

CHAMBER ACTION

1 The Civil Justice Committee recommends the following:

2  
3 **Council/Committee Substitute**

4 Remove the entire bill and insert:

5 A bill to be entitled

6 An act relating to trusts and other agency relationships;  
7 amending s. 711.501, F.S.; including additional investment  
8 instruments within the definition of the term "security  
9 account"; creating s. 737.309, F.S.; providing procedures  
10 for the resignation of a trustee; providing that such  
11 resignation does not discharge or affect any liability of  
12 the resigning trustee; providing for notice of  
13 resignation; amending s. 737.402, F.S.; revising the  
14 powers conferred upon a trustee; amending s. 737.403,  
15 F.S.; specifying circumstances in which court  
16 authorization is not required for a trustee to exercise  
17 his or her power when a conflict of interest exists;  
18 amending s. 738.104, F.S.; removing a prohibition on a  
19 trustee's power to make certain adjustments; specifying a  
20 circumstance under which an adjustment shall not be deemed  
21 to benefit the trustee; providing application of section  
22 to administration of certain trusts; conforming cross  
23 references; amending s. 738.1041, F.S.; providing and

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24 | revising definitions; providing methods by which a trustee  
 25 | may make certain changes to trusts; removing requirements  
 26 | regarding certain minimum unitrust amounts; removing a  
 27 | spouse's right to compel reconversion of certain trusts;  
 28 | providing remedies for trustees or disinterested persons  
 29 | not acting in good faith; expanding scope of section to  
 30 | trusts administered either in this state or under Florida  
 31 | law; authorizing a grantor to create an express total  
 32 | return unitrust; requiring certain provisions to be  
 33 | included in an express total return unitrust; amending s.  
 34 | 738.303, F.S.; redefining the term "undistributed income";  
 35 | amending s. 738.401, F.S., relating to character of  
 36 | receipts; providing certain statements that a trustee may  
 37 | rely upon; providing special rules to apply to receipts by  
 38 | private trustees from certain entities; providing  
 39 | definitions; providing an effective date.

40

41 | Be It Enacted by the Legislature of the State of Florida:

42

43 | Section 1. Subsection (10) of section 711.501, Florida  
 44 | Statutes, is amended to read:

45 | 711.501 Definitions.--In ss. 711.50-711.512, unless the  
 46 | context otherwise requires, the term:

47 | (10) "Security account" means:

48 | (a) A reinvestment account associated with a security, a  
 49 | securities account with a broker, a cash balance in a brokerage  
 50 | account, cash, interest, earnings, or dividends earned or  
 51 | declared on a security in an account, a reinvestment account, or

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52 a brokerage account, whether or not credited to the account  
53 before the owner's death; ~~or~~

54 (b) An investment management account, investment advisory  
55 account, investment agency account, custody account, or any  
56 other type of account with a bank or trust company, including  
57 the securities in the account, the cash balance in the account,  
58 and cash equivalents, and any interest, earnings, or dividends  
59 earned or declared on a security in the account, whether or not  
60 credited to the account before the owner's death; or

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

65 Section 2. Section 737.309, Florida Statutes, is created  
66 to read:

67 737.309 Resignation of trustee.--

68 (1) A trustee may resign:

69 (a) Upon at least 30 days' written notice to the settlor,  
70 if living, all cotrustees, and all persons entitled to a trust  
71 accounting pursuant to s. 737.303, as qualified by s. 731.303;  
72 or

73 (b) With approval of the court. In approving a  
74 resignation, the court may issue orders and impose conditions  
75 reasonably necessary for the protection of the trust property.

76 (2) Any liability of a resigning trustee or of any  
77 sureties on the trustee's bond for acts or omissions of the  
78 trustee is not discharged or affected by the trustee's  
79 resignation.

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80        (3) If the resignation of a trustee would require the  
 81 vacancy to be filled by a successor trustee, a trustee that  
 82 resigns shall continue to serve until the successor assumes the  
 83 trusteeship. The resigning trustee shall deliver copies of all  
 84 notices and other records pertaining to the resignation to the  
 85 successor trustee or, if none, to a cotrustee.

