SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 1166

SPONSOR: Committee on Judiciary and Senator Posey

SUBJECT: Florida Uniform Principal & Income Act

DATE: February 19, 2002 REVISED: ______ ______ ______ ______

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Matthews	Johnson	JU	Favorable/CS
2.			BI	
3.				
4.				
5.				
6.				

I. Summary:

This bill repeals the current provisions of chapter 738, F.S., and enacts the model Uniform Principal and Income Act, with specific Florida modifications. This bill is a by-product of the coordinated efforts of the Real Property, Probate and Trust Law Section of The Florida Bar, the Florida Bankers Association, and the Florida Institute of Certified Public Accountants.

This bill creates the following sections of the Florida Statutes: 738.101, 738.102, 738.103, 738.104, 738.1041, 738.105, 738.201, 738.202, 738.301, 738.302, 738.303, 738.401, 738.402, 738.403, 738.501, 738.502, 738.503, 738.504, 738.601, 738.602, 738.603, 738.604, 738.605, 738.606, 738.607, 738.609, 738.701, 738.702, 738.703, 738.704, 738.705, 738.706, 738.801, 738.802, 738.803, and 738.804.

The bill repeals the following sections of the Florida Statutes: 738.01, 738.02, 738.03, 738.04, 738.05, 738.06, 738.07, 738.08, 738.09, 738.10, 738.11, 738.12, 738.13, 738.14, and 738.15.

II. Present Situation:

Chapter 738, F.S., governs the identification of principal and income in or from a trust property through a trust instrument, will or other governing instrument, the allocation of principal and income, and the apportionment of assets between income and principal. Chapter 738, F.S., is currently based on the 1962 Revised Uniform Principal and Income Act, developed by the National Conference of Commissioners on Uniform State Laws.

There are numerous forms and types of trusts, and numerous forms and types of property held by trusts. A trustee of a trust and the personal representative of a decedent's estate are called fiduciaries. They have special duties toward those who benefit from their administration. The age and type of beneficiaries may warrant different distributions, and federal and state tax consequences must also be considered. A trustee of a trust has a fiduciary obligation to satisfy both the interests of the trust's income beneficiaries during the life of the trust, and the interests of the remainder beneficiaries at the trust's termination. A personal representative may be required to allocate net income to certain individuals during the administration of the estate and to assure that certain expenses are paid out of an appropriate category of interests before finally distributing the assets of the decedent's estate to the heirs or devisees (heirs if there is no will, devisees if there is a will).

- A trustee's management of any trust involves an inherent conflict between the interests of current beneficiaries and future beneficiaries. Determining the proper balance between current beneficiaries, and future beneficiaries, necessarily entails policy considerations. In general, the current beneficiaries seek the largest possible payout given to them. The future beneficiaries seek as little as possible being paid to the present beneficiaries, in order to maximize the amount that the future beneficiary is to receive.

Generally, assets allocated to principal serve the interests of remainder beneficiaries of a trust, and the interests of the final distributees of the assets in an estate. Assets allocated to income meet the requirements of income beneficiaries during the life of a trust, and those beneficiaries who must be paid out of the income derived during administration of an estate. "Principal" is defined generally as "the property that has been set aside by the owner or the person legally empowered so that it is held in trust eventually to be delivered to a remainderman, while the return or use of the principal is in the meantime taken or received by, or held for accumulation for, an income beneficiary." *See* s. 738.03(2), F.S. "Interest" is defined as generally "the return in money or property derived from the use of principal . . . ." *See* s. 738.03(1), F.S.

The grantor of a trust, in the document creating the trust, generally provides for a distribution plan that the grantor deems appropriate. There are many situations, however, where the terms of a trust do not clearly specify a distribution. Those situations include:

- Estate or insurance distributions to minors where no trust language was specified.
- Court settlements or judgments benefiting a minor or incompetent.
- Poor trust drafting.
- Intentionally vague trust drafting intended to give discretion to the trustee.
- Unanticipated change in circumstances.

Currently, chapter 738, F.S., is used to determine the appropriate distribution.

