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HB 897, Engrossed 1

2005 Legislature

1 A bill to be entitled
2 An act relating to trusts and other agency relationships;
3 amending s. 711.501, F.S.; including additional investment
4 instruments within the definition of the term "security
5 account"; creating s. 737.309, F.S.; providing procedures
6 for the resignation of a trustee; providing that such
7 resignation does not discharge or affect any liability of
8 the resigning trustee; providing for notice of
9 resignation; amending s. 737.402, F.S.; revising the
10 powers conferred upon a trustee; amending s. 737.403,
11 F.S.; specifying circumstances in which court
12 authorization is not required for a trustee to exercise
13 his or her power when a conflict of interest exists;
14 amending s. 738.104, F.S.; removing a prohibition on a
15 trustee's power to make certain adjustments; specifying a
16 circumstance under which an adjustment shall not be deemed
17 to benefit the trustee; providing application of section
18 to administration of certain trusts; conforming cross
19 references; amending s. 738.1041, F.S.; providing and
20 revising definitions; providing methods by which a trustee
21 may make certain changes to trusts; removing requirements
22 regarding certain minimum unitrust amounts; removing a
23 spouse's right to compel reconversion of certain trusts;
24 providing remedies for trustees or disinterested persons
25 not acting in good faith; expanding scope of section to
26 trusts administered either in this state or under Florida
27 law; authorizing a grantor to create an express total
28 return unitrust; requiring certain provisions to be

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CODING: Words ~~stricken~~ are deletions; words underlined are additions.

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29 included in an express total return unitrust; amending s.
 30 738.303, F.S.; redefining the term "undistributed income";
 31 amending s. 738.401, F.S., relating to character of
 32 receipts; providing certain statements that a trustee may
 33 rely upon; providing special rules to apply to receipts by
 34 private trustees from certain entities; providing
 35 definitions; providing an effective date.

36

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

38

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

41 711.501 Definitions.--In ss. 711.50-711.512, unless the
 42 context otherwise requires, the term:

43 (10) "Security account" means:

44 (a) A reinvestment account associated with a security, a
 45 securities account with a broker, a cash balance in a brokerage
 46 account, cash, interest, earnings, or dividends earned or
 47 declared on a security in an account, a reinvestment account, or
 48 a brokerage account, whether or not credited to the account
 49 before the owner's death; ~~or~~

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

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57 | ~~(c)(b)~~ A cash balance or other property held for or due to
58 | the owner of a security as a replacement for or product of an
59 | account security, whether or not credited to the account before
60 | the owner's death.

61 | Section 2. Section 737.309, Florida Statutes, is created
62 | to read:

63 | 737.309 Resignation of trustee.--

64 | (1) A trustee may resign:

65 | (a) Upon at least 30 days' written notice to the settlor,
66 | if living, all cotrustees, and all persons entitled to a trust
67 | accounting pursuant to s. 737.303, as qualified by s. 731.303;
68 | or

69 | (b) With approval of the court. In approving a
70 | resignation, the court may issue orders and impose conditions
71 | reasonably necessary for the protection of the trust property.

72 | (2) Any liability of a resigning trustee or of any
73 | sureties on the trustee's bond for acts or omissions of the
74 | trustee is not discharged or affected by the trustee's
75 | resignation.

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

82 | (4) Notice of resignation shall be served in the manner
83 | provided in the Florida Rules of Civil Procedure relating to
84 | service of pleadings subsequent to the initial pleading. The

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85 notice may be served on a legal representative or natural
 86 guardian of a beneficiary without the filing of any proceeding
 87 or approval of any court.

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

90 737.402 Powers of trustees conferred by this part.--

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

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

102 (z)1. To prosecute or defend actions, claims, or
 103 proceedings, including appeals, for the protection of trust
 104 assets and of the trustee in the performance of his or her
 105 duties.

106 2. To employ attorneys and other agents to advise and
 107 assist the trustee in the exercise of any of the trustee's
 108 powers and to pay compensation and costs incurred in connection
 109 with such employment from the assets of the trust.

