

By Senator Atwater

25-1097A-04

1                                   A bill to be entitled  
 2           An act relating to trusts and other agency  
 3           relationships; amending s. 711.501, F.S.;  
 4           including additional investment instruments  
 5           within the definition of the term "security  
 6           account"; amending s. 737.402, F.S.; revising  
 7           the powers conferred upon a trustee; amending  
 8           s. 737.403, F.S.; specifying circumstances in  
 9           which court authorization is not required for a  
 10          trustee to exercise his or her power when a  
 11          conflict of interest exists; amending s.  
 12          738.104, F.S.; revising the circumstances in  
 13          which a trustee is prohibited from making an  
 14          adjustment when such adjustment would benefit  
 15          the trustee; clarifying the application of law  
 16          pertaining to the trustee's power to adjust;  
 17          amending s. 738.1041, F.S.; providing  
 18          definitions governing certain trust  
 19          conversions; specifying consequences when a  
 20          court determines that a fiduciary has not acted  
 21          in good faith; amending s. 738.303, F.S.;  
 22          defining the term "undistributed income" for  
 23          purposes of a trust that is administered as a  
 24          unitrust; providing an effective date.

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

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 28           Section 1. Subsection (10) of section 711.501, Florida  
 29 Statutes, is amended to read:

30           711.501 Definitions.--In ss. 711.50-711.512, unless  
 31 the context otherwise requires, the term:

1 (10) "Security account" means:

2 (a) A reinvestment account associated with a security,  
3 a securities account with a broker, a cash balance in a  
4 brokerage account, cash, interest, earnings, or dividends  
5 earned or declared on a security in an account, a reinvestment  
6 account, or a brokerage account, whether or not credited to  
7 the account before the owner's death; ~~or~~

8 (b) An investment management, investment advisory,  
9 investment agency, custody, or other account with a bank or  
10 trust company, including the securities in the account, the  
11 cash balance in the account, cash equivalents, and interest,  
12 earnings, or dividends earned or declared on a security in the  
13 account, whether or not credited to the account before the  
14 owner's death; or

15 (c)~~(b)~~ A cash balance or other property held for or  
16 due to the owner of a security as a replacement for or product  
17 of an account security, whether or not credited to the account  
18 before the owner's death.

19 Section 2. Paragraphs (y) and (z) of subsection (2) of  
20 section 737.402, Florida Statutes, are amended to read:

21 737.402 Powers of trustees conferred by this part.--

22 (2) Unless otherwise provided in the trust instrument,  
23 a trustee has the power:

24 (y) To employ persons, including attorneys, auditors,  
25 investment advisers, or agents, even if they are the trustee  
26 or associated with the trustee, to advise or assist the  
27 trustee in the performance of his or her administrative duties  
28 and to pay compensation and costs incurred in connection with  
29 such employment from the assets of the trust; to act without  
30 independent investigation upon their recommendations; and,  
31 instead of acting personally, to employ one or more agents to

1 perform any act of administration, whether or not  
2 discretionary.

3 (z) To prosecute or defend actions, claims, or  
4 proceedings, including appeals, for the protection of trust  
5 assets and of the trustee in the performance of his or her  
6 duties; to employ attorneys and other agents to advise and  
7 assist the trustee in the exercise of those powers; and to pay  
8 compensation and costs incurred in connection with such  
9 employment from the assets of the trust.

10 Section 3. Subsection (2) of section 737.403, Florida  
11 Statutes, is amended to read:

12 737.403 Power of court to permit deviation or to  
13 approve transactions involving conflict of interest.--

14 (2) If the duty of the trustee and the trustee's  
15 individual interest or his or her interest as trustee of  
16 another trust conflict in the exercise of a trust power, the  
17 power may be exercised only by court authorization, ~~except as~~  
18 ~~provided in s. 737.402(2)(a), (e), (g), (s) or (y).~~ Under this  
19 section, personal profit or advantage to an affiliated or  
20 subsidiary company or association is personal profit to any  
21 corporate trustee. Court authorization is not required for any  
22 of the following:

23 (a) The exercise of any power described in s.  
24 737.402(2)(a), (e), (g), (s), or (y);

25 (b) The exercise of any power for which the trust  
26 instrument acknowledges the trustee's conflict of interest and  
27 expressly authorizes the exercise of that power  
28 notwithstanding conflict;

29 (c) The exercise of any power consented to in writing  
30 by a settlor of the trust while the settlor holds the right of  
31 revocation of the trust;

1           (d) The exercise of any power consented to in writing  
2 by each of the beneficiaries to whom the trustee is required  
3 to provide any annual or periodic accounting. Consent under  
4 this paragraph may be given by a person who represents the  
5 interest of the beneficiary under s. 731.303, or by the legal  
6 guardian of the beneficiary or, if none, by the natural  
7 guardian of the beneficiary; or

8           (e) Payment of costs or attorney's fees incurred in  
9 any trust proceeding from the assets of the trust unless an  
10 action has been filed or defense asserted against the trustee  
11 based upon a breach of trust. Court authorization is not  
12 required if the action on or defense is later withdrawn,  
13 dismissed, or resolved without a determination by the court  
14 that the trustee has committed a breach of trust.