In 1997, the National Conference of Commissioners on Uniform State Laws promulgated a new version of the Uniform Principal and Income Act (UPIA). [1] The need for the update has been prompted in part by outdated provisions and other factors, including the promulgation of the Uniform Prudent Investor Act in 1994 which has substantially altered a fiduciary's obligation to invest trust assets as a prudent investor would invest them. To date, 24 states have enacted the model uniform act.

[1] See http://www.nccusl.org/nccusl/uniformact_summaries/uniformacts-s-upaia1997.asp for a detailed discussion.

III. Effect of Proposed Changes:

This bill adopts the Uniform Principal And Income Act (1997), promulgated by the National Conference of Commissioners on Uniform State Laws. The cumulative effect of the Act is to:

- Provide more precise procedures for trustees and personal representatives in the administration of a trust or an estate, respectively.
- Specify more clearly what constitutes income and principal and the formulas for allocation of assets to principal and income.
- Ensure proper distribution to beneficiaries, heirs and devisees.
- Reflect changes in principal and allocation rules consistent with modern trust investment principles and practices.

As applicable to the predecessor acts and in accordance with well-established common law, the guiding principle under the Act is to ensure that the trust's creator's intent governs the interpretation and construction of the trust or other governing instrument. Therefore, the Act operates as the default, in the event the a trust document, will or other governing instrument is silent.

The following highlights those provisions which have been added to this bill and which were not originally contained in the model Uniform Principal and Income Act (1997):

- The provisions of chapter 738, F.S., neither create or imply a duty to exercise a power to adjust between principal and income. See s. 738.104(7), F.S.

- Beneficiaries, by a super majority, have a right to object to a trustee's discretionary power to adjust between principal and income. See s. 738.104(8), F.S.

- A trustee has the discretionary power to convert an income trust to a total return unitrust or reconvert a total return unitrust to an income trust. See s.738.1041, F.S.

- Value of trust assets is to be determined on an asset-by-asset basis and a challenge to such valuation must be made within 6 months of notice of such valuation. See s. 738.202(5), F.S.

- Florida law on the apportionment of estate taxes trumps any apportionment provision in chapter 738, F.S. See s. 738.302(4),F.S.

- New shares of stock purchased from reinvested dividends retain their character as income. See s. 738.401(4), F.S.

- Provisions regarding the sale and collection of interest from bonds and other obligations to pay is expanded. See s. 738.503(3), F.S.

- A trustee must allocate to income payments received in the nature of interest or dividends under specified circumstances. See s. 738.602(2)(a)2., F.S.

- An additional category of expenses for extraordinary repairs or expenses in capital improvements may be charged against the principal. See s. 738.702(1)(h), F.S.

- The amount of depreciation taken for tax purpose is presumptively the correct depreciation for allocating between principal and income. See s. 738.703(3), F.S.

- A formula for appointing expenses between a life tenant and the remainder interests is provided. See s. 738.801, F.S.

The following highlights those provisions originally found in the Uniform Principal and Income Act (1997) but altered by this bill:

- Section 738.503(2), F.S., does not include the provision in the uniform act which provides that the profit on the sale by a trustee of a note maturing within one year must be allocated to income. However, subsection (3) of this section expands upon the provisions regarding the sale of a bond.
- Section 738.704(2), F.S., does not include the ability of a trustee to "borrow" principal to pay certain expenses chargeable against income, namely extraordinary repairs and capital improvements. Subsection (4) is added to provide that the principal may only be advanced for mortgage payments if necessary to avoid a default.

General Provisions: Definitions and Duties

Section 738.101, F.S. , entitles the act as the Florida Uniform Principal and Income Act.

Section 738.102, F.S., provides definitions for "accounting period," "beneficiary," "fiduciary," "income," "income beneficiary," "income interest," "mandatory income interest," "net income," "person,", "principal," "remainder beneficiary," "terms of a trust," and "trustee."

Section 738.103, F.S. sets forth the fiduciary's duties to administer the trust or estate in accordance with the grantor or testator's intent. It also sets forth the duty of impartiality in exercising the power of administration and power to adjust.

