

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 943 Family Law

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

TIED BILLS: None **IDEN./SIM. BILLS:** SB 1248

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

SUMMARY ANALYSIS

Alimony provides financial support to a financially dependent former spouse. The primary elements to determine entitlement to alimony are need and the ability to pay, but statutes and case law impose many more criteria. There are currently five different types of alimony: temporary alimony, bridge-the-gap alimony, rehabilitative alimony, durational alimony, and permanent alimony. An award of alimony may be modified or terminated early in certain circumstances.

The bill makes a number of substantial changes to current law on alimony. The bill:

- Eliminates the categorization of alimony as bridge-the-gap, rehabilitative, durational or permanent.
- Eliminates the categorization of marriages as short, moderate, or long term based on their length.
- Provides guidelines to determine an award of temporary alimony.
- Provides a formula and presumptive guidelines to determine an award of full alimony, one effect of which is to eliminate future awards of permanent alimony.
- Redefines the term "income" for purposes of calculating alimony.
- Limits combined awards of alimony and child support to 55 percent of the payor's net income.
- Revises procedures to initiate participation in the alimony depository.
- Repeals cohabitation requirement for a finding of a supportive relationship in a modification action.
- Specifies when evidence of the financial resources of a successor spouse is admissible in a modification action.
- Requires written findings justifying factors used to determine an alimony award or modification.
- Creates a presumption that the parties may have a lower standard of living after divorce.
- Provides that alimony may be modified or terminated upon certain changes in actual income or the obligee reaching retirement age.
- Requires courts to advance certain domestic relations actions on the court calendar upon party motion.

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, 2015.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

ALIMONY

In general, alimony provides support to a financially dependent former spouse.¹ Alimony may be awarded to either party in a dissolution of marriage case,² and may be awarded in certain other cases. The judgment awarding alimony may be based upon the court's findings of fact, or by an underlying agreement of the parties that is approved by the court.³ Alimony is determined by considering both the need of the recipient and the ability to pay of the other party.⁴ 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.⁵

While there is some statutory guidance regarding alimony, much of the law on alimony is common law (that is, established through case precedent). The leading case on alimony is *Canakaris v. Canakaris*,⁶ a 1980 case that 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 Supreme Court said:

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.⁷

However, the court noted the problem with such broad discretion:

The discretionary power that is exercised by a trial judge is not, however, without limitation, and both 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.⁸

In the 35 years since *Canakaris*, little has changed in alimony law. While some statutory guidance has been added and case law has somewhat narrowed judicial discretion, a trial court still has broad discretion in setting the amount and term of alimony. Expressing his frustration with the concept of broad discretion, one appellate judge wrote in 2002:

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

² Section 61.08(2), F.S.

³ Section 61.14(1)(a), F.S.

⁴ See s. 61.08(2), F.S.; *Payne v. Payne*, 88 So.3d 1016 (Fla. 2d DCA 2012).

⁵ Section 61.08(2), F.S.

⁶ *Canakaris v. Canakaris*, 382 So.2d 1197 (Fla. 1980).

⁷ *Id.* at 1202.

⁸ *Id.* at 1203.

I write, however, to express my view that broad discretion in the award of alimony is no longer justifiable and should be discarded in favor of guidelines, if not an outright rule.⁹

TYPES OF ALIMONY

Florida law recognizes five forms of alimony: temporary, bridge-the-gap, rehabilitative, durational, and permanent periodic alimony.

Temporary Alimony

Alimony pendente lite is temporary alimony awarded after a marital party files for dissolution of marriage. The right to temporary alimony ends when the divorce becomes final, which is after the appeal process has run.¹⁰ Florida law provides that a party may request alimony pendente lite through petition or motion, and if well-founded, the court must order a reasonable amount.¹¹

Bridge-the-Gap Alimony

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. Bridge-the-gap alimony is designed to assist a party with legitimate identifiable short-term needs, and the length of an award may not exceed 2 years. An award of bridge-the-gap alimony terminates upon the death of either party or upon the remarriage of the party receiving alimony. An award of bridge-the-gap alimony is not modifiable in amount or duration.¹²

