

**WHITE PAPER
ON
A PROPOSED BILL TO AMEND THE FLORIDA UNIFORM PRINCIPAL AND INCOME ACT, CHAPTER
738, FLORIDA STATUTES**

I. SUMMARY

The 2002 Florida Legislature enacted the Florida Uniform Principal and Income Act (the “UPIA” or the “Act”), effective January 1, 2003. Contained in Chapter 2002-42, Laws of Florida, the UPIA made sweeping changes to Florida's principal and income laws. The UPIA has greatly improved the guidance offered to fiduciaries in administering trusts and estates in Florida. Interested industry groups that were proponents of the UPIA have continued working together to clarify language and to identify other shortfalls with this new law. As a result, further amendments and clarifications to the UPIA have been identified and are discussed below.

This proposal clarifies provisions of the Act related to both trustees and personal representatives. Additionally, this proposal makes a change to the statutes to address Internal Revenue Service Rev. Rul. 2006-26 which impacts the treatment of retirement plan distributions. The proposal also clarifies the computation of income payable to residual devisees and pecuniary devisees.

II. SECTION-BY-SECTION ANALYSIS

A. Summary of specific changes which impact multiple sections:

Current Situation:

With limited exceptions, the Act applies to all fiduciaries including, but not limited to, trustees and personal representatives (see F.S. 738.102(4)). Some confusion arose however, because certain sections of the Act that pertained to all fiduciaries contained the word “trustee”. Additionally, the word “fiduciary(ies)” was used in certain sections that were only intended to apply to “trustee(s)”.

To clarify the fact that a few sections were intended to only apply to trustees, the following provision is added to F. S. 738.103: “ All provisions of this chapter also apply to any estate that is administered in Florida, unless the provision is limited in application to a trustee, rather than a fiduciary.”

Effect of Proposed Changes:

The proposed bill removes the word “trustee(s)” and replaces it with “fiduciary(ies)” where appropriate. Additionally, the word “fiduciary(ies)” was used in certain sections that was

only intended to apply to “trustee(s)”. The specific sections of the Florida Statutes impacted by this change are as follows:

- F.S. 738.105 Judicial control of discretionary powers.
- F.S. 738.301 When right to income begins and ends.
- F.S. 738.302 Apportionment of receipts and disbursements when decedent dies or income interest begins.
- F.S. 738.303 Apportionment when income interest ends.
- F.S. 738.401 Character of receipts.
- F.S. 738.402 Distribution from Trust or Estate
- F.S. 738.403 Business and other activities conducted by trustee.
- F.S. 738.501 Principal receipts.
- F.S. 738.502 Rental property.
- F.S. 738.503 Obligation to pay money.
- F.S. 738.504 Insurance policies and similar contracts.
- F.S. 738.601 Insubstantial allocations not required.
- F.S. 738.602 Payments from deferred compensation plans, annuities, and retirement plans or accounts.
- F.S. 738.603 Liquidating asset.
- F.S. 738.604 Minerals, water, and other natural resources.
- F.S. 738.605 Timber.
- F.S. 738.606 Property not productive of income.
- F.S. 738.607 Derivatives and options.
- F.S. 738.608 Asset-backed securities.
- F.S. 738.701 Disbursements from income.
- F.S. 738.702 Disbursements from principal.
- F.S. 738.703 Transfers from income to principal for depreciation.
- F.S. 738.704 Transfers from income to reimburse principal.
- F.S. 738.705 Income taxes.

B. Section 738.102 Definition of “Carrying Value”

Current Situation:

Prior to the 2002 adoption of the current version of the Act, the Florida Principal and Income Act (the “1962 Act”) included a definition of “Inventory Value” (F.S. 738.01(2), 1962 Act), also known as “carrying value”. The definition was abandoned because it was only referenced in the 1962 Act (old F.S. 738.11). With the removal of this definition, however, Florida Statutes did not contain a definition. The only definition is found in Probate Rule 5.346 when referencing the inclusion of “carrying values” in the preparation of the fiduciary accountings.

Effect of proposed changes:

The proposed bill clarifies the meaning of “carrying value” for purposes of preparing fiduciary accountings. The meaning is also needed because proposed revisions to F.S. ss. 738.202, 738.401(6), and 738.603 make use of the term when computing the allocation between principal and income of various receipts.

Further, the proposed amendment allows for an adjustment of carrying value when there is a change in fiduciaries. This is in line with the Model Fiduciary Accounting Standards adopted by the American Bar Association, American Bankers Association, and the American Institute of Certified Public Accountants. This adjustment is not mandatory, but is intended to allow the new fiduciaries to adjust carrying values to establish the amount over which they are responsible, so that the beneficiaries have a benchmark to measure subsequent performance of the fiduciary. This would typically be applied when the prior fiduciary had incurred substantial unrealized losses that had yet to be recognized for fiduciary accounting purposes. Absent the adjustment, the new fiduciary will be starting out with negative performance as reflected on the fiduciary accounting.

This is addressed in the comments to the Model Fiduciary Accounting Standards Section IV, where illustration 4.2 acknowledges that it may be appropriate, when allowed under applicable local law, to adjust carrying value of assets to reflect values at the start of his/her administration.

As the proposed amendment makes the provision to adjust carrying values when there is a change in fiduciary elective, and is not mandatory, no additional burden is imposed upon successor trustees without their assent. If the fiduciary does elect to adjust carrying values, such adjustment must be reported on the first accounting filed after the election is made.

C. Sections 738.103(3) Fiduciary duties; general principles and 738.104(11)

Current Situation:

F.S. 738.103 “Fiduciary duties; general principles” outlines default duties that apply to all trusts. As written, it is not clear whether these duties are owed to all trusts administered within the state of Florida or under Florida law, regardless of any prior administrative situs the trust may have had in the past. The proposal clarifies F.S. 738.103 to provide that the Act applies to any trust or estate that is administered in this state or under Florida law. Similar language contained in F.S. 738.104(11) has been deleted as redundant to the above change.

D. Section 738.1041 Total Return Unitrust

Current Situation:

F.S. 738.1041 “Total return unitrust” provides for both the creation of an express unitrust and the conversion to or from a unitrust. The unitrust provision has gained wide acceptance with fiduciaries due to its ease of administration. Recent economic events, however, have demonstrated that large market fluctuations, either up or down, can cause large differences in amounts distributable to the unitrust beneficiary from year to year, which are undesirable. Further, there are a number of provisions in F.S. 738.1041 that are duplicative and which potentially conflict creating ambiguity in the statutes, Rather than rely on the statute, grantors are permitted to create an express unitrust in their documents.

Effect of Proposed Changes:

In order to ameliorate the changes to the unitrust distributions that can occur as a result of annual market fluctuations, the proposed revisions to the Act provide for the addition of a “smoothing rule” that uses an average of the fair market value of the trust assets computed for the current and two preceding years. The revisions also provide for an adjustment to the “Average Fair Market Value” if there is either an addition to principal (which can often occur during an estate administration when a trust may be partially funded over several years) or a principal distribution to a beneficiary, so that the smoothing only relates to investment performance. The proposed revisions include a definition of both “Average Fair Market Value” and “Fair Market Value”. This will allow for more consistency of income distributions to the income beneficiaries.

Additionally, the changes to F.S. 738.1041(10) clarify the applicability of the smoothing rules to express unitrusts, unless another method is directed in the governing instrument; the grantor must provide that a unitrust approach is desired and what percentage (between 3% and 5% for IRS reasons) is to be used to calculate the unitrust amount. The grantor may also provide directions on how to determine the fair market value of the trust assets or what, if any, assets are to be excluded from the computation. If the trust is silent on either or both of these points, the applicable provisions of s. 738.1041 will apply.

Example #1: (for illustration purposes, market fluctuation has not been reflected)

The trustee of a unitrust wants to compute the unitrust distribution of 2013. This computation will involve averaging the market values of 2011-2013. The initial funding of the trust of \$1,000,000 occurred sometime during 2011, which is the beginning of the 2011 period; because the purpose of smoothing is to minimize fluctuations due solely to investment performance, \$1,000,000 is the Beginning Market Value for 2011, which would be used in determining the unitrust amount. (Under the provisions of FS s. 738.1041(6)(b), the trustee would likely exercise its discretion to prorate the payment over the remaining portion of the year.)

On July 1, 2012, the trustee receives an addition to principal in the amount of \$1,000,000. Average Fair Market Value would be computed as follows:

	2011	2012	2013
Beginning Market Value	\$1,000,000	\$1,000,000	\$2,000,000
Principal addition	<u>1,000,000</u>	<u>1,000,000</u>	
Total FMV	<u>\$2,000,000</u>	<u>\$2,000,000</u>	<u>\$2,000,000</u>

Average FMV = \$2,000,000

In 2014, the computation would be as follows:

	2012	2013	2014
Beginning Market Value	\$1,000,000	\$2,000,000	\$2,000,000
Principal addition	<u>1,000,000</u>		
Total FMV	<u>\$2,000,000</u>	<u>\$2,000,000</u>	<u>\$2,000,000</u>

Average FMV = \$2,000,000

The principal addition in 2012 was added to the 2012 balance, as well as the balance in all prior periods used in the computation. (i.e. because the addition occurred after 01/01/12, the addition would be to both 2011 and 2012 balances, but in the computation for 2014, it is only included in the 2012 balance, because it already actually included in the 2013 and 2014 balances.)

Example #2:

Same facts as Example #1 with the addition of a principal distribution to a beneficiary of \$500,000 in 2012.

	2011	2012	2013
Beginning Market Value	\$1,000,000	\$1,000,000	\$1,500,000
Principal addition	1,000,000	1,000,000	
Principal distribution	<u>(500,000)</u>	<u>(500,000)</u>	
Total FMV	<u>\$1,500,000</u>	<u>\$1,500,000</u>	<u>\$1,500,000</u>

Average FMV = \$1,500,000

Computations for 2014

	2012	2013	2014
Beginning Market Value	\$1,000,000	\$1,500,000	\$1,500,000
Principal addition	1,000,000		
Principal distribution	<u>(500,000)</u>		
Total FMV	<u>\$1,500,000</u>	<u>\$1,500,000</u>	<u>\$1,500,000</u>

Average FMV = \$1,500,000

Example #3:

Assume the same facts as Example #2 except allow for market fluctuations – showing an increase of \$200,000 during 2011, and an increase of \$300,000 during 2012.

	2011	2012	2013
Beginning Market Value	\$1,000,000	\$1,200,000	\$2,000,000
Principal addition	1,000,000	1,000,000	
Principal distribution	<u>(500,000)</u>	<u>(500,000)</u>	
Total FMV	<u>\$1,500,000</u>	<u>\$1,700,000</u>	<u>\$2,000,000</u>

Average FMV = $(\$1,500,000 + \$1,700,000 + \$2,000,000)/3 = \$1,733,333$

Additionally, current F.S. 738.1041(4) contains a paragraph that is duplicative of F.S. 738.1041(2)(b)(2)(b), so it is proposed that F.S. 738.1041(4) be deleted as unnecessary. Also creating confusion in the current statute is the prohibition in F.S. 738.1041(10)(e) against the use of a unitrust if the trustee currently possesses the power to adjust that is granted under F.S. 738.104. Because the power to adjust is automatically granted to disinterested trustees of trusts becoming irrevocable after January 1, 2003, absent anything to the contrary in the trust document, this section implied that such trustees could not use the unitrust provisions of F.S. 738.1041. Conversely, F. S. 738.104(5)(a) provides that a trustee may release the entire power to adjust allowing the use of a unitrust but no method of release is provided. By removing F.S. 738.1041(10)(e), any possible conflict between the two sections is avoided, so the proposal deletes 738.1041(10)(e) as unnecessary. The proposal also removes a sentence in current F.S. 738.1041(11)(a) that contains language that is duplicative of current F.S. 738.1041(10)(c). Finally, references to “trust document” in F.S. 738.1041 have been changed to “trust instrument” to achieve uniformity with the Florida Trust Code, which uses the term “trust instrument” as a defined term.

