

RPPTL
Probate and Trust Division Roundtable Agenda
The Breakers, Palm Beach
Saturday, July 23, 2022 at 8:30 am

Thank you
GUARDIAN TRUST & STOUT RISIUS ROSS
for sponsoring the PT Division Roundtable

1. **Welcome -- *John Moran***
2. **Sponsor Recognition**
 - A. Stout Risius Ross



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- B. Guardian Trust



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3. **Legislation Committee Report – *Larry Miller***
4. **CLE Report – *Angela Adams***
5. **Action Item -- *Joint Report: Estate and Trust Tax Planning & Probate Law and Procedure Committees* (EC Agenda p. 108)**

Proposed legislation amending Fla. Stat. § 198.41 to suspend those provisions which govern the imposition, reporting, and collection of the Florida Estate Tax.

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6. **Update on *Johnson v. Townsend* Project**

7. **Report of Principal and Income Committee – Potential Changes to Ch. 738, Fla. Stat. (Principal and Income Act)** (attached)
8. **Report of Asset Protection Committee – Potential Legislation on Transfer of Tenants by the Entirety Property to Trust** (attached)
9. **Report of Ad Hoc Committee on Revocable Transfer on Death Deed Act** (attached)
10. **New Business**
11. **Other Committee Reports**
 - a) **Ad Hoc ART Committee** — Alyse Reiser Comiter, Chair; Jack A. Falk and Sean M. Lebowitz, Co-Vice Chairs
 - b) **Ad Hoc Committee on Electronic Wills** —Frederick “Ricky” Hearn, Chair; Jenna G. Rubin, Vice Chair
 - c) **Ad Hoc Guardianship Law Revision Committee** — Nicklaus J. Curley, Stacey B. Rubel and David C. Brennan, Co-Chairs; Sancha Brennan, Vice Chair
 - d) **Ad Hoc Study Committee on Due Process, Jurisdiction & Service of Process** — Barry F. Spivey, Chair; Sean W. Kelley and Shelly Wald Harris, Co-Vice Chairs
 - e) **Asset Protection** — Michael Sneeringer, Chair; Richard R. Gans and Justin Savioli, Co-Vice-Chairs
 - f) **Attorney/Trust Officer Liaison Conference** — Mitchell A. Hipsman, Chair; Tae Kelley Bronner, Stacey L. Cole, Michael Rubenstein, Gail G. Fagan, and Eammon W. Gunther, Co-Vice Chairs
 - g) **Charitable Planning and Exempt Organizations Committee** — Denise S. Cazobon, Chair; Kelly Hellmuth and Alyssa Razook Wan, Co-Vice-Chairs
 - h) **Elective Share Review Committee** — Jenna G. Rubin, Chair; Cristina Papanikos and Lauren Y. Detzel, Co-Vice-Chairs
 - i) **Estate and Trust Tax Planning** —Richard N. Sherrill, Chair; Al Stashis, Andrew Thompson, and Sasha Klein, Co-Vice Chairs
 - j) **Guardianship, Power of Attorney and Advanced Directives** — Stacy B. Rubel, Chair; Elizabeth M. Hughes, Stephanie Cook, Caitlin Powell and Jacobeli Behar, Co-Vice Chairs
 - k) **IRA, Insurance and Employee Benefits** — Charles W. Callahan, III, Chair; Rebecca Bell and Rachel Barlow, Co-Vice-Chairs

- l) **Liaisons with ACTEC** — Elaine M. Bucher, Tami F. Conetta, Thomas M. Karr, Charles I. Nash, L. Howard Payne and Diana S.C. Zeydel
- m) **Liaisons with Elder Law Section** — Travis Finchum and Marjorie E. Wolasky
- n) **Liaisons with Tax Section** — William R. Lane, Jr., Brian Malec and Brian C. Sparks
- o) **Liaison with Professional Fiduciary Council** – Darby Jones
- p) **OPPG Delegate** – Nicklaus Curley
- q) **Principal and Income** — Edward F. Koren and Pamela O. Price, Co-Chairs, Joloyon D. Acosta and Keith B. Braun, Co-Vice Chairs
- r) **Probate and Trust Litigation** — J. Richard Caskey, Chair; R. Lee McElroy, IV and Cady Huss, Co-Vice Chairs
- s) **Probate Law and Procedure** — Theodore S. Kypreos, Chair; Benjamin F. Diamond, Stacey Prince Troutman and Grier Pressly, Co-Vice Chairs
- t) **Trust Law** — Matthew H. Triggs, Chair; David J. Akins, Jenna G. Rubin, Mary E. Karr, and Jennifer J. Robinson, Co-Vice Chairs
- u) **Wills, Trusts and Estates Certification Review Course** — Rachel Lunsford, Chair; J. Allison Archbold, Eric Virgil, and Jerome L. Wolf, Co-Vice Chairs

12. Adjournment



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INFORMATION ITEM -

Proposed Florida Uniform Fiduciary Income and Principal Act

**PRINCIPAL AND INCOME COMMITTEE OF
THE REAL PROPERTY, PROBATE AND TRUST
LAW SECTION OF THE FLORIDA BAR
WHITE PAPER ON PROPOSED FLORIDA
UNIFORM FIDUCIARY INCOME AND
PRINCIPAL ACT (Chapter 738)**

I. SUMMARY

The proposed legislation updates Florida’s Uniform Principal and Income Act, which is 20 years old. The legislation generally follows the new Uniform Fiduciary Income and Principal Act in order to achieve greater consistency among state laws, but includes certain modifications that reflect Florida public policy choices.

II. CURRENT SITUATION

Florida adopted the Florida Uniform Principal and Income Act in 2002.¹ This Act was based upon the Revised Uniform Principal and Income Act (1997) with certain modifications. The National Conference of Commissioners on Uniform State Laws has adopted a new principal and income act, known as the Uniform Fiduciary Income and Principal Act (“UFIPA”), in order to adapt “to changes in the design and use of trusts.” Five states have enacted UFIPA, and all but three states have adopted a prior version of this statute.

**III. EFFECT OF PROPOSED CHANGES
(DETAILED ANALYSIS OF PROPOSED STATUTE)**

The proposed legislation updates the Florida Uniform Principal and Income Act, and its numbering is designed to correspond with UFIPA rather than with the current Florida Uniform Principal and Income Act. The Principal and Income Committee of the Real Property Probate and Trust Law Section made an effort, whenever possible, to adopt UFIPA language while still respecting public policy choices found in the existing statute. For ease of use, the statute will remain in Chapter 738. The existing statute is referred to as the “Current Statute”, and the proposed legislation is referred to as the “Proposed Statute”.

A. Section 738.102 Definitions

Similar to Current Statute §738.102, the definitions are applicable to the entire Chapter 738. However, the number and breadth of the definitions have increased to incorporate UFIPA terminology and concepts focused on allocations between income and principal as applied to wills, trusts, life estates and term interests.

Certain definitions remain substantially unchanged from current Florida law: accounting period, income, mandatory income interest, and person. Definitions for the terms court, estate,

¹ Over the years, Florida has enacted limited amendments to this Act.

personal representative, and record were added to mirror UFIPA but do not impact or change current policy in a meaningful way.

The following incorporate changes to the current definitions:

Beneficiary - the term distinguishes between current income beneficiaries (newly defined to include a beneficiary who may or must receive net income even while receiving principal) and current principal beneficiaries, as well as encompasses persons holding life estate or term interests.

Fiduciary - the term is broadened. It now applies to those with a power to direct, those under delegation of a fiduciary, those who hold property for a successor beneficiary who may be affected by principal/income allocations, as well as to those already considered in current law - the personal representative and trustee.

Income interest - defines an income interest as a right of a "current income beneficiary" and includes a current beneficiary's use of property held by a fiduciary.

Net Income - enlarges the definition to include application to a unitrust and to include an income to principal adjustment.

Principal - changes the focus from that which is distributed to a remainder beneficiary to that either held for distribution to, for production of income for, or for use by, a current or successor beneficiary. Encompasses current income beneficiaries who receive principal distributions.

Terms of the Trust - broadens the current definition to extend to wills, life estates, and term interests. The proposed definition more closely follows the definition in the Florida Trust Code, §736.0103(24).

The following are newly added to define the meaning of the term:

Distribution - clarifies that a distribution is only a payment received by a person in the person's capacity as beneficiary and does not apply to payments received for compensation or rent, etc.

Personal representative - broadly defines who can be considered to perform as a personal representative.

Record - incorporates changing technology in defining a record - can be tangible or electronic.

Settlor - clarifies that anyone who creates or contributes to a trust, including a testator, is a settlor.

Successive Interest – the interest of a successor beneficiary.

Successor beneficiary – the person entitled to income, principal, or use of property at the end of a current interest.

Trust - defines a trust by type, as well as by describing what is not a trust.

Trustee - clarifies that a trustee is not a personal representative.

Will - legally effective testamentary disposition and extends to include a codicil or amendment.

Certain definitions were added to further specific or appropriate federal income tax results:

Independent person - this definition was added for federal tax purposes and substantially mirrors Internal Revenue Code Section 672(c) and the definition of “related or subordinate party”.

Special tax benefit - included to preserve identification of contributions qualifying for the annual gift tax exclusion, to preserve Qualified Subchapter S trust status, to qualify a transfer to a trust for the federal marital tax deduction, and to provide generation skipping transfer tax exemption to a trust.

The following non-UFIPA definition is retained in Florida law:

Carrying Value - this Florida definition was retained as part of the proposed law. The fair market value of assets at the time the asset is received by the fiduciary is a concept necessary for other sections: Proposed Statute §738.401 (Character of Receipts), §738.410 (Liquidating Assets), and §738.602 (Distributions to Successor Beneficiary), and Florida Probate Rule 5.346 (Fiduciary Accounting).

B. Section 738.104 Governing Law.

Current Law: No provision currently.

Effect of Proposed Changes: If the principal place of administration of a trust or estate or the situs of property not held in trust or an estate is Florida, the trustee is governed by this chapter - except as otherwise provided in the terms of the trust or elsewhere in this chapter.

C. Section 738.201 Fiduciary Duties; General Principles

Current Law: Current Statute §738.103 addresses fiduciary duties generally, and sets forth general principles for allocating receipts and disbursements to or between principal and income, including that the terms of the trust or will control over current Chapter 738, that receipts and disbursements are allocated to principal unless otherwise directed by the terms of the trust or the chapter, and that a fiduciary is to administer the trust or estate impartially, based on what is fair and reasonable to all beneficiaries (specifically referring to the exercise of the power to adjust under Current Statute §738.104). The Current Statute also includes a presumption that a determination made in accordance with current Chapter 738 is fair and reasonable to all beneficiaries. Current Chapter 738 uses the defined terms “terms of a trust” and “will” to refer to and include application to estates, wills, and personal representatives, as well as trusts and trustees, except where the context otherwise requires. Current Statute §738.103 provides Chapter 738 is applicable to any trust or estate administered in Florida.

Effect of Proposed Changes: Proposed Statute §738.201 has been renumbered from

§738.103 to correspond to UFIPA Section 201 and substantially retains the concepts of existing law with four exceptions: The newly defined term “terms of a trust” includes wills; there is added an express requirement that a fiduciary act in good faith (although the concept of good faith was found throughout current Chapter 738); although not in UFIPA, the general principles for allocating receipts and disbursements now require a fiduciary to add undistributed income to principal within 65 days after the fiscal year end (unless otherwise provided in the terms of the trust); and Proposed Statute §738.201 now includes the list of factors currently set forth in Current Statute §738.104(2) (applicable in exercising the power to adjust) and makes those factors applicable to all fiduciary decisions under new Chapter 738, including the exercise of powers in administering a unitrust, not only the power to adjust.

Although restructured and streamlined, the factors relocated from Current Statute §738.104(2) to Proposed Statute §738.201(5) are substantively the same as in the Current Statute with the following exceptions: In keeping with UFIPA, Proposed Statute §738.201’s list of factors substitutes the objective “terms of the trust” for the subjective “intent of the grantor”; although omitted in UFIPA, Proposed Statute §738.201’s list of factors retains the Current Statute’s “identity and circumstances of the beneficiaries” as a factor to be considered in exercising fiduciary powers.

D. **Section 738.202 Review of Exercise of Discretionary Power; Request for Instruction**
Current Law: Current Statute §738.105 (entitled Judicial Control of Discretionary Powers) applies to a court’s review of a trustee’s exercise or non-exercise of any discretionary power under current Chapter 738, and specifically applies to a decision to transfer principal to income or vice versa, and determining the relevancy and weight of the factors listed in Current Statute §738.104 to be considered by a trustee in exercising its discretion. The Current Statute expressly provides that a court may not determine a trustee abused its discretion merely because the court would have exercised the discretion in a different manner or would not have exercised the discretion. If the court finds the trustee abused its discretion, the court is directed to take certain actions to restore the beneficiaries to the positions they would have occupied if the trustee had not abused its discretion, including distributing additional amounts from the trust, withholding future distributions, recovering over-distributed amounts, and payment from the trustee’s own funds (disgorgement). There is a mechanism for petitioning the court with respect to a proposed exercise or non-exercise of the trustee’s discretion and, if the petition alleges the statutorily required elements, places on a challenging beneficiary the burden of establishing that such exercise or non-exercise will result in an abuse of discretion. There is also a provision directing payment of the trustee’s costs and attorney’s fees from the trust in defending an action the court determines did not involve an abuse of discretion.

Effect of Proposed Changes: Proposed Statute §738.202 has been renumbered from §738.105 to correspond to UFIPA Section 202 and substantially retains the concepts of existing law with four exceptions: The Proposed Statute uses the term fiduciary instead of trustee and applies to all fiduciaries; the Proposed Statute defines “fiduciary decisions” expressly to include the fiduciary’s allocation between income and principal and the exercise or non-exercise of any power under proposed Chapter 738, including the power to adjust and administering a unitrust; in keeping with UFIPA, the Proposed Statute omits as unnecessary the statement prohibiting the court from substituting its discretion for that of the fiduciary; upon finding a fiduciary abused its discretion, the remedies available to the court now also expressly include all remedies authorized by law, including those authorized in the Florida Trust Code Statute §736.1001 (remedies for breach of

trust) and §736.1002 (damages for breach of trust), as well as compelling a fiduciary to take any actions listed under Proposed Statute §738.401 (unitrust conversion).

Proposed Statute §738.202(3)(a)-(f) retains the express ordering rules of Current Statute §738.105(3)(a)-(c), including the express authorization for the court to order disgorgement by the fiduciary (a remedy omitted in UFIPA).

E. Section 738.203 Fiduciary's Power to Adjust

Current Law: Current Statute §738.104 authorizes a Trustee to adjust between income and principal only if certain conditions are present and only if, after considering certain enumerated factors, the Trustee determines the adjustment is necessary to administer the trust impartially, based on what is fair and reasonable to all beneficiaries, unless otherwise intended under the terms of the trust (referred to as a standard of impossibility); the Trustee is prohibited from exercising the power to adjust under circumstances in which an adverse tax result would occur (the result would deprive the trust of a tax benefit or impose a tax burden), including loss of the marital deduction, annual gift tax exclusion, annuity or unitrust treatment, and estate and gift tax exposure for the trustee. Current Statute §738.104 authorizes the release of all or part of the power to adjust permanently or for a specified period and expressly negates any inference of impropriety because the Trustee does not exercise the power to adjust. Current Statute §738.104 includes a transition rule with respect to trusts in existence on January 1, 2003.

Effect of Proposed Changes: Proposed Statute §738.203 applies to all fiduciaries (not just trustees), and eliminates the conditions required under the Current Statute and replaces the standard of impossibility with a standard of assistance, permitting the exercise of the power to adjust if the fiduciary determines the exercise will assist the fiduciary to administer the trust or estate impartially. The factors to be considered in making the decision have been moved from Current Statute §738.104 to Proposed Statute §738.201 (general principles applicable to all fiduciary decisions under the chapter, including the power to adjust). The Proposed Statute continues the prohibition against exercising the power to adjust when adverse consequences may result (adding S corporation disqualification, loss of generation skipping transfer tax exemption, and loss of public benefits as additional adverse consequences), and continues the transition rule for trusts in existence on January 1, 2003. Proposed Statute §738.203 authorizes the appointment of a co-fiduciary not subject to the prohibition rules (if none is then serving) to exercise the power to adjust.

The Proposed Statute provides for the delegation as well as the release of the power to adjust and includes the presumption that, unless otherwise provided, a release or delegation of the power to adjust is a release or delegation of the entire power and such a release or delegation is permanent. The Proposed Statute clarifies that the exercise of the power to adjust may apply to the immediately preceding period, current period, and one or more subsequent periods. The Proposed Statute includes new accountability procedures, requiring the exercise to be included in the annual accounting report or communicated at least annually to the Qualified Beneficiaries of the trust (as that term is defined in the Florida Trust Code).

F. Overview of Proposed Statute §§738.301-738.310

Current Law: Current Statute §738.1041 specifically authorizes a unitrust and provides that the unitrust amount is considered to be the net income of the trust for purposes of

permitting or requiring income distributions to the trust's income beneficiary. Under the Current Statute, an income trust may be converted to a unitrust or a unitrust may be converted to an income trust. Further, a unitrust may be express (meaning that it was created as such by the Settlor).

Trusts intended to qualify under the Internal Revenue Code for the marital deduction, charitable deduction, generation skipping tax exemption and certain other trusts must distribute all their "income." Treasury Regulations specifically permit a unitrust amount to substitute for net income if the requirements for unitrusts are authorized by state statute. The Treasury Regulations contains an example of standards that if met will qualify a unitrust interest as an income interest for tax purposes. Current Statute §738.1041 meets these "safe harbor" requirements.

The Revised Uniform Principal and Income Act (which was adopted in Florida with amendments) predated this IRS unitrust regulation and did not contain a unitrust statute. Many states, including Florida, have adopted their own unitrust statutes.

UFIPA includes a unitrust in Article 3.