Rehabilitative Alimony

Rehabilitative alimony may be awarded to assist a party 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 appropriate employment skills or credentials.¹³ In order to award rehabilitative alimony, there must be a specific and defined rehabilitative plan which must be included as a part of any order awarding rehabilitative alimony.¹⁴ An award of rehabilitative alimony may be modified or terminated in accordance with s. 61.14, F.S., based upon a substantial change in circumstances, upon noncompliance with the rehabilitative plan, or upon completion of the rehabilitative plan.¹⁵

Durational Alimony

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. An award of durational alimony terminates upon the death of either party or upon the remarriage of the party receiving alimony. The amount of an award of durational alimony may be modified or terminated based upon a substantial change in circumstances in accordance with s. 61.14, F.S. However, the length of an award of durational alimony may not be modified except under exceptional circumstances and may not exceed the length of the marriage.¹⁶

Permanent Alimony

⁹ *Bacon v. Bacon*, 819 So.2d 950, 954 (Fla. 4th DCA 2002)(Farmer, J., concurring).

¹⁰ 24A AM. JR. 2D *Divorce and Separation* §615.

¹¹ Section 61.071, F.S.

¹² Section 61.08(5), F.S.

¹³ Section 61.08(6)(a), F.S.

¹⁴ Section 61.08(6)(b), F.S.

¹⁵ Section 61.08(6)(c), F.S.

¹⁶ Section 61.08(7), F.S.

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, following a marriage of moderate duration if such an award is appropriate upon consideration of certain enumerated factors, or following a marriage of short duration if there are exceptional circumstances. An award of permanent alimony terminates upon the death of either party or upon the remarriage of the party receiving alimony. An award may be modified or terminated based upon a substantial change in circumstances or upon the existence of a supportive relationship in accordance with s. 61.14, F.S.¹⁷

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 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.¹⁸

Effect of the Bill - Types of Alimony

The bill eliminates:

- Permanent alimony.
- The categorization of alimony as bridge-the-gap, rehabilitative, durational, or permanent in form.
- The categorization of marriage as short-term, moderate-term, or long-term based on the length of the marriage.

The bill creates one category of alimony, similar to what is currently called "durational alimony", that may be awarded in amount and duration based on presumptive guidelines as more fully explained in the "Determination of Alimony Award" section of this analysis. The concept of using such alimony for bridging the gap or rehabilitative purposes is retained in the presumptive guidelines that judges may use to determine the alimony award.

The bill does not change the categorization or form of temporary alimony.

DETERMINATION OF ALIMONY AWARD

Current Guidelines

Unlike child support obligations which are established by a fairly strict formula based on income, the type, amount and duration of alimony awards are largely within the discretion of the court. If alimony is to be judicially determined in "just proportions where appropriate," then this judicial discretion can understandably lead to widely disparate results.¹⁹

Currently, before a court can make an award of alimony, equitable distribution of the former spouse's assets must occur.²⁰ Thereafter, the court must make a specific factual determination regarding whether there remains a 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. If the court finds that a party has a need for alimony or maintenance and that the other party has the ability to pay

¹⁷ Section 61.08(8), F.S.

¹⁸ Section 61.08(4), F.S.

¹⁹ Victoria M. Ho and Jennifer J. Cohen, *An update on Florida Alimony Case Law: Are Alimony Guidelines a Part of Our Future? Part I*, The Florida Bar Journal, (October 2003).

²⁰ *Canakaris v. Canakaris*, 382 So.2d 1197, 1202 (Fla. 1980)

alimony or maintenance, then in determining the proper type and amount of alimony or maintenance the court must consider all relevant factors, including:²¹

- 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 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 income available to either party, including income available through investments.
- 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 that adultery in determining an award of alimony.²² However, adultery is not a bar to entitlement to alimony²³ and marital misconduct may not be used as a basis for alimony unless the misconduct causes a depletion of marital assets.²⁴