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

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112 737.403 Power of court to permit deviation or to approve
 113 transactions involving conflict of interest.--

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

123 (a) The exercise of any power described in s.
 124 737.402(2)(a), (e), (g), (s), or (y);

125 (b) The exercise of any power for which the trust
 126 instrument acknowledges the trustee's conflict of interest and
 127 expressly authorizes the exercise of that power notwithstanding
 128 the conflict;

129 (c) The exercise of any power consented to in writing by a
 130 settlor of the trust while the settlor holds the right of
 131 revocation of the trust;

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

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

147 Section 5. Subsections (3), (4), and (5) of section
 148 738.104, Florida Statutes, are amended, and subsection (11) is
 149 added to said section, to read:

150 738.104 Trustee's power to adjust.--

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

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

157 (a)-(b) That reduces the actuarial value of the income
 158 interest in a trust to which a person transfers property with
 159 the intent to qualify for a gift tax exclusion;

160 (b)-(e) That changes the amount payable to a beneficiary as
 161 a fixed annuity or a fixed fraction of the value of the trust
 162 assets;

163 (c)-(d) From any amount that is permanently set aside for
 164 charitable purposes under a will or the terms of a trust unless
 165 both income and principal are so set aside;

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

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

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

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

184 (4) If paragraph (3) ~~(d)-(e)~~, paragraph (3) ~~(e)-(f)~~, paragraph
 185 (3) ~~(f)-(g)~~, or paragraph (3) ~~(g)-(h)~~ applies to a trustee and there
 186 is more than one trustee, a cotrustee to whom the provision does
 187 not apply may make the adjustment unless the exercise of the
 188 power by the remaining trustee is not permitted by the terms of
 189 the trust.

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

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

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

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

211 Section 6. Section 738.1041, Florida Statutes, is amended
 212 to read:

213 738.1041 Total return unitrust.--

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

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

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

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

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

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

242 (e)~~(d)~~ "Interested trustee" means an individual trustee to
243 whom the net income or principal of the trust can currently be
244 distributed or would be distributed if the trust were then to
245 terminate and be distributed, any trustee whom an interested
246 distributee has the power to remove and replace with a related
247 or subordinate party as defined in paragraph (d) ~~(e)~~, or an
248 individual trustee whose legal obligation to support a

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249 beneficiary may be satisfied by distributions of income and
 250 principal of the trust.

251 (f) "Unitrust amount" means the amount determined by
 252 multiplying the fair market value of the assets as defined in
 253 paragraph (b) by the percentage calculated under paragraph
 254 (2) (b).

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

260 (a) The trustee adopts a written statement regarding trust
 261 distributions that provides:

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

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

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

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

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276 (b) The trustee determines the terms of the unitrust under
 277 one of the following methods:

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

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

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

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

290 2. The interested trustee or disinterested trustee
 291 administers the trust such that:

292 a. The percentage used to calculate the unitrust amount is
 293 50 percent of the applicable federal rate as defined in the
 294 Internal Revenue Code, 26 U.S.C. s. 7520, in effect for the
 295 month the conversion under this section becomes effective and
 296 for each January thereafter; however, if the percentage
 297 calculated exceeds 5 percent, the unitrust percentage shall be 5
 298 percent and if the percentage calculated is less than 3 percent,
 299 the unitrust percentage shall be 3 percent; and

300 b. The fair market value of the trust shall be determined
 301 at least annually on an asset-by-asset basis, reasonably and in
 302 good faith, in accordance with the provisions of s. 738.202(5),

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303 | except the following property shall not be included in
 304 | determining the value of the trust:

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

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

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

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

- 324 | 1. The grantor of the trust, if living.
- 325 | 2. All living persons who are currently receiving or
 326 | eligible to receive distributions of income of the trust.
- 327 | 3. All living persons who would receive distributions of
 328 | principal of the trust if the trust were to terminate at the
 329 | time of the giving of such notice (without regard to the
 330 | exercise of any power of appointment) or, if the trust does not

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331 provide for its termination, all living persons who would
332 receive or be eligible to receive distributions of income or
333 principal of the trust if the persons identified in subparagraph
334 2. were deceased.

335 4. All persons acting as advisers or protectors of the
336 trust.

337

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

344

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

347 (e) No person receiving such notice objects, by written
348 instrument delivered to the trustee, to the proposed action of
349 the trustee or the determinations of the disinterested person
350 within 60 days after service ~~receipt~~ of such notice. An
351 objection under this section may be executed by a legal
352 representative or natural guardian of a person without the
353 filing of any proceeding or approval of any court.

