

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 1093 Florida Uniform Fiduciary Income and Principal Act

**SPONSOR(S):** Caruso

**TIED BILLS:** IDEN./SIM. BILLS: SB 1316

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	18 Y, 0 N	Mawn	Jones
2) Insurance & Banking Subcommittee	18 Y, 0 N	Fletcher	Lloyd
3) Judiciary Committee			

### SUMMARY ANALYSIS

A trust is a relationship in which one party, the “settlor,” gives another party, the “trustee,” the right to hold title to the settlor’s property or assets for a third party’s benefit (“beneficiary”). Traditionally, many trust beneficiaries were entitled to receive either income earned by trust investments (“income beneficiary”) or a share of trust principal when an income interest ended (“remainder beneficiary”). In such a scenario, the trustee’s allocation of receipts and expenditures to income or principal had a direct effect on a beneficiary’s financial interests, and the financial interests of an income beneficiary were often at odds with those of the remainder beneficiary.

In 1931, the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) adopted the first Uniform Principal and Income Act (“UPIA”), which, in pertinent part, governed the allocation of trust and estate receipts and disbursements between income and principal where the terms of the trust did not provide for such allocation. Forty-seven states, including Florida, subsequently adopted some form of the UPIA; Florida’s version, known as the Florida Uniform Principal and Income Act (“FUPIA”), is codified in ch. 783, F.S. However, in recent decades, the distinction between income and principal has become less important, for two reasons. First, the “modern portfolio theory” allows trustees to invest for the maximum total return, whether the return is in the form of income or principal growth. This has led to the rise in popularity of the “unitrust,” which has reduced the likelihood that the financial interests of the income beneficiary and the remainder beneficiary will be at odds, as such a trust allows the income beneficiary to receive income from the trust at a set percentage of the trust’s fair market value while the remainder beneficiary receives a fair disbursement after the income interest ends. Second, modern trusts are often drafted with more flexible terms, giving trustees discretion to accumulate income or invade principal when advantageous to further the trust’s purposes.

In 2018, the NCCUSL adopted the Uniform Fiduciary Income and Principal Act (“UFIPA”) to account for these more recent developments. In response to UFIPA’s adoption, the Real Property, Probate and Trust Law Section of the Florida Bar convened a committee (“Committee”) to review UFIPA and consider whether Florida should adopt the new model law. The Committee ultimately proposed a revision to FUPIA that would incorporate UFIPA language wherever possible while preserving certain public policy choices found in existing Florida law. This proposed revision is the Florida Uniform Fiduciary Income and Principal Act (“FUFIPA”).

HB 1093 codifies FUFIPA into ch. 783, F.S., replacing FUPIA as the law governing the allocation of trust and estate receipts and disbursements between principal and interest where a Florida trust does not provide its own terms for such an allocation. FUFIPA would, in addition to modernizing trust law generally:

- Allow for total-return investing under the “modern portfolio theory.”
- Provide for the conversion of an existing trust into a unitrust.
- Provide flexibility for more individualized estate planning.
- Provide a governing law provision to reduce jurisdictional disputes.

The bill does not appear to have a fiscal impact on state or local governments.

The bill provides an effective date of January 1, 2025.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Background

##### Trusts

A trust is a relationship in which one party (the “settlor”)<sup>1</sup> gives another party (the “trustee”) the right to hold title to the settlor’s assets for a third party’s benefit (the “beneficiary”). A trust may be created and take effect during a settlor’s lifetime (“a living trust”) or may be created by a will and take effect when the settlor dies (“testamentary trust”).<sup>2</sup> A trust may also be revocable (so that the terms may be changed at any time before the settlor’s death) or irrevocable (so that the terms cannot be modified after the trust’s creation absent consent of the beneficiaries).<sup>3</sup> Most trusts are generally governed by the Florida Trust Code, codified in chapter 736, F.S. However, additional provisions of Florida law may apply if the trust has special attributes.

##### Uniform Fiduciary Income and Principal Act

Traditionally, many trust beneficiaries were entitled to receive either income earned by trust investments (“income beneficiary”) or a share of trust principal when an income interest ended (“remainder beneficiary”).<sup>4</sup> In such a scenario, the trustee’s allocation of receipts and disbursements to income or principal had a direct effect on a beneficiary’s financial interests, and, thus, the financial interests of an income beneficiary were often at odds with those of the remainder beneficiary.<sup>5</sup>

In 1931, the National Conference of Commissioners on Uniform State Laws, also known as the Uniform Law Commission (“ULC”)<sup>6</sup> adopted the first Uniform Principal and Income Act (“UPIA”), which, in pertinent part, governed the allocation of trust and estate receipts and disbursements between income and principal where the terms of the trust or will did not provide for such allocation or give the fiduciary a discretionary power of administration. Forty-seven states, including Florida, subsequently adopted some form of UPIA; Florida’s version, adopted in 2002 and known as the Florida Uniform Principal and Income Act (“FUPIA”), is codified in ch. 783, F.S.

