

By Senator Posey

15-1091-02

See HB 585

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A bill to be entitled
An act relating to the Florida Uniform
Principal and Income Act; creating ss. 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, 738.608,
738.701, 738.702, 738.703, 738.704, 738.705,
738.706, 738.801, 738.802, 738.803, 738.804,
F.S.; providing a short title; providing
definitions; specifying a fiduciary's duties;
providing general principles; providing a
trustee's power to adjust between principal and
income; providing for a unitrust alternative to
certain trusts where the power to adjust is
unavailable or not exercised; providing
requirements, criteria, and procedures;
providing for judicial control of certain
discretionary powers; providing limitations;
providing for determinations and distributions
of net income; providing requirements;
providing for distributions to residuary and
remainder beneficiaries; providing for
apportionment at beginning and end of an income
interest; providing for entitlement to a right
to income; providing for apportionment of
receipts and disbursements under certain
circumstances; providing for allocation of
trust receipts during administration;
specifying character of receipts; providing for

1 distributions from trust or estate; providing
2 for separate accounting by trustee of certain
3 businesses or activities; providing for
4 allocation of certain receipts not normally
5 apportioned; providing for allocation of
6 certain normally apportioned receipts;
7 providing for allocation of disbursements from
8 income and principal during administration of a
9 trust; providing for certain transfers from
10 income under certain circumstances; providing
11 for payment of certain taxes; providing for
12 adjustments between principal and income due to
13 taxes; providing for uniform application and
14 construction; providing severability; providing
15 for application with respect to apportionment
16 of expenses and improvements; providing for
17 application; repealing ss. 738.01, 738.02,
18 738.03, 738.04, 738.05, 738.06, 738.07, 738.08,
19 738.09, 738.10, 738.11, 738.12, 738.13, 738.14,
20 738.15, F.S., relating to principal and income
21 of trusts; providing an effective date.

22
23 Be It Enacted by the Legislature of the State of Florida:

24
25 Section 1. Sections 738.101, 738.102, 738.103,
26 738.104, 738.1041, 738.105, 738.201, 738.202, 738.301,
27 738.302, 738.303, 738.401, 738.402, 738.403, 738.501, 738.502,
28 738.503, 738.504, 738.601, 738.602, 738.603, 738.604, 738.605,
29 738.606, 738.607, 738.608, 738.701, 738.702, 738.703, 738.704,
30 738.705, 738.706, 738.801, 738.802, 738.803, and 738.804,
31 Florida Statutes, are created to read:

1 738.101 Short Title.--This chapter may be cited as the
2 "Florida Uniform Principal and Income Act."

3 738.102 Definitions.--As used in this chapter, the
4 term:

5 (1) "Accounting period" means a calendar year unless
6 another 12-month period is selected by a fiduciary. The term
7 includes a portion of a calendar year or other 12-month period
8 that begins when an income interest begins or ends when an
9 income interest ends.

10 (2) "Beneficiary" means, in the case of a decedent's
11 estate, an heir or devisee and, in the case of a trust, an
12 income beneficiary or a remainder beneficiary.

13 (3) "Fiduciary" means a personal representative or a
14 trustee. The term includes an executor, administrator,
15 successor personal representative, special administrator, or a
16 person performing substantially the same function.

17 (4) "Income" means money or property that a fiduciary
18 receives as current return from a principal asset. The term
19 includes a portion of receipts from a sale, exchange, or
20 liquidation of a principal asset, to the extent provided in
21 ss. 738.401-738.403 and s. 738.503.

22 (5) "Income beneficiary" means a person to whom net
23 income of a trust is or may be payable.

24 (6) "Income interest" means the right of an income
25 beneficiary to receive all or part of net income, whether the
26 terms of the trust require the net income to be distributed or
27 authorize the net income to be distributed in the trustee's
28 discretion.

29 (7) "Mandatory income interest" means the right of an
30 income beneficiary to receive net income that the terms of the
31 trust require the fiduciary to distribute.

1 (8) "Net income" means the total receipts allocated to
2 income during an accounting period minus the disbursements
3 made from income during the period, plus or minus transfers
4 under this chapter to or from income during the period.

5 (9) "Person" means an individual, corporation,
6 business trust, estate, trust, partnership, limited liability
7 company, association, joint venture, public corporation, or
8 any other legal or commercial entity or a government or
9 governmental subdivision, agency, or instrumentality.

10 (10) "Principal" means property held in trust for
11 distribution to a remainder beneficiary when the trust
12 terminates.

13 (11) "Remainder beneficiary" means a person entitled
14 to receive principal when an income interest ends.

15 (12) "Terms of a trust" means the manifestation of the
16 intent of a settlor or decedent with respect to the trust,
17 expressed in a manner that admits of its proof in a judicial
18 proceeding, whether by written or spoken words or by conduct.

19 (13) "Trustee" includes an original, additional, or
20 successor trustee, whether or not appointed or confirmed by a
21 court.

22 738.103 Fiduciary duties; general principles.--

23 (1) In allocating receipts and disbursements to or
24 between principal and income, and with respect to any matter
25 within the scope of ss. 738.201 and 738.202 and ss.
26 738.301-738.303, a fiduciary:

27 (a) Shall administer a trust or estate in accordance
28 with the terms of the trust or the will, even if there is a
29 different provision in this chapter.

30 (b) May administer a trust or estate by the exercise
31 of a discretionary power of administration given to the

1 fiduciary by the terms of the trust or the will, even if the
2 exercise of the power produces a result different from a
3 result required or permitted by this chapter.

4 (c) Shall administer a trust or estate in accordance
5 with this chapter if the terms of the trust or the will do not
6 contain a different provision or do not give the fiduciary a
7 discretionary power of administration.

8 (d) Shall add a receipt or charge a disbursement to
9 principal to the extent the terms of the trust and this
10 chapter do not provide a rule for allocating the receipt or
11 disbursement to or between principal and income.

12 (2) In exercising the power to adjust under s.
13 738.104(1) or a discretionary power of administration
14 regarding a matter within the scope of this chapter, whether
15 granted by the terms of a trust, a will, or this chapter, a
16 fiduciary shall administer a trust or estate impartially,
17 based on what is fair and reasonable to all of the
18 beneficiaries, except to the extent the terms of the trust or
19 the will clearly manifest an intention that the fiduciary
20 shall or may favor one or more of the beneficiaries. A
21 determination in accordance with this chapter is presumed to
22 be fair and reasonable to all of the beneficiaries.

23 738.104 Trustee's power to adjust.--

24 (1) A trustee may adjust between principal and income
25 to the extent the trustee considers necessary if the trustee
26 invests and manages trust assets as a prudent investor, the
27 terms of the trust describe the amount that may or shall be
28 distributed to a beneficiary by referring to the trust's
29 income, and the trustee determines, after applying the rules
30 in s. 738.103(1), that the trustee is unable to comply with s.
31 738.103(2).

1 (2) In deciding whether and to what extent to exercise
2 the power conferred by subsection (1), a trustee shall
3 consider all factors relevant to the trust and its
4 beneficiaries, including the following factors to the extent
5 they are relevant:

6 (a) The nature, purpose, and expected duration of the
7 trust.

8 (b) The intent of the settlor.

9 (c) The identity and circumstances of the
10 beneficiaries.

11 (d) The needs for liquidity, regularity of income, and
12 preservation and appreciation of capital.

13 (e) The assets held in the trust; the extent to which
14 the assets consist of financial assets, interests in closely
15 held enterprises, tangible and intangible personal property,
16 or real property; the extent to which an asset is used by a
17 beneficiary; and whether an asset was purchased by the trustee
18 or received from the settlor.

19 (f) The net amount allocated to income under the other
20 sections of this chapter and the increases or decreases in the
21 value of the principal assets, which the trustee may estimate
22 as to assets for which market values are not readily
23 available.

24 (g) Whether and to what extent the terms of the trust
25 give the trustee the power to invade principal or accumulate
26 income or prohibit the trustee from invading principal or
27 accumulating income and the extent to which the trustee has
28 exercised a power from time to time to invade principal or
29 accumulate income.

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1 (h) The actual and anticipated effect of economic
2 conditions on principal and income and effects of inflation
3 and deflation.

4 (i) The anticipated tax consequences of an adjustment.

