Civil Justice Subcommittee

Wednesday, November 18, 2015
3:30 p.m. – 5:30 p.m.
Sumner Hall (404 HOB)

MEETING PACKET

Steve Crisafulli
Speaker

Kathleen Passidomo
Chair

Committee Meeting Notice

HOUSE OF REPRESENTATIVES

Civil Justice Subcommittee

Start Date and Time: Wednesday, November 18, 2015 03:30 pm

End Date and Time: Wednesday, November 18, 2015 05:30 pm

Location: Sumner Hall (404 HOB)

Duration: 2.00 hrs

Consideration of the following bill(s):

HB 393 Estates by Berman
HB 455 Alimony by Burton
HB 4029 Nonresident Plaintiffs in Civil Actions by Sprowls

Consideration of the following proposed committee substitute(s):

PCS for HB 9 -- Persons Subject to Final Deportation Orders
PCS for HB 237 -- Renter Insurance

NOTICE FINALIZED on 11/10/2015 4:08PM by Ingram.Michele

PCS FOR HB 9

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCS for HB 9 Persons Subject to Final Deportation Orders
SPONSOR(S): Civil Justice Subcommittee
TIED BILLS: None **IDEN./SIM. BILLS:** None

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Civil Justice Subcommittee		Malcolm	Bond

SUMMARY ANALYSIS

Federal immigration laws generally prohibit an alien who has been denied admission or removed from the United States, or has departed the United States while an order of removal is outstanding, from reentering the United States for a specified period of time. This prohibition does not apply if the Attorney General has consented to the alien reapplying for admission or advance consent for reapplying for admission is not required under prior immigration laws. An alien who violates this prohibition is subject to a fine and 2 years in prison.

The PCS creates a nearly identical prohibition in state law for individuals that reenter the state after being denied admission or removed from the United States or after departing the United States while an order of removal is outstanding. Like federal law, the prohibition in the PCS does not apply if the United States Attorney General has expressly consented to the person reapplying for admission or if advance consent for reapplying for admission is not required under prior federal law. A violation of the prohibition is a third-degree felony.

The PCS may potentially have a negative prison bed impact; however, the Criminal Justice Estimating Conference has not yet met regarding the PCS. The PCS does not appear to have a fiscal impact on local governments.

The PCS has an effective date of October 1, 2016.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Removal Proceedings[1]

An alien[2] may be removed from the United States for a variety of reasons, such as entering the country unlawfully, overstaying a visa, or committing a crime.[3] Removal proceedings are administrative proceedings under the jurisdiction of the Executive Office for Immigration Review (EOIR), which is part of the Department of Justice.[4] Specifically, removal proceedings are held before the Immigration Courts and any administrative appeals go to the Board of Immigration Appeals.[5]

If the removal hearing results in an order to remove an alien from the country, the alien may seek administrative review of the removal order.[6] An alien may be eligible for relief from removal or protection while in removal proceedings. Examples of such relief or protection include adjustment to permanent resident status, waiver of inadmissibility, asylum, and withholding of removal.[7]

When a removal order becomes final, the alien must be removed from the United States within 90 days. This period is called the "removal period," during which time the alien is usually detained.[8] If the alien is not removed within the removal period, the alien may be released subject to supervision.[9] However, "any alien subject to a final order of removal who willfully fails or refuses to depart from the U.S., make timely application in good faith for travel or other documents necessary for departure, or present for removal at the time and place required by the Attorney General" may be fined or imprisoned.[10]

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[1] "Beginning with proceedings commenced on April 1, 1997, deportation and exclusion proceedings have been replaced by removal proceedings." United States Department of Justice, Executive Office for Immigration Review, *Immigration Court Practice Manual*, 109-110, *available at* http://www.justice.gov/sites/default/files/pages/attachments/2015/05/20/practice_manual_review.pdf#page=11 (last visited Oct. 26, 2015); *see* 8 C.F.R. §§ 1003.12 et seq., 1240.1 et seq. "However, Immigration Judges continue to conduct deportation and exclusion proceedings in certain cases that began before April 1, 1997. The procedures in deportation and exclusion proceedings are generally similar to the procedures in removal proceedings. However, deportation and exclusion proceedings are significantly different from removal proceedings in areas such as burden of proof, forms of relief available, and custody." *Immigration Court Practice Manual* at 2.

[2] "Alien" is defined as "any person not a citizen or national of the United States." 8 U.S.C. § 1101 (2014).

[3] 8 U.S.C. § 1229a(a)(2) (2006) (citing 8 U.S.C. §§ 1182(a) and 1227(a)).

[4] *See* 8 U.S.C. § 1101(b)(4). The Department of Homeland Security enforces federal immigration laws, but the Immigration Courts and the Board of Immigration Appeals are responsible for independently adjudicating cases under the immigration laws. *Immigration Court Practice Manual* at 2.

[5] United States Department of Justice, Executive Office for Immigration Review Organization Chart, http://www.justice.gov/eoir/eoir-organization-chart#9,196 (last visited Oct. 26, 2015).

[6] 8 U.S.C. § 1252 (2005). Federal law provides an expedited removal process for certain aliens arriving at a port of entry. Administrative and judicial review of these proceedings is limited. *See United States v. Barajas-Alvarado*, 655 F.3d 1077, 1081 (9th Cir. 2011) (citing 8 U.S.C. § 1225(b)(1)(A)(i); 8 C.F.R. § 1235.3(b)(2)(i)).

[7] 8 CFR § 1240.11(a), (c), and (d).

[8] 8 U.S.C. § 1231 (2006). The removal period begins on the latest of the following: the date the order of removal becomes administratively final; if the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order; or if the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement. *Id.*

[9] *Id.* at (a)(3).

[10] 8 U.S.C. ss. 1253, 1324d.

Removal Statistics

In fiscal year 2014, United States Immigration and Customs Enforcement (ICE) conducted 315,943 removals, of which 102,224 were of aliens apprehended in the interior of the United States.[11] 85 percent of all interior removals involved aliens previously convicted of a crime.[12] Although ICE's interior enforcement operations focus on aliens with criminal convictions, these operations have been negatively impacted by a number of factors such as local and state jurisdictions declining to honor ICE detainers, recent court rulings requiring bond hearings in certain immigration cases[13], and lack of cooperation from foreign governments.[14]

Application for Consent to Reapply for Admission by Removed Aliens

After an alien has been removed from the United States, he or she is inadmissible to the United States unless he or she has remained outside of the United States for five consecutive years after removal. If convicted of an aggravated felony, the alien must remain outside of the United States for twenty consecutive years before he or she is eligible to re-enter the United States. After the alien has spent the required time outside the United States, he or she may apply for admission to the United States but must present evidence that he or she has remained outside the United States.[15] An alien who does not present proof of absence from the United States or who seeks to enter the United States prior to the the required absence must apply to the Attorney General for permission to reapply for admission to the United States.[16] Permission to reapply for admission is at the discretion of the Attorney General.[17]

Reentry of Removed Aliens

Federal law prohibits an alien "who has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding" from reentering the United States.[18] This prohibition does not apply to an alien who "prior to his or her reembarkation at a place outside the United States or application for admission . . . the Attorney General has expressly consented to such alien's reapplying for admission.[19] An alien previously excluded and deported may establish instead that he or she was not required to obtain the advance consent for reapplying for admission under any prior immigration law.[20] An alien who violates this provision may be subject to a fine and up to 2 years in prison.[21]

Effect of Proposed Changes

The PCS creates s. 877.28, F.S., to make it a third-degree felony[22] for a person who has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, to enter or at any time be found in the state. This

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[11] United States Immigration and Customs Enforcement, *ICE Enforcement and Removal Operations Report, Fiscal Year 2014*, 7 (Dec. 19, 2014) *available at* https://www.ice.gov/doclib/about/offices/ero/pdf/2014-ice-immigration-removals.pdf (last visited Oct. 26, 2015).
[12] *Id.*
[13] *Rodriguez v. Robbins*, 715 F.3d 1127 (9th Cir. 2013).
[14] "ICE often cannot repatriate individuals within the legally prescribed time limits because their countries of origin or nationality fail to issue required travel documents in a timely manner. [. . .] In these cases, ICE is generally required by law to release individuals from custody." *ICE Enforcement and Removal Operations Report* at 6.
[15] 8 C.F.R. § 1212.2 (2015).
[16] *Id.*
[17] 8 U.S.C. § 1182(h)(2) (2013).
[18] 8 U.S.C. § 1326(a)(1) (2015).
[19] *Id.* at (a)(2)(A).
[20] 3A C.J.S. Aliens § 1540 (citing 8 U.S.C. § 1326(a)(2)(B)).
[21] 8 U.S.C. § 1326(a). The criminal penalties for reentry after removal may be up to 20 years in prison if the removal follows certain criminal convictions and acts. *See id.* at (b).
[22] A third-degree felony is punishable by up to 5 years in prison and a $5,000 fine. Multiple felony convictions may result in enhanced or mandatory minimum sentences. ss. 775.082 , 775.083, and 775.084 F.S.

section does not apply to a person who "prior to his or her reembarkation at a place outside the United States or his or her application for admission from foreign contiguous territory, the United States Attorney General has expressly consented to such person's reapplying for admission." Nor does this section apply to a person previously denied admission and removed if he or she establishes that he or she was not required to obtain such advance consent to reapply for admission from the Attorney General under federal law.

This provision is nearly identical to federal law that prohibits reentry of removed aliens into the United States.[23]

The PCS provides an effective date of October 1, 2016.

B. SECTION DIRECTORY:

Section 1 creates s. 877.28, F.S., related to reentry into the state after removal.

Section 2 provides an effective date of October 1, 2016.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The PCS does not appear to have any impact on state revenues.

2. Expenditures:

   The PCS creates a new third-degree felony for persons who reenter the state after being removed pursuant to federal immigration laws. This may have a negative prison bed impact; however, the Criminal Justice Estimating Conference has not yet met regarding the PCS.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

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

2. Expenditures:

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

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

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

D. FISCAL COMMENTS:

None.

[23] *See* "Reentry of Removed Aliens" discussed above.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The PCS 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:

In 2012, the United States Supreme Court in *Arizona v. U.S.*, 132 S. Ct. 2492, struck down portions of an Arizona immigration statute on federal preemption grounds. Specifically, Section 3 of the Arizona law created a new misdemeanor for the willful failure to complete or carry an alien registration document in violation of federal law. The Court held that because of the existing comprehensive federal statutory framework related to alien registration, the federal government occupied the field of alien registration and explained that

> Federal law makes a single sovereign responsible for maintaining a comprehensive and unified system to keep track of aliens within the Nation's borders. If § 3 . . . were valid, every State could give itself independent authority to prosecute federal registration violations, "diminish[ing] the [Federal Government]'s control over enforcement" and "detract[ing] from the 'integrated scheme of regulation' created by Congress." Even if a State may make violation of federal law a crime in some instances, it cannot do so in a field (like the field of alien registration) that has been occupied by federal law.[24]

The Court concluded, "Were [Section] 3 to come into force, the State would have the power to bring criminal charges against individuals for violating a federal law even in circumstances where federal officials . . . determine that prosecution would frustrate federal policies."[25] Consequently, Section 3 was preempted.

B. RULE-MAKING AUTHORITY:

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

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

[24] 132 S. Ct. at 2502 (quoting *Wisconsin Dept. of Industry v. Gould Inc.*, 475 U.S. 282, 288–289 (1986)).
[25] 132 S. Ct. at 2492.

A bill to be entitled

An act relating to reentry into state by certain persons; creating s. 877.28, F.S.; prohibiting entry or presence within the state of persons denied admission, excluded, deported, or removed unless the United States Attorney General consents to admission or federal law does not require advance consent; providing criminal penalties; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 877.28, Florida Statutes, is created to read:

877.28 Reentry into state after removal.- Any person who pursuant to 8 U.S.C. ss. 1151 et seq. has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter enters or is at any time found in the state, unless prior to his or her reembarkation at a place outside the United States or his or her application for admission from foreign contiguous territory, the United States Attorney General has expressly consented to such person's reapplying for admission; or with respect to a person previously denied admission and removed, unless such person establishes that he or she was not required to obtain such advance consent

under federal law, commits a felony of the third degree, punishable is provided in s. 775.082, s. 775.083, or s. 775.084.

Section 2. This act shall take effect October 1, 2016.

PCS for HB 237

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCS for HB 237 Renter Insurance
SPONSOR(S): Civil Justice Subcommittee
TIED BILLS: None **IDEN./SIM. BILLS:** SB 342

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Civil Justice Subcommittee		Bond	Bond

SUMMARY ANALYSIS

The "Florida Residential Landlord and Tenant Act," or "Act," governs the relationship between landlords and tenants under a residential rental agreement. The Act contains certain mandatory or conditional lease provisions and disclosures that a landlord must provide to a tenant or prospective tenant.

If a landlord requires the tenant to purchase insurance, the bill requires that the lease disclose the required coverage. If the lease does not require insurance, the bill requires a landlord to include in the lease a specific disclosure regarding insurance.

