



## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

Promote personal responsibility—The bill will limit the ability of an ex-spouse to collect alimony when the ex-spouse is found to be living with a person of the opposite sex in a relationship similar to a marriage.

#### Comments from the Future of Florida's Families Committee

**Provide limited government** – The bill has the potential to increase the workload of the courts, the clerks of court, and the Department of Revenue due to an increase in the number of modification proceedings. Also, if the amount of alimony being paid to a mother with dependent children is reduced or eliminated, the family could find itself in need of some form of public assistance.

**Empower families** – If the amount of alimony being paid to a mother with dependent children is reduced or eliminated, the family could become dependent on some form of public assistance, which would typically lead to a decrease in family stability and the ability to self support. Also, since the provisions of the bill are specific to de facto marriages existing between the obligee and a person of the opposite sex, tacit approval of same-sex partnerships could be implied.

#### B. EFFECT OF PROPOSED CHANGES:

##### Alimony Law

Alimony is generally used to provide support to a financially dependent spouse.<sup>1</sup> The primary basis for 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.<sup>2</sup> Before a court can make an award of alimony, equitable distribution of the former spouse's assets must occur.<sup>3</sup> The court then has several options with regard to awarding alimony, including permanent periodic alimony, lump-sum alimony, "bridge-the-gap" alimony, rehabilitative alimony, a combination of several different types of alimony, or no alimony at all.<sup>4</sup>

Permanent periodic alimony is usually awarded to meet the needs of a dependent spouse, although this form of alimony can also be used to balance any inequities that might result from the property division of the final judgment.<sup>5</sup> Lump sum alimony can also be used to remedy any inequity that remains as a result of the final division of property.<sup>6</sup> Lump sum alimony can also be accomplished through periodic payments.<sup>7</sup>

In a long-term marriage, there is a presumption in favor of permanent alimony, regardless of the spouse's age or ability to earn income, although the district courts of Florida do not agree as to what constitutes a long-term marriage.<sup>8</sup> Generally, however, a marriage of fourteen years or longer is considered long-term.<sup>9</sup>

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<sup>1</sup> Victoria Ho & Jennifer Johnson, *Overview of Florida Alimony Law*, 78-OCT Fla. B. J. 71, 71 (2004).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 72.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

Lump sum alimony may also take the form of “bridge-the-gap” alimony, which is alimony intended only for short-term assistance with legitimate, identifiable short-term needs.<sup>10</sup> This form of alimony typically lasts no longer than two years.<sup>11</sup> Finally, the court has the option of awarding rehabilitative alimony, which can be awarded alone or together with permanent alimony.<sup>12</sup> To receive an award of rehabilitative alimony, the party seeking support must provide the court with a rehabilitative plan including the purpose of the rehabilitation, the areas in which rehabilitation is needed, and the actual amount of money necessary for rehabilitation.<sup>13</sup>

Section 61.08(1), F.S., provides that:

In a proceeding for dissolution of marriage, the court may grant alimony to either party, which alimony may be rehabilitative or permanent in nature. In any award of alimony, the court may order periodic payments or payments in lump sum or both. The court may consider the adultery of either spouse and the circumstances thereof in determining the amount of alimony, if any, to be awarded. In all dissolution actions, the court shall include findings of fact relative to the factors enumerated in subsection (2) supporting an award or denial of alimony.

In awarding alimony, the trial court is given broad discretion to consider any factor “necessary to do equity and justice between the parties.”<sup>14</sup> The trial court is to consider “all relevant economic factors” when determining a proper award of maintenance or alimony.<sup>15</sup> These factors include:

- The standard of living established during the marriage.
- The duration of the marriage.
- The age, physical, and emotional condition of each party.
- The financial resources of each party, both marital and nonmarital, and the liabilities of each of them.
- If applicable, the time necessary for either party to acquire the education or training necessary for the party to find employment.
- Each party’s contribution to the marriage, including, but not limited to, homemaking services, child care, education, and career building of the other party.
- All sources of income available to either party.

