

HOUSE OF REPRESENTATIVES STAFF FINAL BILL ANALYSIS

BILL #: HB 521 Equitable Distribution of Marital Assets and Liabilities

SPONSOR(S): Koster and others

TIED BILLS: **IDEN./SIM. BILLS:** SB 534

FINAL HOUSE FLOOR ACTION: 117 Y's

0 N's

GOVERNOR'S ACTION: Pending

SUMMARY ANALYSIS

HB 521 passed the House on February 22, 2024, and subsequently passed the Senate on February 28, 2024.

In a proceeding for dissolution of marriage, the court must determine an equitable distribution of assets and liabilities between the parties. The court first evaluates the assets and liabilities of the parties and determines which are "marital" and which are "non-marital." Under s. 61.075(6)(a)1, F.S., marital assets include:

- Assets and liabilities acquired and incurred during the marriage by either spouse or together as a marital couple;
- The enhancement of value and appreciation of non-marital assets due to the efforts of either spouse or the contribution of marital funds or other marital assets;
- Interspousal gifts during the marriage;
- All vested and non-vested benefits, rights, and funds accrued during the marriage in retirement, pension, profit-sharing, and other similar funds;
- All real property held as tenants by the entirety; and
- All personal property titled jointly by the parties as tenants by the entireties, regardless of whether it was acquired prior to the marriage.

After establishing the list of assets and liabilities, the court must identify each non-marital asset and liability and set those apart to the respective owner spouse, because non-marital assets and liabilities are not included in the equitable distribution process. On the other hand, the court must begin with the premise that the distribution of marital assets and liabilities should be equal, unless there is justification for an unequal distribution based on the factors provided by law.

HB 521 amends s. 61.075, F.S. to clarify various aspects of the equitable distribution process. The bill clarifies what sort of circumstances justify an interim partial distribution and provides a list of factors for the court to use in making a determination on whether good cause exists to make an interim partial distribution.

The bill also requires any interspousal gift of real property to be made in writing in accordance with s. 689.01, F.S., similar to any other transfer of real property made outside of a marriage. The bill amends the definitions of "marital" and "nonmarital" property to reflect the requirement of a written instrument for an interspousal gift of real property. Lastly, the bill recognizes the enterprise goodwill in a closely held business as a marital asset which should be distributed between the parties.

The bill may have an indeterminate fiscal impact on the private sector due to the changes made to the classification of marital property to be divided subject to a dissolution.

Subject to the Governor's veto powers, the effective date of this bill is July 1, 2024.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Background

Equitable Distribution

During a dissolution of marriage proceeding, the court must evaluate the assets and liabilities of the parties and distribute the marital assets between the parties. The court must first identify all assets that are “non-marital” and set those aside to the respective owner spouse.¹ Next, the court must distribute the marital assets and liabilities between the parties.² In distributing the marital assets, the court must begin with the premise that the distribution should be equal, unless there is a justification for an unequal distribution based on relevant factors.³ Generally, equitable distribution is one of the first components the court must address in a dissolution matter as the distribution of assets may impact future earning potential and income which, in turn, may impact the amount of alimony, child support, or attorney fees assessed against each party.

Pursuant to s. 61.075(7), F.S., the cut-off date for determining assets and liabilities to be classified as marital is either the date the parties entered into a valid separation agreement⁴ or the date of the filing of the petition for dissolution, whichever is earlier. The assets and liabilities incurred by either spouse following the date of the marriage and not specifically identified as non-marital (such as property identified in a valid prenuptial agreement as being non-marital) are presumed to be marital assets and liabilities.⁵ Further, in certain circumstances the court may order a lump sum monetary payment or installment payments to the other spouse over a fixed period of time.⁶

Marital Assets

Pursuant to s. 61.075(6)(a)1, F.S. marital assets and liabilities include:

- Assets and liabilities acquired and incurred during the marriage by either spouse or together as a marital couple;
- The enhancement of value and appreciation of non-marital assets due to the efforts of either spouse or the contribution of marital funds or other marital assets;⁷
- Interspousal gifts during the marriage;⁸
- All vested and non-vested benefits, rights, and funds accrued during the marriage in retirement, pension, profit-sharing, and other similar funds;
- All real property held as tenants by the entirety; and
- All personal property titled jointly by the parties as tenants by the entireties, regardless of whether it was acquired prior to the marriage.

Non-Marital Assets

On the other hand, s. 61.075(6)(b) identifies non-marital assets and liabilities as including:

- Assets acquired and liabilities incurred by either party prior to the marriage;

¹ S. 61.075(1), F.S.