86        (4) Notice of resignation shall be served in the manner  
 87 provided in the Florida Rules of Civil Procedure relating to  
 88 service of pleadings subsequent to the initial pleading. The  
 89 notice may be served on a legal representative or natural  
 90 guardian of a beneficiary without the filing of any proceeding  
 91 or approval of any court.

92        Section 3. Paragraphs (y) and (z) of subsection (2) of  
 93 section 737.402, Florida Statutes, are amended to read:

94        737.402 Powers of trustees conferred by this part.--

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

97        (y) To employ persons, including attorneys, auditors,  
 98 investment advisers, or agents, even if they are the trustee or  
 99 associated with the trustee, to advise or assist the trustee in  
 100 the performance of his or her administrative duties and to pay  
 101 compensation and costs incurred in connection with such  
 102 employment from the assets of the trust; to act without  
 103 independent investigation upon their recommendations; and,  
 104 instead of acting personally, to employ one or more agents to  
 105 perform any act of administration, whether or not discretionary.

106        (z)1. To prosecute or defend actions, claims, or  
 107 proceedings, including appeals, for the protection of trust

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108 assets and of the trustee in the performance of his or her  
109 duties.

110 2. To employ attorneys and other agents to advise and  
111 assist the trustee in the exercise of any of the trustee's  
112 powers and to pay compensation and costs incurred in connection  
113 with such employment from the assets of the trust.

114 Section 4. Subsection (2) of section 737.403, Florida  
115 Statutes, is amended to read:

116 737.403 Power of court to permit deviation or to approve  
117 transactions involving conflict of interest.--

118 (2) If the duty of the trustee and the trustee's  
119 individual interest or his or her interest as trustee of another  
120 trust conflict in the exercise of a trust power, the power may  
121 be exercised only by court authorization, ~~except as provided in~~  
122 ~~s. 737.402(2)(a), (e), (g), (s) and (y)~~. Under this section,  
123 personal profit or advantage to an affiliated or subsidiary  
124 company or association is personal profit to any corporate  
125 trustee. Court authorization is not required for any of the  
126 following:

127 (a) The exercise of any power described in s.  
128 737.402(2)(a), (e), (g), (s), or (y);

129 (b) The exercise of any power for which the trust  
130 instrument acknowledges the trustee's conflict of interest and  
131 expressly authorizes the exercise of that power notwithstanding  
132 the conflict;

133 (c) The exercise of any power consented to in writing by a  
134 settlor of the trust while the settlor holds the right of  
135 revocation of the trust;

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136        (d) The exercise of any power consented to in writing by  
 137 each of the beneficiaries to whom the trustee is required to  
 138 provide any annual or periodic accounting. Consent under this  
 139 paragraph may be given by a person who represents the interest  
 140 of the beneficiary under s. 731.303 or by the legal guardian of  
 141 the beneficiary or, if there is no legal guardian, by the  
 142 natural guardian of the beneficiary; or

143        (e) Payment of costs or attorney's fees incurred in any  
 144 trust proceeding from the assets of the trust unless an action  
 145 has been filed or defense asserted against the trustee based  
 146 upon a breach of trust. Court authorization is not required if  
 147 the action or defense is later withdrawn or dismissed by the  
 148 party that is alleging a breach of trust or resolved without a  
 149 determination by the court that the trustee has committed a  
 150 breach of trust.

151        Section 5. Subsections (3), (4), and (5) of section  
 152 738.104, Florida Statutes, are amended, and subsection (11) is  
 153 added to said section, to read:

154        738.104 Trustee's power to adjust.--

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

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

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

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164        ~~(b)(e)~~ That changes the amount payable to a beneficiary as  
 165 a fixed annuity or a fixed fraction of the value of the trust  
 166 assets;

167        ~~(c)(d)~~ From any amount that is permanently set aside for  
 168 charitable purposes under a will or the terms of a trust unless  
 169 both income and principal are so set aside;

170        ~~(d)(e)~~ If possessing or exercising the power to adjust  
 171 causes an individual to be treated as the owner of all or part  
 172 of the trust for income tax purposes and the individual would  
 173 not be treated as the owner if the trustee did not possess the  
 174 power to adjust;