Effect of Proposed Changes: Proposed Statute §§738.301-738.310 replace Current Statute §733.1041 and generally follow the order of Article 3 of UFIPA. However, these Article 3 provisions have been modified to stay within the safe harbor standards of the Treasury Regulations and to add some provisions from existing Florida law. The official comments to UFIPA acknowledge that many of its unitrust provisions exceed the safe harbor limits, and §309(b) of UFIPA limits the application of its provisions to the safe harbor limits in the case of trusts qualifying for a "special tax benefit", such as trusts intended to qualify for the estate or gift tax marital deduction, exemption from generation-skipping transfer tax (GST tax), or as a subchapter S trust (QSST). These exclusions are buried in UFIPA at the end of Article 3 (in §309) which then must then be read in conjunction with the definitions section in Article 1 of UFIPA at §102(19) to see the definition of a special needs trust. Further, this "special tax benefit trust" is defined in terms of United States Code sections which makes this provision hard to understand. If, in the future, these safe harbor standards are relaxed by the Treasury Regulations, the new format of Proposed Statute §§738.301-738.310 will facilitate modification. In the meantime, Florida should not be the test case to depart from the safe harbor standards.

The safe harbor standards require that the unitrust be limited to the 3-5% unitrust range, and that a calendar year be used. Under the safe harbor standards, the unitrust amount must be based upon the net value of the unitrust assets determined annually, or averaged on a multiple year basis. Current Statute §738.1041 permits averaging over 3 years, i.e., the January 1 fair market value of the trust value for the current year, plus the January 1 value as the preceding two years. Further, under the safe harbor standards, express unitrusts must be specifically authorized by state statute. (Express unitrusts are those contained in the trust instrument itself.) Current Statute §738.1041(10) specifically authorizes express unitrusts within the safe harbor standards.

Since the Proposed Statute is based on Article 3 of UFIPA as well as Current Statute §738.1041, changes from both UFIPA and from the Current Statute will be noted.

G. Section 738.301 Definitions

Current Law: Current Statute §738.1041(a) includes definitions relevant to a unitrust.

Effect of Proposed Changes: Proposed Statute §738.301 expands the definitions to include a definition of an “income trust” and “net fair market value of a trust”. The UFIPA definitions have been modified to use provisions from existing Florida law, as follows:

738.301(3) Definition of Income Trust

UFIPA 301(3) defines an income trust as a trust that is not a unitrust. By definition, that would include an annuity trust but for the exclusion in UFIPA 309(2)(b) for some trusts excluded by citation to complex Internal Revenue Code provisions. That complexity is unnecessary. The UFIPA definition has been modified in Proposed Statute §738.301(3) to use the Florida definition of an income trust from Current Statute §738.1041(1)(d). The existing Florida definition is more meaningful for those who may not be familiar with these Internal Revenue Code citations and the trusts they cover.

738.301(4) - Definition of net fair market value of a trust.

The UFIPA 301(4) definition of net fair market value of a trust has been modified to net out “reasonably known” noncontingent liabilities of the trust as under present Florida law. With that change, it will be consistent with current Florida law.

H. Section 738.302 Application; Duties and Remedies

Current Law: Current Statute §738.1041 applies to the conversion of an income trust to a unitrust and to the reconversion of an income trust to a unitrust.

Effect of Proposed Changes: UFIPA §302(a) provides that the Unitrust Article 3 applies to an income trust and to an express unitrust. An express unitrust is one that has been created by the grantor of the trust. Thus, UFIPA does not expressly apply to a unitrust created by conversion from an income trust. However, other UFIPA provisions make it clear it was intended to apply to a converted unitrust as well. The Current Statute applies to an express unitrust, an income trust converted to a unitrust, and a unitrust converted (or reconverted) to an income trust.

Proposed Statute §738.302(1)(c) has been added to provide that §§738.301–738.310 additionally applies to a unitrust that has been *converted* from an income trust to make it consistent with current Florida law.

UFIPA §302(d) [Proposed Statute §738.302(4)] provides that the Unitrust provisions apply to estates in limited circumstances where the trust is beneficiary of the estate. Note that the UFIPA §303 election by a fiduciary to convert an estate to a unitrust is a separate provision and is found in Proposed Statute §738.303. A fiduciary is defined in UFIPA §102(8) and includes a trustee and a personal representative as is applicable.

I. Section 738.303 Authority of Fiduciary

Current Law: Current Statute §738.1041(2) does not set forth an impartiality

standard for a trustee in determining the unitrust rate, although it does require a disinterested trustee or other person to determine the unitrust rate.

Under the Current Statute, a beneficiary has 60 days to object to a conversion.

Effect of Proposed Changes: The notice provisions of UFIPA §303 are less stringent than existing Florida law. Proposed Statute §738.303 has been modified in Proposed Statute §738.303(2)(d) to be consistent with the stricter Florida provisions so that the beneficiaries to be notified include *all* of the qualified beneficiaries and requires certain status of at least one of each class of beneficiaries.

The notice period for objecting to a unitrust conversion has been changed in Proposed Statute §738.303(5) from the 90-day notice period of UFIPA to a 60-day notice period for objecting to a notice of Unitrust conversion as provided under the Current Statute §738.1041(2)(e).

J. Proposed Statute §738.304 includes substantially similar notice requirements to the notice requirements found in Current Statute §738.1041(2).

K. Section 738.305 Unitrust Policy

Current Law: Current Statute §738.1041(2)(a) provides that a trust converting to a unitrust, reconverting to an income trust or changing the percentage used to calculate the unitrust rate or the method used to determine fair market value must adopt a “written statement”.

Effect of Proposed Changes: UFIPA §305 describes only the mandatory provisions of a Unitrust Policy. UFIPA §309 permits the Unitrust Policy to contain more than the mandatory provisions. The provisions in UFIPA §309 that permit the Unitrust Policy to contain more than the mandatory provisions have been moved and are now in Proposed Statute §738.305(3) where they are more visible. Among the mandatory provisions that must be included in the Unitrust Policy are the unitrust rate (or the method for determining the rate) and the method for determining value. Value is determined under Proposed Statute §738.307.

L. Section 738.306 Unitrust Rate

Current Law: Current Statute §738.1041(2) requires a unitrust rate not greater than 5%, nor less than 3%. Further, if there is an interested trustee, the unitrust rate is determined based on 50% of the rate defined in Internal Revenue Code Section 7520 (the “7520 rate”), in effect for the month the conversion becomes effective and for each January thereafter; however, if 50% of the 7520 rate exceeds 5%, the unitrust percentage is 5% and if 50% of the 7520 rate is less than 3%, the unitrust percentage is 3%.

Effect of Proposed Changes: UFIPA §306 permits a wide range of unitrust rates using market indexes, other published data or a mathematical blend of rates over a stated number of periods. UFIPA has no limits except for Special Tax Benefit Trusts.

Proposed Statute §738.306 modifies the UFIPA provision to limit the unitrust rates so that the rate so determined will be not less than 3% nor more than 5% per annum whether or not the trust is a Special Tax Benefit Trust. Additionally, Proposed Statute §738.306 adds a provision that determines the rate if the fiduciary is not an independent person. That rate is based on the 7520

rate, in effect for the month the conversion becomes effective and for each January thereafter; however, if the 7520 rate exceeds 5%, the unitrust percentage is 5% and if the 7520 rate is less than 3%, the unitrust percentage is 3%. UFIPA does not limit this determination by a disinterested trustee when the rate determined is between 3%-5%.

While UFIPA does not limit the rate if it is between 3%5%, there are nontax concerns when an interested person is a trustee. The conversion to a unitrust could be abusive in a high interest environment or a reconversion to an income trust could be abusive in a very low interest environment. As a result, Current Statute §738.1041(2) and the Proposed Statute limit the discretion by utilizing the 7520 rate if the fiduciary is not an independent person.

M. Section 738.307 Applicable Value

Current Law: Current Statute §738.1041(2)(b) permits a trustee to determine which assets, if any, are excluded in determining the unitrust amount and specifically excludes (i) any residential property or tangible personal property a beneficiary has the right to occupy or possess and control, (ii) any asset specifically devised and its income, and (iii) any assets while held in the decedent's estate.

Effect of Proposed Changes: Proposed Statute §738.307 modifies the UFIPA provision to permit assets to be excluded as set forth in Current Statute §738.1041(2)(b)2.b(I), (II) and (III), even if the trust is a special tax benefit trust or the trustee is an interested person. Specifically excluded are: (i) any residential property or tangible personal property a beneficiary has the right to occupy or possess and control, (ii) any asset specifically devised and its income, and (iii) any assets while held in the decedent's estate. The use of these assets in clause (i) by the beneficiary is tantamount to a life estate interest.

The UFIPA definition of value has been modified in Proposed Statute §738.307(3) to exclude from the value of a trust the value of certain assets while held in decedent's estate. Further, the interest given to a beneficiary in Proposed Statute §738.307(3)(a) is tantamount to a life estate and the value of a trust should not include specifically given property described in Proposed Statute §738.307(3)(b). These assets are excluded from value under Florida's present unitrust statute.

N. Proposed Statute §738.308 modifies the UFIPA provision to require the calendar year. If the unitrust is in effect for only a part of the calendar year, then the "unitrust year" is that part. This is consistent with Current Statute §738.1041(2).

O. Section 738.309 Express Unitrust

Current Law: Current Statute §738.1041(10) authorizes the creation of an express unitrust and provides parameters that are within the safe harbor limitations required by the Treasury Regulations under Internal Revenue Code Section 643.

Effect of Proposed Changes: UFIPA defined an express unitrust but did not specifically authorize it. There is a concern that merely defining an express unitrust may not provide the statutory authority required by the Treasury Regulations under Internal Revenue Code Section 643.

Proposed Statute §738.309 specifically authorizes an express unitrust and specifies parameters that meet the safe harbor standards. It permits unitrust distributions to exceed 5% but the excess over 5% is regarded as a principal distribution. The statute permits a trustee to convert a unitrust to an income trust unless the express trust prohibits it. Proposed Statute §738.309 also contains provisions prioritizing the source of the distributions from an express unitrust (for income tax purposes) unless the grantor expressly provides otherwise.

P. Section 738.310 Other Rules

Current Law: Current Statute §738.1041(4)(b) authorizes the trustee to allocate capital gain to income following the conversion from an income trust to a unitrust for income tax purposes. (The Treasury Regulations under Internal Revenue Code Section 643 require statutory authority for such allocation.)

Effect of Proposed Changes: Proposed Statute §738.310 contains provisions prioritizing the source of the distributions for income tax purposes following the conversion of an income trust to a unitrust.

Q. Section 738.401 Character of Receipts from Entity

Current Law: Current Statute §738.401 characterizes receipts from entities and deviates from the prior Revised Uniform Principal and Income Act by applying several Florida specific rules: (i) lookback rules (applying a portion of large receipts to income, at a rate of 3% per year), (ii) rules applicable to receipts from public entities, (iii) provisions regarding private (non-independent) trustees administering investment entities, (iv) treating as principal money received from a RIC or REIT if short-term capital gain within the entity, and (v) treating as income dividends elected to be reinvested by the fiduciary. Florida favors objective calculations in lieu of the exercise of fiduciary discretion.

Effect of Proposed Changes: The Florida specific rules are retained. However, the lookback rule is limited to three years, as the current unlimited lookback rule has presented difficulties to fiduciaries in administration. Proposed Statute §738.401 has been restructured to more closely match the overall organization of UFIPA and promote uniformity among the states. UFIPA also includes additional details on certain concepts (chains of entities, distributions of tangible personal property, and qualifications on an entity's classification of its distribution) which have been incorporated into the Proposed Statute.

R. Proposed Statute §§738.402-738.408 are substantially similar to Current Statute §§738.402-738.601.

S. Section 738.409 Deferred Compensation, Annuity, or Similar Payment

Current Law: Current Statute §738.602 characterizes receipts from deferred compensation accounts (such as IRAs), annuities, and other similar arrangements. The section determines "income of the fund" and compares such amount to payments actually received from the fund; the lesser of such amounts is allocated to income and the remainder is allocated to principal. The section allows the fiduciary to elect to determine income under traditional principals or a calculation based on a percentage of assets. The section includes special rules for trusts

qualifying for the marital deduction.

Effect of Proposed Changes: Proposed Statute §738.409 uses the more customary term “internal income” in lieu of “income of the fund”. The Proposed Statute requires the fiduciary to determine income under traditional principles. If such approach is not viable, the fiduciary may then use a percentage of assets approach. A transition rule is included to aid the fiduciary in migrating from the old rule allowing the fiduciary to elect the method used to determine income. An accounting period concept has been added (generally expected to be a calendar year), helping to balance the allocation of intra-period receipts between income and principal. The Proposed Statute specifically authorizes fiduciaries to transfer assets from principal to income, as may be necessary to fully fund the internal income of the fund and distribute such income to the beneficiary.

T. Proposed Statute §738.410 is substantially similar to Current Statute §738.603.

U. Section 738.411 Minerals, Water, and Other Natural Resources

Current Law: Current Statute §738.604 allocates receipts 90% to principal and 10% to income.

Effect of Proposed Changes: The proposal, following UFIPA, migrates away from the 90/10 allocation and allows federal tax depletion rules to be used as a safe harbor.

V. Proposed Statute §738.412 is substantially similar to Current Statute §738.605.

W. Section 738.413 Marital Deduction Property Not Productive of Income.

Current Law: Current Statute §738.606 provides a safe harbor to ensure that a trust intending to qualify for the estate tax marital deduction allows the surviving spouse to make property productive of income (as required in a marital deduction trust). It also contemplates a unitrust conversion and Florida’s elective share laws.

Effect of Proposed Changes: Proposed Statute §738.413 retains current law and authorizes a surviving spouse to petition a court to make property productive using one of the options noted in the section and further provides that the section may be overridden as explicitly set forth in this Section.

X. Section 738.414 Derivative or Option

Current Law: Current Statute §738.607 allocates all amounts received from these instruments to principal.

Effect of Proposed Changes: The proposal, following UFIPA, employs an allocation 90% to principal and 10% to income.

Y. Section 738.415 Asset Backed Security

Current Law: Current Statute §738.608 applies receipts in exchange for the trust’s or estate’s entire interests during a single accounting period to principal and applies all other

receipts 90% to principal and 10% to income.

Effect of Proposed Changes: The proposal, following UFIPA, modifies the definition of an “asset backed security” to more closely align with the Securities and Exchange Commission definition and applies the 90/10 rule to all receipts.

Z. Section 738.416 Other Financial Instrument or Arrangement is a new section, intended to be a “catch-all” provision to allocate other types of financial arrangements; such arrangements are to be allocated in accordance with the 90% to principal/10% to income rules used for derivatives, options, and asset-backed securities.

AA. Section 738.501 Disbursement from Income

Current Law: Current Statute directs one-half of certain compensation and expenses, but all of the ordinary expenses incurred in connection with trust property that primarily concerns the income interest, to be disbursed from income. However, there is no guidance outlining how to account for a situation where there is not enough income to disburse the amount charged. It appears the likely solution would be to borrow the deficit from principal. However, fiduciaries were left without guidance when addressing such an issue.

Effect of Proposed Changes: Proposed Statute §738.501 provides two changes. "To the extent income is sufficient" has been added to the end of Proposed Statute §738.501(1)(a) and (b) as well as Proposed Statute §738.501(3). This addition specifically addresses a situation where there is not enough income to disburse the full amount charged.

Additionally, in Proposed Statute §738.501(2), the fiduciary is granted the discretion to disburse the remaining amounts charged to income provided in Proposed Statute §738.501(a) and (b) to the extent the fiduciary is an independent person and the disbursement would be in the interest of the beneficiaries. This broadening of discretion will allow the fiduciary to use solely income for the designated disbursements instead of using principal. This discretion will be utilized where there is an investment policy or overarching goal of preserving trust principal.

BB. Section 738.502 Disbursements from Principal

Current Law: The Current Statute does not address a situation where there is insufficient income to account for the amount charged under Current Statute §738.701. Therefore, this section specifically states the “remaining one-half” of the compensation and expense disbursements addressed in Current Statute §738.701(1) and (2). Also, the Current Statute states the fiduciary shall disburse from principal: all of trustee’s compensation for preparing property for sale; payments on the principal of trust debt; expenses of proceedings that primarily concerns trust principal.

Effect of Proposed Changes: The change to Proposed Statute §738.502 provides that principal shall be disbursed in an amount equal to the remaining balance of the compensation and expenses provided for in Proposed Statute §738.501(1)(a) and (b) as well as Proposed Statute §738.501(3).

However, Proposed Statute §738.502 allows the fiduciary to use income to disburse the balance of those amounts charged to income in Proposed Statute §738.501(1)(a) & (b) before

principal is used.

Additionally, the proposed changes will keep Current Statute §738.702(1)(f) as Proposed Statute §738.502(1)(h). Taxes properly charged to principal referred to in Internal Revenue Code Section 2056A(b)(1)(A) and 2061 are not imposed because of the death of a decedent and, therefore, would not be captured by the comparable UFIPA section.

Internal Revenue Code Section 2056A(b)(1)(A) imposes estate tax on a principal distribution from a Qualified Domestic Trust made before the death of the surviving spouse. This distribution is properly charged to principal, but would not be included in UFIPA §502(1)(g), as this section specifically limits the included tax to one which is “imposed because of the death of a decedent.” As such, Current Statute §738.702(1)(f) is retained as Proposed Statute §738.502(1)(h) as this section does not limit the taxes to be included as those derived from the death of a decedent.

Internal Revenue Code Section 2601 imposes a generation-skipping transfer (“GST”) tax on all generation skipping transfers, including taxable distributions and taxable terminations. Internal Revenue Code Section 2621(b) indicates that the trust may pay the GST tax. When a principal distribution is subject to the GST tax, it is properly chargeable to principal. Further, when a principal discretionary standard is limited to a health, education, maintenance and support standard, the principal beneficiary would, by definition of the standard, not have extra cash to pay the GST tax due on the principal distribution. Therefore, it would be advisable for Internal Revenue Code Section 2621(b) to be utilized and, thus, the GST tax paid from trust principal. Again, this is not considered by UFIPA §502(1)(g), as this tax is not “imposed because of the death of a decedent”. As such, Current Statute §738.702(1)(f) is retained as Proposed Statute §738.502(1)(h) as this section does not limit the taxes to be included as those derived from the death of a decedent.

