

By Representative Goodlette

1                                   A bill to be entitled  
2           An act relating to the Florida Uniform  
3           Principal and Income Act; creating ss. 738.101,  
4           738.102, 738.103, 738.104, 738.1041, 738.105,  
5           738.201, 738.202, 738.301, 738.302, 738.303,  
6           738.401, 738.402, 738.403, 738.501, 738.502,  
7           738.503, 738.504, 738.601, 738.602, 738.603,  
8           738.604, 738.605, 738.606, 738.607, 738.608,  
9           738.701, 738.702, 738.703, 738.704, 738.705,  
10          738.706, 738.801, 738.802, 738.803, and  
11          738.804, F.S.; providing a short title;  
12          providing definitions; specifying a fiduciary's  
13          duties; providing general principles; providing  
14          a trustee's power to adjust between principal  
15          and income; providing for a unitrust  
16          alternative to certain trusts where the power  
17          to adjust is unavailable or not exercised;  
18          providing requirements, criteria, and  
19          procedures; providing for judicial control of  
20          certain discretionary powers; providing  
21          limitations; providing for determinations and  
22          distributions of net income; providing  
23          requirements; providing for distributions to  
24          residuary and remainder beneficiaries;  
25          providing for apportionment at beginning and  
26          end of an income interest; providing for  
27          entitlement to a right to income; providing for  
28          apportionment of receipts and disbursements  
29          under certain circumstances; providing for  
30          allocation of trust receipts during  
31          administration; specifying character of

1 receipts; providing for distributions from  
2 trust or estate; providing for separate  
3 accounting by trustee of certain businesses or  
4 activities; providing for allocation of certain  
5 receipts not normally apportioned; providing  
6 for allocation of certain normally apportioned  
7 receipts; providing for allocation of  
8 disbursements from income and principal during  
9 administration of a trust; providing for  
10 certain transfers from income under certain  
11 circumstances; providing for payment of certain  
12 taxes; providing for adjustments between  
13 principal and income due to taxes; providing  
14 for uniform application and construction;  
15 providing severability; providing for  
16 application with respect to apportionment of  
17 expenses and improvements; providing for  
18 application; repealing ss. 738.01, 738.02,  
19 738.03, 738.04, 738.05, 738.06, 738.07, 738.08,  
20 738.09, 738.10, 738.11, 738.12, 738.13, 738.14,  
21 and 738.15, F.S., relating to principal and  
22 income of trusts; providing an effective date.  
23

24 Be It Enacted by the Legislature of the State of Florida:  
25

26 Section 1. Sections 738.101, 738.102, 738.103,  
27 738.104, 738.1041, 738.105, 738.201, 738.202, 738.301,  
28 738.302, 738.303, 738.401, 738.402, 738.403, 738.501, 738.502,  
29 738.503, 738.504, 738.601, 738.602, 738.603, 738.604, 738.605,  
30 738.606, 738.607, 738.608, 738.701, 738.702, 738.703, 738.704,  
31

1 738.705, 738.706, 738.801, 738.802, 738.803, and 738.804,  
2 Florida Statutes, are created to read:  
3 738.101 Short Title.--This chapter may be cited as the  
4 "Florida Uniform Principal and Income Act."  
5 738.102 Definitions.--As used in this chapter:  
6 (1) "Accounting period" means a calendar year unless  
7 another 12-month period is selected by a fiduciary. The term  
8 includes a portion of a calendar year or other 12-month period  
9 that begins when an income interest begins or ends when an  
10 income interest ends.  
11 (2) "Beneficiary" means, in the case of a decedent's  
12 estate, an heir or devisee and, in the case of a trust, an  
13 income beneficiary or a remainder beneficiary.  
14 (3) "Fiduciary" means a personal representative or a  
15 trustee. The term includes an executor, administrator,  
16 successor personal representative, special administrator, or a  
17 person performing substantially the same function.  
18 (4) "Income" means money or property that a fiduciary  
19 receives as current return from a principal asset. The term  
20 includes a portion of receipts from a sale, exchange, or  
21 liquidation of a principal asset, to the extent provided in  
22 ss. 738.401-738.403 and s. 738.503.  
23 (5) "Income beneficiary" means a person to whom net  
24 income of a trust is or may be payable.  
25 (6) "Income interest" means the right of an income  
26 beneficiary to receive all or part of net income, whether the  
27 terms of the trust require the net income to be distributed or  
28 authorize the net income to be distributed in the trustee's  
29 discretion.  
30  
31

1       (7) "Mandatory income interest" means the right of an  
2 income beneficiary to receive net income that the terms of the  
3 trust require the fiduciary to distribute.

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

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

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

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

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

22       (13) "Trustee" includes an original, additional, or  
23 successor trustee, whether or not appointed or confirmed by a  
24 court.

25       738.103 Fiduciary duties; general principles.--

26       (1) In allocating receipts and disbursements to or  
27 between principal and income, and with respect to any matter  
28 within the scope of ss. 738.201 and 738.202 and ss.  
29 738.301-738.303, a fiduciary:

30  
31

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

4       (b) May administer a trust or estate by the exercise  
5 of a discretionary power of administration given to the  
6 fiduciary by the terms of the trust or the will, even if the  
7 exercise of the power produces a result different from a  
8 result required or permitted by this chapter.

9       (c) Shall administer a trust or estate in accordance  
10 with this chapter if the terms of the trust or the will do not  
11 contain a different provision or do not give the fiduciary a  
12 discretionary power of administration.

13       (d) Shall add a receipt or charge a disbursement to  
14 principal to the extent the terms of the trust and this  
15 chapter do not provide a rule for allocating the receipt or  
16 disbursement to or between principal and income.

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

28       738.104 Trustee's power to adjust.--

29       (1) A trustee may adjust between principal and income  
30 to the extent the trustee considers necessary if the trustee  
31 invests and manages trust assets as a prudent investor, the

1 terms of the trust describe the amount that may or shall be  
2 distributed to a beneficiary by referring to the trust's  
3 income, and the trustee determines, after applying the rules  
4 in s. 738.103(1), that the trustee is unable to comply with s.  
5 738.103(2).

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

11 (a) The nature, purpose, and expected duration of the  
12 trust.

13 (b) The intent of the settlor.