175        ~~(e)(f)~~ If possessing or exercising the power to adjust  
 176 causes all or part of the trust assets to be included for estate  
 177 tax purposes in the estate of an individual who has the power to  
 178 remove a trustee or appoint a trustee, or both, and the assets  
 179 would not be included in the estate of the individual if the  
 180 trustee did not possess the power to adjust;

181        ~~(f)(g)~~ If the trustee is a beneficiary of the trust; or

182        ~~(g)(h)~~ If the trustee is not a beneficiary of the trust  
 183 but the adjustment would benefit the trustee directly or  
 184 indirectly, except that in the case of a trustee whose  
 185 compensation for acting as trustee is based upon the value of  
 186 trust assets, an adjustment that affects the value of trust  
 187 assets shall not be deemed to benefit the trustee.

188        (4) If paragraph (3)~~(d)(e)~~, paragraph (3)~~(e)(f)~~, paragraph  
 189 (3)~~(f)(g)~~, or paragraph (3)~~(g)(h)~~ applies to a trustee and there  
 190 is more than one trustee, a cotrustee to whom the provision does  
 191 not apply may make the adjustment unless the exercise of the

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192 power by the remaining trustee is not permitted by the terms of  
193 the trust.

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

197 (b) A trustee may release the entire power to adjust  
198 conferred by subsection (1) or may release only the power to  
199 adjust from income to principal or the power to adjust from  
200 principal to income if the trustee is uncertain about whether  
201 possessing or exercising the power will cause a result described  
202 in paragraphs (3)(a)-~~(e)~~~~(f)~~ or paragraph (3)~~(g)~~~~(h)~~ or if the  
203 trustee determines that possessing or exercising the power will  
204 or may deprive the trust of a tax benefit or impose a tax burden  
205 not described in subsection (3).

206 (c) A release under this subsection may be permanent or  
207 for a specified period, including a period measured by the life  
208 of an individual. Notwithstanding anything contrary to this  
209 subsection, a release of the power to adjust pursuant to  
210 paragraph (a) shall remain effective only for as long as the  
211 trust is administered as a unitrust pursuant to s. 738.1041.

212 (11) This section shall be construed as pertaining to the  
213 administration of a trust and is applicable to any trust that is  
214 administered either in this state or under Florida law.

215 Section 6. Section 738.1041, Florida Statutes, is amended  
216 to read:

217 738.1041 Total return unitrust.--

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



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219 (a) "Disinterested person" means a person who is not a  
 220 "related or subordinate party" as defined in s. 672(c) of the  
 221 United States Internal Revenue Code, 26 U.S.C. ss. 1 et seq., or  
 222 any successor provision thereof, with respect to the person then  
 223 acting as trustee of the trust and excludes the grantor and any  
 224 interested trustee.

225 (b) "Fair market value" means the fair market value of  
 226 assets held by the trust as otherwise determined under this  
 227 chapter, reduced by all known noncontingent liabilities.

228 (c)(b) "Income trust" means a trust, created by either an  
 229 inter vivos or a testamentary instrument, which directs or  
 230 permits the trustee to distribute the net income of the trust to  
 231 one or more persons, either in fixed proportions or in amounts  
 232 or proportions determined by the trustee and regardless of  
 233 whether the trust directs or permits the trustee to distribute  
 234 the principal of the trust to one or more such persons.

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

240 (d)(e) "Interested distributee" means a person to whom  
 241 distributions of income or principal can currently be made who  
 242 has the power to remove the existing trustee and designate as  
 243 successor a person who may be a "related or subordinate party,"  
 244 as defined in the Internal Revenue Code, 26 U.S.C. s. 672(c),  
 245 with respect to such distributee.

246        (e)~~(d)~~ "Interested trustee" means an individual trustee to  
 247 whom the net income or principal of the trust can currently be  
 248 distributed or would be distributed if the trust were then to  
 249 terminate and be distributed, any trustee whom an interested  
 250 distributee has the power to remove and replace with a related  
 251 or subordinate party as defined in paragraph (d) ~~(e)~~, or an  
 252 individual trustee whose legal obligation to support a  
 253 beneficiary may be satisfied by distributions of income and  
 254 principal of the trust.

255        (f) "Unitrust amount" means the amount determined by  
 256 multiplying the fair market value of the assets as defined in  
 257 paragraph (b) by the percentage calculated under paragraph  
 258 (2)(b).