E. Section 738.201 Determination and distribution of net income

Current Situation:

F.S. 738.201(1) & (2) contain wording that implies that estates may not be subject to all relevant provisions of the Act. F.S. 738.201(3) provides that a fiduciary shall distribute to a beneficiary who receives a pecuniary amount outright the interest provided by will, the terms of the trust, or *applicable law*. The language “applicable law” creates confusion, because the Florida Statutes contain no such provision.

Effect of Proposed Changes:

The proposal deletes the language “which apply to trustees” as unnecessary, in F.S. 738.201(3) due to the clarification of the term fiduciary in other portions of the statute. The language has been modified to clarify that there is no statutory right to income on an outright pecuniary devise.

F. Section 738.202 Distribution to residuary and remainder beneficiaries

Current Situation:

The 2002 revisions to the Act required distributions to pecuniary devises in trust and remainder beneficiaries in proportion to their respective interests in the fair market value of the assets on the date of distribution. From an administrative perspective, this required a revaluation of all assets on each distribution date, unless the devises were fractional. The 1962 Act provided that distributions were to be based upon relative carrying values and not fair market value. This simplified administration and did not require recomputation of a beneficiary’s proportionate interest in income as long as no disproportionate distributions were made. (F.S. 738.04 1962 Act).

Effect of Proposed Changes:

The proposed changes will simplify administration by returning to the method of using carrying values to allocate income and provides a framework for dealing with disproportionate distributions. By using carrying values, the fiduciary will no longer need to revalue the assets on each distribution date, unless there is a non prorata distribution to one or more beneficiaries. If a fiduciary does make a principal distribution to one or more beneficiaries not in proportion to their respective interests in the trust principal, the beneficiary’s interest in the remaining trust

principal is changed and must be recomputed. To accomplish this, the proposed statute requires the fiduciary to restate the carrying value of all assets to their fair market values as of the distribution date (similar to what is now required every year whether or not there has been a disproportionate distribution) and recompute the interests of all beneficiaries. This is illustrated as follows:

Example #1: The total principal of a trust remaining after all debts and expenses is \$12,000,000. A pecuniary devise of \$7,000,000 is to be held in further trust for the benefit of beneficiary A, with the residue left outright to beneficiary B. From the onset, the trust for beneficiary A is entitled to 7/12 of any income earned during administration and beneficiary B is entitled to 5/12.

Prior to the funding of the trust or payment of any of the residue, beneficiary B receives a principal distribution of \$1,000,000. As of the date of this principal distribution, but prior to the actual distribution, the fair market value of the trust assets is \$20,000,000. The fractional interests are recomputed as follows:

	Beneficiary A	Beneficiary B
Date of death values	\$7,000,000	\$5,000,000
Adjusted Carrying values	\$7,000,000	\$13,000,000
Principal Distribution		<u>(1,000,000)</u>
Remaining principal	\$7,000,000	\$12,000,000
Recomputed Fraction	7/19	12/19

Example #2: The total principal of a trust remaining after all debts and expenses is \$12,000,000. The residue is to be split equally between beneficiary A and B. From the onset, both beneficiary A and B are entitled to 50% of any income earned during administration. Prior to the disbursement of the residual devises, beneficiary B receives a principal distribution of \$1,000,000. As of the date of the principal distribution, but prior to the distribution, the fair market value of the trust assets is \$20,000,000. The fractional interests are recomputed as follows:

	Beneficiary A	Beneficiary B
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Date of death values	\$6,000,000	\$6,000,000
Adjusted Carrying values	\$10,000,000	\$10,000,000
Principal Distribution		<u>(1,000,000)</u>
Remaining principal	\$10,000,000	\$9,000,000
Recomputed Fraction	10/19	9/19

G. Section 738.401 Character of receipts

Current Situation:

As originally adopted, the Act provided a default rule that required that payments in excess of 20% of the entities' assets were presumed to be liquidating distributions which are allocable to principal. This became a problem for entities involved in the service industry that paid large dividends in proportion to their asset base. This also became a problem when Microsoft Corp. declared its first dividend, which exceeded 20% of its total assets, but was far less than 20% of its market value. Many fiduciaries were unsure of how to treat that dividend under current law, although most assumed it was principal. Additionally, Private Trustees have separate rules to follow as they relate to Targeted Entities as outlined in s. 738.401(7). Under the current law, it is not clear how to handle distributions from Targeted Entities that are not in excess of book income but do represent gain from the sale of a portion of the business. With the proposed changes made to s. 738.401(6), s. 401(7) does not need to apply to Targeted Entities other than Investment Entities.

Effect of Proposed Changes:

The proposed revision to F.S. 738.401(6) retains the 20% partial liquidation rule for non-publicly traded entities, but only after the trust or estate has received a cumulative minimum return of 3% annually, which is required to be allocated to the income interest. In addition, if the entity is a "pass-through" entity, causing its income to be taxed to its owners, rather than the entity itself, the trust or estate must also have received the amount of tax attributable to its

ownership share of the entity for as long as the trust or estate held the ownership interest, if that tax exceeds the 3% cumulative return. This will serve to protect the interest of both the income and remainder beneficiaries, and falls within the income range authorized by the Internal Revenue Service for both marital and charitable trusts.

In computing the 20% threshold, the proposed statute makes it clear that the 20% rule applies to the trust's or estate's pro rata share of the entity. The 3% cumulative return test applies to the trust's share of the entity's distribution.

To preclude a "makeup" distribution of income from being characterized as principal for publicly traded entities, the proposed revision to 738.401(3)(e) provides that distributions from public entities must satisfy the same 3% cumulative income test before being categorized as principal. In addition, because the income interest will then be assured of a 3% return, the threshold for characterization as principal is reduced to 10% of the fair market value of the interest, which, in a company like Microsoft, would be much higher than 20% of its asset value.

F.S. 738.401(7) was added in 2005 to address potential abuses of entities by private trustees. The section has been effective, but it was found to impose an undue burden on trusts that have a private trustee and invest in a publicly traded partnership. Because the private trustee is not involved with determining the dividend policy of such entities, the conflict of interest addressed in 738.401(7) does not exist. The proposed revision to F.S. 738.401(7)(c)(1) excludes entities listed on a public stock exchange from the application of F.S. 738.401(7). With the changes made to s. 738.401(6), it was felt that s. 738.401(7) did not need to apply to Targeted Entities other than Investment Entities. Nonetheless, in the case of non-publicly traded Investment Entities, it was felt that potential abuses exist that are not solved by s. 738.401(6), so s. 738.401(7) was revised to try to eliminate those potential abuse situations.

Finally, because of the other revisions to F.S. 738.401(5) and (6), existing F.S. 738.407(7)(e) was renumbered as a new subsection (8) that covers the whole section, so that the section is first applied before the tax provisions of F.S. 735.705 and 738.706 are applied.

H. Section 738.602 Payments from deferred compensation plans, annuities, and retirement plans or accounts

Current Situation:

F.S. 738.602 was amended in 2009 to change the method used to compute the income from payments from deferred compensation plans, annuities, and retirement plans in response to an IRS ruling that declared that the language in the Revised Uniform Principal and Income Act could jeopardize the qualification of a trust for the marital deduction. The amendment adopted a method of computation of income from such assets held in marital trusts similar to that adopted by the National Conference of Commissioners on Uniform State Laws (“NCCUSL”). Under the amendment, however, non marital trusts continued to compute the allocation of income and principal using the method included in the original Act.

Effect of Proposed Changes:

The proposed revision to F.S. 738.602 would result in only one set of rules for all trusts holding such interests, thereby simplifying administration. In addition, the proposed change expands the references to an estate or gift tax and marital deduction to cover not only the federal tax laws, but those of any state to protect residents of other states whose trusts are administered in Florida.

I. Section 738.603 Liquidating asset

Current Situation:

F.S. 738.603 is used to allocate receipts from assets from which payments will diminish or terminate because the asset is expected to produce receipts for a period of limited duration, such as royalties, patents and leaseholds. NCCUSL’s Uniform Principal and Income Act allocated 10% of such payments to income and the balance to principal. Florida adopted this approach in 2002. In light of the adverse ruling issued by the IRS relative to using a payment of 10% of total

payments received to income and the balance to principal, this section should be amended to remove such language.

Effect of Proposed Changes:

The proposed amendment to F.S. 738.603 adopts the same rules that existed under the 1962 Act in F.S. 738.11, which required that payments be allocated first to income to the extent of 5% of the assets' carrying value at the beginning of the year and the balance to principal. This falls within the safe harbor permitted in IRS Regulations, which allows income to be from 3-5%.

J. Section 738.606 Property Not Productive of Income

Current Situation:

The statute applies to permit a beneficiary of a trust that qualified for a marital deduction under federal tax law to demand that the trust property be made productive, as required by federal law.

Effect of Proposed Changes:

The proposed amendment expands the protection to trusts that qualified for a marital deduction under the laws of any state, similar to the change in F.S. 738.602.

K. Section 738.705 Income taxes

Current Situation:

Since its original adoption in 2002, NCCUSL has amended the Uniform Principal and Income Act to clarify the method of income tax allocation for pass through entities such as partnerships and S Corporations.

Effect of Proposed Changes:

The proposed amendment adopts the methodology employed by NCCUSL in its whitepaper comments. The formula used by NCCUSL to determine the amount of a receipt from a pass through entity that is allocable to income and distributable to the income beneficiary is as follows:

$$D = [C - (R \times K)] / (1 - R)$$

D = Distribution to income beneficiary

C = Cash paid by the entity to the trust

R = Tax rate on income

K = Entity's K-1 taxable income

Example: ABC Trust receives a K-1 from Partnership reflecting taxable income of \$1 million. Partnership distributes \$500,000 to the trust, which it represents to be income. The trust is in the 35 percent tax bracket.

In the example above, the partnership distribution exceeds the trust's \$350,000 tax on the K-1 income by \$150,000 (\$500,000 - \$350,000 = \$150,000) allowing it to distribute the remaining \$150,000 to the beneficiary. But because the trust can deduct the \$150,000 paid to the beneficiary in computing the trust's income tax liability, it must apply the algebraic formula above to derive the amount owed the beneficiary. After deducting the payment, the trust should have exactly enough to pay its tax on the remaining share of entity taxable income.

Taxable income per K-1		1,000,000
Payment to beneficiary		<u>(230,769)</u>
Trust taxable income		\$ 769,231
Trust tax-35% Percent		269,231

Partnership distribution	\$ 500,000
Trust tax	<u>(269,231)</u>
Payable to the beneficiary	<u>\$ 230,769</u>

The proposed amendment incorporates this formula into F.S. 738.705.

L. Section 738.801 Application with respect to apportionment of expenses; improvements.

Current Situation:

Before the existence of modern trusts, interests in property were often divided into life estates (held by life tenants) and remainder interests (held by remaindermen). Life estates (and estates for a term of years) can be created by deed, will, or other instrument. Under the common law, the life tenant was responsible for the payment of expenses relating to the maintenance and upkeep of property, while the remainderman was generally responsible for capital improvements. In addition, the life tenant was responsible for preventing "waste" – any reduction in the value of the property. The life tenant was not responsible for making improvements to property, with some exceptions.