CC. Section 738.503 Transfer from Income to Principal for Depreciation

Current Law: Current Statute §738.703 allows a fiduciary to transfer a reasonable amount of the net cash receipts from a principal asset subject to depreciation to principal. However, this is restricted against depreciation of property that is used or made available to a beneficiary, during the administration of a decedent’s estate, or if the fiduciary is accounting for the business or other activity separately pursuant to Current Statute §738.403. Further, any amount of depreciation taken for an asset shall be presumed to be a reasonable amount of depreciation (“Florida Depreciation Safe Harbor”).

Effect of Proposed Changes: Proposed Statute §738.503 leaves this section relatively unchanged, with three exceptions. Proposed Statute §738.503(1) outlines the definition of depreciation. The Current Statute’s definition of depreciation was retained as it expresses numbers numerically instead of by word. However, the term “fixed asset” has been replaced with the term “tangible asset”, as the term has been adopted throughout Proposed Statute Chapter 738. Proposed Statute §738.503(2)(c)(1) also excludes depreciation for assets accounted for as a liquidating asset pursuant to new §738.410. Finally, the Florida Depreciation Safe Harbor has been excluded from Proposed Statute §738.503, based upon the direction to adopt UFIPA provisions unless there is a compelling reason to retain the Current Statute. No compelling reason was found. The result is to hold the fiduciary to a higher standard with regard to the amount of depreciation taken.

DD. Section 738.504 Reimbursement of Income from Principal

Current Law: Currently, Florida does not have a comparable section to UFIPA §504. As such, there is not a section allowing a fiduciary to reimburse principal from income.

Effect of Proposed Changes: Proposed Statute §738.503 allows a fiduciary to transfer an appropriate amount of principal to income in one or more accounting periods to either reimburse, or provide a reserve, in the following situations: when an amount is charged to principal but paid from income because principal is illiquid; when a disbursement of income is made to prepare property for sale; and for any disbursement of principal specified in Proposed Statute §738.502(1).

EE. Section 738.505 Reimbursement of Principal from Income

Current Law: Current Statute §738.704 allows a fiduciary to transfer an appropriate amount of income to principal in one or more accounting periods to either reimburse or provide a reserve in the following situations: when an unusually large amount is charged to income, but paid from principal; when disbursements are made to prepare property for rent; and for disbursements related to environmental matters. Further, if principal is found insufficient for the principal balance of payments due on mortgaged property or property with a security interest, income may be applied. This borrowing of income shall receive priority for reimbursement when principal cash becomes available. However, if the property has multiple successive income interests, no lien on the property is created when the income interest creating the principal deficiency ends.

Effects of Proposed Changes: Proposed Statute §738.505 adds §738.505(2)(b) back into the Proposed Statute as this was recently deleted per Florida Staff Analysis. This section allows fiduciaries to make an “appropriate” disbursement from income for the cost of a principal improvement or addition of a new asset, or to provide a reserve if this addition/construction is contemplated. Current Statute §738.704(4) has been split into new Proposed Statute §§738.505(2)(b), 738.505(2)(d), and 738.505(3) as this simplifies the reading of the section. Also, Proposed Statute §738.505(3) clarifies that when a current income interest of a principal asset ends and a successive income interest remains, the fiduciary may continue to transfer those appropriate amounts from income to principal specified in this section.

FF. Section 738.506 Income Taxes

Current Law: With regard to income tax, Current Statute §738.705 states the fiduciary shall disburse from income those amounts allocated to income, and from principal those amounts allocated to principal. These same allocation rules shall be followed on the trust’s or estate’s share of an entity’s taxable income, except that principal shall be used to disburse amounts that exceed total receipts from the entity. However, pursuant to Current Statute §738.705(4), a fiduciary shall adjust income or principal receipts, pursuant to a given formula (“Formula”), to the extent the trust or estate’s income taxes are reduced, but not eliminated, due to a deduction for payments made to a beneficiary.

Effects of Proposed Changes: The proposed changes are mostly within Proposed Statute §738.505(4). The use of “but not eliminated” has been deleted, as this implies that if a distribution eliminates income taxes, we should not make an adjustment of income receipts. This

would result in the opposite of the intention of this section. Further, the Formula outlining the amount distributable to a beneficiary has been deleted. A trust's tax year usually ends on December 31st. On this date, the trust's after-tax income will not be known in the following situations: when an Internal Revenue Code Section 643(g) election is made within 65 days after the close of the taxable year allowing a fiduciary to treat a payment of tax as made by the beneficiary; when an Internal Revenue Code Section 663(b) election is made within 65 days after the close of the taxable year to treat any distribution to a beneficiary within those 65 days as made on the last day of the previous tax year; and due to passthrough entities not having their accountings complete by year end. Proposed Statute §738.506(5) has been added in response to Proposed Statute §738.08145(1)(a), allowing for the fiduciary to reimburse the "owner" of a grantor trust for the income taxes paid. Proposed Statute §738.506(5) states that the income tax reimbursement shall be made proportionately from income and principal based upon the allocation of receipts from the entity, and principal to the extent the tax exceeds receipts.

GG. Section 738.507 Adjustment between Principal and Income because of Taxes

Current Law: Current Statute §738.707 states a fiduciary may adjust principal and income to offset the shifting of economic interests or tax benefits between income and remainder beneficiaries due to: elections and decisions made by a fiduciary; a tax imposed on the fiduciary or beneficiary due to a distribution from the estate or trust; or the taxable income of an entity owned by an estate or trust includable in the taxable income of the estate, trust or beneficiary. Further, when an estate tax marital deduction or charitable contribution deduction is reduced due to a fiduciary deducting an amount paid from principal for income tax purposes resulting in the amount of income tax paid by an estate, tax or trust decreasing, the income tax payor shall reimburse principal for the amount of tax not paid ("Deduction Adjustment"). However, this amount of reimbursement is limited to the extent the principal used would have qualified for the stated deduction.

Effects of Proposed Changes: The only change to the Current Statute is the addition of Proposed Statute §738.507(3), which specifies that a fiduciary that charges a beneficiary under the above-stated Deduction Adjustment may offset the charge by obtaining payment from the beneficiary, withholding future distributions to the beneficiary, or adopting another method or combination of methods.

HH. Section 738.508 Apportionment of Property Expenses between Tenant and Remainderman

Current Law: Current Statute §738.801 is entitled Apportionment of Expenses; Improvements. This section speaks to the apportionment of property expenses between tenants and remainderman. The tenant shall be allocated: all ordinary expenses incurred in connection with the administration, management or preservation of property; recurring premiums on insurance covering loss of property or income; and expense relating to environmental matters attributable to use of property by the tenant. The remainderman shall be allocated: payments on the principal of the debt secured by the property, except if allocated to tenant; expenses of a proceeding that concerns primarily the title to the property and not the tenant's estate; environmental matters not allocated to the tenant; and extraordinary repairs. Further, any improvement shall be borne by the tenant if the improvement is not reasonably expected to outlast the estate of tenant. If the improvement is to outlast the estate of tenant, the cost of the improvement is prorated between the tenant and remainderman, taking into consideration the expected duration of the improvement as well as the

life expectancy of the tenant. Finally, the governing instrument of an estate or agreement of the parties may override this statute.

Effect of Proposed Changes: Current Statute §738.801 has been moved to Proposed Statute §738.708 and is now entitled Apportionment of Property Expenses Between Tenant and Remainderman. No substantive changes have been made to Proposed Statute §738.708.

II. Proposed Statute §738.601 is substantially similar to Current Statute §738.201

JJ. Section 738.602 Distribution to successor beneficiary --

Current Law: Current Statute §738.201 provides for the distribution of the net income among residuary and remainder beneficiaries. The Current Statute includes certain public policy choices in subparagraphs (2)(b) and (2)(d), relating to the use of fair market values in valuing distributions to a beneficiary and paragraphs (1) and (5) and relating to the use of carrying values (as opposed to fair market values) in determining the allocation of net income.

Effect of Proposed Changes: Proposed Statute §738.602 retains these Florida public policy choices, which were not found in UFIPA.

KK. Proposed Statute §§738.701 and 738.702 are substantially similar to Current Statute §§738.301 and 738.302.

LL. Section 738.703 Apportionment when income interest ends --

Current Law: Current Statute §738.303 provides for the apportionment of income after an income interest ends. The Current Statute provides for the proration of a untrust amount.

Effect of Proposed Change: The reference to a unitrust has been deleted as it is covered elsewhere.

MM. Section 738.802 Relation to Electronic Signatures in Global and National Commerce Act –

Effect of Proposed Changes: Proposed Statute §738.802 is not found in the Current Statute. It will modify and limit the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001, *et seq.* (except for Section 101(c) of that Act), but it does not authorize electronic delivery of any notices described in Section 103(b) of that Act.

NN. Section 733.804 Application –

Current Law: The Current Statute provides that Chapter 738 applies “to any receipt or expense received or incurred and any disbursement made after January 1, 2003,” by a trust or estate, whether established before or after January 1, 2003.

Effect of Proposed Change: Proposed Statute §738.804 provides that the new Chapter 738 will apply to any receipt or expense received or disbursed on or after January 1 of the year after enactment by any trust or estate, whether then in existence or established afterward.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

The proposed legislation should not have a fiscal impact on state and local governments.

V. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

Adoption of the proposed legislation would benefit members of the private sector by both creating greater consistency with the laws of other states and by updating principal and income principles to reflect modern behavior.

VI. CONSTITUTIONAL ISSUES

It is not anticipated that this legislation will raise constitutional issues.

VII. OTHER INTERESTED PARTIES

In preparing this proposal, this committee worked closely with the Florida Bankers Association and the Florida Institute of CPAs.

1 A bill to be entitled

2 An act relating to income and principal regarding
3 estate, trusts, and other fiduciary arrangements; replacing
4 provisions of law related to income and principal;
5 providing an effective date.

6 Be it Enacted by the Legislature of the State of
7 Florida:

8 Section 1. Chapter 738, Florida Statutes is amended to
9 read:

10 738.101 Short title.—This chapter may be cited as the
11 “Florida Uniform Fiduciary Income and Principal Act.”

12 738.102 Definitions.—As used in this chapter, the
13 term:

14 (1) “Accounting period” means a calendar year unless a
15 fiduciary selects another period of 12 calendar months or
16 approximately 12 calendar months. The term includes a
17 part of a calendar year or another period of 12 calendar
18 months or approximately 12 calendar months which begins or
19 ends when an income interest ends.

20 (2) “Asset-backed security,” as provided in s.
21 738.415, means a security that is serviced primarily by the
22 cash flows of a discrete pool of fixed or revolving
23 receivables or other financial assets that by their terms
24 convert into cash within a finite time. The term includes
25 rights or other assets that ensure the servicing or timely

26 distribution of proceeds to the holder of the asset-backed
27 security. The term does not include an asset to which s.
28 738.401, s. 738.409, or s. 738.414 applies.

29 (3) "Beneficiary" includes:

30 (a) for a trust:

31 1. a current beneficiary, including a current income
32 beneficiary and a beneficiary that may receive only
33 principal;

34 2. a remainder beneficiary; and

35 3. any other successor beneficiary;

36 (b) for an estate, an heir, and a devisee; and

37 (c) for a life estate or term interest a person that
38 holds a life estate, a term interest, or a remainder or
39 other interest following a life estate or term interest.

40 (4) "Carrying value" means the fair market value at
41 the time the assets are received by the fiduciary. For the
42 estates of decedents and trusts described in s. 733.707(3),
43 after the grantor's death, the assets are considered
44 received as of the date of death. If there is a change in
45 fiduciaries, a majority of the continuing fiduciaries may
46 elect to adjust the carrying values to reflect the fair
47 market value of the assets at the beginning of their
48 administration. If such election is made, it must be
49 reflected on the first accounting filed after the election.
50 For assets acquired during the administration of the estate

51 or trust, the carrying value is equal to the acquisition
52 costs of the asset. Carrying value of assets should not be
53 arbitrarily "written up" or "written down." In some
54 circumstances, including but not limited to those described
55 in ss. 738.410 and 738.602, carrying value may be adjusted
56 with proper disclosure to reflect changes in carrying value
57 applied in a consistent manner.

58 (5) "Court" means a circuit court of this state.

59 (6) "Current income beneficiary" means a beneficiary
60 to which a fiduciary may or must distribute net income,
61 whether or not the fiduciary also may distribute principal
62 to the beneficiary.

63 (7) "Distribution" means a payment or transfer by a
64 fiduciary to a beneficiary in the beneficiary's capacity as
65 a beneficiary, without consideration other than the
66 beneficiary's right to receive the payment or transfer
67 under the terms of the trust as defined in this s. 738.102,
68 will, life estate, or term interest. "Distribute",
69 "distributed", and "distributee" have corresponding
70 meanings.

71 (8) "Estate" means a decedent's estate. The term
72 includes the property of the decedent as the estate is
73 originally constituted and the property of the estate as it
74 exists at any time during administration.

75 (9) "Fiduciary" includes a trustee, trust director
76 determined under s. 736.0103, personal representative, and
77 person acting under a delegation from a fiduciary. The term
78 includes a person that holds property for a successor
79 beneficiary whose interest may be affected by an allocation
80 of receipts and expenditures between income and principal.
81 If there are two or more co-fiduciaries, the term includes
82 all co-fiduciaries acting under the terms of the trust and
83 applicable law.

84 (10) "Income" means money or other property a
85 fiduciary receives as current return from principal. The
86 term includes a part of receipts from a sale, exchange, or
87 liquidation of a principal asset, to the extent provided in
88 ss. 738.401-738.416.

89 (11) "Income interest" means the right of a current
90 income beneficiary to receive all or part of net income,
91 whether the terms of the trust require the net income to be
92 distributed or authorize the net income to be distributed
93 in the fiduciary's discretion. The term includes the right
94 of a current beneficiary to use property held by a
95 fiduciary.

96 (12) "Independent person" means a person that is not:

97 (a) for a trust:

98 1. a qualified beneficiary determined under s.

99 736.0103;

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2. a settlor of the trust;

3. an individual whose legal obligation to support a beneficiary may be satisfied by a distribution from the trust; or

4. any trustee whom an interested distributee has the power to remove and replace with a related or subordinate party.

(b) for an estate, a beneficiary;

(c) a spouse, parent, brother, sister, or issue of an individual described in paragraph (a) or (b);

(d) a corporation, partnership, limited liability company, or other entity in which persons described in paragraphs (a)-(c), in the aggregate, have voting control; or

(e) an employee of a person described in paragraph (a), (b), (c) or (d).

(13) "Internal Revenue Code" means the Internal Revenue Code of 1986, as amended.

(14) "Mandatory income interest" means the right of a current income beneficiary to receive net income that the terms of the trust require the fiduciary to distribute.

(15) "Net income" means the total allocations during an accounting period to income under the terms of a trust and this chapter minus the disbursements during the period, other than distributions, allocated to income under the

125 terms of the trust and this chapter. To the extent the
126 trust is a unitrust under ss. 738.301-738.309, the term
127 means the unitrust amount determined under ss. 738.301-
128 738.309. The term includes the amount of an adjustment from
129 principal to income under s. 738.203. The term does not
130 include the amount of an adjustment from income to
131 principal under s. 738.203.

132 (16) "Person" means an individual, estate, trust,
133 business or nonprofit entity, public corporation,
134 government or governmental subdivision, agency, or
135 instrumentality, or other legal entity.

136 (17) "Personal representative" means an executor,
137 administrator, successor personal representative, special
138 administrator, or person that performs substantially the
139 same function with respect to an estate under the law
140 governing the person's status.

141 (18) "Principal" means property held in trust for
142 distribution to, production of income for, or use by a
143 current or successor beneficiary.

144 (19) "Record" means information that is inscribed on a
145 tangible medium or that is stored in an electronic or other
146 medium and is retrievable in perceivable form.

147 (20) "Settlor" means a person, including a testator,
148 that creates or contributes property to a trust. If more
149 than one person creates or contributes property to a trust,

150 the term includes each person, to the extent of the trust
151 property attributable to that person's contribution, except
152 to the extent another person has the power to revoke or
153 withdraw that portion.

154 (21) "Special tax benefit" means:

155 (a) exclusion of a transfer to a trust from gifts
156 described in s. 2503(b) of the Internal Revenue Code
157 because of the qualification of an income interest in the
158 trust as a present interest in property;

159 (b) status as a qualified subchapter S trust described
160 in s. 1361(d)(3) of the Internal Revenue Code at a time the
161 trust holds stock of an S corporation described in s.
162 1361(a)(1) of the Internal Revenue Code;

163 (c) an estate or gift tax marital deduction for a
164 transfer to a trust under s. 2056 or s. 2523 of the
165 Internal Revenue Code which depends or depended in whole or
166 in part on the right of the settlor's spouse to receive the
167 net income of the trust;

168 (d) exemption in whole or in part of a trust from the
169 federal generation-skipping transfer tax imposed by s. 2601
170 of the Internal Revenue Code because the trust was
171 irrevocable on September 25, 1985, if there is any
172 possibility that:

173 1. a taxable distribution, as defined in s. 2612(b) of
174 the Internal Revenue Code could be made from the trust: or

175 2. a taxable termination, as defined in s. 2612(a) of
176 the Internal Revenue Code could occur with respect to the
177 trust; or

178 (e) an inclusion ratio, as defined in s. 2642(a) of
179 the Internal Revenue Code, of the trust which is less than
180 one, if there is any possibility that:

181 1. a taxable distribution, as defined in s. 2612(b) of
182 the Internal Revenue Code, could be made from the trust; or

183 2. a taxable termination, as defined in s. 2612(a) of
184 the Internal Revenue Code could occur with respect to the
185 trust.

186 (22) "Successive interest" means the interest of a
187 successor beneficiary.

188 (23) "Successor beneficiary" means a person entitled
189 to receive income or principal or to use property when an
190 income interest or other current interest ends.

191 (24) "Terms of a trust" means:

192 (a) except as otherwise provided in paragraph (b), the
193 manifestation of the settlor's intent regarding a trust's
194 provisions as:

195 1. expressed in the will or trust instrument; or

196 2. established by other evidence that would be
197 admissible in a judicial proceeding.