14 (c) The identity and circumstances of the  
15 beneficiaries.

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

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

24 (f) The net amount allocated to income under the other  
25 sections of this chapter and the increases or decreases in the  
26 value of the principal assets, which the trustee may estimate  
27 as to assets for which market values are not readily  
28 available.

29 (g) Whether and to what extent the terms of the trust  
30 give the trustee the power to invade principal or accumulate  
31 income or prohibit the trustee from invading principal or

1 accumulating income and the extent to which the trustee has  
2 exercised a power from time to time to invade principal or  
3 accumulate income.

4 (h) The actual and anticipated effect of economic  
5 conditions on principal and income and effects of inflation  
6 and deflation.

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

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

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

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

17 (c) That changes the amount payable to a beneficiary  
18 as a fixed annuity or a fixed fraction of the value of the  
19 trust assets;

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

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

28 (f) If possessing or exercising the power to make an  
29 adjustment causes all or part of the trust assets to be  
30 included for estate tax purposes in the estate of an  
31 individual who has the power to remove a trustee or appoint a

1 trustee, or both, and the assets would not be included in the  
2 estate of the individual if the trustee did not possess the  
3 power to make an adjustment;

4 (g) If the trustee is a beneficiary of the trust; or

5 (h) If the trustee is not a beneficiary of the trust  
6 but the adjustment would benefit the trustee directly or  
7 indirectly.

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

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

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

30 (7) Nothing in this chapter is intended to create or  
31 imply a duty to make an adjustment and no inference of



1 impropriety shall be made as a result of a trustee not  
2 exercising the power of adjustment conferred by subsection  
3 (1).

4 (8) With respect to a trust in existence on January 1,  
5 2003:

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

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

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

28 (d) If no timely objection is made or if the trustee  
29 is vested with the power to adjust by court order, the trustee  
30 may thereafter exercise the power to adjust without providing  
31 notice of its intent to do so unless, in vesting the trustee

1 with the power to adjust, the court determines that unusual  
2 circumstances require otherwise.

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

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

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

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

1 a trustee not seeking a power to adjust pursuant to this  
2 subsection.  
3 (9)(a) A trustee of a trust in existence on January 1,  
4 2003, that is not prohibited under subsection (3) from  
5 exercising the power to adjust shall, any time prior to  
6 initially exercising the power, provide to all reasonably  
7 ascertainable current beneficiaries described in s.  
8 737.303(4)(b)1. and all reasonably ascertainable remainder  
9 beneficiaries described in s. 737.303(4)(b)2. a statement  
10 containing the following:  
11 1. The name, telephone number, street address, and  
12 mailing address of the trustee and of any individuals who may  
13 be contacted for further information;  
14 2. A statement that unless a super majority of the  
15 beneficiaries objects to the application of this section to  
16 the trust within 60 days after the date the statement pursuant  
17 to this subsection was transmitted, section 738.104, Florida  
18 Statutes, shall apply to the trust; and  
19 3. A statement that, if section 738.104, Florida  
20 Statutes, applies to the trust, the trustee will have the  
21 power to adjust between income and principal and that such a  
22 power may have an effect on the distributions to such  
23 beneficiary from the trust.  
24 (b) The statement may contain information regarding a  
25 trustee's fiduciary obligations with respect to the power to  
26 adjust between income and principal under this section.  
27 (c) The statement referred to in this subsection shall  
28 be served informally, in the manner provided in the Florida  
29 Rules of Civil Procedure relating to service of pleadings  
30 subsequent to the initial pleading.  
31

1       (d) For purposes of subsection (8) and this  
2 subsection, a "super majority of the trust beneficiaries"  
3 means at least two-thirds in interest of the reasonably  
4 ascertainable current beneficiaries described in s.  
5 737.303(4)(b)1. or two-thirds in interest of the reasonably  
6 ascertainable remainder beneficiaries described in s.  
7 737.303(4)(b)2., if the interests of the beneficiaries are  
8 reasonably ascertainable, otherwise, it means two-thirds in  
9 number of either such class.

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

16       738.1041 Total return unitrust.--

17       (1) For purposes of this section:

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

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

30 Notwithstanding the foregoing, no trust that otherwise is an  
31 "income trust" shall qualify hereunder, if it may be subject

1 to taxation under I.R.C. s. 2001 or s. 2501, until the  
2 expiration of the period for filing the return therefor,  
3 including extensions.

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

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

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

23 (a) The trustee adopts a written statement regarding  
24 trust distributions that provides:

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

31

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

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

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

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

15           a. The percentage to be used to calculate the unitrust  
16 amount, provided the percentage used is not greater than 5  
17 percent nor less than 3 percent;

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

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

22           2. The trustee administers the trust such that:

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

29           b. The fair market value of the trust shall be  
30 determined at least annually on an asset-by-asset basis,  
31 reasonably and in good faith, in accordance with the

1 provisions of s. 738.202(5), except the following property  
2 shall not be included in determining the value of the trust:  
3 (I) Any residential property or any tangible personal  
4 property that, as of the first business day of the current  
5 valuation year, one or more current beneficiaries of the trust  
6 have or have had the right to occupy, or have or have had the  
7 right to possess or control (other than in his or her capacity  
8 as trustee of the trust), and instead the right of occupancy  
9 or the right to possession and control shall be deemed to be  
10 the unitrust amount with respect to such property; however,  
11 the unitrust amount shall be adjusted to take into account  
12 partial distributions from or receipt into the trust of such  
13 property during the valuation year.  
14 (II) Any asset specifically given to a beneficiary and  
15 the return on investment on such property, which return on  
16 investment shall be distributable to such beneficiary.  
17 (III) Any asset while held in a testator's estate.  
18 (c) The trustee sends written notice of its intention  
19 to take such action, along with copies of such written  
20 statement and this section, and, if applicable, the  
21 determinations of either the trustee or the disinterested  
22 person to:  
23 1. The grantor of the trust, if living.  
24 2. All living persons who are currently receiving or  
25 eligible to receive distributions of income of the trust.  
26 3. All living persons who would receive principal of  
27 the trust if the trust were to terminate at the time of the  
28 giving of such notice (without regard to the exercise of any  
29 power of appointment) or, if the trust does not provide for  
30 its termination, all living persons who would receive or be  
31 eligible to receive distributions of income or principal of

1 the trust if the persons identified in subparagraph 2. were  
2 deceased.