The existing UPIA codified common law as to the apportionment of specific expenses between life tenants and remaindermen, by incorporating the provisions of 738.701-738.705 as far as applicable. Those provisions are expressed in trust terms of principal and income, adding to the confusion as to which provisions apply to both trusts and lifetenants/remaindermen, and which apply only to trusts..

The current statute provides for the allocation of expenses to the life tenant and the remaindermen in some circumstances based on the "official mortality tables". but there is confusion as to what they are.

Effect of proposed changes:

The proposal revises 738.801 to specifically include those portions of 738.701-738.705 that apply, and has expressed those provisions in terms applicable to life tenants and remaindermen. .

The proposal defines the “official mortality tables” by referring to tables published monthly by the federal government pursuant to 26 U.S.C. s. 7520. These tables are widely available to the public

The proposal confirms that, to the extent that the revised statute does not address the allocation of a particular expense, the common law will apply.

III. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

The proposal does not have a fiscal impact on state or local governments.

IV. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

The proposal does not have a direct economic impact on the private sector.

V. CONSTITUTIONAL ISSUES

None anticipated.

VI. OTHER INTERESTED PARTIES.

The Uniform Principal and Income Act Committee of the RPPTL Section worked directly with representatives of the Florida Banker’s Association and the Florida Institute of Certified Public Accountants in preparing this proposal. It is anticipated that both organizations will either support or not oppose the proposal.

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LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By ED KOREN, Chair, UNIFORM PRINCIPAL & INCOME ACT Committee of the Real Property Probate & Trust Law Section (RPPTL Approval Date August 6, 2011)

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Position Type RPPTL Section, The Florida Bar
(Florida Bar, section, division, committee or both)

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Martha J. Edenfield, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee FL 32302-2095, Telephone (850) 222-3533.
(List name, address and phone number)

Appearances

Before Legislators

(SAME)

(List name and phone # of those having face to face contact with Legislators)

Meetings with

Legislators/staff

(SAME)

(List name and phone # of those having face to face contact with Legislators)

PROPOSED ADVOCACY

All types of partisan advocacy or nonpartisan technical assistance should be presented to the Board of Governors via this request form. All proposed legislation that has *not* been filed as a bill or a proposed committee bill (PCB) should be attached to this request in legislative format - Standing Board Policy 9.20(c). Contact the Governmental Affairs office with questions.

If Applicable,

List The Following

N/A

(Bill or PCB #)

(Bill or PCB Sponsor)

Indicate Position

Support _____

Oppose _____

Tech Asst. _____

Other _____

Proposed Wording of Position for Official Publication:

"Support the proposed amendments to F.S. Chapter 738 to bring the Florida Uniform Principal and Income Act into conformity and alignment with the Uniform Act and Federal tax law and to clarify existing ambiguities representing further and ongoing technical corrections to our Act."

Reasons For Proposed Advocacy:

This proposed legislation addresses needed clarification concerning when provisions of the act apply only to trustees and not other fiduciaries, adds a definition of "carrying value" for fiduciary accounting purposes, clarifies that the act applies to any trust or estate administered in Florida or under Florida law, provides for use of average fair market value of trust assets over several years in computing unitrust payments in order to avoid wide swings in payments to beneficiaries, provides simplified rules for categorizing receipts from certain assets as income or principal, and effects certain changes required by IRS rulings and changes made in the Uniform Act by the National Conference of Commissioners on Uniform State Laws (NCCUSL). See the attached White Paper for details.

PRIOR POSITIONS TAKEN ON THIS ISSUE

Please indicate any prior Bar or section positions on this issue to include opposing positions. Contact the Governmental Affairs office if assistance is needed in completing this portion of the request form.

Most Recent Position NONE
(Indicate Bar or Name Section) (Support or Oppose) (Date)

Others
(May attach list if more than one) NONE
(Indicate Bar or Name Section) (Support or Oppose) (Date)

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

The Legislation Committee and Board of Governors do not typically consider requests for action on a legislative position in the absence of responses from all potentially affected Bar groups or legal organizations - Standing Board Policy 9.50(c). Please include all responses with this request form.

Referrals

The Florida Bar Tax Section SUPPORT
(Name of Group or Organization) (Support, Oppose or No Position)

The Florida Bankers Association SUPPORT EXPECTED
(Name of Group or Organization) (Support, Oppose or No Position)

The Florida Institute of Certified Public Accountants SUPPORT EXPECTED
(Name of Group or Organization) (Support, Oppose or No Position)

Please submit completed Legislative Position Request Form, along with attachments, to the Governmental Affairs Office of The Florida Bar. Upon receipt, staff will further coordinate the scheduling for final Bar action of your request which usually involves separate appearances before the Legislation Committee and the Board of Governors unless otherwise advised. For information or assistance, please telephone (904) 561-5662 or 800-342-8060, extension 5662.

1 A bill to be entitled

2 An act relating to the Principal and Income Act, Florida
3 Statutes Ch. 738; amending s.738.102, F.S.; adding a definition
4 of "Carrying Value"; amending s. 738.103, F.S.; clarifying the
5 applicability of Florida Statutes Ch. 738 to all trusts and
6 estates administered in this state or under Florida law;
7 amending s. 738.104, F.S.; deleting language as a result of the
8 amendment to s. 738.103, F.S.; amending s. 738.1041, F.S.;;
9 providing for the definition of "Average Fair Market
10 Value"; deleting duplicative language in s. 1041(4); clarifying
11 requirements for express total return unitrust; amending s.
12 738.105, F.S.; clarifying the applicability of the section to
13 trustees only; amending s. 738.201, F.S.; clarifying that
14 section applies to all fiduciaries; clarifying rules for payment
15 of interest on pecuniary devises not in trust; amending s.
16 738.202, F.S.; modifying and clarifying the method by which
17 income is to be distributed to certain beneficiaries; amending
18 s. 738.301, F.S.; clarifying that section applies to all
19 fiduciaries; amending s. 738.302, F.S.; clarifying that section
20 applies to all fiduciaries; amending s. 738.303, F.S.;;
21 clarifying that section applies to all fiduciaries; amending s.
22 738.401, F.S.; clarifying that section applies to all
23 fiduciaries; modifying the method by which distributions from

24 entities are allocated between income and principal; amending s.
25 738.402, F.S.; clarifying that section applies to all
26 fiduciaries; amending s. 738.403, F.S.; clarifying that section
27 applies to all fiduciaries; correcting improper cross-reference;
28 amending s. 738.501, F.S.; clarifying that section applies to
29 all fiduciaries; amending s. 738.502, F.S.; clarifying that
30 section applies to all fiduciaries; amending s. 738.503, F.S.;
31 clarifying that section applies to all fiduciaries; amending s.
32 738.504, F.S.; clarifying that section applies to all
33 fiduciaries; amending s. 738.601, F.S.; clarifying that section
34 applies to all fiduciaries; amending s. 738.602, F.S.;
35 clarifying that section applies to all fiduciaries; modifying
36 section to remove disparate treatment of trusts so that all
37 trust are treated the same; amending s. 738.603, F.S.;
38 clarifying that section applies to all fiduciaries; modifying
39 method used to allocate between income and principal for
40 liquidating assets; amending s. 738.604, F.S.; clarifying that
41 section applies to all fiduciaries; amending s. 738.605, F.S.;
42 clarifying that section applies to all fiduciaries; amending s.
43 738.606, F.S.; clarifying that section applies to all
44 fiduciaries; amending s. 738.607, F.S.; clarifying that section
45 applies to all fiduciaries; amending s. 738.608, F.S.; clarifying
46 that section applies to all fiduciaries; amending s. 738.701,

47 F.S.; clarifying that section applies to all fiduciaries;
48 amending s. 738.702, F.S.; clarifying that section applies to
49 all fiduciaries; amending s. 738.703, F.S.; clarifying that
50 section applies to all fiduciaries; amending s. 738.704, F.S.;
51 clarifying that section applies to all fiduciaries; amending s.
52 738.705, F.S.; clarifying that section applies to all
53 fiduciaries; clarifying the method used to allocate income taxes
54 between income and principal; restating s. 738.801. F.S.;
55 clarifying responsibilities of tenants and remaindermen;
56 providing for an effective date for the provisions of this Act.

57

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

59

60 Section 1. Subsection (3) through (13) of section
61 738.102, Florida Statutes, are renumbered as subsections (4)
62 through (14), respectively, and a new subsection (3) is added to
63 that section to read:

64 738.102 Definitions.—

65 (3) "Carrying Value" (also known as "Inventory Value" and
66 "Fiduciary Acquisition Value") means the fair market value at
67 the time the assets are received by the fiduciary. For estates
68 of decedents, and trusts described in s. 733.707(3) after the
69 grantor's death, the assets are considered as received at the

70 date of death. If there is a change in fiduciaries, a majority
71 of the continuing fiduciaries may elect to adjust the carrying
72 values to reflect the fair market value of the assets at the
73 beginning of their administration. If that election is made, it
74 must be reflected on the first accounting filed after the
75 election. For assets acquired during the administration of the
76 estate or trust, the carrying value will be equal to the
77 acquisition cost of the asset.

78 Section 2. Subsection (3) is added to section 738.103,
79 Florida Statutes, to read:

80 738.103 Fiduciary duties; general principles.—

81 (3) Except as provided in Section 738.1041(9), this
82 chapter shall be construed as pertaining to the administration
83 of a trust and is applicable to any trust that is administered
84 either in this state or under Florida law. All provisions of
85 this chapter also apply to any estate that is administered in
86 Florida, unless the provision is limited in application to a
87 trustee, rather than a fiduciary.

88 Section 3. Subsection (11) of section 738.104, Florida
89 Statutes, is deleted:

90 738.104 Trustee's power to adjust.—

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

94 Section 4. Paragraphs (a), (c), (d) and (e) of
95 subsection (1) of section 738.1041, Florida Statutes, are
96 redesignated as paragraphs (b), (d), (e) and (f), respectively,
97 present paragraph (b) is redesignated as paragraph (c) and
98 amended, present paragraph (f) is redesignated as paragraph (g)
99 and amended, and a new paragraph (a) is added to that subsection
100 to read:

101 738.1041 Total return unitrust.—

102 (1)

103 (a) "Average fair market value" means the average of the
104 fair market values of assets held by the trust at the beginning
105 of the current and each of the two preceding years, or for the
106 entire term of the trust if there are fewer than two preceding
107 years, adjusted as follows:

108 (i) If assets have been added to the trust at any
109 time during the years used to determine the average, then the
110 amount of each addition will be added to all years in which that
111 addition was not included.

112 (ii) If assets have been distributed from the trust
113 at any time during the years used to determine the average,

114 other than in satisfaction of the unitrust amount, then the
115 amount of each distribution will be subtracted from all years in
116 which that distribution was not included.

117
118 (a**b**) "Disinterested person" means a person who is not a
119 "related or subordinate party" as defined in s. 672(c) of the
120 United States Internal Revenue Code, 26 U.S.C. ss. 1 et seq., or
121 any successor provision thereof, with respect to the person then
122 acting as trustee of the trust and excludes the grantor and any
123 interested trustee.

124 (b**c**) "Fair market value" means the fair market value of
125 the assets held by the trust as otherwise determined under this
126 chapter, reduced by all known non-contingent ~~noncontingent~~
127 liabilities.

128 (e**d**) "Income trust" means a trust, created by either an
129 inter vivos or a testamentary instrument, which directs or
130 permits the trustee to distribute the net income of the trust to
131 one or more persons, either in fixed proportions or in amounts
132 or proportions determined by the trustee and regardless of
133 whether the trust directs or permits the trustee to distribute
134 the principal of the trust to one or more such persons.

