

By Senator Atwater

25-1159A-03

See HB 1071

1 A bill to be entitled
2 An act relating to the Florida Uniform
3 Principal and Income Act; amending s. 738.104,
4 F.S.; revising provisions with respect to the
5 trustee's power to adjust; authorizing the
6 trustee to release certain powers; restricting
7 the power to adjust under certain
8 circumstances; providing for service of notice
9 on a legal representative or natural guardian
10 of a beneficiary without the filing of any
11 proceeding or approval of any court; amending
12 s. 738.1041, F.S.; redefining the term
13 "interested trustee" for the purpose of a
14 provision governing total return unitrust;
15 providing for notice to be served in a
16 described manner; providing that an objection
17 may be executed by a legal representative or
18 natural guardian without the filing of any
19 proceeding or approval of any court; revising
20 language with respect to power of withdrawal;
21 amending s. 738.202, F.S.; revising provisions
22 with respect to distribution to residuary and
23 remainder beneficiaries; amending s. 738.401,
24 F.S.; revising provisions with respect to
25 character of receipts; providing for
26 retroactive application; providing an effective
27 date.

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29 Be It Enacted by the Legislature of the State of Florida:
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1 Section 1. Subsections (5), (8), and (9) of section
2 738.104, Florida Statutes, are amended to read:

3 738.104 Trustee's power to adjust.--

4 (5)(a) A trustee may release the entire power to
5 adjust conferred by subsection (1) if the trustee desires to
6 convert an income trust to a total return unitrust pursuant to
7 s. 738.1041.

8 (b) A trustee ~~or~~ may release the entire power to
9 adjust conferred by subsection (1) or may release only the
10 power to adjust from income to principal or the power to
11 adjust from principal to income if the trustee is uncertain
12 about whether possessing or exercising the power will cause a
13 result described in paragraphs (3)(a)-(f) or paragraph (3)(h)
14 or if the trustee determines that possessing or exercising the
15 power will or may deprive the trust of a tax benefit or impose
16 a tax burden not described in subsection (3).

17 (c) A ~~The~~ release under this subsection may be
18 permanent or for a specified period, including a period
19 measured by the life of an individual. Notwithstanding
20 anything contrary to this subsection, a release of the power
21 to adjust pursuant to paragraph (a) shall remain effective
22 only for as long as the trust is administered as a unitrust
23 pursuant to s. 738.1041.

24 (8) With respect to a trust in existence on January 1,
25 2003:

26 (a) A trustee shall not have the power to adjust under
27 this section until the statement required in subsection (9) is
28 provided and either no objection is made or any objection
29 which is made has been terminated.

30 1. An objection is made if, within 60 days after the
31 date of the statement required in subsection (9), a super

1 majority of the trust beneficiaries deliver to the trustee a
2 written objection to the application of this section to such
3 trust. An objection shall be deemed to be delivered to the
4 trustee on the date the objection is mailed to the mailing
5 address listed in the notice provided in subsection (9).

6 2. An objection is terminated upon the earlier of the
7 receipt of consent from a super majority of trust
8 beneficiaries of the class that made the objection, or the
9 resolution of the objection pursuant to paragraph (c).

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

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

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

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 served, s. 738.104 shall apply to the
16 trust; and

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

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

24 (c) The statement referred to in this subsection shall
25 be served informally, in the manner provided in the Florida
26 Rules of Civil Procedure relating to service of pleadings
27 subsequent to the initial pleading. The statement may be
28 served on a legal representative or natural guardian of a
29 beneficiary without the filing of any proceeding or approval
30 of any court.

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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 Section 2. Paragraph (d) of subsection (1), paragraphs
11 (b), (c), and (e) of subsection (2), and paragraph (c) of
12 subsection (12) of section 738.1041, Florida Statutes, are
13 amended to read:

14 738.1041 Total return unitrust.--

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

16 (d) "Interested trustee" means an individual trustee
17 to whom the net income or principal of the trust can currently
18 be distributed or would be distributed if the trust were then
19 to terminate and be distributed, any trustee whom ~~who may be~~
20 ~~removed and replaced by~~ an interested distributee has the
21 power to remove and replace with a related or subordinate
22 party as defined in paragraph (c), or an individual trustee
23 whose legal obligation to support a beneficiary may be
24 satisfied by distributions of income and principal of the
25 trust.