5 (3) A trustee may not make an adjustment:

6 (a) That diminishes the income interest in a trust
7 that requires all of the income to be paid at least annually
8 to a spouse and for which an estate tax or gift tax marital
9 deduction would be allowed, in whole or in part, if the
10 trustee did not have the power to make an adjustment;

11 (b) That reduces the actuarial value of the income
12 interest in a trust to which a person transfers property with
13 the intent to qualify for a gift tax exclusion;

14 (c) That changes the amount payable to a beneficiary
15 as a fixed annuity or a fixed fraction of the value of the
16 trust assets;

17 (d) From any amount that is permanently set aside for
18 charitable purposes under a will or the terms of a trust
19 unless both income and principal are so set aside;

20 (e) If possessing or exercising the power to make an
21 adjustment causes an individual to be treated as the owner of
22 all or part of the trust for income tax purposes and the
23 individual would not be treated as the owner if the trustee
24 did not possess the power to make an adjustment;

25 (f) If possessing or exercising the power to make an
26 adjustment causes all or part of the trust assets to be
27 included for estate tax purposes in the estate of an
28 individual who has the power to remove a trustee or appoint a
29 trustee, or both, and the assets would not be included in the
30 estate of the individual if the trustee did not possess the
31 power to make an adjustment;

1 (g) If the trustee is a beneficiary of the trust; or
2 (h) If the trustee is not a beneficiary of the trust
3 but the adjustment would benefit the trustee directly or
4 indirectly.

5 (4) If paragraph (3)(e), paragraph (3)(f), paragraph
6 (3)(g), or paragraph (3)(h) applies to a trustee and there is
7 more than one trustee, a cotrustee to whom the provision does
8 not apply may make the adjustment unless the exercise of the
9 power by the remaining trustee is not permitted by the terms
10 of the trust.

11 (5) A trustee may release the entire power conferred
12 by subsection (1) or may release only the power to adjust from
13 income to principal or the power to adjust from principal to
14 income if the trustee is uncertain about whether the
15 possessing or exercising the power will cause a result
16 described in paragraphs (3)(a)-(f) or paragraph (3)(h) or if
17 the trustee determines that possessing or exercising the power
18 will or may deprive the trust of a tax benefit or impose a tax
19 burden not described in subsection (3). The release may be
20 permanent or for a specified period, including a period
21 measured by the life of an individual.

22 (6) Terms of a trust that limit the power of a trustee
23 to make an adjustment between principal and income do not
24 affect the application of this section unless it is clear from
25 the terms of the trust that the terms are intended to deny the
26 trustee the power of adjustment conferred by subsection (1).

27 (7) Nothing in this chapter is intended to create or
28 imply a duty to make an adjustment and no inference of
29 impropriety shall be made as a result of a trustee not
30 exercising the power of adjustment conferred by subsection
31 (1).

1 (8) With respect to a trust in existence on January 1,
2 2003:

3 (a) A trustee shall not have the power to adjust under
4 this section if, within 60 days after the date of the
5 statement required in subsection (9), a super majority of the
6 trust beneficiaries deliver to the trustee a written objection
7 to the application of this section to such trust. An objection
8 shall be deemed to be delivered to the trustee on the date the
9 objection is mailed to the address listed in the notice
10 provided in subsection (9).

11 (b) An objection under this section may be executed by
12 a legal representative or natural guardian of a beneficiary
13 without the filing of any proceeding or approval of any court.

14 (c) If an objection is delivered to the trustee, then
15 the trustee may petition the court for an order quashing the
16 objection and vesting in such trustee the power to adjust
17 under this section. The burden will be on the objecting
18 beneficiaries to prove that the power to adjust would be
19 inequitable, illegal, or otherwise in contravention of the
20 settlor's intent. The court may award costs and attorney's
21 fees relating to the trustee's petition in the same manner as
22 in chancery actions. When costs and attorney's fees are to be
23 paid out of the trust, the court may, in its discretion,
24 direct from which part of the trust they shall be paid.

25 (d) If no timely objection is made or if the trustee
26 is vested with the power to adjust by court order, the trustee
27 may thereafter exercise the power to adjust without providing
28 notice of its intent to do so unless, in vesting the trustee
29 with the power to adjust, the court determines that unusual
30 circumstances require otherwise.

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1 (e)1. If a trustee makes a good-faith effort to comply
2 with the notice provisions of subsection (9), but fails to
3 deliver notice to one or more beneficiaries entitled to such
4 notice, neither the validity of the notice required under this
5 subsection, nor the trustee's power to adjust under this
6 section shall be affected until the trustee has actual notice
7 that one or more beneficiaries entitled to notice were not
8 notified. Until the trustee has actual notice of the notice
9 deficiency, the trustee shall have all of the powers and
10 protections granted a trustee with the power to adjust under
11 this chapter.

12 2. When the trustee has actual notice that one or more
13 beneficiaries entitled to notice under subsection (9) were not
14 notified, the trustee's power to adjust under this section
15 shall cease until all beneficiaries who are entitled to such
16 notice, including those who were previously provided with such
17 notice, are notified and given the opportunity to object as
18 provided for under this subsection.

19 (f) The objection of a super majority of beneficiaries
20 under this subsection shall be valid for a period of 1 year
21 after the date of the notice set forth in subsection (9). Upon
22 expiration of the objection, the trustee may thereafter give a
23 new notice under subsection (9).

24 (g) Nothing in this section is intended to create or
25 imply a duty of the trustee of a trust existing on January 1,
26 2003, to seek a power to adjust pursuant to this subsection or
27 to give the notice described in subsection (9) if the trustee
28 does not desire to have a power to adjust under this section,
29 and no inference of impropriety shall be made as the result of
30 a trustee not seeking a power to adjust pursuant to this
31 subsection.

1 (9)(a) A trustee of a trust in existence on January 1,
2 2003, that is not prohibited under subsection (3) from
3 exercising the power to adjust shall, any time prior to
4 initially exercising the power, provide to all reasonably
5 ascertainable current beneficiaries described in s.
6 737.303(4)(b)1. and all reasonably ascertainable remainder
7 beneficiaries described in s. 737.303(4)(b)2. a statement
8 containing the following:

9 1. The name, telephone number, street address, and
10 mailing address of the trustee and of any individuals who may
11 be contacted for further information;

12 2. A statement that unless a super majority of the
13 beneficiaries objects to the application of this section to
14 the trust within 60 days after the date the statement pursuant
15 to this subsection was transmitted, section 738.104, Florida
16 Statutes, shall apply to the trust; and

17 3. A statement that, if section 738.104, Florida
18 Statutes, applies to the trust, the trustee will have the
19 power to adjust between income and principal and that such a
20 power may have an effect on the distributions to such
21 beneficiary from the trust.

22 (b) The statement may contain information regarding a
23 trustee's fiduciary obligations with respect to the power to
24 adjust between income and principal under this section.

25 (c) The statement referred to in this subsection shall
26 be served informally, in the manner provided in the Florida
27 Rules of Civil Procedure relating to service of pleadings
28 subsequent to the initial pleading.

29 (d) For purposes of subsection (8) and this
30 subsection, a "super majority of the trust beneficiaries"
31 means at least two-thirds in interest of the reasonably

1 ascertainable current beneficiaries described in s.
2 737.303(4)(b)1. or two-thirds in interest of the reasonably
3 ascertainable remainder beneficiaries described in s.
4 737.303(4)(b)2., if the interests of the beneficiaries are
5 reasonably ascertainable, otherwise, it means two-thirds in
6 number of either such class.

7 (10) A trust exists on January 1, 2003, if it is not
8 revocable on January 1, 2003. A trust is revocable if
9 revocable by the settlor alone or in conjunction with any
10 other person. A trust is not revocable for purposes of this
11 section if revocable by the settlor only with the consent of
12 all persons having a beneficial interest in the property.

13 738.1041 Total return unitrust.--

14 (1) For purposes of this section, the term:

15 (a) "Disinterested person" means a person who is not a
16 "related or subordinate party" as defined in s. 672(c) of the
17 United States Internal Revenue Code, 26 U.S.C. s. 1 et seq.,
18 or any successor provision thereof (hereinafter referred to in
19 this section as the "I.R.C."), with respect to the person then
20 acting as trustee of the trust and excludes the settlor and
21 any interested trustee.

22 (b) "Income trust" means a trust, created by either an
23 inter vivos or a testamentary instrument, which directs or
24 permits the trustee to distribute the net income of the trust
25 to one or more persons, either in fixed proportions or in
26 amounts or proportions determined by the trustee.

27 Notwithstanding the foregoing, no trust that otherwise is an
28 "income trust" shall qualify hereunder, if it may be subject
29 to taxation under I.R.C. s. 2001 or s. 2501, until the
30 expiration of the period for filing the return therefor,
31 including extensions.

1 (c) "Interested distributee" means a person to whom
2 distributions of income or principal can currently be made who
3 has the power to remove the existing trustee and designate as
4 successor a person who may be a "related or subordinate
5 party," as defined in I.R.C. s. 672(c), with respect to such
6 distributee.