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

5  
6 Notice under this paragraph shall be served informally, in the  
7 manner provided in the Florida Rules of Civil Procedure  
8 relating to service of pleadings subsequent to the initial  
9 pleading.

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

12 (e) No person receiving such notice objects, by  
13 written instrument delivered to the trustee, to the proposed  
14 action of the trustee or the determinations of the  
15 disinterested person within 60 days after receipt of such  
16 notice.

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

30 (4) All determinations made pursuant to  
31 sub-subparagraph (2)(b)2.b. shall be conclusive if reasonable



1 and made in good faith. Such determination shall be  
2 conclusively presumed to have been made reasonably and in good  
3 faith unless proven otherwise in a proceeding commenced by or  
4 on behalf of a person interested in the trust within the time  
5 provided in s. 737.307. The burden will be on the objecting  
6 interested party to prove that the determinations were not  
7 made reasonably and in good faith.

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

11 (a) A trust for which a marital deduction has been  
12 taken for federal tax purposes under I.R.C. s. 2056 or s.  
13 2523, during the lifetime of the spouse for whom the trust was  
14 created; or

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

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

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

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

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

- 1           1. Net short-term capital gain described in I.R.C. s.  
2 1222(5) for such year, or portion thereof, but only to the  
3 extent that the amount so allocated together with all other  
4 amounts allocated to trust income, as determined under the  
5 provisions of this chapter without regard to this section and  
6 s. 738.104, for such year, or portion thereof, does not exceed  
7 the unitrust amount for such year, or portion thereof; and  
8           2. Net long-term capital gain described in I.R.C. s.  
9 1222(7) for such year, or portion thereof, but only to the  
10 extent that the amount so allocated together with all other  
11 amounts, including amounts described in subparagraph 1.,  
12 allocated to trust income for such year, or portion thereof,  
13 does not exceed the unitrust amount for such year, or portion  
14 thereof.  
15           (7) In administering a total return unitrust, the  
16 trustee may, in its sole discretion but subject to the  
17 provisions of the governing instrument, determine:  
18           (a) The effective date of the conversion.  
19           (b) The timing of distributions, including provisions  
20 for prorating a distribution for a short year in which a  
21 beneficiary's right to payments commences or ceases.  
22           (c) Whether distributions are to be made in cash or in  
23 kind or partly in cash and partly in kind.  
24           (d) If the trust is reconverted to an income trust,  
25 the effective date of such reversion.  
26           (e) Such other administrative issues as may be  
27 necessary or appropriate to carry out the purposes of this  
28 section.  
29           (8) Conversion to a total return unitrust under the  
30 provisions of this section shall not affect any other  
31

1 provision of the governing instrument, if any, regarding  
2 distributions of principal.

3 (9) In the case of a trust for which a marital  
4 deduction has been taken for federal tax purposes under I.R.C.  
5 s. 2056 or s. 2523, the spouse otherwise entitled to receive  
6 the net income of the trust shall have the right, by written  
7 instrument delivered to the trustee, to compel the  
8 reconversion during his or her lifetime of the trust from a  
9 total return unitrust to an income trust, notwithstanding  
10 anything in this section to the contrary, unless the use of a  
11 total return unitrust is recognized for federal tax purposes  
12 under I.R.C. s. 2056 or s. 2523.

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

25 (11) If a majority in interest of either the income or  
26 remainder beneficiaries of an income trust has delivered to  
27 the trustee a written objection to the amount of the income  
28 distributions of the trust, and, if the trustee has failed to  
29 resolve the objection to the satisfaction of the objecting  
30 beneficiaries within 6 months from the receipt of such written  
31

1 objection, then the objecting beneficiaries may petition the  
2 court in accordance with subsection (3).

3 (12) This section shall be construed as pertaining to  
4 the administration of a trust and shall be available to any  
5 trust that is administered in this state under Florida law  
6 unless:

7 (a) The governing instrument reflects an intention  
8 that the current beneficiary or beneficiaries are to receive  
9 an amount other than a reasonable current return from the  
10 trust;

11 (b) The trust is a trust described in I.R.C. s.  
12 170(f)(2)(B), s. 642(c)(5), s. 664(d), s. 1361(d), s.  
13 2702(a)(3), or s. 2702(b);

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

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

27 (e) The trust is a trust with respect to which a  
28 trustee currently possesses the power to adjust under s.  
29 738.104.

30 738.105 Judicial control of discretionary powers.--  
31

1       (1) A court shall not change a fiduciary's decision to  
2 exercise or not to exercise a discretionary power conferred by  
3 this chapter unless the court determines that the decision was  
4 an abuse of the fiduciary's discretion. A court shall not  
5 determine that a fiduciary abused its discretion merely  
6 because the court would have exercised the discretion in a  
7 different manner or would not have exercised the discretion.

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

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

13       (b) A determination of the factors that are relevant  
14 to the trust and trust beneficiaries, the extent to which such  
15 factors are relevant, and the weight, if any, to be given to  
16 the relevant factors, in deciding whether and to what extent  
17 to exercise the power conferred by s. 738.104(1).

18       (3) If a court determines that a fiduciary has abused  
19 its discretion, the remedy shall be to restore the income and  
20 remainder beneficiaries to the positions they would have  
21 occupied if the fiduciary had not abused its discretion,  
22 according to the following rules:

23       (a) To the extent the abuse of discretion has resulted  
24 in no distribution to a beneficiary or a distribution that is  
25 too small, the court shall require the fiduciary to distribute  
26 from the trust to the beneficiary an amount the court  
27 determines will restore the beneficiary, in whole or in part,  
28 to his or her appropriate position.

29       (b) To the extent the abuse of discretion has resulted  
30 in a distribution to a beneficiary that is too large, the  
31 court shall restore the beneficiaries, the trust, or both, in

1 whole or in part, to their appropriate positions by requiring  
2 the fiduciary to withhold an amount from one or more future  
3 distributions to the beneficiary who received the distribution  
4 that was too large or requiring that beneficiary to return  
5 some or all of the distribution to the trust.

