

This bill substantially amends the following sections of the Florida Statutes: 701.04, 738.102, 738.103, 738.104, 738.1041, 738.105, 738.201, 738.202, 738.301, 738.302, 738.303, 738.401, 738.402, 738.403, 738.501, 738.502, 738.503, 738.504, 738.601, 738.602, 738.603, 738.604, 738.605, 738.606, 738.607, 738.608, 738.701, 738.702, 738.703, 738.704, 738.705, and 738.801.

II. Present Situation:

Release of Mortgage Information

Chapter 701, F.S., allows the person who has a mortgage (the mortgagor) to obtain from the mortgage holder (the mortgagee) information about the unpaid balance of the loan secured by the mortgage within 14 days of a written request.¹ The information requested is returned in a document known as an estoppel letter. Generally, only the mortgagor is able to receive this information from the mortgagee.

Current law does not require the mortgagee to provide information relating to the mortgagor's loan to anyone other than the mortgagor of the encumbered property. However, persons who may have a legitimate interest in knowing the loan information include, an heir or devisee through probate, homestead laws, a surviving spouse that was not on the note, or a junior lienholder that has foreclosed on the property against the mortgagor.

Privacy Laws Related to the Release of Mortgage Information

According to advocates of the bill, some mortgagees are not furnishing the mortgage information citing the privacy requirements of the federal Gramm-Leach-Bliley Act. The federal Gramm-Leach-Bliley Act, 15 USC ss. 6801-6809, addresses privacy requirements and disclosure or nonpublic personal information. Except as otherwise provided in this subchapter, a financial institution may not, directly or through any affiliate, disclose to a nonaffiliated third party any nonpublic personal information, unless such financial institution provides or has provided to the consumer a notice disclosing the institution's privacy policy that complies with applicable federal law.² Under the Gramm-Leach-Bliley Act, states may enact laws to require financial institutions to disclose loan information to persons other than the mortgagor.³

Pursuant to s. 655.059, F.S., the records of a financial institution⁴ are confidential and are made available for inspection and examination only in specifically enumerated circumstances or to specifically listed individuals or entities. Under current law, if the mortgagee is a financial

¹ Section 701.04, F.S.

² See 15 U.S.C.A. § 6803 which provides requirements for the disclosure of a financial institution's privacy policy.

³ "[T]o comply with Federal, State, or local laws, rules, and other applicable legal requirements; to comply with a properly authorized civil, criminal, or regulatory investigation or subpoena or summons by Federal, State, or local authorities; or to respond to judicial process or government regulatory authorities having jurisdiction over the financial institution for examination, compliance, or other purposes as authorized by law." 15 U.S.C. § 6802(e)(8).

⁴ Section 55.005(1)(i), F.S., defines "financial institution" as a state or federal savings or thrift association, bank, savings bank, trust company, international bank agency, international banking corporation, international branch, international representative office, international administrative office, international trust company representative office, credit union, or an agreement corporation operating pursuant to s. 25 of the Federal Reserve Act, 12 U.S.C. ss. 601 et seq. or Edge Act corporation organized pursuant to s. 25(a) of the Federal Reserve Act, 12 U.S.C. ss. 611 et seq."

institution, the mortgagee may violate privacy laws and face penalties for releasing the mortgagor's mortgage information.

Uniform Principal and Income Act

In 2002, the Florida Legislature enacted a slightly modified version of the Uniform Principal and Income Act (1997), as developed by the National Commissioners on Uniform State Laws.⁵ The Florida Uniform Principal and Income Act (act) specifies procedures for trustees administering an estate in separating principal from income and to ensure that the intention of the trust creator is the guiding principle for trustees.⁶ The act establishes default rules for trustees and fiduciaries when making allocations of principal and income where the will or trust instrument is silent.⁷