135 (e**e**) "Interested distributee" means a person to whom
136 distributions of income or principal can currently be made who

137 has the power to remove the existing trustee and designate as
138 successor a person who may be a "related or subordinate party,"
139 as defined in the Internal Revenue Code, 26 U.S.C. s. 672(c),
140 with respect to such distributee.

141 (ef) "Interested trustee" means an individual trustee to
142 whom the net income or principal of the trust can currently be
143 distributed or would be distributed if the trust were then to
144 terminate and be distributed, any trustee whom an interested
145 distributee has the power to remove and replace with a related
146 or subordinate party as defined in paragraph (d), or an
147 individual trustee whose legal obligation to support a
148 beneficiary may be satisfied by distributions of income and
149 principal of the trust.

150 (fg) "Unitrust amount" means the amount determined by
151 multiplying the average fair market value of the assets as
152 defined in paragraph ~~(b)~~ (a) by the percentage calculated under
153 paragraph (2)(b).

154 Section 5. Subparagraph 2. of paragraph (b) of
155 subsection (2) of section 738.1041, Florida Statutes, is amended
156 to read:

157 738.1041 Total return unitrust.—

158 2. The interested trustee or disinterested trustee
159 administers the trust such that:

160 a. The percentage used to calculate the unitrust amount is
161 50 percent of the ~~applicable federal~~ rate as defined in the
162 Internal Revenue Code, 26 U.S.C. s. 7520, in effect for the
163 month the conversion under this section becomes effective and
164 for each January thereafter; however, if the percentage
165 calculated exceeds 5 percent, the unitrust percentage shall be 5
166 percent and if the percentage calculated is less than 3 percent,
167 the unitrust percentage shall be 3 percent; and

168 b. The fair market value of the trust shall be determined
169 at least annually on an asset-by-asset basis, reasonably and in
170 good faith, in accordance with the provisions of s. 738.202(5),
171 except the following property shall not be included in
172 determining the value of the trust:

173 (I) Any residential property or any tangible personal
174 property that, as of the first business day of the current
175 valuation year, one or more current beneficiaries of the trust
176 have or have had the right to occupy, or have or have had the
177 right to possess or control (other than in his or her capacity
178 as trustee of the trust), and instead the right of occupancy or
179 the right to possession and control shall be deemed to be the
180 unitrust amount with respect to such property; however, the
181 unitrust amount shall be adjusted to take into account partial

182 distributions from or receipt into the trust of such property
183 during the valuation year; +

184 (II) Any asset specifically given to a beneficiary and the
185 return on investment on such property, which return on
186 investment shall be distributable to such beneficiary; or +

187 (III) Any asset while held in a decedent's ~~testator's~~
188 estate. +

189 Section 6. Subsection (4) of section 738.1041, Florida
190 Statutes, is deleted, subsections (5) through (9) are renumbered
191 as subsections (4) through (8), respectively, present subsection
192 (10) is renumbered as subsection (9) and amended, and present
193 subsection (11) is renumbered as subsection (10) and amended, to
194 read as follows:

195 738.1041 Total return unitrust.-

196 (4) ~~All determinations made pursuant to sub-subparagraph~~
197 ~~(2)(b)2.b. shall be conclusive if reasonable and made in good~~
198 ~~faith. Such determination shall be conclusively presumed to have~~
199 ~~been made reasonably and in good faith unless proven otherwise~~
200 ~~in a proceeding commenced by or on behalf of a person interested~~
201 ~~in the trust within the time provided in s. 736.1008. The burden~~
202 ~~will be on the objecting interested party to prove that the~~
203 ~~determinations were not made reasonably and in good faith.~~

204 ~~(910)~~ This section shall be construed as pertaining to the
205 administration of a trust and is applicable to any trust that is
206 administered either in this state or under Florida law unless:

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

210 (b) The trust is a trust described in the Internal Revenue
211 Code, 26 U.S.C. s. 170(f)(2)(B), s. 642(c)(5), s. 664(d), s.
212 2702(a)(3), or s. 2702(b);

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

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

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

221 (d) The governing instrument expressly prohibits use of
222 this section by specific reference to the section. A provision
223 in the governing instrument that, "The provisions of section
224 738.1041, Florida Statutes, as amended, or any corresponding
225 provision of future law, shall not be used in the administration

226 of this trust," or similar words reflecting such intent shall be
227 sufficient to preclude the use of this section. ~~or~~

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

230 (1011) The grantor of a trust may create an express total
231 return unitrust which will become effective as provided in the
232 trust instrument ~~document~~ without requiring a conversion under
233 this section. An express total return unitrust created by the
234 grantor of the trust shall be treated as a unitrust under this
235 section only if the terms of the trust instrument ~~document~~
236 contain ~~all~~ both of the following provisions:

237 (a) That distributions from the trust will be unitrust
238 amounts and the manner in which the unitrust amount will be
239 calculated; ~~and the method in which the fair market value of~~
240 ~~the trust will be determined.~~ and

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

244 In addition, the trust instrument may contain provisions
245 specifying:

246 (c) The method to be used in determining the fair market
247 value of the trust (including whether to use an average fair

248 market value or just the fair market value of the assets held by
 249 the trust at the beginning of the current year); or -

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

252 The remaining provisions of this section shall apply to
 253 establish the method of determining the fair market value of the
 254 trust if the trust instrument is silent as to paragraph (c), and
 255 to specify those assets, if any, that are to be excluded in
 256 determining the unitrust amount if the trust instrument is
 257 silent as to paragraph (d).

258
 259 Section 7. Subsections (1) and (3) of section 738.105,
 260 Florida Statutes, are amended to read as follows:

261 738.105 Judicial control of discretionary powers.—

262 (1) A court shall not change a trustee's ~~fiduciary~~
 263 decision to exercise or not to exercise a discretionary power
 264 conferred by this chapter unless the court determines that the
 265 decision was an abuse of the trustee's ~~fiduciary~~ discretion. A
 266 court shall not determine that a trustee ~~fiduciary~~ abused its
 267 discretion merely because the court would have exercised the
 268 discretion in a different manner or would not have exercised the
 269 discretion.

270 (3) If a court determines that a trustee ~~fiduciary~~ has
271 abused its discretion, the remedy shall be to restore the income
272 and remainder beneficiaries to the positions they would have
273 occupied if the trustee ~~fiduciary~~ had not abused its discretion,
274 according to the following rules:

275 (a) To the extent the abuse of discretion has resulted in
276 no distribution to a beneficiary or a distribution that is too
277 small, the court shall require the trustee ~~fiduciary~~ to
278 distribute from the trust to the beneficiary an amount the court
279 determines will restore the beneficiary, in whole or in part, to
280 his or her appropriate position.

281 (b) To the extent the abuse of discretion has resulted in
282 a distribution to a beneficiary that is too large, the court
283 shall restore the beneficiaries, the trust, or both, in whole or
284 in part, to their appropriate positions by requiring the trustee
285 ~~fiduciary~~ to withhold an amount from one or more future
286 distributions to the beneficiary who received the distribution
287 that was too large or requiring that beneficiary to return some
288 or all of the distribution to the trust.

289 (c) To the extent the court is unable, after applying
290 paragraphs (a) and (b), to restore the beneficiaries, the trust,
291 or both, to the positions they would have occupied if the
292 trustee ~~fiduciary~~ had not abused its discretion, the court may

293 require the trustee ~~fiduciary~~ to pay an appropriate amount from
294 its own funds to one or more of the beneficiaries or the trust
295 or both.

296 (4) Upon the filing of a petition by the trustee
297 ~~fiduciary~~, the court having jurisdiction over the trust shall
298 determine whether a proposed exercise or nonexercise by the
299 trustee ~~fiduciary~~ of a discretionary power conferred by this
300 chapter will result in an abuse of the trustee's ~~fiduciary~~
301 discretion. If the petition describes the proposed exercise or
302 nonexercise of the power and contains sufficient information to
303 inform the beneficiaries of the reasons for the proposal, the
304 facts upon which the trustee ~~fiduciary~~ relies, and an
305 explanation of how the income and remainder beneficiaries will
306 be affected by the proposed exercise or nonexercise of the
307 power, a beneficiary who challenges the proposed exercise or
308 nonexercise has the burden of establishing that such exercise or
309 nonexercise will result in an abuse of discretion.

310 Section 8. Section 738.201, Florida Statutes, is
311 amended to read:

312 738.201 Determination and distribution of net income.—
313 After a decedent dies, in the case of an estate, or after an
314 income interest in a trust ends, the following rules apply:

315 (1) A fiduciary of an estate or of a terminating income
316 interest shall determine the amount of net income and net
317 principal receipts received from property specifically given to
318 a beneficiary under the rules in ss. 738.301-738.706 ~~which apply~~
319 ~~to trustees~~ and the rules in subsection (5). The fiduciary shall
320 distribute the net income and net principal receipts to the
321 beneficiary who is to receive the specific property.

322 (2) A fiduciary shall determine the remaining net income
323 of a decedent's estate or a terminating income interest under
324 the rules in ss. 738.301-738.706 ~~which apply to trustees~~ and by:

325 (a) Including in net income all income from property used
326 to discharge liabilities.

327 (b) Paying from income or principal, in the fiduciary's
328 discretion, fees of attorneys, accountants, and fiduciaries;
329 court costs and other expenses of administration; and interest
330 on death taxes, but the fiduciary may pay those expenses from
331 income of property passing to a trust for which the fiduciary
332 claims an estate tax marital or charitable deduction under the
333 Internal Revenue Code or comparable law of any state only to the
334 extent the payment of those expenses from income will not cause
335 the reduction or loss of the deduction.

336 (c) Paying from principal all other disbursements made or
337 incurred in connection with the settlement of a decedent's

338 estate or the winding up of a terminating income interest,
339 including debts, funeral expenses, disposition of remains,
340 family allowances, and death taxes and related penalties that
341 are apportioned to the estate or terminating income interest by
342 the will, the terms of the trust, or applicable law.

343 (3) If A fiduciary shall distribute to a beneficiary who
344 receives a pecuniary amount outright is also entitled to receive
345 the interest on that amount or any other amount provided by the
346 will ~~or~~ the terms of the trust, a fiduciary shall distribute
347 the interest or applicable law from net income determined under
348 subsection (2) or from principal to the extent net income is
349 insufficient. ~~If a beneficiary is to receive a pecuniary amount~~
350 ~~outright from a trust after an income interest ends and no~~
351 ~~interest or other amount is provided for by the terms of the~~
352 ~~trust or applicable law, the fiduciary shall distribute the~~
353 ~~interest or other amount to which the beneficiary would be~~
354 ~~entitled under applicable law if the pecuniary amount were~~
355 ~~required to be paid under a will.~~

356 (4) A fiduciary shall distribute the net income remaining
357 after distributions required by subsections (1) through
358 ~~subsection (3)~~ in the manner described in s. 738.202 to all
359 other beneficiaries, including a beneficiary who receives a
360 pecuniary amount in trust, even if the beneficiary holds an

361 unqualified power to withdraw assets from the trust or other
362 presently exercisable general power of appointment over the
363 trust.

364 (5) A fiduciary may not reduce principal or income receipts
365 from property described in subsection (1) because of a payment
366 described in s. 738.701 or s. 738.702 to the extent the will,
367 the terms of the trust, or applicable law requires the fiduciary
368 to make the payment from assets other than the property or to
369 the extent the fiduciary recovers or expects to recover the
370 payment from a third party. The net income and principal
371 receipts from the property are determined by including all of
372 the amounts the fiduciary receives or pays with respect to the
373 property, whether those amounts accrued or became due before,
374 on, or after the date of a decedent's death or an income
375 interest's terminating event, and by making a reasonable
376 provision for amounts the fiduciary believes the estate or
377 terminating income interest may become obligated to pay after
378 the property is distributed.