6 (c) To the extent the court is unable, after applying  
7 paragraphs (a) and (b), to restore the beneficiaries, the  
8 trust, or both, to the positions they would have occupied if  
9 the fiduciary had not abused its discretion, the court may  
10 require the fiduciary to pay an appropriate amount from its  
11 own funds to one or more of the beneficiaries or the trust or  
12 both.

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

27 (5) If an action is instituted alleging an abuse of  
28 discretion in the exercise or nonexercise of the power of  
29 adjustment conferred by s. 738.104(1) and the court determines  
30 that no abuse of discretion has occurred, the trustee's costs  
31

1 and attorney's fees incurred in defending the action shall be  
2 paid from the trust assets.

3 738.201 Determination and distribution of net  
4 income.--After a decedent dies, in the case of an estate, or  
5 after an income interest in a trust ends, the following rules  
6 apply:

7 (1) A fiduciary of an estate or of a terminating  
8 income interest shall determine the amount of net income and  
9 net principal receipts received from property specifically  
10 given to a beneficiary under the rules in ss. 738.301-738.706  
11 which apply to trustees and the rules in subsection (5). The  
12 fiduciary shall distribute the net income and net principal  
13 receipts to the beneficiary who is to receive the specific  
14 property.

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

19 (a) Including in net income all income from property  
20 used to discharge liabilities.

21 (b) Paying from income or principal, in the  
22 fiduciary's discretion, fees of attorneys, accountants, and  
23 fiduciaries; court costs and other expenses of administration;  
24 and interest on death taxes, but the fiduciary may pay those  
25 expenses from income of property passing to a trust for which  
26 the fiduciary claims an estate tax marital or charitable  
27 deduction only to the extent the payment of those expenses  
28 from income will not cause the reduction or loss of the  
29 deduction.

30 (c) Paying from principal all other disbursements made  
31 or incurred in connection with the settlement of a decedent's

1 estate or the winding up of a terminating income interest,  
2 including debts, funeral expenses, disposition of remains,  
3 family allowances, and death taxes and related penalties that  
4 are apportioned to the estate or terminating income interest  
5 by the will, the terms of the trust, or applicable law.

6 (3) A fiduciary shall distribute to a beneficiary who  
7 receives a pecuniary amount outright the interest or any other  
8 amount provided by the will, the terms of the trust, or  
9 applicable law from net income determined under subsection (2)  
10 or from principal to the extent net income is insufficient.  
11 If a beneficiary is to receive a pecuniary amount outright  
12 from a trust after an income interest ends and no interest or  
13 other amount is provided for by the terms of the trust or  
14 applicable law, the fiduciary shall distribute the interest or  
15 other amount to which the beneficiary would be entitled under  
16 applicable law if the pecuniary amount were required to be  
17 paid under a will.

18 (4) A fiduciary shall distribute the net income  
19 remaining after distributions required by subsection (3) in  
20 the manner described in s. 738.202 to all other beneficiaries,  
21 including a beneficiary who receives a pecuniary amount in  
22 trust, even if the beneficiary holds an unqualified power to  
23 withdraw assets from the trust or other presently exercisable  
24 general power of appointment over the trust.

25 (5) A fiduciary may not reduce principal or income  
26 receipts from property described in subsection (1) because of  
27 a payment described in s. 738.701 or s. 738.702 to the extent  
28 the will, the terms of the trust, or applicable law requires  
29 the fiduciary to make the payment from assets other than the  
30 property or to the extent the fiduciary recovers or expects to  
31 recover the payment from a third party. The net income and



1 principal receipts from the property are determined by  
2 including all of the amounts the fiduciary receives or pays  
3 with respect to the property, whether those amounts accrued or  
4 became due before, on, or after the date of a decedent's death  
5 or an income interest's terminating event, and by making a  
6 reasonable provision for amounts the fiduciary believes the  
7 estate or terminating income interest may become obligated to  
8 pay after the property is distributed.

9 738.202 Distribution to residuary and remainder  
10 beneficiaries.--

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

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

24 (a) The beneficiary is entitled to receive a portion  
25 of the net income equal to the beneficiary's fractional  
26 interest in the undistributed principal assets immediately  
27 before the distribution date, including assets that later may  
28 be sold to meet principal obligations.

29 (b) The beneficiary's fractional interest in the  
30 undistributed principal assets shall be calculated without  
31

1 regard to property specifically given to a beneficiary and  
2 property required to pay pecuniary amounts not in trust.

3 (c) The beneficiary's fractional interest in the  
4 undistributed principal assets shall be calculated on the  
5 basis of the aggregate value of those assets as of the  
6 distribution date without reducing the value by any unpaid  
7 principal obligation.

8 (d) The distribution date for purposes of this section  
9 may be the date as of which the fiduciary calculates the value  
10 of the assets if that date is reasonably near the date on  
11 which assets are actually distributed.

12 (3) If a fiduciary does not distribute all of the  
13 collected but undistributed net income to each person as of a  
14 distribution date, the fiduciary shall maintain appropriate  
15 records showing the interest of each beneficiary in that net  
16 income.

17 (4) A fiduciary may apply the rules in this section,  
18 to the extent the fiduciary considers appropriate, to net gain  
19 or loss realized after the date of death or terminating event  
20 or earlier distribution date from the disposition of a  
21 principal asset if this section applies to the income from the  
22 asset.

23 (5) The value of trust assets shall be determined on  
24 an asset-by-asset basis and shall be conclusive if reasonable  
25 and determined in good faith. Determinations based on  
26 appraisals performed within 2 years of the valuation date  
27 shall be presumed reasonable. The value of trust assets shall  
28 be conclusively presumed to be reasonable and determined in  
29 good faith unless proven otherwise in a proceeding commenced  
30 by or on behalf of a person interested in the trust within the  
31 time provided in s. 737.307.

1           738.301 When right to income begins and ends.--An  
2 income beneficiary is entitled to net income from the date on  
3 which the income interest begins.

4           (1) An income interest begins on the date specified in  
5 the terms of the trust or, if no date is specified, on the  
6 date an asset becomes subject to a trust or successive income  
7 interest.

8           (2) An asset becomes subject to a trust:

9           (a) On the date the asset is transferred to the trust  
10 in the case of an asset that is transferred to a trust during  
11 the transferor's life;

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

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

19           (3) An asset becomes subject to a successive income  
20 interest on the day after the preceding income interest ends,  
21 as determined under subsection (4), even if there is an  
22 intervening period of administration to wind up the preceding  
23 income interest.