Under the act, "principal" means "property held in trust for distribution to a remainder beneficiary when the trust terminates."⁸ Under the act, the term "income" means "money or property that a fiduciary⁹ receives as current return from a principal asset. The term includes a portion of receipts from a sale, exchange, or liquidation of a principal asset, to the extent provided in [the act]."¹⁰ "Fiduciary" is defined under the act to mean "a personal representative or a trustee. The term includes an executor, administrator, successor, personal representative, special administrator, or a person performing substantially the same function."¹¹ "Trustee" is defined under the act, "to includ[e] an original, additional, or successor trustee, whether or not appointed or confirmed by a court."¹²

III. Effect of Proposed Changes:

Release of Mortgage Information

The bill amends s. 701.04(1), F.S., to require a mortgage holder to release mortgage information to a record title owner of the property, as well as a fiduciary or trustee lawfully acting on behalf of a record title owner, or any other person lawfully authorized to act on behalf of a mortgagor or record title owner of the property. The mortgagee is required to provide the estoppel letter containing such information within 14 days after receipt of a written request.

If the requestor is not the mortgagor, the estoppel letter does not have to contain an itemization of the unpaid balance of the loan secured by the mortgage, but it must include a per-day amount for the unpaid balance. A record title owner of a property, or any person lawfully authorized to

⁵ Chapter 2002-42, Laws of Florida. See Senate Staff Analysis and Economic Impact Statement for CS/CS/SB 1166 (2002 Reg. Session) by the Senate Committee on Banking and Insurance (February 26, 2002).

⁶ National Conference of Commissioners on Uniform State Laws, *Why States Should Adopt UPIA*, available at <http://www.uniformlaws.org/Narrative.aspx?title=Why%20States%20Should%20Adopt%20UPIA> (last visited Jan. 21, 2012).

⁷ *Id.*

⁸ Section 738.102(10), F.S.

⁹ See e.g., "Fiduciary" is defined to mean "A person who is required to act for the benefit of another person on all matters within the scope of their relationship; one who owes to another the duties of good faith, trust, confidence, and candor. One who must exercise a high standard of care in managing another's money or property." BLACK'S LAW DICTIONARY (9th ed. 2009).

¹⁰ Section 738.102(4), F.S.

¹¹ Section 738.102(3), F.S.

¹² Section 738.102(13), F.S.

act on behalf of a mortgagor or record title owner must include, along with the request, a copy of the instrument showing title in the property or lawful authorization.

The bill provides that the mortgagee or servicer of the mortgagee, acting pursuant to the request, is not liable to any person because of the release of the requested information, other than the obligation to comply with the terms of the estoppel letter. A mortgagee is authorized to provide the information required under this bill to a person authorized to request the financial information notwithstanding laws that would otherwise prohibit the disclosure of the information.

Uniform Principal and Income Act

Trustee/Fiduciary

The bill changes the term, “trustee” to “fiduciary” throughout ch. 738, F.S., wherever the term, “trustee” should also apply to a fiduciary that is not specifically designated as a trustee.

Section 738.104(11), F.S., is repealed which provides that s. 738.104, F.S., relating to a trustee’s power to adjust, “shall be construed as pertaining to the administration of a trust and is applicable to any trust that is administered in [Florida] or under Florida law.”¹³ This provision would be redundant to the bill’s changes in s. 738.103, F.S., which provide that ch. 738, F.S., pertains to the administration of trusts administered in Florida or under its law, and to any estate that is administered in Florida unless the provision of the chapter is limited in application to a trustee, rather than a fiduciary.

Carrying Value

The bill amends s. 738.102, F.S., to define “carrying value” to mean the fair market value at the time the assets are received by the fiduciary. If there is a change in fiduciaries, a majority of the continuing fiduciaries may elect to adjust the carrying values to reflect the fair market value of the assets at the beginning of their administration. The bill amends s. 738.202, F.S., to apply the carrying value, which will simplify administration of trusts by not requiring the fiduciary to revalue the assets on each distribution date unless there is a disproportionate distribution to one or more beneficiaries, in which case the bill provides guidelines on how to make the distribution.¹⁴

Unitrusts

A “unitrust” is defined as “a trust from which a fixed percentage of the fair market value of the trust’s assets, valued annually, is paid each year to the beneficiary.”¹⁵ The bill creates new rules for valuing assets for unitrusts. The bill amends s. 738.1041(1)(a), F.S., to create a definition of the term, “average fair market value” which includes what is commonly referred to as the

¹³ Section 738.104(11), F.S.