² *Id.*

³ *Id.*

⁴ A valid written or oral agreement to separate is necessary; mere physical separation may not be sufficient to establish a separation date. *Broadway v. Broadway*, 132 So. 3d 953 (Fla. 1st DCA 2014).

⁵ S. 61.075(8), F.S.

⁶ S. 61.075(10)(a), F.S.

⁷ See *Jordan v. Jordan*, 127 So. 3d 794 (Fla. 4th DCA 2013) (husband's pre-marital real property was classified as marital property subject to equitable distribution based on the wife's integral role in managing vast improvements to the property during the marriage).

⁸ An interspousal gift is a gift between spouses during a marriage and is established by showing donative intent, delivery or possession of the gift, and surrender of control of the gift. *Hooker v. Hooker*, 220 So. 3d 397 (Fla. 2017).

- Assets acquired separately by either party by noninterspousal gift, bequest, devise, or descent, and all assets acquired in exchange for such;
- 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 specifically excluded from marital classification 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.

Unequal Distribution

After the allocation of non-marital assets to each respective party, the court makes a distribution of the marital assets and liabilities between the parties. The court must begin with the premise that such distribution is to be equal. However, upon finding justification for an unequal distribution, the court may unequally distribute such marital assets and liabilities. The court must consider all relevant factors when making a determination as to the justification for unequal distribution, including:⁹

- 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.
- 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, intact and free from any claim or interference by the other party.
- 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 assets and the non-marital assets of the parties.
- The desirability of retaining the marital home as a residence for any dependent child of the marriage, or any other party, when it would be equitable to do so, it is in the best interest of the child or that party, and it is financially feasible for the parties to maintain the residence until the child is emancipated or until exclusive possession is otherwise terminated by a court of competent jurisdiction. In making this determination, the court must first determine if it would be in the best interest of the dependent child to remain in the marital home; and, if not, whether other equities would be served by giving any other party exclusive use and possession of the marital home.
- The intentional dissipation, waste, depletion, or destruction of marital assets after the filing of the petition or within 2 years prior to the filing of the petition.
- Any other factors necessary to do equity and justice between the parties.

Interim Partial Distribution

The court may make an interim partial distribution of assets during the pendency of a dissolution proceeding. Upon a party's sworn motion¹⁰ presenting the factual basis for an interim distribution and a finding by the court that "good cause" exists for such, the court may award an interim distribution.¹¹

"Good cause" means extraordinary circumstances that require an interim partial distribution;¹² however, the court has broad discretion in what it deems to be an extraordinary circumstance. In awarding

⁹ S. 61.075(1)(a)-(j), F.S.

¹⁰ An interim partial distribution may not be ordered in the absence of a verified motion requesting such a distribution. *Kemp v. Kemp*, 171 So. 3d 243 (Fla. 1st DCA 2015).

¹¹ S. 61.075(5), F.S.

¹² S. 61.075(5)(d), F.S.

interim distribution, the court must make specific findings that any partial distribution will not cause inequity or prejudice to either party as to either party's claims for support or attorney fees.¹³

Business Interests

A business interest in a closely held business acquired by a spouse during the marriage is a marital asset that must be valued and distributed in accordance with s. 61.075, F.S.

The value of a business in excess of the value of its property and capital is called "goodwill."¹⁴ Goodwill may also be thought of as the tendency of clients or customers to return to the business and recommend the business to others.¹⁵ One kind of goodwill, called "enterprise goodwill," is the value that exists separate and apart from the reputation or continued presence of the owner spouse. As such, enterprise goodwill is a marital asset subject to equitable distribution in a dissolution proceeding. On the other hand, "personal goodwill" is the goodwill attributable to a person, not to the business, and is therefore considered a non-marital asset.¹⁶ However, when determining the existence of enterprise goodwill versus personal goodwill, the court in *Schmidt v. Schmidt* held that when the valuation of a business requires a covenant not to compete or non-solicitation agreement, it signals the existence of personal goodwill and no further analysis of the value of enterprise goodwill is required.¹⁷ As such, under *Schmidt*, when the valuation of a business requires a non-compete contract or a similar agreement to conduct the sale, the goodwill is considered personal goodwill and is not included in determining the value of said business for the purposes of equitable distribution.

Under current law, a court has broad discretion in how to value the goodwill associated with a closely held business. Further, although it has been well established in case law, chapter 61 does not expressly provide for the separate consideration of different types of goodwill in the valuation of a business during equitable distribution.

