; type of work; and normal retirement age for that type of work.

The obligor may file a petition for termination or modification of the alimony award effective upon the retirement date. The court must terminate or modify the alimony award based on the circumstances of the parties after retirement of the obligor and the factors set out in s. 61.08(2), F.S.

Other Changes Regarding Alimony Awards

¹⁵ *Townsend v. Townsend*, 585 So.2d 468 (Fla. 2d DCA 1991).

Regarding alimony awards, the bill requires that:

- If an obligor remarries or resides with another person, the income and assets of the obligor's spouse or person with whom the obligor resides may not be considered in a modification action regarding such obligor.
- If a court orders alimony payable concurrent with a child support order, the alimony award may not be modified solely because of a later modification or termination of child support payments.

This bill also provides that an alimony award may not leave the payor with a lower standard of living than the recipient, unless the court makes written findings of exceptional circumstances.

The bill also provides that except in cases where the parties were in a long-term marriage, the court must impute income to the obligee using the analysis and factors in s. 61.30(2)(b), relating to the child support guidelines. Under s. 61.30(2)(b), income must be imputed to an unemployed or underemployed individual if such unemployment or underemployment is found to be voluntary. This does not apply if the court finds that the individual has a physical or mental incapacity or is subject to other circumstances beyond his or her control.

If a court finds that a party is voluntarily unemployed or underemployed, it must determine the party's employment potential and probable earnings level based on his or her recent work history and occupational qualifications if such information is available. If it is not available, income is automatically imputed and there is a rebuttable presumption that the party has "income equivalent to the median income of year-round full-time workers as derived from current population reports or replacement reports published by the United States Bureau of the Census."¹⁶ To impute income accordingly, the court must make specific findings of fact consistent with this section.

An individual seeking to impute income has the burden to present evidence that:

- The unemployment or underemployment is voluntary; and
- Identifies the amount and source of the imputed income through evidence of income from available employment for which the other individual is qualified for given his or her education and experience; and with consideration of the parties' time-sharing schedule in the parenting plan.

In addition, income may not be imputed based on:

- Income records that are more than five years old at the time of the hearing or trial at which imputation is sought; or
- Income at the level that a party has never earned in the past, unless the party has recently received a degree, license, or certification in the profession at issue. The court must also consider the parties' existing time-sharing plan when imputing income to a party.

A court may refuse to impute income to a party if it finds it necessary for the party to stay home with a child who is subject to a child support calculation.

Bifurcation of Divorce Action

Bifurcation is a split procedure in which the court grants a dissolution of marriage and reserves jurisdiction regarding property settlement, debts, alimony and child support. A party might petition the court for bifurcation of a case where the party would like to expedite the divorce so he or she can remarry. Current case law discourages the use of bifurcation. Specifically, in *Claughton v. Claughton*, the Florida Supreme Court explained:

[W]e believe trial judges should avoid this split procedure. The general law and our procedural rules at both the trial and appellate levels are designed for one

¹⁶ Section 61.30(2)(b), F.S.

final judgment and one appeal. Splitting the process can cause multiple legal and procedural problems which result in delay and additional expense to the litigants. This split procedure should be used only when it is clearly necessary for the best interests of the parties or their children. The convenience of one of the parties for an early remarriage does not justify its use.¹⁷

The bill provides a list of instances where a court may or may not grant a petition for bifurcation.

- During the first 180 days after the dissolution of marriage petition is filed, a court may not grant a petition for bifurcation of a case unless there are exceptional circumstances justifying bifurcation and the court makes written findings of such circumstances.
- After 180 days, a court may grant a petition only if the court enters appropriate temporary orders to protect the parties and their children and makes written findings that no irreparable harm will result from the decision.
- After 365 days, the court must grant the petition once it has entered any appropriate temporary orders necessary to protect the parties, unless a party shows that granting the petition will result in irreparable harm.

The bill also includes a nonexclusive list of temporary orders which must be entered before a court may grant a dissolution of marriage without adjudicating all substantive issues: restrict the sale or disposition of property; protect and preserve the marital assets; establish temporary support; provide for maintenance of health insurance; and provide for maintenance of life insurance. However, the court is not required to enter temporary orders if it enters a final judgment of marriage which adjudicates substantially all of the substantive issues between the parties but reserves jurisdiction to address ancillary issues such as the adjudication of attorney's fees and costs.

B. SECTION DIRECTORY:

Section 1 amends s. 61.08, F.S., relating to alimony

Section 2 amends s. 61.14, F.S., relating to enforcement and modification of support, maintenance, of alimony agreements or orders.

Section 3 amends s. 61.19, F.S., relating to entry of judgment of dissolution of marriage.

Section 4 provides an effective date of July 1, 2012.