However, in recent decades, the distinction between income and principal has lost some significance, for two reasons. First, the “modern portfolio theory” allows trustees to invest for the maximum total return, whether the return is in the form of income or principal growth.<sup>7</sup> This has led to the rise in popularity of the “unitrust,” which trust allows the income beneficiary to receive income from the trust at a set percentage of the trust’s fair market value while the remainder beneficiary receives a fair disbursement after the income interest ends, thereby reducing the likelihood that the financial interests of the income beneficiary and the remainder beneficiary will be at odds.<sup>8</sup> In other words, under a unitrust, both the income beneficiary and remainder beneficiary benefit from an increase in the value of

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<sup>1</sup> “Settlor” means a person, including a testator, who creates or contributes property to a trust. S. 736.0103(18), F.S.

<sup>2</sup> See “inter vivos trust” and “testamentary trust,” Black’s Law Dictionary (11th ed. 2019).

<sup>3</sup> Greg Depersio, Investopedia (Apr. 30, 2023), *Revocable Trust v. Irrevocable Trust: What’s the Difference*, <https://www.investopedia.com/ask/answers/071615/what-difference-between-revocable-trust-and-living-trust.asp> (last visited Jan. 25, 2024).

<sup>4</sup> For example, a trust may require that all trust income be distributed to the settlor’s surviving spouse, but that trust principal be held and accumulated for the settlor’s surviving children, to be paid after the surviving spouse’s death. Uniform Law Commission, *The Uniform Fiduciary Income and Principal Act: A Summary*, <https://www.uniformlaws.org/viewdocument/enactment-kit-74?CommunityKey=1105f9bb-eb93-4d4d-a1ab-a535ef73de0c&tab=librarydocuments> (last visited Jan. 25, 2024).

<sup>5</sup> *Id.*

<sup>6</sup> The NCCUSL is an association of commissioners appointed by each state, the District of Columbia, the Commonwealth of Puerto Rico, and the U.S. Virgin Islands, that discusses and debates which areas of the law require uniformity among the states and territories and drafts uniform acts accordingly. Legal Information Institute, *National Conference of Commissioners on Uniform State Laws*, [https://www.law.cornell.edu/wex/national\\_conference\\_of\\_commissioners\\_on\\_uniform\\_state\\_laws\\_\(nccusl\)](https://www.law.cornell.edu/wex/national_conference_of_commissioners_on_uniform_state_laws_(nccusl)) (last visited Jan. 25, 2024).

<sup>7</sup> Uniform Law Commission, *supra* note 4.

<sup>8</sup> *Id.*; Rod Fluck, *What is a Unitrust and Why is it Used*, <http://buteralaw.com/newsletters/estate/what-is-a-unitrust-and-why-is-it-used/> (last visited Jan. 25, 2024).

a trust's assets.<sup>9</sup> Second, modern trusts are often drafted with more flexible terms, thereby giving trustees discretion to accumulate income or invade principal when advantageous to further the trust's overall purposes.<sup>10</sup>

Thus, in 2018, the ULC adopted the Uniform Fiduciary Income and Principal Act ("UFIPA") to account for these developments, provide additional flexibility in tailoring individual trusts to meet a settlor's specific needs, provide for the conversion of older trusts into unitrusts, and provide a governing law section to help avoid jurisdictional disputes.<sup>11</sup> Seven states have since enacted some form of UFIPA.<sup>12</sup>

In response to UFIPA's adoption, the Real Property, Probate and Trust Law Section of the Florida Bar convened a Principal and Income Committee ("Committee") to review UFIPA and consider whether Florida should adopt the new model law. The Committee ultimately proposed a revision to FUIPA, known as the Florida Uniform Fiduciary Income and Principal Act ("FUFIPA"), that would incorporate UFIPA language wherever possible while preserving certain public policy choices found in existing Florida law that continue to make sense for the State.

## Effect of Proposed Changes

HB 1093 codifies FUFIPA into ch. 783, F.S., replacing FUIPA as the law governing the allocation of trust and estate receipts and disbursements between principal and interest where a Florida trust does not provide its own terms for such an allocation. FUFIPA would, in addition to modernizing Florida trust law generally:

- Allow for total-return investing under the "modern portfolio theory."
- Provide for the conversion of an older trust into a unitrust.
- Provide flexibility for more individualized estate planning.
- Provide a governing law provision to reduce jurisdictional disputes.

## Definitions

The bill revises s. 738.102, F.S., to modify existing definitions and provide new definitions to incorporate UFIPA terminology and concepts. Under the bill, the definitions of "accounting period," "income," "mandatory income interest," and "person" remain unchanged, while definitions for new terms, including "court," "estate," "personal representative," and "record," were added without impacting current policy. However, the bill modifies the following definitions in a substantive way:

- "Beneficiary" is redefined to distinguish between current income beneficiaries and current remainder beneficiaries, as well as to encompass persons holding life estates or term interests.
- "Fiduciary" is broadened to apply not only to the personal representative and trustee, as under current law, but also to those with a power to direct, those under a fiduciary's delegation, and those holding property for a successor beneficiary who may be impacted by principal or income allocations.
- "Income interest" is redefined as a right of a current income beneficiary and includes a current beneficiary's use of property held by a fiduciary.
- "Net income" is broadened to include application to a unitrust and an income to principal adjustment.
- "Principal" is modified from meaning that which is distributed to a remainder beneficiary to that which is held for distribution to, for production of income for, or for use by, a current or successor beneficiary.
- "Terms of the trust" is broadened to extend to wills, life estates, and term interests, and thus more closely follows the definition of the term in the Florida Trust Code.