In addition to the factors listed in s. 61.08(2), the court might consider whether there was an agreement between the parties that one spouse would stay home with the children, and whether, as a result of the marriage, the spouse seeking alimony had a diminished ability to support himself or herself.<sup>16</sup>

### **Modification of Alimony**

When the parties have entered into an agreement for the payment of support, maintenance, or alimony, whether in connection with a dissolution proceeding or any other voluntary property settlement, or whenever a party is required by the court to make payments, either party may apply to the circuit court of the circuit in which either party resides to petition the court for an order increasing or decreasing the amount of alimony, support, or maintenance provided for in the order.<sup>17</sup> When the court has jurisdiction to make orders as equity requires with regard to the changed circumstances or financial abilities of the parties, the court may increase, decrease, or confirm, the amount of alimony, support, or maintenance

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> Section 61.08(2), Florida Statutes.

<sup>15</sup> *Id.*

<sup>16</sup> Ho & Johnson, *Overview of Florida Alimony Law*, 78-OCT Fla. B. J. at 72.

<sup>17</sup> Section 61.14(1)(a), Florida Statutes.

provided for in the agreement or order.<sup>18</sup> The court may modify an order of alimony, support, or maintenance retroactively to the date of filing of the action for modification as equity requires, in light of the changed circumstances or the financial ability of the parties.<sup>19</sup>

In addressing the issue of the cohabitation of a former spouse as the reason to reduce or end alimony payments, it appears that there are a range of responses by the appellate and trial courts regarding when it is appropriate to modify, reduce, or terminate alimony payments. A trial court may not automatically terminate alimony when the recipient spouse begins cohabiting with a person of the opposite sex.<sup>20</sup> The *DiBartolomeo* court explained:

Because it does not entail the same benefits, duties and rights as a traditional marriage, cohabitation alone cannot precipitate a termination of alimony without the factual finding of a change in circumstances concerning the former spouse's needs and finances.<sup>21</sup>

The Fifth District Court of Appeal has expressed a disinclination for this standard of determining when alimony should be reduced or terminated.<sup>22</sup> The Fifth District notes that permanent periodic alimony is only subject to modification when the complaining party can show a substantial change in circumstances after the order awarding alimony was entered.<sup>23</sup> Furthermore, the Fifth District notes that how a recipient spouse chooses to spend alimony is generally irrelevant in a modification action, because the recipient's decision to give the money to adult children, or to gamble or spend the alimony on liquor, will not affect the recipient's right to alimony.<sup>24</sup> The Fifth District acknowledges that modification of alimony has been deemed proper based on financial contributions to or from the receiving spouse's live-in companion, while maintaining that the fact of cohabitation alone should not be the sole basis for the modification.<sup>25</sup> Instead, the trial court should evaluate the extent to which the live-in companion benefits from the recipient spouse's expenditures.<sup>26</sup> On the facts of *Springstead*, the Fifth District concluded that the trial court erred in modifying the ex-wife's alimony because other than two checks of less than \$100 each, there was no evidence that she provided financial support to the live-in companion she had for a year and a half.<sup>27</sup>

The Fourth District Court of Appeal has held that a trial court may consider the amount of income a cohabitant contributes when determining the overall needs of a spouse, as long as the evidence of the cohabitant's income is considered solely in light of the benefit accruing to the spouse's income or expenses.<sup>28</sup> The Fourth District upheld the view that:

Cohabitation alone cannot support a termination or a reduction of alimony without a corresponding fact finding of change in circumstances concerning the spouse's needs and finances. Although contributions made by a cohabitant may certainly be considered in modifying a former spouse's income or expenses, the moving party in such circumstances is required to show that the cohabitant provides support to the former spouse or the former spouse contributes to the other's support.<sup>29</sup>

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Tanner v. Tanner*, 850 So. 2d 610, 611 (Fla. 1st DCA 2003) (reversing the trial court's insertion of a provision that the former wife's entitlement to periodic alimony would terminate automatically upon her cohabitation); *DiBartolomeo v. DiBartolomeo*, 679 So. 2d 72, 73 (Fla. 4th DCA 1996) (citations omitted).

<sup>21</sup> *Id.*

<sup>22</sup> *Springstead v. Springstead*, 717 So. 2d 203, 204 (Fla. 5th DCA 1998).

<sup>23</sup> *Id.* (citing *Canakaris v. Canakaris*, 382 So. 2d 1197, 1201-02 (Fla. 1980)).

<sup>24</sup> *Springstead*, 717 So. 2d at 204.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Cheney v. Cheney*, 741 So. 2d 565, 566 (Fla. 4th DCA 1999).

<sup>29</sup> *Id.* at 566.