7 (d) "Interested trustee" means an individual trustee
8 to whom the net income or principal of the trust can currently
9 be distributed or would be distributed if the trust were then
10 to terminate and be distributed, any trustee who may be
11 removed and replaced by an interested distributee, or an
12 individual trustee whose legal obligation to support a
13 beneficiary may be satisfied by distributions of income and
14 principal of the trust.

15 (2) A trustee may, without court approval, convert an
16 income trust to a total return unitrust, reconvert a total
17 return unitrust to an income trust, or change the percentage
18 used to calculate the unitrust amount or the method used to
19 determine the fair market value of the trust if:

20 (a) The trustee adopts a written statement regarding
21 trust distributions that provides:

22 1. In the case of a trust being administered as an
23 income trust, that future distributions from the trust will be
24 unitrust amounts rather than net income, and indicates the
25 manner in which the unitrust amount will be calculated and the
26 method in which the fair market value of the trust will be
27 determined.

28 2. In the case of a trust being administered as a
29 total return unitrust, that:

30 a. Future distributions from the trust will be net
31 income rather than unitrust amounts; or

1 b. The percentage used to calculate the unitrust
2 amount or the method used to determine the fair market value
3 of the trust will be changed, and indicates the manner in
4 which the new unitrust amount will be calculated and the
5 method in which the new fair market value of the trust will be
6 determined.

7 (b)1. The trustee determines, or if there is no
8 trustee other than an interested trustee, the trustee appoints
9 a disinterested person who, in its sole discretion but acting
10 in a fiduciary capacity, determines for the trustee:

11 a. The percentage to be used to calculate the unitrust
12 amount, provided the percentage used is not greater than 5
13 percent nor less than 3 percent;

14 b. The method to be used in determining the fair
15 market value of the trust; and

16 c. Which assets, if any, are to be excluded in
17 determining the unitrust amount; or

18 2. The trustee administers the trust such that:

19 a. The percentage used to calculate the unitrust
20 amount is 50 percent of the applicable federal rate as defined
21 in I.R.C. s. 7520 in effect for the month the conversion under
22 this section becomes effective and for each January
23 thereafter; however, the percentage shall never be greater
24 than 5 percent nor less than 3 percent;

25 b. The fair market value of the trust shall be
26 determined at least annually on an asset-by-asset basis,
27 reasonably and in good faith, in accordance with the
28 provisions of s. 738.202(5), except the following property
29 shall not be included in determining the value of the trust:

30 (I) Any residential property or any tangible personal
31 property that, as of the first business day of the current

1 valuation year, one or more current beneficiaries of the trust
2 have or have had the right to occupy, or have or have had the
3 right to possess or control (other than in his or her capacity
4 as trustee of the trust), and instead the right of occupancy
5 or the right to possession and control shall be deemed to be
6 the unitrust amount with respect to such property; however,
7 the unitrust amount shall be adjusted to take into account
8 partial distributions from or receipt into the trust of such
9 property during the valuation year.

10 (II) Any asset specifically given to a beneficiary and
11 the return on investment on such property, which return on
12 investment shall be distributable to such beneficiary.

13 (III) Any asset while held in a testator's estate.

14 (c) The trustee sends written notice of its intention
15 to take such action, along with copies of such written
16 statement and this section, and, if applicable, the
17 determinations of either the trustee or the disinterested
18 person to:

19 1. The grantor of the trust, if living.

20 2. All living persons who are currently receiving or
21 eligible to receive distributions of income of the trust.

22 3. All living persons who would receive principal of
23 the trust if the trust were to terminate at the time of the
24 giving of such notice (without regard to the exercise of any
25 power of appointment) or, if the trust does not provide for
26 its termination, all living persons who would receive or be
27 eligible to receive distributions of income or principal of
28 the trust if the persons identified in subparagraph 2. were
29 deceased.

30 4. All persons acting as adviser or protector of the
31 trust.

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2 Notice under this paragraph shall be served informally, in the
3 manner provided in the Florida Rules of Civil Procedure
4 relating to service of pleadings subsequent to the initial
5 pleading.

6 (d) At least one person receiving notice under each of
7 subparagraphs (c)2. and 3. is legally competent.

8 (e) No person receiving such notice objects, by
9 written instrument delivered to the trustee, to the proposed
10 action of the trustee or the determinations of the
11 disinterested person within 60 days after receipt of such
12 notice.

13 (3) If a trustee desires to convert an income trust to
14 a total return unitrust, reconvert a total return unitrust to
15 an income trust, or change the percentage used to calculate
16 the unitrust amount or the method used to determine a fair
17 market value of the trust but does not have the ability to or
18 elects not to do it under subsection (2), the trustee may
19 petition the circuit court for such order as the trustee deems
20 appropriate. In that event, the court, in its own discretion
21 or on the petition of such trustee or any person having an
22 income or remainder interest in the trust, may appoint a
23 disinterested person who, acting in a fiduciary capacity,
24 shall present such information to the court as shall be
25 necessary for the court to make a determination hereunder.

26 (4) All determinations made pursuant to
27 sub-subparagraph (2)(b)2.b. shall be conclusive if reasonable
28 and made in good faith. Such determination shall be
29 conclusively presumed to have been made reasonably and in good
30 faith unless proven otherwise in a proceeding commenced by or
31 on behalf of a person interested in the trust within the time

1 provided in s. 737.307. The burden will be on the objecting
2 interested party to prove that the determinations were not
3 made reasonably and in good faith.

4 (5) The unitrust amount shall not be less than the net
5 income of the trust, determined without regard to the
6 provisions of subsection (6), for:

7 (a) A trust for which a marital deduction has been
8 taken for federal tax purposes under I.R.C. s. 2056 or s.
9 2523, during the lifetime of the spouse for whom the trust was
10 created; or

11 (b) A trust to which the generation-skipping transfer
12 tax due under I.R.C. s. 2601 does not apply by reason of any
13 effective date or transition rule.

14
15 Paragraph (a) will not apply to any trust to the extent that
16 the use of a total return unitrust is recognized for federal
17 tax purposes under I.R.C. s. 2053. Paragraph (b) will not
18 apply to any trust to the extent that the use of a total
19 return unitrust is recognized for federal tax purposes under
20 I.R.C. s. 2601.

21 (6) Following the conversion of an income trust to a
22 total return unitrust, the trustee:

23 (a) Shall treat the unitrust amount as if it were net
24 income of the trust for purposes of determining the amount
25 available, from time to time, for distribution from the trust.

26 (b) May allocate to trust income for each taxable year
27 of the trust, or portion thereof:

28 1. Net short-term capital gain described in I.R.C. s.
29 1222(5) for such year, or portion thereof, but only to the
30 extent that the amount so allocated together with all other
31 amounts allocated to trust income, as determined under the

1 provisions of this chapter without regard to this section and
2 s. 738.104, for such year, or portion thereof, does not exceed
3 the unitrust amount for such year, or portion thereof; and

4 2. Net long-term capital gain described in I.R.C. s.
5 1222(7) for such year, or portion thereof, but only to the
6 extent that the amount so allocated together with all other
7 amounts, including amounts described in subparagraph 1.,
8 allocated to trust income for such year, or portion thereof,
9 does not exceed the unitrust amount for such year, or portion
10 thereof.

11 (7) In administering a total return unitrust, the
12 trustee may, in its sole discretion but subject to the
13 provisions of the governing instrument, determine:

14 (a) The effective date of the conversion.

15 (b) The timing of distributions, including provisions
16 for prorating a distribution for a short year in which a
17 beneficiary's right to payments commences or ceases.

18 (c) Whether distributions are to be made in cash or in
19 kind or partly in cash and partly in kind.

20 (d) If the trust is reconverted to an income trust,
21 the effective date of such reconversion.

22 (e) Such other administrative issues as may be
23 necessary or appropriate to carry out the purposes of this
24 section.

25 (8) Conversion to a total return unitrust under the
26 provisions of this section shall not affect any other
27 provision of the governing instrument, if any, regarding
28 distributions of principal.

29 (9) In the case of a trust for which a marital
30 deduction has been taken for federal tax purposes under I.R.C.
31 s. 2056 or s. 2523, the spouse otherwise entitled to receive

1 the net income of the trust shall have the right, by written
2 instrument delivered to the trustee, to compel the
3 reconversion during his or her lifetime of the trust from a
4 total return unitrust to an income trust, notwithstanding
5 anything in this section to the contrary, unless the use of a
6 total return unitrust is recognized for federal tax purposes
7 under I.R.C. s. 2056 or s. 2523.