26 (2) A trustee may, without court approval, convert an
27 income trust to a total return unitrust, reconvert a total
28 return unitrust to an income trust, or change the percentage
29 used to calculate the unitrust amount or the method used to
30 determine the fair market value of the trust if:

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

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

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

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

12 2. The trustee administers the trust such that:

13 a. The percentage used to calculate the unitrust
14 amount is 50 percent of the applicable federal rate as defined
15 in the Internal Revenue Code, 26 U.S.C. s. 7520, in effect for
16 the month the conversion under this section becomes effective
17 and for each January thereafter; however, if the percentage
18 calculated exceeds 5 percent, the unitrust percentage shall
19 never be greater than 5 percent and if the percentage
20 calculated is not less than 3 percent, the unitrust percentage
21 shall be 3 percent; and

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

27 (I) Any residential property or any tangible personal
28 property that, as of the first business day of the current
29 valuation year, one or more current beneficiaries of the trust
30 have or have had the right to occupy, or have or have had the
31 right to possess or control (other than in his or her capacity

1 as trustee of the trust), and instead the right of occupancy
2 or the right to possession and control shall be deemed to be
3 the unitrust amount with respect to such property; however,
4 the unitrust amount shall be adjusted to take into account
5 partial distributions from or receipt into the trust of such
6 property during the valuation year.

7 (II) Any asset specifically given to a beneficiary and
8 the return on investment on such property, which return on
9 investment shall be distributable to such beneficiary.

10 (III) Any asset while held in a testator's estate;

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

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

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

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

27 4. All persons acting as advisers or protectors of the
28 trust.

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30 Notice under this paragraph shall be served informally, in the
31 manner provided in the Florida Rules of Civil Procedure

1 relating to service of pleadings subsequent to the initial
2 pleading. Notice may be served on a legal representative or
3 natural guardian of a person without the filing of any
4 proceeding or approval of any court;

5 (e) No person receiving such notice objects, by
6 written instrument delivered to the trustee, to the proposed
7 action of the trustee or the determinations of the
8 disinterested person within 60 days after receipt of such
9 notice. An objection under this section may be executed by a
10 legal representative or natural guardian of a person without
11 the filing of any proceeding or approval of any court.

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

16 (c) One or more persons to whom the trustee could
17 distribute income have a power of withdrawal over the trust:

18 1. That is not subject to an ascertainable standard
19 under the Internal Revenue Code, 26 U.S.C. s. 2041 or s. 2514,
20 and exceeds in any calendar year the amount set forth in the
21 Internal Revenue Code, 26 U.S.C. s. 2041(b)(2) or s. 2514(e);
22 or

23 2. A power of withdrawal over the trust that can be
24 exercised to discharge a duty of support he or she possesses;

25 Section 3. Subsection (5) of section 738.202, Florida
26 Statutes, is amended to read:

27 738.202 Distribution to residuary and remainder
28 beneficiaries.--

29 (5) The value of trust assets shall be determined on
30 an asset-by-asset basis and shall be conclusive if reasonable
31 and determined in good faith. Determinations based on

1 appraisals performed within 2 years before or after the
2 valuation date shall be presumed reasonable. The value of
3 trust assets shall be conclusively presumed to be reasonable
4 and determined in good faith unless proven otherwise in a
5 proceeding commenced by or on behalf of a person interested in
6 the trust within the time provided in s. 737.307.

7 Section 4. Paragraph (d) of subsection (3) of section
8 738.401, Florida Statutes, is amended to read:

9 738.401 Character of receipts.--

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

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 realized within the entity ~~for federal~~
16 ~~income tax purposes.~~

17 Section 5. This act shall take effect upon becoming a
18 law and shall apply retroactively to January 1, 2003.

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