354 (3) If a trustee desires to convert an income trust to a
355 total return unitrust, reconvert a total return unitrust to an
356 income trust, or change the percentage used to calculate the
357 unitrust amount or the method used to determine a fair market
358 value of the trust but does not have the ability to or elects

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359 | not to do it under subsection (2), the trustee may petition the
 360 | circuit court for such order as the trustee deems appropriate.
 361 | In that event, the court, in its own discretion or on the
 362 | petition of such trustee or any person having an income or
 363 | remainder interest in the trust, may appoint a disinterested
 364 | person who, acting in a fiduciary capacity, shall present such
 365 | information to the court as shall be necessary for the court to
 366 | make a determination hereunder.

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

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

378 | ~~(a) A trust for which a marital deduction has been taken~~
 379 | ~~for federal tax purposes under the Internal Revenue Code, 26~~
 380 | ~~U.S.C. s. 2056 or s. 2523, during the lifetime of the spouse for~~
 381 | ~~whom the trust was created; or~~

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

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

393 (5)~~(6)~~ Following the conversion of an income trust to a
 394 total return unitrust, the trustee:

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

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

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

408 2. Net long-term capital gain described in the Internal
 409 Revenue Code, 26 U.S.C. s. 1222(7), for such year, or portion
 410 thereof, but only to the extent that the amount so allocated
 411 together with all other amounts, including amounts described in
 412 subparagraph 1., allocated to trust income for such year, or

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413 | portion thereof, does not exceed the unitrust amount for such
 414 | year, or portion thereof.

415 | (6)~~(7)~~ In administering a total return unitrust, the
 416 | trustee may, in its sole discretion but subject to the
 417 | provisions of the governing instrument, determine:

418 | (a) The effective date of the conversion.

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

422 | (c) Whether distributions are to be made in cash or in
 423 | kind or partly in cash and partly in kind.

424 | (d) If the trust is reconverted to an income trust, the
 425 | effective date of such reconversion.

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

428 | (7)~~(8)~~ Conversion to a total return unitrust under the
 429 | provisions of this section shall not affect any other provision
 430 | of the governing instrument, if any, regarding distributions of
 431 | principal.

432 | ~~(9) In the case of a trust for which a marital deduction~~
 433 | ~~has been taken for federal tax purposes under the Internal~~
 434 | ~~Revenue Code, 26 U.S.C. s. 2056 or s. 2523, the spouse otherwise~~
 435 | ~~entitled to receive the net income of the trust shall have the~~
 436 | ~~right, by written instrument delivered to the trustee, to compel~~
 437 | ~~the reconversion during his or her lifetime of the trust from a~~
 438 | ~~total return unitrust to an income trust, notwithstanding~~
 439 | ~~anything in this section to the contrary, unless the use of a~~

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440 ~~total return unitrust is recognized for federal tax purposes~~
441 ~~under the Internal Revenue Code, 26 U.S.C. s. 2056 or s. 2523.~~

442 (8)~~(10)~~ Any trustee or disinterested person who in good
443 faith takes or fails to take any action under this section shall
444 not be liable to any person affected by such action or inaction,
445 regardless of whether such person received written notice as
446 provided in this section and regardless of whether such person
447 was under a legal disability at the time of the delivery of such
448 notice. Such person's exclusive remedy shall be to obtain, under
449 subsection (9)~~(11)~~, an order of the court directing the trustee
450 to convert an income trust to a total return unitrust, to
451 reconvert from a total return unitrust to an income trust, or to
452 change the percentage used to calculate the unitrust amount. If
453 a court determines that the trustee or disinterested person has
454 not acted in good faith in taking or failing to take any action
455 under this section, the provisions of s. 738.105(3) apply.

456 (9)~~(11)~~ If a majority in interest of either the income or
457 remainder beneficiaries of an income trust has delivered to the
458 trustee a written objection to the amount of the income
459 distributions of the trust, and, if the trustee has failed to
460 resolve the objection to the satisfaction of the objecting
461 beneficiaries within 6 months from the receipt of such written
462 objection, then the objecting beneficiaries may petition the
463 court in accordance with subsection (3).