Fiduciary's Power to Adjust

The earlier Uniform Acts did not deal with adjustment as a result of prudent investment. The whole notion of prudent investment, modern portfolio theory and total return came later than either of the two earlier acts. A trustee must use prudent investment rules in any state that has adopted the Uniform Prudent Investor Act or equivalent statute, and in any case governed by the Restatement of the Law of Trusts III. The investment policy governing a trust's assets depends upon making the appropriate risk/return analysis and investing accordingly. Asset growth can be as significant an objective as income in setting the investment policy for a specific trust. Because a trustee may weigh either growth or income significantly in making investment decisions, and because either may be greater or less than anticipated, the trustee may have to rebalance the interests of remainder and income beneficiaries as a result.

UPIA 1997 allows the trustee to adjust principal and income to the extent made necessary by prudent investment when a trust provides for a fixed income for the income beneficiary. A trustee must consider all of the factors relevant to the trust and its beneficiaries. The express list of factors includes the nature, purpose, and expected duration of the trust; and the intent of the grantor. Adjustments are prohibited in certain circumstances, such as when they may diminish the income interest in a trust that requires all of the income to be paid at least annually to a surviving spouse and for which an estate tax or gift tax marital deduction would be allowed or if the trustee is a beneficiary of the trust. The following provisions deal with a fiduciary's discretionary powers to adjust and the power to convert a trust to a unitrust.

- Section 738.104, F.S., sets forth the fiduciary's discretionary power to adjust. Subsection (7) provides that nothing in ch. 738, F.S., is intended to create or imply a duty to make a discretionary adjustment between principal and income, and no inference of impropriety can be made as a result of a trustee not exercising the power to adjust. Beneficiaries have the right to object to the exercise of the trustee's discretionary power to adjust. Subsection (8) provides a method by which a supermajority of the beneficiaries of a trust in existence on the date of enactment of this bill may elect, under certain conditions, to opt out of the new provisions regarding a trustee's discretionary power of adjustment between principal and income. Subsection (9) requires a trustee to notify beneficiaries of their right to make this election.

- Section 738.1041, F.S., is a provision not contained in the model Act. It allows a trustee the discretionary authority, without court approval, to convert a trust to a total return unitrust or reconvert the total return unitrust back to an income trust. If the trustee converting the trust into a unitrust is an interested person, the trustee must appoint a disinterested person to determine the appropriate unitrust percentage and the asset valuation method. The trustee must give written notice to the beneficiaries of the decision. The trustee may petition the circuit court to determine the appropriate unitrust percentage. In determining the terms of the unitrust, the trustee or the court must take into account the federal income tax consequences regarding the marital deduction and the generation skipping tax. A trustee acting in good faith may not be sued for failure to act to convert an income trust to a unitrust. A beneficiary may seek an order compelling a trustee to convert an income trust to a unitrust. If a majority in interest of the beneficiaries object to the unitrust percentage, and such objection is not resolved by the trustee after 6 months, those beneficiaries may petition the circuit court for a determination of the appropriate percentage. This section is available to any trust in existence, including those created prior to the effective date of this bill; unless the trust is not an income trust, the trust is one of several special types cited, the grantor of the trust specifically prohibited conversion in the trust instrument, or the trustee has the power of adjustment at s. 738.104.

- Section 738.105, F.S., provides for judicial review of a fiduciary's exercise of discretionary powers but only to the extent that there is an abuse of discretion.

Distribution or right to payment: decedent's estate or terminating income interest
UPIA 1997 expressly requires distribution of net income and principal receipts to the appropriate beneficiaries when a decedent dies or when an income interest ends. There is discretion given to

pay certain expenses out of either principal or income unless there is an adverse effect on estate tax marital deductions or income tax charitable deductions. General expenses of an estate are paid from principal. A specific pecuniary amount required to be paid, is paid from income unless insufficient. The deficiency is paid from principal. If there is any net income after the fact, it is distributed to remainder beneficiaries according to share in principal.

These rules assure orderly distribution of income when the decedent dies or an income interest ends. The earlier uniform acts make no attempt to deal with this distribution problem. The following provisions deal with distribution:

- Section 738.201, F.S., provides for the determination and distribution of net income.