The First District Court of Appeal has noted that, although the state of Florida does not recognize “de facto marriage” as a basis for terminating alimony, unmarried cohabitation can raise a presumption of changed circumstances,<sup>30</sup> which seems to be a slightly different treatment of cohabitation than is recognized in other districts. The First District set forth two factors for consideration in determining whether cohabitation amounts to a change in circumstances: 1) whether the cohabitant gives support to the recipient spouse, or 2) whether the recipient spouse contributes to the support of the cohabitant.<sup>31</sup> “[O]nce the party seeking modification establishes cohabitation and shows support to or from the cohabitant,” the First District shifts the burden of proof to the recipient spouse to show a continued need for alimony.<sup>32</sup>

In *Bridges*, the former wife was receiving permanent alimony from the former husband, until he sought termination or modification of alimony based on the fact that the former wife was cohabiting with a man in a “de facto” marriage.<sup>33</sup> Although the couple was not legally married, they had exchanged rings during a ceremony, at the end of which they were presented as “partners in life.”<sup>34</sup> The trial court found that the recipient spouse had significant resources and that the cohabitant was willing and able to support her.<sup>35</sup> Therefore, the trial court concluded that she had failed to meet her burden of proof to show a continued need for alimony.<sup>36</sup> The First District found competent, substantial evidence supporting the trial court’s findings of fact, but modified the termination of alimony, changing it to a nominal payment of \$1 per year, which was intended to protect the recipient spouse’s interests in case she later experienced a “significant change in circumstances,” since her current living arrangement did not equal of the legal obligations of a spouse.<sup>37</sup>

However, cases with facts similar to those of *Bridges* do not always lead to the same result, as some courts have not agreed that an unsolemnized ceremony with a cohabitant should result in a change in the person’s ability to collect alimony. One recent example is that of Michael Rice, who was ordered by a Hillsborough County circuit judge to continue paying \$5,000 per month in alimony to his ex-wife even though she and her boyfriend “had invited 50 friends and relatives to Las Vegas in June” for a “Las Vegas Wedding Weekend.”<sup>38</sup> “[A] video of the event showed the couple standing beneath a chuppah, a canopy traditionally used in Jewish weddings.” The couple “exchanged vows and rings, but Judge Robert Foster ruled it was not a legal marriage because there was no marriage license.”<sup>39</sup> As a result, the ex-husband is still responsible for \$30,000 in alimony payments, the amount of alimony that has accrued since the June wedding event.<sup>40</sup>

## Terms

“De facto marriage” is defined as “[a] marriage in which the parties live together as husband and wife under color of validity but which is defective for reasons of form, etc.”<sup>41</sup> Common-law marriage is “[a] marriage that takes legal effect, without license or ceremony, when a couple live together as husband and wife, intend to be married, and hold themselves out to others as a married couple.”<sup>42</sup>

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<sup>30</sup> *Bridges v. Bridges*, 842 So. 2d 983, 984 (Fla. 1st DCA 2003).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> Carrie Johnson, *Bill Seeks to Clarify State Law on Alimony*, ST. PETERSBURG TIMES, Feb. 10, 2005.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> BLACK’S LAW DICTIONARY, (6th ed. 1990).

<sup>42</sup> BLACK’S LAW DICTIONARY 406 (Bryan Garner, ed., Pocket ed., 1996).

## HB 1181

The bill provides that the “court may reduce or terminate an award of alimony after giving specific written findings that, since the granting of a divorce and the award of alimony, a de facto marriage has existed between the obligee and a person of the opposite sex.” The burden of proving, by a preponderance of the evidence, that a de facto marriage exists is placed upon the obligor.

Then, in determining whether the alleged de facto marriage should result in the reduction or termination of an existing award of alimony, the court is directed to “elicit the nature and extent of the relationship in question.” The court is to consider the following non-exclusive list of circumstances, in determining the relationship of an obligee to another person:

- Whether the obligee and the other person hold themselves out as a married couple, engaging in conduct such as using the same last name and a common mailing address, referring to each other as “my husband” or “my wife,” or “otherwise conducting themselves in a manner that evidences a stable marriage-like relationship.
- The length of time that the obligee has resided in a permanent place of abode with another person who is not related by blood or affinity.
- “The duration and circumstances under which the obligee has maintained a continuing conjugal relationship with the other person”.
- The extent to which the obligee and other person have combined their assets or income or have otherwise demonstrated financial interdependence.
- The extent to which either the obligee or the other person supports the other, either in whole or in part.
- “The extent to which the obligee or the other person has performed valuable services for the other’s company or employer”.
- “Whether the obligee and other person have worked together to create or enhance anything of value”.
- Whether the obligee and other person have made a joint purchase of real or personal property.
- Whether there is evidence to show that the obligee and the other person have an express agreement regarding property sharing and support.
- Whether there is evidence to show that the obligee and the other person have an implied agreement regarding property sharing or support.