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<sup>9</sup> Fluck, *supra* note 8.

<sup>10</sup> Uniform Law Commission, *supra* note 4.

<sup>11</sup> *Id.*

<sup>12</sup> These states are Arkansas, California, Colorado, Kansas, Utah, Virginia, and Washington State. Uniform Law Commission, *Fiduciary Income and Principal Act: Legislative Bill Tracking*, <https://www.uniformlaws.org/committees/community-home?communitykey=1105f9bb-eb93-4d4d-a1ab-a535ef73de0c#LegBillTrackingAnchor> (last visited Jan. 25, 2024).

Additionally, the bill adds the following new definitions, which definitions modify Florida law in a substantive way:

- “Distribution,” meaning a payment or transfer by a fiduciary to a beneficiary in the beneficiary’s capacity as a beneficiary, without consideration other than the beneficiary’s right to receive the payment or transfer under the terms of the trust, will, life estate, or term interest.
- “Independent person,” meaning a person that is not:
  - For a trust, a qualified beneficiary; a settlor; an individual whose legal obligation to support a beneficiary may be satisfied by a trust distribution; or any trustee whom an interested distributee may remove and replace with a related or subordinate party.
  - For an estate, a beneficiary; a spouse, parent, brother, sister, or issue of specified persons; a corporation, partnership, limited liability company, or other entity in which specified persons have voting control; or an employee of a specified person.
- “Personal representative,” meaning an executor, administrator, successor personal representative, special administrator, or person that performs substantially the same function with respect to an estate under the law governing the person’s status.
- “Record,” meaning information that is inscribed on a tangible medium or stored in an electronic or other medium and is retrievable in perceivable form.
- “Settlor,” meaning a person, including a testator, that creates or contributes property to a trust.
- “Special tax benefit,” meaning the annual gift tax exclusion,<sup>13</sup> qualified subchapter S status,<sup>14</sup> federal marital tax deduction,<sup>15</sup> and generation-skipping transfer tax exemption.<sup>16</sup>
- “Successive interest,” meaning the interest of a successor beneficiary.
- “Successor beneficiary,” meaning a person entitled to receive income or principal or to use property when an income interest or other current interest ends.
- “Trust,” meaning an express trust, whether private or charitable, with additions to the trust, wherever and however created, and a trust created or determined by judgment or decree under which the trust is to be administered in the manner of an express trust.
- “Trustee,” meaning a person, other than a personal representative, that owns or holds property for the benefit of a beneficiary.
- “Will,” meaning any testamentary instrument recognized by applicable law which makes a legally effective disposition of an individual’s property, effective at the individual’s death, and includes a codicil or other amendment to a testamentary instrument.

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<sup>13</sup> The Internal Revenue Service allows individuals to give away up to a specific amount of assets each year tax-free under the annual gift tax exclusion. Jean Gordon Carter and Janice L. Davies, Gift Tax, *the Annual Exclusion and Estate Planning*, <https://www.actec.org/resource-center/video/gift-tax-the-annual-exclusion-and-estate-planning/> (last visited Jan. 25, 2024)

<sup>14</sup> A trust with qualified subchapter S status is eligible to own stock in an S corporation. A settlor can use this type of trust to make a gift of all or a part of the S corporation stock and retain voting power while the beneficiary receives the income and the tax burden. Rebecca C. Bowen, *Trusts as Eligible Shareholders of an S Corporation*, <https://www.t-m-law.com/commentary/trusts-as-eligible-shareholders-of-an-s-corporation/> (last visited Jan. 25, 2024).

<sup>15</sup> The Internal Revenue Service allows a spouse to leave property of unlimited value to his or her surviving spouse tax-free. Such assets may be distributed by a direct transfer from the decedent to the surviving spouse or by an indirect transfer to a qualifying trust for the surviving spouse’s benefit. Peter B. von Stein, *Basic Estate Tax Planning for Married Couples: Opportunities for Use of Estate Tax Exemptions*, <https://www.wardandsmith.com/articles/basic-estate-tax-planning-married-couples-use-estate-tax-exemptions> (last visited Jan. 25, 2024).

<sup>16</sup> The generation-skipping transfer tax is a federal tax on a gift or an inheritance that prevents the donor from avoiding estate taxes by skipping over children in favor of grandchildren. However, the Internal Revenue Service allows a person to give up to a certain amount to a qualified recipient to avoid this tax. Troy Segal, *What is the Generation-Skipping Transfer Tax*, Investopedia (Feb. 7, 2023), <https://www.investopedia.com/terms/g/generation-skipping-transfer-tax.asp> (last visited Jan. 25, 2024).