198 (b) the trust's provisions as established, determined,
199 or amended by:

200 1. a trustee or trust director in accordance with
201 applicable law;

202 2. court order; or

203 3. a nonjudicial settlement agreement under s.
204 736.0111.

205 (c) for an estate, a will; or

206 (d) for a life estate or term interest, the
207 corresponding manifestation of the rights of the
208 beneficiaries to the extent provided in s. 738.508.

209 (25) "Trust":

210 (a) includes:

211 1. an express trust, private or charitable, with
212 additions to the trust wherever and however created; and
213 2. a trust created or determined by judgment or decree
214 under which the trust is to be administered in the manner
215 of an express trust; and

216 (b) does not include:

217 1. constructive trusts;
218 2. resulting trusts; conservatorships; custodial
219 arrangements pursuant to the Florida Uniform Transfers to
220 Minors Act; business trusts providing for certificates to
221 be issued to beneficiaries; common trust funds; land trusts
222 under s. 689.071; trusts created by the form of the account
223 or by the deposit agreement at a financial institution;
224 voting trusts; security arrangements; liquidation trusts;

225 or trusts for the primary purpose of paying debts,
 226 dividends, interest, salaries, wages, profits, pensions,
 227 retirement benefits, or employee benefits of any kind; or

228 3. an arrangement under which a person is a nominee,
 229 escrowee, or agent for another.

230 (26) "Trustee" means a person, other than a personal
 231 representative, that owns or holds property for the benefit
 232 of a beneficiary. The term includes an original,
 233 additional, or successor trustee, whether or not appointed
 234 or confirmed by a court.

235 (27) "Will" means any testamentary instrument
 236 recognized by applicable law which makes a legally
 237 effective disposition of an individual's property,
 238 effective at the individual's death. The term includes a
 239 codicil or other amendment to a testamentary instrument.

240 738.103 Scope.—Except as otherwise provided in the
 241 terms of a trust or this chapter, this chapter applies to:

242 (1) a trust or estate; and

243 (2) a life estate or other term interest in which the
 244 interest of one or more persons will be succeeded by the
 245 interest of one or more other persons to the extent
 246 provided in s. 738.508.

247 738.104 Governing law.—Except as otherwise provided
 248 in the terms of a trust or this chapter, this chapter
 249 applies when this state is the principal place of

250 administration of a trust or estate or the situs of
251 property that is not held in a trust or estate and is
252 subject to a life estate or other term interest described
253 in s. 738.103(2). By accepting the trusteeship of a trust
254 having its principal place of administration in this state
255 or by moving the principal place of administration of a
256 trust to this state, the trustee submits to the application
257 of this chapter to any matter within the scope of this
258 chapter involving the trust.

259 738.201 Fiduciary duties; general principles.—

260 (1) In making an allocation or determination or
261 exercising discretion under this chapter, a fiduciary
262 shall:

263 (a) act in good faith, based on what is fair and
264 reasonable to all beneficiaries;

265 (b) administer a trust or estate impartially, except
266 to the extent the terms of the trust manifest an intent
267 that the fiduciary shall or may favor one or more
268 beneficiaries;

269 (c) administer the trust or estate in accordance with
270 the terms of the trust, even if there is a different
271 provision in this chapter; and

272 (d) administer the trust or estate in accordance with
273 this chapter, except to the extent the terms of the trust

274 provide otherwise or authorize the fiduciary to determine
275 otherwise.

276 (2) A fiduciary's allocation, determination, or
277 exercise of discretion under this chapter is presumed to be
278 fair and reasonable to all beneficiaries. A fiduciary may
279 exercise a discretionary power of administration given to
280 the fiduciary by the terms of the trust, and an exercise of
281 the power that produces a result different from a result
282 required or permitted by this chapter does not create an
283 inference that the fiduciary abused the fiduciary's
284 discretion.

285 (3) A fiduciary shall:

286 (a) add a receipt to principal, to the extent neither
287 the terms of the trust nor this chapter allocates the
288 receipt between income and principal;

289 (b) charge a disbursement to principal, to the extent
290 neither the terms of the trust nor this chapter allocates
291 the disbursement between income and principal; and

292 (c) within 65 days after the fiscal year end, add any
293 undistributed income to principal, unless otherwise
294 provided by the terms of the trust.

295 (4) A fiduciary may exercise the power to adjust under
296 s. 738.203(1), convert an income trust to a unitrust under
297 ss. 738.301-738.309, change the percentage or method used
298 to calculate a unitrust amount under ss. 738.301-738.309,

299 or convert a unitrust to an income trust under ss. 738.301-
300 738.309, if the fiduciary determines the exercise of the
301 power will assist the fiduciary to administer the trust or
302 estate impartially.

303 (5) Factors the fiduciary must consider in making the
304 determination under subsection (4) include:

305 (a) the terms of the trust;

306 (b) the nature, distribution standards, and expected
307 duration of the trust;

308 (c) the effect of the allocation rules, including
309 specific adjustments between income and principal, under
310 ss. 738.301-738.416;

311 (d) the desirability of liquidity and regularity of
312 income;

313 (e) the desirability of the preservation and
314 appreciation of principal;

315 (f) the extent to which an asset is used or may be
316 used by a beneficiary;

317 (g) the increase or decrease in the value of principal
318 assets, reasonably determined by the fiduciary;

319 (h) whether and to what extent the terms of the trust
320 give the fiduciary power to accumulate income or invade
321 principal or prohibit the fiduciary from accumulating
322 income or invading principal;

323 (i) the extent to which the fiduciary has accumulated
324 income or invaded principal in preceding accounting
325 periods;

326 (j) the effect of current and reasonably expected
327 economic conditions;

328 (k) the reasonably expected tax consequences of the
329 exercise of the power; and

330 (l) the identity and circumstances of the
331 beneficiaries.

332 (6) Except as provided in ss. 738.301-738.309, this
333 chapter pertains to the administration of a trust and is
334 applicable to any trust that is administered in this state
335 or under its law. This chapter also applies to any estate
336 that is administered in this state unless the provision is
337 limited in application to a trustee, rather than a
338 fiduciary.

339 738.202. Judicial review of exercise of discretionary
340 power; request for instruction.-

341 (1) As used in this section, the term "fiduciary
342 decision" means:

343 (a) a fiduciary's allocation between income and
344 principal or other determination regarding income and
345 principal required or authorized by the terms of the trust
346 or this chapter;

347 (b) the fiduciary's exercise or nonexercise of a
348 discretionary power regarding income and principal granted
349 by the terms of the trust or this chapter, including the
350 power to adjust under s. 738.203, convert an income trust
351 to a unitrust under ss. 738.301-738.309, change the
352 percentage or method used to calculate a unitrust amount
353 under ss. 738.301-738.309, convert a unitrust to an income
354 trust under ss. 738.301-738.309, or the method used to make
355 property productive of income under s. 738.413; or

356 (c) the fiduciary's implementation of a decision
357 described in paragraph (a) or (b).

358 (2) The court may not order a fiduciary to change a
359 fiduciary decision unless the court determines that the
360 fiduciary decision was an abuse of the fiduciary's
361 discretion. A court may not determine that a fiduciary
362 abused its discretion merely because the court would have
363 exercised the discretion in a different manner or would not
364 have exercised the discretion.

365 (3) If the court determines that a fiduciary decision
366 was an abuse of the fiduciary's discretion, the court may
367 order a remedy authorized by law, including s. 736.1001 and
368 s. 736.1002. Following such a determination by the court,
369 the remedy is to place the income and remainder
370 beneficiaries in the positions they would have occupied if

371 the fiduciary had not abused its discretion, in accordance
372 with the following:

373 (a) The court may order the fiduciary to exercise or
374 refrain from exercising the power to adjust under s.
375 738.203;

376 (b) The court may order the fiduciary to exercise or
377 refrain from exercising the power to convert an income
378 trust to a unitrust under ss. 738.301-738.309, change the
379 percentage or method used to calculate a unitrust amount
380 under ss. 738.301-738.309, or convert a unitrust to an
381 income trust under ss. 738.301-738.309;

382 (c) The court may compel the fiduciary to take any of
383 the actions listed under s. 738.413;

384 (d) To the extent the abuse of discretion has resulted
385 in no distribution to a beneficiary or a distribution that
386 is too small, the court shall require the fiduciary to
387 distribute from the trust to the beneficiary an amount the
388 court determines will restore the beneficiary, in whole or
389 in part, to his or her appropriate position;

390 (e) To the extent the abuse of discretion has resulted
391 in a distribution to a beneficiary that is too large, the
392 court shall restore the beneficiaries, the trust, or both,
393 in whole or in part, to their appropriate positions by
394 requiring the fiduciary to withhold an amount from one or
395 more future distributions to the beneficiary who received

396 | the distribution that was too large or requiring that
397 | beneficiary to return some or all of the distribution to
398 | the trust; or

399 | (f) To the extent the court is unable, after applying
400 | paragraphs (a) - (e), to restore the beneficiaries or the
401 | trust, or both, to the positions they would have occupied
402 | if the fiduciary had not abused its discretion, the court
403 | may require the fiduciary to pay an appropriate amount from
404 | its own funds to one or more of the beneficiaries or the
405 | trust or both.

406 | (4) On petition by a fiduciary for instruction, the
407 | court may determine whether a proposed fiduciary decision
408 | will result in an abuse of the fiduciary's discretion. If
409 | the petition describes the proposed decision, contains
410 | sufficient information to inform the beneficiary of the
411 | reasons for making the proposed decision and the facts on
412 | which the fiduciary relies, and explains how the
413 | beneficiary will be affected by the proposed decision, a
414 | beneficiary that opposes the proposed decision has the
415 | burden to establish that it will result in an abuse of the
416 | fiduciary's discretion.

417 | (5) If an action is instituted alleging an abuse of
418 | discretion in the exercise or nonexercise of the
419 | fiduciary's discretion under this chapter and the court
420 | determines no abuse of discretion has occurred, the

421 fiduciary's costs and attorney's fees incurred in defending
422 the action shall be paid from the trust assets.

423 738.203 Fiduciary's power to adjust.-

424 (1) Except as otherwise provided in the terms of a
425 trust or this section, a fiduciary, in a record, without
426 court approval, may adjust between income and principal if
427 the fiduciary determines the exercise of the power to
428 adjust will assist the fiduciary to administer the trust or
429 estate impartially.

430 (2) This section does not create a duty to exercise or
431 consider the power to adjust under paragraph (1) or to
432 inform a beneficiary about the applicability of this
433 section.

434 (3) A fiduciary that in good faith exercises or fails
435 to exercise the power to adjust under subsection (1) is not
436 liable to a person affected by the exercise or failure to
437 exercise.

438 (4) In deciding whether and to what extent to exercise
439 the power to adjust under subsection (1), a fiduciary shall
440 consider all factors the fiduciary considers relevant,
441 including relevant factors in s. 738.201(5) and the
442 application of ss. 738.401(9), 738.408, and 738.413.

443 (5) A fiduciary may not exercise the power under
444 subsection (1) to make an adjustment or under s. 738.408 to

445 make a determination that an allocation is insubstantial
446 if:

447 (a) the adjustment or determination would reduce the
448 amount payable to a current income beneficiary from a trust
449 that qualifies for a special tax benefit, except to the
450 extent the adjustment is made to provide for a reasonable
451 apportionment of the total return of the trust between the
452 current income beneficiary and successor beneficiaries;

453 (b) the adjustment or determination would change the
454 amount payable to a beneficiary, as a fixed annuity or a
455 fixed fraction of the value of the trust assets, under the
456 terms of the trust;

457 (c) the adjustment or determination would reduce an
458 amount that is permanently set aside for a charitable
459 purpose under the terms of the trust, unless both income
460 and principal are set aside for the charitable purpose;

461 (d) possessing or exercising the power would cause a
462 person to be treated as the owner of all or part of the
463 trust for federal income tax purposes and the person would
464 not be treated as the owner if the trustee did not possess
465 the power to adjust;

466 (e) possessing or exercising the power would cause all
467 or part of the value of the trust assets to be included in
468 the gross estate of an individual for federal estate tax
469 purposes and the assets would not be included in the estate

470 of the person if the trustee did not possess the power to
471 adjust;

472 (f) possessing or exercising the power would cause an
473 individual to be treated as making a gift for federal gift
474 tax purposes;

475 (g) the fiduciary is not an independent person;

476 (h) the trust is irrevocable and provides for income
477 to be paid to the settlor and possessing or exercising the
478 power would cause the adjusted principal or income to be
479 considered an available resource or available income under
480 a public-benefit program; or

481 (i) the trust is a unitrust under ss. 738.301-738.309.

482 (6) If paragraph (5)(d), (e), (f), or (g) applies to a
483 fiduciary:

484 (a) a co-fiduciary to which paragraphs (5)(d) - (g) do
485 not apply may exercise the power to adjust, unless the
486 exercise of the power by the remaining co-fiduciary or co-
487 fiduciaries is not permitted by the terms of the trust or
488 law other than this chapter; or

489 (b) if there is no co-fiduciary to which paragraph
490 (5)(d)-(g) does not apply, the fiduciary may appoint a co-
491 fiduciary to which paragraph (5)(d)-(g) does not apply,
492 which may be a special fiduciary with limited powers, and
493 the appointed co-fiduciary may exercise the power to adjust
494 under subsection (1), unless the appointment of a co-

495 | fiduciary or the exercise of the power by a co-fiduciary is
496 | not permitted by the terms of the trust or law other than
497 | this chapter.

498 | (7) A fiduciary may release or delegate to a co-
499 | fiduciary the power to adjust under subsection (1) if the
500 | fiduciary determines that the fiduciary's possession or
501 | exercise of the power will or may:

502 | (a) cause a result described in paragraph (5) (a), (b),
503 | (c), (d), (e), (f), or (h); or

504 | (b) deprive the trust of a tax benefit or impose a tax
505 | burden not described in paragraph (5) (a), (b), (c), (d),
506 | (e), or (f).

507 | (8) A fiduciary's release or delegation to a co-
508 | fiduciary under subsection (7) of the power to adjust under
509 | subsection (1):

510 | (a) must be in a record;

511 | (b) applies to the entire power, unless the release or
512 | delegation provides a limitation, which may be a limitation
513 | to the power to adjust:

514 | (i) from income to principal;

515 | (ii) from principal to income;

516 | (iii) for specified property; or

517 | (iv) in specified circumstances;

518 (c) for a delegation, may be modified by a re-
519 delegation under this subsection by the co-fiduciary to
520 which the delegation is made; and

521 (d) subject to paragraph (c), is permanent, unless the
522 release or delegation provides a specified period,
523 including a period measured by the life of an individual or
524 the lives of more than one individual.

525 (9) Terms of a trust that deny or limit the power to
526 adjust between income and principal do not affect the
527 application of this section, unless the terms of the trust
528 expressly deny or limit the power to adjust under
529 subsection (1).

530 (10) The exercise of the power to adjust under
531 paragraph (a) in any accounting period may apply to the
532 current period, the immediately preceding period, and one
533 or more subsequent periods.

534 (11) A description of the exercise of the power to
535 adjust under subsection (1) must be:

536 (a) included in a report, if any, sent to
537 beneficiaries under s. 736.0813; or

538 (b) communicated at least annually to the qualified
539 beneficiaries determined under s. 736.0103(19) other than
540 the Attorney General.

541 (12) With respect to a trust in existence on January
542 1, 2003:

543 (a) A trustee shall not have the power to adjust under
544 this section until the statement required in subsection
545 (14) is provided and either no objection is made or any
546 objection which is made has been terminated.

547 1. An objection is made if, within 60 days after the
548 date of the statement required in subsection (13), a super
549 majority of the eligible beneficiaries deliver to the
550 trustee a written objection to the application of this
551 section to such trust. An objection shall be deemed to be
552 delivered to the trustee on the date the objection is
553 mailed to the mailing address listed in the notice provided
554 in paragraph (13).

555 2. An objection is terminated upon the earlier of the
556 receipt of consent from a super majority of eligible
557 beneficiaries of the class that made the objection, or the
558 resolution of the objection pursuant to paragraph (c).

559 (b) An objection or consent under this section may be
560 executed by a legal representative or natural guardian of a
561 beneficiary without the filing of any proceeding or
562 approval of any court.

563 (c) If an objection is delivered to the trustee, then
564 the trustee may petition the circuit court for an order
565 quashing the objection and vesting in such trustee the
566 power to adjust under this section. The burden will be on
567 the objecting beneficiaries to prove that the power to

568 adjust would be inequitable, illegal, or otherwise in
569 contravention of the grantor's intent. The court may award
570 costs and attorney's fees relating to the trustee's
571 petition in the same manner as in chancery actions. When
572 costs and attorney's fees are to be paid out of the trust,
573 the court may, in its discretion, direct from which part of
574 the trust they shall be paid.

575 (d) If no timely objection is made or if the trustee
576 is vested with the power to adjust by court order, the
577 trustee may thereafter exercise the power to adjust without
578 providing notice of its intent to do so unless, in vesting
579 the trustee with the power to adjust, the court determines
580 that unusual circumstances require otherwise.

581 (e)1. If a trustee makes a good faith effort to comply
582 with the notice provisions of subsection (13), but fails to
583 deliver notice to one or more beneficiaries entitled to
584 such notice, neither the validity of the notice required
585 under this subsection nor the trustee's power to adjust
586 under this section shall be affected until the trustee has
587 actual notice that one or more beneficiaries entitled to
588 notice were not notified. Until the trustee has actual
589 notice of the notice deficiency, the trustee shall have all
590 of the powers and protections granted a trustee with the
591 power to adjust under this chapter.

592 2. When the trustee has actual notice that one or more
593 beneficiaries entitled to notice under subsection (13) were
594 not notified, the trustee's power to adjust under this
595 section shall cease until all beneficiaries who are
596 entitled to such notice, including those who were
597 previously provided with such notice, are notified and
598 given the opportunity to object as provided for under this
599 subsection.