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

28           738.302 Apportionment of receipts and disbursements  
29 when decedent dies or income interest begins.--

30           (1) A trustee shall allocate an income receipt or  
31 disbursement other than one to which s. 738.201(1) applies to

1 principal if the due date of the receipt or disbursement  
2 occurs before a decedent dies in the case of an estate or  
3 before an income interest begins in the case of a trust or  
4 successive income interest.

5 (2) A trustee shall allocate an income receipt or  
6 disbursement to income if the due date of the receipt or  
7 disbursement occurs on or after the date on which a decedent  
8 dies or an income interest begins and the due date is a  
9 periodic due date. An income receipt or disbursement shall be  
10 treated as accruing from day to day if the due date of the  
11 receipt or disbursement is not periodic or the receipt or  
12 disbursement has no due date. The portion of the receipt or  
13 disbursement accruing before the date on which a decedent dies  
14 or an income interest begins shall be allocated to principal  
15 and the balance shall be allocated to income.

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

28 (4) Nothing in this section shall prevent the  
29 application of s. 733.817 to apportion tax to the income  
30 recipient under this section.

31 738.303 Apportionment when income interest ends.--

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

7       (2) When a mandatory income interest ends, the trustee  
8 shall pay to a mandatory income beneficiary who survives that  
9 date, or the estate of a deceased mandatory income beneficiary  
10 whose death causes the interest to end, the beneficiary's  
11 share of the undistributed income that is not disposed of  
12 under the terms of the trust unless the beneficiary has an  
13 unqualified power to revoke more than 5 percent of the trust  
14 immediately before the income interest ends. In the latter  
15 case, the undistributed income from the portion of the trust  
16 that may be revoked shall be added to principal.

17       (3) When a trustee's obligation to pay a fixed annuity  
18 or a fixed fraction of the value of the trust's assets ends,  
19 the trustee shall prorate the final payment if and to the  
20 extent required by applicable law to accomplish a purpose of  
21 the trust or its settlor relating to income, gift, estate, or  
22 other tax requirements.

23       738.401 Character of receipts.--

24       (1) For purposes of this section, "entity" means a  
25 corporation, partnership, limited liability company, regulated  
26 investment company, real estate investment trust, common trust  
27 fund, or any other organization in which a trustee has an  
28 interest other than a trust or estate to which s. 738.402  
29 applies, a business or activity to which s. 738.403 applies,  
30 or an asset-backed security to which s. 738.608 applies.

31

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

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

6           (a) Property other than money.

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

10          (c) Money received in total or partial liquidation of  
11 the entity.

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

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

21          (5) Money is received in partial liquidation:

22           (a) To the extent the entity, at or near the time of a  
23 distribution, indicates that such money is a distribution in  
24 partial liquidation; or

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

30          (6) Money is not received in partial liquidation, nor  
31 may money be taken into account under paragraph (5)(b), to the

1 extent such money does not exceed the amount of income tax a  
2 trustee or beneficiary must pay on taxable income of the  
3 entity that distributes the money.

4 (7) A trustee may rely upon a statement made by an  
5 entity about the source or character of a distribution if the  
6 statement is made at or near the time of distribution by the  
7 entity's board of directors or other person or group of  
8 persons authorized to exercise powers to pay money or transfer  
9 property comparable to those of a corporation's board of  
10 directors.

11 738.402 Distribution from trust or estate.--A trustee  
12 shall allocate to income an amount received as a distribution  
13 of income from a trust or an estate in which the trust has an  
14 interest other than a purchased interest and shall allocate to  
15 principal an amount received as a distribution of principal  
16 from such a trust or estate. If a trustee purchases an  
17 interest in a trust that is an investment entity, or a  
18 decedent or donor transfers an interest in such a trust to a  
19 trustee, s. 738.401 or s. 738.608 applies to a receipt from  
20 the trust.

21 738.403 Business and other activities conducted by  
22 trustee.--

23 (1) If a trustee who conducts a business or other  
24 activity determines that it is in the best interest of all the  
25 beneficiaries to account separately for the business or  
26 activity instead of accounting for the business or activity as  
27 part of the trust's general accounting records, the trustee  
28 may maintain separate accounting records for the transactions  
29 of such business or other activity, whether or not the assets  
30 of such business or activity are segregated from other trust  
31 assets.

1       (2) A trustee who accounts separately for a business  
2 or other activity may determine the extent to which the net  
3 cash receipts of such business or activity must be retained  
4 for working capital, the acquisition or replacement of fixed  
5 assets, and other reasonably foreseeable needs of the business  
6 or activity, and the extent to which the remaining net cash  
7 receipts are accounted for as principal or income in the  
8 trust's general accounting records. If a trustee sells assets  
9 of the business or other activity, other than in the ordinary  
10 course of the business or activity, the trustee shall account  
11 for the net amount received as principal in the trust's  
12 general accounting records to the extent the trustee  
13 determines that the amount received is no longer required in  
14 the conduct of the business.

15       (3) Activities for which a trustee may maintain  
16 separate accounting records include:

17           (a) Retail, manufacturing, service, and other  
18 traditional business activities.

19           (b) Farming.

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

21           (d) Management of rental properties.

22           (e) Extraction of minerals and other natural  
23 resources.

24           (f) Timber operations.

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

26       738.501 Principal receipts.--A trustee shall allocate  
27 to principal:

28           (1) To the extent not allocated to income under this  
29 chapter, assets received from a transferor during the  
30 transferor's lifetime, a decedent's estate, a trust with a  
31



1 terminating income interest, or a payer under a contract  
2 naming the trust or its trustee as beneficiary.

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

6 (3) Amounts recovered from third parties to reimburse  
7 the trust because of disbursements described in s.  
8 738.702(1)(g) or for other reasons to the extent not based on  
9 the loss of income.

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

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

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

18 738.502 Rental property.--To the extent a trustee  
19 accounts for receipts from rental property pursuant to this  
20 section, the trustee shall allocate to income an amount  
21 received as rent of real or personal property, including an  
22 amount received for cancellation or renewal of a lease. An  
23 amount received as a refundable deposit, including a security  
24 deposit or a deposit that is to be applied as rent for future  
25 periods, shall be added to principal and held subject to the  
26 terms of the lease and is not available for distribution to a  
27 beneficiary until the trustee's contractual obligations have  
28 been satisfied with respect to that amount.