## Scope

The bill amends s. 738.103, F.S., to provide FUFIPA's scope. Specifically, the bill states that, except as otherwise provided by the terms of a trust or FUFIPA, FUFIPA applies to a trust or estate and to a life estate or other term interest in which someone's interest will be succeeded by another's interest under s. 738.508, F.S.

## Governing Law

The bill adds a new governing law provision to renumbered s. 738.104, F.S. Specifically, the bill provides that, if the principal place of administration of a trust or estate or the situs of property not held in trust or an estate is Florida, the trustee is governed by FUFIPA, except as otherwise provided in the terms of the trust or elsewhere in that chapter.

## General Principles of Fiduciary Duties

The bill renumbers from s. 738.103, F.S., to s. 738.201, F.S., a provision setting forth a trustee's fiduciary duties, including the duty to administer a trust or estate impartially based on what is fair and reasonable to all beneficiaries. Current law also establishes the general principles for allocating receipts and disbursements to or between principal and income, specifying that, generally speaking, receipts and disbursements must be allocated to principal, and establishes a presumption that a determination made in accordance with ch. 738 is fair and reasonable.

The bill substantially preserves current law, with four exceptions. Specifically, the bill:

- Incorporates the revised definition of "terms of the trust."
- Adds an express requirement that a fiduciary act in good faith.
- Requires a fiduciary to add undistributed income to principal within a specified time period.
- Incorporates the factors currently set out in s. 738.104(2), F.S., applicable in exercising the adjustment power, and making such factors applicable to all fiduciary decisions under FUFIPA.

The factors incorporated from s. 738.104(2), F.S., remain largely the same as in current law, except that the bill substitutes the objective "terms of the trust" factor for the subjective "intent of the grantor" factor, in keeping with changes made by UFIPA.

## Judicial Review

The bill renumbers from s. 738.105, F.S., to s. 738.202, F.S., a provision governing judicial review of a trustee's exercise of or failure to exercise any discretionary power under FUFIPA, as it relates to a decision to transfer principal to income, or vice versa. Under current law, a court may not determine that a trustee abused its discretion merely because the court would have exercised the discretion differently, but, once an abuse of discretion is found, the court must take certain actions to restore the beneficiaries to the positions they would have been in had the trustee not abused its discretion.

The bill substantially preserves current law, with four exceptions. Specifically, the bill:

- Updates the term "trustee" in this provision to "fiduciary," thus broadening this section's scope.
- Defines "fiduciary decisions" to expressly include the fiduciary's allocation between income and principal and the exercise or failure to exercise any power under FUFIPA.
- Expressly adds to the remedies available when a fiduciary abuses his or her discretion "all remedies authorized by law," including remedies and damages for breach of trust as set out in the Florida Trust Code in ss. 736.1001 and 736.1002, F.S.
- Removes an unnecessary provision prohibiting the court from substituting its discretion for that of the fiduciary.

## Fiduciary's Adjustment Powers

The bill renumbers from s. 738.104, F.S., to s. 738.203, F.S., a provision authorizing a trustee to adjust between income and principal if specified conditions are met, including the consideration of enumerated factors, and a determination that an adjustment is necessary to administer the trust impartially, based on what is fair and reasonable. Under current law, a trustee is prohibited from exercising the adjustment power under certain circumstances where adverse tax consequences would result but may release all or part of the power for any time period. Further, current law expressly negates any inference of impropriety simply because a trustee declines to exercise the power.

The bill makes several changes to current law. Specifically, the bill:

- Expands the scope of this section from trustees to all fiduciaries.
- Relocates the conditions limiting when a fiduciary may adjust between principal and income to a different section, making such conditions applicable to all fiduciary decisions.
- Replaces the standard of “impossibility” with a standard of “assistance,” thereby authorizing a fiduciary to exercise the adjustment power if the fiduciary determines that doing so will assist the fiduciary in administering the trust or estate impartially.
- Authorizes the appointment of a co-fiduciary to exercise the adjustment power under specified circumstances.
- Includes a presumption that a release or delegation of the adjustment power is a release or delegation of the entire power, and that such a release or delegation is permanent.
- Clarifies that the exercise of the adjustment power may apply to the immediately preceding period, current period, and one or more subsequent periods.
- Adds new accountability procedures, including a requirement that the exercise of the adjustment power be included in the annual accounting report or communicated at least annually to the trust’s qualified beneficiaries.

## Unitrusts

The bill replaces s. 738.1041, F.S., which specifically authorizes the express creation of a unitrust, provides that the unitrust amount is considered to be the trust’s net income for purposes of allowing or requiring income distributions, and provides for the conversion of an income trust to a unitrust, or vice versa, with ss. 738.301-738.310, F.S.

