

**HOUSE OF REPRESENTATIVES  
FINAL BILL ANALYSIS**

<b>BILL #:</b>	CS/CS/HB 505 (CS/SB 1050)	<b>FINAL HOUSE FLOOR ACTION:</b>	
<b>SPONSOR(S):</b>	Civil Justice Subcommittee; Insurance & Banking Subcommittee; Bernard; and McBurney (Banking and Insurance and Bogdanoff)	116 Y's	0 N's
<b>COMPANION BILLS:</b>	CS/HB 1050; includes CS/SB 978; CS/HB 823	<b>GOVERNOR'S ACTION:</b>	Approved

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**SUMMARY ANALYSIS**

CS/CS/HB 505 passed the House on March 7, 2012, as CS/SB 1050. The bill requires a mortgagee to provide certain information within a specified time relating to the unpaid loan balance due under a mortgage if a request is made by certain persons. The bill also makes a number of clarifying and substantive changes to the Florida Principal and Income Act.

Current law allows mortgagors to request and receive, within 14 days, information about their mortgage, such as the payoff, from the mortgagee. This information is provided by a mortgagee in the form of an estoppel letter. The bill allows 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 to also obtain an estoppel letter. To receive the information, these authorized persons must provide a copy of the instrument proving title or lawful authorization. The information contained in the estoppel letter must at least provide the total unpaid balance on a per-day basis, but may include additional information depending on the requester.

The bill also makes a number of clarifying and substantive changes to the Florida Principal and Income Act. This bill represents the first broad revision of the Act since it was enacted in 2002. 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.

This bill does not appear to have a fiscal impact on the state or local governments. The private sector may incur some indeterminate costs since mortgagees will likely receive an increase in estoppel letter requests.

The bill was approved by the Governor on April 6, 2012, ch. 2012-49, Laws of Florida. The effective date of the bill is January 1, 2013.

## I. SUBSTANTIVE INFORMATION

### A. EFFECT OF CHANGES:

#### **Release of Mortgage Information**

##### *Cancellation of Mortgages*

Current law specifically allows the person who takes out a mortgage (the mortgagor) to request and receive from the holder of the mortgage (the mortgagee), within 14 days of the request, an estoppel letter setting forth the unpaid balance of the loan secured by the mortgage.<sup>1</sup> Generally, only the mortgagor is able to request and receive this information from the mortgagee.<sup>2</sup>

This bill amends s. 701.04, F.S., to extend the right to request and receive information on the unpaid balance to a record title owner of the property, a fiduciary or trustee lawfully acting on behalf of a record title owner, or any person lawfully authorized<sup>3</sup> to act on behalf of the mortgagor or record title owner of the property.

The bill requires a person lawfully authorized to act on behalf of the mortgagor to receive the same itemized information as the mortgagor, which includes the principal, interest, and any other charges properly due under or secured by the mortgage and interest on a per-day basis for the unpaid balance. However, a record title owner or a person lawfully authorized to act on behalf of the record title owner must at least receive information setting forth the unpaid balance on a per-day basis. A record title owner of the property, or any person lawfully authorized to act on behalf of the mortgagor or record title owner of the property, must provide an instrument with the request that proves title or legal authorization.

##### *Privacy Laws*

Under current law, if the mortgagee is a financial institution,<sup>4</sup> the mortgagee may violate privacy laws and face penalties by releasing the mortgagor's mortgage information. The books and records of a financial institution are confidential and shall be made available for inspection and examination only in specifically enumerated circumstances or by specifically listed individuals or entities.<sup>5</sup> The bill provides that the mortgage holder may provide the information required by this bill notwithstanding the confidentiality statute. This bill also provides that the mortgagee or servicer is expressly discharged from any obligation or liability to any person on account of the release of the requested information, other than the obligation to comply with the terms of the estoppel letter.

#### **Uniform Principal and Income Act**

##### *Background*

In 2002, a modified version of the Uniform Principal and Income Act, as developed by the National Commissioners on Uniform State Laws in 1997, was enacted.<sup>6</sup> The Act provides procedures for trustees

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<sup>1</sup> Section 701.04, F.S.