29 738.503 Obligation to pay money.--

30 (1) An amount received as interest, whether determined  
31 at a fixed, variable, or floating rate, on an obligation to

1 pay money to the trustee, including an amount received as  
2 consideration for prepaying principal, shall be allocated to  
3 income without any provision for amortization of premium.

4 (2) Except as otherwise provided herein, a trustee  
5 shall allocate to principal an amount received from the sale,  
6 redemption, or other disposition of an obligation to pay money  
7 to the trustee.

8 (3) The increment in value of a bond or other  
9 obligation for the payment of money bearing no stated interest  
10 but payable at a future time in excess of the price at which  
11 it was issued or purchased, if purchased after issuance, is  
12 distributable as income. If the increment in value accrues  
13 and becomes payable pursuant to a fixed schedule of  
14 appreciation, it may be distributed to the beneficiary who was  
15 the income beneficiary at this time of increment from the  
16 first principal cash available or, if none is available, when  
17 the increment is realized by sale, redemption, or other  
18 disposition. When unrealized increment is distributed as  
19 income but out of principal, the principal shall be reimbursed  
20 for the increment when realized. If, in the reasonable  
21 judgment of the trustee, exercised in good faith, the ultimate  
22 payment of the bond principal is in doubt, the trustee may  
23 withhold the payment of incremental interest to the income  
24 beneficiary.

25 (4) This section does not apply to an obligation to  
26 which s. 738.602, s. 738.603, s. 738.604, s. 738.605, s.  
27 738.607, or s. 738.608 applies.

28 738.504 Insurance policies and similar contracts.--

29 (1) Except as otherwise provided in subsection (2), a  
30 trustee shall allocate to principal the proceeds of a life  
31 insurance policy or other contract in which the trust or its

1 trustee is named as beneficiary, including a contract that  
2 insures the trust or its trustee against loss for damage to,  
3 destruction of, or loss of title to a trust asset. The  
4 trustee shall allocate dividends on an insurance policy to  
5 income if the premiums on the policy are paid from income and  
6 to principal if the premiums are paid from principal.

7 (2) A trustee shall allocate to income proceeds of a  
8 contract that insures the trustee against loss of occupancy or  
9 other use by an income beneficiary, loss of income, or,  
10 subject to s. 738.403, loss of profits from a business.

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

13 738.601 Insubstantial allocations not required.--If a  
14 trustee determines that an allocation between principal and  
15 income required by s. 738.602, s. 738.603, s. 738.604, s.  
16 738.605, or s. 738.608 is insubstantial, the trustee may  
17 allocate the entire amount to principal unless one of the  
18 circumstances described in s. 738.104(3) applies to the  
19 allocation. This power may be exercised by a cotrustee in the  
20 circumstances described in s. 738.104(4) and may be released  
21 for the reasons and in the manner described in s. 738.104(5).

22 An allocation is presumed to be insubstantial if:

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

26 (2) The value of the asset producing the receipt for  
27 which the allocation would be made is less than 10 percent of  
28 the total value of the trust's assets at the beginning of the  
29 accounting period.

30 738.602 Deferred compensation, annuities, and similar  
31 payments.--

1       (1) For purposes of this section, "payment" means a  
2 payment that a trustee may receive over a fixed number of  
3 years or during the life of one or more individuals because of  
4 services rendered or property transferred to the payer in  
5 exchange for future payments. The term includes a payment  
6 made in money or property from the payer's general assets or  
7 from a separate fund created by the payer, including a private  
8 or commercial annuity, an individual retirement account, and a  
9 pension, profit-sharing, stock-bonus, or stock-ownership plan.

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

12           (a) A trustee shall allocate to income in the  
13 following order:

14               1. First, payments characterized by the payor as  
15 interest or dividends or as a payment made in lieu of interest  
16 or dividends.

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

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

23       (3) If no part of a payment is characterized as, or  
24 otherwise determined to be, interest, a dividend, or an  
25 equivalent payment and all or part of the payment is required  
26 to be made, a trustee shall allocate to income 10 percent of  
27 the part that is required to be made during the accounting  
28 period and the balance to principal. If no part of a payment  
29 is required to be made or the payment received is the entire  
30 amount to which the trustee is entitled, the trustee shall  
31 allocate the entire payment to principal. For purposes of

1 this subsection, a payment is not "required to be made" to the  
2 extent the payment is made because the trustee exercises a  
3 right of withdrawal.

4 (4) If, to obtain an estate tax marital deduction for  
5 a trust, a trustee must allocate more of a payment to income  
6 than provided for by this section, the trustee shall allocate  
7 to income the additional amount necessary to obtain the  
8 marital deduction.

9 (5) This section does not apply to payments to which  
10 s. 738.603 applies.

11 738.603 Liquidating asset.--

12 (1) For purposes of this section, "liquidating asset"  
13 means an asset the value of which will diminish or terminate  
14 because the asset is expected to produce receipts for a period  
15 of limited duration. The term includes a leasehold, patent,  
16 copyright, royalty right, and right to receive payments during  
17 a period of more than 1 year under an arrangement that does  
18 not provide for the payment of interest on the unpaid balance.  
19 The term does not include a payment subject to s. 738.602,  
20 resources subject to s. 738.604, timber subject to s. 738.605,  
21 an activity subject to s. 738.607, an asset subject to s.  
22 738.608, or any asset for which the trustee establishes a  
23 reserve for depreciation under s. 738.703.

24 (2) A trustee shall allocate to income 10 percent of  
25 the receipts from a liquidating asset and the balance to  
26 principal.

27 738.604 Minerals, water, and other natural  
28 resources.--

29 (1) To the extent a trustee accounts for receipts from  
30 an interest in minerals or other natural resources pursuant to  
31

1 this section, the trustee shall allocate such receipts as  
2 follows:

3 (a) If received as nominal delay rental or nominal  
4 annual rent on a lease, a receipt shall be allocated to  
5 income.

6 (b) If received from a production payment, a receipt  
7 shall be allocated to income if and to the extent the  
8 agreement creating the production payment provides a factor  
9 for interest or its equivalent. The balance shall be  
10 allocated to principal.