The bill makes several changes to current law. Specifically, the bill:

- Separates provisions relating to unitrusts into distinct sections, making them more visible.
- Specifies that these sections apply to estates only where a trust is a beneficiary of an estate.
- Adds definitions applicable to a unitrust, including “applicable value,” “express unitrust,” “net fair market value of a trust,” “unitrust,” “unitrust policy,” and “unitrust rate.”
- Modernizes but does not substantially alter provisions relating to a fiduciary’s authority and duties as they relate to unitrusts; the method for determining the unitrust rate; and the method for determining an asset’s fair market value for the purpose of determining the unitrust amount.
- Ensures that the unitrust provisions remain within the safe harbor standards of the Treasury Regulations (as they are under current law) but allows for future modification of the relevant provisions should the Treasury relax those standards.

## Character of Receipts

The bill amends s. 738.401, F.S., which currently characterizes receipts from entities, applies a “lookback period”<sup>17</sup> of unlimited duration, and establishes rules applicable to receipts from public entities; provisions regarding private trustees administering investment entities; treating as principal money received from specified sources; and treating as income dividends a fiduciary elects to reinvest. Current law favors objective calculations over the exercise of fiduciary discretion in such matters.

The bill modifies current law by:

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<sup>17</sup> Florida’s “lookback period” applies a portion of large receipts to income, at a rate of three percent per year.

- Limiting the lookback period to three accounting periods to simplify trust administration.
- Restructuring the law to more closely match UFIPA's overall organization.
- Amending or adding definitions, including "capital distribution," "entity," and "entity distribution," to clarify certain concepts incorporated into this section.

## Allocations

### *Deferred Compensation Accounts, Annuities, and Similar Arrangements*

The bill renumbers from s. 738.602, F.S., to s. 738.409, F.S., a section of law characterizing receipts from deferred compensation accounts, annuities, and other similar arrangements. Under current law, the "income of the fund" is determined in a specified manner, and such amount is compared to payments actually received from the fund; the lesser of such amounts is then allocated to income, while the remainder is allocated to principal.

The bill modifies this section by:

- Changing the phrase "income of the fund" to the more customary "internal income."
- Adding an accounting period concept to balance the allocation of intra-period receipts between principal and income.
- Specifically authorizing fiduciaries to transfer assets from principal to income as necessary to fully fund the internal income of the fund and distribute such income to the beneficiary.

### *Minerals, Water, and Other Natural Resources*

The bill renumbers from s. 738.604, F.S., to s. 738.411, F.S., a provision allocating receipts from an interest in minerals, water, or other natural resources as 90 percent to principal and ten percent to income. The bill modifies this section by removing the 90/10 allocation standard and replacing it with a fact-specific standard.

### *Marital Deduction Property Not Productive of Income*

The bill renumbers from s. 738.606, F.S., to s. 738.413, F.S., a provision providing a safe harbor to ensure that a trust intending to qualify for the estate tax marital deduction allows the surviving spouse to require the trustee to make property income-producing where the trust assets do not otherwise provide the spouse with sufficient income to qualify for the deduction. Current law also allows the surviving spouse to require the trustee to make property income-producing where trust assets have been used in whole or in part to satisfy the spouse's elective share under s. 732.2125, F.S.,<sup>18</sup> and the property, in the aggregate, does not provide the spouse with sufficient income.

The bill substantially preserves current law but provides that this section may be overridden only if the terms of the trust explicitly reference this section.

### *Derivatives and Options*

The bill renumbers from s. 738.607, F.S., to s. 738.414, F.S., a provision providing for the allocation of all amounts received from derivatives and options to principal. The bill also modifies this section to provide for the allocation of 10 percent of receipts from the transaction and 10 percent of disbursements made in connection with the transaction to income, with the remaining balance allocated to principal.

### *Asset-Backed Securities*

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<sup>18</sup> This section allows the surviving spouse of a decedent to claim up to 30 percent of the decedent's estate, regardless of the terms of the decedent's will. Practically speaking, this prevents a surviving spouse from being disinherited and potentially left destitute.

The bill renumbers from s. 738.608, F.S., to s. 738.415, F.S., a provision for the allocation of payments received in exchange for the trust's or estate's entire interest in an asset-backed security<sup>19</sup> during a single accounting period entirely to principal. Current law also provides that, for payments that are part of a series of payments that will result in the liquidation of the trust's or estate's interest in the security over more than a single accounting period, the fiduciary must allocate 10 percent of the payment to income and the balance to principal.<sup>20</sup>

The bill modifies the definition of an "asset-backed security" to more closely align with the definition used by the Securities and Exchange Commission<sup>21</sup> and extends the 90/10 distribution rule to all receipts from or related to such a security.

### *Other Financial Instruments or Arrangements*

The bill creates s. 738.416, F.S., to be a "catch-all" provision for the allocation of receipts and disbursements arising from or related to financial instruments or arrangements not specifically mentioned in FUFIPA. Under the bill, allocation must be 90 percent to principal and 10 percent to income, making the allocation standard the same as for derivatives, options, and asset-backed securities.

### Disbursements

#### *Disbursements from Income and Principal*

The bill amends s. 738.501, F.S., which currently directs that one-half of certain forms of compensation and expenses be disbursed from income, along with all of the ordinary expenses incurred in connection with a trust property that primarily concerns the income interest.