Among the factors enumerated in current law, the income of the parties is one of the most important to courts in establishing the need of one party and the ability of the other to pay, but is perhaps the most difficult to accurately measure. Unlike the definition of income for purposes of the child support guidelines, income as applicable to alimony actions is 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."²⁵ Case law has expanded the definition of income to include in-kind payments²⁶ and regular gifts.²⁷ In general, a source of income must be "available" in order to be considered in an alimony claim.²⁸ A spouse cannot voluntarily make the income unavailable in order to reduce his or her annual income.²⁹ Income may also be imputed to a voluntarily unemployed or underemployed spouse, whether the spouse is the payor or payee.³⁰ In either case, evidence about specific job opportunities must be presented.³¹

The court must include findings of fact relative to the factors enumerated supporting an award or denial of alimony.³² It is reversible error if a judgment fails to include findings as to all enumerated factors.³³

²¹ Section 61.08(2), F.S.

²² Section 61.08(1), F.S.

²³ See *Coltea v. Coltea*, 856 So.2d 1047 (Fla. 4th DCA).

²⁴ 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).

²⁵ Section 61.046(7), F.S.

²⁶ *Fitzgerald v. Fitzgerald*, 912 So.2d 363 (Fla.2d DCA 2005).

²⁷ *Weiser v. Weiser*, 782 So.2d 986 (Fla. 4th DCA 2000).

²⁸ *Zold v. Zold*, 880 So.2d 779 (Fla. 5th DCA 2004).

²⁹ *Geoghegan v. Geoghegan*, 969 So.2d 482 (Fla. 5th DCA 2007)(court should have considered including income earned by husband that was annually contributed by him to his 401K plan where contributions were voluntary)

³⁰ *Kovar v. Kovar*, 648 So.2d 177 (Fla. 4th DCA 1994); *Rojas v. Rojas*, 656 So.2d 563 (Fla. 3d DCA 1995).

³¹ *Brooks v. Brooks*, 602 So.2d 630 (Fla. 2d DCA 1992).

³² Section 61.08, F.S.

After determining the amount of alimony, the court may order periodic payments, payments in lump sum, or a combination of the two. Periodic payment of alimony means a payment of a certain amount of alimony at regular intervals (for example payment of the alimony on a monthly, semi-monthly, bi-weekly, or weekly basis). 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.³⁴

An alimony award may be protected by the court by requiring the payor to purchase life insurance or post a bond, or to otherwise secure the alimony award with other assets that may be suitable for that purpose.³⁵

Effect of the Bill - Presumptive Guidelines

The bill creates one category of alimony, similar to what is currently called "durational alimony," that may be awarded in amount and duration based on presumptive guidelines. The guidelines may not be used to calculate temporary alimony.

Initial Determination of Presumptive Alimony Range

The court must make initial written findings regarding the amount of each party's monthly gross income, which includes actual or potential income and such income from nonmarital or marital property distributed to each party, as well as the years of marriage as determined from the date of marriage through the date of the filing of the action for dissolution of marriage.

Gross income is defined virtually identical to gross income for purposes of determining child support under s. 61.30(2)(a), F.S. with the inclusion of several additional sources of income currently recognized in case law, such as continuing monetary gifts³⁶ and severance pay.³⁷ "Gross income" does not include child support, public assistance benefits, certain social security benefits, or earnings or gains on retirement accounts if unable to take a distribution from such account.

If a party is voluntarily unemployed or underemployed, alimony is calculated based upon that party's potential income unless the court makes specific written findings regarding circumstances that make it inequitable to impute income. Potential income means income which could be earned by a party using his or her best efforts from:

- Employment - The income a party could reasonable expect to earn by working at a locally available full time job commensurate with education, training, or experience; or
- Investments of assets or use of property - The income a party could reasonably expect to earn from the investment of his or her assets or the use of his or her property in a financially prudent manner.

A party is underemployed if he or she is not working full time in a position which is appropriate, based upon his or her education and experience, and available in the geographical area of his or her residence. A party will not be considered underemployed if he or she is enrolled in an educational program that can be reasonably expected to result in a degree or certification if it will lead to higher income and is a good faith educational choice.