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

The bill provides an effective date of January 1, 2017.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Part II of ch. 83, F.S., entitled the "Florida Residential Landlord and Tenant Act," or "Act," governs the relationship between landlords and tenants under a residential rental agreement. The Act contains certain mandatory or conditional provisions and disclosures that a landlord must provide to a tenant or prospective tenant. For example:

- If the landlord requires a security deposit, the Act requires a disclosure regarding the tenant's rights and responsibilities with respect to the security deposit.[1]
- The landlord must disclose his or her address.[2]
- If there is a liquidated damages provision in the lease, the Act provides language that must be included in the lease.[3]
- If the rental agreement indemnifies the landlord for storage or disposition of personal property of the tenant after the tenant surrenders the dwelling, the Act requires language within the lease to notify the tenant to that effect.[4]

The common term "renter insurance" refers to an insurance product that is also sometimes referred to as a "contents policy." Such insurance indemnifies a tenant for loss or damage to the tenant's personal property within the rental unit, and is generally packaged with liability coverage. In essence, it is a homeowner's policy without coverage for the structure. While nearly all homeowners carry homeowners insurance, a 2014 study showed that only 37 percent of tenants buy a renters insurance policy.[5]

Effect of the Bill

The bill creates s. 83.491, F.S., to require that a landlord make one of two notices regarding renter insurance.

If renter insurance is required, the rental agreement must specify the coverage.

If the rental agreement does not require the purchase of a tenant's policy of insurance, the rental agreement must include a statement providing substantially the following language:

> "Your landlord's insurance policy does not cover loss or damage to your personal property nor does it cover your personal liability. To cover potential loss or damage to your personal property and your liability, you are advised to contact a licensed insurance agent or company about purchasing a renters insurance policy."

The bill has an effective date of January 1, 2017, and applies to any residential lease entered into on or after that date.

[1] Section 83.49(2)(d), F.S.
[2] Section 83.50, F.S.
[3] Section 83.595(4), F.S.
[4] Section 83.67(5), F.S.
[5] http://www.iii.org/fact-statistic/renters-insurance, last accessed on November 6, 2015.

B. SECTION DIRECTORY:

Section 1 creates s. 83.491, F.S., relating to an insurance requirement.

Section 2 provides an effective date of January 1, 2017.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

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

2. Expenditures:

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

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

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

2. Expenditures:

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

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill requires landlords to update their lease forms, for which they may incur a small expense.

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:

None.

B. RULE-MAKING AUTHORITY:

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

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

A bill to be entitled

An act relating to renter insurance; creating s. 83.491, F.S.; requiring a residential lease agreement to give a certain disclosures regarding renter insurance; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 83.491, Florida Statutes, is created to read:

83.491 Renters insurance.—In the lease agreement a landlord shall give written notice to the tenant as to personal liability and liability for the loss or damage to the tenant's personal property. If a lease agreement governed by this part requires the tenant to obtain renters insurance, the lease must specify the coverage required. A lease agreement governed by this part that does not require the tenant to obtain renters insurance must contain a statement in substantially the following form:

"Your landlord's insurance policy does not cover loss or damage to your personal property nor does it cover your personal liability. To cover potential loss or damage to your personal property and your liability, you are advised to contact a licensed insurance agent

or company about purchasing a renters insurance policy."

Section 2. This act shall take effect January 1, 2017, and shall apply to a lease agreement entered into on that day or thereafter.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 393 Estates
SPONSOR(S): Berman
TIED BILLS: None **IDEN./SIM. BILLS:** SB 540

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee		Robinson	Bond
2) Insurance & Banking Subcommittee			
3) Judiciary Committee			

SUMMARY ANALYSIS

The Florida Probate Code and the Florida Trust Code govern the disposition and management of estates during a person's lifetime or after their death. This bill amends the codes to:

- Codify the common law situs rule which provides that the disposition of real property located in Florida is governed by Florida law regardless of any contrary directive in a will.
- Prohibit non-judicial modification of all irrevocable trusts created on or after July 1, 2016, unless non-judicial modification is expressly authorized by the terms of the trust.
- Provide additional guidance to lawyers and the courts regarding the circumstances under which a trustee may pay attorney's fees and costs from trust assets in breach of trust proceedings.

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

The bill has an effective date of July 1, 2016.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Disposition of Real Property in Probate

"Lex loci rei sitae," or the situs rule, is the fundamental legal principle that real property is governed by the law of the jurisdiction in which it is situated. The situs rule is based upon the rationale that the situs jurisdiction has the greatest interest in controlling the administration of real property located within its borders.[1] As early as the nineteenth century, the Florida Supreme Court affirmed the application of the situs rule in this state:

> [I]t is the universal rule that the laws of the state where [the property] is situated furnish the rules for its descent, alienation, and transfer, the construction and validity of conveyances thereof, and the capacity of the parties to such contracts and conveyances, as well as their rights under the same.[2]

Under the Florida Probate Code, chs. 731-735, F.S., intestate[3] succession to real property located in Florida is explicitly governed by Florida law, regardless of whether the decedent owner was a resident or non-resident of the state, in accordance with the common law situs rule.[4] In regard to testamentary dispositions of Florida real property by non-residents, s. 731.106(2), F.S. provides in pertinent part:

> When a nonresident decedent, whether or not a citizen of the United States, provides by will that the testamentary disposition of tangible or intangible personal property having a situs within this state, or of real property in this state, shall be construed and regulated by the laws of this state, the validity and effect of the dispositions shall be determined by Florida law.

As it relates to the disposition of Florida real property by non-residents, s. 731.106(2), F.S., merely restates the long standing common law principle of "lex loci rei sitae," while acknowledging the realities of multijurisdictional estate planning. However, construing this provision of law as a matter of first impression, the First District Court of Appeal in *Saunders v. Saunders* concluded that the statute was a restraint, rather than codification, of "lex loci rei sitae."[5] The court held that Florida law applies to the disposition of a non-resident testator's Florida real property only when explicitly provided by such testator's will.[6] Where the will is silent, the court found that the law of the non-resident decedent's domicile governs.[7] The holding of the court is directly at odds with the consistent and longstanding approach of Florida courts endorsing the situs rule.[8] Rules of statutory construction presume that no change in the common law is intended unless the statute is explicit; and inference and implication cannot be substituted for clear expression.

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[1] The situs rule has been justified on several additional grounds: the situs state has a strong interest in regulating the manner in which real estate is used and developed; there is a compelling interest in insuring that title and ownership interests in situs land be regular and predictable; the situs state has a clear interest in land as a source of public revenue, since real property taxation is premised on the accurate identification and description of ownership interests in land; and the situs state is best situated to resolve disputes and enforce legal decisions pertaining to local property, and can best do so when it implements local legal policy. Michael S. Finch, *Choice-of-Law and Property* 26 STETSON L. REV. 257 (1996).
[2] *Walling v. Christian & Craft Grocery Co.*, 27 So. 46, 48 (Fla. 1899).
[3] Any part of the estate of a decedent not effectively disposed of by will. s. 732.101, F.S.
[4] s. 732.101, F.S.; *See also Estate of Salathe v. Schula*, 703 So. 2d 1167, 1168 (Fla. 2d DCA 1997).
[5] *Saunders v. Saunders*, 796 So. 2d 1253, 1254 (Fla. 1st DCA 2001).
[6] *Id.*
[7] *Id.*
[8] *See Connor v. Elliott*, 85 So. 164, 165 (Fla. 1920); *Kyle v. Kyle*, 128 So. 2d 427 (Fla. 2d DCA 1961); *Denison v. Denison*, 658 So. 2d 581 (Fla. 4th DCA 1995); *Beale v. Beale*, 807 So. 2d 797, 798 (Fla. 1st DCA 2002).

Effect of Proposed Changes

The bill amends s. 731.106, F.S. to provide that the disposition of real property in this state, whether testate or intestate, is governed by laws of this state in accordance with the common law "situs" rule.

Trusts

The "Florida Trust Code", ch. 736, F.S., governs the creation and administration of trusts. A "trust" is generally defined as a fiduciary relationship[9] with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person.[10] A trust involves three interest holders: the "settlor"[11] who establishes the trust; the "trustee"[12] who holds legal title to the property for the benefit of the beneficiary; and lastly, the "beneficiary"[13] who has an equitable interest in property held subject to the trust.

Trusts are created for many purposes including, but not limited to, the protection of property and beneficiaries, tax planning, and professional management of assets.

Modification of Irrevocable Trusts

Under the Trust Code, a trust may be created by *inter vivos* or testamentary transfer, by a settlor's self-declaration of trust, or by the exercise of a power of appointment.[14] Unless the power to modify, amend, or terminate is reserved at the time of creation, a trust becomes irrevocable upon its creation. The terms and provisions of an irrevocable trust cannot be changed, nor may be the trust be terminated, by the settlor.

The terms of the trust, however, do not prevail over default rules of the Trust Code authorizing the modification or termination of an irrevocable trust under certain circumstances.[15] Upon petition by an interested party at any time after its creation, an irrevocable trust may be judicially modified: to reform mistakes to accomplish the settlor's intent,[16] to achieve the settlor's tax objectives,[17] to prevent the failure of a charitable gift,[18] to protect the best interests of the beneficiaries,[19] or if modification is not inconsistent with the settlor's purpose.[20] Judicial modification may be a lengthy and expensive process and there is no guarantee a court will grant a petition for modification.

Section 736.0412, F.S. authorizes a simpler non-judicial modification process for irrevocable trusts created after December 31, 2000, if the settlor is no longer alive and the trustee and all qualified beneficiaries unanimously agree to such modification. Such trusts may be non-judicially modified to:[21]

- Amend or change the terms of the trust, including terms governing distribution of the trust income or principal or terms governing administration of the trust.

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[9] *Brundage v. Bank of America*, 996 So. 2d 877, 882 (Fla. 4th DCA 2008) (trustee owes a fiduciary duty to settlor/beneficiary).
[10] 55A FLA. JUR.2D *Trusts* § 1.
[11] "Settlor" means a person, including a testator, who creates or contributes property to a trust. s. 736.0103(18), F.S.
[12] "Trustee" means the original trustee and includes any additional trustee, any successor trustee, and any cotrustee. s. 736.0103(18), F.S.
[13] "Beneficiary" means a person who has a present or future beneficial interest in a trust, vested or contingent, or who holds a power of appointment over trust property in a capacity other than that of trustee. s. 736.0103(4), F.S.
[14] s. 736.0401, F.S.
[15] s. 736.0105(2)(j) and (k), F.S.
[16] s. 736.0415, F.S.
[17] s. 736.0416, F.S.
[18] s. 736.0413, F.S.
[19] s. 736.04115, F.S.
[20] s. 736.04113, F.S.
[21] s. 736.0412(1), F.S.

- Terminate the trust in whole or in part.
- Direct or permit the trustee to do acts that are not authorized or that are prohibited by the terms of the trust.
- Prohibit the trustee from performing acts that are permitted or required by the terms of the trust.

Rule Against Perpetuities

Although an irrevocable trust is subject to judicial modification at any time, the availability of non-judicial modification under s. 736.0412, F.S. depends upon the time within which a property interest must vest or terminate under the trust pursuant to the Rule against Perpetuities.[22] The Rule against Perpetuities ensures that a trust has ascertainable beneficiaries as required by the Trust Code.[23] Florida's Uniform Statutory Rule against Perpetuities establishes three periods within which a property interest must vest or terminate:

- Within 21 years after the death of an individual then alive.[24]
- Within 90 years after the property interest is created.[25]
- As to any trust created after December 31, 2000, within 360 years after the property interest is created (unless the trust requires that all beneficial interests vest or terminate within a lesser period).[26]

The first two periods are collectively referred to as the "90-year period," and the third period is generally referred to as the "360-year period." Depending upon the unique needs and intent of the settlor, a trust may be drafted to comply with either the "90-year period" or the "360-year period."

Section 736.0412(4),F.S. *prohibits* the use of non-judicial modification for an irrevocable trust subject to the "90-year period," *unless the terms of the trust expressly authorize nonjudicial modification.*[27] In the absence of such authorization, the trust may only be judicially modified during the first 90 years after it becomes irrevocable. However, an irrevocable trust subject to the "360-year period" *may be non-judicially modified* at any time after the settlor's death, *even if the terms of the trust do not authorize such modification.*

While flexibility and ease of non-judicial modification may be desirable for 360-year trusts in order to accommodate unforeseen changes in circumstances over hundreds of years, there is no readily apparent justification to treat irrevocable trusts subject to the "90-year period" differently than those subject to the "360-year period."[28] Moreover, permitting 360 year trusts to be non-judicially modified immediately after the settlor's death invites abuse. The settlor of such trusts clearly intended to control the disposition of trust assets for an extended period after their death.[29]

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[22] The common law Rule against Perpetuities originated from an English court rule in 1682. The rule provides that a nonvested (also known as contingent) interest in property or power of appointment in a trust is invalid unless it can be said with absolute certainty, that it will either vest or terminate, no later than 21 years after the death of an individual alive at the creation of the trust interest. The primary objective of the rule is to prevent perpetual control and unreasonable restraints upon the alienation of property by invalidating, after a specific time, any future nonvested interest created either by a will, deed, or power of appointment.