Transfer of Real Property

As noted above, gifts from one spouse to another made during the marriage are generally considered marital property that is subject to equitable distribution. Under section 689.01, F.S., all conveyances of real property must be made in writing and signed in the presence of two witnesses.¹⁸ However, in *Hooker v. Hooker*, 220 So. 3d 397 (Fla. 2017), the Florida Supreme Court affirmed a lower court ruling that had held a property owner spouse had effectively gifted formerly non-marital property to the other spouse, even though there was no written instrument validly conveying such property under s. 689.01. The result of the case was that the non-marital property was transformed into marital property, thus causing the property to be subject to equitable distribution between the spouses in a dissolution of marriage proceeding.

Effect of the Bill

Equitable Distribution

HB 521 amends s. 61.075, F.S. to clarify various components of the equitable distribution process.

Interim Partial Distribution

The bill clarifies the meaning of "good cause" for purposes of whether the court may order interim partial distribution pending a dissolution proceeding. More specifically, the bill establishes a list of

¹³ S. 61.075(5)(b), F.S.

¹⁴ *Thompson v. Thompson*, 576 So. 2d 267 (Fla. 1991) (citing *Swann v. Mitchell*, 435 So. 2d 797 (Fla. 1983)).

¹⁵ See *Thompson*, 576 So. 2d at 269.

¹⁶ See *id.* at 270.

¹⁷ *Schmidt v. Schmidt*, 120 So. 3d 31, 33 (Fla. 4th DCA 2013).

¹⁸ S. 689.01(1), F.S.

factors the court must consider when determining whether extraordinary circumstances exist for such interim partial distribution, including the following:

- Whether there is a need for funds in order to avoid or prevent the loss of an asset through repossession or foreclosure, the loss of a house, the default by either party of a marital debt, or the levy of a tax lien.
- Whether there is a need for funds to pay an expense for a dependent child if nonpayment of the expense would be detrimental to the child.
- Whether one of both parties have a need to access funds to pay a reasonable amount of the attorney fees, court costs, or other suit money for maintaining or defending a dissolution proceeding.
- Any other circumstances that justify granting an interim partial equitable distribution.

Transfer of Real Property

The bill also amends s. 61.075(6)(a)1, F.S., to provide that the term “marital assets and liabilities” includes all of the listed items offered under that subparagraph. Further, the bill prohibits an interspousal gift of real property from being made without written documentation that complies with the provisions for conveyance of real property under s. 689.01, F.S. As such, under the bill, the mere inference of a gift of real property, as occurred in *Hooker*, without written documentation for the conveyance of such real property, would not meet the threshold required for an interspousal gift and would be assessed as any other acquisition of real property purchased within a marriage.

The bill further provides that the joinder of a spouse in the execution of a deed with the sole purpose of the conveyance of homestead real property to any person or entity other than the other spouse or both spouses jointly does not change the character of the real property being conveyed, or any proceeds from the sale thereof, to marital property. The bill amends s. 61.075(6)(b), F.S. to add a sixth asset to the prescribed list of non-marital assets and liabilities offered in statute. Under the bill, real property acquired separately by either party through noninterspousal gift, bequest, devise, or descent for which legal title has not been transferred to the parties as tenants in the entirety remains non-marital property for the purposes of equitable distribution.

Business Interests

The bill adds to the list of marital assets the marital interest in a closely held business. Further, the bill specifies the manner by which the court conducts a valuation of the marital interest in a closely held business. Under the bill, the court is directed to use the fair market value¹⁹ in determining the value of the closely held business. Additionally, the bill recognizes enterprise goodwill as a marital asset and distinguishes it from personal goodwill, which is a non-marital asset. As such, any enterprise goodwill in the business is a marital asset that must be valued by the court for distribution. In making a valuation of the closely held business, the bill requires the court to consider evidence that a non-compete clause or similar restrictive covenant may be required upon the sale of the business. However, contrary to the court in *Schmidt*, the bill clarifies that the mere existence of a non-compete provision subject to a sale of the business is not dispositive as to whether the goodwill is considered enterprise goodwill, and thus a marital asset subject to equitable distribution; or personal goodwill, and thus a non-marital asset that is not subject to equitable distribution. As such, even if the valuation of a business is based on the requirement for a non-compete contract, the court may still conduct an analysis as to whether the goodwill is enterprise or personal and, thus, subject to equitable distribution.

Subject to the Governor’s veto powers, the effective date of this bill is July 1, 2024.

¹⁹ The bill defines the “fair market value” as the price at which property would change hands between a willing and able buyer and a willing and able seller, with neither party under the compulsion to buy or sell, and when both parties possess reasonable knowledge of the relevant facts.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may have an indeterminate fiscal impact on parties involved in the dissolution process. The bill revises what constitutes a marital asset for the distribution of assets and liabilities and may alter the manner by which a court classifies certain property.

D. FISCAL COMMENTS:

None.