The bill does not abrogate the requirement that every marriage in this state must be solemnized under a license, nor does it recognize the validity of common law marriage.

The bill shall take effect upon becoming law.

### C. SECTION DIRECTORY:

**Section 1.** Amends s. 61.14, F.S., to provide that the court may reduce or terminate an award of alimony upon a specific written finding that the obligee is living in a de facto marriage with a person of the opposite sex.

**Section 2.** Provides that this bill shall take effect upon becoming a law.

## 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:

No direct impact on the private sector.

D. FISCAL COMMENTS:

None.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not require counties or municipalities to spend funds or to take action requiring the expenditure of funds. The bill does not reduce the percentage of a state tax shared with counties or municipalities. The bill does not reduce the authority that municipalities have to raise revenue.

2. Other:

To the extent that this bill could retroactively effect the property rights of divorced spouses who have entered into dissolution of marriage settlement agreements, it raises constitutional concerns regarding the prohibition on laws that impair the obligation of contracts.<sup>43</sup> While alimony payments, or orders providing for the support of a spouse, are subject to modification, court-adopted property settlement agreements are not subject to modification.<sup>44</sup> This is because “true property settlement agreements,” including those cases where a spouse relinquishes special equities in valuable property rights in return for the other spouse’s promise to pay a stipulated monthly sum, are not to be treated as alimony, but as contractual obligations not subject to modification.<sup>45</sup> Therefore, while this bill might be used to modify alimony payments, particularly permanent periodic alimony, the bill may raise constitutional concerns if applied to other forms of alimony, particularly lump sum alimony, or any form of alimony that appears to be part of a property settlement agreement made in exchange for the relinquishment of property rights, the mutual promises of the parties, or other consideration.<sup>46</sup> It is unclear whether this bill could apply to previously established alimony agreements that are not in the nature of property settlements.

B. RULE-MAKING AUTHORITY:

This bill does not establish rule-making authority in any administrative agency.

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<sup>43</sup> Article 1, s. 10, FLA. CONST.

<sup>44</sup> *Campbell v. Campbell*, 615 So. 2d 879, 879 (Fla. 5th DCA 1993).

<sup>45</sup> *Hogshead v. Hogshead*, 444 So. 2d 74, 76 (Fla. 5th DCA 1984); *Mills v. Mills*, 339 So. 2d 681, 684 (Fla. 1st DCA 1976).

<sup>46</sup> *Salomon v. Salomon*, 196 So. 2d 111, 113 (Fla. 1967); *Hogshead*, 444 So. 2d at 76.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

**Comments from the Future of Florida's Families Committee**

Today, alimony is gender-neutral, and in cases where alimony is considered, the amount is determined by balancing the dependent spouse's needs with the supporting spouse's ability to pay, while taking into account the standard of living enjoyed during the marriage.<sup>47</sup>

Currently, Florida law provides:

When the parties enter into an agreement for payments for alimony, ... and the circumstances or the financial ability of either party changes ... either party may apply to the circuit court ... for an order decreasing or increasing the amount of alimony, and the court has jurisdiction to make orders as equity requires, with due regard to the changed circumstances or the financial ability of the parties ..., decreasing, increasing, or confirming the amount of alimony provided ...<sup>48</sup>

Under Florida law, alimony is not automatically terminated upon a showing of cohabitation.<sup>49</sup>