After making such initial findings, the court must calculate and make written findings regarding the presumptive alimony amount and duration range pursuant to the following formula:

³³ *Pavese v. Pavese*, 932 So.2d 1269 (Fla 2d DCA 2006); *Baig v. Baig*, 917 So.2d 379 (Fla. 2d DCA 2005).

³⁴ *Rosario v. Rosario*, 945 So. 2d 629, 632 (Fla. 4th DCA 2006).

³⁵ Section 61.08(3), F.S.

³⁶ *Ordini v. Ordini*, 701 So. 2d 663 (Fla. 4th DCA 1997) and *Cooper v. Kahn*, 696 So. 2d 1186 (Fla. 3d DCA 1997).

³⁷ *Stebbins. v. Stebbins*, 754 So.2d 903 (Fla. 1st DCA 2000).

Presumptive Alimony Formula		
	Low End	High End
Amount	(0.0125 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.
Duration	0.25 x YOMD	0.75 x YOMD
<ul style="list-style-type: none"> • 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 the alimony 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. 		

Determining Alimony Award Within Presumptive Range

A court must award alimony within the presumptive range based on the length of the marriage and a list of enumerated factors.

There is a rebuttable presumption for marriages 2 years or less that no alimony may be awarded regardless of the range determined pursuant to the presumptive guidelines. 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.

For all other marriages, and a marriage of 2 years or less meeting the above criteria, if there is no agreement between the parties, alimony is presumptively awarded within the calculated presumptive range. In determining the amount and duration of the alimony award within the 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 with consideration that neither party may be able to maintain that standard of living as there will be two households 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 amount 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;
- The tax consequence of the alimony award;
- The adultery of either spouse; and
- Any other factor necessary to do equity and justice between the parties.

After consideration of the presumptive alimony amount and duration range and the listed factors, the court may establish an alimony award. The order establishing the award must clearly set forth both the amount and duration of the award. The court must also make a written finding that the payor has the financial ability to pay the award.

A court may still order a payor to secure the award of alimony, 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 obligation of a payor to secure the award of alimony may be modified if the underlying alimony award is modified and must be reduced in an amount commensurate with any reduction in the alimony award.

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 alimony duration ranges only if the court has considered all of the enumerated factors and makes specific written findings concerning the factors that justify the finding that the application of the presumptive alimony amount and alimony duration ranges 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 created in the bill to calculate temporary alimony.

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 agreement or ordered by the court, if the circumstances or the financial ability of either party changes. The change in circumstances must be alleged to have occurred subsequent to last judgment or order awarding alimony.³⁸ The court has jurisdiction to modify an award of alimony as equity requires.³⁹ A modification order may be retroactive to the date of the filing of the action, or the filing of the petition for modification.⁴⁰ Though s. 61.14, F.S., provides for a modification of alimony upon a change in circumstances, whether the award can be modified and on what basis depends on the type and the purpose of the alimony award.

Basis for Modification or Termination of Alimony		
Type of Alimony	Basis for Modification or Termination	Automatic Termination

³⁸ *Johnson v. Johnson*, 537 So.2d 637 (Fla. 2d DCA 1998).

³⁹ Section 61.14(1)(a), F.S.

⁴⁰ *Id.*

Temporary	Upon good cause shown	Entry of final judgment of dissolution of marriage.
Bridge-the-gap	Not modifiable in amount or duration	After 2 Years Remarriage of Recipient Death of Payor or Recipient
Rehabilitative	Substantial change in circumstances Non-compliance with the rehabilitative plan Completion of the rehabilitative plan	Death of Payor or Recipient
Durational	Substantial change in circumstances (Amount) Exceptional Circumstances (Length)	Remarriage of Recipient Death of Payor or Recipient
Permanent	Substantial change in circumstances	Remarriage of Recipient Death of Payor or Recipient

Substantial Change in Circumstances

Where a substantial change in circumstances forms the basis to modify an award of alimony, 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.⁴¹

Supportive Relationship

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 authorizes a court to terminate or modify an award of alimony based upon a supportive relationship that currently exists or has existed within the year before the filing of the petition for modification. Additional factors that a court may consider to determine the relationship of the obligee to another person include:

- 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 need and extent to which an obligee provides or receives caretaking assistance from a person related by consanguinity with whom the obligee resides.