8 (10) Any trustee or disinterested person who in good
9 faith takes or fails to take any action under this section
10 shall not be liable to any person affected by such action or
11 inaction, regardless of whether such person received written
12 notice as provided in this section and regardless of whether
13 such person was under a legal disability at the time of the
14 delivery of such notice. Such person's exclusive remedy shall
15 be to obtain, under subsection (11), an order of the court
16 directing the trustee to convert an income trust to a total
17 return unitrust, to reconvert from a total return unitrust to
18 an income trust, or to change the percentage used to calculate
19 the unitrust amount.

20 (11) If a majority in interest of either the income or
21 remainder beneficiaries of an income trust has delivered to
22 the trustee a written objection to the amount of the income
23 distributions of the trust, and, if the trustee has failed to
24 resolve the objection to the satisfaction of the objecting
25 beneficiaries within 6 months from the receipt of such written
26 objection, then the objecting beneficiaries may petition the
27 court in accordance with subsection (3).

28 (12) This section shall be construed as pertaining to
29 the administration of a trust and shall be available to any
30 trust that is administered in this state under Florida law
31 unless:

1 (a) The governing instrument reflects an intention
2 that the current beneficiary or beneficiaries are to receive
3 an amount other than a reasonable current return from the
4 trust;

5 (b) The trust is a trust described in I.R.C. s.
6 170(f)(2)(B), s. 642(c)(5), s. 664(d), s. 1361(d), s.
7 2702(a)(3), or s. 2702(b);

8 (c) One or more persons to whom the trustee could
9 distribute income have a power of withdrawal over the trust
10 that is not subject to an ascertainable standard under I.R.C.
11 s. 2041 or s. 2514 or that can be exercised to discharge a
12 duty of support he or she possesses;

13 (d) The governing instrument expressly prohibits use
14 of this section by specific reference to the section. A
15 provision in the governing instrument that, "The provisions of
16 section 738.1041, Florida Statutes, as amended, or any
17 corresponding provision of future law, shall not be used in
18 the administration of this trust," or similar words reflecting
19 such intent shall be sufficient to preclude the use of this
20 section; or

21 (e) The trust is a trust with respect to which a
22 trustee currently possesses the power to adjust under s.
23 738.104.

24 738.105 Judicial control of discretionary powers.--

25 (1) A court shall not change a fiduciary's decision to
26 exercise or not to exercise a discretionary power conferred by
27 this chapter unless the court determines that the decision was
28 an abuse of the fiduciary's discretion. A court shall not
29 determine that a fiduciary abused its discretion merely
30 because the court would have exercised the discretion in a
31 different manner or would not have exercised the discretion.

1 (2) The decisions to which subsection (1) applies
2 include:

3 (a) A determination under s. 738.104(1) of whether and
4 to what extent an amount should be transferred from principal
5 to income or from income to principal.

6 (b) A determination of the factors that are relevant
7 to the trust and trust beneficiaries, the extent to which such
8 factors are relevant, and the weight, if any, to be given to
9 the relevant factors, in deciding whether and to what extent
10 to exercise the power conferred by s. 738.104(1).

11 (3) If a court determines that a fiduciary has abused
12 its discretion, the remedy shall be to restore the income and
13 remainder beneficiaries to the positions they would have
14 occupied if the fiduciary had not abused its discretion,
15 according to the following rules:

16 (a) To the extent the abuse of discretion has resulted
17 in no distribution to a beneficiary or a distribution that is
18 too small, the court shall require the fiduciary to distribute
19 from the trust to the beneficiary an amount the court
20 determines will restore the beneficiary, in whole or in part,
21 to his or her appropriate position.

22 (b) To the extent the abuse of discretion has resulted
23 in a distribution to a beneficiary that is too large, the
24 court shall restore the beneficiaries, the trust, or both, in
25 whole or in part, to their appropriate positions by requiring
26 the fiduciary to withhold an amount from one or more future
27 distributions to the beneficiary who received the distribution
28 that was too large or requiring that beneficiary to return
29 some or all of the distribution to the trust.

30 (c) To the extent the court is unable, after applying
31 paragraphs (a) and (b), to restore the beneficiaries, the

1 trust, or both, to the positions they would have occupied if
2 the fiduciary had not abused its discretion, the court may
3 require the fiduciary to pay an appropriate amount from its
4 own funds to one or more of the beneficiaries or the trust or
5 both.

6 (4) Upon the filing of a petition by the fiduciary,
7 the court having jurisdiction over the trust or estate shall
8 determine whether a proposed exercise or nonexercise by the
9 fiduciary of a discretionary power conferred by this chapter
10 will result in an abuse of the fiduciary's discretion. If the
11 petition describes the proposed exercise or nonexercise of the
12 power and contains sufficient information to inform the
13 beneficiaries of the reasons for the proposal, the facts upon
14 which the fiduciary relies, and an explanation of how the
15 income and remainder beneficiaries will be affected by the
16 proposed exercise or nonexercise of the power, a beneficiary
17 who challenges the proposed exercise or nonexercise has the
18 burden of establishing that such exercise or nonexercise will
19 result in an abuse of discretion.

20 (5) If an action is instituted alleging an abuse of
21 discretion in the exercise or nonexercise of the power of
22 adjustment conferred by s. 738.104(1) and the court determines
23 that no abuse of discretion has occurred, the trustee's costs
24 and attorney's fees incurred in defending the action shall be
25 paid from the trust assets.

26 738.201 Determination and distribution of net
27 income.--After a decedent dies, in the case of an estate, or
28 after an income interest in a trust ends, the following rules
29 apply:

30 (1) A fiduciary of an estate or of a terminating
31 income interest shall determine the amount of net income and

1 net principal receipts received from property specifically
2 given to a beneficiary under the rules in ss. 738.301-738.706
3 which apply to trustees and the rules in subsection (5). The
4 fiduciary shall distribute the net income and net principal
5 receipts to the beneficiary who is to receive the specific
6 property.

7 (2) A fiduciary shall determine the remaining net
8 income of a decedent's estate or a terminating income interest
9 under the rules in ss. 738.301-738.706 which apply to trustees
10 and by:

11 (a) Including in net income all income from property
12 used to discharge liabilities.

13 (b) Paying from income or principal, in the
14 fiduciary's discretion, fees of attorneys, accountants, and
15 fiduciaries; court costs and other expenses of administration;
16 and interest on death taxes, but the fiduciary may pay those
17 expenses from income of property passing to a trust for which
18 the fiduciary claims an estate tax marital or charitable
19 deduction only to the extent the payment of those expenses
20 from income will not cause the reduction or loss of the
21 deduction.

22 (c) Paying from principal all other disbursements made
23 or incurred in connection with the settlement of a decedent's
24 estate or the winding up of a terminating income interest,
25 including debts, funeral expenses, disposition of remains,
26 family allowances, and death taxes and related penalties that
27 are apportioned to the estate or terminating income interest
28 by the will, the terms of the trust, or applicable law.

29 (3) A fiduciary shall distribute to a beneficiary who
30 receives a pecuniary amount outright the interest or any other
31 amount provided by the will, the terms of the trust, or

1 applicable law from net income determined under subsection (2)
2 or from principal to the extent net income is insufficient.
3 If a beneficiary is to receive a pecuniary amount outright
4 from a trust after an income interest ends and no interest or
5 other amount is provided for by the terms of the trust or
6 applicable law, the fiduciary shall distribute the interest or
7 other amount to which the beneficiary would be entitled under
8 applicable law if the pecuniary amount were required to be
9 paid under a will.

10 (4) A fiduciary shall distribute the net income
11 remaining after distributions required by subsection (3) in
12 the manner described in s. 738.202 to all other beneficiaries,
13 including a beneficiary who receives a pecuniary amount in
14 trust, even if the beneficiary holds an unqualified power to
15 withdraw assets from the trust or other presently exercisable
16 general power of appointment over the trust.

17 (5) A fiduciary may not reduce principal or income
18 receipts from property described in subsection (1) because of
19 a payment described in s. 738.701 or s. 738.702 to the extent
20 the will, the terms of the trust, or applicable law requires
21 the fiduciary to make the payment from assets other than the
22 property or to the extent the fiduciary recovers or expects to
23 recover the payment from a third party. The net income and
24 principal receipts from the property are determined by
25 including all of the amounts the fiduciary receives or pays
26 with respect to the property, whether those amounts accrued or
27 became due before, on, or after the date of a decedent's death
28 or an income interest's terminating event, and by making a
29 reasonable provision for amounts the fiduciary believes the
30 estate or terminating income interest may become obligated to
31 pay after the property is distributed.

1 738.202 Distribution to residuary and remainder
2 beneficiaries.--

3 (1) Each beneficiary described in s. 738.201(4) is
4 entitled to receive a portion of the net income equal to the
5 beneficiary's fractional interest in undistributed principal
6 assets, using values as of the distribution date. If a
7 fiduciary makes more than one distribution of assets to
8 beneficiaries to whom this section applies, each beneficiary,
9 including one who does not receive part of the distribution,
10 is entitled, as of each distribution date, to the net income
11 the fiduciary has received after the date of death or
12 terminating event or earlier distribution date but has not
13 distributed as of the current distribution date.