[23] s. 736.0402, F.S.; It is the beneficiaries who have standing to enforce the trust, and beneficiaries, courts and trustees alike need to know who they are.

[24] s. 689.225(2)(a), F.S.

[25] *Id.*

[26] s. 689.225(2)(f), F.S.

[27] s. 736.0412(4)(b), F.S.

[28] The Real Property, Probate, and Trust Law Section of the Florida Bar, *White Paper: Proposed Amendments to §§736.0412(4) and 736.0105(2)k), Florida Statutes, restricting nonjudicial modification of irrevocable trusts during the first 90 years unless the trust specifically permits it* (on file with the Civil Justice Subcommittee, Florida House of Representatives).

[29] *Id.*

The discrepancy between the treatment of the two trusts appears to be an error in the codification of a compromise between stakeholders at the time of the extension of the rule against perpetuities to 360 years.[30]

Effect of Proposed Changes – Modification of Irrevocable Trusts

The bill amends s. 736.0412, F.S. to provide that an irrevocable trust created on or after July 1, 2016, regardless of whether the trust is drafted to comply with the "90-year period" or the "360 year period", is not subject to non-judicial modification during the first 90 years after creation unless non-judicial modification is expressly authorized by the terms of the trust.

The bill also makes conforming changes to s. 736.0105, F.S.

Attorney's Fees and Costs in Breach of Trust Proceedings

A trustee may be involved in legal proceedings relating to the trust. When legal proceedings are instituted, a trustee may retain counsel and pay attorney fees and costs from the assets of the trust.[31] Payment of such costs and fees may be made without the approval of any person, including trust beneficiaries, and without prior court authorization.[32]

Breach of Trust

A trustee's broad authority to pay legal fees incurred in connection with the trust administration from trust assets is not without limitation, however, in proceedings involving a breach of trust.

The Trust Code requires a trustee to administer a trust "in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with [the] code,"[33] and also imposes a duty of loyalty upon the trustee.[34] A trustee's violation of a duty owed to a beneficiary is a breach of trust.[35] Breaches of trust can include: undervaluing trust assets,[36] failure to obtain a surety bond,[37] failure to render accountings to the beneficiaries,[38] failure to disperse monies pursuant to the settlor's wishes,[39] improperly favoring one beneficiary over another,[40] and failure to prosecute claims of the trust or defend claims against the trust.[41] Beneficiaries of the trust have standing to initiate causes of action in equity for breaches of trust unless the beneficiary has consented to or ratified the action, released the trustee of liability for such action,[42] or the claim is otherwise barred by statute.[43]

Attorney's Fees and Costs in Breach of Trust Proceedings

If a claim or defense based upon a breach of trust is made against a trustee in a proceeding, the trustee must provide prior written notice of any intention to pay its attorney's fees and costs from the

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[30] *Id.*
[31] s. 736.0816(20), F.S.
[32] s. 736.0802(10), F.S.
[33] s. 736.0801, F.S.
[34] s. 736.0802(1), F.S.
[35] s. 736.1001(1), F.S.
[36] *McCormick v. Cox*, 118 So. 3d 980, 986 (Fla. 3d DCA 2013).
[37] *Id.*
[38] *Id.*; *Corya v. Sanders,* 155 So. 3d 1279, 1283-84 (Fla. 4th DCA 2015).
[39] *Kritchman v. Wolk*, 152 So. 3d 628, 632 (Fla. 3d DCA 2014).
[40] s. 736.0803, F.S.
[41] s. 736.0811, F.S.
[42] John Grimsley, 18 FLA. PRAC., Law of Trusts § 8:4 (2012), John Bourheau et al, *Breach of Trust Action Against Trustee*, 55A FLA. JUR 2D Trusts § 235 (2015), George Gleason Bogert et al, *Action be Beneficiary Against Express Trustee*, THE LAW OF TRUSTS AND TRUSTEES § 951 (2015); s. 736.1012, F.S.; *See also Anderson v. Northrop*, 12 So. 318, 324 (Fla. 1892).
[43] s. 736.1008, F.S.

trust assets to qualified beneficiaries.[44] The notice must inform the beneficiary of the right to obtain an order prohibiting the payment of fees and costs.[45] The notice must be delivered by any commercial delivery service requiring a signed receipt, by any form of mail requiring a signed receipt, or as provided in the Florida Rules of Civil Procedure for service of process.[46]

Upon the motion of a qualified beneficiary whose share of the trust may be affected by such payment, the court may preclude a trustee from paying its attorney fees and costs from the trust assets.[47] The beneficiary must make a reasonable showing by evidence in the record, or by proffering evidence, that a reasonable basis exists for a court to conclude that there has been a breach of trust. If the court finds that there is a reasonable basis to conclude that there has been a breach of trust, unless the court finds good cause, the court must enter an order prohibiting the payment of attorney's fees and costs from the assets of the trust. The order must also provide for the refund of attorney's fees or costs paid before an order was entered on the motion.[48] If a refund is not made as directed by the court, the court may, among other sanctions, strike defenses or pleadings filed by the trustee.[49]

If a claim or defense based upon a breach of trust is later withdrawn, dismissed, or resolved in favor of the trustee, the trustee may pay costs or attorney's fees incurred in the proceeding from the assets of the trust without further court authorization or notice to the beneficiaries.[50]

Leading practitioners have identified several areas in which the provisions governing the payment of attorney's fees and costs in breach of trust proceedings fail to provide direction to lawyers and the court, including:[51]

- The circumstances under which the limitations on the payment of attorney's fees and costs are triggered.
- The categories of attorney's fees and costs subject to limitation.
- The circumstances under which the trustee must serve notice of an intention to pay attorney's fees and costs from trust assets and the consequences, if any, of paying such fees and costs prior to serving notice.
- Whether a trustee may use trust assets to pay its attorney's fees and costs upon a final determination in its favor by the trial court or must wait until the conclusion of any appellate proceeding.
- The type of showing required to preclude a trustee from using trust assets to pay its attorney's fees and cost, and the type of evidence that may be used to make or rebut such a showing.

Effect of Proposed Changes – Attorney Fees and Costs in Trust Proceedings

The bill substantially amends s. 736.0802(10), F.S. to provide additional guidance to lawyers and the courts regarding the payment of attorney's fees and costs from trust assets in breach of trust proceedings. Specifically, the bill:

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[44] "Qualified beneficiary" means a living beneficiary who, on the date of the beneficiary's qualification is determined, is a distribute or permissible distribute of trust income or principal; would be a distribute or permissible distribute of trust income or principal if the interests of other actual or permissible distributes terminated on that date without causing the trust to terminate; or would be a distribute or permissible distribute of trust income or principal if the trust terminated in accordance with its terms on that date. s. 736.0103(16), F.S.

[45] s. 736.0802(10), F.S.

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] The Real Property, Probate, and Trust Law Section of the Florida Bar, *White Paper Regarding a Trustee's Use of Trust Assets to Pay Attorney's Fees and Costs in Connection with Claim or Defense of Breach of Trust* (on file with the Civil Justice Subcommittee, Florida House of Representatives).

- Provides that the limitation on the general authority of a trustee to pay attorney's fees and costs from trust assets applies only to the payment of attorney's fees and costs incurred in connection with a claim or defense of breach of trust that is set forth in a filed pleading. The bill defines "pleading" as a pleading recognized by the Florida Rules of Civil Procedure.[52]

- Requires that the notice of intent to pay attorney's fees and costs also identify the judicial proceeding in which the claim or defense of breach of trust has been made.

- Authorizes a trustee to serve the notice of intent to pay attorney's fees and costs in the manner provided for service of pleadings and other documents under the Florida Rules of Civil Procedure[53] if the court has already acquired jurisdiction over the party in the proceeding. Additionally, the bill waives service of the notice of intent upon a qualified beneficiary whose identity or location is unknown to, and not reasonably ascertainable by, the trustee.

- Provides that if a trustee pays attorney's fees and costs from trust assets prior to serving the notice of intent, any affected qualified beneficiary is entitled to an order compelling the return of the payment with interest at the statutory rate.[54] The court must award attorney's fees and costs in connection with a motion to compel under such circumstances.

- Identifies the categories of evidence through which a movant may show, or through which a trustee may rebut, that a reasonable basis exists to conclude there has been a breach of trust. Permissible evidence consists of affidavits, answers to interrogatories, admissions, depositions, and any evidence otherwise admissible under the Florida Evidence Code.[55]

- Requires that payments made after service of the notice of intent be returned to the trust with interest at the statutory rate if ordered by the court.

- Provides that if the claim or defense of breach of trust is withdrawn, dismissed, or resolved by the trial court without a determination that the trustee committed a breach of trust, the trustee may pay attorney's fees and costs from trust assets without court authorization or serving a notice of intent. Further, the attorney's fees and costs that the trustee may pay under such circumstances include those payments that the trustee may have been previously compelled to return.

The bill also makes conforming changes to ss. 736.0816 and 736.1007, F.S.

B. SECTION DIRECTORY:

Section 1 amends s. 731.106, F.S., relating to assets of nondomiciliaries.

Section 2 amends s. 736.0105, F.S., relating to default and mandatory rules.

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[52] Fla. R. Civ. Procedure 1.100(a) provides: "There shall be a complaint or, when so designated by a statute or rule, a petition, and an answer to it; an answer to a counterclaim denominated as such; an answer to a crossclaim if the answer contains a crossclaim; a third-party complaint if a person who was not an original party is summoned as a third-party defendant; and a third-party answer if a third-party complaint is served. If an answer or third-party answer contains an affirmative defense and the opposing party seeks to avoid it, the opposing party shall file a reply containing the avoidance. No other pleadings shall be allowed."

[53] Such service may be made by e-mail, mail, hand delivery, fax, or by deposit with the clerk of court if no address is known. *See* Fla. R. Civ. Pro. 1.080(a) and Fla. R. Jud. Admin. 2.516.

[54] The Chief Financial Officer is required to set the rate of interest payable on judgments and decrees on December 1, March 1, June 1, and September 1 of each year for the following applicable quarter. The current rate is 4.75%. FLORIDA DEPARTMENT OF FINANCIAL SERVICES, http://www.myfloridacfo.com/Division/AA/Vendors/ (last visited November 11, 2015).

[55] Ch. 90, F.S.

Section 3 amends s. 736.0412, F.S., relating to nonjudicial modification of irrevocable trust.

Section 4 amends s. 736.0802, F.S., relating to duty of loyalty.

Section 5 amends s. 736.0816, F.S., relating to specific powers of trustee.

Section 6 amends s. 736.1007, F.S., relating to trustee's attorney's fees.

Section 7 provides an effective date of July 1, 2016.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

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

2. Expenditures:

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

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

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

2. Expenditures:

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

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

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

D. FISCAL COMMENTS:

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:

   None.

B. RULE-MAKING AUTHORITY:

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

C. DRAFTING ISSUES OR OTHER COMMENTS:

Fla. R. Civ. Pro. 1.100 identifies permissible pleadings under the Florida Rules of Civil Procedure, however the bill references Fla. R. Civ. Pro. 1.110.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

A bill to be entitled

An act relating to estates; amending s. 731.106, F.S.; providing that the validity and the effect of a specified disposition of real property be determined by Florida law; amending s. 736.0105, F.S.; conforming a provision to changes made by the act; amending s. 736.0412, F.S.; providing applicability for nonjudicial modification of irrevocable trust; amending s. 736.0802, F.S.; defining the term "pleading"; authorizing a trustee to pay attorney fees and costs from the assets of the trust without specified approval or court authorization in certain circumstances; requiring the trustee to serve a written notice of intent upon each qualified beneficiary of the trust before the payment is made; requiring the notice of intent to contain specified information and to be served in a specified manner; providing that specified qualified beneficiaries may be entitled to an order compelling the refund of a specified payment to the trust; requiring the court to award specified attorney fees and costs in certain circumstances; authorizing the court to prohibit a trustee from using trust assets to make a specified payment; authorizing the court to enter an order compelling the return of specified attorney fees and costs to the trust with interest at the statutory

rate; requiring the court to deny a specified motion unless the court finds a reasonable basis to conclude that there has been a breach of the trust; authorizing a court to deny the motion if it finds good cause to do so; authorizing the movant to show that a reasonable basis exists, and a trustee to rebut the showing, through specified means; authorizing the court to impose such remedies or sanctions as it deems appropriate; providing that a trustee is authorized to use trust assets in a specified manner if a claim or defense of breach of trust is withdrawn, dismissed, or judicially resolved in a trial court without a determination that the trustee has committed a breach of trust; providing that specified proceedings, remedies, and rights are not limited; amending ss. 736.0816 and 736.1007, F.S.; conforming provisions to changes made by the act; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (2) of section 731.106, Florida Statutes, is amended to read:

731.106 Assets of nondomiciliaries.—

(2) When a nonresident decedent, whether or not a citizen of the United States, provides by will that the testamentary disposition of tangible or intangible personal property having a

situs within this state~~, or of real property in this state,~~ shall be construed and regulated by the laws of this state, the validity and effect of the dispositions shall be determined by Florida law. The validity and the effect of a disposition, whether intestate or testate, of real property in this state shall be determined by Florida law. The court may, and in the case of a decedent who was at the time of death a resident of a foreign country the court shall, direct the personal representative appointed in this state to make distribution directly to those designated by the decedent's will as beneficiaries of the tangible or intangible property or to the persons entitled to receive the decedent's personal estate under the laws of the decedent's domicile.