600 (f) The objection of a super majority of eligible
601 beneficiaries under this subsection shall be valid for a
602 period of 1 year after the date of the notice set forth in
603 paragraph (13). Upon expiration of the objection, the
604 trustee may thereafter give a new notice under paragraph
605 (13).

606 (g) Nothing in this section is intended to create or
607 imply a duty of the trustee of a trust existing on January
608 1, 2003, to seek a power to adjust pursuant to this
609 subsection or to give the notice described in paragraph
610 (13) if the trustee does not desire to have a power to
611 adjust under this section, and no inference of impropriety
612 shall be made as the result of a trustee not seeking a
613 power to adjust pursuant to this subsection.

614 (13) (a) A trustee of a trust in existence on January
615 1, 2003, that is not prohibited under paragraph (5) from
616 exercising the power to adjust shall, any time prior to

617 initially exercising the power, provide to all eligible
618 beneficiaries a statement containing the following:

619 1. The name, telephone number, street address, and
620 mailing address of the trustee and of any individuals who
621 may be contacted for further information;

622 2. A statement that unless a super majority of the
623 eligible beneficiaries objects to the application of this
624 section to the trust within 60 days after the date the
625 statement pursuant to this subsection was served, this
626 section shall apply to the trust; and

627 3. A statement that, if this section applies to the
628 trust, the trustee will have the power to adjust between
629 income and principal and that such a power may have an
630 effect on the distributions to such beneficiary from the
631 trust.

632 (b) The statement may contain information regarding a
633 trustee's fiduciary obligations with respect to the power
634 to adjust between income and principal under this section.

635 (c) The statement referred to in this subsection shall
636 be served informally, in the manner provided in the Florida
637 Rules of Civil Procedure relating to service of pleadings
638 subsequent to the initial pleading. The statement may be
639 served on a legal representative or natural guardian of a
640 beneficiary without the filing of any proceeding or
641 approval of any court.

642 (d) For purposes of this subsection and subsection
643 (14), the term:

644 1. "Eligible beneficiaries" means:

645 a. If at the time the determination is made there are
646 one or more beneficiaries described in s. 736.0103(19)(c),
647 the beneficiaries described in s. 736.0103(19)(a) and (c);
648 or

649 b. If there is no beneficiary described in s.
650 736.0103(19)(c), the beneficiaries described in s.
651 736.0103(19)(a) and (b).

652 2. "Super majority of the eligible beneficiaries"
653 means:

654 a. If at the time the determination is made there are
655 one or more beneficiaries described in s. 736.0103(19)(c),
656 at least two-thirds in interest of the beneficiaries
657 described in s. 736.0103(19)(a) or two-thirds in interest
658 of the beneficiaries described in s. 736.0103(19)(c), if
659 the interests of the beneficiaries are reasonably
660 ascertainable; otherwise, it means two-thirds in number of
661 either such class; or

662 b. If there is no beneficiary described in s.
663 736.0103(19)(c), at least two-thirds in interest of the
664 beneficiaries described in s. 736.0103(19)(a) or two-thirds
665 in interest of the beneficiaries described in s.
666 736.0103(19)(b), if the interests of the beneficiaries are

667 reasonably ascertainable, otherwise, two-thirds in number
668 of either such class.

669 (14) A trust exists on January 1, 2003, if it is not
670 revocable on January 1, 2003. A trust is revocable if
671 revocable by the grantor alone or in conjunction with any
672 other person. A trust is not revocable for purposes of this
673 section if revocable by the grantor only with the consent
674 of all persons having a beneficial interest in the
675 property.

676 738.301 Definitions.—For purposes of ss. 738.301-
677 738.310:

678 (1) "Applicable value" means the amount of the net
679 fair market value of a trust taken into account under s.
680 738.307.

681 (2) "Express unitrust" means a trust for which, under
682 the terms of the trust without regard to ss. 738.301-
683 738.310, net income must be calculated as a unitrust
684 amount.

685 (3) "Income trust" means a trust, created by an
686 intervivos or a testamentary instrument, which directs or
687 permits the trustee to distribute the net income of the
688 trust to one or more persons, in fixed proportions or in
689 amounts or proportions determined by the trustee and
690 regardless of whether the trust directs or permits the

691 trustee to distribute the principal of the trust to one or
692 more such persons.

693 (4) "Net fair market value of a trust" means the fair
694 market value of the assets of the trust, less the
695 reasonably known noncontingent liabilities of the trust.

696 (5) "Unitrust" means a trust for which net income is a
697 unitrust amount. The term includes an express unitrust.

698 (6) "Unitrust amount" means an amount computed by
699 multiplying a determined value of a trust by a determined
700 percentage. For a unitrust administered under a unitrust
701 policy, the term means the applicable value, multiplied by
702 the unitrust rate.

703 (7) "Unitrust policy" means a policy described in ss.
704 738.305-738.309 and adopted under s. 738.303.

705 (8) "Unitrust rate" means the rate used to compute the
706 unitrust amount under subsection (6) for a unitrust
707 administered under a unitrust policy.

708 738.302 Application; duties and remedies.-

709 (1) Except as otherwise provided in subsection (2),
710 ss. 738.301-738.310 applies to:

711 (a) an income trust, unless the terms of the trust
712 expressly prohibit use of ss. 738.301-738.309 by a specific
713 reference to ss. 738.301-738.309 or an explicit expression
714 of intent that net income not be calculated as a unitrust
715 amount; and

716 (b) an express unitrust, except to the extent the
717 terms of the trust explicitly:

718 1. prohibit use of ss. 738.301-738.309 by a specific
719 reference to ss. 738.301-738.309;

720 2. prohibit conversion to an income trust; or

721 3. limit changes to the method of calculating the
722 unitrust amount; and

723 (c) a unitrust that had been converted from an income
724 trust.

725 (2) The provisions of ss. 738.301-738.310 do not apply
726 to a trust described in s. 170(f)(2)(B), 642(c)(5), 664(d),
727 2702(a)(3)(A)(ii) or (iii), or 2702(b) of the Internal
728 Revenue Code.

729 (3) An income trust to which ss. 738.301-738.310
730 applies under subsection (1)(a) may be converted to a
731 unitrust under ss. 738.301-738.310 regardless of the terms
732 of the trust concerning distributions. Conversion to a
733 unitrust under ss. 738.301-738.310 does not affect other
734 terms of the trust concerning distributions of income or
735 principal.

736 (4) The provisions of ss. 738.301-738.310 apply to an
737 estate only to the extent a trust is a beneficiary of the
738 estate. To the extent of the trust's interest in the
739 estate, the estate may be administered as a unitrust, the
740 administration of the estate as a unitrust may be

741 discontinued, or the percentage or method used to calculate
 742 the unitrust amount may be changed, in the same manner as
 743 for a trust under ss. 738.301-738.310.

744 (5) The provisions of ss. 738.301-738.309 do not
 745 create a duty to take or consider action under ss. 738.301-
 746 738.309 or to inform a beneficiary about the applicability
 747 of ss. 738.301-738.309.

748 (6) A fiduciary that in good faith takes or fails to
 749 take an action under ss. 738.301-738.309 is not liable to a
 750 person affected by the action or inaction.

751 738.303 Authority of fiduciary.—

752 (1) A fiduciary, without court approval, by complying
 753 with subsections (2) and (6), may:

754 (a) convert an income trust to a unitrust if the
 755 fiduciary adopts in a record a unitrust policy for the
 756 trust providing:

757 1. that in administering the trust the net income of
 758 the trust will be a unitrust amount rather than net income
 759 determined without regard to ss. 738.301-738.310; and

760 2. the percentage and method used to calculate the
 761 unitrust amount;

762 (b) change the percentage or method used to calculate
 763 a unitrust amount for a unitrust if the fiduciary adopts in
 764 a record a unitrust policy or an amendment or replacement

765 of a unitrust policy providing changes in the percentage or
766 method used to calculate the unitrust amount; or

767 (c) convert a unitrust to an income trust if the
768 fiduciary adopts in a record a determination that, in
769 administering the trust, the net income of the trust will
770 be net income determined without regard to ss. 738.301-
771 738.309 rather than a unitrust amount.

772 (2) A fiduciary may take an action under subsection
773 (1) if:

774 (a) the fiduciary determines that the action will
775 assist the fiduciary to administer a trust impartially;

776 (b) the fiduciary sends a notice in a record, in the
777 manner required by s. 738.304, describing and proposing to
778 take the action;

779 (c) the fiduciary sends a copy of the notice under
780 paragraph (b) to each settlor of the trust which is:

- 781 1. if an individual, living; or
782 2. if not an individual, in existence;

783 (d) the qualified beneficiaries determined under ss.
784 736.0103 and 736.0110, provided that at least one member of
785 each class of the qualified beneficiaries determined under
786 ss. 736.0103 and 736.0110, other than the Attorney General,
787 receiving the notice under paragraph (b) is:

- 788 1. if an individual, legally competent; or
789 2. if not an individual, in existence; or

790 3. represented in the manner provided in s.
791 738.304(2); and

792 (e) the fiduciary does not receive, by the date
793 specified in the notice under s. 738.304(4) (e) an objection
794 in a record to the action proposed under paragraph (b) from
795 a person to which the notice under paragraph (b) is sent.

796 (3) If a fiduciary receives, not later than the date
797 stated in the notice under s. 738.304(4) (e), an objection
798 in a record described in s. 738.304(4) (d) to a proposed
799 action, the fiduciary or a beneficiary may request the
800 court to have the proposed action taken as proposed, taken
801 with modifications, or prevented. A person described in s.
802 738.304(1) may oppose the proposed action in the proceeding
803 under this subsection, whether or not the person:

804 (a) consented under s. 738.304(3); or
805 (b) objected under s. 738.304(4) (d).

806 (4) If, after sending a notice under subsection
807 (2) (b), a fiduciary decides not to take the action proposed
808 in the notice, the fiduciary shall notify in a record each
809 person described in s. 738.304(1) of the decision not to
810 take the action and the reasons for the decision.

811 (5) If a beneficiary requests in a record that a
812 fiduciary take an action described in subsection (a) and
813 the fiduciary declines to act or does not act within 60
814 days after receiving the request, the beneficiary may

815 request the court to direct the fiduciary to take the
816 action requested.

817 (6) In deciding whether and how to take an action
818 authorized by subsection (1), or whether and how to respond
819 to a request by a beneficiary under subsection (5), a
820 fiduciary shall consider all factors relevant to the trust
821 and the beneficiaries, including relevant factors in s.
822 738.201(5).

823 (7) A fiduciary may release or delegate the power to
824 convert an income trust to a unitrust under paragraph
825 (1)(a), change the percentage or method used to calculate a
826 unitrust amount under paragraph (1)(b), or convert a
827 unitrust to an income trust under paragraph (1)(c), for a
828 reason described in s. 738.203(7) and in the manner
829 described in s. 735.203(8).

830 738.304 Notice.—

831 (1) A notice required by s. 738.303(2)(b) must be sent
832 in a manner authorized under s. 736.0109 to:

833 (a) the qualified beneficiaries determined under s.
834 736.0103, other than the Attorney General; and

835 (b) each person that is granted a power over the trust
836 by the terms of the trust, to the extent the power is
837 exercisable when the person is not then serving as a
838 trustee:

839 1. including a:

840 a. power over the investment, management, or
841 distribution of trust property or other matters of trust
842 administration; and

843 b. power to appoint or remove a trustee or person
844 described in this paragraph; and

845 2. excluding a:

846 a. power of appointment;

847 b. power of a beneficiary over the trust, to the
848 extent the exercise or nonexercise of the power affects the
849 beneficial interest of the beneficiary or another
850 beneficiary represented by the beneficiary under ss.
851 736.0301-736.0306 with respect to the exercise or
852 nonexercise of the power; and

853 c. power over the trust if the terms of the trust
854 provide that the power is held in a nonfiduciary capacity
855 and the power must be held in a nonfiduciary capacity to
856 achieve a tax objective under the Internal Revenue Code;
857 and

858 (c) each person that is granted a power by the terms
859 of the trust to appoint or remove a trustee or person
860 described in paragraph (b), to the extent the power is
861 exercisable when the person that exercises the power is not
862 then serving as a trustee or person described in paragraph
863 (b).

864 (2) The representation provisions of ss. 736.0301-
865 736.0306 apply to notice under this section.

866 (3) A person may consent in a record at any time to
867 action proposed under s. 738.303(2)(b). A notice required
868 by s. 738.303(2)(b) need not be sent to a person that
869 consents under this subsection.

870 (4) A notice required by s. 738.303(2)(b) must
871 include:

872 (a) the action proposed under s. 738.303(2)(b);

873 (b) for a conversion of an income trust to a unitrust,
874 a copy of the unitrust policy adopted under s.
875 738.303(1)(a);

876 (c) for a change in the percentage or method used to
877 calculate the unitrust amount, a copy of the unitrust
878 policy or amendment or replacement of the unitrust policy
879 adopted under s. 738.303(1)(b);

880 (d) a statement that the person to which the notice is
881 sent may object to the proposed action by stating in a
882 record the basis for the objection and sending or
883 delivering the record to the fiduciary;

884 (e) the date by which an objection under paragraph (d)
885 must be received by the fiduciary, which must be at least
886 30 days after the date the notice is sent;

887 (f) the date on which the action is proposed to be
 888 taken and the date on which the action is proposed to take
 889 effect;

890 (g) the name and contact information of the fiduciary;
 891 and

892 (h) the name and contact information of a person that
 893 may be contacted for additional information.

894 738.305 Unitrust policy.—

895 (1) In administering a unitrust under ss. 738.301-
 896 738.310, a fiduciary shall follow a unitrust policy adopted
 897 under s. 738.303(1)(a) or (b) or amended or replaced under
 898 s. 738.303(1)(b).

899 (2) A unitrust policy must provide:

900 (a) the unitrust rate or the method for determining
 901 the unitrust rate under s. 738.306;

902 (b) the method for determining the applicable value
 903 under s. 738.307; and

904 (c) the rules described in ss. 738.306-738.310 which
 905 apply in the administration of the unitrust, whether the
 906 rules are:

907 1. mandatory, as provided in ss. 738.307(1),
 908 738.307(3), 737.308(1), and 738.310; or

909 2. optional, as provided in ss. 738.306, 738.307(2),
 910 and 738.308(2), to the extent the fiduciary elects to adopt
 911 those rules.

- 912 (3) A unitrust policy may:
- 913 (a) provide methods and standards for:
- 914 1. determining the timing of distributions;
- 915 2. making distributions in cash or in kind or partly
- 916 in cash and partly in kind; or
- 917 3. correcting an underpayment or overpayment to a
- 918 beneficiary based on the unitrust amount if there is an
- 919 error in calculating the unitrust amount;
- 920 (b) specify sources and the order of sources,
- 921 including categories of income for federal income tax
- 922 purposes, from which distributions of a unitrust amount are
- 923 paid; or
- 924 (c) provide other standards and rules the fiduciary
- 925 determines serve the interests of the beneficiaries.
- 926 738.306 Unitrust rate.—
- 927 (1) A unitrust rate must be at least three percent and
- 928 not more than five percent. Within those limits, the
- 929 unitrust rate may be:
- 930 (a) a fixed unitrust rate; or
- 931 (b) a unitrust rate that is determined for each period
- 932 using:
- 933 1. a market index or other published data; or
- 934 2. a mathematical blend of market indices or other
- 935 published data over a stated number of preceding periods.

936 3. If the rate calculated under this paragraph (b)
937 would be less than three, the rate shall be three and if
938 the rate calculated would be more than five the rate shall
939 be five.

940 (2) Within the limits of subsection (1) a unitrust
941 policy may provide:

942 (a) a limit on how much the unitrust rate determined
943 under paragraph (1)(b) may increase over the unitrust rate
944 for the preceding period or a mathematical blend of
945 unitrust rates over a stated number of preceding periods;

946 (b) a limit on how much the unitrust rate determined
947 under paragraph (1)(b) may decrease below the unitrust rate
948 for the preceding period or a mathematical blend of
949 unitrust rates over a stated number of preceding periods;
950 or

951 (c) a mathematical blend of any of the unitrust rates
952 determined under paragraph (1)(b) and paragraphs (a) and
953 (b).

954 (3) If the fiduciary is not an independent person, the
955 percentage used to calculate the unitrust amount is the
956 rate determined under s. 7520(a)(2) of the Internal Revenue
957 Code in effect for the month the conversion under this
958 section becomes effective and for each January thereafter;
959 however, if the rate determined under s. 7520(a)(2) exceeds
960 5 percent, the unitrust percentage is 5 percent and if the

961 rate determined under s. 7520(a)(2) is less than 3 percent,
962 the unitrust percentage is 3 percent.

963 738.307 Applicable value.—

964 (1) A unitrust policy must provide the method for
965 determining the fair market value of an asset for the
966 purpose of determining the unitrust amount, including:

967 (a) the frequency of valuing the asset, which need not
968 require a valuation in every period; and

969 (b) the date for valuing the asset in each period in
970 which the asset is valued.

971 (2) Except as otherwise provided in s. 738.309, a
972 unitrust policy may provide methods for determining the
973 amount of the net fair market value of the trust to take
974 into account in determining the applicable value,
975 including:

976 (a) obtaining an appraisal of an asset for which fair
977 market value is not readily available;

978 (b) exclusion of specific assets or groups or types of
979 assets in addition to those described in subsection (3);

980 (c) other exceptions or modifications of the treatment
981 of specific assets or groups or types of assets;

982 (d) identification and treatment of cash or property
983 held for distribution;

984 (e) use of an average of fair market values over a
985 stated number of preceding periods, not to exceed three
986 calendar years; or

987 (f) determining the reasonably known liabilities of
988 the trust, including treatment of liabilities to conform
989 with the treatment of assets under paragraphs (a)-(e).

990 (3) The following property shall not be included in
991 determining the value of the trust:

992 (a) Any residential property or any tangible personal
993 property that, as of the first business day of the current
994 valuation year, one or more current beneficiaries of the
995 trust have or have had the right to occupy, or have or have
996 had the right to possess or control, other than in his or
997 her capacity as trustee of the trust, and instead the right
998 of occupancy or the right to possession and control is the
999 unitrust amount with respect to such property; however, the
1000 unitrust amount must be adjusted to take into account
1001 partial distributions from or receipt into the trust of
1002 such property during the valuation year;

1003 (b) Any asset specifically given to a beneficiary and
1004 the return on investment on such property, which return on
1005 investment shall be distributable to the beneficiary; and

1006 (c) Any asset while held in a decedent's estate;

1007 738.308 Period.-

1008 (1) A unitrust policy must provide the period used
 1009 under ss. 738.306-738.307. The period must be the calendar
 1010 year.

