

STORAGE NAME: h0315s1.sgc.doc
DATE: February 13, 2002

**HOUSE OF REPRESENTATIVES
SMARTER GOVERNMENT COUNCIL
ANALYSIS**

BILL #: CS/HB 315
RELATING TO: Marital Assets & Liabilities
SPONSOR(S): Representatives Betancourt, Lynn, and Baxley
TIED BILL(S): None

ORIGINATING COMMITTEE(S)/COUNCIL(S)/COMMITTEE(S) OF REFERENCE:

- (1) JUDICIAL OVERSIGHT YEAS 11 NAYS 0
 - (2) SMARTER GOVERNMENT COUNCIL YEAS 13 NAYS 0
 - (3)
 - (4)
 - (5)
-

I. SUMMARY:

THIS DOCUMENT IS NOT INTENDED TO BE USED FOR THE PURPOSE OF CONSTRUING STATUTES, OR TO BE CONSTRUED AS AFFECTING, DEFINING, LIMITING, CONTROLLING, SPECIFYING, CLARIFYING, OR MODIFYING ANY LEGISLATION OR STATUTE.

Florida law regarding dissolution of marriage currently provides a presumption of equal distribution of marital assets, but also provides a list of factors that a trial court may optionally consider as grounds for an unequal distribution of marital assets.

This bill adds fault, by either spouse, that was the primary cause of the dissolution of marriage as an additional factor to be considered as grounds for unequal distribution of marital property.

This bill also provides that a liability that was incurred through forgery or unauthorized signature is a nonmarital liability, thereby removing the debt from consideration of the equitable distribution of marital assets and liabilities and makes payment of the liability solely the responsibility of the offending spouse. This bill further provides that the court must consider the forgery or unauthorized signature when awarding attorney's fees to the spouse whose signature was forged or used without authorization.

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

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|---|--|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/> |

For any principle that received a "no" above, please explain:

The permissive presumptions in current law allow a trial court judge to fashion a final distribution of assets that best suits the needs of the family and dependent children. This bill may require a distribution of assets that harms a financially dependent spouse or children.

B. PRESENT SITUATION:

Section 61.075(1), F.S. provides that the court must do equity in distribution of assets between the parties in a proceeding for dissolution of marriage. It further provides that each spouse will be attributed their non-marital assets or liabilities. The statute also provides that in distributing marital assets and liabilities the court must start with the premise that all assets and liabilities will be distributed equally. It also sets out factors to be considered as exceptions to this premise of equal distribution, including:

- 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.
- The interruption of personal careers or educational opportunities of either party.
- 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 the 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 filing the petition.
- Any other factors necessary to do equity and justice between the parties.

Section 61.052, F.S., provides that a dissolution of marriage shall be granted if the either (1) the marriage is irretrievably broken, or (2) one of the parties is deemed mentally incapacitated. While s. 61.052, F.S. does not reference fault by either party as a factor for granting a dissolution of marriage, s. 61.08(1), F.S., provides that the court may consider the adultery of either spouse and the circumstances thereof in determining the amount of alimony, if any, to be awarded.

Florida case law regarding unequal division of marital property indicates that “a spouse’s misconduct is not a valid reason to award a disproportionate amount of the marital assets to the innocent spouse, unless the infidelity depleted marital assets.”¹ As well, Florida case law indicates that “where marital misconduct results in a depletion or dissipation of marital assets, such misconduct can serve as a basis for an unequal division of marital property, or can be assigned to the spending spouse as part of that spouse’s equitable distribution.”²

Section 673.4031(1), F.S., a part of the Uniform Commercial Code relating to negotiable instruments,³ provides that “an unauthorized signature is ineffective except as the signature of the unauthorized signer in favor of a person who in good faith pays the instrument or takes it for value.” For purposes of this section, an unauthorized signature may be ratified. The writers of the Uniform Commercial Code explain the concept of ratification as follows:

The last sentence of subsection (a) allows an unauthorized signature to be ratified. Ratification is a retroactive adoption of the unauthorized signature by the person whose name is signed and may be found from conduct as well as from express statements. For example, it may be found from the retention of benefits received in the transaction with knowledge of the unauthorized signature. Although the forger is not an agent, ratification is governed by the rules and principles applicable to ratification of unauthorized acts of an agent.