The bill modifies this section to address what happens where there is insufficient income to disburse the full amount charged and to give the fiduciary the discretion to disburse specified amounts charged if the fiduciary is an independent person and the disbursement would be in the beneficiaries' interest.

The bill also amends s. 738.502, F.S., which currently directs that the remaining one-half of certain forms of compensation and expenses be disbursed from principal, along with all of the trustee's compensation for preparing property for sale; payments on the principal of trust debt; and expenses of proceedings that primarily concern trust principal.

The bill modifies this section to provide that principal must be disbursed in an amount equal to the remaining balance of the compensation and expenses provided for in s. 738.501, F.S., and to allow a fiduciary to use income to disburse the balance of such amounts charged to income before using principal. Further, the bill incorporates certain tax provisions found elsewhere in current law into this section.

#### *Transfers from Income to Principal for Depreciation*

The bill amends s. 738.503, F.S., which currently allows a fiduciary to transfer a reasonable amount of the net cash receipts from a principal asset from income to principal, subject to depreciation to such principal, with restrictions.

The bill substantially preserves current law, with three exceptions. Specifically, the bill:

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<sup>19</sup> Under current law, an "asset-backed security" is an asset, the value of which is based upon the right given to the owner to receive distributions from the proceeds of financial assets that provide collateral for the security. S. 738.608, F.S.

<sup>20</sup> See s. 738.608(3), F.S.

<sup>21</sup> 17 C.F.R. Sec. 229.1101(c)(1) defines "asset-backed security" as a security that is primarily serviced by the cash flows of a discrete pool of receivables or other financial assets, either fixed or revolving, that by their terms convert into cash within a finite time period, plus any rights or other assets designed to assure the servicing or timely distributions of proceeds to the security holders; provided that in the case of financial assets that are leases, those assets may convert to cash partially by the cash proceeds from the disposition of the physical property underlying such leases. See 17 C.F.R. Sec. 229.1101(c)(1)(2) for other conditions that must apply for a security to be considered as an "asset-backed security."

- Replaces the term “fixed asset” with the term “tangible asset” to conform to changes made elsewhere in FUFIPA.
- Excludes depreciation for assets accounted for as a liquidating asset.
- Removes a safe harbor specifying that any amount of depreciation taken for an asset must be presumed to be a reasonable amount of depreciation.

### *Reimbursements*

The bill amends s. 738.504, F.S., which currently relates to allocations from insurance policies and similar contracts, to create a provision authorizing a fiduciary to reimburse income from principal. Such reimbursement is not presently authorized under Florida law.

The bill also renumbers from s. 738.704, F.S., to s. 738.505, F.S., a provision authorizing a fiduciary to transfer an appropriate amount of income to principal to either reimburse or provide a reserve in specified situations. The bill modifies this section by clarifying that, when a current income interest of a principal asset ends and a successive income interest remains, the fiduciary may continue to transfer those appropriate amounts from income to principal as specified in this section. The bill also authorizes fiduciaries to transfer an appropriate amount from income to principal for the cost of an improvement to principal, whether a change to an existing asset or the construction of a new asset, and for a periodic payment on an obligation secured by a principal asset, in specified circumstances.

### *Income Taxes*

The bill renumbers from s. 738.705, F.S., to s. 738.506, F.S., a provision specifying that, with respect to income tax, the fiduciary must disburse from income those amounts allocated to income and from principal those amounts allocated to principal. Current law also specifies that the same allocation rules must be followed on the trust’s or estate’s share of an entity’s taxable income, except that principal must be used to disburse amounts exceeding total receipts from the entity; however, the fiduciary must also adjust income or principal receipts, pursuant to a specified formula, to the extent the trust’s or estate’s income taxes are reduced, but not eliminated, due to a deduction for beneficiary payments.

The bill substantially retains current law but makes several changes. Specifically, the bill:

- Removes the phrase “but not eliminated,” as it created confusion.
- Removes the formula outlining the amount distributable to a beneficiary.
- Adds a provision allowing a fiduciary to reimburse the “owner” of a “grantor trust”<sup>22</sup> for income taxes paid.

### *Adjustments Between Principal and Income Because of Taxes*

The bill renumbers from s. 738.706, F.S., to s. 738.507, F.S., a provision authorizing a fiduciary to adjust between principal and income to offset the shifting of economic interests or tax benefits between income and remainder beneficiaries due to elections and decisions made by a fiduciary; a tax imposed on the fiduciary or beneficiary due to a distribution from the trust or estate; or the taxable income of an entity owned by the trust or estate includable in the taxable income of the trust, estate, or beneficiary. This section also provides that, when an estate tax marital deduction or charitable contribution deduction is reduced due to a fiduciary deducting an amount paid from principal for income tax purposes, resulting in the amount of income tax paid by the trust or estate decreasing, the income tax payor must reimburse principal for the amount of tax not paid, with limitations (“deduction adjustment”).