1011 (2) A unitrust policy may provide standards for:

1012 (a) using fewer preceding periods under s.

1013 738.306(1)(b)2. or (2)(c) or (d) if:

1014 1. the trust was not in existence in a preceding
 1015 period; or

1016 2. market indices or other published data are not
 1017 available for a preceding period;

1018 (b) using fewer preceding periods under s.

1019 738.307(2)(e)1. or 2., (f)2., or (g)2., if:

1020 1. the trust was not in existence in a preceding
 1021 period; or

1022 2. fair market values are not available for a
 1023 preceding period; and

1024 (c) prorating the unitrust amount on a daily basis for
 1025 a part of a period in which the trust or the administration
 1026 of the trust as a unitrust or the interest of any
 1027 beneficiary commences or terminates.

1028 738.309 Express Unitrust.-

1029 (1) This section applies to a trust that, by its
 1030 governing instrument, requires or permits income or net
 1031 income to be calculated as a unitrust amount.

1032 (2) The trustee of an express unitrust may determine
1033 the unitrust amount by reference to the net fair market
1034 value of the unitrust's assets in one or more years.

1035 (3) Distribution of a unitrust amount is considered a
1036 distribution of all of the net income of an express
1037 unitrust and is considered to be an income interest.

1038 (4) The unitrust amount is considered to be a
1039 reasonable apportionment of the total return of an express
1040 unitrust.

1041 (5) An express unitrust that provides or permits a
1042 distribution based on a unitrust percentage in excess of
1043 five percent of the net fair market value of the unitrust
1044 assets a year is considered a distribution of all of the
1045 income of the unitrust and a distribution of principal of
1046 the unitrust to the extent that the distribution exceeds
1047 five percent a year.

1048 (6) An express unitrust may or may not provide a
1049 mechanism for changing the unitrust percentage similar to
1050 the mechanism provided under s. 738.306, based upon the
1051 factors noted therein, and may or may not provide for a
1052 conversion from a unitrust to an income trust and/or a
1053 reconversion of an income trust to a unitrust under s.
1054 738.303.

1055 (7) If an express unitrust does not specifically or by
1056 reference to s. 738.306 deny a power to change the unitrust

1057 percentage or to convert to an income trust under s.
1058 738.303, then the trustee shall have such power.

1059 (8) The governing instrument of an express unitrust
1060 may grant discretion to the trustee to adopt a consistent
1061 practice of treating capital gains as part of the unitrust
1062 amount to the extent that the unitrust amount exceeds the
1063 income determined as if the trust were not an express
1064 unitrust, or the governing instrument may specify the
1065 ordering of classes of income.

1066 (9) Unless the terms of the express unitrust
1067 specifically provide otherwise as provided in subsection
1068 (8), the distribution of a unitrust amount is considered a
1069 distribution made from the following sources, which are
1070 listed in order of priority:

1071 (a) net accounting income determined under this
1072 chapter as if the trust were not a unitrust;

1073 (b) ordinary income not allocable to net accounting
1074 income;

1075 (c) net realized short-term capital gains;

1076 (d) net realized long-term capital gains; and

1077 (e) the principal of the trust.

1078 (10) The governing instrument of an express unitrust
1079 may provide that the trustee may exclude assets used by the
1080 unitrust's beneficiary, including but not limited to a
1081 residence property or tangible personal property, from the

1082 net fair market value of the unitrust's assets for the
1083 purposes of computing the unitrust amount. The use of these
1084 assets may be considered equivalent to income or to the
1085 unitrust amount.

1086 738.310 Other rules.—

1087 (1) Following the conversion of an income trust to a
1088 unitrust, the trustee shall consider the unitrust amount as
1089 paid from the following sources, which are listed in order
1090 of priority:

1091 (a) net accounting income determined under this
1092 chapter as if the trust were not a unitrust;

1093 (b) ordinary income not allocable to net accounting
1094 income;

1095 (c) net realized short-term capital gains;

1096 (d) net realized long-term capital gains; and

1097 (e) the principal of the trust.

1098 738.401 Character of receipts from entity.—

1099 (1) As used in this section, the term:

1100 (a) "Capital distribution" means an entity
1101 distribution of money which is a:

1102 1. return of capital; or

1103 2. distribution in total or partial liquidation of the
1104 entity.

1105 (b) "Entity":

1106 1. means a corporation, partnership, limited liability
1107 company, regulated investment company, real estate
1108 investment trust, common trust fund, or any other
1109 organization or arrangement in which a fiduciary owns or
1110 holds an interest, whether or not the entity is a taxpayer
1111 for federal income tax purposes; and

1112 2. does not include:

1113 a. a trust or estate to which s. 738.402 applies;

1114 b. a business or other activity to which s. 738.403
1115 applies which is not conducted by an entity described in
1116 subparagraph 1.;

1117 c. an asset-backed security; or

1118 d. an instrument or arrangement to which s. 738.416
1119 applies.

1120 (c) "Entity distribution" means a payment or transfer
1121 by an entity made to a person in the person's capacity as
1122 an owner or holder of an interest in the entity.

1123 (d) "Lookback period" means the current accounting
1124 period and the preceding two accounting periods or, if
1125 less, the number of accounting periods (or portion of
1126 accounting periods) that the interest in the entity has
1127 been held by the fiduciary.

1128 (2) In this section, an attribute or action of an
1129 entity includes an attribute or action of any other entity

1130 in which the entity owns or holds an interest, including an
1131 interest owned or held indirectly through another entity.

1132 (3) Except as otherwise provided in paragraph (4) (b)-
1133 (d), a fiduciary shall allocate to income:

1134 (a) money received in an entity distribution; and

1135 (b) tangible personal property of nominal value
1136 received from the entity.

1137 (4) A fiduciary shall allocate to principal:

1138 (a) property received in an entity distribution which
1139 is not:

1140 1. money; or

1141 2. tangible personal property of nominal value;

1142 (b) money received in an entity distribution in an
1143 exchange for part or all of the fiduciary's interest in the
1144 entity, to the extent the entity distribution reduces the
1145 fiduciary's interest in the entity relative to the
1146 interests of other persons that own or hold interests in
1147 the entity;

1148 (c) money received in an entity distribution that is a
1149 capital distribution, to the extent not allocated to
1150 income; and

1151 (d) money received in an entity distribution from an
1152 entity that is a regulated investment company or real
1153 estate investment trust if the money received represents

1154 short-term or long-term capital gain realized within the
1155 entity.

1156 (5) If the fiduciary elects, or continues an election
1157 made by its predecessor, to reinvest dividends in shares of
1158 stock of a distributing corporation or fund, whether
1159 evidenced by new certificates or entries on the books of
1160 the distributing entity, the new shares retain their
1161 character as income.

1162 (6) Except as otherwise provided in subsections (10)
1163 and (11), money received in an entity distribution is a
1164 capital distribution:

1165 (a) to the extent the entity, at or near the time of
1166 the entity distribution, indicates that such money is a
1167 capital distribution; or

1168 (b) to the extent that the total amount of money and
1169 property received by the fiduciary in the entity
1170 distribution or a series of related entity distributions is
1171 or will be greater than 20 percent of the fiduciary's pro
1172 rata share of the entity's gross assets, as shown by the
1173 entity's year-end financial statements immediately
1174 preceding the initial receipt.

1175 (7) In the case of a capital distribution, the amount
1176 received in an entity distribution allocated to principal
1177 must be reduced to the extent that the cumulative

1178 distributions from the entity to the fiduciary allocated to
1179 income do not exceed the greater of:

1180 (a) A cumulative annual return of 3 percent of the
1181 entity's carrying value computed at the beginning of each
1182 accounting period (or portion of an accounting period),
1183 during the lookback period. If a fiduciary has exercised a
1184 power to adjust under s. 738.203 during the lookback
1185 period, the fiduciary, in determining the total income
1186 distributions from that entity, must take into account the
1187 extent to which the exercise of the power resulted in
1188 income to the fiduciary from that entity for that period.
1189 If the income of a fiduciary during the lookback period has
1190 been computed pursuant to ss. 738.301-738.310, the
1191 fiduciary, in determining the total income distributions
1192 from the entity for that period, must take into account the
1193 portion of the unitrust amount paid as a result of the
1194 ownership of the trust's interest in the entity for that
1195 period; or

1196 (b) In the case of an entity treated as a partnership,
1197 subchapter S corporation, or disregarded entity pursuant to
1198 the Internal Revenue Code, the amount of income tax
1199 attributable to the fiduciary's ownership share of the
1200 entity, based on its pro rata share of the taxable income
1201 of the entity that distributes the money, during the

1202 lookback period, calculated as if all of the tax was
1203 incurred by the fiduciary.

1204 (8) If a fiduciary receives additional information
1205 about the application of this section to an entity
1206 distribution before the fiduciary has paid part of the
1207 entity distribution to a beneficiary, the fiduciary may
1208 consider the additional information before making the
1209 payment to the beneficiary and may change a decision to
1210 make the payment to the beneficiary.

1211 (9) If a fiduciary receives additional information
1212 about the application of this section to an entity
1213 distribution after the fiduciary has paid part of the
1214 entity distribution to a beneficiary, the fiduciary is not
1215 required to change or recover the payment to the
1216 beneficiary but may consider that information in
1217 determining whether to exercise its other powers, including
1218 but not limited to the power to adjust under s. 738.203.

1219 (10) The following applies to money or property
1220 received by a private trustee as a distribution from an
1221 investment entity described in this subsection:

1222 (a) The trustee shall first treat as income of the
1223 trust all of the money or property received from the
1224 investment entity in the current accounting period which
1225 would be considered income under this chapter if the
1226 trustee had directly held the trust's pro rata share of the

1227 assets of the investment entity. For this purpose, all
1228 distributions received in the current accounting period
1229 must be aggregated.

1230 (b) The trustee shall next treat as income of the
1231 trust any additional money or property received in the
1232 current accounting period which would have been considered
1233 income in the prior two accounting periods under paragraph
1234 (a) if additional money or property had been received from
1235 the investment entity in any of those prior 2 accounting
1236 periods. The amount to be treated as income shall be
1237 reduced by any distribution of money or property made by
1238 the investment entity to the trust during the current and
1239 the prior 2 accounting periods which were treated as income
1240 under this paragraph.

1241 (c) The remainder of the distribution, if any, is
1242 treated as principal.

1243 (d) As used in this subsection, the term:

1244 1. "Investment entity" means an entity, other than a
1245 business activity conducted by the trustee described in s.
1246 738.403 or an entity that is listed on a public stock
1247 exchange, which is treated as a partnership, subchapter s
1248 corporation, or disregarded entity pursuant to the Internal
1249 Revenue Code, and which normally derives 50 percent or more
1250 of its annual cumulative net income from interest,
1251 dividends, annuities, royalties, rental activity, or other

1252 passive investments, including income from the sale or
1253 exchange of such passive investments.

1254 2. "Private Trustee" means a trustee who is a natural
1255 person but is not an independent person as set forth at s.
1256 738.102.

1257 (11) A fiduciary shall allocate to principal money and
1258 property received by the fiduciary in a distribution or
1259 series of related distributions from a public entity
1260 greater than 10 percent of the fair market value of the
1261 fiduciary's interest in the public entity on the first day
1262 of the accounting period. The amount to be allocated to
1263 principal must be reduced to the extent that the cumulative
1264 distributions from the entity to the fiduciary allocated to
1265 income do not exceed a cumulative annual return of 3
1266 percent of the fair market value of the interest in the
1267 entity at the beginning of each accounting period (or
1268 portion of an accounting period), during the lookback
1269 period. If a fiduciary has exercised a power to adjust
1270 under s. 738.203 during the lookback period, the fiduciary,
1271 in determining the total income distributions from that
1272 entity, must take into account the extent to which the
1273 exercise of that power resulted in income to the fiduciary
1274 from that entity for that period. If the income of the
1275 fiduciary during the lookback period has been computed
1276 under ss. 738.301 - 738.310, the fiduciary, in determining

1277 the total income distribution from that entity for that
1278 period, must take into account the portion of the unitrust
1279 amount paid as a result of the ownership of the trust's
1280 interest in the entity for that period. As used in this
1281 subsection the term "public entity" means an entity listed
1282 on a public stock exchange.

1283 (12) This section shall be applied before ss. 738.506
1284 and 738.507 and does not modify or change any of the
1285 provisions of those sections.

1286 738.402 Distribution from trust or estate.-

1287 A fiduciary shall allocate to income an amount
1288 received as a distribution of income, including a unitrust
1289 distribution under ss. 738.301 - 738.310, from a trust or
1290 estate in which the fiduciary has an interest, other than
1291 an interest the fiduciary purchased in a trust that is an
1292 investment entity, and shall allocate to principal an
1293 amount received as a distribution of principal from the
1294 trust or estate. If a fiduciary purchases, or receives from
1295 a settlor, an interest in a trust that is an investment
1296 entity, s. 738.401, s. 738.415, or s. 738.416 applies to a
1297 receipt from the trust.

1298 738.403 Business or other activity conducted by
1299 fiduciary.-

1300 (1) This section applies to a business or other
1301 activity conducted by a fiduciary if the fiduciary

1302 determines that it is in the interests of the beneficiaries
1303 to account separately for the business or other activity
1304 instead of:

1305 (a) accounting for the business or other activity as
1306 part of the fiduciary's general accounting records; or

1307 (b) conducting the business or other activity through
1308 an entity described in s. 738.401(1)(b).

1309 (2) A fiduciary may account separately under this
1310 section for the transactions of a business or other
1311 activity, whether or not assets of the business or other
1312 activity are segregated from other assets held by the
1313 fiduciary.

1314 (3) A fiduciary that accounts separately under this
1315 section for a business or other activity:

1316 (a) may determine:

1317 1. the extent to which the net cash receipts of the
1318 business or other activity must be retained for:

1319 a. working capital;

1320 b. the acquisition or replacement of fixed assets; and

1321 c. other reasonably foreseeable needs of the business
1322 or other activity; and

1323 2. the extent to which the remaining net cash receipts
1324 are accounted for as principal or income in the fiduciary's
1325 general accounting records for the trust;

1326 (b) may make a determination under subsection (a)
1327 separately and differently from the fiduciary's decisions
1328 concerning distributions of income or principal; and

1329 (c) shall account for the net amount received from the
1330 sale of an asset of the business or other activity, other
1331 than a sale in the ordinary course of the business or other
1332 activity, as principal in the fiduciary's general
1333 accounting records for the trust, to the extent the
1334 fiduciary determines that the net amount received is no
1335 longer required in the conduct of the business or other
1336 activity.

1337 (4) Activities for which a fiduciary may account
1338 separately under this section include:

1339 (a) retail, manufacturing, service, and other
1340 traditional business activities;

1341 (b) farming;

1342 (c) raising and selling livestock and other animals;

1343 (d) managing rental properties;

1344 (e) extracting minerals, water, and other natural
1345 resources;

1346 (f) growing and cutting timber;

1347 (g) an activity to which s. 738.414, s. 738.415, or s.
1348 738.416 applies; and

1349 (h) any other business conducted by the fiduciary.

1350 738.404 Principal receipts.—

1351 A fiduciary shall allocate to principal:
1352 (1) to the extent not allocated to income under this
1353 chapter, an asset received from:
1354 (a) an individual during the individual's lifetime;
1355 (b) an estate;
1356 (c) a trust on termination of an income interest; or
1357 (d) a payor under a contract naming the fiduciary as
1358 beneficiary;
1359 (2) except as otherwise provided in ss. 738.401-
1360 738.416, money or other property received from the sale,
1361 exchange, liquidation, or change in form of a principal
1362 asset;
1363 (3) an amount recovered from a third party to
1364 reimburse the fiduciary because of a disbursement described
1365 in s. 738.502(1) or for another reason to the extent not
1366 based on loss of income;
1367 (4) proceeds of property taken by eminent domain,
1368 except that proceeds awarded for loss of income in an
1369 accounting period are income if a current income
1370 beneficiary had a mandatory income interest during the
1371 period;
1372 (5) net income received in an accounting period during
1373 which there is no beneficiary to which a fiduciary may or
1374 must distribute income; and
1375 (6) other receipts as provided in ss. 738.408-738.416.

1376 738.405 Rental property.—

1377 To the extent a fiduciary does not account for the
1378 management of rental property as a business under s.
1379 738.403, the fiduciary shall allocate to income an amount
1380 received as rent of real or personal property, including an
1381 amount received for cancellation or renewal of a lease. An
1382 amount received as a refundable deposit, including a
1383 security deposit or a deposit that is to be applied as rent
1384 for future periods:

1385 (1) must be added to principal and held subject to the
1386 terms of the lease, except as otherwise provided by law
1387 other than this chapter; and

1388 (2) is not allocated to income or available for
1389 distribution to a beneficiary until the fiduciary's
1390 contractual obligations have been satisfied with respect to
1391 that amount.

1392 738.406 Receipt on obligation to be paid in money.—

1393 (1) This section does not apply to an obligation to
1394 which s. 738.409, s. 738.410, s. 738.411, s. 738.412, s.
1395 738.414, s. 738.415, or s. 738.416 applies.

1396 (2) A fiduciary shall allocate to income, without
1397 provision for amortization of premium, an amount received
1398 as interest on an obligation to pay money to the fiduciary,
1399 including an amount received as consideration for prepaying
1400 principal.