15           Section 4. Subsection (3) of section 738.104, Florida  
16 Statutes, is amended, and subsection (11) is added to that  
17 section, to read:

18           738.104 Trustee's power to adjust.--

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

20           (a) That diminishes the income interest in a trust  
21 that requires all of the income to be paid at least annually  
22 to a spouse and for which an estate tax or gift tax marital  
23 deduction would be allowed, in whole or in part, if the  
24 trustee did not have the power to adjust;

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

28           (c) That changes the amount payable to a beneficiary  
29 as a fixed annuity or a fixed fraction of the value of the  
30 trust assets;

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

4 (e) If possessing or exercising the power to adjust  
5 causes an individual to be treated as the owner of all or part  
6 of the trust for income tax purposes and the individual would  
7 not be treated as the owner if the trustee did not possess the  
8 power to adjust;

9 (f) If possessing or exercising the power to adjust  
10 causes all or part of the trust assets to be included for  
11 estate tax purposes in the estate of an individual who has the  
12 power to remove a trustee or appoint a trustee, or both, and  
13 the assets would not be included in the estate of the  
14 individual if the trustee did not possess the power to adjust;

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

16 (h) If the trustee is not a beneficiary of the trust  
17 but the adjustment would benefit the trustee directly or  
18 indirectly, except that in the case of a trustee whose  
19 compensation for acting as trustee is based upon the value of  
20 trust assets, an adjustment that affects the value of the  
21 trust assets shall not be deemed to benefit the trustee.

22 (11) This section pertains to the administration of a  
23 trust and is available to any trust that is administered under  
24 state law.

25 Section 5. Subsections (1), (10), and (12) of section  
26 738.1041, Florida Statutes, are amended to read:

27 738.1041 Total return unitrust.--

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

29 (a) "Disinterested person" means a person who is not a  
30 "related or subordinate party" as defined in s. 672(c) of the  
31 United States Internal Revenue Code, 26 U.S.C. ss. 1 et seq.,

1 or any successor provision thereof, with respect to the person  
2 then acting as trustee of the trust and excludes the grantor  
3 and any interested trustee.

4 (b) "Income trust" means a trust, created by either an  
5 inter vivos or a testamentary instrument, which directs or  
6 permits the trustee to distribute the net income of the trust  
7 to one or more persons, either in fixed proportions or in  
8 amounts or proportions determined by the trustee.

9 Notwithstanding the foregoing, no trust that otherwise is an  
10 "income trust" shall qualify hereunder, if it may be subject  
11 to taxation under the Internal Revenue Code, 26 U.S.C. s. 2001  
12 or s. 2501, until the expiration of the period for filing the  
13 return therefor, including extensions.

14 (c) "Interested distributee" means a person to whom  
15 distributions of income or principal can currently be made who  
16 has the power to remove the existing trustee and designate as  
17 successor a person who may be a "related or subordinate  
18 party," as defined in the Internal Revenue Code, 26 U.S.C. s.  
19 672(c), with respect to such distributee.

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

29 (e) "Fair market value" means the fair market value of  
30 assets held by the trust as otherwise determined under this  
31 chapter, reduced by all known noncontingent liabilities except

1 for those liabilities that, upon payment, will represent  
2 expenses under s. 738.701 or s. 738.702.

3 (f) "Unitrust amount" means the amount determined by  
4 multiplying the fair market value of the assets as defined in  
5 paragraph (e) by the percentage calculated under paragraph  
6 (2)(b).

7 (10) Any trustee or disinterested person who in good  
8 faith takes or fails to take any action under this section  
9 shall not be liable to any person affected by such action or  
10 inaction, regardless of whether such person received written  
11 notice as provided in this section and regardless of whether  
12 such person was under a legal disability at the time of the  
13 delivery of such notice. Such person's exclusive remedy shall  
14 be to obtain, under subsection (11), an order of the court  
15 directing the trustee to convert an income trust to a total  
16 return unitrust, to reconvert from a total return unitrust to  
17 an income trust, or to change the percentage used to calculate  
18 the unitrust amount. If a court determines that the trustee or  
19 disinterested person has not acted in good faith in taking or  
20 failing to take any action under this section, the provisions  
21 of s. 738.105(3) shall apply.

22 (12) This section shall be construed as pertaining to  
23 the administration of a trust and shall be available to any  
24 trust that is administered ~~in this state~~ under Florida law  
25 unless:

26 (a) The governing instrument reflects an intention  
27 that the current beneficiary or beneficiaries are to receive  
28 an amount other than a reasonable current return from the  
29 trust;

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1 (b) The trust is a trust described in the Internal  
2 Revenue Code, 26 U.S.C. s. 170(f)(2)(B), s. 642(c)(5), s.  
3 664(d), s. 1361(d), s. 2702(a)(3), or s. 2702(b);

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

6 1. That is not subject to an ascertainable standard  
7 under the Internal Revenue Code, 26 U.S.C. s. 2041 or s. 2514,  
8 and exceeds in any calendar year the amount set forth in the  
9 Internal Revenue Code, 26 U.S.C. s. 2041(b)(2) or s. 2514(e);  
10 or

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

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

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

24 Section 6. Subsection (1) of section 738.303, Florida  
25 Statutes, is amended to read:

26 738.303 Apportionment when income interest ends.--

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



1 under the terms of the trust. In the case of a trust being  
2 administered as a unitrust under s. 738.1041, "undistributed  
3 income" means the prorated unitrust amount computed on a daily  
4 basis through the date on which the income interest ends.

5 Section 7. This act shall take effect upon becoming a  
6 law.

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SENATE SUMMARY

10 Revises various laws governing the administration of  
11 trusts and trust accounts. Revises the powers conferred  
12 upon a trustee. Specifies circumstances in which court  
13 authorization is not required for a trustee to exercise  
14 his or her power when a conflict of interest exists.  
15 Revises the circumstances in which a trustee may not make  
16 an adjustment when such adjustment would benefit him or  
17 her. Provides for consequences when a court determines  
18 that a fiduciary has not acted in good faith. Revises the  
19 definition of the term "undistributed income" when a  
20 trust is being administered as a unitrust. (See bill for  
21 details.)  
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