The bill substantially preserves current law but modifies this section to specify that a fiduciary that charges a beneficiary under the deduction adjustment may offset the charge by obtaining payment from

<sup>22</sup> A “grantor trust” is a type of trust that allows the settlor, in this case known as the “grantor,” to retain some control over trust assets. For tax purposes, the grantor is considered the owner of the trust and is liable for any taxes on trust income. Christopher R. Callahan and Scott M. Snyder, *Foreign Grantor Trust Planning: A Flexible Planning Structure for U.S. Income Tax*, Fla. Bar Journal Vol. 97, No. 6 (Nov./Dec. 2023), <https://www.floridabar.org/the-florida-bar-journal/foreign-grantor-trust-planning-a-flexible-planning-structure-for-u-s-income-tax/> (last visited Jan. 25, 2024).

the beneficiary, withholding future distributions to the beneficiary, or adopting another method or combination of methods.

#### *Apportionment when Income Interest Ends*

The bill amends s. 738.703, F.S., to incorporate the substance of former s. 738.303, F.S., which provides for the apportionment of income after an income interest ends. The bill also removes a provision for the proration of the unitrust amount under this section, as this concept is covered elsewhere in FUFIPA.

#### Relation to Electronic Signatures in Global and National Commerce Act

The bill amends s. 738.802, F.S., to replace existing law relocated elsewhere in the bill with a provision, not found in current law, specifying that FUFIPA modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act (“GNCA”),<sup>23</sup> with exceptions, but does not authorize electronic delivery of specified notices described in the GNCA.

#### Non-Substantive Changes

The bill makes non-substantive, technical changes to what are now numbered as ss. 738.402, 738.403, 738.501, 738.502, 738.503, 738.504, 738.508, 738.601, 738.602, 738.603, 738.605, 738.701, 738.702, and 738.801, F.S.

#### Severability

The bill amends s. 738.803, F.S., to provide for severability. Specifically, the bill states that if any provision of FUFIPA or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of FUFIPA which can be given effect without the invalid provisions or application.

#### Applicability

The bill amends s. 738.804, F.S., to provide that, except as otherwise provided by a trust’s terms or the bill itself, the bill applies to any receipt or expense received or incurred and any disbursement made after January 1, 2025, by any trust or estate, regardless of when the trust or estate was established or the asset involved was acquired.

#### Effective Date

The bill provides an effective date of January 1, 2025.

#### B. SECTION DIRECTORY:

**Section 1:** Amends s. 738.101, F.S., relating to short title.

**Section 2:** Amends s. 738.102, F.S., relating to definitions.

**Section 3:** Amends s. 738.103, F.S., relating to fiduciary duties; general principles.

**Section 4:** Amends s. 738.104, F.S., relating to trustee’s power to adjust.

**Section 5:** Repeals s. 738.1041, F.S., relating to total return unitrust.

**Section 6:** Repeals s. 738.105, F.S., relating to judicial control of discretionary powers.

**Section 7:** Amends s. 738.201, F.S., relating to determination and distribution of net income.

**Section 8:** Amends s. 738.202, F.S., relating to distribution to residuary and remainder beneficiaries.

**Section 9:** Creates s. 738.203, F.S., relating to fiduciary’s power to adjust.

**Section 10:** Amends s. 738.301, F.S., relating to when right to income begins and ends.

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<sup>23</sup> See 15. U.S.C. s. 7001(c). The GNCA provides a general rule of validity for electronic records and signatures for transactions in or affecting interstate or foreign commerce, allowing the use of electronic records to satisfy any statute, regulation, or rule of law requiring that such information be provided in writing.