<sup>2</sup> Access to a financial institution's books, for persons other than the mortgagor, is appropriate under certain circumstances under s. 655.059, F.S.

<sup>3</sup> For example, in the administration of an estate, the personal representative could be someone legally authorized to act on behalf of the mortgagor or record title owner of the property.

<sup>4</sup> Section 655.005(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.

<sup>5</sup> Section 655.059, F.S.

<sup>6</sup> Chapter 2002-42, L.O.F.

administering an estate in differentiating principal from income and ensuring that the intention of the trust creator is the guiding principal for trustees.<sup>7</sup>

The Act provides default rules to trustees and fiduciaries where the will or trust instrument is silent. The Act defines principal as property held in trust for distribution to a remainder beneficiary when the trust terminates.<sup>8</sup> Income is money or property that a fiduciary receives as current return from a principal asset.<sup>9</sup>

### *Trustee and Fiduciary*

Trustees and fiduciaries both have the responsibility to act primarily for another's benefit.<sup>10</sup> However, a trustee is the owner of the legal title to the property of the trust.<sup>11</sup> Current law defines a trustee to include an original, additional, or successor trustee, whether or not appointed or confirmed by a court.<sup>12</sup> A fiduciary is 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.<sup>13</sup> A trustee is always a fiduciary, but a fiduciary is not always a trustee.

The bill changes "trustee" to "fiduciary" throughout wherever the word "trustee" should also apply to fiduciaries that are not specifically designated as trustees. Furthermore, the bill amends s. 738.103, F.S., to provide that the chapter pertains to the administration of trusts administered in this state or under its law, and to any estate that is administered in this state unless the provision is limited in application to a trustee, rather than a fiduciary.

### *Carrying Value*

The bill amends s. 738.102, F.S., to provide a new standard for valuing assets. The term "carrying value" is defined as the fair market value at the time the assets are received by the fiduciary, and a change in fiduciaries allows the majority of continuing fiduciaries to elect to adjust the carrying values to reflect the fair market value of the assets at the beginning of their administration. The bill amends ss. 738.202, 738.302, and 738.603, 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 non pro-rata distribution to one or more beneficiaries, in which case the bill provides guidelines on how to make the distribution.

### *Unitrusts*

A "unitrust" is a "trust from which a fixed percentage of the net fair market value of the trust's assets, valued annually, is paid each year to the beneficiary."<sup>14</sup> The value of assets in a unitrust are calculated by the "fair market value" method, which is the fair market value of assets held by the trust as otherwise determined under ch. 738, F.S., reduced by all known noncontingent liabilities.<sup>15</sup>

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<sup>7</sup> The National Conference of Commissioners on Uniform State Laws, [http://www.nccusl.org/Narrative.aspx?title=Why States Should Adopt UPIA](http://www.nccusl.org/Narrative.aspx?title=Why%20States%20Should%20Adopt%20UPIA) (last visited on Jan. 4, 2012).

<sup>8</sup> Section 738.102(10), F.S.

<sup>9</sup> Section 738.102(4), F.S.

<sup>10</sup> See, e.g., *Black's Law Dictionary*, which defines a fiduciary as ". . . a person holding the character of a trustee, or a character analogous to that of a trustee, in respect to the trust and confidence involved in it and the scrupulous good faith and candor which it requires. A person having duty, created by his undertaking, to act primarily for another's benefit in matters connected with such undertaking." 5th Ed., at 563.

<sup>11</sup> See, e.g., *Black's Law Dictionary*, which defines a trustee as a "person holding property in trust. The person appointed, or required by law, to execute a trust; one in whom an estate, interest, or power is vested, under an express or implied agreement to administer or exercise it for the benefit or to the use of another called the cestui que trust. Person who holds title to res and administers it for others' benefit." 5th Ed., at 1357.

<sup>12</sup> Section 738.102(13), F.S.

<sup>13</sup> Section 738.102(3), F.S.

<sup>14</sup> *Black's Law Dictionary*, 5th Ed., at 1376.

<sup>15</sup> Section 738.1041(1)(b), F.S.