259        (2) A trustee may, without court approval, convert an  
 260 income trust to a total return unitrust, reconvert a total  
 261 return unitrust to an income trust, or change the percentage  
 262 used to calculate the unitrust amount or the method used to  
 263 determine the fair market value of the trust if:

264        (a) The trustee adopts a written statement regarding trust  
 265 distributions that provides:

266            1. In the case of a trust being administered as an income  
 267 trust, that future distributions from the trust will be unitrust  
 268 amounts rather than net income, and indicates the manner in  
 269 which the unitrust amount will be calculated and the method in  
 270 which the fair market value of the trust will be determined.

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

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

275 b. The percentage used to calculate the unitrust amount or  
276 the method used to determine the fair market value of the trust  
277 will be changed, and indicates the manner in which the new  
278 unitrust amount will be calculated and the method in which the  
279 new fair market value of the trust will be determined;

280 (b) The trustee determines the terms of the unitrust under  
281 one of the following methods:

282 1. A disinterested ~~The trustee determines~~, or if there is  
283 no trustee other than an interested trustee, the interested  
284 trustee appoints a disinterested person who, in its sole  
285 discretion but acting in a fiduciary capacity, determines for  
286 the interested trustee:

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

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

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

294 2. The interested trustee or disinterested trustee  
295 administers the trust such that:

296 a. The percentage used to calculate the unitrust amount is  
297 50 percent of the applicable federal rate as defined in the  
298 Internal Revenue Code, 26 U.S.C. s. 7520, in effect for the  
299 month the conversion under this section becomes effective and  
300 for each January thereafter; however, if the percentage

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301 | calculated exceeds 5 percent, the unitrust percentage shall be 5  
302 | percent and if the percentage calculated is less than 3 percent,  
303 | the unitrust percentage shall be 3 percent; and

304 |       b. The fair market value of the trust shall be determined  
305 | at least annually on an asset-by-asset basis, reasonably and in  
306 | good faith, in accordance with the provisions of s. 738.202(5),  
307 | except the following property shall not be included in  
308 | determining the value of the trust:

309 |       (I) Any residential property or any tangible personal  
310 | property that, as of the first business day of the current  
311 | valuation year, one or more current beneficiaries of the trust  
312 | have or have had the right to occupy, or have or have had the  
313 | right to possess or control (other than in his or her capacity  
314 | as trustee of the trust), and instead the right of occupancy or  
315 | the right to possession and control shall be deemed to be the  
316 | unitrust amount with respect to such property; however, the  
317 | unitrust amount shall be adjusted to take into account partial  
318 | distributions from or receipt into the trust of such property  
319 | during the valuation year.

320 |       (II) Any asset specifically given to a beneficiary and the  
321 | return on investment on such property, which return on  
322 | investment shall be distributable to such beneficiary.

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

324 |       (c) The trustee sends written notice of its intention to  
325 | take such action, along with copies of such written statement  
326 | and this section, and, if applicable, the determinations of  
327 | either the trustee or the disinterested person to:

328 |       1. The grantor of the trust, if living.

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

331           3. All living persons who would receive distributions of  
332 principal of the trust if the trust were to terminate at the  
333 time of the giving of such notice (without regard to the  
334 exercise of any power of appointment) or, if the trust does not  
335 provide for its termination, all living persons who would  
336 receive or be eligible to receive distributions of income or  
337 principal of the trust if the persons identified in subparagraph  
338 2. were deceased.

339           4. All persons acting as advisers or protectors of the  
340 trust.

341  
342 Notice under this paragraph shall be served informally, in the  
343 manner provided in the Florida Rules of Civil Procedure relating  
344 to service of pleadings subsequent to the initial pleading.  
345 Notice may be served on a legal representative or natural  
346 guardian of a person without the filing of any proceeding or  
347 approval of any court;

348  
349           (d) At least one person receiving notice under each of  
350 subparagraphs (c)2. and 3. is legally competent; and

351           (e) No person receiving such notice objects, by written  
352 instrument delivered to the trustee, to the proposed action of  
353 the trustee or the determinations of the disinterested person  
354 within 60 days after service ~~receipt~~ of such notice. An  
355 objection under this section may be executed by a legal

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356 representative or natural guardian of a person without the  
357 filing of any proceeding or approval of any court.