- Section 11:** Amends s. 738.302, F.S., relating to apportionment of receipts and disbursements when decedent dies or income interest begins.
- Section 12:** Amends s. 738.303, F.S., relating to apportionment when income interest ends.
- Section 13:** Creates s. 738.304, F.S., relating to notice.
- Section 14:** Creates s. 738.305, F.S., relating to unitrust policy.
- Section 15:** Creates s. 738.306, F.S., relating to unitrust rate.
- Section 16:** Creates s. 738.307, F.S., relating to applicable value.
- Section 17:** Creates s. 738.308, F.S., relating to period.
- Section 18:** Creates s. 738.309, F.S., relating to express unitrust.
- Section 19:** Creates s. 738.310, F.S., relating to other rules.
- Section 20:** Amends s. 738.401, F.S., relating to character of receipts.
- Section 21:** Amends s. 738.402, F.S., relating to distribution from trust or estate.
- Section 22:** Amends s. 738.403, F.S., relating to business and other activities conducted by fiduciary.
- Section 23:** Creates s. 738.404, F.S., relating to principal receipts.
- Section 24:** Creates s. 738.405, F.S., relating to rental property.
- Section 25:** Creates s. 738.406, F.S., relating to receipt on obligation to be paid in money.
- Section 26:** Creates s. 738.407, F.S., relating to insurance policy on contracts.
- Section 27:** Creates s. 738.408, F.S., relating to insubstantial allocation not required.
- Section 28:** Creates s. 738.409, F.S., relating to deferred compensation, annuity, or similar payment.
- Section 29:** Renumbers and amends s. 738.603, F.S., relating to liquidating asset.
- Section 30:** Renumbers and amends s. 738.604, F.S., relating to minerals, water, and other natural resources.
- Section 31:** Renumbers and amends s. 738.605, F.S., relating to timber.
- Section 32:** Renumbers and amends s. 738.606, F.S., relating to property not productive of income.
- Section 33:** Renumbers and amends s. 738.607, F.S., relating to derivatives and options.
- Section 34:** Renumbers and amends s. 738.608, F.S., relating to asset-backed securities.
- Section 35:** Creates s. 738.416, F.S., relating to other financial instrument or arrangement.
- Section 36:** Amends s. 738.501, F.S., relating to principal receipts.
- Section 37:** Amends s. 738.502, F.S., relating to rental property.
- Section 38:** Amends s. 738.503, F.S., relating to obligation to pay money.
- Section 39:** Amends s. 738.504, F.S., relating to insurance policies and similar contracts.
- Section 40:** Renumbers and amends s. 738.704, F.S., relating to transfers from income to reimburse principal.
- Section 41:** Renumbers and amends s. 738.705, F.S., relating to income taxes.
- Section 42:** Renumbers and amends s. 738.706, F.S., relating to adjustments between principal and income because of taxes.
- Section 43:** Creates s. 738.508, F.S., relating to apportionment of property expenses between tenant and remainderman.
- Section 44:** Amends s. 738.601, F.S., relating to insubstantial allocations not required.
- Section 45:** Amends s. 738.602, F.S., relating to payments from deferred compensation plans, annuities, and retirement plans or accounts.
- Section 46:** Amends s. 738.701, F.S., relating to disbursements from income.
- Section 47:** Amends s. 738.702, F.S., relating to disbursements from principal.
- Section 48:** Amends s. 738.703, F.S., relating to transfers from income to principal for depreciation.
- Section 49:** Amends s. 738.801, F.S., relating to apportionment of expenses; improvements.
- Section 50:** Amends s. 738.802, F.S., relating to uniformity of application and construction.
- Section 51:** Amends s. 738.803, F.S., relating to severability.

**Section 52:** Amends s. 738.804, F.S., relating to application.

**Section 53:** Provides an effective date of January 1, 2025.

## 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 will likely have a positive economic impact on the private sector to the extent that it provides more flexibility for individualized estate planning, allows for total-return investing under the “modern portfolio theory,” and otherwise gives Floridians advantages that benefit their financial interests.

### D. FISCAL COMMENTS:

None.

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable.

2. Other:

Federalism

The framers of the United States Constitution allocated power among the federal and state governments, seeking to establish a unified national government of limited powers while carving out for the states a distinct sphere of autonomy for the exercise of general police powers.<sup>24</sup> Although the Constitution does not clearly delineate many of the boundaries between federal and state government powers, the Supreme Court has invoked certain constitutional provisions when determining whether a government has exceeded its constitutional authority.<sup>25</sup>

One such provision is the Supremacy Clause, found in Article IV of the United States Constitution, which clause gives federal law supremacy over state law where the laws conflict.<sup>26</sup> Put another way,

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<sup>24</sup> Library of Congress, *Constitution Annotated: Federalism and the Constitution*, [https://constitution.congress.gov/browse/essay/intro.7-3/ALDE\\_0000032/](https://constitution.congress.gov/browse/essay/intro.7-3/ALDE_0000032/) (last visited Jan. 25, 2024).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

under the Supremacy Clause, a federal law preempts any conflicting state laws.<sup>27</sup> Another such provision is the Commerce Clause, found in Article I, section 8, clause 3 of the United States Constitution, which clause gives Congress broad power to regulate interstate and foreign commerce and restricts the states from impairing such commerce through the enactment of state laws.<sup>28</sup>

The bill amends s. 738.802, F.S., to specify that FUFIPA modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act (“GNCA”), using language similar to language already appearing elsewhere in Florida law. The GNCA is a federal law, codified at 15 U.S.C. s. 7001, which law provides a general rule of validity for electronic records and signatures for transactions in or affecting interstate or foreign commerce, allowing the use of electronic records to satisfy any statute, regulation, or rule of law requiring that such information be provided in writing. To the extent that, in a particular case, FUFIPA could conflict with the GNCA, or its application thereto otherwise could impair interstate or foreign commerce, a court may find the GNCA controls over the amendment to s. 738.802, F.S.

**B. RULE-MAKING AUTHORITY:**

Not applicable.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

None.

**IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES**

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<sup>27</sup> *Id.*

<sup>28</sup> Library of Congress, *Constitution Annotated: Overview of Commerce Clause*, [https://constitution.congress.gov/browse/essay/artI-S8-C3-1/ALDE\\_00013403/](https://constitution.congress.gov/browse/essay/artI-S8-C3-1/ALDE_00013403/) (last visited Jan. 25, 2024).