Section 2. Paragraph (k) of subsection (2) of section 736.0105, Florida Statutes, is amended to read:

736.0105 Default and mandatory rules.—

(2) The terms of a trust prevail over any provision of this code except:

(k) The ability to modify a trust under s. 736.0412, except as provided in s. 736.0412(4)(b) or (c).

Section 3. Section 736.0412, Florida Statutes, is amended to read:

736.0412 Nonjudicial modification of irrevocable trust.—

(1) After the settlor's death, a trust may be modified at any time as provided in s. 736.04113(2) upon the unanimous agreement of the trustee and all qualified beneficiaries.

(2) Modification of a trust as authorized in this section is not prohibited by a spendthrift clause or by a provision in the trust instrument that prohibits amendment or revocation of the trust.

(3) An agreement to modify a trust under this section is binding on a beneficiary whose interest is represented by another person under part III of this code.

(4) This section does ~~shall~~ not apply to any trust:

(a) ~~Any trust~~ Created prior to January 1, 2001.

(b) ~~Any trust~~ Created after December 31, 2000, and before July 1, 2016, if, under the terms of the trust, all beneficial interests in the trust must vest or terminate within the period prescribed by the rule against perpetuities in s. 689.225(2), notwithstanding s. 689.225(2)(f), unless the terms of the trust expressly authorize nonjudicial modification.

(c) Created on or after July 1, 2016, during the first 90 years after it is created, unless the terms of the trust expressly authorize nonjudicial modification under this section.

(d) ~~Any trust~~ For which a charitable deduction is allowed or allowable under the Internal Revenue Code until the termination of all charitable interests in the trust.

(5) For purposes of subsection (4), a revocable trust shall be treated as created when the right of revocation terminates.

(6) The provisions of this section are in addition to, and not in derogation of, rights under the common law to modify,

amend, terminate, or revoke trusts.

Section 4. Subsection (10) of section 736.0802, Florida Statutes, is amended to read:

736.0802 Duty of loyalty.—

(10) Unless otherwise provided in this subsection, payment of costs or attorney ~~attorney's~~ fees incurred in any proceeding ~~from the assets of the trust~~ may be made by a ~~the~~ trustee from assets of the trust without the approval of any person and without court authorization, ~~unless the court orders otherwise~~ as provided in ss. 736.0816(20) and 736.1007(1) ~~paragraph (b)~~.

(a) As used in this subsection, the term "pleading" means a pleading as defined in Rule 1.110 of the Florida Rules of Civil Procedure.

(b) If a trustee incurs attorney fees or costs in connection with a claim or defense of breach of trust which is made in a filed pleading, the trustee may pay such attorney fees or costs from trust assets without the approval of any person and without any court authorization. However, the trustee must serve a written notice of intent upon each qualified beneficiary of the trust whose share of the trust may be affected by the payment before such payment is made. The notice of intent does not need to be served upon a qualified beneficiary whose identity or location is unknown to, and not reasonably ascertainable by, the trustee.

(c) The notice of intent must identify the judicial proceeding in which the claim or defense of breach of trust has

been made in a filed pleading and must inform the person served of his or her right under paragraph (e) to apply to the court for an order prohibiting the trustee from using trust assets to pay attorney fees or costs as provided in paragraph (b) or compelling the return of such attorney fees and costs to the trust. The notice of intent must be served by any commercial delivery service or form of mail requiring a signed receipt; the manner provided in the Florida Rules of Civil Procedure for service of process; or, as to any party over whom the court has already acquired jurisdiction in that judicial proceeding, in the manner provided for service of pleadings and other documents by the Florida Rules of Civil Procedure.

(d) If a trustee has used trust assets to pay attorney fees or costs described in paragraph (b) before service of a notice of intent, any qualified beneficiary who is not barred under s. 736.1008 and whose share of the trust may have been affected by such payment is entitled, upon the filing of a motion to compel the return of such payment to the trust, to an order compelling the return of such payment, with interest at the statutory rate. The court shall award attorney fees and costs incurred in connection with the motion to compel as provided in s. 736.1004.

(e) Upon the motion of any qualified beneficiary who is not barred under s. 736.1008 and whose share of the trust may be affected by the use of trust assets to pay attorney fees or costs as provided in paragraph (b), the court may prohibit the

trustee from using trust assets to make such payment and, if such payment has been made from trust assets after service of a notice of intent, the court may enter an order compelling the return of the attorney fees and costs to the trust, with interest at the statutory rate. In connection with any hearing on a motion brought under this paragraph:

1. The court shall deny the motion unless it finds a reasonable basis to conclude that there has been a breach of trust. If the court finds there is a reasonable basis to conclude there has been a breach of trust, the court may still deny the motion if it finds good cause to do so.

2. The movant may show that such reasonable basis exists, and the trustee may rebut any such showing by presenting affidavits, answers to interrogatories, admissions, depositions, and any evidence otherwise admissible under the Florida Evidence Code.

(f) If a trustee fails to comply with an order of the court prohibiting the use of trust assets to pay attorney fees or costs described in paragraph (b) or fails to comply with an order compelling that such payment be refunded to the trust, the court may impose such remedies or sanctions as the court deems appropriate, including, without limitation, striking the defenses or pleadings filed by the trustee.

(g) Notwithstanding the entry of an order prohibiting the use of trust assets to pay attorney fees and costs as provided in paragraph (b), or compelling the return of such attorney fees

or costs, if a claim or defense of breach of trust is withdrawn, dismissed, or judicially resolved in the trial court without a determination that the trustee has committed a breach of trust, the trustee is authorized to use trust assets to pay attorney fees and costs as provided in paragraph (b) and may do so without service of a notice of intent or order of the court. The attorney fees and costs may include fees and costs that were refunded to the trust pursuant to an order of the court.

(h) This subsection does not limit proceedings under s. 736.0206 or remedies for breach of trust under s. 736.1001, or the right of any interested person to challenge or object to the payment of compensation or costs from the trust.

~~(a) If a claim or defense based upon a breach of trust is made against a trustee in a proceeding, the trustee shall provide written notice to each qualified beneficiary of the trust whose share of the trust may be affected by the payment of attorney's fees and costs of the intention to pay costs or attorney's fees incurred in the proceeding from the trust prior to making payment. The written notice shall be delivered by sending a copy by any commercial delivery service requiring a signed receipt, by any form of mail requiring a signed receipt, or as provided in the Florida Rules of Civil Procedure for service of process. The written notice shall inform each qualified beneficiary of the trust whose share of the trust may be affected by the payment of attorney's fees and costs of the right to apply to the court for an order prohibiting the trustee~~

~~from paying attorney's fees or costs from trust assets. If a trustee is served with a motion for an order prohibiting the trustee from paying attorney's fees or costs in the proceeding and the trustee pays attorney's fees or costs before an order is entered on the motion, the trustee and the trustee's attorneys who have been paid attorney's fees or costs from trust assets to defend against the claim or defense are subject to the remedies in paragraphs (b) and (c).~~

~~(b) If a claim or defense based upon breach of trust is made against a trustee in a proceeding, a party must obtain a court order to prohibit the trustee from paying costs or attorney's fees from trust assets. To obtain an order prohibiting payment of costs or attorney's fees from trust assets, a party must make a reasonable showing by evidence in the record or by proffering evidence that provides a reasonable basis for a court to conclude that there has been a breach of trust. The trustee may proffer evidence to rebut the evidence submitted by a party. The court in its discretion may defer ruling on the motion, pending discovery to be taken by the parties. If the court finds that there is a reasonable basis to conclude that there has been a breach of trust, unless the court finds good cause, the court shall enter an order prohibiting the payment of further attorney's fees and costs from the assets of the trust and shall order attorney's fees or costs previously paid from assets of the trust to be refunded. An order entered under this paragraph shall not limit a trustee's right to seek~~

~~an order permitting the payment of some or all of the attorney's fees or costs incurred in the proceeding from trust assets, including any fees required to be refunded, after the claim or defense is finally determined by the court. If a claim or defense based upon a breach of trust is withdrawn, dismissed, or resolved without a determination by the court that the trustee committed a breach of trust after the entry of an order prohibiting payment of attorney's fees and costs pursuant to this paragraph, the trustee may pay costs or attorney's fees incurred in the proceeding from the assets of the trust without further court authorization.~~

~~(c) If the court orders a refund under paragraph (b), the court may enter such sanctions as are appropriate if a refund is not made as directed by the court, including, but not limited to, striking defenses or pleadings filed by the trustee. Nothing in this subsection limits other remedies and sanctions the court may employ for the failure to refund timely.~~

~~(d) Nothing in this subsection limits the power of the court to review fees and costs or the right of any interested persons to challenge fees and costs after payment, after an accounting, or after conclusion of the litigation.~~

~~(e) Notice under paragraph (a) is not required if the action or defense is later withdrawn or dismissed by the party that is alleging a breach of trust or resolved without a determination by the court that the trustee has committed a breach of trust.~~

Section 5. Subsection (20) of section 736.0816, Florida Statutes, is amended to read:

736.0816 Specific powers of trustee.—Except as limited or restricted by this code, a trustee may:

(20) Employ persons, including, but not limited to, attorneys, accountants, investment advisers, or agents, even if they are the trustee, an affiliate of the trustee, or otherwise associated with the trustee, to advise or assist the trustee in the exercise of any of the trustee's powers and pay reasonable compensation and costs incurred in connection with such employment from the assets of the trust, subject to s. 736.0802(10) with respect to attorney fees and costs, and act without independent investigation on the recommendations of such persons.

Section 6. Subsection (1) of section 736.1007, Florida Statutes, is amended to read:

736.1007 Trustee's attorney's fees.—

(1) If the trustee of a revocable trust retains an attorney to render legal services in connection with the initial administration of the trust, the attorney is entitled to reasonable compensation for those legal services, payable from the assets of the trust, subject to s. 736.0802(10), without court order. The trustee and the attorney may agree to compensation that is determined in a manner or amount other than the manner or amount provided in this section. The agreement is not binding on a person who bears the impact of the compensation

unless that person is a party to or otherwise consents to be bound by the agreement. The agreement may provide that the trustee is not individually liable for the attorney ~~attorney's~~ fees and costs.

Section 7. This act shall take effect July 1, 2016.

Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION	
ADOPTED	__ (Y/N)
ADOPTED AS AMENDED	__ (Y/N)
ADOPTED W/O OBJECTION	__ (Y/N)
FAILED TO ADOPT	__ (Y/N)
WITHDRAWN	__ (Y/N)
OTHER	_____

Committee/Subcommittee hearing bill: Civil Justice Subcommittee

Representative Berman offered the following:

Amendment (with title amendment)

Remove lines 47-65 and insert:

Section 1. Section 731.1055, Florida Statutes, is created to read:

731.1055 Disposition of real property.—The validity and the effect of a disposition, whether intestate or testate, of real property in this state shall be determined by Florida law.

Section 2. Subsection (2) of section 731.106, Florida Statutes, is amended to read:

731.106 Assets of nondomiciliaries.—

(2) When a nonresident decedent, whether or not a citizen of the United States, provides by will that the testamentary disposition of tangible or intangible personal property having a situs within this state~~, or of real property in this state,~~

shall be construed and regulated by the laws of this state, the validity and effect of the dispositions shall be determined by Florida law. The court may, and in the case of a decedent who was at the time of death a resident of a foreign country the court shall, direct the personal representative appointed in this state to make distribution directly to those designated by the decedent's will as beneficiaries of the tangible or intangible property or to the persons entitled to receive the decedent's personal estate under the laws of the decedent's domicile.

T I T L E A M E N D M E N T

Between lines 2 and 3, insert:

conforming a provision to changes made by the act; creating s. 731.1055, F.S.;

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 455 Alimony
SPONSOR(S): Burton
TIED BILLS: None **IDEN./SIM. BILLS:** None

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee		Robinson TR	Bond VB
2) Judiciary Committee			

SUMMARY ANALYSIS

Alimony is a court-ordered payment from one spouse to another for support or maintenance.
Florida courts may currently award one, or a combination, of five different types of alimony: temporary alimony, bridge-the-gap alimony, rehabilitative alimony, durational alimony, and permanent alimony. A court has broad discretion to determine the type, amount, duration, and later modification or termination of the alimony award.