14 (2) In determining a beneficiary's share of net
15 income, the following rules apply:

16 (a) The beneficiary is entitled to receive a portion
17 of the net income equal to the beneficiary's fractional
18 interest in the undistributed principal assets immediately
19 before the distribution date, including assets that later may
20 be sold to meet principal obligations.

21 (b) The beneficiary's fractional interest in the
22 undistributed principal assets shall be calculated without
23 regard to property specifically given to a beneficiary and
24 property required to pay pecuniary amounts not in trust.

25 (c) The beneficiary's fractional interest in the
26 undistributed principal assets shall be calculated on the
27 basis of the aggregate value of those assets as of the
28 distribution date without reducing the value by any unpaid
29 principal obligation.

30 (d) The distribution date for purposes of this section
31 may be the date as of which the fiduciary calculates the value

1 of the assets if that date is reasonably near the date on
2 which assets are actually distributed.

3 (3) If a fiduciary does not distribute all of the
4 collected but undistributed net income to each person as of a
5 distribution date, the fiduciary shall maintain appropriate
6 records showing the interest of each beneficiary in that net
7 income.

8 (4) A fiduciary may apply the rules in this section,
9 to the extent the fiduciary considers appropriate, to net gain
10 or loss realized after the date of death or terminating event
11 or earlier distribution date from the disposition of a
12 principal asset if this section applies to the income from the
13 asset.

14 (5) The value of trust assets shall be determined on
15 an asset-by-asset basis and shall be conclusive if reasonable
16 and determined in good faith. Determinations based on
17 appraisals performed within 2 years of the valuation date
18 shall be presumed reasonable. The value of trust assets shall
19 be conclusively presumed to be reasonable and determined in
20 good faith unless proven otherwise in a proceeding commenced
21 by or on behalf of a person interested in the trust within the
22 time provided in s. 737.307.

23 738.301 When right to income begins and ends.--An
24 income beneficiary is entitled to net income from the date on
25 which the income interest begins.

26 (1) An income interest begins on the date specified in
27 the terms of the trust or, if no date is specified, on the
28 date an asset becomes subject to a trust or successive income
29 interest.

30 (2) An asset becomes subject to a trust:
31

1 (a) On the date the asset is transferred to the trust
2 in the case of an asset that is transferred to a trust during
3 the transferor's life;

4 (b) On the date of a testator's death in the case of
5 an asset that becomes subject to a trust by reason of a will,
6 even if there is an intervening period of administration of
7 the testator's estate; or

8 (c) On the date of an individual's death in the case
9 of an asset that is transferred to a fiduciary by a third
10 party because of the individual's death.

11 (3) An asset becomes subject to a successive income
12 interest on the day after the preceding income interest ends,
13 as determined under subsection (4), even if there is an
14 intervening period of administration to wind up the preceding
15 income interest.

16 (4) An income interest ends on the day before an
17 income beneficiary dies or another terminating event occurs,
18 or on the last day of a period during which there is no
19 beneficiary to whom a trustee may distribute income.

20 738.302 Apportionment of receipts and disbursements
21 when decedent dies or income interest begins.--

22 (1) A trustee shall allocate an income receipt or
23 disbursement other than one to which s. 738.201(1) applies to
24 principal if the due date of the receipt or disbursement
25 occurs before a decedent dies in the case of an estate or
26 before an income interest begins in the case of a trust or
27 successive income interest.

28 (2) A trustee shall allocate an income receipt or
29 disbursement to income if the due date of the receipt or
30 disbursement occurs on or after the date on which a decedent
31 dies or an income interest begins and the due date is a

1 periodic due date. An income receipt or disbursement shall be
2 treated as accruing from day to day if the due date of the
3 receipt or disbursement is not periodic or the receipt or
4 disbursement has no due date. The portion of the receipt or
5 disbursement accruing before the date on which a decedent dies
6 or an income interest begins shall be allocated to principal
7 and the balance shall be allocated to income.

8 (3) An item of income or an obligation is due on the
9 date the payer is required to make a payment. If a payment
10 date is not stated, there is no due date for the purposes of
11 this chapter. Distributions to shareholders or other owners
12 from an entity to which s. 738.401 applies are deemed to be
13 due on the date fixed by the entity for determining who is
14 entitled to receive the distribution or, if no date is fixed,
15 on the declaration date for the distribution. A due date is
16 periodic for receipts or disbursements that shall be paid at
17 regular intervals under a lease or an obligation to pay
18 interest or if an entity customarily makes distributions at
19 regular intervals.

20 (4) Nothing in this section shall prevent the
21 application of s. 733.817 to apportion tax to the income
22 recipient under this section.

23 738.303 Apportionment when income interest ends.--

24 (1) For purposes of this section, "undistributed
25 income" means net income received before the date on which an
26 income interest ends. The term does not include an item of
27 income or expense that is due or accrued or net income that
28 has been added or is required to be added to principal under
29 the terms of the trust.

30 (2) When a mandatory income interest ends, the trustee
31 shall pay to a mandatory income beneficiary who survives that

1 date, or the estate of a deceased mandatory income beneficiary
2 whose death causes the interest to end, the beneficiary's
3 share of the undistributed income that is not disposed of
4 under the terms of the trust unless the beneficiary has an
5 unqualified power to revoke more than 5 percent of the trust
6 immediately before the income interest ends. In the latter
7 case, the undistributed income from the portion of the trust
8 that may be revoked shall be added to principal.

9 (3) When a trustee's obligation to pay a fixed annuity
10 or a fixed fraction of the value of the trust's assets ends,
11 the trustee shall prorate the final payment if and to the
12 extent required by applicable law to accomplish a purpose of
13 the trust or its settlor relating to income, gift, estate, or
14 other tax requirements.

15 738.401 Character of receipts.--

16 (1) For purposes of this section, "entity" means a
17 corporation, partnership, limited liability company, regulated
18 investment company, real estate investment trust, common trust
19 fund, or any other organization in which a trustee has an
20 interest other than a trust or estate to which s. 738.402
21 applies, a business or activity to which s. 738.403 applies,
22 or an asset-backed security to which s. 738.608 applies.

23 (2) Except as otherwise provided in this section, a
24 trustee shall allocate to income money received from an
25 entity.

26 (3) A trustee shall allocate the following receipts
27 from an entity to principal:

28 (a) Property other than money.

29 (b) Money received in one distribution or a series of
30 related distributions in exchange for part or all of a trust's
31 interest in the entity.

1 (c) Money received in total or partial liquidation of
2 the entity.

3 (d) Money received from an entity that is a regulated
4 investment company or a real estate investment trust if the
5 money distributed represents a distribution of short-term or
6 long-term capital gain for federal income tax purposes.

7 (4) If a trustee elects, or continues an election made
8 by its predecessor, to reinvest dividends in shares of stock
9 of a distributing corporation or fund, whether evidenced by
10 new certificates or entries on the books of the distributing
11 entity, the new shares shall retain their character as income.

12 (5) Money is received in partial liquidation:

13 (a) To the extent the entity, at or near the time of a
14 distribution, indicates that such money is a distribution in
15 partial liquidation; or

16 (b) If the total amount of money and property received
17 in a distribution or series of related distributions is
18 greater than 20 percent of the entity's gross assets, as shown
19 by the entity's year-end financial statements immediately
20 preceding the initial receipt.

21 (6) Money is not received in partial liquidation, nor
22 may money be taken into account under paragraph (5)(b), to the
23 extent such money does not exceed the amount of income tax a
24 trustee or beneficiary must pay on taxable income of the
25 entity that distributes the money.

26 (7) A trustee may rely upon a statement made by an
27 entity about the source or character of a distribution if the
28 statement is made at or near the time of distribution by the
29 entity's board of directors or other person or group of
30 persons authorized to exercise powers to pay money or transfer
31

1 property comparable to those of a corporation's board of
2 directors.

3 738.402 Distribution from trust or estate.--A trustee
4 shall allocate to income an amount received as a distribution
5 of income from a trust or an estate in which the trust has an
6 interest other than a purchased interest and shall allocate to
7 principal an amount received as a distribution of principal
8 from such a trust or estate. If a trustee purchases an
9 interest in a trust that is an investment entity, or a
10 decedent or donor transfers an interest in such a trust to a
11 trustee, s. 738.401 or s. 738.608 applies to a receipt from
12 the trust.