- Section 738.202, F.S., provides for the distribution to residuary and remainder beneficiaries. Subsection (5) provides that the value of trust assets is determined on an asset-by-asset basis, and will be conclusive if reasonable and determined in good faith. An appraisal less than 2 years old is presumed correct. A valuation challenge must be commenced within 6 months of when the interested party is notified of the valuation.

Apportionment of Income Interest

In any administration of a trust or an estate, a determination needs to be made as to whether the trust or estate asset is principal or income. This in turn affects which beneficiary may be entitled to the asset. Timing also affects these determinations. There are three relevant times to consider -- the time before creation of an income interest, the time during which an income interest is current and the time after the income interest ends (an income interest is merely the interest of the income beneficiary -- the right to receive current payment). The time influences allocation of assets to principal or to income, and ultimately the rights of income and remainder beneficiaries. The beginning and the end of the income interest are key, because (1) sometimes assets that would otherwise be income are allocated to principal if there is no current income interest; and (2) even if assets are allocated to income, when there is no current income interest, remainder beneficiaries will be entitled to a share of that income. The beginning point and the ending point of an income interest in an estate or a trust provide particular problems, even though the incoming assets would clearly be income under the rules applied during the life of the income interest. Depending upon the time of receipt, an asset that is otherwise classified as income may have to be apportioned at least in part to principal to balance beneficiary interests. Unlike the earlier acts, UPIA 1997 provides more precisely and simply for apportionment. The followings sections deal with apportionment issues:

- Section 738.301, F.S., sets forth when the right to income begins and ends.
- Section 738.302, F.S., sets forth the apportionment of receipts and disbursements when a testator dies or income interest begins. Subsection (4) specifically provides that s. 733.817, F.S. (Florida law on the apportionment of estate taxes), controls over any apportionment provision in the Uniform Principal and Income Act which is in conflict.
- Section 738.303, F.S., provides for the apportionment when an income interest ends.

Allocation to receipts during administration of trust

Principal is fundamentally defined as the property held in trust for distribution to a remainder beneficiary when the trust terminates. Income is the current return that any fiduciary receives from an asset that is principal. There are a group of rules that establish what is principal and what is income with respect to specific kinds of assets.

UPIA 1997 refines old rules and provides specific rules for assets that are not accounted for in the earlier acts. An example of the refinement of old rules concerns receipts from an entity. The earlier uniform acts provide for corporate distributions, generally allocating ordinary dividends to income and any other distribution in the form of additional equity to principal. UPIA 1997 addresses the broader category of receipts from an entity. A corporation is an entity, but so is a partnership, a limited liability company, a regulated investment company and a real estate investment trust. UPIA 1997 allocates the receipts from all entities in the same manner.

UPIA 1997 also simplifies the allocation issue. Any money received by a fiduciary is regarded as income, unless it fits certain categories. For example, if money is received as part of a liquidation of the entity, it is principal. If money is received from an investment company (mutual fund) that labels a distribution as capital gain, the receipt is principal. All property received that is not money, i.e., a stock distribution, is principal. In addition, UPIA 1997 establishes what qualifies as a partial or complete liquidation of an entity. Fiduciaries will, thus, be better able to make judgments about receipts that are part of a liquidation. This provides a more precise and logical set of rules for making allocations than exists in the earlier uniform acts, making fiduciaries' decisions easier and more certain.

There are also certain kinds of assets that UPIA 1997 provides for that are not within the scope of consideration in the earlier acts. One of them is derivatives. Another is asset-backed securities. Receipts from derivatives, unless a trustee exercises powers available in the conduct of a business held in trust, are principal. Receipts from asset-backed securities are either income or principal, depending upon the categorization of the asset-backed security's payor.
The followings sections deal with allocation between principal and income:

Receipts from entities: Under UPIA 1997, a trustee who conducts a business held in a trust may separate out the accounting for the business from that for other trust assets. The trustee, also, has the power to allocate net cash receipts to working capital, the acquisition or replacement of fixed assets, and other reasonably foreseeable needs of the business or activity, and the extent to which the remaining net cash receipts are accounted for as principal or income in the trust's general accounting records. The earlier uniform acts treated net profit from a business as income, and losses as principal, providing little flexibility.