The bill provides new rules for valuing assets for unitrusts. The bill amends s. 738.1041(1)(a), F.S., to add a definition for "average fair market value" which includes what is commonly referred to as the "smoothing rule." This rule is intended to reduce the large differences in amounts distributable to a beneficiary from year to year depending on large market fluctuations by using the average fair market value over the past three years to value assets. The bill then implements the smoothing rule in the definition of "unitrust amount" in s. 738.1041(1), F.S.

#### *Determination and Distribution of Net Income*

Current law requires a fiduciary, in certain situations, to distribute to the beneficiary who receives a pecuniary amount outright the interest provided by will, the terms of the trust, or applicable law. However, this was model-act language and there are no situations where this law applies in Florida. Current law also contains language from the model act that implies that there is a statutory right to income on an outright pecuniary device in Florida, where such a right does not exist.<sup>16</sup>

The bill amends s. 738.201(3), F.S., to remove unnecessary language referencing "applicable law" where there is no applicable law and to remove model-act language pertaining to a statutory right to income on an outright pecuniary device, which is not a right in Florida.

#### *Character of Receipts*

Current law provides a default provision for determining whether assets should be allocated to principal or income: payments in excess of 20 percent of the entities' assets are presumed to be liquidating distributions which are allocated to principal (the 20 percent partial liquidation rule). However, certain entities pay large dividends that may exceed this limit despite not being liquidating assets.<sup>17</sup>

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

#### *Marital Trusts and Deductions*

Current law contains one method of computing income from assets held in marital trusts and another more complex method of computing the allocation of principal and income for non-marital trusts.<sup>18</sup>

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 to not only federal tax laws, but tax laws of other states where the trust is administered in Florida. The bill also amends s. 738.606(1), F.S., to clarify that the marital deduction in that section can apply to the IRS or a comparable law of any state.

#### *Liquidating Asset*

Assets in a trust that are expected to produce receipts for a limited period of time are allocated such that 10 percent of the payments go to income and the rest is applied to principal. The Internal Revenue Service (IRS) recently ruled that the safe harbor was between 3 % and 5% to income, putting Florida trusts at risk for additional tax liabilities.

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<sup>16</sup> Section 738.201, F.S.

<sup>17</sup> Section 738.401, F.S.

<sup>18</sup> Compare s. 738.602(4) and (5), F.S.

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

### *Disbursements from Income*

Current law requires fiduciaries to make certain disbursements from income, providing that the disbursements are not income from property used to discharge liabilities or disbursements paying from principal which were incurred in connection with the settlement of a decedent's estate or the winding up of a terminating income interest.<sup>19</sup>

The bill amends s. 738.701, F.S., to add an additional exclusion from disbursements from income, payments from income or principal including, at the fiduciary's discretion, attorney, accountant, or fiduciary fees, court costs, other administration expenses, and interest on death taxes.

### *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.<sup>20</sup>

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 the Act attempted to codify the common law rule, but the wording of the Act could lead to different conclusion for the apportionment of expenses because the Act used terms common in trust law, which did not exist at common law.

The bill amends s. 738.801, F.S., to provide definitions and additional guidelines for apportioning expenses between the life tenant and the remainderman in the absence of a trust. Life tenants are responsible for paying ordinary expenses and maintenance, recurring insurance premiums, and other expenses which are the result of the property's use by the tenant. The remainderman is responsible for paying mortgage debt not allocated to the tenant, expenses due to title other than the tenant's estate, environmental expenses, and extraordinary repairs. If either party incurs an expense for personal benefit without the consent of the other, that party bears the expense in full. For improvements that add value to the property forming part of the principal, the expense is split between the tenant and the remainderman, with the tenant paying to the extent that the improvement increases the value of the tenant's estate.

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<sup>19</sup> Section 738.701, F.S.

<sup>20</sup> Section 738.705, F.S.

**Effective Date**

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

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

None.

2. Expenditures:

None.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

None.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

The bill does not appear to have any direct economic impact on the private sector; however, mortgagees may incur some indeterminate costs since mortgagees will likely receive an increase in estoppel letter requests.

**D. FISCAL COMMENTS:**

None.