379 Section 9. Subsections (1), (2) and (5) of section
380 738.202, Florida Statutes, are amended, and a new subsection (6)
381 is added to that section, to read:

382 738.202 Distribution to residuary and remainder
383 beneficiaries.—

384 (1) Each beneficiary described in s. 738.201(4) is
385 entitled to receive a portion of the net income remaining after
386 the application of s. 738.201(1)-(3), that is equal to the
387 beneficiary's fractional interest in undistributed principal
388 assets, using carrying values as of the distribution date. If a
389 fiduciary makes more than one distribution of assets to
390 beneficiaries to whom this section applies, each beneficiary,
391 including one who does not receive part of the distribution, is
392 entitled, as of each distribution date, to the net income the
393 fiduciary has received after the date of death or terminating
394 event or earlier distribution date but has not distributed as of
395 the current distribution date.

396 (2) In determining a beneficiary's share of net income,
397 the following rules apply:

398 (a) The beneficiary is entitled to receive a portion of
399 the net income equal to the beneficiary's fractional interest in
400 the carrying value of the undistributed principal assets
401 immediately prior to ~~before~~ the distribution date, excluding the
402 amount of unpaid liabilities ~~including assets that later may be~~
403 ~~sold to meet principal obligations.~~

404 (b) The beneficiary's fractional interest in the
405 undistributed principal assets shall be calculated: without
406 ~~regard to~~

407 1. At the time the interest began and adjusted for any
408 disproportionate distributions since the interest began;

409 2. By excluding any liabilities of the estate or trust
410 from the calculation;

411 3. By also excluding property specifically given to a
412 beneficiary and property required to pay pecuniary amounts not
413 in trust; and—.

414 ~~4.(c) The beneficiary's fractional interest in the~~
415 ~~undistributed principal assets shall be calculated on~~ On the
416 basis of the aggregate carrying value of those assets determined
417 under section (1), as of the distribution date ~~without reducing~~
418 ~~the value by any unpaid principal obligation.~~

419 ~~(d) The distribution date for purposes of this section may~~
420 ~~be the date as of which the fiduciary calculates the value of~~
421 ~~the assets if that date is reasonably near the date on which~~
422 ~~assets are actually distributed.~~

423 (c) If a disproportionate distribution of principal is made
424 to any beneficiary, the respective fractional interests of all
425 beneficiaries in the remaining underlying assets will be
426 recomputed by:

427 (i) adjusting the carrying value of the principal assets to
428 their fair market value prior to the distribution;

429 (ii) reducing the fractional interest of the recipient of
 430 the disproportionate distribution in the remaining principal
 431 assets by the fair market value of the principal distribution;
 432 and
 433 (iii) recomputing the fractional interests of all
 434 beneficiaries in the remaining principal assets based upon the
 435 now restated carrying values.

436
 437 (5) The carrying value or fair market value of trust
 438 assets shall be determined on an asset-by-asset basis and shall
 439 be conclusive if reasonable and determined in good faith.
 440 Determinations of fair market value based upon ~~on~~ appraisals
 441 performed within 2 years before ~~or after~~ the valuation date
 442 shall be presumed reasonable. The values of trust assets shall
 443 be conclusively presumed to be reasonable and determined in good
 444 faith unless proven otherwise in a proceeding commenced by or on
 445 behalf of a person interested in the trust within the time
 446 provided in s. 736.1008.

447 (6) All distributions to a beneficiary shall be valued
 448 based upon their fair market value on the date of distribution.

449 Section 10. Subsection (4) of section 738.301, Florida
 450 Statutes, is amended to read:

451 738.301 When right to income begins and ends.—

452 (4) An income interest ends on the day before an income
453 beneficiary dies or another terminating event occurs, or on the
454 last day of a period during which there is no beneficiary to
455 whom a fiduciary ~~trustee~~ may distribute income.

456 Section 11. Subsections (1) and (2) of section 738.302,
457 Florida Statutes, are amended to read:

458 738.302 Apportionment of receipts and disbursements when
459 decedent dies or income interest begins.—

460 (1) A fiduciary ~~trustee~~ shall allocate an income receipt
461 or disbursement other than one to which s. 738.201(1) applies to
462 principal if the due date of the receipt or disbursement occurs
463 before a decedent dies in the case of an estate or before an
464 income interest begins in the case of a trust or successive
465 income interest.

466 (2) A fiduciary ~~trustee~~ shall allocate an income receipt
467 or disbursement to income if the due date of the receipt or
468 disbursement occurs on or after the date on which a decedent
469 dies or an income interest begins and the due date is a periodic
470 due date. An income receipt or disbursement shall be treated as
471 accruing from day to day if the due date of the receipt or
472 disbursement is not periodic or the receipt or disbursement has
473 no due date. The portion of the receipt or disbursement accruing
474 before the date on which a decedent dies or an income interest

475 begins shall be allocated to principal and the balance shall be
476 allocated to income.

477 Section 12. Subsections (2) and (3) of section 738.303,
478 Florida Statutes, are amended to read:

479 738.303 Apportionment when income interest ends.—

480 (2) When a mandatory income interest ends, the fiduciary
481 ~~trustee~~ shall pay to a mandatory income beneficiary who survives
482 that date, or the estate of a deceased mandatory income
483 beneficiary whose death causes the interest to end, the
484 beneficiary's share of the undistributed income that is not
485 disposed of under the terms of the trust unless the beneficiary
486 has an unqualified power to revoke more than 5 percent of the
487 trust immediately before the income interest ends. In the latter
488 case, the undistributed income from the portion of the trust
489 that may be revoked shall be added to principal.

490 (3) When a fiduciary's ~~trustee~~ obligation to pay a fixed
491 annuity or a fixed fraction of the value of the trust's assets
492 ends, the fiduciary ~~trustee~~ shall prorate the final payment if
493 and to the extent required by applicable law to accomplish a
494 purpose of the trust or its grantor relating to income, gift,
495 estate, or other tax requirements.

496 Section 13. Section 738.401, Florida Statutes, is
497 amended to read:

498 738.401 Character of receipts.-

499 (1) For purposes of this section, "entity" means a
500 corporation, partnership, limited liability company, regulated
501 investment company, real estate investment trust, common trust
502 fund, or any other organization in which a fiduciary ~~trustee~~ has
503 an interest other than a trust or estate to which s. 738.402
504 applies, a business or activity to which s. 738.403 applies, or
505 an asset-backed security to which s. 738.608 applies.

506 (2) Except as otherwise provided in this section, a
507 fiduciary ~~trustee~~ shall allocate to income money received from
508 an entity.

509 (3) Except as otherwise provided in this section, a
510 fiduciary ~~trustee~~ shall allocate the following receipts from an
511 entity to principal:

512 (a) Property other than money.

513 (b) Money received in one distribution or a series of
514 related distributions in exchange for part or all of a trust's
515 or estate's interest in the entity.

516 (c) Money received in total or partial liquidation of the
517 entity.

518 (d) Money received from an entity that is a regulated
519 investment company or a real estate investment trust if the

520 money ~~distributed~~ received represents short-term or long-term
521 capital gain realized within the entity.

522 (e) Money received from an entity listed on a public stock
523 exchange during any year of the trust or estate that that
524 exceeds 10 percent of the fair market value of the trust's or
525 estate's interest in the entity on the first day of that year
526 of the trust or estate. The amount to be allocated to principal
527 shall be reduced to the extent that the cumulative distributions
528 from the entity to the trust or estate allocated to income do
529 not exceed a cumulative annual return of 3 percent of the fair
530 market value of the interest in the entity at the beginning of
531 each year or portion of year for the number of years or portion
532 of years in the period that the interest in the entity has been
533 held by the trust or estate. If a trustee has exercised a power
534 to adjust under s. 738.104 during any period the interest in the
535 entity has been held by the trust, then the trustee must take
536 into account in determining the total income distributions from
537 that entity the extent to which the exercise of that power
538 resulted in income to the trust from that entity for that
539 period. If the income of the trust for any period was computed
540 under s. 738.1041, then the trustee must take into account in
541 determining the total income distributions from that entity for
542 that period the portion of the unitrust amount paid as a result

543 of the ownership of the trust's interest in the entity for that
544 period.

545 (4) If a fiduciary ~~trustee~~ elects, or continues an
546 election made by its predecessor, to reinvest dividends in
547 shares of stock of a distributing corporation or fund, whether
548 evidenced by new certificates or entries on the books of the
549 distributing entity, the new shares shall retain their character
550 as income.

551 (5) Money is received in partial liquidation:

552 (a) To the extent the entity, at or near the time of a
553 distribution, indicates that such money is a distribution in
554 partial liquidation; or

555 (b) To the extent the total amount of money and property
556 received in a distribution or series of related distributions
557 from an entity that is not listed on a public stock exchange
558 exceeds 20 percent of the trust or estate's pro rata share of
559 the entity's gross assets, as shown by the entity's year-end
560 financial statements immediately preceding the initial receipt.

561 (c) This subsection does not apply to any entity to which
562 subsection (7) applies.

563 (6) Money may not ~~is not received in partial liquidation,~~
564 ~~nor may money~~ be taken into account in determining any excess
565 under paragraph (5) (b), to the extent that the cumulative

566 distributions from the entity to the trust or the estate
567 allocated to income do not exceed the greater of:~~such money does~~
568 ~~not exceed the amount of income tax a trustee or beneficiary~~
569 ~~must pay on taxable income of the entity that distributes the~~
570 ~~money.~~

571 (a) A cumulative annual return of 3 percent of the
572 entity's carrying value computed at the beginning of each
573 period for the number of years or portion of years that the
574 entity was held by the fiduciary. If a trustee has exercised a
575 power to adjust under s. 738.104 during any period the interest
576 in the entity has been held by the trust, then the trustee must
577 take into account in determining the total income distributions
578 from that entity the extent to which exercise of the power
579 resulted in income to the trust from that entity for that
580 period. If the income of a trust for any period was computed
581 under the provisions of s.738.1041, then the trustee must take
582 into account in determining the total income distributions from
583 the entity for that period the portion of the unitrust amount
584 paid as a result of the ownership of the trust's interest in the
585 entity for that period; or

586 (b) If the entity is treated as a partnership, subchapter S
587 corporation, or disregarded entity pursuant to the Internal
588 Revenue Code of 1986, as amended, then the amount of income tax

589 attributable to the trust's or estate's ownership share of the
590 entity, based upon its pro rata share of the taxable income of
591 the entity that distributes the money, for the number of years
592 or portion of years that the interest in the entity was held by
593 the fiduciary, calculated as if all of that tax was incurred by
594 the fiduciary.

595 (7) The following special rules shall apply to money or
596 property received by a private trustee as a distribution from an
597 investment entity described in this subsection:

598 (a) that is treated as a partnership, subchapter S
599 corporation, or disregarded entity pursuant to the Internal
600 Revenue Code of 1986, as amended The trustee shall first treat
601 as income of the trust all of the money or property received
602 from the investment entity in the current year that would be
603 considered income under this chapter if the trustee had directly
604 held the trust's pro rata share of the assets of the investment
605 entity. For this purpose, all distributions received in the
606 current year are to be aggregated.

607 (b) The trustee shall next treat as income of the trust any
608 additional money or property received in the current year that
609 would have been considered income in the prior two years under
610 paragraph (a) if additional money or property had been received
611 from the investment entity in any of those prior two years. The

612 amount to be treated as income is to be reduced by any
613 distributions of money or property made by the investment entity
614 to the trust during the current and prior two years that were
615 treated as income under this paragraph (b).

616 (c) The remainder of the distribution, if any, will be
617 treated as principal.