- Section 738.401, F.S., sets forth the character of receipts. Subsection (4), provides that if a trustee elects, or continues an election made by its predecessor, to reinvest dividends in shares of stock of a distributing corporation or fund, whether evidenced by new certificates or entries on the books of the distributing entity, the new shares retain their character as income.
- Section 738.402, F.S., provides for the allocation of an amount received as a distribution of income or principal from a trust or an estate in the absence of terms in the trust. If a trustee purchases an interest in a trust that is an investment entity or a decedent or donor transfers an interest in the trust to the trustee, then other provisions of the bill apply.
- Section 738.403, F.S., provides for the accounting of businesses and other activities conducted by a trustee. Greater flexibility is given to a trustee acting in a proprietorship

manner. Additionally, this section facilitates the trustee's ability to decide to what extent the net receipts should be allocated to income. It also allows the trustee account separately for each business or activity. This also gives the trustee broader authority to apply the business record-keeping methods that best suit the activity.

Receipts not normally apportioned

- Section 738.501, F.S., provides what receipts in the form of assets, money, property or other amounts will be allocated to the principal. Such receipts include asserts from a transferor, a decedent's estate, payer under a contract, money or property received from the sale, exchange, liquidation or change in the form of a principal asset including realized profit, recovery from third party reimbursements, proceeds from property taken by eminent domain, net income received in an accounting period and other receipts as provided in s. 738.502-738.608, F.S.
- Section 738.502, F.S., provides for the allocation of receipts from rental property to income.
- Section 738.503, F.S., provides for the allocation of receipts to income for any amount received as interest, whether at a fixed, variable or floating rate, on a bond or other obligation to pay money to the trustee. Subsection (3) expands upon the uniform provision regarding the sale and collection of interest from bonds.
- Section 738.504, F.S., provides for the allocation of proceeds from a life insurance policy or other contract, to the principal.

Receipts normally apportioned

- Section 738.601, F.S., sets forth guidelines by which a trustee may exercise the discretionary power to re-allocate specified payments (under s. 738.602-.605, and 738.608, F.S.) entirely to the principal if the receipts are insubstantial as defined.
- Section 738.602, F.S., provides the allocation formula for specified payments from deferred compensation plans, annuities, profit-sharing, stock-bonus, and other pension plans. Subsection (a)2. provides that a trustee must allocate to income, payments received that are in the nature of interest or dividends, even if not characterized as such by the payor.
- Section 738.603, F.S., allocates 10 percent to income receipts from a liquidating asset and the balance to the principal. A liquidating asset is defined as an asset whose value diminishes or terminates after a period of time. Examples of liquidating assets include a leasehold, patent, copyright, and royalty right.
- Section 738.604, F.S., provides for the allocation of receipts from interests in minerals, water, or other natural resources.
- Section 738.605, F.S., provides for the allocation of receipts from the sale of tree timber and related by-products from harvesting and processing. The amount of net receipts allocated to income depends on whether the amount of timber is more than or less than the rate of growth. The methodology for such determination is left to the trustee.
- Section 738.606, F.S., abolishes the right to receive delayed income from the sale proceeds of an asset that produces little or no income, but an income beneficiary still has the right to compel the trustee to make property productive of income. This section also enables a trust for a spouse to qualify for a marital deduction if the law is unclear about such right to make property productive. Provided there is insufficient beneficial

enjoyment from the property and the spouse demands action from the trustee, the trustee can decide whether to make the property productive, convert, it, transfer funds from principal to income to take some other combined course of action.

- Section 738.607, F.S., provides for the allocation of receipts from and disbursements in connection with derivatives and other options. A derivative is defined as a contract or financial instrument or combination thereof which gives a trust the right or obligation to participate in the change of a price of a tangible or intangible asset or group of assets, or change in the rate or other market indicator for the asset or group of assets.
- Section 738.608, F.S., provides for the allocation to the income and principal of interest or other return and proceeds of the collateral financial assets. It also provides for the allocation to income and principal of payments for a trust's entire interest in an asset-backed security under specified circumstances. An asset-backed security is defined as an asset whose value is based on the right of the owner to receive distributions from the proceeds of financial assets that provide collateral for the security. Typical asset-backed securities include arrangements in which debt obligations such as real estate mortgages, credit card receivables and auto loans are acquired by an investment trust and interests in such are sold to investors. in the trust