¹⁴ See Real Property, Probate, and Trust Law Section of The Florida Bar, *White Paper on a Proposed Bill to Amend the Florida Uniform Principal and Income Act, Chapter 738, Florida Statutes* (2010) (on file with the Senate Committee on Judiciary).

¹⁵ BLACK’S LAW DICTIONARY (9th ed. 2009).

“smoothing rule.” The “smoothing rule” is intended to reduce the large differences in amounts distributable to a beneficiary from year to year resulting from large market fluctuations by using the average fair market value over the past three years to value assets.¹⁶

Determination and Distribution of Net Income

Under current law, a fiduciary is required, to distribute to the beneficiary who receives a pecuniary amount outright the interest provided by will, the terms of the trust, or applicable law. This concept was adopted as part of the UPIA. However, the Real Property, Probate and Trust Law Section of The Florida Bar indicate that there are not any situations to which this law applies in Florida.¹⁷

The bill amends s. 738.201(3), F.S., to remove unnecessary language referring to “applicable law” where there is no applicable law and to remove UPIA language relating to a statutory right to income on a pecuniary device, which is not a right in Florida.¹⁸

Character of Receipts

Current law establishes a default provision for determining whether money or property received by a trust should be allocated to principal or income. Payments in excess of 20 percent of an entity’s assets are assumed to be liquidating distributions which are allocated to principal (the 20 percent partial liquidation rule). Certain entities pay large dividends that may exceed this limit despite not being liquidating assets.¹⁹

The bill amends s. 738.401, F.S., to retain the 20 percent partial liquidation for non-publicly-traded entities, but only after the trust or estate has received a cumulative minimum return of 3 percent annually. The bill provides a framework for allocating dividends and other stock payments that exceed 10 percent of the fair market value of the trust’s interest in an entity, and provides rules for different types of entities, such as publicly traded companies, partnerships, subchapter S corporations, and other entities.²⁰

Marital Trusts and Deduction

Provisions within the act contain a methodology for computing income from assets held in marital trusts and another more complex method of computing the allocation of principal and income from non-marital trusts.²¹

The bill amends s. 738.602(4), F.S., to simplify the method for computing income held in non-marital trusts. The bill also amends s. 738.602(5), F.S., to ensure that the estate or gift tax marital deduction applies not only to federal tax laws, but also to tax laws of other states where the trust

¹⁶ Real Property, Probate, and Trust Law Section of The Florida Bar, *White Paper on a Proposed Bill to Amend the Florida Uniform Principal and Income Act, Chapter 738, Florida Statutes* (2010) (on file with the Senate Committee on Judiciary).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Section 738.401, F.S.

²⁰ Real Property, Probate, and Trust Law Section of The Florida Bar, *White Paper on a Proposed Bill to Amend the Florida Uniform Principal and Income Act, Chapter 738, Florida Statutes* (2010) (on file with the Senate Committee on Judiciary).

²¹ Compare ss. 738.602(4) and 738.602(5), F.S.

is administered in Florida. The bill also amends s. 738.606(1), F.S., to clarify that the marital deduction may apply to the federal tax laws or tax laws of other states.

Liquidating Asset

Assets in a trust which are expected to produce receipts for a limited period of time are allocated so that 10 percent of the payments go to income and the rest are applied to principal. According to the Real Property, Probate, and Trust Law Section of The Florida Bar, the Internal Revenue Service (IRS) recently ruled that the safe harbor for allocations to income was between 3 percent and 5 percent of income, putting Florida trusts at risk for additional tax liabilities.²²

The bill amends s. 738.603(2), F.S., to change the percentage of limited-duration assets applied to income to 5 percent from 10 percent to comply with an IRS ruling that 5 percent is the maximum safe harbor for such an allocation.