The bill also eliminates the requirement that the obligee cohabit with the person with whom they are in a supportive relationship, although cohabitation is a factor the court may still consider. The obligor does not have to prove cohabitation. If a reduction or termination of alimony is granted based on a supportive relationship the reduction or termination is retroactive to the date of filing of the petition for reduction or termination.

⁴¹ *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)).

Retirement of the Obligor

Current law provides that retirement of the obligor can be considered as part of the total circumstances in order to determine if a sufficient change in circumstances exists to warrant a modification of alimony.⁴² In *Pimm v. Pimm*,⁴³ the Florida Supreme Court set out the following criteria for modification in cases of retirement and voluntary retirement before age 65 (the full retirement age for social security benefits at the time):

- Consideration of payor's age, health, and motivation for retirement as well as the type of work the payor performs and the age at which others engage in that line of work normally retire.
- Whether the retirement placed the receiving spouse in peril of poverty.
- The assets of the parties.

There are no statutory standards relating to modification or termination of alimony based on retirement, and it is strictly up to the trial court's discretion within the guidance provided by the Supreme Court.

The bill codifies the *Pimm case* and provides for modification or termination of an alimony award based on actual retirement. A substantial change in circumstances is deemed to exist if the obligor has reached the full retirement age for social security benefits and has retired or 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 his or her anticipated retirement and the court must determine the customary retirement date for the obligor's profession. However, such determination is not adjudicative of the petition for modification.

If an obligor voluntarily retires before meeting either condition, the court must determine if the retirement is reasonable based on the factors set out in *Pimm*. If the voluntary retirement is reasonable it constitutes a substantial change in circumstances. There is a rebuttal presumption that an obligor's existing alimony obligation shall be modified or terminated upon a finding of substantial change in circumstances. The bill provides factors that may overcome the presumption when applied to the current circumstances of the obligor and obligee, including:

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

The court may temporarily reduce or suspend the obligor's payment of alimony while a petition for modification based on retirement is pending.

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 the alimony obligation and is living off the income of a successor spouse.⁴⁴

The bill provides that the remarriage of an alimony obligor does not constitute a substantial change in circumstance or a basis for modification of alimony. Financial information of a successor spouse of the party paying or receiving alimony is inadmissible in a modification action unless a party claims his or her income has decreased since the marriage. The bill specifies the extent to which the information is discoverable and admissible in such actions.

⁴² *Pimm v. Pimm*, 601 So.2d 534 (Fla. 1992).

⁴³ *Id.*

⁴⁴ *Harmon v. Harmon* 523 So.2d 187 (Fla. 2d DCA 1988), *Hayden v. Hayden*, 662 So.2d 714 (Fla. 4th DCA 1995).

Imputed Income

The bill provides that a party is entitled to pursue an immediate modification of alimony under the following circumstances which shall 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.

Attorney Fees and Costs

Attorney's fees are available in proceedings to modify an award of alimony. Section 61.16(1), F.S. 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." The purpose of s. 61.16, F.S., is to make certain that both parties will have similar ability to secure competent legal counsel. "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 these fees."⁴⁵ 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 fees of his or her spouse based upon public policy considerations that each party have similar ability to secure competent legal counsel.

The bill provides an exception to the consideration of the financial resources of the both parties when awarding attorney fees and costs in a modification action. A party who unreasonably pursues or defends an action for modification of alimony will be required to pay the reasonable attorney fees and costs of the prevailing party and is disqualified from payment of his or her own fees or costs under s. 61.16, F.S.

INCOME TAX TREATMENT OF ALIMONY PAYMENTS

Gross income for federal income tax purposes, includes amounts received as alimony or separate maintenance payments.⁴⁶ The payment to or for the benefit of a spouse or former spouse under a divorce or separation instrument⁴⁷ will qualify and be deemed and treated by the Internal Revenue Service (IRS) as "alimony" for income tax purposes, and thus will be tax deductible from the payor's gross income and taxable income to the payee, if:⁴⁸

- 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 payee.