Allocation of disbursements during the administration of a trust

Expenses and taxes must be paid during the administration of a trust. Generally, UPIA 1997 provides for payment of ordinary expenses out of income, for payment of compensation to the trustee and legal proceedings from principal and income, dividing expenses in two, and payment of expenses peculiar to the remainder interest to principal. A trustee may transfer income to principal to make up for depreciation of an asset or to reimburse principal for disbursements that enhance income, i.e., repairs to assets that are necessary to maintain income. A trustee may make adjustments to principal and income to offset shifting of economic interests or tax benefits between income and remainder beneficiaries in certain instances. The following provisions deal with disbursements:

- Section 738.701, F.S., provides for disbursements from income, including expenses for custodial services, administrative and judicial proceedings, administration, management and preservation of the trust property, and recurring premiums on insurance for loss of principal asset or loss of income from or use of the asset.
- Section 738.702, F.S., provides for disbursements from principal, including expenses for custodial services, administrative and judicial proceedings, trustee's compensation, payments on the principal of a trust debt, proceedings construing or protecting the trust or property, premiums paid on specified insurance policy, estate, inheritance and other transfer taxes, environmental matters (including reclamation, assessment of environmental conditions, environmental contamination, etc.), and extraordinary repairs in making capital improvements. Subsection (1)(h) provides an additional category of expense charged against principal, for any expense representing extraordinary repairs or expenses incurred in making a capital improvement to principal.
- Section 738.703, F.S., provides for the transfer of a specified amount from income to principal for depreciation. Subsection (3) provides that the amount of depreciation taken for tax purposes is presumptively the correct depreciation for allocating between principal and income.

- Section 738.704, F.S., provides for the transfer of an amount from income to reimburse the principal.

Adjustments for Taxes
UPIA 1997 allows a fiduciary to make adjustments between principal and income for tax purposes. Tax liabilities may accrue to either income or remainder beneficiaries. A fiduciary may have to make elections under the tax laws. Imbalances of interests that arise because of taxes can be remedied by the fiduciary. The earlier uniform acts did not provide such discretion to the fiduciary.

- Section 738.705, F.S., provides for payment of income taxes from the income and from the principal under specified circumstances.
- Section 738.706, F.S., gives the fiduciary authority to adjust between the principal and income of a trust to offset the shifting of economic interests or tax benefits between income beneficiaries and remainder beneficiaries.

Miscellaneous Provisions

- Section 738.801, F.S., provides that ss. 738.701-738.705, F.S., govern, to the extent specified, the apportionment of expenses between tenants and remainderman.
- Section 738.802, F.S., provides for the uniform application and construction of the act.
- Section 738.803, F.S., provides a severability clause.
- Section 738.804, F.S., provides for the application of this act to receipts, assets and expenses as specified.

This bill provides an effective date of January 1, 2003.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

This bill contains a number of provisions cross-referencing federal law and regulations. Consequently, it engrafts the federal law requirements by cross-reference to the Internal Revenue Code, as amended. Although the Legislature may approve and adopt provisions of federal statutes, and all administrative rules made by a federal administrative body that are in existence and in effect at time the legislature acts, it constitutes an unconstitutional delegation of legislative power if the Legislature adopts in advance any federal act or ruling of any federal administrative body that Congress or such administrative body may adopt in the future. *See State ex rel. Orange State Oil Co.*. 21 So.2d 599, 603 (Fla. 1945). Since the amendment incorporates the specific and descriptive reference to those applicable federal statutes, the law under chapter 738, F.S., will take the federal law as it exists at the time the state law is enacted without affect by any subsequent amendment or repeal to the federal law or regulations.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill may assist trustees, personal representatives and other fiduciaries in the better administration of a trust or an estate in a manner consistent with modern principal and income allocation rules and trust investment practices. The bill may also ensure that the interests of beneficiaries, heirs and devisees are maximized and that these individuals receive the proper distribution of principal and income as applicable.