358 (3) If a trustee desires to convert an income trust to a  
359 total return unitrust, reconvert a total return unitrust to an  
360 income trust, or change the percentage used to calculate the  
361 unitrust amount or the method used to determine a fair market  
362 value of the trust but does not have the ability to or elects  
363 not to do it under subsection (2), the trustee may petition the  
364 circuit court for such order as the trustee deems appropriate.  
365 In that event, the court, in its own discretion or on the  
366 petition of such trustee or any person having an income or  
367 remainder interest in the trust, may appoint a disinterested  
368 person who, acting in a fiduciary capacity, shall present such  
369 information to the court as shall be necessary for the court to  
370 make a determination hereunder.

371 (4) All determinations made pursuant to sub-subparagraph  
372 (2)(b)2.b. shall be conclusive if reasonable and made in good  
373 faith. Such determination shall be conclusively presumed to have  
374 been made reasonably and in good faith unless proven otherwise  
375 in a proceeding commenced by or on behalf of a person interested  
376 in the trust within the time provided in s. 737.307. The burden  
377 will be on the objecting interested party to prove that the  
378 determinations were not made reasonably and in good faith.

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

382 ~~(a) A trust for which a marital deduction has been taken~~  
383 ~~for federal tax purposes under the Internal Revenue Code, 26~~

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384 ~~U.S.C. s. 2056 or s. 2523, during the lifetime of the spouse for~~  
 385 ~~whom the trust was created; or~~

386 ~~(b) A trust to which the generation-skipping transfer tax~~  
 387 ~~due under the Internal Revenue Code, 26 U.S.C. s. 2601 does not~~  
 388 ~~apply by reason of any effective date or transition rule.~~

389  
 390 ~~Paragraph (a) will not apply to any trust to the extent that the~~  
 391 ~~use of a total return unitrust is recognized for federal tax~~  
 392 ~~purposes under the Internal Revenue Code, 26 U.S.C. s. 2056 or~~  
 393 ~~s. 2523. Paragraph (b) will not apply to any trust to the extent~~  
 394 ~~that the use of a total return unitrust is recognized for~~  
 395 ~~federal tax purposes under the Internal Revenue Code, 26 U.S.C.~~  
 396 ~~s. 2601.~~

397 (5)~~(6)~~ Following the conversion of an income trust to a  
 398 total return unitrust, the trustee:

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

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

404 1. Net short-term capital gain described in the Internal  
 405 Revenue Code, 26 U.S.C. s. 1222(5), for such year, or portion  
 406 thereof, but only to the extent that the amount so allocated  
 407 together with all other amounts allocated to trust income, as  
 408 determined under the provisions of this chapter without regard  
 409 to this section and s. 738.104, for such year, or portion  
 410 thereof, does not exceed the unitrust amount for such year, or  
 411 portion thereof.

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412           2. Net long-term capital gain described in the Internal  
413 Revenue Code, 26 U.S.C. s. 1222(7), for such year, or portion  
414 thereof, but only to the extent that the amount so allocated  
415 together with all other amounts, including amounts described in  
416 subparagraph 1., allocated to trust income for such year, or  
417 portion thereof, does not exceed the unitrust amount for such  
418 year, or portion thereof.

419           (6)~~(7)~~ In administering a total return unitrust, the  
420 trustee may, in its sole discretion but subject to the  
421 provisions of the governing instrument, determine:

422           (a) The effective date of the conversion.

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

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

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

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

432           (7)~~(8)~~ Conversion to a total return unitrust under the  
433 provisions of this section shall not affect any other provision  
434 of the governing instrument, if any, regarding distributions of  
435 principal.