13 738.403 Business and other activities conducted by
14 trustee.--

15 (1) If a trustee who conducts a business or other
16 activity determines that it is in the best interest of all the
17 beneficiaries to account separately for the business or
18 activity instead of accounting for the business or activity as
19 part of the trust's general accounting records, the trustee
20 may maintain separate accounting records for the transactions
21 of such business or other activity, whether or not the assets
22 of such business or activity are segregated from other trust
23 assets.

24 (2) A trustee who accounts separately for a business
25 or other activity may determine the extent to which the net
26 cash receipts of such business or activity must be retained
27 for working capital, the acquisition or replacement of fixed
28 assets, and other reasonably foreseeable needs of the business
29 or activity, and the extent to which the remaining net cash
30 receipts are accounted for as principal or income in the
31 trust's general accounting records. If a trustee sells assets

1 of the business or other activity, other than in the ordinary
2 course of the business or activity, the trustee shall account
3 for the net amount received as principal in the trust's
4 general accounting records to the extent the trustee
5 determines that the amount received is no longer required in
6 the conduct of the business.

7 (3) Activities for which a trustee may maintain
8 separate accounting records include:

9 (a) Retail, manufacturing, service, and other
10 traditional business activities.

11 (b) Farming.

12 (c) Raising and selling livestock and other animals.

13 (d) Management of rental properties.

14 (e) Extraction of minerals and other natural
15 resources.

16 (f) Timber operations.

17 (g) Activities to which s. 738.608 applies.

18 738.501 Principal receipts.--A trustee shall allocate
19 to principal:

20 (1) To the extent not allocated to income under this
21 chapter, assets received from a transferor during the
22 transferor's lifetime, a decedent's estate, a trust with a
23 terminating income interest, or a payer under a contract
24 naming the trust or its trustee as beneficiary.

25 (2) Money or other property received from the sale,
26 exchange, liquidation, or change in form of a principal asset,
27 including realized profit, subject to this section.

28 (3) Amounts recovered from third parties to reimburse
29 the trust because of disbursements described in s.
30 738.702(1)(g) or for other reasons to the extent not based on
31 the loss of income.

1 (4) Proceeds of property taken by eminent domain but a
2 separate award made for the loss of income with respect to an
3 accounting period during which a current income beneficiary
4 had a mandatory income interest is income.

5 (5) Net income received in an accounting period during
6 which there is no beneficiary to whom a trustee may or shall
7 distribute income.

8 (6) Other receipts as provided in ss. 738.601-738.608.

9 738.502 Rental property.--To the extent a trustee
10 accounts for receipts from rental property pursuant to this
11 section, the trustee shall allocate to income an amount
12 received as rent of real or personal property, including an
13 amount received for cancellation or renewal of a lease. An
14 amount received as a refundable deposit, including a security
15 deposit or a deposit that is to be applied as rent for future
16 periods, shall be added to principal and held subject to the
17 terms of the lease and is not available for distribution to a
18 beneficiary until the trustee's contractual obligations have
19 been satisfied with respect to that amount.

20 738.503 Obligation to pay money.--

21 (1) An amount received as interest, whether determined
22 at a fixed, variable, or floating rate, on an obligation to
23 pay money to the trustee, including an amount received as
24 consideration for prepaying principal, shall be allocated to
25 income without any provision for amortization of premium.

26 (2) Except as otherwise provided herein, a trustee
27 shall allocate to principal an amount received from the sale,
28 redemption, or other disposition of an obligation to pay money
29 to the trustee.

30 (3) The increment in value of a bond or other
31 obligation for the payment of money bearing no stated interest

1 but payable at a future time in excess of the price at which
2 it was issued or purchased, if purchased after issuance, is
3 distributable as income. If the increment in value accrues
4 and becomes payable pursuant to a fixed schedule of
5 appreciation, it may be distributed to the beneficiary who was
6 the income beneficiary at this time of increment from the
7 first principal cash available or, if none is available, when
8 the increment is realized by sale, redemption, or other
9 disposition. When unrealized increment is distributed as
10 income but out of principal, the principal shall be reimbursed
11 for the increment when realized. If, in the reasonable
12 judgment of the trustee, exercised in good faith, the ultimate
13 payment of the bond principal is in doubt, the trustee may
14 withhold the payment of incremental interest to the income
15 beneficiary.

16 (4) This section does not apply to an obligation to
17 which s. 738.602, s. 738.603, s. 738.604, s. 738.605, s.
18 738.607, or s. 738.608 applies.

19 738.504 Insurance policies and similar contracts.--

20 (1) Except as otherwise provided in subsection (2), a
21 trustee shall allocate to principal the proceeds of a life
22 insurance policy or other contract in which the trust or its
23 trustee is named as beneficiary, including a contract that
24 insures the trust or its trustee against loss for damage to,
25 destruction of, or loss of title to a trust asset. The
26 trustee shall allocate dividends on an insurance policy to
27 income if the premiums on the policy are paid from income and
28 to principal if the premiums are paid from principal.

29 (2) A trustee shall allocate to income proceeds of a
30 contract that insures the trustee against loss of occupancy or
31

1 other use by an income beneficiary, loss of income, or,
2 subject to s. 738.403, loss of profits from a business.

3 (3) This section does not apply to a contract to which
4 s. 738.602 applies.

5 738.601 Insubstantial allocations not required.--If a
6 trustee determines that an allocation between principal and
7 income required by s. 738.602, s. 738.603, s. 738.604, s.
8 738.605, or s. 738.608 is insubstantial, the trustee may
9 allocate the entire amount to principal unless one of the
10 circumstances described in s. 738.104(3) applies to the
11 allocation. This power may be exercised by a cotrustee in the
12 circumstances described in s. 738.104(4) and may be released
13 for the reasons and in the manner described in s. 738.104(5).

14 An allocation is presumed to be insubstantial if:

15 (1) The amount of the allocation would increase or
16 decrease net income in an accounting period, as determined
17 before the allocation, by less than 10 percent; or

18 (2) The value of the asset producing the receipt for
19 which the allocation would be made is less than 10 percent of
20 the total value of the trust's assets at the beginning of the
21 accounting period.

22 738.602 Deferred compensation, annuities, and similar
23 payments.--

24 (1) For purposes of this section, "payment" means a
25 payment that a trustee may receive over a fixed number of
26 years or during the life of one or more individuals because of
27 services rendered or property transferred to the payer in
28 exchange for future payments. The term includes a payment
29 made in money or property from the payer's general assets or
30 from a separate fund created by the payer, including a private

31

1 or commercial annuity, an individual retirement account, and a
2 pension, profit-sharing, stock-bonus, or stock-ownership plan.

3 (2) With respect to payments that may be characterized
4 as interest, dividends, or their equivalent:

5 (a) A trustee shall allocate to income in the
6 following order:

7 1. First, payments characterized by the payor as
8 interest or dividends or as a payment made in lieu of interest
9 or dividends.

10 2. Second, all other payments to the extent that the
11 trustee, reasonably and in good faith, determines that such
12 payments represent interest, dividends, or their equivalent.

13 (b) A trustee shall allocate to principal the balance
14 of any payment not characterized as, or otherwise determined
15 to be, interest, dividends, or their equivalent.

16 (3) If no part of a payment is characterized as, or
17 otherwise determined to be, interest, a dividend, or an
18 equivalent payment and all or part of the payment is required
19 to be made, a trustee shall allocate to income 10 percent of
20 the part that is required to be made during the accounting
21 period and the balance to principal. If no part of a payment
22 is required to be made or the payment received is the entire
23 amount to which the trustee is entitled, the trustee shall
24 allocate the entire payment to principal. For purposes of
25 this subsection, a payment is not "required to be made" to the
26 extent the payment is made because the trustee exercises a
27 right of withdrawal.

28 (4) If, to obtain an estate tax marital deduction for
29 a trust, a trustee must allocate more of a payment to income
30 than provided for by this section, the trustee shall allocate
31

1 to income the additional amount necessary to obtain the
2 marital deduction.

3 (5) This section does not apply to payments to which
4 s. 738.603 applies.

5 738.603 Liquidating asset.--

6 (1) For purposes of this section, "liquidating asset"
7 means an asset the value of which will diminish or terminate
8 because the asset is expected to produce receipts for a period
9 of limited duration. The term includes a leasehold, patent,
10 copyright, royalty right, and right to receive payments during
11 a period of more than 1 year under an arrangement that does
12 not provide for the payment of interest on the unpaid balance.
13 The term does not include a payment subject to s. 738.602,
14 resources subject to s. 738.604, timber subject to s. 738.605,
15 an activity subject to s. 738.607, an asset subject to s.
16 738.608, or any asset for which the trustee establishes a
17 reserve for depreciation under s. 738.703.