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 does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

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

2. Expenditures:

¹⁷ *Cloughton v. Cloughton*, 393 So.2d 1061, 1062 (Fla. 1981).

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

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have any direct economic impact on the private sector.

D. FISCAL COMMENTS:

This bill may increase the courts' workload in dissolution of marriage cases. For instance, the bill requires written findings for determinations of alimony; and requires bifurcation of a case if more than 180 days have passed since the action of dissolution was filed.

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 provision of the bill relating to bifurcation of a case appears to implicate courts' rule-making authority. The Florida Supreme Court is responsible for adopting rules of practice and procedure in all state courts. The Legislature cannot modify or rewrite court-formulated rules of practice and procedure.¹⁸ The Florida Supreme Court has stated that any "attempt by the Legislature to amend a statute which has become a part of the rules of practice and procedure would be a nullity."¹⁹ The court has invalidated statutes that the court claims violate its exclusive rulemaking authority.²⁰

The bifurcation provision of the bill provides specific time limitations and requirements in a dissolution of marriage case.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On December 7, 2011, the Civil Justice Subcommittee adopted two amendments and reported the bill favorably as a committee substitute.

- Amendment 1 provides that an alimony award must be deductible by the obligor and taxable to the obligee; however, an award for the cost of the obligee's education or training necessary to establishing the capacity for self support need not be deductible by the obligor.

¹⁸ See Art. V, Sec. 2(a), Fla. Const.

¹⁹ *In re Clarification of Fla. Rules of Practice and Procedure*, 281 So.2d 204, 205 (Fla. 1973).

²⁰ See *Allen v. Butterworth*, 756 So.2d 52 (Fla. 2000) (holding that time limits for the writ of habeas corpus is a matter of practice and procedure, thereby invalidating part of the Death Penalty Reform Act); see also *Haven Fed. Sav. & Loan Ass'n v. Kirian*, 579 So.2d 730 (Fla. 1991) (striking law regarding counterclaims in foreclosure proceedings).

- Amendment 2 provides that in awarding long-term alimony, the court must include a finding that no other form of alimony will provide for the needs and necessities of life of the recipient and that no other form of alimony is fair and reasonable under the circumstances of the parties.

On February 16, 2012, the Judiciary Committee adopted an amendment and reported the bill favorably as a committee substitute. The amendment:

- Restore previous language regarding the court's consideration of adultery in awarding alimony; and provide that the court may only consider adultery to the extent it is caused by a significant depletion in marital assets or a significant reduction in the income of a party.
- Restore the factor in s. 61.08, F.S., regarding tax treatment and consequences of an alimony award to specify that the court's award must be consistent with applicable state and federal tax laws.
- Restore the factor in s. 61.08, F.S., regarding security for an alimony award; and provide that security may only be awarded upon a showing of special circumstances. If it finds such circumstances exist, the court must make written findings.
- Require a court awarding durational alimony to: (1) provide written findings that an award of rehabilitative and/or bridge-the-gap alimony is inappropriate; and (2) if the award is for a length of time greater than half the time the parties were married, make written findings to justify the length of the award.
- Restore previous language requiring a court to provide "written findings of exceptional circumstances" where an award of alimony leaves a payor with less net income or a lower standard of living than the payee.
- Consolidate language regarding the existence of a supportive relationship to provide that: (1) there is a rebuttable presumption that a modification or termination of alimony is retroactive to the date the petition was filed; and (2) if the court determines that the obligee unnecessarily or unreasonably litigated the underlying petition, the court may award the obligor reasonable attorney fees and costs.
- Provide that an increase in an obligor's income may not be considered permanent for purposes of modification of the alimony award unless the increase has been maintained for at least one year.
- Modify the language regarding retirement of the obligor to provide that the obligor's retirement at a reasonable retirement age is a substantial change in circumstances warranting consideration of termination or modification of the alimony award.
- Replace language requiring a person receiving alimony to maximize the potential for rehabilitation and reasonable earning capacity to provide that, except in cases of where the parties were in a long-term marriage, the court must impute income to the obligee using the analysis and factors in s. 61.30(2)(b), relating to the child support guidelines.
- Revise the provision on bifurcation to provide that: (1) during the first 180 days after the dissolution of marriage petition is filed, a court may not grant a petition for bifurcation of a case unless there are exceptional circumstances justifying bifurcation; (2) after 180 days, a court may grant a petition only if the court enters appropriate temporary orders to protect the parties and their children and makes written findings that no irreparable harm will result from the decision; and (3) after 365 days, the court must grant the petition once it has entered any appropriate temporary orders necessary to protect the parties.

This analysis is drafted to the committee substitute as passed by the Judiciary Committee.