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

15 (d) If an amount is received from a working interest  
16 or any other interest not provided for in paragraph (a),  
17 paragraph (b), or paragraph (c), 90 percent of the net amount  
18 received shall be allocated to principal and the balance to  
19 income.

20 (2) An amount received on account of an interest in  
21 water that is renewable shall be allocated to income. If the  
22 water is not renewable, 90 percent of the amount shall be  
23 allocated to principal and the balance to income.

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

27 (4) If a trust owns an interest in minerals, water, or  
28 other natural resources on January 1, 2003, the trustee may  
29 allocate receipts from the interest as provided in this  
30 chapter or in the manner used by the trustee before January 1,  
31 2003. If the trust acquires an interest in minerals, water,

1 or other natural resources after January 1, 2003, the trustee  
2 shall allocate receipts from the interest as provided in this  
3 chapter.

4 738.605 Timber.--

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

8 (a) To income to the extent the amount of timber  
9 removed from the land does not exceed the rate of growth of  
10 the timber during the accounting periods in which a  
11 beneficiary has a mandatory income interest;

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

15 (c) To or between income and principal if the net  
16 receipts are from the lease of timberland or from a contract  
17 to cut timber from land owned by a trust by determining the  
18 amount of timber removed from the land under the lease or  
19 contract and applying the rules in paragraphs (a) and (b); or

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

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

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

29 (4) If a trust owns an interest in timberland on  
30 January 1, 2003, the trustee may allocate net receipts from  
31 the sale of timber and related products as provided in this

1 chapter or in the manner used by the trustee before January 1,  
2 2003. If the trust acquires an interest in timberland after  
3 January 1, 2003, the trustee shall allocate net receipts from  
4 the sale of timber and related products as provided in this  
5 chapter.

6 738.606 Property not productive of income.--

7 (1) If a marital deduction is allowed for all or part  
8 of a trust the income of which is required to be distributed  
9 to the settlor's spouse and the assets of which consist  
10 substantially of property that does not provide the spouse  
11 with sufficient income from or use of the trust assets, and if  
12 the amounts the trustee transfers from principal to income  
13 under s. 738.104 and distributes to the spouse from principal  
14 pursuant to the terms of the trust are insufficient to provide  
15 the spouse with the beneficial enjoyment required to obtain  
16 the marital deduction, the spouse may require the trustee to  
17 make property productive of income, convert property within a  
18 reasonable time, or exercise the power conferred by ss.  
19 738.104 and 738.1041. The trustee may decide which action or  
20 combination of actions to take.

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

25 738.607 Derivatives and options.--

26 (1) For purposes of this section, "derivative" means a  
27 contract or financial instrument or a combination of contracts  
28 and financial instruments which gives a trust the right or  
29 obligation to participate in some or all changes in the price  
30 of a tangible or intangible asset or group of assets, or  
31



1 changes in a rate, an index of prices or rates, or other  
2 market indicator for an asset or a group of assets.

3 (2) To the extent a trustee does not account under s.  
4 738.403 for transactions in derivatives, the trustee shall  
5 allocate to principal receipts from and disbursements made in  
6 connection with those transactions.

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

19 738.608 Asset-backed securities.--

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

29 (2) If a trust receives a payment from interest or  
30 other current return and from other proceeds of the collateral  
31 financial assets, the trustee shall allocate to income the

1 portion of the payment which the payer identifies as being  
2 from interest or other current return and shall allocate the  
3 balance of the payment to principal.

4 (3) If a trust receives one or more payments in  
5 exchange for the trust's entire interest in an asset-backed  
6 security during a single accounting period, the trustee shall  
7 allocate the payments to principal. If a payment is one of a  
8 series of payments that will result in the liquidation of the  
9 trust's interest in the security over more than a single  
10 accounting period, the trustee shall allocate 10 percent of  
11 the payment to income and the balance to principal.

12 738.701 Disbursements from income.--A trustee shall  
13 make the following disbursements from income to the extent  
14 they are not disbursements to which s. 738.201(2)(a) or (c)  
15 applies:

16 (1) One-half of the regular compensation of the  
17 trustee and of any person providing investment advisory or  
18 custodial services to the trustee.

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

22 (3) All of the other ordinary expenses incurred in  
23 connection with the administration, management, or  
24 preservation of trust property and the distribution of income,  
25 including interest, ordinary repairs, regularly recurring  
26 taxes assessed against principal, and expenses of a proceeding  
27 or other matter that concerns primarily the income interest.

28 (4) Recurring premiums on insurance covering the loss  
29 of a principal asset or the loss of income from or use of the  
30 asset.

31 738.702 Disbursements from principal.--

- 1       (1) A trustee shall make the following disbursements  
2 from principal:
- 3       (a) The remaining one-half of the disbursements  
4 described in s. 738.701(1) and (2).
- 5       (b) All of the trustee's compensation calculated on  
6 principal as a fee for acceptance, distribution, or  
7 termination and disbursements made to prepare property for  
8 sale.
- 9       (c) Payments on the principal of a trust debt.
- 10       (d) Expenses of a proceeding that concerns primarily  
11 principal, including a proceeding to construe the trust or to  
12 protect the trust or its property.
- 13       (e) Premiums paid on a policy of insurance not  
14 described in s. 738.701(4) of which the trust is the owner and  
15 beneficiary.
- 16       (f) Estate, inheritance, and other transfer taxes,  
17 including penalties, apportioned to the trust.
- 18       (g) Disbursements related to environmental matters,  
19 including reclamation, assessing environmental conditions,  
20 remedying and removing environmental contamination, monitoring  
21 remedial activities and the release of substances, preventing  
22 future releases of substances, collecting amounts from persons  
23 liable or potentially liable for the costs of such activities,  
24 penalties imposed under environmental laws or regulations and  
25 other payments made to comply with those laws or regulations,  
26 statutory or common law claims by third parties, and defending  
27 claims based on environmental matters.
- 28       (h) Payments representing extraordinary repairs or  
29 expenses incurred in making a capital improvement to  
30 principal, including special assessments; however, a trustee  
31

1 may establish an allowance for depreciation out of income to  
2 the extent permitted by s. 738.703.