1401 (3) A fiduciary shall allocate to principal an amount
1402 received from the sale, redemption, or other disposition of
1403 an obligation to pay money to the fiduciary. A fiduciary
1404 shall allocate to income the increment in value of a bond
1405 or other obligation for the payment of money bearing no
1406 stated interest but payable or redeemable, at maturity or
1407 another future time, in an amount that exceeds the amount
1408 in consideration of which it was issued. If the increment
1409 in value accrues and becomes payable pursuant to a fixed
1410 schedule of appreciation, it may be distributed to the
1411 beneficiary who was the income beneficiary at the time of
1412 increment from the first principal cash available or, if
1413 none is available, when the increment is realized by sale,
1414 redemption, or other disposition. If unrealized increment
1415 is distributed as income but out of principal, the
1416 principal must be reimbursed for the increment when
1417 realized. If, in the reasonable judgment of the fiduciary,
1418 exercised in good faith, the ultimate payment of the bond
1419 principal is in doubt, the fiduciary may withhold the
1420 payment of incremental interest to the income beneficiary.

1421 738.407 Insurance policy or contract.—

1422 (1) This section does not apply to a contract to which
1423 s. 738.409 applies.

1424 (2) Except as otherwise provided in subsection (3), a
1425 fiduciary shall allocate to principal the proceeds of a

1426 life insurance policy or other contract received by the
1427 fiduciary as beneficiary, including a contract that insures
1428 against damage to, destruction of, or loss of title to an
1429 asset. The fiduciary shall allocate dividends on an
1430 insurance policy to income to the extent premiums on the
1431 policy are paid from income and to principal to the extent
1432 premiums on the policy are paid from principal.

1433 (3) A fiduciary shall allocate to income proceeds of a
1434 contract that insures the fiduciary against loss of:

1435 (a) occupancy or other use by a current income
1436 beneficiary;

1437 (b) income; or

1438 (c) subject to s. 738.403, profits from a business.

1439 738.408 Insubstantial allocation not required.-

1440 (1) If a fiduciary determines that an allocation
1441 between income and principal required by s. 738.409, s.
1442 738.410, s. 738.411, s. 738.412, or s. 738.415 is
1443 insubstantial, the fiduciary may allocate the entire amount
1444 to principal, unless s. 738.203(5) applies to the
1445 allocation.

1446 (2) A fiduciary may presume an allocation is
1447 insubstantial under subsection (1) if:

1448 (a) the amount of the allocation would increase or
1449 decrease net income in an accounting period, as determined
1450 before the allocation, by less than 10 percent; and

1451 (b) the asset producing the receipt to be allocated
1452 has a carrying value less than 10 percent of the total
1453 carrying value of the assets owned or held by the fiduciary
1454 at the beginning of the accounting period.

1455 (3) The power to make a determination under subsection
1456 (1) may be:

1457 (a) exercised by a co-fiduciary in the manner
1458 described in s. 738.203(6); or

1459 (b) released or delegated for a reason described in s.
1460 738.203(7) and in the manner described in s. 738.203(8).

1461 738.409 Deferred compensation, annuity, or similar
1462 payment.—

1463 (1) As used in this section, the term:

1464 (a) "Internal income of a separate fund" means the
1465 amount determined under subsection (2).

1466 (b) "Marital trust" means a trust:

1467 1. of which the settlor's surviving spouse is the only
1468 current income beneficiary and is entitled to a
1469 distribution of all the current net income of the trust;
1470 and

1471 2. that qualifies for a marital deduction with respect
1472 to the settlor's estate under the Internal Revenue Code or
1473 comparable law of any state because:

1474 a. an election to qualify for a marital deduction
1475 under s. 2056(b)(7) of the Internal Revenue Code has been
1476 made;

1477 b. the trust qualifies for a marital deduction under
1478 s. 2056(b)(5) of the Internal Revenue Code; or

1479 c. the trust otherwise qualifies for a marital
1480 deduction.

1481 (c) "Payment" means an amount a fiduciary may receive
1482 over a fixed number of years or during the life of one or
1483 more individuals because of services rendered or property
1484 transferred to the payor in exchange for future amounts the
1485 fiduciary may receive. The term includes an amount received
1486 in money or property from the payor's general assets or
1487 from a separate fund created by the payor.

1488 (d) "Percent calculated" means a percent equal to the
1489 rate determined under s. 7520 of the Internal Revenue Code
1490 in effect for the month preceding the beginning of the
1491 accounting period; however, if the percent calculated
1492 exceeds 5 percent it shall be reduced to 5 percent, and if
1493 the percent calculated is less than 3 percent it shall be
1494 increased to 3 percent. Notwithstanding the preceding
1495 sentence, a fiduciary that is an independent person, as set
1496 forth at s. 738.102, may set the percent calculated at a
1497 percent no less than 3 percent and no greater than 5
1498 percent.

1499 (e) "Separate fund" includes a private or commercial
1500 annuity, an individual retirement account, and a pension,
1501 profit-sharing, stock-bonus, stock-ownership plan, or other
1502 deferred compensation fund holding assets exclusively for
1503 the benefit of a participant or account owner.

1504 (f) "Nonseparate fund" means an annuity, deferred
1505 compensation plan, pension plan, or other fund for which
1506 the value of the participant's or account owner's right to
1507 receive benefits can be determined only by the occurrence
1508 of a date or event as defined in the instrument governing
1509 the fund.

1510 (2) For each accounting period, the following rules
1511 apply to a separate fund:

1512 (a) The fiduciary shall determine the internal income
1513 of the separate fund as if the separate fund were a trust
1514 subject to this chapter.

1515 (b) If the fiduciary cannot determine the internal
1516 income of the separate fund under paragraph (a), the
1517 internal income of the separate fund is deemed to equal a
1518 percent, equal to the percent calculated, of the value of
1519 the separate fund, according to the most recent statement
1520 of value preceding the beginning of the accounting period.

1521 (c) If the fiduciary cannot determine the value of the
1522 separate fund under paragraph (b), the value of the
1523 separate fund is deemed to equal the present value of the

1524 expected future payments, as determined under s. 7520 of
1525 the Internal Revenue Code for the month preceding the
1526 beginning of the accounting period for which the
1527 computation is made.

1528 (d) A fiduciary calculating the internal income of the
1529 separate fund under paragraph (b) shall make such
1530 disclosure in a trust disclosure document that satisfies
1531 the requirements of s. 736.1008(4)(a).

1532 (3) A fiduciary shall allocate a payment received from
1533 a separate fund during an accounting period to income, to
1534 the extent of the internal income of the separate fund
1535 during the period, and the balance to principal.

1536 (4) The fiduciary of a marital trust shall:

1537 (a) withdraw from a separate fund the amount the
1538 current income beneficiary of the trust requests the
1539 fiduciary to withdraw, not greater than the amount by which
1540 the internal income of the separate fund during the
1541 accounting period exceeds the amount the fiduciary
1542 otherwise receives from the separate fund during the
1543 period;

1544 (b) transfer from principal to income the amount the
1545 current income beneficiary requests the fiduciary to
1546 transfer, not greater than the amount by which the internal
1547 income of the separate fund during the period exceeds the

1548 amount the fiduciary receives from the separate fund during
1549 the period after the application of paragraph (a); and

1550 (c) distribute to the current income beneficiary as
1551 income:

1552 1. the amount of the internal income of the separate
1553 fund received or withdrawn during the period; and

1554 2. the amount transferred from principal to income
1555 under paragraph (b).

1556 (5) For a trust, other than a marital trust, of which
1557 one or more current income beneficiaries are entitled to a
1558 distribution of all the current net income, the fiduciary
1559 shall transfer from principal to income the amount by which
1560 the internal income of a separate fund during the
1561 accounting period exceeds the amount the fiduciary receives
1562 from the separate fund during the period.

1563 (6) The fiduciary of a nonseparate fund shall
1564 calculate internal income of the fund as the percent
1565 calculated of the present value of the right to receive the
1566 remaining payments as determined under s. 7520(a)(2) of the
1567 Internal Revenue Code for the month preceding the beginning
1568 of the accounting period.

1569 (7) If a fiduciary owns a separate fund or a
1570 nonseparate fund before the effective date of this s.
1571 738.409, as amended, the fiduciary may determine internal
1572 income, allocate payments, and account for unwithdrawn

1573 internal income as provided in this section or in the
1574 manner used by the fiduciary before the effective date of
1575 this s. 738.409. Such fiduciary is not required to consider
1576 subsection (5) of this section. If the fiduciary acquires a
1577 separate fund or a nonseparate fund on or after the
1578 effective date of this s. 738.409, the fiduciary shall
1579 calculate internal income, allocate payments, and account
1580 for unwithdrawn internal income as provided in this
1581 section.

1582 738.410 Liquidating asset.—

1583 (1) As used in this section, the term, "liquidating
1584 asset" means an asset whose value will diminish or
1585 terminate because the asset is expected to produce receipts
1586 for a limited time. The term includes a leasehold, patent,
1587 copyright, royalty right, and right to receive payments
1588 during a period of more than one year under an arrangement
1589 that does not provide for the payment of interest on the
1590 unpaid balance.

1591 (2) This section does not apply to a receipt subject
1592 to s. 738.401, s. 738.409, s. 738.411, s. 738.412, s.
1593 738.414, s. 738.415, s. 738.416, or s. 738.503.

1594 (3) A fiduciary shall allocate to income a receipt
1595 produced by a liquidating assets to the extent the receipt
1596 does not exceed five percent of the carrying value of the

1597 asset at the beginning of the accounting period and to
 1598 principal the balance of the receipt.

1599 (4) The amount allocated to principal shall reduce the
 1600 carrying value of the liquidating asset, but not below
 1601 zero. Amounts received in excess of the remaining carrying
 1602 value must be allocated to principal.

1603 738.411 Minerals, water, and other natural resources.—

1604 (1) To the extent a fiduciary does not account for a
 1605 receipt from an interest in minerals, water, or other
 1606 natural resources as a business under s. 738.403, the
 1607 fiduciary shall allocate the receipt:

1608 (a) to income, to the extent received:

1609 1. as delay rental or annual rent on a lease;

1610 2. as a factor for interest or the equivalent of
 1611 interest under an agreement creating a production payment;

1612 or

1613 3. on account of an interest in renewable water;

1614 (b) to principal, if received from a production
 1615 payment, to the extent subparagraph (a)2. does not apply;

1616 or

1617 (c) between income and principal equitably, to the
 1618 extent received:

1619 1. on account of an interest in non-renewable water;

1620 2. as a royalty, shut-in-well payment, take-or-pay
 1621 payment, or bonus; or

1622 3. from a working interest or any other interest not
1623 provided for in paragraph (a) or (b) or subparagraph (c)1.
1624 or (c)2.

1625 (2) This section applies to an interest owned or held
1626 by a fiduciary whether or not a settlor was extracting
1627 minerals, water, or other natural resources before the
1628 fiduciary owned or held the interest.

1629 (3) An allocation of a receipt under paragraph (1)(c)
1630 is presumed to be equitable if the amount allocated to
1631 principal is equal to the amount allowed by the Internal
1632 Revenue Code as a deduction for depletion of the interest.

1633 (4) If a fiduciary owns or holds an interest in
1634 minerals, water, or other natural resources before the
1635 effective date of this section, as amended, the fiduciary
1636 may allocate receipts from the interest as provided in this
1637 section or in the manner used by the fiduciary before the
1638 effective date of this section, as amended. If the
1639 fiduciary acquires an interest in minerals, water, or other
1640 natural resources on or after the effective date of this
1641 section, as amended, the fiduciary shall allocate receipts
1642 from the interest as provided in this section.

1643 738.412 Timber.—

1644 (1) To the extent a fiduciary does not account for
1645 receipts from the sale of timber and related products as a

1646 business under s. 738.403, the fiduciary shall allocate the
1647 net receipts:

1648 (a) to income, to the extent the amount of timber cut
1649 from the land does not exceed the rate of growth of the
1650 timber;

1651 (b) to principal, to the extent the amount of timber
1652 cut from the land exceeds the rate of growth of the timber
1653 or the net receipts are from the sale of standing timber;

1654 (c) between income and principal if the net receipts
1655 are from the lease of land used for growing and cutting
1656 timber or from a contract to cut timber from land, by
1657 determining the amount of timber cut from the land under
1658 the lease or contract and applying the rules in paragraphs
1659 (a) and (b); or

1660 (d) to principal, to the extent advance payments,
1661 bonuses, and other payments are not allocated under
1662 paragraph (a), (b), or (c).

1663 (2) In determining net receipts to be allocated under
1664 subsection (1), a fiduciary shall deduct and transfer to
1665 principal a reasonable amount for depletion.

1666 (3) This section applies to land owned or held by a
1667 fiduciary whether or not a settlor was cutting timber from
1668 the land before the fiduciary owned or held the property.

1669 (4) If a fiduciary owns or holds an interest in land
1670 used for growing and cutting timber before the effective

1671 date of this section, as amended, the fiduciary may
1672 allocate net receipts from the sale of timber and related
1673 products as provided in this section or in the manner used
1674 by the fiduciary before the effective date of this section,
1675 as amended. If the fiduciary acquires an interest in land
1676 used for growing and cutting timber on or after the
1677 effective date of this section, as amended, the fiduciary
1678 shall allocate net receipts from the sale of timber and
1679 related products as provided in this section.

1680 738.413 Marital deduction property not productive of
1681 income.—

1682 (1) If a trust received property for which a gift or
1683 estate tax marital deduction was allowed (or if a trust
1684 received property satisfying the requirements of s.
1685 732.2025(2)(a) and (c), and such property has been used in
1686 whole or in part to satisfy an election by a surviving
1687 spouse under s. 732.2125) and the settlor's spouse holds a
1688 mandatory income interest in the trust, the spouse may
1689 require the trustee, to the extent the trust assets
1690 otherwise do not provide the spouse with sufficient income
1691 from or use of the trust assets to qualify for the
1692 deduction (or to satisfy an election by a surviving spouse
1693 under s. 732.2125), to make property productive of income
1694 within a reasonable time. The Trustee may:

1695 (a) convert property to property productive of income
 1696 within a reasonable time;

1697 (b) exercise the power to adjust under s. 738.203;

1698 (c) exercise the power to convert to or from a
 1699 unitrust under s. 738.303; or

1700 (d) exercise the fiduciary's authority under the
 1701 governing instrument to otherwise provide the surviving
 1702 spouse with sufficient income from or use of the trust
 1703 assets to qualify for the marital deduction (or to satisfy
 1704 an election by a surviving spouse under s. 732.2125).

1705 (2) The trustee may decide which action or combination
 1706 of actions in subsection (1) to take.

1707 (3) Subsection (1) shall apply even though, in the
 1708 case of an elective share trust under s. 732.2025(2), a
 1709 marital deduction is not made or is only partially made.

1710 (4) The terms of a trust as defined in s. 738.102
 1711 shall not supersede this section unless such terms
 1712 explicitly reference this section.

1713 738.414 Derivative or option.—

1714 (1) As used in this section, the term "derivative"
 1715 means a contract, instrument, other arrangement, or
 1716 combination of contracts, instruments, or other
 1717 arrangements, the value, rights, and obligations of which
 1718 are, in whole or in part, dependent on or derived from an
 1719 underlying tangible or intangible asset, group of tangible

1720 or intangible assets, index, or occurrence of an event. The
1721 term includes stocks, fixed income securities, and
1722 financial instruments and arrangements based on indices,
1723 commodities, interest rates, weather-related events, and
1724 credit-default events.

1725 (2) To the extent a fiduciary does not account for a
1726 transaction in derivatives as a business under s. 738.403,
1727 the fiduciary shall allocate 10 percent of receipts from
1728 the transaction and 10 percent of disbursements made in
1729 connection with the transaction to income and the balance
1730 to principal.

1731 (3) Subsection (4) applies if:

1732 (a) a fiduciary:

1733 1. grants an option to buy property from a trust,
1734 whether or not the trust owns the property when the option
1735 is granted;

1736 2. grants an option that permits another person to
1737 sell property to the trust; or

1738 3. acquires an option to buy property for the trust or
1739 an option to sell an asset owned by the trust; and

1740 (b) the fiduciary or other owner of the asset is
1741 required to deliver the asset if the option is exercised.

1742 (4) If this subsection applies, the fiduciary shall
1743 allocate 10 percent to income and the balance to principal
1744 of the following amounts:

1745 (a) an amount received for granting the option;
 1746 (b) an amount paid to acquire the option; and
 1747 (c) gain or loss realized on the exercise, exchange,
 1748 settlement, offset, closing, or expiration of the option.

1749 738.415 Asset-backed security.—

1750 (1) Except as otherwise provided in subsection (2), a
 1751 fiduciary shall allocate to income a receipt from or
 1752 related to an asset-backed security, as defined in s.
 1753 738.102, to the extent the payor identifies the payment as
 1754 being from interest or other current return, and to
 1755 principal the balance of the receipt.

1756 (2) If a fiduciary receives one or more payments in
 1757 exchange for part or all of the fiduciary's interest in an
 1758 asset-backed security, including a liquidation or
 1759 redemption of the fiduciary's interest in the security, the
 1760 fiduciary shall allocate to income 10 percent of receipts
 1761 from the transaction and 10 percent of disbursements made
 1762 in connection with the transaction, and to principal the
 1763 balance of the receipts and disbursements.

1764 738.416 Other financial instrument or arrangement.—

1765 A fiduciary shall allocate receipts from or related to
 1766 a financial instrument or arrangement not otherwise
 1767 addressed by this chapter. The allocation must be
 1768 consistent with ss. 738.414 and 738.415.

1769 738.501 Disbursements from income.—Subject to s.
1770 738.504, and except as otherwise provided in s.
1771 738.601(3)(b) or (c), a fiduciary shall disburse from
1772 income:
1773 (1) one-half of:
1774 (a) the regular compensation of the fiduciary and any
1775 person providing investment advisory, custodial, or other
1776 services to the fiduciary, to the extent income is
1777 sufficient; and
1778 (b) an expense for an accounting, judicial or
1779 nonjudicial proceeding, or other matter that involves both
1780 income and successive interests, to the extent income is
1781 sufficient;
1782 (2) the balance of the disbursements described in
1783 subsection (1), to the extent a fiduciary that is an
1784 independent person determines that making those
1785 disbursements from income would be in the interests of the
1786 beneficiaries;
1787 (3) another ordinary expense incurred in connection
1788 with administration, management, or preservation of
1789 property and distribution of income, including interest, an
1790 ordinary repair, regularly recurring tax assessed against
1791 principal, and an expense of an accounting, judicial or
1792 nonjudicial proceeding, or other matter that involves

1793 primarily an income interest, to the extent income is
1794 sufficient; and

1795 (4) a premium on insurance covering loss of a
1796 principal asset or income from or use of the asset.