618 (d) For purposes of this subsection, the following
619 definitions shall apply:

620 1. "Investment entity" means any entity, other than a
621 business activity conducted by the trustee described in s.
622 738.403 or an entity that is listed on a public stock
623 exchange, that is treated as a partnership, subchapter S
624 corporation, or disregarded entity pursuant to the Internal
625 Revenue Code of 1986, as amended, and that normally
626 derives 50 percent or more of its annual cumulative net
627 income from interest, dividends, annuities, royalties,
628 rental activity, or other passive investments, including
629 income from the sale or exchange of such passive
630 investments.

631 2. "Private trustee" means a trustee who is an individual,
632 but only if the trustee is unable to utilize the power to
633 adjust between income and principal with respect to
634 receipts from entities described in this subsection

635 pursuant to s. 738.104. A bank, trust company, or other
636 commercial trustee shall not be considered to be a private
637 trustee.

638 (8) This section shall be applied before applying ss. 738.705
639 and 738.706 and shall not be construed to modify or change any
640 of the provisions of those sections.

641
642 ~~The following special rules shall apply to money moneys or~~
643 ~~property received by a private trustee from entities described~~
644 ~~in this subsection:~~

645 ~~(a) Moneys or property received from a targeted entity that~~
646 ~~is not an investment entity which do not exceed the trust's pro~~
647 ~~rata share of the undistributed cumulative net income of the~~
648 ~~targeted entity during the time an ownership interest in the~~
649 ~~targeted entity was held by the trust shall be allocated to~~
650 ~~income. The balance of moneys or property received from a~~
651 ~~targeted entity shall be allocated to principal.~~

652 ~~(b) If trust assets include any interest in an investment~~
653 ~~entity, the designated amount of moneys or property received~~
654 ~~from the investment entity shall be treated by the trustee in~~
655 ~~the same manner as if the trustee had directly held the trust's~~
656 ~~pro rata share of the assets of the investment entity~~

657 ~~attributable to the distribution of such designated amount.~~

658 ~~Thereafter, distributions shall be treated as principal.~~

659 ~~(c) For purposes of this subsection, the following~~
660 ~~definitions shall apply:~~

661 ~~1. "Cumulative net income" means the targeted entity's net~~
662 ~~income as determined using the method of accounting regularly~~
663 ~~used by the targeted entity in preparing its financial~~
664 ~~statements, or if no financial statements are prepared, the net~~
665 ~~book income computed for federal income tax purposes, for every~~
666 ~~year an ownership interest in the entity is held by the trust.~~
667 ~~The trust's pro rata share shall be the cumulative net income~~
668 ~~multiplied by the percentage ownership of the trust.~~

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

672 ~~a. The amount of income of the investment entity for the~~
673 ~~current year, as reported to the trustee by the investment~~
674 ~~entity for federal income tax purposes; or~~

675 ~~b. The amount of income of the investment entity for the~~
676 ~~current year and the prior 2 years, as reported to the trustee~~
677 ~~by the investment entity for federal income tax purposes, less~~
678 ~~any distributions of moneys or property made by the investment~~
679 ~~entity to the trustee during the prior 2 years.~~

680 ~~3. "Investment entity" means a targeted entity that~~
681 ~~normally derives 50 percent or more of its annual cumulative net~~
682 ~~income from interest, dividends, annuities, royalties, rental~~
683 ~~activity, or other passive investments, including income from~~
684 ~~the sale or exchange of such passive investments.~~

685 ~~4. "Private trustee" means a trustee who is an individual,~~
686 ~~but only if the trustee is unable to utilize the power to adjust~~
687 ~~between income and principal with respect to receipts from~~
688 ~~entities described in this subsection pursuant to s. 738.104. A~~
689 ~~bank, trust company, or other commercial trustee shall not be~~
690 ~~considered to be a private trustee.~~

691 ~~5. "Targeted entity" means any entity that is treated as a~~
692 ~~partnership, subchapter S corporation, or disregarded entity~~
693 ~~pursuant to the Internal Revenue Code of 1986, as amended, other~~
694 ~~than an entity described in s. 738.403.~~

695 ~~6. "Undistributed cumulative net income" means the trust's~~
696 ~~pro rata share of cumulative net income, less all prior~~
697 ~~distributions from the targeted entity to the trust that have~~
698 ~~been allocated to income.~~

699 ~~(d) This subsection shall not be construed to modify or~~
700 ~~change any of the provisions of ss. 738.705 and 738.706 relating~~
701 ~~to income taxes.~~

702 ~~(8) A trustee may rely upon a statement made by an entity~~
703 ~~about the source or character of a distribution, about the~~
704 ~~amount of profits of a targeted entity, or about the nature and~~
705 ~~value of assets of an investment entity if the statement is made~~
706 ~~at or near the time of distribution by the entity's board of~~
707 ~~directors or other person or group of persons authorized to~~
708 ~~exercise powers to pay money or transfer property comparable to~~
709 ~~those of a corporation's board of directors.~~

710 Section 14. Section 738.402, Florida Statutes, is
711 amended to read:

712 738.402 Distribution from trust or estate.— A fiduciary
713 ~~trustee~~ shall allocate to income an amount received as a
714 distribution of income from a trust or an estate in which the
715 trust has an interest other than a purchased interest and shall
716 allocate to principal an amount received as a distribution of
717 principal from such a trust or estate. If a fiduciary ~~trustee~~
718 purchases an interest in a trust that is an investment entity,
719 or a decedent or donor transfers an interest in such a trust to
720 a fiduciary ~~trustee~~, s. 738.401 or s. 738.608 applies to a
721 receipt from the trust.

722 Section 15. Section 738.403, Florida Statutes, is
723 amended to read:

724 738.403 Business and other activities conducted by
725 fiduciary trustee.-

726 (1) If a fiduciary trustee who conducts a business or
727 other activity determines that it is in the best interest of all
728 the beneficiaries to account separately for the business or
729 activity instead of accounting for the business or activity as
730 part of the trust's general accounting records, the fiduciary
731 ~~trustee~~ may maintain separate accounting records for the
732 transactions of such business or other activity, whether or not
733 the assets of such business or activity are segregated from
734 other trust assets.

735 (2) A fiduciary trustee who accounts separately for a
736 business or other activity may determine the extent to which the
737 net cash receipts of such business or activity must be retained
738 for working capital, the acquisition or replacement of fixed
739 assets, and other reasonably foreseeable needs of the business
740 or activity, and the extent to which the remaining net cash
741 receipts are accounted for as principal or income in the trust's
742 general accounting records. If a fiduciary trustee sells assets
743 of the business or other activity, other than in the ordinary
744 course of the business or activity, the fiduciary trustee shall
745 account for the net amount received as principal in the trust's
746 general accounting records to the extent the fiduciary trustee

747 determines that the amount received is no longer required in the
748 conduct of the business.

749 (3) Activities for which a fiduciary ~~trustee~~ may maintain
750 separate accounting records include:

751 (a) Retail, manufacturing, service, and other traditional
752 business activities.

753 (b) Farming.

754 (c) Raising and selling livestock and other animals.

755 (d) Management of rental properties.

756 (e) Extraction of minerals and other natural resources.

757 (f) Timber operations.

758 (g) Activities to which s. 738.607 ~~738.608~~ applies.

759 Section 16. Section 738.501, Florida Statutes, is
760 amended to read:

761 738.501 Principal receipts.—A fiduciary ~~trustee~~ shall
762 allocate to principal:

763 (1) To the extent not allocated to income under this
764 chapter, assets received from a transferor during the
765 transferor's lifetime, a decedent's estate, a trust with a
766 terminating income interest, or a payor under a contract naming
767 the trust or its fiduciary ~~trustee~~ as beneficiary.

768 (2) Money or other property received from the sale,
769 exchange, liquidation, or change in form of a principal asset,
770 including realized profit, subject to this section.

771 (3) Amounts recovered from third parties to reimburse the
772 trust because of disbursements described in s. 738.702(1)(g) or
773 for other reasons to the extent not based on the loss of income.

774 (4) Proceeds of property taken by eminent domain but a
775 separate award made for the loss of income with respect to an
776 accounting period during which a current income beneficiary had
777 a mandatory income interest is income.

778 (5) Net income received in an accounting period during
779 which there is no beneficiary to whom a fiduciary ~~trustee~~ may or
780 shall distribute income.

781 (6) Other receipts as provided in ss. 738.601-738.608.

782 Section 17. Section 738.502, Florida Statutes, is
783 amended to read:

784 738.502 Rental property.—To the extent a fiduciary ~~trustee~~
785 accounts for receipts from rental property pursuant to this
786 section, the fiduciary ~~trustee~~ shall allocate to income an
787 amount received as rent of real or personal property, including
788 an amount received for cancellation or renewal of a lease. An
789 amount received as a refundable deposit, including a security
790 deposit or a deposit that is to be applied as rent for future

791 periods, shall be added to principal and held subject to the
792 terms of the lease and is not available for distribution to a
793 beneficiary until the fiduciary's ~~trustee~~ contractual
794 obligations have been satisfied with respect to that amount.

795 Section 18. Subsections (1) through (3) of section
796 738.503, Florida Statutes, are amended to read:

797 738.503 Obligation to pay money.—

798 (1) An amount received as interest, whether determined at
799 a fixed, variable, or floating rate, on an obligation to pay
800 money to the fiduciary ~~trustee~~, including an amount received as
801 consideration for prepaying principal, shall be allocated to
802 income without any provision for amortization of premium.

803 (2) Except as otherwise provided herein, a fiduciary
804 ~~trustee~~ shall allocate to principal an amount received from the
805 sale, redemption, or other disposition of an obligation to pay
806 money to the fiduciary ~~trustee~~.

807 (3) The increment in value of a bond or other obligation
808 for the payment of money bearing no stated interest but payable
809 at a future time in excess of the price at which it was issued
810 or purchased, if purchased after issuance, is distributable as
811 income. If the increment in value accrues and becomes payable
812 pursuant to a fixed schedule of appreciation, it may be
813 distributed to the beneficiary who was the income beneficiary at

814 this time of increment from the first principal cash available
815 or, if none is available, when the increment is realized by
816 sale, redemption, or other disposition. When unrealized
817 increment is distributed as income but out of principal, the
818 principal shall be reimbursed for the increment when realized.
819 If, in the reasonable judgment of the fiduciary ~~trustee~~,
820 exercised in good faith, the ultimate payment of the bond
821 principal is in doubt, the fiduciary ~~trustee~~ may withhold the
822 payment of incremental interest to the income beneficiary.

823 Section 19. Subsections (1) and (2) of section 738.504,
824 Florida Statutes, are amended to read:

825 738.504 Insurance policies and similar contracts.—

826 (1) Except as otherwise provided in subsection (2), a
827 fiduciary ~~trustee~~ shall allocate to principal the proceeds of a
828 life insurance policy or other contract in which the trust or
829 its fiduciary ~~trustee~~ is named as beneficiary, including a
830 contract that insures the trust or its fiduciary ~~trustee~~ against
831 loss for damage to, destruction of, or loss of title to a trust
832 asset. The fiduciary ~~trustee~~ shall allocate dividends on an
833 insurance policy to income if the premiums on the policy are
834 paid from income and to principal if the premiums are paid from
835 principal.

836 (2) A fiduciary ~~trustee~~ shall allocate to income proceeds
837 of a contract that insures the fiduciary ~~trustee~~ against loss of
838 occupancy or other use by an income beneficiary, loss of income,
839 or, subject to s. 738.403, loss of profits from a business.