The bill:

- Provides factors to assist a court in awarding temporary alimony during dissolution proceedings.
- Repeals the current categorization of post-dissolution alimony awards as bridge-the-gap, rehabilitative, durational, or permanent and creates one form of post-dissolution alimony.
- Limits judicial discretion in awarding post-dissolution alimony by establishing a formula to determine a presumptive range for the amount and duration of the alimony award, effectively ending permanent alimony.
- Provides factors to assist a court in determining a post-dissolution alimony award within the presumptive range.
- Authorizes a court to deviate from the presumptive range if the resulting alimony award would be inappropriate or inequitable.
- Revises procedures to initiate payment of alimony awards through the clerk of court depository.
- Provides that certain changes in actual income, or, an obligor's retirement after reaching the retirement age for social security or the obligor's profession, constitute a substantial change in circumstances for purposes of modifying or terminating an alimony award.
- Revises the criteria to determine the existence of a supportive relationship for purposes of modifying or terminating an alimony award, including the consideration of relationships that may have recently ended and repealing the cohabitation requirement.
- Creates a rebuttable presumption that modification or termination of alimony is retroactive.
- Prohibits a party who unreasonably pursues or defends a modification action from recovering attorney's fees and costs and requiring that such party pay the fees and costs of the prevailing party.

The bill also codifies current provisions of law relating to:

- Caps on income deduction for combined alimony and child support orders.
- Tax treatment of alimony awards.
- Consideration of the income of a successor spouse in an alimony modification proceeding.

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, 2016.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

ALIMONY

Alimony is a court-ordered payment from one spouse to another for support or maintenance. Alimony is most commonly awarded in an action for dissolution of marriage,[1] but may also be awarded to a spouse in an action for support that does not seek marital dissolution.[2]

While there is some statutory guidance regarding alimony, much of the law governing alimony is common law (that is, established through case precedent). The leading case, *Canakaris v. Canakaris*,[3] 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 Florida Supreme Court explained:

> 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.[4]

However, the Court acknowledged problems with the exercise of such broad discretion:

> ...[B]oth 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.[5]

In the 35 years since *Canakaris*, little has changed in the law governing alimony. The legislature has provided some statutory guidance and case law has somewhat narrowed the exercise of judicial discretion. Nevertheless, the application of the law to similar cases has continued to lead to varied and inconsistent alimony awards throughout the state. Expressing frustration with the concept of broad discretion, and the resulting inconsistent decisions of courts within the state regarding the appropriate award of alimony in similar cases, one appellate judge wrote in 2002:

> Broad discretion in the award of alimony is no longer justifiable and should be discarded in favor of guidelines, if not an outright rule.[6]

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[1] s. 61.08(2), F.S.
[2] s. 61.09, F.S.
[3] *Canakaris v. Canakaris*, 382 So. 2d 1197 (Fla. 1980).
[4] *Id.* at 1202.
[5] *Id.* at 1203.
[6] *Bacon v. Bacon*, 819 So. 2d 950, 954 (Fla. 4th DCA 2002)(Farmer, J., concurring).

ALIMONY AWARDS

Types of Alimony

Florida law recognizes five forms of alimony: temporary, bridge-the-gap, rehabilitative, durational, and permanent periodic alimony as illustrated by **Figure 1**.

Figure 1: Types of Alimony Awards under Florida Law

Type of Alimony Award	***Purpose***	***Duration***	***Modification or Termination***	***Automatic Termination***
Temporary[7]	May be requested by petition or motion after the initiation of dissolution proceedings for support during the dissolution action.	Length of the dissolution action.	Good Cause	Entry of final judgment in dissolution action (including appeals).[8]
Bridge-the-Gap[9]	May be awarded to provide support necessary to make the transition from married to single. Designed to assist with legitimate short-term needs.	Varies, but may not exceed 2 years.	Not modifiable in amount or duration	Remarriage of Recipient or Death of Either Party.
Rehabilitative[10]	May be awarded to assist 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 employment skills or credentials. Requires a specific and defined plan.[11]	Varies	Substantial Change in Circumstances or Non-Compliance with Rehabilitation Plan or Completion of the Rehabilitation Plan.[12]	Death of Either Party.
Durational[13]	May be awarded if permanent alimony is inappropriate. Provides economic assistance for a set period of time following a marriage of short or moderate duration.[14]	Varies, but may not exceed the length of the marriage.	Substantial Change in Circumstances (Amount Only) or Exceptional Circumstances (Duration Only)	Remarriage of Recipient or Death of Either Party.
Permanent[15]	May be awarded to provide for the needs and necessities of life as they were established during the marriage for a party who lacks the financial ability to meet such needs following the divorce. May be awarded following a marriage of long duration, moderate duration or short duration under certain circumstances.	Perpetual	Substantial Change in Circumstances, including the existence of a supportive relationship.	Remarriage of Recipient or Death or Either Party.

[7] s. 61.071, F.S.
[8] 24A AM. JR. 2D *Divorce and Separation* §615.
[9] s. 61.08(5), F.S.
[10] s. 61.08(6)(a), F.S.
[11] s. 61.08(6)(b), F.S.
[12] s. 61.08(6)(c), F.S.
[13] s. 61.08(7), F.S.
[14] 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 7 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. s. 61.08(4), F.S.
[15] s. 61.08(8), F.S.

Determining an Award of Alimony

A court may order the payment of one, or a combination, of the types of alimony authorized under current law. Unlike child support obligations which are established by a fairly strict formula and expire after a statutorily defined period, the amount and duration of alimony awards are largely within the discretion of the court.

Before a court may make an award of alimony, it must equitably distribute the former spouse's assets.[16] If subsequent to the distribution the requesting spouse has no need for support or the other spouse does not have the ability to pay, an alimony award is inappropriate. The court must make a specific factual determination regarding whether there remains a need for and ability to pay alimony.[17] If an alimony award is appropriate under the circumstances, to determine the proper alimony award the court must consider all relevant factors, including:[18]

- 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 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[19] available to either party, including income available through investments. Income may be imputed to a voluntarily unemployed or underemployed spouse, whether the spouse is the payor or payee.[20]
- 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 the adultery.[21] However, adultery is not a bar to entitlement to alimony[22] and marital misconduct may not be used as a basis for alimony unless the misconduct causes a depletion of marital assets.[23]

It is within these general guidelines that courts may exercise broad discretion in determining the type, amount, and duration of an alimony award, if any, although the award may not leave the obligor with

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[16] *Canakaris v. Canakaris,* 382 So. 2d 1197, 1202 (Fla. 1980).
[17] *See* s. 61.08(2), F.S.; *Payne v. Payne*, 88 So.3d 1016 (Fla. 2d DCA 2012).
[18] s. 61.08(2), F.S.
[19] 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. s. 61.046(7), F.S. Case law has expanded the definition to include in-kind payments and regular gifts and clarified that the source of income must be "available" to the party. *See Fitzgerald v. Fitzgerald*, 912 So. 2d 363 (Fla. 2d DCA 2005); *Weiser v. Weiser*, 782 So. 2d 986 (Fla. 4th DCA 2000), and *Zold v. Zold*, 880 So. 2d 779 (Fla. 5th DCA 2004). However, a party may not voluntarily make income unavailable in order to reduce his or her annual income. *See Geoghegan v. Geoghegan*, 969 So. 2d 482 (Fla. 5th DCA 2007).
[20] *Kovar v. Kovar*, 648 So. 2d 177 (Fla. 4th DCA 1994); *Rojas v. Rojas*, 656 So. 2d 563 (Fla. 3d DCA 1995).
[21] s. 61.08(1), F.S.
[22] *See Coltea v. Coltea*, 856 So. 2d 1047 (Fla. 4th DCA 2003).
[23] *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).

significantly less net income than the obligee unless there are exceptional circumstances.[24] The court must only make findings of fact relative to the factors enumerated supporting its award or denial of alimony.[25] A party may be ordered to pay an alimony award in periodic payments, payments in lump sum, [26] or a combination of the two. The court may also require the obligor to purchase life insurance or post a bond to secure the actual payment of the alimony award. [27]

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 obligee. Nominal alimony is not a form of alimony, but rather is an award of a de minimis amount, such as $1, 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 obligee, should the financial conditions of the obligor improve.[28]

EFFECT OF THE BILL – ALIMONY AWARDS

The bill repeals the current classification scheme of alimony awards and creates one category of alimony, similar to what is currently called "durational alimony." It may be awarded in an amount and duration within a range based on a mathematical formula illustrated by **Figure 2**. The concept of using such alimony for bridging the gap or rehabilitative purposes is retained in the guidelines that judges may use to determine the award within the presumptive range. The new guidelines effectively eliminate permanent alimony.

The bill does not change the categorization or form of temporary alimony and the formula may not be used to calculate temporary alimony.

Presumptive Range

Figure 2: Alimony Formula

	Low End	***High End***
Amount	**(0.015 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**

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 an alimony award 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.

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[24] s. 61.08(9), F.S.
[25] s. 61.08, F.S.
[26] 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. *Rosario v. Rosario*, 945 So. 2d 629, 632 (Fla. 4th DCA 2006).
[27] s. 61.08(3), F.S.
[28] *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 which was then being used for his own support).

Under the new alimony guidelines created by the bill, the court must first establish the presumptive range of the amount and duration of an alimony award pursuant to the mathematical formula illustrated by **Figure 2**. To determine the range, the court must make initial written findings regarding the monthly gross income of each party and the total years of marriage. Income, for purposes of determining the presumptive range, is consistent with income for purposes of determining an order of child support.[29]

After making such initial findings, the court must use the information to calculate the presumptive alimony amount and duration range pursuant to the formula in **Figure 2.**

> ***Example 1:*** *Spouse 1 and Spouse 2 were married for 6 years (**YOMD** and **YOMA**). Spouse 1 has a monthly gross income of $5,000. Spouse 2 has a monthly gross income of $1,800. The difference between their income is $3,200 (**GI**). Spouse 2 requests alimony. The presumptive alimony range is $288 - $384 for a period of 1.5 years to 4.5 years.*
>
> ***Example 2:*** *Spouse 1 and Spouse 2 were married for 32 years (**YOMD**)(**YOMA** is capped at 20 years). Spouse 1 has a monthly gross income of $2,000. Spouse 2 has a monthly gross income of $12,000. The difference between their income is $10,000 (**GI**). Spouse 1 requests alimony. The presumptive alimony range is $3,000 - $ 4,000 for a period of 8 years to 24 years.*

Determining Alimony Award within Presumptive Range

Marriages less than 2 years

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

Marriages longer than 2 years

For marriages longer than 2 years, if there is no agreement between the parties, alimony is presumptively awarded within the range calculated under the formula in **Figure 2**. In determining the amount and duration of the alimony award within the presumptive 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, but with the consideration that neither party may be able to maintain that standard of living 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.

[29] Compare lines 78-157 of the bill with s. 61.30(2) and (3), F.S.

- Whether either party has caused the unreasonable depletion or dissipation of marital assets.
- The amount of temporary alimony and the period 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.
- Any other factor necessary to do equity and justice between the parties.

After consideration of the enumerated factors, the court may establish an alimony award within the presumptive range. The order establishing the award must clearly set forth both the amount and duration of the award. The bill does not authorize the court to order payment of alimony in lump sum. The court must also make a written finding that the obligor has the financial ability to pay the award.

A court retains the authority to order an obligor to secure the actual payment of the alimony award, 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 security may be modified if the underlying alimony award is modified and must also be reduced in an amount commensurate with any reduction in the alimony award.

Nominal Alimony

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 nominal alimony must be established in accordance with the presumptive alimony formula illustrated in **Figure 2.** Before the expiration of the durational period, the amount of the nominal alimony award may be modified to a full award using the presumptive alimony formula in **Figure 2**.

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 duration range. In such cases, the court must consider all the enumerated factors applicable to determining an award of alimony within the presumptive range and make specific written findings concerning the factors that justify the finding that the application of the presumptive alimony amount and duration range 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 in **Figure 2** to calculate temporary alimony.

COMBINED ALIMONY AND CHILD SUPPORT ORDERS

Section 61.1301, F.S. requires that a court, upon the entry of an order establishing, enforcing, or modifying an obligation for child support, alimony, or a combination of both, enter an order for income deduction. Income deduction is a process by which an employed obligor has child support or alimony payments withheld directly from his or her salary. Employers receiving an income deduction order are required to deduct support payments from the obligor's income, but may not deduct in excess of the amounts allowed under the federal Consumer Credit Protection Act (CCPA).[30] The CCPA provides the maximum disposable earnings[31] of an individual for a work week that may be deducted pursuant to an order of support:[32]

- 50% if the obligor is supporting a spouse or dependent child (other than a spouse or child that is the subject of the support order);
- 55% if the obligor is supporting a spouse or dependent child (other than a spouse or child that is the subject of the support order) and is more than 12 weeks delinquent in the payment of support.
- 60% if the obligor is not supporting a spouse or dependent child.
- 65% if the obligor is not supporting a spouse or dependent child and is more than 12 weeks delinquent in the payment of support.

Florida courts have also reversed combined support orders that totaled 58%-70% of the obligor's net income as "clearly excessive."[33]

Effect of the bill

The bill restates and codifies the current caps on income deduction for combined alimony and child support orders. If the calculation of an award of combined support exceeds 55% of the payor's net income, the court must adjust the award of child support to ensure that the cap is not exceeded.