464 (10)~~(12)~~ This section shall be construed as pertaining to
465 the administration of a trust and is applicable ~~shall be~~
466 ~~available~~ to any trust that is administered either in this state
467 or under Florida law unless:

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

471 (b) The trust is a trust described in the Internal Revenue
 472 Code, 26 U.S.C. s. 170(f)(2)(B), s. 642(c)(5), s. 664(d), ~~s.~~
 473 ~~1361(d)~~, s. 2702(a)(3), or s. 2702(b);

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

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

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

482 (d) The governing instrument expressly prohibits use of
 483 this section by specific reference to the section. A provision
 484 in the governing instrument that, "The provisions of section
 485 738.1041, Florida Statutes, as amended, or any corresponding
 486 provision of future law, shall not be used in the administration
 487 of this trust," or similar words reflecting such intent shall be
 488 sufficient to preclude the use of this section; or

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

491 (11) The grantor of a trust may create an express total
 492 return unitrust which will become effective as provided in the
 493 trust document without requiring a conversion under this
 494 section. An express total return unitrust created by the grantor
 495 of the trust shall be treated as a unitrust under this section

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496 only if the terms of the trust document contain all of the
 497 following provisions:

498 (a) That distributions from the trust will be unitrust
 499 amounts and the manner in which the unitrust amount will be
 500 calculated and the method in which the fair market value of the
 501 trust will be determined.

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

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

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

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

511 738.303 Apportionment when income interest ends.--

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

521 Section 8. Subsection (3) of section 738.401, Florida
 522 Statutes, is amended, subsection (7) is renumbered as subsection

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523 (8) and amended, and a new subsection (7) is added to said
 524 section, to read:

525 738.401 Character of receipts.--

526 (3) Except as otherwise provided in this section, a
 527 trustee shall allocate the following receipts from an entity to
 528 principal:

529 (a) Property other than money.

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

533 (c) Money received in total or partial liquidation of the
 534 entity.

535 (d) Money received from an entity that is a regulated
 536 investment company or a real estate investment trust if the
 537 money distributed represents short-term or long-term capital
 538 gain realized within the entity.

539 (7) The following special rules shall apply to moneys or
 540 property received by a private trustee from entities described
 541 in this subsection:

542 (a) Moneys or property received from a targeted entity
 543 that is not an investment entity which do not exceed the trust's
 544 pro rata share of the undistributed cumulative net income of the
 545 targeted entity during the time an ownership interest in the
 546 targeted entity was held by the trust shall be allocated to
 547 income. The balance of moneys or property received from a
 548 targeted entity shall be allocated to principal.

549 (b) If trust assets include any interest in an investment
 550 entity, the designated amount of moneys or property received

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551 from the investment entity shall be treated by the trustee in
552 the same manner as if the trustee had directly held the trust's
553 pro rata share of the assets of the investment entity
554 attributable to the distribution of such designated amount.

555 Thereafter, distributions shall be treated as principal.

556 (c) For purposes of this subsection, the following
557 definitions shall apply:

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

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

569 a. The amount of income of the investment entity for the
570 current year, as reported to the trustee by the investment
571 entity for federal income tax purposes; or

572 b. The amount of income of the investment entity for the
573 current year and the prior 2 years, as reported to the trustee
574 by the investment entity for federal income tax purposes, less
575 any distributions of moneys or property made by the investment
576 entity to the trustee during the prior 2 years.

577 3. "Investment entity" means a targeted entity that
578 normally derives 50 percent or more of its annual cumulative net

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579 income from interest, dividends, annuities, royalties, rental
580 activity, or other passive investments, including income from
581 the sale or exchange of such passive investments.

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

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

592 6. "Undistributed cumulative net income" means the trust's
593 pro rata share of cumulative net income, less all prior
594 distributions from the targeted entity to the trust that have
595 been allocated to income.

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

599 (8)(7) A trustee may rely upon a statement made by an
600 entity about the source or character of a distribution, about
601 the amount of profits of a targeted entity, or about the nature
602 and value of assets of an investment entity if the statement is
603 made at or near the time of distribution by the entity's board
604 of directors or other person or group of persons authorized to
605 exercise powers to pay money or transfer property comparable to
606 those of a corporation's board of directors.

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