840 Section 20. Section 738.601, Florida Statutes, is
841 amended to read:

842 738.601 Insubstantial allocations not required.—If a
843 fiduciary ~~trustee~~ determines that an allocation between
844 principal and income required by s. 738.602, s. 738.603, s.
845 738.604, s. 738.605, or s. 738.608 is insubstantial, the
846 fiduciary ~~trustee~~ may allocate the entire amount to principal
847 unless one of the circumstances described in s. 738.104(3)
848 applies to the allocation. This power may be exercised by a co-
849 fiduciary ~~co~~~~trustee~~ in the circumstances described in s.
850 738.104(4) and may be released for the reasons and in the manner
851 described in s. 738.104(5). An allocation is presumed to be
852 insubstantial if:

853 (1) The amount of the allocation would increase or
854 decrease net income in an accounting period, as determined
855 before the allocation, by less than 10 percent; or

856 (2) The value of the asset producing the receipt for which
857 the allocation would be made is less than 10 percent of the

858 total value of the trust's assets at the beginning of the
859 accounting period.

860 Section 21. Section 738.602, Florida Statutes, is
861 amended to read:

862 738.602 Payments from deferred compensation plans,
863 annuities, and retirement plans or accounts.—

864 (1) For purposes of this section:

865 (a) "Fund" means a private or commercial annuity, an
866 individual retirement account, an individual retirement annuity,
867 a deferred compensation plan, a pension plan, a profit-sharing
868 plan, a stock-bonus plan, an employee stock-ownership plan, or
869 another similar arrangement in which federal income tax is
870 deferred.

871 (b) "Income of the fund" means income that is determined
872 according to subsection (2) or subsection (3).

873 (c) "Nonseparate account" means a fund for which the value
874 of the participant's or account owner's right to receive
875 benefits can be determined only by the occurrence of a date or
876 event as defined in the instrument governing the fund.

877 (d) "Payment" means a distribution from a fund that a
878 fiduciary ~~trustee~~ may receive over a fixed number of years or
879 during the life of one or more individuals because of services
880 rendered or property transferred to the payor in exchange for

881 future payments. The term includes a distribution made in money
882 or property from the payor's general assets or from a fund
883 created by the payor or payee.

884 (e) "Separate account" means a fund holding assets
885 exclusively for the benefit of a participant or account owner
886 and:

887 1. The value of such assets or the value of the separate
888 account is ascertainable at any time; or

889 2. The administrator of the fund maintains records that
890 show receipts and disbursements associated with such assets.

891 (2)(a) For a fund that is a separate account, income of
892 the fund shall be determined:

893 1. As if the fund were a trust subject to the provisions
894 of ss. 738.401-738.706; or

895 2. As a unitrust amount calculated by multiplying the fair
896 market value of the fund as of the first day of the first
897 accounting period and, thereafter, as of the last day of the
898 accounting period that immediately precedes the accounting
899 period during which a payment is received by the percentage
900 determined in accordance with s. 738.1041(2)(b)2.a. The
901 fiduciary ~~trustee~~ shall determine such percentage as of the
902 first month that the fiduciary's ~~trustee~~ election to treat the
903 income of the fund as a unitrust amount becomes effective. For

904 purposes of this subparagraph, "fair market value" means the
905 fair market value of the assets held in the fund as of the
906 applicable valuation date determined as provided in this
907 subparagraph. The fiduciary ~~trustee~~ is not liable for good faith
908 reliance upon any valuation supplied by the person or persons in
909 possession of the fund. If the fiduciary ~~trustee~~ makes or
910 terminates an election under this subparagraph, the fiduciary
911 ~~trustee~~ shall make such disclosure in a trust disclosure
912 document that satisfies the requirements of s. 736.1008(4)(a).

913 (b) The fiduciary ~~trustee~~ shall have discretion to elect
914 the method of determining the income of the fund pursuant to
915 this subsection and may change the method of determining income
916 of the fund for any future accounting period.

917 (3) For a fund that is a nonseparate account, income of
918 the fund is a unitrust amount determined by calculating the
919 present value of the right to receive the remaining payments
920 under 26 U.S.C. s. 7520 of the Internal Revenue Code as of the
921 first day of the accounting period and multiplying it by the
922 percentage determined in accordance with s. 738.1041(2)(b)2.a.
923 The fiduciary ~~trustee~~ shall determine the unitrust amount as of
924 the first month that the fiduciary's ~~trustee~~ election to treat
925 the income of the fund as a unitrust amount becomes effective.

926 (4) Except for those trusts described in subsection (5),
927 the fiduciary trustee shall allocate to income the lesser of the
928 payment received from a fund, or the income determined under
929 subsection (2) or subsection (3). Any remaining amount of the
930 payment shall be allocated to principal. ~~a payment from a fund~~
931 ~~as follows:~~

932 ~~(a) That portion of the payment the payor characterizes as~~
933 ~~income shall be allocated to income, and any remaining portion~~
934 ~~of the payment shall be allocated to principal.~~

935 ~~(b) To the extent that the payor does not characterize any~~
936 ~~portion of a payment as income or principal and the trustee can~~
937 ~~ascertain the income of the fund by the fund's account~~
938 ~~statements or any other reasonable source, the trustee shall~~
939 ~~allocate to income the lesser of the income of the fund or the~~
940 ~~entire payment and shall allocate to principal any remaining~~
941 ~~portion of the payment.~~

942 ~~(c) If the trustee, acting reasonably and in good faith,~~
943 ~~determines that neither paragraph (a) nor paragraph (b) applies~~
944 ~~and all or part of the payment is required to be made, the~~
945 ~~trustee shall allocate to income 10 percent of the portion of~~
946 ~~the payment that is required to be made during the accounting~~
947 ~~period and shall allocate the balance to principal. If no part~~
948 ~~of a payment is required to be made or the payment received is~~

949 ~~the entire amount to which the trustee is entitled, the trustee~~
950 ~~shall allocate the entire payment to principal. For purposes of~~
951 ~~this paragraph, a payment is not "required to be made" to the~~
952 ~~extent the payment is made because the trustee exercises a right~~
953 ~~of withdrawal.~~

954 (5) For a trust which, to qualify for the estate or gift
955 tax marital deduction under the Internal Revenue Code or
956 comparable law of any state, entitles the spouse to all of the
957 income of the trust, and the terms of the trust are silent as to
958 the time and frequency for distribution of the income of the
959 fund, then:

960 (a) For a fund that is a separate account, unless the
961 spouse directs the fiduciary ~~trustee~~ to leave the income of the
962 fund in the fund, the fiduciary ~~trustee~~ shall withdraw and pay
963 to the spouse, no less frequently than annually:

964 1. All of the income of the fund determined in accordance
965 with subparagraph (2) (a)1.; or

966 2. The income of the fund as a unitrust amount determined
967 in accordance with subparagraph (2) (a)2.

968 (b) For a fund that is a nonseparate account, the
969 fiduciary ~~trustee~~ shall withdraw and pay to the spouse, no less
970 frequently than annually, the income of the fund as a unitrust
971 amount determined in accordance with subsection (3).

972 (6) This section does not apply to payments to which s.
973 738.603 applies.

974 Section 22. Section 738.603, Florida Statutes, is
975 amended to read:

976 738.603 Liquidating asset.—

977 (1) For purposes of this section, "liquidating asset"
978 means an asset the value of which will diminish or terminate
979 because the asset is expected to produce receipts for a period
980 of limited duration. The term includes a leasehold, patent,
981 copyright, royalty right, and right to receive payments during a
982 period of more than 1 year under an arrangement that does not
983 provide for the payment of interest on the unpaid balance. The
984 term does not include a payment subject to s. 738.602, resources
985 subject to s. 738.604, timber subject to s. 738.605, an activity
986 subject to s. 738.607, an asset subject to s. 738.608, or any
987 asset for which the fiduciary ~~trustee~~ establishes a reserve for
988 depreciation under s. 738.703.

989 (2) A fiduciary ~~trustee~~ shall allocate to income 5 ~~10~~
990 percent of the receipts from the carrying value of a liquidating
991 asset and the balance to principal. Amounts allocated to
992 principal will reduce the carrying value of the liquidating
993 asset, but not below zero. Amounts received in excess of the
994 remaining carrying value are to be allocated to principal.

995 Section 23. Subsections (1) and (4) of section 738.604,
996 Florida Statutes, are amended to read:

997 738.604 Minerals, water, and other natural resources.—

998 (1) To the extent a fiduciary ~~trustee~~ accounts for
999 receipts from an interest in minerals or other natural resources
1000 pursuant to this section, the fiduciary ~~trustee~~ shall allocate
1001 such receipts as follows:

1002 (4) If a trust owns an interest in minerals, water, or
1003 other natural resources on January 1, 2003, the fiduciary
1004 ~~trustee~~ may allocate receipts from the interest as provided in
1005 this chapter or in the manner used by the fiduciary ~~trustee~~
1006 before January 1, 2003. If the trust acquires an interest in
1007 minerals, water, or other natural resources after January 1,
1008 2003, the fiduciary ~~trustee~~ shall allocate receipts from the
1009 interest as provided in this chapter.

1010 Section 24. Subsections (1), (2) and (4) of section
1011 738.605, Florida Statutes, are amended to read:

1012 738.605 Timber.—

1013 (1) To the extent a fiduciary ~~trustee~~ accounts for
1014 receipts from the sale of timber and related products pursuant
1015 to this section, the fiduciary ~~trustee~~ shall allocate the net
1016 receipts:

1017 (2) In determining net receipts to be allocated pursuant
1018 to subsection (1), a fiduciary ~~trustee~~ shall deduct and transfer
1019 to principal a reasonable amount for depletion.

1020 (4) If a trust owns an interest in timberland on January
1021 1, 2003, the fiduciary ~~trustee~~ may allocate net receipts from
1022 the sale of timber and related products as provided in this
1023 chapter or in the manner used by the fiduciary ~~trustee~~ before
1024 January 1, 2003. If the trust acquires an interest in timberland
1025 after January 1, 2003, the fiduciary ~~trustee~~ shall allocate net
1026 receipts from the sale of timber and related products as
1027 provided in this chapter.

1028 Section 25. Subsection (1) of section 738.606, Florida
1029 Statutes, is amended to read:

1030 738.606 Property not productive of income.—

1031 (1) If a marital deduction is allowed under either the
1032 Internal Revenue Code or comparable law of any state is allowed
1033 for all or part of a trust the income of which is required to be
1034 distributed to the grantor's spouse and the assets of which
1035 consist substantially of property that does not provide the
1036 spouse with sufficient income from or use of the trust assets,
1037 and if the amounts the fiduciary ~~trustee~~ transfers from
1038 principal to income under s. 738.104 and distributes to the
1039 spouse from principal pursuant to the terms of the trust are

1040 insufficient to provide the spouse with the beneficial enjoyment
1041 required to obtain the marital deduction, the spouse may require
1042 the fiduciary ~~trustee~~ to make property productive of income,
1043 convert property within a reasonable time, or exercise the power
1044 conferred by ss. 738.104 and 738.1041. The fiduciary ~~trustee~~ may
1045 decide which action or combination of actions to take.

1046 Section 26. Subsections (2) and (3) of section 738.607,
1047 Florida Statutes, are amended to read:

1048 738.607 Derivatives and options.—

1049 (2) To the extent a fiduciary ~~trustee~~ does not account
1050 under s. 738.403 for transactions in derivatives, the fiduciary
1051 ~~trustee~~ shall allocate to principal receipts from and
1052 disbursements made in connection with those transactions.

1053 (3) If a fiduciary ~~trustee~~ grants an option to buy
1054 property from the trust whether or not the trust owns the
1055 property when the option is granted, grants an option that
1056 permits another person to sell property to the trust, or
1057 acquires an option to buy property for the trust or an option to
1058 sell an asset owned by the trust, and the fiduciary ~~trustee~~ or
1059 other owner of the asset is required to deliver the asset if the
1060 option is exercised, an amount received for granting the option
1061 shall be allocated to principal. An amount paid to acquire the
1062 option shall be paid from principal. A gain or loss realized

1063 upon the exercise of an option, including an option granted to a
1064 grantor of the trust for services rendered, shall be allocated
1065 to principal.