PAYMENT OF ALIMONY AWARDS

Section 61.08(10), F.S. requires that any alimony order entered after January 1, 1985, direct that the payment of alimony be made through a depository operated by the clerk of court. Parties may opt out of the depository if they have no minor child or if the parties request that the court not direct payment through the depository. If the court does not direct payment through the depository, either party may subsequently apply to initiate payments through the depository by filing an affidavit with the depository alleging default or arrearages in payment.[34] The moving party must provide copies of the affidavit to the court and the other party or parties.[35] Fifteen days after receipt of the affidavit, the depository must notify all parties that future payments must be made through the depository.[36] The depository collects a fee equal to 4% of the alimony payment, except that no fee may exceed $5.25.[37]

Effect of the bill

The bill revises the procedures parties must use to opt in to 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

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[30] s. 61.1301, F.S.; The Consumer Credit Protection Act is codified at 15 U.S.C. § 1671, et. seq.
[31] "Disposable earnings" means that part of the earnings of any individual remaining after the deduction from those earnings of any amounts required by law to be withheld. 15 U.S.C. § 1672(b).
[32] 15 U.S.C. § 1673(b).
[33] See *Thomas v. Thomas*, 418 So. 2d 316, (Fla. 4th DCA 1982); *Casella v. Casella*, 569 So. 2d 848, 849 (Fla. 4th DCA 1990) (the court stopped short of ruling that a particular percentage constitutes a bright-line rule, and instead, ruled that each case must be determined individually).
[34] s. 61.08, F.S.
[35] *Id.*
[36] *Id.*
[37] s. 61.181(2)(b), F.S.

court and serve a copy on the non-moving party. An evidentiary hearing must be conducted within 15 days after the filing of the motion to establish the default and arrearages, if any. The court must thereafter issue an order directing the clerk of the circuit court to establish or amend a Family Law Case History account for the parties, and directing that the obligor make future payments through the depository.

INCOME TAX TREATMENT OF ALIMONY PAYMENTS

Gross income for federal income tax purposes includes amounts received as alimony or separate maintenance payments.[38] The payment to, or for the benefit of, a spouse or former spouse under a divorce or separation instrument[39] will qualify and be deemed and treated by the Internal Revenue Service (IRS) as "alimony" for income tax purposes. Alimony is deductible from the obligor's gross income and taxable income to the obligee, if:[40]

- 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 obligee.

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 obligee and not deductible by the obligor.[41] However, the usual treatment of alimony has been to make the alimony taxable to the recipient and deductible by the payor.[42]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 obligor and excludable from the gross income of the obligee in a marital settlement agreement or related agreement.[43]

Effect of the Bill

The bill codifies and restates current law.

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[44] or ordered by the court, if the circumstances or the financial ability of either party changes. 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

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[38] 26 U.S.C. § 71(a).
[39] 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).
[40] 26 U.S.C. § 71(b)(1).
[41] *Rykiel v. Rykiel*, 838 So. 2d 508, 511-12 (Fla. 2003).
[42] *See generally Garcia v. Garcia,* 696 So. 2d 1279 (Fla. 2d DCA 1997); *Rihl v. Rihl*, 727 So. 2d 272 (Fla. 3d DCA 1999).
[43] 26 CFR. § 1.71-1T, Q8 & A8.
[44]Despite such statutory authorization, a marital settlement agreement becomes a contractual duty which, when endorsed by court order, may not be set aside or revisited, according to principles of collateral estoppel and res judicata. Florida courts do not take lightly agreements made by husband and wife concerning spousal support. A marital settlement agreement as to alimony or property rights which is entered before the dissolution of marriage is binding upon the parties. *See, e.g., Perry v. Perry*, 976 So. 2d 1151 (Fla. 4th DCA 2008) and *Griffith v. Griffith*, 860 So. 2d 1069, 1073 (Fla. 1st DCA 2003).

nature.[45] The change in circumstances must be alleged to have occurred subsequent to the last judgment or order awarding alimony.[46] The court has jurisdiction to modify an award of alimony as equity requires.[47] A modification order may be retroactive to the date of the filing of the action, or the filing of the petition for modification.[48]

Supportive Relationship

A court may reduce or terminate an award of alimony based on the existence of a supportive relationship.[49] The court must make specific written findings that, since the granting of a divorce and the award of alimony, the obligee has entered into a supportive relationship with a person, unrelated to the obligee by consanguinity or affinity, with whom he or she resides. In determining whether a supportive relationship exists, the court may consider:[50]

- The extent to which the obligee and the other person have held themselves out as a married couple, including referring to each other in terms such as "my husband" or "my wife."
- The period of time that the obligee has resided with the other person in a permanent place of abode.
- The extent to which the obligee and the other person have pooled their assets or income or otherwise exhibited financial interdependence.
- The extent to which the obligee or the other person has supported the other, in whole or in part.
- The extent to which the obligee or the other person has performed valuable services for the other.
- 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 the other person have worked together to create or enhance anything of value.
- Whether the obligee and the other person have jointly contributed to the purchase of any real or personal property.
- Evidence in support of a claim that the obligee and the other person have an express agreement regarding property sharing or support.
- Evidence in support of a claim that the obligee and the other person have an implied agreement regarding property sharing or support.
- Whether the obligee and the other person have provided support to the children of one another, regardless of any legal duty to do so.

The obligor has the burden to prove by a preponderance of the evidence that a supportive relationship exists.[51]

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[45] *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)).

[46] *Johnson v. Johnson*, 537 So. 2d 637 (Fla. 2d DCA 1998).

[47] s. 61.14(1)(a), F.S.

[48] *Id.*

[49] A supportive relationship is a relationship that provides economic support equivalent to a marriage. The existence of a conjugal relationship, though it may be relevant to the nature and extent of the relationship, is not determinative of the existence of a supportive relationship.

[50] s. 61.14(1)(b), F.S.

[51] s. 61.14(1)(b), F.S.

Effect of the Bill – Supportive Relationship

The bill revises the criteria to determine the existence of a supportive relationship for purposes of modification or termination of alimony. Specifically, the bill provides that:

- The court may consider evidence of cohabitation, but cohabitation is not a requirement of a supportive relationship. The obligor does not have to prove cohabitation.
- The court may consider 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 court may consider whether the parties referred to each other in the more generic term, "spouse", rather than husband or wife.

The bill also authorizes a court to terminate or modify an alimony award based on a supportive relationship that may have existed in the year before the filing of the petition for modification, although a current supportive relationship may not exist.

A reduction or termination of alimony based on a supportive relationship is retroactive to the date of the filing of the petition for reduction or termination.

Retirement of the Obligor

Retirement of the obligor can be considered as part of the totality of circumstances in order to determine if a substantial change in circumstances exists to warrant a modification of alimony. However, retirement does not by itself constitute a substantial change in circumstances.[52] The Florida Supreme Court directed that in modification cases based upon the retirement of the obligor courts should consider:[53]

- The obligor's age, health, and motivation for retirement.
- The type of work the obligor performs and the age at which others engaged in that line of work normally retire.
- Whether the retirement placed the obligee in peril of poverty.
- The assets of the parties.

There are no additional statutory standards relating to modification or termination of alimony based upon retirement of the obligor. Any modification is strictly within the trial court's discretion subject only to the guidance provided by the Supreme Court.

Effect of the Bill – Retirement of the Obligor

The bill provides that retirement constitutes a substantial change in circumstances if the obligor has reached the full retirement age for social security benefits[54] and has retired or if 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 the anticipated retirement date and the court must determine the customary retirement age for the obligor's profession if the obligor has not reached the full retirement age for social security. However, such determination is not adjudicative of the petition for modification.

If an obligor voluntarily retires before reaching the full retirement age for social security benefits or the customary retirement age for his or her profession, the court must determine if the retirement is reasonable under the factors set out by the Supreme Court. If the voluntary retirement is reasonable it constitutes a substantial change in circumstances.

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[52] *Pimm v. Pimm*, 601 So. 2d 534 (Fla. 1992).
[53] *Id.*
[54] Full retirement age (also called "normal retirement age") had been 65 for many years. However, beginning with people born in 1938 or later, that age gradually increases until it reaches 67 for people born after 1959. SOCIAL SECURITY ADMINISTRATION, https://www.ssa.gov/planners/retire/ageincrease.html (last visited November 12, 2015).

There is a rebuttal presumption that the obligor's alimony obligation must be modified or terminated upon a finding of substantial change in circumstances based upon retirement. The bill provides factors that may overcome the presumption when applied to the circumstances of the obligor and obligee, including:

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

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 an alimony obligation and is living off the income of a successor spouse.[55]

Effect of the Bill – Remarriage of the Obligor

The bill restates and codifies current law.

Change in Actual Income

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

Retroactive Effect of Modification or Termination Order

The bill provides that there is a rebuttable presumption that a modification or termination of an alimony award is retroactive to the date of the filing of the petition, unless the obligee demonstrates that the result is inequitable.

Modification and Termination of an Alimony Award under the Presumptive Guidelines

The amount of an award of alimony under the presumptive guidelines may be modified consistent with current law, subject to the revisions regarding modification made by this bill. However, the duration of such awards, or an award provided for by an agreement of the parties, may not be modified.

An award of alimony under the presumptive guidelines automatically terminates upon the remarriage of the obligee or the death of either party.

ATTORNEY FEES AND COSTS IN MODIFICATION ACTIONS

Section 61.16(1), F.S., authorizes the recovery of attorney's fees and costs in alimony modification proceedings. The statute provides in relevant part:

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

> 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.

Providing for the recovery of attorney's fees and costs ensures that both parties will have similar ability to secure competent legal representation in the modification proceeding. Further, 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 such fees.[56] Instead, 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 spouses' attorney's fees and costs based upon public policy considerations.

Effect of the bill

The bill provides that a party who unreasonably pursues or defends an action for modification of alimony may not recover his or her attorney's fees or costs under s. 61.16, F.S. Further such party must pay the reasonable attorney's fees and costs of the prevailing party regardless of his or her financial resources relative to the prevailing party.

APPLICABILITY

The revisions made by the bill apply to all initial determinations of alimony and all alimony modification actions pending or brought on or after October 1, 2016. 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, 2016.

B. SECTION DIRECTORY:

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

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

Section 5 provides an effective date of October 1, 2016.

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.

[56] *Canakaris v. Canakaris*, 382 So. 2d 1197 (Fla. 1980).

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:

None.

B. RULE-MAKING AUTHORITY:

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

C. DRAFTING ISSUES OR OTHER COMMENTS:

- It is unclear if a court may use the presumptive alimony formula in **Figure 2** to calculate an alimony award in an action for support unconnected with martial dissolution under s. 61.90, F.S. If the formula may be used, it is unclear how the court will calculate the years of marriage, as the **YOMA** and **YOMD** variables depend upon the date an action for dissolution was filed.

- It is unclear if a court must round the years of marriage to reach a whole number for purposes of the presumptive alimony formula in **Figure 2.**

- Lines 627-630 of the bill amend current law to provide a rebuttable presumption that a modification or termination of an alimony award is retroactive. The establishment of the rebuttable presumption may require an amendment to current law in lines 474-481 of the bill.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

A bill to be entitled

An act relating to alimony; amending s. 61.071, F.S.; requiring the use of specified factors in calculating alimony pendente lite; requiring findings by the court regarding such alimony; specifying that a court may not use certain presumptive alimony guidelines in calculating such alimony; amending s. 61.08, F.S.; providing definitions; requiring a court to make specified findings before ruling on a request for alimony; providing for determination of presumptive alimony range and duration range; providing presumptions concerning alimony awards depending on the duration of marriages; providing for imputation of income in certain circumstances; providing for awards of nominal alimony in certain circumstances; providing for taxability and deductibility of alimony awards; specifying that a combined award of alimony and child support may not constitute more than a specified percentage of a payor's net income; providing that a combined alimony and child support award be adjusted to reduce the combined award if it exceeds such specified percentage; providing for security of awards through specified means; providing for modification, termination, and payment of awards; providing for participation in alimony depository; amending s. 61.14, F.S.; prohibiting a court from changing the

duration of an alimony award; providing that a party may pursue an immediate modification of alimony in certain circumstances; revising factors to be considered in determining whether an existing award of alimony should be reduced or terminated because of an alleged supportive relationship; providing for the effective date of a reduction or termination of an alimony award based on the existence of a supportive relationship; providing that the remarriage of an alimony obligor is not a substantial change in circumstance; providing that the financial information of a subsequent spouse of a party paying or receiving alimony is inadmissible and undiscoverable; providing an exception; providing for modification or termination of an award based on a party's retirement; providing for a temporary reduction or suspension of an obligor's payment of alimony while his or her petition for modification or termination based on retirement is pending; providing for an award of attorney fees and costs for unreasonably pursuing or defending a modification of an award; establishing a rebuttable presumption that the modification of an alimony award is retroactive; providing applicability; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 61.071, Florida Statutes, is amended to read:

61.071 Alimony pendente lite; suit money.—In every proceeding for dissolution of the marriage, a party may claim alimony and suit money in the petition or by motion, and if the petition is well founded, the court shall allow a reasonable sum therefor. If a party in any proceeding for dissolution of marriage claims alimony or suit money in his or her answer or by motion, and the answer or motion is well founded, the court shall allow a reasonable sum therefor. After determining that there is a need for alimony and that there is an ability to pay alimony, the court shall consider the alimony factors in s. 61.08(4)(b)1.-14. and make specific written findings of fact regarding the relevant factors that justify an award of alimony under this section. The court may not use the presumptive alimony guidelines in s. 61.08 to calculate alimony under this section.