Ratification is effective for all purposes of this Article. The unauthorized signature becomes valid so far as its effect as a signature is concerned. Although the ratification may relieve the signer of liability on the instrument, it does not of itself relieve the signer of liability to the person whose name is signed. It does not in any way affect the criminal law. No policy of the criminal law prevents a person whose name is forged to assume liability to others on the instrument by ratifying the forgery, but the ratification cannot affect the rights of the state. While the ratification may be taken into account with other

¹ *Eckroade v. Eckroade*, 570 so.2d 1347, 1349 (Fla. 3d DCA 1990), quoting *Noah v. Noah*, 491 So.2d 1124 (Fla. 1986); *McKinlay v. McKinlay*, 523 So.2d 182 (Fla. 1st DCA 1988); *Pardue v. Pardue*, 518 So.2d 954 (Fla. 1st DCA 1988), see *Escudero v. Escudero*, 739 so.2d 688, 692 (Fla. 5th DCA 1999), indicating that “unless misconduct of a party results in dissipation of marital assets, it does not justify an unequal award of marital assets. This includes a spouse’s criminal behavior, and abuse.” See also *Bell v. Bell*, 587 so.2d 642 (Fla. 1st DCA 1991).

² *Romano v. Romano*, 632 So.2d 207, 210 (Fla. 4th DCA 1994), see also *MurrayIII v. Murray*, 636 So.2d 536, 539 (Fla. 1st DCA 1994) (*J. Wolf opinion (concurring in part, dissenting in part)*) “where serious misconduct (whether it be criminal conduct or other conduct offensive to the marital relationship) has occurred, a trial judge should be able to consider any negative financial impact resulting from the misconduct.”

³ Checks are the primary form of negotiable instrument to which ch. 673, F.S., applies.

relevant facts in determining punishment, it does not relieve the signer of criminal liability.

Article X, s. 4, Fla.Const., requires that both husband and wife must execute any deed or mortgage encumbering their homestead real property. If the signature of one spouse to a deed or mortgage on homestead real property is found to be a forgery, the deed or mortgage can be set aside.

C. EFFECT OF PROPOSED CHANGES:

This bill amends s. 61.075(1), F.S., to provide that any fault, by either spouse, that was the primary cause of the dissolution of marriage is considered as an additional exception to the presumption of equal distribution of marital property. This bill defines fault to include, but not limited to, adultery, abandonment, cruelty, abuse or neglect.

This bill provides that a liability that was incurred through forgery or unauthorized signature is a nonmarital liability. This removes the debt from consideration of the equitable distribution of marital assets and liabilities and makes payment of the liability solely the responsibility of the offending spouse. This bill further provides that the court must consider the forgery or unauthorized signature when awarding attorney's fees to the spouse whose signature was forged or used without authorization. This bill also provides that if the forged or unauthorized signature is subsequently ratified, this section will not apply.

This bill will become effective on July 1, 2002.

D. SECTION-BY-SECTION ANALYSIS:

See "Present Situation" and "Effect of Proposed Changes."

III. 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:

None.

D. FISCAL COMMENTS:

None.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to expend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

None.

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

While this bill appears to require that a liability incurred by forgery or an unauthorized signature must give rise to an unequal distribution, that is not clear from the wording of the bill.

This bill does not address the concept of ratification of a signature.

Section 61.075(1)(j), F.S., perhaps already provides a mechanism by which a court may provide for an unequal distribution of marital assets that would be warranted due to forgery by a spouse.

The inclusion of references to specific statutes relating to forgery and authorized signatures in this bill means that any statute not on the list will not be considered. There is a concept of statutory construction known as "expressio unius est exclusio alterius", which means that the express inclusion of items in a statute means that those not listed are intended to be excluded.⁴ For instance, the various federal statutes on forgery are not included.

⁴ *Jordan v. State*, 2001 WL 1635440 (5th DCA 2001), quoting, *Thayer v. State*, 335 So.2d815, 817 (Fla. 1976).

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On January 30, 2002, the Committee on Judicial Oversight adopted 1 amendment with 1 amendment to the amendment. The amendment provides that a liability incurred through forgery or unauthorized signature is a non-marital liability, thereby removing the debt from consideration of the equitable distribution of marital assets and liabilities and makes payment of the liability solely the responsibility of the offending spouse. The amendment further provides that court must consider the forgery or unauthorized signature when awarding attorney fees to the spouse whose signature was forged or used without authorization and provides that this provision will not be applicable if a forged or unauthorized signature is ratified by the other spouse. The amendment to the amendment changes the provision regarding award of attorney's fees from "shall consider" to "may consider."

On February 7, 2002, the Council for Smarter Government adopted one amendment that included fault, of one spouse or the other, leading to the dissolution of marriage, as another factor to be considered in an unequal distribution of marital assets. The Council then adopted a council substitute that incorporated all amendments. The bill was then reported favorably, as a committee substitute.

VII. SIGNATURES:

COMMITTEE ON JUDICIAL OVERSIGHT:

Prepared by:

Noelle M. Melanson

Staff Director:

Nathan L. Bond J.D.

AS REVISED BY THE SMARTER GOVERNMENT COUNCIL:

Prepared by:

Noelle M. Melanson

Staff Director:

Don Rubotttom