Income Taxes

Current law provides guidelines for paying income taxes out of a trust, including guidelines specifically for paying taxes on an entity's taxable income. Current law also requires payment from income to the extent receipts from the entity are allocated to income and from principal to the extent that receipts from the entity are allocated to principal and the trust's share of the entity's taxable income exceeds the total of such receipts. Receipts allocated to principal or income, are reduced by the amount distributed to a beneficiary from principal or income for which the trust receives a deduction in calculating the tax.²³

The bill amends s. 738.705, F.S., to provide new guidelines for paying income taxes out of a trust. The bill provides that an income tax required to be paid on the trust or estate's share of an entity's taxable income is to be paid proportionally from income to the extent the receipts from the entity are allocated to income, from principal to the extent the receipts from the entity are allocated to principal, and from principal to the extent that the income taxes payable by the trust or estate exceed the total distributions from the entity. Then, the fiduciary is to adjust income or principal receipts to the extent that the trust or estate's income taxes are reduced, but not eliminated, because the trust or estate receives a deduction for payments made to a beneficiary, with additional guidelines to provide clarity to the fiduciary.

Improvements

Under the common law, when a tenant of a property had a life estate, the tenant was generally responsible for the maintenance of the property while the holder of the remainder interest, or the remainderman, was responsible for capital improvements. The original adoption of UPIA attempted to codify the common law rule, but the wording of the act could lead to a different

²² Real Property, Probate, and Trust Law Section of The Florida Bar, *White Paper on a Proposed Bill to Amend the Florida Uniform Principal and Income Act, Chapter 738, Florida Statutes* (2010) (on file with the Senate Committee on Judiciary).

²³ Section 738.705, F.S.

conclusion for the apportionment of expenses because the UPIA used terms commonly used in trust law, which did not exist at common law.²⁴

The bill amends s. 738.801, F.S., to provide definitions and additional guidelines for apportioning expenses between the life tenant and the remainderman. Life tenants are responsible for paying ordinary expenses and maintenance, recurring insurance premiums, and other expenses which are attributable to the property's use by the life tenant. The remainderman is responsible for paying mortgage debt (debt secured by the property) not allocated to the tenant, expenses of any proceeding concerning the title to the property other than the title to the tenant's estate, environmental expenses, and extraordinary repairs. If either the life estate tenant or the remainderman incurs an expense for personal benefit without the consent of the other, then he or she bears the expense in full. For improvements that add value to the property forming part of the principal, the expense is split between the life tenant and the remainderman. The tenant pays to the extent that the improvement increases the value of the tenant's estate if the improvement is not reasonably expected to outlast the life tenant's estate.

The bill provides an effective date of January 1, 2013.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill will allow a record title owner of a property, a fiduciary or trustee lawfully acting on behalf of a record title owner, or any other person lawfully authorized to act on behalf of a mortgagor or record title owner of the property access to information in order to pay off a mortgage and clear title to the property. Holders of mortgages may incur some indeterminate costs to accommodate additional requests.

²⁴ Real Property, Probate, and Trust Law Section of The Florida Bar, *White Paper on a Proposed Bill to Amend the Florida Uniform Principal and Income Act, Chapter 738, Florida Statutes* (2010) (on file with the Senate Committee on Judiciary).

In regards to the changes to the Florida Uniform Principal and Income Act, the bill will provide greater clarity and guidance relating to IRS issues and reduce administrative concerns in the determination of income and principal, which will ultimately benefit beneficiaries of a trust or estate.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Banking and Insurance on February 7, 2012:

The bill also makes a number of clarifying and substantive changes to the Florida Principal and Income Act (act). The bill implements a smoothing rule where fiduciaries calculate the average fair market value of the current year assets and the preceding years' assets to address spikes due to fluctuations in the market. The bill modifies the default guidelines applicable to unitrusts, distribution of income, the partial liquidation rule, marital tax deductions, liquidating assets, income taxes, and property improvements.

B. Amendments:

None.