1066 Section 27. Subsections (2) and (3) of section 738.608,
1067 Florida Statutes, are amended to read:

1068 738.608 Asset-backed securities.—

1069 (2) If a trust receives a payment from interest or other
1070 current return and from other proceeds of the collateral
1071 financial assets, the fiduciary ~~trustee~~ shall allocate to income
1072 the portion of the payment which the payor identifies as being
1073 from interest or other current return and shall allocate the
1074 balance of the payment to principal.

1075 (3) If a trust receives one or more payments in exchange
1076 for the trust's entire interest in an asset-backed security
1077 during a single accounting period, the fiduciary ~~trustee~~ shall
1078 allocate the payments to principal. If a payment is one of a
1079 series of payments that will result in the liquidation of the
1080 trust's interest in the security over more than a single
1081 accounting period, the fiduciary ~~trustee~~ shall allocate 10
1082 percent of the payment to income and the balance to principal.

1083 Section 28. Section 738.701, Florida Statutes, is
1084 amended to read:

1085 738.701 Disbursements from income.—A fiduciary ~~trustee~~
 1086 shall make the following disbursements from income to the extent
 1087 they are not disbursements to which s. 738.201(2) ~~(a) or (c)~~
 1088 applies:

1089 (1) One-half of the regular compensation of the fiduciary
 1090 ~~trustee~~ and of any person providing investment advisory or
 1091 custodial services to the fiduciary ~~trustee~~.

1092 (2) One-half of all expenses for accountings, judicial
 1093 proceedings, or other matters that involve both the income and
 1094 remainder interests.

1095 (3) All of the other ordinary expenses incurred in
 1096 connection with the administration, management, or preservation
 1097 of trust property and the distribution of income, including
 1098 interest, ordinary repairs, regularly recurring taxes assessed
 1099 against principal, and expenses of a proceeding or other matter
 1100 that concerns primarily the income interest.

1101 (4) Recurring premiums on insurance covering the loss of a
 1102 principal asset or the loss of income from or use of the asset.

1103 Section 29. Subsection (1) of section 738.702, Florida
 1104 Statutes, is amended to read:

1105 738.702 Disbursements from principal.—

1106 (1) A fiduciary ~~trustee~~ shall make the following
 1107 disbursements from principal:

1108 (a) The remaining one-half of the disbursements described
1109 in s. 738.701(1) and (2).

1110 (b) All of the fiduciary's ~~trustee's~~ compensation
1111 calculated on principal as a fee for acceptance, distribution,
1112 or termination and disbursements made to prepare property for
1113 sale.

1114 (c) Payments on the principal of a trust debt.

1115 (d) Expenses of a proceeding that concerns primarily
1116 principal, including a proceeding to construe the trust or will
1117 or to protect the trust, estate or its property.

1118 (e) Premiums paid on a policy of insurance not described
1119 in s. 738.701(4) of which the trust or estate is the owner and
1120 beneficiary.

1121 (f) Estate, inheritance, and other transfer taxes,
1122 including penalties, apportioned to the trust.

1123 (g) Disbursements related to environmental matters,
1124 including reclamation, assessing environmental conditions,
1125 remedying and removing environmental contamination, monitoring
1126 remedial activities and the release of substances, preventing
1127 future releases of substances, collecting amounts from persons
1128 liable or potentially liable for the costs of such activities,
1129 penalties imposed under environmental laws or regulations and
1130 other payments made to comply with those laws or regulations,

1131 statutory or common law claims by third parties, and defending
1132 claims based on environmental matters.

1133 (h) Payments representing extraordinary repairs or
1134 expenses incurred in making a capital improvement to principal,
1135 including special assessments; however, a fiduciary ~~trustee~~ may
1136 establish an allowance for depreciation out of income to the
1137 extent permitted by s. 738.703.

1138 Section 30. Subsection (2) of Section 738.703, Florida
1139 Statutes, is amended to read:

1140 738.703 Transfers from income to principal for
1141 depreciation.—

1142 (2) A fiduciary ~~trustee~~ may transfer to principal a
1143 reasonable amount of the net cash receipts from a principal
1144 asset that is subject to depreciation but may not transfer any
1145 amount for depreciation:

1146 (a) Of that portion of real property used or available for
1147 use by a beneficiary as a residence or of tangible personal
1148 property held or made available for the personal use or
1149 enjoyment of a beneficiary;

1150 (b) During the administration of a decedent's estate; or

1151 (c) Under this section if the fiduciary ~~trustee~~ is
1152 accounting under s. 738.403 for the business or activity in
1153 which the asset is used.

1154 Section 31. Subsections (1) through (3) of section
1155 738.704, Florida Statutes, are amended to read:

1156 738.704 Transfers from income to reimburse principal.—

1157 (1) If a fiduciary ~~trustee~~ makes or expects to make a
1158 principal disbursement described in this section, the fiduciary
1159 ~~trustee~~ may transfer an appropriate amount from income to
1160 principal in one or more accounting periods to reimburse
1161 principal or to provide a reserve for future principal
1162 disbursements.

1163 (2) Principal disbursements to which subsection (1)
1164 applies include the following, but only to the extent the
1165 fiduciary ~~trustee~~ has not been and does not expect to be
1166 reimbursed by a third party:

1167 (a) An amount chargeable to income but paid from principal
1168 because the amount is unusually large.

1169 (b) Disbursements made to prepare property for rental,
1170 including tenant allowances, leasehold improvements, and
1171 broker's commissions.

1172 (c) Disbursements described in s. 738.702(1)(g).

1173 (3) If the asset the ownership of which gives rise to the
1174 disbursements becomes subject to a successive income interest
1175 after an income interest ends, a fiduciary ~~trustee~~ may continue

1176 to transfer amounts from income to principal as provided in
1177 subsection (1).

1178 Section 32. Section 738.705, Florida Statutes, is
1179 amended to read:

1180 738.705 Income taxes.—

1181 (1) A tax required to be paid by a fiduciary ~~trustee~~ based
1182 on receipts allocated to income shall be paid from income.

1183 (2) A tax required to be paid by a fiduciary ~~trustee~~ based
1184 on receipts allocated to principal shall be paid from principal,
1185 even if the tax is called an income tax by the taxing authority.

1186 (3) A tax required to be paid by a fiduciary ~~trustee~~ on
1187 the trust's or estate's share of an entity's taxable income
1188 shall be paid proportionately:

1189 (a) From income to the extent receipts from the entity are
1190 allocated to income; and

1191 (b) From principal to the extent ~~(1)~~ receipts from the
1192 entity are allocated to principal; and

1193
1194 (c) From principal to the extent that the income taxes
1195 payable by the trust or estate exceed the total distributions
1196 from the entity.

1197 ~~2. The trust's share of the entity's taxable income~~
1198 ~~exceeds the total receipts described in paragraph (a) and~~
1199 ~~subparagraph 1.~~

1200 (4) After applying subsections (1) through (3), the
1201 fiduciary shall adjust income or principal receipts to the
1202 extent that the trust's or estate's income taxes are reduced,
1203 but not eliminated, because the trust or estate receives a
1204 deduction for payments made to a beneficiary. The amount
1205 distributable to that beneficiary as income as a result of this
1206 adjustment will be equal to (a) the cash received by the trust or
1207 estate, reduced (but not below zero) by (b) the entity's taxable
1208 income allocable to the trust or estate multiplied by the
1209 trust's or estate's income tax rate. This reduced amount shall
1210 then be divided by (c) the difference between one (1) and the
1211 trust's or estate's income tax rate to determine the amount
1212 distributable to that beneficiary as income before giving effect
1213 to other receipts or disbursements allocable to that
1214 beneficiary's interest ~~receipts allocated to principal or~~
1215 ~~income shall be reduced by the amount distributed to a~~
1216 ~~beneficiary from principal or income for which the trust~~
1217 ~~receives a deduction in calculating the tax.~~

1218

1219 Section 33. Section 738.801, Florida Statutes, is
1220 deleted and amended to read:

1221 738.801 Apportionment of expenses; improvements.—

1222 (1) For purposes of this section:

1223 (a) "Tenant" means the holder of an estate for life or
1224 term of years in real property, personal property, or both.

1225 (b) "Remainderman" means the holder of the remainder
1226 interests after the expiration of a tenant's estate in property.

1227 (2) When no trust has been created, expenses shall be
1228 apportioned between the tenant and remainderman as follows:

1229 (a) The following expenses are to be allocated to and paid
1230 by the tenant:

1231 1. All ordinary expenses incurred in connection with
1232 the administration, management, or preservation of the property,
1233 including interest, ordinary repairs, regularly recurring taxes
1234 assessed against the property, and expenses of a proceeding or
1235 other matter than concerns primarily the tenant's estate or use
1236 of the property.

1237 2. Recurring premiums on insurance covering the loss
1238 of the property or the loss of income from or use of the
1239 property.

1240 3. Any of the expenses described in (2) (b) 3 that are
1241 attributable to the use of the property by the tenant.

1242 (b) The following expenses are to be allocated to and paid
1243 by the remainderman:

1244 1. Payments on the principal of a debt secured by
1245 the property, except to the extent the debt is for expenses
1246 allocated to the tenant.

1247 2. Expenses of a proceeding or other matter that
1248 concerns primarily the title to the property (other than title
1249 to the tenant's estate).

1250 3. Except as provided in (2)(a)3, expenses related
1251 to environmental matters, including reclamation, assessing
1252 environmental conditions, remedying and removing environmental
1253 contamination, monitoring remedial activities and the release of
1254 substances, preventing future releases of substances, collecting
1255 amounts from persons liable or potentially liable for the costs
1256 of such activities, penalties imposed under environmental laws
1257 or regulations and other payments made to comply with those laws
1258 or regulations, statutory or common law claims by third parties,
1259 and defending claims based on environmental matters.

1260 4. Extraordinary repairs.

1261 (c) When either the tenant or remainderman has incurred an
1262 expense for the benefit of his or her own estate without consent
1263 or agreement of the other, he or she shall pay such expense in
1264 full.

1265 (d) Except as provided in (2)(c), the cost of, or special
1266 taxes or assessments for, an improvement representing an
1267 addition of value to property forming part of the principal
1268 shall be paid by the tenant when the improvement is not
1269 reasonably expected to outlast the estate of the tenant. In all
1270 other cases a part only shall be paid by the tenant, while the
1271 remainder shall be paid by the remainderman. The part payable by
1272 the tenant shall be ascertainable by taking that percentage of
1273 the total that is found by dividing the present value of the
1274 tenant's estate by the present value of an estate of the same
1275 form as that of the tenant except that it is limited for a
1276 period corresponding to the reasonably expected duration of the
1277 improvement. The computation of present values of the estates
1278 shall be made using the rate defined in 26 U.S.C. s. 7520, then
1279 in effect and, in the case of an estate for life, the official
1280 mortality tables then in effect under 26 U.S.C. s. 7520. No
1281 other evidence of duration or expectancy shall be considered.
1282 (3) The provisions of this section shall not apply to the
1283 extent inconsistent with the instrument creating the estates,
1284 the agreement of the parties, or the specific direction of the
1285 taxing or other statutes.

1286 (4) The common law applicable to tenants and remaindermen
1287 supplements this section, except to the extent modified by this
1288 section or other statutes.

1289

1290

1291 Section 34. The provisions of this Act shall take
1292 effect January 1, 2013.