Section 2. Section 61.08, Florida Statutes, is amended to read:

61.08 Alimony.—

(Substantial rewording of section. See s. 61.08, F.S., for present text.)

(1) DEFINITIONS.—As used in this section, unless the context otherwise requires, the term:

(a)1. "Gross income" means recurring income from any

source and includes, but is not limited to:

a. Income from salaries.

b. Wages, including tips declared by the individual for purposes of reporting to the Internal Revenue Service or tips imputed to bring the employee's gross earnings to the minimum wage for the number of hours worked, whichever is greater.

c. Commissions.

d. Payments received as an independent contractor for labor or services, which payments must be considered income from self-employment.

e. Bonuses.

f. Dividends.

g. Severance pay.

h. Pension payments and retirement benefits actually received.

i. Royalties.

j. Rental income, which is gross receipts minus ordinary and necessary expenses required to produce the income.

k. Interest.

l. Trust income and distributions which are regularly received, relied upon, or readily available to the beneficiary.

m. Annuity payments.

n. Capital gains.

o. Any money drawn by a self-employed individual for personal use that is deducted as a business expense, which moneys must be considered income from self-employment.

p. Social security benefits, including social security benefits actually received by a party as a result of the disability of that party.

q. Workers' compensation benefits.

r. Unemployment insurance benefits.

s. Disability insurance benefits.

t. Funds payable from any health, accident, disability, or casualty insurance to the extent that such insurance replaces wages or provides income in lieu of wages.

u. Continuing monetary gifts.

v. Income from general partnerships, limited partnerships, closely held corporations, or limited liability companies; except that if a party is a passive investor, has a minority interest in the company, and does not have any managerial duties or input, the income to be recognized may be limited to actual cash distributions received.

w. Expense reimbursements or in-kind payments or benefits received by a party in the course of employment, self-employment, or operation of a business which reduces personal living expenses.

x. Overtime pay.

y. Income from royalties, trusts, or estates.

z. Spousal support received from a previous marriage.

aa. Gains derived from dealings in property, unless the gain is nonrecurring.

2. "Gross income" does not include:

a. Child support payments received.

b. Benefits received from public assistance programs.

c. Social security benefits received by a parent on behalf of a minor child as a result of the death or disability of a parent or stepparent.

d. Earnings or gains on retirement accounts, including individual retirement accounts; except that such earnings or gains shall be included as income if a party takes a distribution from the account. If a party is able to take a distribution from the account without being subject to a federal tax penalty for early distribution and the party chooses not to take such a distribution, the court may consider the distribution that could have been taken in determining the party's gross income.

3.a. For income from self-employment, rent, royalties, proprietorship of a business, or joint ownership of a partnership or closely held corporation, the term "gross income" equals gross receipts minus ordinary and necessary expenses, as defined in sub-subparagraph b., which are required to produce such income.

b. "Ordinary and necessary expenses," as used in sub-subparagraph a., does not include amounts allowable by the Internal Revenue Service for the accelerated component of depreciation expenses or investment tax credits or any other business expenses determined by the court to be inappropriate for determining gross income for purposes of calculating

alimony.

(b) "Potential income" means income which could be earned by a party using his or her best efforts and includes potential income from employment and potential income from the investment of assets or use of property. Potential income from employment is the income which a party could reasonably expect to earn by working at a locally available, full-time job commensurate with his or her education, training, and experience. Potential income from the investment of assets or use of property is the income which 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.

(c)1. "Underemployed" means a party is not working full-time in a position which is appropriate, based upon his or her educational training and experience, and available in the geographical area of his or her residence.

2. A party is not considered "underemployed" if he or she is enrolled in an educational program that can be reasonably expected to result in a degree or certification within a reasonable period, so long as the educational program is:

a. Expected to result in higher income within the foreseeable future.

b. A good faith educational choice based upon the previous education, training, skills, and experience of the party and the availability of immediate employment based upon the educational program being pursued.

(d) "Years of marriage" means the number of whole years, beginning from the date of the parties' marriage until the date of the filing of the action for dissolution of marriage.

(2) INITIAL FINDINGS.—When a party has requested alimony in a dissolution of marriage proceeding, before granting or denying an award of alimony, the court shall make initial written findings as to:

(a) The amount of each party's monthly gross income, including, but not limited to, the actual or potential income, and also including actual or potential income from nonmarital or marital property distributed to each party.

(b) The years of marriage as determined from the date of marriage through the date of the filing of the action for dissolution of marriage.

(3) ALIMONY GUIDELINES.—After making the initial findings described in subsection (2), the court shall calculate the presumptive alimony amount range and the presumptive alimony duration range. The court shall make written findings as to the presumptive alimony amount range and presumptive alimony duration range.

(a) Presumptive alimony amount range.—The low end of the presumptive alimony amount range shall be calculated by using the following formula:

(0.015 x the years of marriage) x the difference between the monthly gross incomes of the parties

The high end of the presumptive alimony amount range shall be calculated by using the following formula:

(0.020 x the years of marriage) x the difference between the monthly gross incomes of the parties

For purposes of calculating the presumptive alimony amount range, 20 years of marriage shall be used in calculating the low end and high end for marriages of 20 years or more. In calculating the difference between the parties' monthly gross income, the income of the party seeking alimony shall be subtracted from the income of the other party. If the application of the formulas to establish a guideline range results in a negative number, the presumptive alimony amount shall be $0. If a court establishes the duration of the alimony award at 50 percent or less of the length of the marriage, the court shall use the actual years of the marriage, up to a maximum of 25 years, to calculate the high end of the presumptive alimony amount range.

(b) Presumptive alimony duration range.—The low end of the presumptive alimony duration range shall be calculated by using the following formula:

0.25 x the years of marriage

The high end of the presumptive alimony duration range shall be calculated by using the following formula:

0.75 x the years of marriage

(4) ALIMONY AWARD.—

(a) Marriages of 2 years or less.—For marriages of 2 years or less, there is a rebuttable presumption that no alimony shall be awarded. The court may award alimony for a marriage with a duration of 2 years or less only if the court makes written findings that there is clear and convincing need for alimony, there is an ability to pay alimony, and that the failure to award alimony would be inequitable. The court shall then establish the alimony award in accordance with paragraph (b).

(b) Marriages of more than 2 years.—Absent an agreement of the parties, alimony shall presumptively be awarded in an amount within the alimony amount range calculated in paragraph (3)(a). Absent an agreement of the parties, alimony shall presumptively be awarded for a duration within the alimony duration range calculated in paragraph (3)(b). In determining the amount and duration of the alimony award, the court shall consider all of the following factors upon which evidence was presented:

1. The financial resources of the recipient spouse, including the actual or potential income from nonmarital or marital property or any other source and the ability of the recipient spouse to meet his or her reasonable needs

independently.

2. The financial resources of the payor spouse, including the actual or potential income from nonmarital or marital property or any other source and the ability of the payor spouse to meet his or her reasonable needs while paying alimony.

3. The standard of living of the parties during the marriage with consideration that there will be two households to maintain after the dissolution of the marriage and that neither party may be able to maintain the same standard of living after the dissolution of the marriage.

4. The equitable distribution of marital property, including whether an unequal distribution of marital property was made to reduce or alleviate the need for alimony.

5. Both parties' income, employment, and employability, obtainable through reasonable diligence and additional training or education, if necessary, and any necessary reduction in employment due to the needs of an unemancipated child of the marriage or the circumstances of the parties.

6. Whether a party could become better able to support himself or herself and reduce the need for ongoing alimony by pursuing additional educational or vocational training along with all of the details of such educational or vocational plan, including, but not limited to, the length of time required and the anticipated costs of such educational or vocational plan.

7. Whether one party has historically earned higher or lower income than the income reflected at the time of trial and

the duration and consistency of income from overtime or secondary employment.

8. Whether either party has foregone or postponed economic, educational, or employment opportunities during the course of the marriage.

9. Whether either party has caused the unreasonable depletion or dissipation of marital assets.

10. The amount of temporary alimony and the number of months that temporary alimony was paid to the recipient spouse.

11. The age, health, and physical and mental condition of the parties, including consideration of significant health care needs or uninsured or unreimbursed health care expenses.

12. Significant economic or noneconomic contributions to the marriage or to the economic, educational, or occupational advancement of a party, including, but not limited to, services rendered in homemaking, child care, education, and career building of the other party, payment by one spouse of the other spouse's separate debts, or enhancement of the other spouse's personal or real property.

13. The tax consequence of the alimony award.

14. Any other factor necessary to do equity and justice between the parties.

(c) Deviation from guidelines.—The court may establish an award of alimony that is outside the presumptive alimony amount or alimony duration ranges only if the court considers all of the factors in paragraph (b) and makes specific written findings

concerning the relevant factors that justify that the application of the presumptive alimony amount or alimony duration ranges, as applicable, is inappropriate or inequitable.

(d) Order establishing alimony award.—After consideration of the presumptive alimony amount and duration ranges in accordance with paragraphs (3)(a) and (b), and the factors upon which evidence was presented in accordance with paragraph (b), the court may establish an alimony award. An order establishing an alimony award must clearly set forth both the amount and the duration of the award. The court shall also make a written finding that the payor has the financial ability to pay the award.

(5) IMPUTATION OF INCOME.—If a party is voluntarily unemployed or underemployed, alimony shall be calculated based on a determination of potential income unless the court makes specific written findings regarding the circumstances that make it inequitable to impute income.

(6) NOMINAL ALIMONY.—Notwithstanding subsections (1), (3), and (4), the court may make an award of nominal alimony in the amount of $1 per year if, at the time of trial, a party who has traditionally provided the primary source of financial support to the family temporarily lacks the ability to pay support but is reasonably anticipated to have the ability to pay support in the future. The court may also award nominal alimony for an alimony recipient that is presently able to work but for whom a medical condition with a reasonable degree of medical certainty

may inhibit or prevent his or her ability to work during the duration of the alimony period. The duration of the nominal alimony shall be established within the presumptive durational range based upon the length of the marriage subject to the alimony factors in paragraph (4)(b). Before the expiration of the durational period, nominal alimony may be modified in accordance with s. 61.14 as to amount to a full alimony award using the alimony guidelines and factors in this section.

(7) TAXABILITY AND DEDUCTIBILITY OF ALIMONY.—

(a) Unless otherwise stated in the judgment or order for alimony or in an agreement incorporated thereby, alimony shall be deductible from income by the payor under s. 215 of the Internal Revenue Code and includable in the income of the payee under s. 71 of the Internal Revenue Code.

(b) When making a judgment or order for alimony, the court may, in its discretion after weighing the equities and tax efficiencies, order alimony be nondeductible from income by the payor and nonincludable in the income of the payee.

(c) The parties may, in a marital settlement agreement, separation agreement, or related agreement, specifically agree in writing that alimony be nondeductible from income by the payor and nonincludable in the income of the payee.

(8) MAXIMUM COMBINED AWARD.—In no event shall 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. If the

combined award exceeds the maximum percentage of the payor's net income, the court shall adjust the award of child support to ensure that the 55-percent cap is not exceeded.

(9) SECURITY OF AWARD.—To the extent necessary to protect an award of alimony, the court may order any party who is ordered to pay alimony to purchase or maintain a decreasing term life insurance policy or a bond, or to otherwise secure such alimony award with any other assets that may be suitable for that purpose, in an amount adequate to secure the alimony award. Any such security may be awarded only upon a showing of special circumstances. If the court finds special circumstances and awards such security, the court must make specific evidentiary findings regarding the availability, cost, and financial impact on the obligated party. Any security may be modifiable in the event that the underlying alimony award is modified and shall be reduced in an amount commensurate with any reduction in the alimony award.

(10) MODIFICATION OF AWARD.—A court may subsequently modify or terminate the amount of an award of alimony initially established under this section in accordance with s. 61.14. However, a court may not modify the duration of an award of alimony initially established under this section.

(11) TERMINATION OF AWARD.—An alimony award shall terminate upon the death of either party or the remarriage of the obligee.

(12)(a) PAYMENT OF AWARD.—With respect to an order

requiring the payment of alimony entered on or after January 1, 1985, unless paragraph (c) or paragraph (d) applies, the court shall direct in the order that the payments of alimony be made through the appropriate depository as provided in s. 61.181.

(b) With respect to an order requiring the payment of alimony entered before January 1, 1985, upon the subsequent appearance, on or after that date, of one or both parties before the court having jurisdiction for the purpose of modifying or enforcing the order or in any other proceeding related to the order, or upon the application of either party, unless paragraph (c) or paragraph (d) applies, the court shall modify the terms of the order as necessary to direct that payments of alimony be made through the appropriate depository as provided in s. 61.181.