While the impact of cohabitation on continuation of alimony payments is not addressed in statute, a showing of cohabitation triggers a court inquiry regarding whether there has been an attendant change in circumstances. In fact, a presumption of changed circumstances may apply. Though courts do not recognize de facto remarriage as the sole basis for ending court-ordered alimony,<sup>50</sup> they have authorized a modification of alimony upon a showing of cohabitation provided that the financial impact of the cohabitation is considered.<sup>51</sup> Cohabitation does not automatically equal marriage for purposes of alimony modification, as the court in *Springstead* indicated: "Because it does not entail the same benefits, duties and rights as a traditional marriage, cohabitation alone cannot precipitate a termination of alimony without the factual finding of a change in circumstances concerning the former spouse's needs and finances."<sup>52</sup> Still, the First District Court of Appeal indicated that a presumption of changed circumstances arises where cohabitation is proven, thereby shifting the burden to the cohabitant.<sup>53</sup> In determining the financial impact of cohabitation, the standard is not what the third party should be contributing, but what is actually contributed, such that the additional income is not imputed by the court.<sup>54</sup> However, the court may modify alimony even based on temporary cohabitation where it is proven that financial contributions were made during the period of cohabitation.<sup>55</sup>

- Current law provides for modification of alimony awards based on change of circumstances and case law shows that courts do indeed consider cohabitation or de facto marriage as a possible basis for a change of circumstances that would warrant a modification. Thus, it could appear that the provisions of the bill – by providing an alternate method to a court to reduce or terminate alimony, without first having to find that there has been a change in financial circumstance, as is the case in current law – are reflective of an intention to impose a moral judgment on cohabitation with a member of the opposite sex.

- If the provisions of the bill are not intended to reflect a moral judgment on cohabitation with a member of the opposite sex, then it is inconsistent not to include all types of cohabitation as grounds for a reduction or termination of alimony. For example, Mary Smith may decide to live with an aging parent

<sup>47</sup> Victoria M. Ho and Jennifer L. Johnson, *Overview Of Florida Alimony*, 9 Fla. B.J. 71 (October 2004).

<sup>48</sup> See section 61.14, Florida Statutes.

<sup>49</sup> *Tanner v. Tanner*, 850 So.2d 610 (Fla. 1st DCA 2003).

<sup>50</sup> *Bridges v. Bridges*, 842 So.2d 983, 984 (Fla. 1st DCA 2003).

<sup>51</sup> *Springstead v. Springstead*, 717 So.2d 203, 204 (Fla. 5th DCA 1998).

<sup>52</sup> *Id.* at 205.

<sup>53</sup> *Bridges*, 842 So.2d at 984.

<sup>54</sup> *Cheney v. Cheney*, 741 So.2d 565, 566 (Fla. 4th DCA 1999).

<sup>55</sup> *Donoff v. Donoff*, 777 So.2d 1078, 1079 (Fla. 4th DCA 2001).

or an adult child and may realize an improvement in financial circumstances as a result of sharing that parent's or adult child's financial situation. It is also inconsistent that the provisions of the bill apply only to cohabitation between members of the opposite sex. This could be construed as tacit approval of cohabitation between members of the same sex.

- If the provisions of the bill are simply an attempt to codify current law and practice, by making the financial impact of cohabitation a part of the court's consideration for a modification, then an argument could be made that modifications should be possible based on the living arrangements of either ex-spouse. That is, if the ex-spouse paying alimony is cohabiting and such cohabitation brings an improvement in financial circumstances that translate into an increased ability to pay, then the ex-spouse receiving alimony might argue that he or she is entitled to an increase in the amount being paid. This might help ensure equal treatment of ex-spouses.
- The bill does not address a situation in which alimony is terminated due to cohabitation and the relationship ends. In *Bridges*, the First District modified the termination of alimony, changing it to a nominal payment of \$1 per year, which was intended to protect the recipient spouse's interests in case she later experienced a "significant change in circumstances," since her current living arrangement did not equal the legal obligations of a spouse.<sup>56</sup>
- Since most recipients of alimony are women, the bill could be construed to be biased against women.
- Should the bill pass, it will likely only apply prospectively, as retroactive application may be constitutionally suspect under Article I, Section 10 of the Florida Constitution.<sup>57</sup> As several courts in Florida have already recognized dissolution settlement agreements as a type of obligation or contract, there are likely to be constitutional challenges if the bill passes and is applied retroactively. As a result, individuals currently paying alimony and seeking a modification based on the provisions of the bill, may not be eligible to do so.

#### IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

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<sup>56</sup> *Bridges*, 842 So.2d at 984.

<sup>57</sup> Art. I, s. 10 provides, in part: "No...law impairing the obligation of contracts shall be passed."