C. Government Sector Impact:

It is indeterminate what effect causes of action in this bill will have on the court workload.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Section 738.104, F.S., relating to the fiduciary's duties

- This section refers to the "power to invade principal" or "power to accumulate income" but neither are defined in the bill.
- Subsection (8)(a) provides that an objection by the supermajority of the beneficiaries to the trustee's power to adjust must be delivered to the trustee at the address listed in the notice requirements under subsection (9). However, subsection (9) requires both a street address and a mailing address. It is unclear to which address the objection must be mailed.
- Subsection (9)(a)2., F.S., requires that the trustee's notice statement to a beneficiary include a statement that an objection [to a trustee's power to adjust] by the supermajority of the beneficiaries must be made within 60 days after the notice statement is "transmitted." In contrast, subsection (9)(c) requires the notice statement to be "served" in accordance with the Florida Rules of Civil Procedure. Clarification may be needed to avoid ambiguity as to how the notice statement must be made.

Section 738.1041, F.S., relating to the power to convert an income trust to a total return unitrust

- The terms "total return unitrust" and "unitrust amounts" are not defined in the bill. The Black Law's Dictionary, 7^{th} ed., defines unitrust as a "trust from which a fixed percentage of the net fair market value of the trust's assets, valued annually, is paid each year to the beneficiary." In addition, this section also uses the term "remainder interest" which is not defined in the bill but which presumably refers to the interest of the remainder beneficiary.

- Only a majority of a beneficiaries is required to object to the exercise of power to convert an income trust to a unitrust. In all other provisions of this chapter, a supermajority of the beneficiaries is required for a valid objection to other specified exercise of discretionary power by the trustee.

- Subsection (2) enumerates certain events that must occur in order for the trustee to exercise the power to convert an income trust to a unitrust. It is unclear whether all conditions of paragraphs (a), (b), (c), (d), and (f) must be satisfied or any one of the paragraphs. It is also unclear whether subparagraphs (2)(b)2.a and (2)(b)2.b must both occur to satisfy the conditions.

- Under subsection (2), the trustee's discretionary power to convert, without court approval embraces the power: 1) To convert an income trust to a total return unitrust, 2) To reconvert a total return unitrust to an income trust, 3) Change the percentage used to calculate the unitrust amount or 4) Change the method used to determine a fair market value of the trust. However, under subsections (10) and (11), if the majority of interests objects to such action taken in good faith or not taken, an affected person may seek a court order under this section to direct the trustee to take or not take the specified action. However, subsection (10) does not mention that the court order may direct the trustee to change the method used to determine the fair market value of the trust.

Section 738.105, F.S., relating to judicial control of discretionary powers

- It is unclear whether subsections (4) and (5) are referring to two different actions (i.e., a declaratory judgment action by a fiduciary for a determination as to whether the exercise of discretionary power would result in abuse and an action by a beneficiary to allege abuse of discretionary power) or to one singular action which can only be brought by the fiduciary but during which the beneficiary may counter with an allegation of abuse of discretion.

- Subsection (5) provides a trustee with recovery of attorney's fees and costs in the defense of an action regardless of whether he or she prevails. A trustee is a subclass of the broader term "fiduciary". It is unclear whether this is an oversight or intentional exclusion. No provision is made for an award of attorneys fees to a prevailing party other than the trustee.

Section 738.503, F.S., relating to the allocation of receipts to income for any amount received as interest on a bond or other obligation to pay money

- There is inconsistent reference to "bonds" and "other obligations to pay money." Subsections (1) and (2) make no reference to bonds while subsection (3) mentions "bonds" and "bond principal."

Section 738.604, F.S., relating to the allocation of receipts from minerals, water and other natural resources.

- Subsection (1) refers to minerals and other natural resources without mention of water. Subsection (2) expressly mentions water. It is unclear whether water is subject to the provisions of subsection (1) as "other natural resources." In addition, subsection (3) , F.S., refers to a decedent or a donor as to the extraction of these resources. It is unclear who or what the donor is in this instance.

Section 738.605, F.S., relating to the allocation of receipts from timber

- Reference is made to a decedent or transferor harvesting timber at a specified time. It is not specified who constitutes a transferor.

VIII. Amendments:

None.