18 (2) A trustee shall allocate to income 10 percent of
19 the receipts from a liquidating asset and the balance to
20 principal.

21 738.604 Minerals, water, and other natural
22 resources.--

23 (1) To the extent a trustee accounts for receipts from
24 an interest in minerals or other natural resources pursuant to
25 this section, the trustee shall allocate such receipts as
26 follows:

27 (a) If received as nominal delay rental or nominal
28 annual rent on a lease, a receipt shall be allocated to
29 income.

30 (b) If received from a production payment, a receipt
31 shall be allocated to income if and to the extent the

1 agreement creating the production payment provides a factor
2 for interest or its equivalent. The balance shall be
3 allocated to principal.

4 (c) If an amount received as a royalty, shut-in-well
5 payment, take-or-pay payment, bonus, or delay rental is more
6 than nominal, 90 percent shall be allocated to principal and
7 the balance to income.

8 (d) If an amount is received from a working interest
9 or any other interest not provided for in paragraph (a),
10 paragraph (b), or paragraph (c), 90 percent of the net amount
11 received shall be allocated to principal and the balance to
12 income.

13 (2) An amount received on account of an interest in
14 water that is renewable shall be allocated to income. If the
15 water is not renewable, 90 percent of the amount shall be
16 allocated to principal and the balance to income.

17 (3) This chapter applies whether or not a decedent or
18 donor was extracting minerals, water, or other natural
19 resources before the interest became subject to the trust.

20 (4) If a trust owns an interest in minerals, water, or
21 other natural resources on January 1, 2003, the trustee may
22 allocate receipts from the interest as provided in this
23 chapter or in the manner used by the trustee before January 1,
24 2003. If the trust acquires an interest in minerals, water,
25 or other natural resources after January 1, 2003, the trustee
26 shall allocate receipts from the interest as provided in this
27 chapter.

28 738.605 Timber.--

29 (1) To the extent a trustee accounts for receipts from
30 the sale of timber and related products pursuant to this
31 section, the trustee shall allocate the net receipts:

1 (a) To income to the extent the amount of timber
2 removed from the land does not exceed the rate of growth of
3 the timber during the accounting periods in which a
4 beneficiary has a mandatory income interest;

5 (b) To principal to the extent the amount of timber
6 removed from the land exceeds the rate of growth of the timber
7 or the net receipts are from the sale of standing timber;

8 (c) To or between income and principal if the net
9 receipts are from the lease of timberland or from a contract
10 to cut timber from land owned by a trust by determining the
11 amount of timber removed from the land under the lease or
12 contract and applying the rules in paragraphs (a) and (b); or

13 (d) To principal to the extent advance payments,
14 bonuses, and other payments are not allocated pursuant to
15 paragraph (a), paragraph (b), or paragraph (c).

16 (2) In determining net receipts to be allocated
17 pursuant to subsection (1), a trustee shall deduct and
18 transfer to principal a reasonable amount for depletion.

19 (3) This chapter applies whether or not a decedent or
20 transferor was harvesting timber from the property before the
21 property became subject to the trust.

22 (4) If a trust owns an interest in timberland on
23 January 1, 2003, the trustee may allocate net receipts from
24 the sale of timber and related products as provided in this
25 chapter or in the manner used by the trustee before January 1,
26 2003. If the trust acquires an interest in timberland after
27 January 1, 2003, the trustee shall allocate net receipts from
28 the sale of timber and related products as provided in this
29 chapter.

30 738.606 Property not productive of income.--
31

1 (1) If a marital deduction is allowed for all or part
2 of a trust the income of which is required to be distributed
3 to the settlor's spouse and the assets of which consist
4 substantially of property that does not provide the spouse
5 with sufficient income from or use of the trust assets, and if
6 the amounts the trustee transfers from principal to income
7 under s. 738.104 and distributes to the spouse from principal
8 pursuant to the terms of the trust are insufficient to provide
9 the spouse with the beneficial enjoyment required to obtain
10 the marital deduction, the spouse may require the trustee to
11 make property productive of income, convert property within a
12 reasonable time, or exercise the power conferred by ss.
13 738.104 and 738.1041. The trustee may decide which action or
14 combination of actions to take.

15 (2) In cases not governed by subsection (1), proceeds
16 from the sale or other disposition of an asset are principal
17 without regard to the amount of income the asset produces
18 during any accounting period.

19 738.607 Derivatives and options.--

20 (1) For purposes of this section, "derivative" means a
21 contract or financial instrument or a combination of contracts
22 and financial instruments which gives a trust the right or
23 obligation to participate in some or all changes in the price
24 of a tangible or intangible asset or group of assets, or
25 changes in a rate, an index of prices or rates, or other
26 market indicator for an asset or a group of assets.

27 (2) To the extent a trustee does not account under s.
28 738.403 for transactions in derivatives, the trustee shall
29 allocate to principal receipts from and disbursements made in
30 connection with those transactions.

31

1 (3) If a trustee grants an option to buy property from
2 the trust whether or not the trust owns the property when the
3 option is granted, grants an option that permits another
4 person to sell property to the trust, or acquires an option to
5 buy property for the trust or an option to sell an asset owned
6 by the trust, and the trustee or other owner of the asset is
7 required to deliver the asset if the option is exercised, an
8 amount received for granting the option shall be allocated to
9 principal. An amount paid to acquire the option shall be paid
10 from principal. A gain or loss realized upon the exercise of
11 an option, including an option granted to a settlor of the
12 trust for services rendered, shall be allocated to principal.

13 738.608 Asset-backed securities.--

14 (1) For purposes of this section, "asset-backed
15 security" means an asset the value of which is based upon the
16 right given the owner to receive distributions from the
17 proceeds of financial assets that provide collateral for the
18 security. The term includes an asset that gives the owner the
19 right to receive from the collateral financial assets only the
20 interest or other current return or only the proceeds other
21 than interest or current return. The term does not include an
22 asset to which s. 738.401 or s. 738.602 applies.

23 (2) If a trust receives a payment from interest or
24 other current return and from other proceeds of the collateral
25 financial assets, the trustee shall allocate to income the
26 portion of the payment which the payer identifies as being
27 from interest or other current return and shall allocate the
28 balance of the payment to principal.

29 (3) If a trust receives one or more payments in
30 exchange for the trust's entire interest in an asset-backed
31 security during a single accounting period, the trustee shall

1 allocate the payments to principal. If a payment is one of a
2 series of payments that will result in the liquidation of the
3 trust's interest in the security over more than a single
4 accounting period, the trustee shall allocate 10 percent of
5 the payment to income and the balance to principal.

6 738.701 Disbursements from income.--A trustee shall
7 make the following disbursements from income to the extent
8 they are not disbursements to which s. 738.201(2)(a) or (c)
9 applies:

10 (1) One-half of the regular compensation of the
11 trustee and of any person providing investment advisory or
12 custodial services to the trustee.

13 (2) One-half of all expenses for accountings, judicial
14 proceedings, or other matters that involve both the income and
15 remainder interests.

16 (3) All of the other ordinary expenses incurred in
17 connection with the administration, management, or
18 preservation of trust property and the distribution of income,
19 including interest, ordinary repairs, regularly recurring
20 taxes assessed against principal, and expenses of a proceeding
21 or other matter that concerns primarily the income interest.

22 (4) Recurring premiums on insurance covering the loss
23 of a principal asset or the loss of income from or use of the
24 asset.

25 738.702 Disbursements from principal.--

26 (1) A trustee shall make the following disbursements
27 from principal:

28 (a) The remaining one-half of the disbursements
29 described in s. 738.701(1) and (2).

30 (b) All of the trustee's compensation calculated on
31 principal as a fee for acceptance, distribution, or

1 termination and disbursements made to prepare property for
2 sale.

3 (c) Payments on the principal of a trust debt.

4 (d) Expenses of a proceeding that concerns primarily
5 principal, including a proceeding to construe the trust or to
6 protect the trust or its property.

7 (e) Premiums paid on a policy of insurance not
8 described in s. 738.701(4) of which the trust is the owner and
9 beneficiary.

10 (f) Estate, inheritance, and other transfer taxes,
11 including penalties, apportioned to the trust.

12 (g) Disbursements related to environmental matters,
13 including reclamation, assessing environmental conditions,
14 remediating and removing environmental contamination, monitoring
15 remedial activities and the release of substances, preventing
16 future releases of substances, collecting amounts from persons
17 liable or potentially liable for the costs of such activities,
18 penalties imposed under environmental laws or regulations and
19 other payments made to comply with those laws or regulations,
20 statutory or common law claims by third parties, and defending
21 claims based on environmental matters.

22 (h) Payments representing extraordinary repairs or
23 expenses incurred in making a capital improvement to
24 principal, including special assessments; however, a trustee
25 may establish an allowance for depreciation out of income to
26 the extent permitted by s. 738.703.