⁴⁵ *Canakaris v. Canakaris*, 382 So.2d 1197 (Fla. 1980).

⁴⁶ 26 U.S.C. § 71(a).

⁴⁷ 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).

⁴⁸ 26 U.S.C. § 71(b)(1).

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 payee and not deductible by the payor.⁴⁹ However, the usual treatment of alimony has been to make the alimony taxable to the recipient and deductible by the payor.⁵⁰ 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 payor and excludable from gross income by the payee in a marital settlement agreement or related agreement.⁵¹

Effect of the Bill

The bill codifies and restates current law.

OTHER EFFECTS OF THE BILL

Nominal Alimony

Under current law, 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 payee. Nominal alimony is not a form of alimony, but rather is an award of a de minimis amount 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 payee, should the financial conditions of the payor spouse improve.⁵²

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 the nominal alimony must be established in accordance with the presumptive guidelines. Before the expiration of the durational period, nominal alimony may be modified to a full alimony award using the presumptive alimony guidelines.

Advancing Trial

Judges and lawyers have a professional obligation to conclude litigation as soon as it is reasonably and justly possible to do so.⁵³ The Florida Rules of Judicial Administration provide that the presumptively reasonable time period for the completion of domestic relation cases in the trial and appellate courts of this state is 90 days (from filing to disposition) for uncontested actions and 180 days (from filing to disposition) for contested actions.⁵⁴ Nevertheless, the length of a dissolution and support action depends on the circumstances of a particular situation, and may exceed these time periods in some cases. Judges have the duty to identify priority cases as assigned by statute, rule of procedure, case law, or otherwise and implementing such docket control policies as may be necessary.⁵⁵ In all civil cases assigned a priority status, any party may file a notice of priority status explaining the nature of

⁴⁹ *Rykiel v. Rykiel*, 838 So.2d 508, 511-12 (Fla. 2003)

⁵⁰ See generally *Garcia v. Garcia*, 696 So.2d 1279 (Fla. 2d DCA 1997); *Rihl v. Rihl*, 727 So.2d 272 (Fla. 3d DCA 1999).

⁵¹ 26 CFR. § 1.71-1T, Q8 & A8.

⁵² *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 currently being used for his own support).

⁵³ Florida Rule of Judicial Administration 2.085.

⁵⁴ *Id.*

⁵⁵ *Id.*

the case, the source of the priority status, any deadlines imposed by law on any aspect of the case, and any unusual factors that may bear on meeting the imposed deadlines.⁵⁶

Section 61.192, F.S. is created by the bill to authorize either party in an action brought pursuant to ch. 61, F.S. to move the court to advance the trial of the action on the docket if more than 2 years have passed since the initial petition was served. The statute directs that the court is thereafter required to give the case priority on the court's calendar.

Payment of Alimony Awards

Section 61.08(10), F.S. requires that any order entered after January 1, 1985 that awards alimony, must direct the payment of alimony be made through a depository operated by the clerk of court unless the parties have no minor child or the parties request that the court not direct payment through the depository. If the parties request that the court not enter an order directing payment through the depository, the order of support must provide, or will be deemed to provide, that either party may subsequently apply to the depository to require that payments be made through the depository.⁵⁷ Either party may subsequently file with the depository an affidavit alleging default or arrearages in payment and stating that the party wishes to initiate participation in the depository program.⁵⁸ The party must provide copies of the affidavit to the court and the other party or parties.⁵⁹ Fifteen days after receipt of the affidavit, the depository must notify all parties that future payments must be directed to the depository.⁶⁰ The depository collects a fee equal to 4 percent of the alimony payment, except that no fee may exceed \$5.25.⁶¹

The bill revises the procedures parties must use to initiate subsequent participation in 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. The moving party must provide the non-moving party with a copy of the motion. A court is required to conduct an evidentiary hearing within 15 days after the filing of the motion to establish the default and arrearages, if any. The court must issue an order directing the clerk of the circuit court to establish or amend a Family Law Case History account, and direct that future payments be processed by the depository.