436           ~~(9) In the case of a trust for which a marital deduction~~  
437 ~~has been taken for federal tax purposes under the Internal~~  
438 ~~Revenue Code, 26 U.S.C. s. 2056 or s. 2523, the spouse otherwise~~  
439 ~~entitled to receive the net income of the trust shall have the~~



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440 ~~right, by written instrument delivered to the trustee, to compel~~  
441 ~~the reconversion during his or her lifetime of the trust from a~~  
442 ~~total return unitrust to an income trust, notwithstanding~~  
443 ~~anything in this section to the contrary, unless the use of a~~  
444 ~~total return unitrust is recognized for federal tax purposes~~  
445 ~~under the Internal Revenue Code, 26 U.S.C. s. 2056 or s. 2523.~~

446 (8)~~(10)~~ Any trustee or disinterested person who in good  
447 faith takes or fails to take any action under this section shall  
448 not be liable to any person affected by such action or inaction,  
449 regardless of whether such person received written notice as  
450 provided in this section and regardless of whether such person  
451 was under a legal disability at the time of the delivery of such  
452 notice. Such person's exclusive remedy shall be to obtain, under  
453 subsection (9) ~~(11)~~, an order of the court directing the trustee  
454 to convert an income trust to a total return unitrust, to  
455 reconvert from a total return unitrust to an income trust, or to  
456 change the percentage used to calculate the unitrust amount. If  
457 a court determines that the trustee or disinterested person has  
458 not acted in good faith in taking or failing to take any action  
459 under this section, the provisions of s. 738.105(3) apply.

460 (9)~~(11)~~ If a majority in interest of either the income or  
461 remainder beneficiaries of an income trust has delivered to the  
462 trustee a written objection to the amount of the income  
463 distributions of the trust, and, if the trustee has failed to  
464 resolve the objection to the satisfaction of the objecting  
465 beneficiaries within 6 months from the receipt of such written  
466 objection, then the objecting beneficiaries may petition the  
467 court in accordance with subsection (3).

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468        (10)~~(12)~~ This section shall be construed as pertaining to  
 469 the administration of a trust and is applicable ~~shall be~~  
 470 ~~available~~ to any trust that is administered either in this state  
 471 or under Florida law unless:

472            (a) The governing instrument reflects an intention that  
 473 the current beneficiary or beneficiaries are to receive an  
 474 amount other than a reasonable current return from the trust;

475            (b) The trust is a trust described in the Internal Revenue  
 476 Code, 26 U.S.C. s. 170(f)(2)(B), s. 642(c)(5), s. 664(d), ~~s.~~  
 477 ~~1361(d)~~, s. 2702(a)(3), or s. 2702(b);

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

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

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

486            (d) The governing instrument expressly prohibits use of  
 487 this section by specific reference to the section. A provision  
 488 in the governing instrument that, "The provisions of section  
 489 738.1041, Florida Statutes, as amended, or any corresponding  
 490 provision of future law, shall not be used in the administration  
 491 of this trust," or similar words reflecting such intent shall be  
 492 sufficient to preclude the use of this section; or

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

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495       (11) The grantor of a trust may create an express total  
 496 return unitrust which will become effective as provided in the  
 497 trust document without requiring a conversion under this  
 498 section. An express total return unitrust created by the grantor  
 499 of the trust shall be treated as a unitrust under this section  
 500 only if the terms of the trust document contain all of the  
 501 following provisions:

502       (a) That distributions from the trust will be unitrust  
 503 amounts and the manner in which the unitrust amount will be  
 504 calculated and the method in which the fair market value of the  
 505 trust will be determined.

506       (b) The percentage to be used to calculate the unitrust  
 507 amount, provided the percentage used is not greater than 5  
 508 percent nor less than 3 percent.

509       (c) The method to be used in determining the fair market  
 510 value of the trust.

511       (d) Which assets, if any, are to be excluded in  
 512 determining the unitrust amount.

513       Section 7. Subsection (1) of section 738.303, Florida  
 514 Statutes, is amended to read:

515       738.303 Apportionment when income interest ends.--

516       (1) For purposes of this section, "undistributed income"  
 517 means net income received on or before the date on which an  
 518 income interest ends. The term does not include an item of  
 519 income or expense that is due or accrued or net income that has  
 520 been added or is required to be added to principal under the  
 521 terms of the trust. In the case of a trust being administered as  
 522 a unitrust under s. 738.1041, the term "undistributed income"

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523 | means the prorated unitrust amount computed on a daily basis  
 524 | through the date on which the income interest ends.