(c) If there is no minor child, alimony payments need not be directed through the depository.

(d)1. If there is a minor child of the parties and both parties so request, the court may order that alimony payments need not be directed through the depository. In this case, the order of support shall provide, or be deemed to provide, that either party may subsequently apply to the depository to require that payments be made through the depository. The court shall provide a copy of the order to the depository.

2. If subparagraph 1. applies, either party may subsequently file with the clerk of the court a verified motion alleging a default or arrearages in payment stating that the

party wishes to initiate participation in the depository program. The moving party shall provide a copy of the motion to the other party. No later than 15 days after filing the motion, the court shall conduct an evidentiary hearing establishing the default and arrearages, if any, and issue an order directing the clerk of the circuit court to establish, or amend an existing, family law case history account, and further advising the parties that future payments shall thereafter be directed through the depository.

3. In IV-D cases, the Title IV-D agency shall have the same rights as the obligee in requesting that payments be made through the depository.

Section 3. Subsection (1) of section 61.14, Florida Statutes, is amended to read:

61.14 Enforcement and modification of support, maintenance, or alimony agreements or orders.—

(1)(a) When the parties enter into an agreement for payments for, or instead of, support, maintenance, or alimony, whether in connection with a proceeding for dissolution or separate maintenance or with any voluntary property settlement, or when a party is required by court order to make any payments, and the circumstances or the financial ability of either party changes or the child who is a beneficiary of an agreement or court order as described herein reaches majority after the execution of the agreement or the rendition of the order, either party may apply to the circuit court of the circuit in which the

parties, or either of them, resided at the date of the execution of the agreement or reside at the date of the application, or in which the agreement was executed or in which the order was rendered, for an order decreasing or increasing the amount of support, maintenance, or 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 or the child, decreasing, increasing, or confirming the amount of separate support, maintenance, or alimony provided for in the agreement or order. However, a court may not decrease or increase the duration of alimony provided for in the agreement or order. A party is entitled to pursue an immediate modification of alimony if the actual income earned by the other party exceeds, by at least 10 percent, the amount imputed to that party at the time the existing alimony award was determined and such circumstance shall constitute a substantial change in circumstances sufficient to support a modification of alimony. However, an increase in an alimony obligor's income alone does not constitute a basis for a modification to increase alimony unless at the time the alimony award was established it was determined that the obligor was underemployed or unemployed and the court did not impute income to that party at his or her maximum potential income. If an alimony obligor becomes involuntarily underemployed or unemployed for a period of 6 months following the entry of the last order requiring the payment of alimony, the obligor is entitled to pursue an

immediate modification of his or her existing alimony obligations and such circumstance shall constitute a substantial change in circumstance sufficient to support a modification of alimony. A finding that medical insurance is reasonably available or the child support guidelines schedule in s. 61.30 may constitute changed circumstances. Except as otherwise provided in s. 61.30(11)(c), the court may modify an order of support, maintenance, or alimony by increasing or decreasing the support, maintenance, or alimony retroactively to the date of the filing of the action or supplemental action for modification as equity requires, giving due regard to the changed circumstances or the financial ability of the parties or the child.

(b)1. The court may reduce or terminate an award of alimony upon specific written findings by the court that since the granting of a divorce and the award of alimony a supportive relationship exists or has existed within the previous year before the date of the filing of the petition for modification or termination between the obligee and another ~~a~~ person ~~with whom the obligee resides~~. ~~On the issue of whether alimony should be reduced or terminated under this paragraph, the burden is on the obligor to prove by a preponderance of the evidence that a supportive relationship exists.~~

2. In determining whether an existing award of alimony should be reduced or terminated because of an alleged supportive relationship between an obligee and a person who is not related

by consanguinity or affinity ~~and with whom the obligee resides~~, the court shall elicit the nature and extent of the relationship in question. The court shall give consideration, without limitation, to circumstances, including, but not limited to, the following, in determining the relationship of an obligee to another person:

a. The extent to which the obligee and the other person have held themselves out as a married couple by engaging in conduct such as using the same last name, using a common mailing address, referring to each other in terms such as "my spouse" ~~"my husband" or "my wife,"~~ or otherwise conducting themselves in a manner that evidences a permanent supportive relationship.

b. The period of time that the obligee has resided with the other person in a permanent place of abode.

c. The extent to which the obligee and the other person have pooled their assets or income or otherwise exhibited financial interdependence.

d. The extent to which the obligee or the other person has supported the other, in whole or in part.

e. The extent to which the obligee or the other person has performed valuable services for the other.

f. The extent to which the obligee or the other person has performed valuable services for the other's company or employer.

g. Whether the obligee and the other person have worked together to create or enhance anything of value.

h. Whether the obligee and the other person have jointly

contributed to the purchase of any real or personal property.

i. Evidence in support of a claim that the obligee and the other person have an express agreement regarding property sharing or support.

j. Evidence in support of a claim that the obligee and the other person have an implied agreement regarding property sharing or support.

k. Whether the obligee and the other person have provided support to the children of one another, regardless of any legal duty to do so.

1. Whether the obligor's failure, in whole or in part, to comply with all court-ordered financial obligations to the obligee constituted a significant factor in the establishment of the supportive relationship.

3. In any proceeding to modify an alimony award based upon a supportive relationship, the obligor has the burden of proof to establish, by a preponderance of the evidence, that a supportive relationship exists or has existed within the previous year before the date of the filing of the petition for modification or termination. The obligor is not required to prove cohabitation of the obligee and the third party.

4. Notwithstanding paragraph (f), if a reduction or termination is granted under this paragraph, the reduction or termination is retroactive to the date of filing of the petition for reduction or termination.

5.~~3.~~ This paragraph does not abrogate the requirement that

every marriage in this state be solemnized under a license, does not recognize a common law marriage as valid, and does not recognize a de facto marriage. This paragraph recognizes only that relationships do exist that provide economic support equivalent to a marriage and that alimony terminable on remarriage may be reduced or terminated upon the establishment of equivalent equitable circumstances as described in this paragraph. The existence of a conjugal relationship, though it may be relevant to the nature and extent of the relationship, is not necessary for the application of the provisions of this paragraph.

(c)1. For purposes of this section, the remarriage of an alimony obligor does not constitute a substantial change in circumstance or a basis for a modification of alimony.

2. The financial information, including, but not limited to, information related to assets and income, of a subsequent spouse of a party paying or receiving alimony is inadmissible and may not be considered as a part of any modification action unless a party is claiming that his or her income has decreased since the marriage. If a party makes such a claim, the financial information of the subsequent spouse is discoverable and admissible only to the extent necessary to establish whether the party claiming that his or her income has decreased is diverting income or assets to the subsequent spouse that might otherwise be available for the payment of alimony. However, this subparagraph may not be used to prevent the discovery of or

admissibility in evidence of the income or assets of a party when those assets are held jointly with a subsequent spouse. This subparagraph is not intended to prohibit the discovery or admissibility of a joint tax return filed by a party and his or her subsequent spouse in connection with a modification of alimony.

(d)1. An obligor may file a petition for modification or termination of an alimony award based upon his or her actual retirement.

a. A substantial change in circumstance is deemed to exist if:

(I) The obligor has reached the age for eligibility to receive full retirement benefits under s. 216 of the Social Security Act, 42 U.S.C. s. 416 and has retired; or

(II) The obligor has reached the customary retirement age for his or her occupation and has retired from that occupation. An obligor may file an action within 1 year of his or her anticipated retirement date and the court shall determine the customary retirement date for the obligor's profession. However, a determination of the customary retirement age is not an adjudication of a petition for a modification of an alimony award.

b. If an obligor voluntarily retires before reaching any of the ages described in sub-subparagraph a., the court shall determine whether the obligor's retirement is reasonable upon consideration of the obligor's age, health, and motivation for

retirement and the financial impact on the obligee. A finding of reasonableness by the court shall constitute a substantial change in circumstance.

2. Upon a finding of a substantial change in circumstance, there is a rebuttable presumption that an obligor's existing alimony obligation shall be modified or terminated. The court shall modify or terminate the alimony obligation, or make a determination regarding whether the rebuttable presumption has been overcome, based upon the following factors applied to the current circumstances of the obligor and obligee:

a. The age of the parties.

b. The health of the parties.

c. The assets and liabilities of the parties.

d. The earned or imputed income of the parties as provided in s. 61.08(1)(a) and (5).

e. The ability of the parties to maintain part-time or full-time employment.

f. Any other factor deemed relevant by the court.

3. The court may temporarily reduce or suspend the obligor's payment of alimony while his or her petition for modification or termination under this paragraph is pending.

(e) A party who unreasonably pursues or defends an action for modification of alimony shall be required to pay the reasonable attorney fees and costs of the prevailing party. Further, a party obligated to pay prevailing party attorney fees and costs in connection with unreasonably pursuing or defending

an action for modification is not entitled to an award of attorney fees and cost in accordance with s. 61.16.

(f) There is a rebuttable presumption that a modification or termination of an alimony award is retroactive to the date of the filing of the petition, unless the obligee demonstrates that the result is inequitable.

(g) ~~(e)~~ For each support order reviewed by the department as required by s. 409.2564(11), if the amount of the child support award under the order differs by at least 10 percent but not less than $25 from the amount that would be awarded under s. 61.30, the department shall seek to have the order modified and any modification shall be made without a requirement for proof or showing of a change in circumstances.

(h) ~~(d)~~ The department may ~~shall have authority to~~ adopt rules to implement this section.

Section 4. The amendments made by this act to chapter 61, Florida Statutes, apply to all initial determinations of alimony and all alimony modification actions that are pending on October 1, 2016, or that are brought on or after October 1, 2016. The changes to the law made by this act do not constitute a substantial change in circumstances and may not serve as the sole basis to seek a modification of an alimony award made before the effective date of this act.

Section 5. This act shall take effect October 1, 2016.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 4029 Nonresident Plaintiffs in Civil Actions
SPONSOR(S): Sprowls
TIED BILLS: None **IDEN./SIM. BILLS:** SB 396

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee		Malcolm	Bond
2) Justice Appropriations Subcommittee			
3) Judiciary Committee			

SUMMARY ANALYSIS

Current law requires a nonresident plaintiff, or a plaintiff who leaves the state after filing a lawsuit, to file a surety bond of $100 conditioned to pay all costs for which the plaintiff may be liable. The bill repeals this requirement.

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

The bill has an effective date of July 1, 2016.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Security by Nonresident Plaintiffs

Enacted in 1828 and 1829 by the Legislative Council of the Territory of Florida,[1] s. 57.011, F.S., requires a nonresident plaintiff, or a plaintiff who leaves the state after beginning an action, to file a surety bond of $100 within 30 days after the commencement of the action or leaving the state. The bond must be conditioned to pay all costs for which the plaintiff may be liable in the action. A defendant may, after providing 20 days' notice to the plaintiff, move to dismiss the action or hold the plaintiff's attorney liable for any costs for which the plaintiff may be liable in the action up to the amount of the bond.

Costs for which a plaintiff may be liable in a lawsuit (which a cost bond in 57.011, F.S. would at least partially pay) may include court reporting costs, costs related to depositions, costs related to witnesses and testifying expert witnesses, electronic discovery expenses, and mediation fees and expenses.[2] Generally, these costs are only taxed against a plaintiff when the defendant prevails in the action unless a contract or statute provides otherwise.

More than 40 states have statutes similar to s. 57.011, F.S.[3]

Effect of Proposed Changes

The bill repeals the nonresident plaintiffs' bond requirement in s. 57.011, F.S.

B. SECTION DIRECTORY:

Section 1 repeals s. 57.011, F.S., related to costs and security by nonresidents.

Section 2 provides an effective date of July 1, 2016.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

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

2. Expenditures:

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

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

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

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[1] s. 8, Nov. 23, 1828; s. 4 Nov. 21, 1829.
[2] *See* ss. 57.041, 57.071; Fla. R. Civ. P. Taxation of Costs (2013).
[3] *See Gerace v. Bentley*, 62 V.I. 254 (V.I. Super. 2015)(analyzing nonresident cost bond statutes in all federal jurisdictions and states). Section 57.011, F.S., has one notable distinction from similar statutes in other states: "in the event the plaintiff fails to post the statutory cost bond, plaintiffs [sic] counsel must stand in the absent surety's shoes-so that plaintiff's counsel is personally liable for the costs adjudged in the cause against the plaintiff . . . ." *Id.*

2. Expenditures:

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

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The minimum premium charged by a leading surety for a cost bond like the one required in s. 57.011, F.S., is $100.[4]

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:

None.

B. RULE-MAKING AUTHORITY:

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

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

[4] Jurisco, Inc., *Cost Bond*, http://jurisco.com/bonds/plaintiffs-bonds/cost-bond/ (last visited Nov. 12, 2015).

A bill to be entitled

An act relating to nonresident plaintiffs in civil actions; repealing s. 57.011, F.S., requiring a nonresident plaintiff in a civil action to post security for costs; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 57.011, Florida Statutes, is repealed.

Section 2. This act shall take effect July 1, 2016.