Child Support

The bill provides that in no event may a combined award of alimony and child support constitute more than 55 percent of the payor's net income, calculated without any consideration of alimony or child support obligations, and amends s. 61.30, F.S., the child support guidelines to require a court to adjust the award of child support to ensure that the 55 percent cap is not exceeded.

APPLICABILITY TO PENDING OR FUTURE PETITIONS FOR MODIFICATION OF ALIMONY

The revisions made by the bill, with the exception of revisions related to the calculation of the duration of an alimony award, apply to all petitions for modification of alimony pending on October 1, 2015, and to all petitions for modification of alimony filed on or after October 1, 2015. 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, 2015.

B. SECTION DIRECTORY:

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

⁵⁶ *Id.*

⁵⁷ Section 61.08(10)(d), F.S.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Section 61.181(2)(b), F.S.

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 amends s. 61.30, F.S., relating to child support guidelines; retroactive child support.

Section 5 creates s. 61.192, F.S., relating to advancing trial.

Section 6 provides for applicability and construction of the effect of the bill.

Section 7 provides an effective date of October 1, 2015.

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:

Provisions of the bill requiring the court to advance actions under ch. 61, F.S. on the calendar and to hear a motion regarding payment of alimony through the clerk depository within a specified period may violate the court's exclusive 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.⁶²The court has invalidated statutes that the court claims violate its exclusive rulemaking authority.⁶³

B. RULE-MAKING AUTHORITY:

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

C. DRAFTING ISSUES OR OTHER COMMENTS:

Current law provides for an award of alimony unconnected with an action for dissolution. The court has the ability in these actions to enter an alimony award "as it deems just and proper."⁶⁴ As the bill repeals the discretionary guidelines given to judges to determine an award of alimony and replaces it with presumptive guidelines based on income and the years of marriage, which is calculated depending upon the date of the filing of the action of dissolution, it is unclear whether alimony awards unconnected with dissolution are also subject to the presumptive guidelines or if judges retain full discretion to determine the award.

The bill does not specify the basis of modification for an award of alimony under the presumptive guidelines.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 17, 2015, the Civil Justice Subcommittee adopted one amendment to a proposed committee substitute and reported the bill favorably as a committee substitute. The amended committee substitute differs from the bill by:

- Providing guidelines for the determination of an award of temporary alimony.
- Revising the definition of the term "gross income" and "underemployed" for purposes of determining a full alimony award.
- Requiring the court to use the actual years of marriage, up to a maximum of 25 years, to calculate the high end of the presumptive alimony amount range for certain alimony awards.
- Requiring that a court make specific written findings before imputing income to a party.
- Requiring that a court weigh equities and tax consequences before ordering that alimony be nondeductible and nonincludable in income for income tax purposes.
- Requiring that a court consider the adultery of a spouse in determining an award of alimony within the presumptive guidelines.
- Providing that a court may order a payor to secure an alimony award upon a showing of special circumstances, specifying acceptable methods to secure the award, and providing for modification of the security upon a change in the alimony award.
- Providing that the 55% cap for a combined award of alimony and child support must be calculated without any consideration of alimony or child support obligations.
- Requiring an evidentiary hearing and court order to direct the payment of alimony through the alimony depository upon the request of a party alleging a payment default or arrearage.
- Specifying circumstances under which a party is entitled to pursue an immediate modification of income if actual income exceeds income imputed by the court in determining an alimony award.
- Removing a provision shifting the burden of proof to an obligee to disprove a supportive relationship after the obligor has established a supportive relationship by a preponderance of the evidence.
- Providing that an obligor may file an action prior to retirement to determine the customary retirement date for the obligor's profession.
- Providing that a court has discretion, but is not required, to reduce or suspend an obligor's payment of alimony while a petition for modification of alimony based on retirement is pending.

⁶² Art. V, Sec. 2(a), Fla. Const.

⁶³ 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).

⁶⁴ Section 61.09 F.S.

- Making technical, grammatical, and stylistic changes.

This analysis is drafted to the committee substitute as passed by the Civil Justice Subcommittee.