27 (2) If a principal asset is encumbered with an
28 obligation that requires income from that asset to be paid
29 directly to the creditor, the trustee shall transfer from
30 principal to income an amount equal to the income paid to the
31

1 creditor in reduction of the principal balance of the
2 obligation.

3 738.703 Transfers from income to principal for
4 depreciation.--

5 (1) For purposes of this section, "depreciation" means
6 a reduction in value due to wear, tear, decay, corrosion, or
7 gradual obsolescence of a fixed asset having a useful life of
8 more than 1 year.

9 (2) A trustee may transfer to principal a reasonable
10 amount of the net cash receipts from a principal asset that is
11 subject to depreciation but may not transfer any amount for
12 depreciation:

13 (a) Of that portion of real property used or available
14 for use by a beneficiary as a residence or of tangible
15 personal property held or made available for the personal use
16 or enjoyment of a beneficiary;

17 (b) During the administration of a decedent's estate;
18 or

19 (c) Under this section if the trustee is accounting
20 under s. 738.403 for the business or activity in which the
21 asset is used.

22 (3) The amount of depreciation taken for tax purposes
23 with respect to an asset shall be presumed to be a reasonable
24 amount of depreciation. An amount taken for depreciation
25 shall not be considered unreasonable solely because it is
26 greater or less than the amount taken for tax purposes.

27 (4) An amount transferred to principal need not be
28 held as a separate fund.

29 738.704 Transfers from income to reimburse
30 principal.--

31

1 (1) If a trustee makes or expects to make a principal
2 disbursement described in this section, the trustee may
3 transfer an appropriate amount from income to principal in one
4 or more accounting periods to reimburse principal or to
5 provide a reserve for future principal disbursements.

6 (2) Principal disbursements to which subsection (1)
7 applies include the following, but only to the extent the
8 trustee has not been and does not expect to be reimbursed by a
9 third party:

10 (a) An amount chargeable to income but paid from
11 principal because the amount is unusually large.

12 (b) Disbursements made to prepare property for rental,
13 including tenant allowances, leasehold improvements, and
14 broker's commissions.

15 (c) Disbursements described in s. 738.702(1)(g).

16 (3) If the asset the ownership of which gives rise to
17 the disbursements becomes subject to a successive income
18 interest after an income interest ends, a trustee may continue
19 to transfer amounts from income to principal as provided in
20 subsection (1).

21 (4) To the extent principal cash is not sufficient to
22 pay the principal balance of payments due on mortgaged
23 property, income may be applied to such payment in order to
24 avoid a default on any mortgage or security interest securing
25 the property. Income shall be reimbursed for such payments
26 out of the first available principal cash. If the asset the
27 ownership of which gives rise to the disbursements described
28 in this subsection becomes subject to a successive income
29 interest after an income interest ends, all rights of the
30 initial income interest shall lapse, and amounts remaining due
31 from principal shall not be a lien on the assets of the trust.

1 738.705 Income taxes.--
2 (1) A tax required to be paid by a trustee based on
3 receipts allocated to income shall be paid from income.
4 (2) A tax required to be paid by a trustee based on
5 receipts allocated to principal shall be paid from principal,
6 even if the tax is called an income tax by the taxing
7 authority.
8 (3) A tax required to be paid by a trustee on the
9 trust's share of an entity's taxable income shall be paid
10 proportionately:
11 (a) From income to the extent receipts from the entity
12 are allocated to income; and
13 (b) From principal to the extent:
14 1. Receipts from the entity are allocated to
15 principal; and
16 2. The trust's share of the entity's taxable income
17 exceeds the total receipts described in paragraph (a) and
18 subparagraph 1.
19 (4) For purposes of this section, receipts allocated
20 to principal or income shall be reduced by the amount
21 distributed to a beneficiary from principal or income for
22 which the trust receives a deduction in calculating the tax.
23 738.706 Adjustments between principal and income
24 because of taxes.--
25 (1) A fiduciary may make adjustments between principal
26 and income to offset the shifting of economic interests or tax
27 benefits between income beneficiaries and remainder
28 beneficiaries which arise from:
29 (a) Elections and decisions, other than those
30 described in paragraph (b), that the fiduciary makes from time
31 to time regarding tax matters;

1 (b) An income tax or any other tax that is imposed
2 upon the fiduciary or a beneficiary as a result of a
3 transaction involving or a distribution from the estate or
4 trust; or

5 (c) The ownership by an estate or trust of an interest
6 in an entity whose taxable income, whether or not distributed,
7 is includable in the taxable income of the estate, trust, or a
8 beneficiary.

9 (2) If the amount of an estate tax marital deduction
10 or charitable contribution deduction is reduced because a
11 fiduciary deducts an amount paid from principal for income tax
12 purposes instead of deducting such amount for estate tax
13 purposes, and as a result estate taxes paid from principal are
14 increased and income taxes paid by an estate, trust, or
15 beneficiary are decreased, each estate, trust, or beneficiary
16 that benefits from the decrease in income tax shall reimburse
17 the principal from which the increase in estate tax is paid.
18 The total reimbursement shall equal the increase in the estate
19 tax to the extent the principal used to pay the increase would
20 have qualified for a marital deduction or charitable
21 contribution deduction but for the payment. The proportionate
22 share of the reimbursement for each estate, trust, or
23 beneficiary whose income taxes are reduced shall be the same
24 as such estate's, trust's, or beneficiary's proportionate
25 share of the total decrease in income tax. An estate or trust
26 shall reimburse principal from income.

27 738.801 Application with respect to apportionment of
28 expenses; improvements.--

29 (1) The provisions of ss. 738.701-738.705 so far as
30 applicable and excepting those dealing with costs of, or
31 assessments for, improvements to property, shall govern the

1 apportionment of expenses between tenants and remaindermen
2 when no trust has been created, subject to any agreement of
3 the parties or specific direction of the taxing or other
4 statutes, but when either tenant or remainderman has incurred
5 an expense for the benefit of his or her own estate without
6 consent or agreement of the other, he or she shall pay such
7 expense in full.

8 (2) Subject to the exceptions stated in subsection
9 (1), the cost of, or special taxes or assessments for, an
10 improvement representing an addition of value to property
11 forming part of the principal shall be paid by the tenant when
12 the improvement is not reasonably expected to outlast the
13 estate of the tenant. In all other cases a part only shall be
14 paid by the tenant, while the remainder shall be paid by the
15 remainderman. The part payable by the tenant shall be
16 ascertainable by taking that percentage of the total that is
17 found by dividing the present value of the tenant's estate by
18 the present value of an estate of the same form as that of the
19 tenant except that it is limited for a period corresponding to
20 the reasonably expected duration of the improvement. The
21 computation of present values of the estates shall be made on
22 the expectancy basis set forth in the official mortality
23 tables, and no other evidence of duration or expectancy shall
24 be considered.

25 738.802 Uniformity of application and
26 construction.--In applying and construing this act,
27 consideration shall be given to the need to promote uniformity
28 of the law with respect to the act's subject matter among
29 states that enact such act.

30 738.803 Severability.--If any provision of this
31 chapter or its application to any person or circumstance is

1 held invalid, the invalidity shall not affect other provisions
2 or applications of this chapter which can be given effect
3 without the invalid provision or application and to this end
4 the provisions of this chapter are severable.

5 738.804 Application.--Except as provided in the trust
6 instrument, the will, or this chapter, this chapter shall
7 apply to any receipt or expense received or incurred and any
8 disbursement made after January 1, 2003, by any trust or
9 decedent's estate, whether established before or after January
10 1, 2003, and whether the asset involved was acquired by the
11 trustee or personal representative before or after January 1,
12 2003. Receipts or expenses received or incurred and
13 disbursements made before January 1, 2003, shall be governed
14 by the law of this state in effect at the time of the event,
15 except as otherwise expressly provided in the will or terms of
16 the trust or in this chapter.

17 Section 2. Sections 738.01, 738.02, 738.03, 738.04,
18 738.05, 738.06, 738.07, 738.08, 738.09, 738.10, 738.11,
19 738.12, 738.13, 738.14, and 738.15, Florida Statutes, are
20 repealed.

21 Section 3. This act shall take effect January 1, 2003.

22
23 *****

24 LEGISLATIVE SUMMARY

25
26 Creates the "Florida Uniform Principal and Income Act," a
27 model act providing for powers and duties of trustees and
28 for distribution, allocation, and apportionment of income
29 and principal of estates and trusts within the trust and
30 among beneficiaries. Repeals current provisions of
31 chapter 738, Florida Statutes, relating to principal and
income of trusts. (See bill for details.)