525 | Section 8. Subsection (3) of section 738.401, Florida  
 526 | Statutes, is amended, subsection (7) is renumbered as subsection  
 527 | (8) and amended, and a new subsection (7) is added to said  
 528 | section, to read:

529 | 738.401 Character of receipts.--

530 | (3) Except as otherwise provided in this section, a  
 531 | trustee shall allocate the following receipts from an entity to  
 532 | principal:

533 | (a) Property other than money.

534 | (b) Money received in one distribution or a series of  
 535 | related distributions in exchange for part or all of a trust's  
 536 | interest in the entity.

537 | (c) Money received in total or partial liquidation of the  
 538 | entity.

539 | (d) Money received from an entity that is a regulated  
 540 | investment company or a real estate investment trust if the  
 541 | money distributed represents short-term or long-term capital  
 542 | gain realized within the entity.

543 | (7) The following special rules shall apply to moneys or  
 544 | property received by a private trustee from entities described  
 545 | in this subsection:

546 | (a) Moneys or property received from a targeted entity  
 547 | that is not an investment entity which do not exceed the trust's  
 548 | pro rata share of the undistributed cumulative net income of the  
 549 | targeted entity during the time an ownership interest in the  
 550 | targeted entity was held by the trust shall be allocated to

551 income. The balance of moneys or property received from a  
 552 targeted entity shall be allocated to principal.

553 (b) If trust assets include any interest in an investment  
 554 entity, the designated amount of moneys or property received  
 555 from the investment entity shall be treated by the trustee in  
 556 the same manner as if the trustee had directly held the trust's  
 557 pro rata share of the assets of the investment entity  
 558 attributable to the distribution of such designated amount.  
 559 Thereafter, distributions shall be treated as principal.

560 (c) For purposes of this subsection, the following  
 561 definitions shall apply:

562 1. "Cumulative net income" means the targeted entity's net  
 563 income as determined using the method of accounting regularly  
 564 used by the targeted entity in preparing its financial  
 565 statements, or if no financial statements are prepared, the net  
 566 book income computed for federal income tax purposes, for every  
 567 year an ownership interest in the entity is held by the trust.  
 568 The trust's pro rata share shall be the cumulative net income  
 569 multiplied by the percentage ownership of the trust.

570 2. "Designated amount" means moneys or property received  
 571 from an investment entity during any year that is equal to the  
 572 amount of the distribution that does not exceed the greater of:

573 a. The amount of income of the investment entity for the  
 574 current year, as reported to the trustee by the investment  
 575 entity for federal income tax purposes; or

576 b. The amount of income of the investment entity for the  
 577 current year and the prior 2 years, as reported to the trustee  
 578 by the investment entity for federal income tax purposes, less

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579 any distributions of moneys or property made by the investment  
580 entity to the trustee during the prior 2 years.

581 3. "Investment entity" means a targeted entity that  
582 normally derives 50 percent or more of its annual cumulative net  
583 income from interest, dividends, annuities, royalties, rental  
584 activity, or other passive investments, including income from  
585 the sale or exchange of such passive investments.

586 4. "Private trustee" means a trustee who is an individual,  
587 but only if the trustee is unable to utilize the power to adjust  
588 between income and principal with respect to receipts from  
589 entities described in this subsection pursuant to s. 738.104. A  
590 bank, trust company, or other commercial trustee shall not be  
591 considered to be a private trustee.

592 5. "Targeted entity" means any entity that is treated as a  
593 partnership, subchapter S corporation, or disregarded entity  
594 pursuant to the Internal Revenue Code of 1986, as amended, other  
595 than an entity described in s. 738.403.

596 6. "Undistributed cumulative net income" means the trust's  
597 pro rata share of cumulative net income, less all prior  
598 distributions from the targeted entity to the trust that have  
599 been allocated to income.

600 (d) This subsection shall not be construed to modify or  
601 change any of the provisions of ss. 738.705 and 738.706 relating  
602 to income taxes.

603 (8)(7) A trustee may rely upon a statement made by an  
604 entity about the source or character of a distribution, about  
605 the amount of profits of a targeted entity, or about the nature  
606 and value of assets of an investment entity if the statement is

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607 | made at or near the time of distribution by the entity's board  
608 | of directors or other person or group of persons authorized to  
609 | exercise powers to pay money or transfer property comparable to  
610 | those of a corporation's board of directors.

611 |       Section 9. This act shall take effect July 1, 2005.