3 (2) If a principal asset is encumbered with an  
4 obligation that requires income from that asset to be paid  
5 directly to the creditor, the trustee shall transfer from  
6 principal to income an amount equal to the income paid to the  
7 creditor in reduction of the principal balance of the  
8 obligation.

9 738.703 Transfers from income to principal for  
10 depreciation.--

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

15 (2) A trustee may transfer to principal a reasonable  
16 amount of the net cash receipts from a principal asset that is  
17 subject to depreciation but may not transfer any amount for  
18 depreciation:

19 (a) Of that portion of real property used or available  
20 for use by a beneficiary as a residence or of tangible  
21 personal property held or made available for the personal use  
22 or enjoyment of a beneficiary;

23 (b) During the administration of a decedent's estate;  
24 or

25 (c) Under this section if the trustee is accounting  
26 under s. 738.403 for the business or activity in which the  
27 asset is used.

28 (3) The amount of depreciation taken for tax purposes  
29 with respect to an asset shall be presumed to be a reasonable  
30 amount of depreciation. An amount taken for depreciation  
31

1 shall not be considered unreasonable solely because it is  
2 greater or less than the amount taken for tax purposes.

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

5 738.704 Transfers from income to reimburse  
6 principal.--

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

12 (2) Principal disbursements to which subsection (1)  
13 applies include the following, but only to the extent the  
14 trustee has not been and does not expect to be reimbursed by a  
15 third party:

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

18 (b) Disbursements made to prepare property for rental,  
19 including tenant allowances, leasehold improvements, and  
20 broker's commissions.

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

22 (3) If the asset the ownership of which gives rise to  
23 the disbursements becomes subject to a successive income  
24 interest after an income interest ends, a trustee may continue  
25 to transfer amounts from income to principal as provided in  
26 subsection (1).

27 (4) To the extent principal cash is not sufficient to  
28 pay the principal balance of payments due on mortgaged  
29 property, income may be applied to such payment in order to  
30 avoid a default on any mortgage or security interest securing  
31 the property. Income shall be reimbursed for such payments

1 out of the first available principal cash. If the asset the  
2 ownership of which gives rise to the disbursements described  
3 in this subsection becomes subject to a successive income  
4 interest after an income interest ends, all rights of the  
5 initial income interest shall lapse, and amounts remaining due  
6 from principal shall not be a lien on the assets of the trust.

7 738.705 Income taxes.--

8 (1) A tax required to be paid by a trustee based on  
9 receipts allocated to income shall be paid from income.

10 (2) A tax required to be paid by a trustee based on  
11 receipts allocated to principal shall be paid from principal,  
12 even if the tax is called an income tax by the taxing  
13 authority.

14 (3) A tax required to be paid by a trustee on the  
15 trust's share of an entity's taxable income shall be paid  
16 proportionately:

17 (a) From income to the extent receipts from the entity  
18 are allocated to income; and

19 (b) From principal to the extent:

20 1. Receipts from the entity are allocated to  
21 principal; and

22 2. The trust's share of the entity's taxable income  
23 exceeds the total receipts described in paragraph (a) and  
24 subparagraph 1.

25 (4) For purposes of this section, receipts allocated  
26 to principal or income shall be reduced by the amount  
27 distributed to a beneficiary from principal or income for  
28 which the trust receives a deduction in calculating the tax.

29 738.706 Adjustments between principal and income  
30 because of taxes.--

31

1       (1) A fiduciary may make adjustments between principal  
2 and income to offset the shifting of economic interests or tax  
3 benefits between income beneficiaries and remainder  
4 beneficiaries which arise from:

5           (a) Elections and decisions, other than those  
6 described in paragraph (b), that the fiduciary makes from time  
7 to time regarding tax matters;

8           (b) An income tax or any other tax that is imposed  
9 upon the fiduciary or a beneficiary as a result of a  
10 transaction involving or a distribution from the estate or  
11 trust; or

12           (c) The ownership by an estate or trust of an interest  
13 in an entity whose taxable income, whether or not distributed,  
14 is includable in the taxable income of the estate, trust, or a  
15 beneficiary.

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

1 share of the total decrease in income tax. An estate or trust  
2 shall reimburse principal from income.

3 738.801 Application with respect to apportionment of  
4 expenses; improvements.--

5 (1) The provisions of ss. 738.701-738.705 so far as  
6 applicable and excepting those dealing with costs of, or  
7 assessments for, improvements to property, shall govern the  
8 apportionment of expenses between tenants and remaindermen  
9 when no trust has been created, subject to any agreement of  
10 the parties or specific direction of the taxing or other  
11 statutes, but when either tenant or remainderman has incurred  
12 an expense for the benefit of his or her own estate without  
13 consent or agreement of the other, he or she shall pay such  
14 expense in full.

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



1           738.802 Uniformity of application and  
2 construction.--In applying and construing this act,  
3 consideration shall be given to the need to promote uniformity  
4 of the law with respect to the act's subject matter among  
5 states that enact such act.

6           738.803 Severability.--If any provision of this  
7 chapter or its application to any person or circumstance is  
8 held invalid, the invalidity shall not affect other provisions  
9 or applications of this chapter which can be given effect  
10 without the invalid provision or application and to this end  
11 the provisions of this chapter are severable.

12           738.804 Application.--Except as provided in the trust  
13 instrument, the will, or this chapter, this chapter shall  
14 apply to any receipt or expense received or incurred and any  
15 disbursement made after January 1, 2003, by any trust or  
16 decedent's estate, whether established before or after January  
17 1, 2003, and whether the asset involved was acquired by the  
18 trustee or personal representative before or after January 1,  
19 2003. Receipts or expenses received or incurred and  
20 disbursements made before January 1, 2003, shall be governed  
21 by the law of this state in effect at the time of the event,  
22 except as otherwise expressly provided in the will or terms of  
23 the trust or in this chapter.

24           Section 2. Sections 738.01, 738.02, 738.03, 738.04,  
25 738.05, 738.06, 738.07, 738.08, 738.09, 738.10, 738.11,  
26 738.12, 738.13, 738.14, and 738.15, Florida Statutes, are  
27 repealed.

28           Section 3. This act shall take effect January 1, 2003.  
29  
30  
31

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31

\*\*\*\*\*

HOUSE SUMMARY

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