1797 738.502 Disbursement from principal.—

1798 (1) Subject to s. 738.505, and except as otherwise
1799 provided in s. 738.601(3)(b), a fiduciary shall disburse
1800 from principal:

1801 (a) the balance of the disbursements described in s.
1802 738.501(1) and (3), after application of s. 738.501(2);

1803 (b) the fiduciary's compensation calculated on
1804 principal as a fee for acceptance, distribution, or
1805 termination;

1806 (c) a payment of an expense to prepare for or execute
1807 a sale or other disposition of property;

1808 (d) a payment on the principal of a trust debt;

1809 (e) a payment of an expense of an accounting, judicial
1810 or nonjudicial proceeding, or other matter that involves
1811 primarily principal, including a proceeding to construe the
1812 terms of the trust or protect property;

1813 (f) a payment of a premium for insurance, including
1814 title insurance, not described in s. 738.501(4), of which
1815 the fiduciary is the owner and beneficiary; and

1816 (g) Estate, inheritance, and other transfer taxes,
1817 including penalties, apportioned to the trust.

1818 (h) a payment related to environmental matters
1819 including:
1820 1. reclamation;
1821 2. assessing environmental conditions;
1822 3. remedying and removing environmental contamination;
1823 4. monitoring remedial activities and the release of
1824 substances;
1825 5. preventing future releases of substances;
1826 6. collecting amounts from persons liable or
1827 potentially liable for the costs of activities described in
1828 clauses 1. through 5.;
1829 7. penalties imposed under environmental laws or
1830 regulations;
1831 8. other actions to comply with environmental laws or
1832 regulations;
1833 9. statutory or common law claims by third parties;
1834 and
1835 10. defending claims based on environmental matters.
1836 (i) a payment for a premium for insurance for matters
1837 described in paragraph (h).
1838 (2) If a principal asset is encumbered with an
1839 obligation that requires income from the asset to be paid
1840 directly to a creditor, the fiduciary shall transfer from
1841 principal to income an amount equal to the income paid to

1842 the creditor in reduction of the principal balance of the
1843 obligation.

1844 738.503 Transfer from income to principal for
1845 depreciation.-

1846 (1) For purposes of this section, "depreciation" means
1847 a reduction in value due to wear, tear, decay, corrosion,
1848 or gradual obsolescence of a tangible asset having a useful
1849 life of more than one year.

1850 (2) A fiduciary may transfer to principal a reasonable
1851 amount of the net cash receipts from a principal asset that
1852 is subject to depreciation, but may not transfer any amount
1853 for depreciation:

1854 (a) of the part of real property used or available for
1855 use by a beneficiary as a residence;

1856 (b) of tangible personal property held or made
1857 available for the personal use or enjoyment of a
1858 beneficiary; or

1859 (c) under this section, to the extent the fiduciary
1860 accounts:

1861 1. under s. 738.410 for the asset; or

1862 2. under s. 738.403 for the business or other activity
1863 in which the asset is used.

1864 (3) An amount transferred to principal under this
1865 section need not be separately held.

1866 738.504 Reimbursement of income from principal.-

1867 (1) If a fiduciary makes or expects to make an income
1868 disbursement described in subsection (2), the fiduciary may
1869 transfer an appropriate amount from principal to income in
1870 one or more accounting periods to reimburse income.

1871 (2) To the extent the fiduciary has not been and does
1872 not expect to be reimbursed by a third party, income
1873 disbursements to which subsection (1) applies include:

1874 (a) an amount chargeable to principal but paid from
1875 income because principal is illiquid;

1876 (b) a disbursement made to prepare property for sale,
1877 including improvements and commissions; and

1878 (c) a disbursement described in s. 738.502(1).

1879 (3) If an asset whose ownership gives rise to an
1880 income disbursement becomes subject to a successive
1881 interest after an income interest ends, the fiduciary may
1882 continue to make transfers under subsection (1).

1883 738.505 Reimbursement of principal from income.—

1884 (1) If a fiduciary makes or expects to make a
1885 principal disbursement described in subsection (2), the
1886 fiduciary may transfer an appropriate amount from income to
1887 principal in one or more accounting periods to reimburse
1888 principal or provide a reserve for future principal
1889 disbursements.

1890 (2) To the extent a fiduciary has not been and does
1891 not expect to be reimbursed by a third party, principal
1892 disbursements to which subsection (1) applies include:

1893 (a) an amount chargeable to income but paid from
1894 principal because income is not sufficient;

1895 (b) the cost of an improvement to principal, whether a
1896 change to an existing asset or the construction of a new
1897 asset, including a special assessment;

1898 (c) a disbursement made to prepare property for
1899 rental, including tenant allowances, leasehold
1900 improvements, and commissions;

1901 (d) a periodic payment on an obligation secured by a
1902 principal asset, to the extent the amount transferred from
1903 income to principal for depreciation is less than the
1904 periodic payment; and

1905 (e) a disbursement described in s. 738.502(1).

1906 (3) If an asset whose ownership gives rise to a
1907 principal disbursement becomes subject to a successive
1908 interest after an income interest ends, the fiduciary may
1909 continue to make transfers under subsection (1).

1910 738.506 Income taxes.—

1911 (1) A tax required to be paid by a fiduciary which is
1912 based on receipts allocated to income must be paid from
1913 income.

1914 (2) A tax required to be paid by a fiduciary which is
1915 based on receipts allocated to principal must be paid from
1916 principal, even if the tax is called an income tax by the
1917 taxing authority.

1918 (3) Subject to subsection (4) and ss. 738.504,
1919 738.505, and 738.507, a tax required to be paid by a
1920 fiduciary on a share of an entity's taxable income in an
1921 accounting period must be paid from:

1922 (a) income and principal proportionately to the
1923 allocation between income and principal of receipts from
1924 the entity in the period; and

1925 (b) principal to the extent the tax exceeds the
1926 receipts from the entity in the period.

1927 (4) After applying subsections (1) - (3), a fiduciary
1928 shall adjust income or principal receipts, to the extent
1929 the taxes the fiduciary pays are reduced because of a
1930 deduction for a payment made to a beneficiary.

1931 (5) Subject to the limitations and excluded assets
1932 provided under s. 736.08145, a reimbursement of State or
1933 Federal income tax elected to be made by a fiduciary
1934 pursuant to s. 736.08145 shall be allocated and paid
1935 pursuant to paragraphs 3(a) and (b).

1936 738.507 Adjustment between principal and income
1937 because of taxes.-

1938 (1) A fiduciary may make an adjustment between income
1939 and principal to offset the shifting of economic interests
1940 or tax benefits between current income beneficiaries and
1941 successor beneficiaries which arises from:

1942 (a) an election or decision the fiduciary makes
1943 regarding a tax matter, other than a decision to claim an
1944 income tax deduction to which subsection (2) applies;

1945 (b) an income tax or other tax imposed on the
1946 fiduciary or a beneficiary as a result of a transaction
1947 involving the fiduciary or a distribution by the fiduciary;

1948 (c) ownership by the fiduciary of an interest in an
1949 entity a part of whose taxable income, whether or not
1950 distributed, is includable in the taxable income of the
1951 fiduciary or a beneficiary; or

1952 (d) an election or decision a fiduciary makes to
1953 reimburse any tax pursuant to s. 736.08145.

1954 (2) If the amount of an estate tax marital or
1955 charitable deduction is reduced because a fiduciary deducts
1956 an amount paid from principal for income tax purposes
1957 instead of deducting it for estate tax purposes and, as a
1958 result, estate taxes paid from principal are increased and
1959 income taxes paid by the fiduciary or a beneficiary are
1960 decreased, the fiduciary shall charge each beneficiary that
1961 benefits from the decrease in income tax to reimburse the
1962 principal from which the increase in estate tax is paid.

1963 The total reimbursement must equal the increase in the
 1964 estate tax, to the extent the principal used to pay the
 1965 increase would have qualified for a marital or charitable
 1966 deduction but for the payment. The share of the
 1967 reimbursement for each fiduciary or beneficiary whose
 1968 income taxes are reduced must be the same as its share of
 1969 the total decrease in income tax.

1970 (3) A fiduciary that charges a beneficiary under
 1971 subsection (2) may offset the charge by obtaining payment
 1972 from the beneficiary, withholding an amount from future
 1973 distributions to the beneficiary, or adopting another
 1974 method or combination of methods.

1975 738.508 Apportionment of property expenses between
 1976 tenant and remainderman.—

1977 (1) For purposes of this section, the term:

1978 (a) "Remainderman" means the holder of the remainder
 1979 interests after the expiration of a tenant's estate in
 1980 property.

1981 (b) "Tenant" means the holder of an estate for life or
 1982 term of years in real property or personal property, or
 1983 both.

1984 (2) If a trust has not been created, expenses shall be
 1985 apportioned between the tenant and remainderman as follows:

1986 (a) The following expenses are allocated to and shall
 1987 be paid by the tenant:

1988 1. All ordinary expenses incurred in connection with
 1989 the administration, management, or preservation of the
 1990 property, including interest, ordinary repairs, regularly
 1991 recurring taxes assessed against the property, and expenses
 1992 of a proceeding or other matter that concerns primarily the
 1993 tenant's estate or use of the property.

1994 2. Recurring premiums on insurance covering the loss
 1995 of the property or the loss of income from or use of the
 1996 property.

1997 3. Any of the expenses described in subparagraph (b)3.
 1998 which are attributable to the use of the property by the
 1999 tenant.

2000 (b) The following expenses are allocated to and shall
 2001 be paid by the remainderman:

2002 1. Payments on the principal of a debt secured by the
 2003 property, except to the extent the debt is for expenses
 2004 allocated to the tenant.

2005 2. Expenses of a proceeding or other matter that
 2006 concerns primarily the title to the property, other than
 2007 title to the tenant's estate.

2008 3. Except as provided in subparagraph (a)3., expenses
 2009 related to environmental matters, including reclamation,
 2010 assessing environmental conditions, remedying and removing
 2011 environmental contamination, monitoring remedial activities
 2012 and the release of substances, preventing future releases

2013 of substances, collecting amounts from persons liable or
2014 potentially liable for the costs of such activities,
2015 penalties imposed under environmental laws or regulations
2016 and other payments made to comply with those laws or
2017 regulations, statutory or common law claims by third
2018 parties, and defending claims based on environmental
2019 matters.

2020 4. Extraordinary repairs.

2021 (c) If the tenant or remainderman incurred an expense
2022 for the benefit of his or her own estate without consent or
2023 agreement of the other, he or she must pay such expense in
2024 full.

2025 (d) Except as provided in paragraph (c), the cost of,
2026 or special taxes or assessments for, an improvement
2027 representing an addition of value to property forming part
2028 of the principal shall be paid by the tenant if the
2029 improvement is not reasonably expected to outlast the
2030 estate of the tenant. In all other cases, only a part shall
2031 be paid by the tenant while the remainder shall be paid by
2032 the remainderman. The part payable by the tenant is
2033 ascertainable by taking that percentage of the total that
2034 is found by dividing the present value of the tenant's
2035 estate by the present value of an estate of the same form
2036 as that of the tenant, except that it is limited for a
2037 period corresponding to the reasonably expected duration of

2038 the improvement. The computation of present values of the
 2039 estates shall be made by using the rate determined under s.
 2040 7520(a)(2) of the Internal Revenue Code, then in effect
 2041 and, in the case of an estate for life, the official
 2042 mortality tables then in effect under s. 7520 of the
 2043 Internal Revenue Code. Other evidence of duration or
 2044 expectancy may not be considered.

2045 (3) This section does not apply to the extent it is
 2046 inconsistent with the instrument creating the estates, the
 2047 agreement of the parties, or the specific direction of the
 2048 taxing or other statutes.

2049 (4) The common law applicable to tenants and
 2050 remaindermen supplements this section, except as modified
 2051 by this section or other laws.

2052 738.601 Determination and distribution of net income.—

2053 (1) This section applies when:

2054 (a) the death of an individual results in the creation
 2055 of an estate or trust; or

2056 (b) an income interest in a trust terminates, whether
 2057 the trust continues or is distributed.

2058 (2) A fiduciary of an estate or trust with an income
 2059 interest that terminates shall determine, under subsection
 2060 (6) and ss. 738.401-738.508 and 738.701-738.703, the amount
 2061 of net income and net principal receipts received from
 2062 property specifically given to a beneficiary. The fiduciary

2063 shall distribute the net income and net principal receipts
2064 to the beneficiary that is to receive the specific
2065 property.

2066 (3) A fiduciary shall determine the income and net
2067 income of an estate or income interest in a trust which
2068 terminates, other than the amount of net income determined
2069 under subsection (2), under ss. 738.401-738.508 and
2070 738.701-738.703 and by:

2071 (a) including in net income all income from property
2072 used or sold to discharge liabilities;

2073 (b) paying from income or principal, in the
2074 fiduciary's discretion, fees of attorneys, accountants, and
2075 fiduciaries, court costs and other expenses of
2076 administration; and interest on estate and inheritance
2077 taxes and other taxes imposed because of the decedent's
2078 death, but the fiduciary may pay the expenses from income
2079 of property passing to a trust for which the fiduciary
2080 claims an estate tax marital or charitable deduction under
2081 the Internal Revenue Code or comparable law of any state
2082 only to the extent:

2083 1. the payment of the expenses from income will not
2084 cause the reduction or loss of the deduction; or

2085 2. the fiduciary makes an adjustment under s.
2086 738.507(2); and

2087 (c) paying from principal other disbursements made or
2088 incurred in connection with the settlement of the estate or
2089 the winding up of an income interest that terminates,
2090 including:

2091 1. to the extent authorized by the decedent's will,
2092 the terms of the trust, or applicable law, debts, funeral
2093 expenses, disposition of remains, family allowances, estate
2094 and inheritance taxes, and other taxes imposed because of
2095 the decedent's death; and

2096 2. related penalties that are apportioned, by the
2097 decedent's will, the terms of the trust, or applicable law,
2098 to the estate or income interest that terminates.

2099 (4) If a decedent's will or the terms of a trust
2100 provides for the payment of interest or the equivalent of
2101 interest to a beneficiary that receives a pecuniary amount
2102 outright, the fiduciary shall make the payment from net
2103 income determined under subsection (3) or from principal to
2104 the extent net income is insufficient.

2105 (5) A fiduciary shall distribute net income remaining
2106 after payments required by subsection (4) in the manner
2107 described in s. 738.602 to all other beneficiaries,
2108 including a beneficiary that receives a pecuniary amount in
2109 trust, even if the beneficiary holds an unqualified power
2110 to withdraw assets from the trust or other presently
2111 exercisable general power of appointment over the trust.

2112 (6) A fiduciary may not reduce principal or income
2113 receipts from property described in subsection (2) because
2114 of a payment described in s. 738.501 or s. 738.502, to the
2115 extent the decedent's will, the terms of the trust, or
2116 applicable law requires the fiduciary to make the payment
2117 from assets other than the property or to the extent the
2118 fiduciary recovers or expects to recover the payment from a
2119 third party. The net income and principal receipts from the
2120 property must be determined by including the amount the
2121 fiduciary receives or pays regarding the property, whether
2122 the amount accrued or became due before, on, or after the
2123 date of the decedent's death or an income interest's
2124 terminating event, and making a reasonable provision for an
2125 amount the estate or income interest may become obligated
2126 to pay after the property is distributed.

2127 738.602 Distribution to successor beneficiary.—

2128 (1) Except to the extent ss. 738.301-738.310 applies
2129 for a beneficiary that is a trust, each beneficiary
2130 described in s. 738.601(5) is entitled to receive a share
2131 of the net income equal to the beneficiary's fractional
2132 interest in undistributed principal assets, using carrying
2133 values as of the distribution date. If a fiduciary makes
2134 more than one distribution of assets to beneficiaries to
2135 which this section applies, each beneficiary, including a
2136 beneficiary that does not receive part of the distribution,

2137 is entitled, as of each distribution date, to a share of
2138 the net income the fiduciary received after the decedent's
2139 death, an income interest's other terminating event, or the
2140 preceding distribution by the fiduciary.

2141 (2) In determining a beneficiary's share of net income
2142 under subsection (1), the following rules apply:

2143 (a) The beneficiary is entitled to receive a share of
2144 the net income equal to the beneficiary's fractional
2145 interest in the undistributed principal assets immediately
2146 before the distribution date.

2147 (b) The beneficiary's fractional interest under
2148 paragraph (2) (a) must be calculated:

2149 1. on the aggregate carrying value of the assets as of
2150 the distribution date; and

2151 2. reduced by:

2152 (i) any liabilities of the estate or trust;

2153 (ii) property specifically given to a beneficiary
2154 under the decedent's will or the terms of the trust; and

2155 (iii) property required to pay pecuniary amounts not
2156 in trust.

2157 (c) If a disproportionate distribution of principal
2158 is made to any beneficiary, the respective fractional
2159 interests of all beneficiaries in the undistributed
2160 principal assets shall be recomputed by:

2161 1. Adjusting the carrying value of the principal
2162 assets to their fair market value before the distribution;

2163 2. Reducing the fractional interest of the recipient
2164 of the disproportionate distribution in the remaining
2165 principal assets by the fair market value of the principal
2166 distribution; and

2167 3. Recomputing the fractional interests of all
2168 beneficiaries in the remaining principal assets based upon
2169 the now restated carrying values.

2170 (d) The distribution date under paragraph (a) may be
2171 the date as of which the fiduciary calculates the value of
2172 the assets if that date is reasonably near the date on
2173 which the assets are distributed. All distributions to a
2174 beneficiary shall be valued based on their fair market
2175 value on the date of distribution.

2176 (3) To the extent a fiduciary does not distribute
2177 under this section all the collected but undistributed net
2178 income to each beneficiary as of a distribution date, the
2179 fiduciary shall maintain records showing the interest of
2180 each beneficiary in the net income.

2181 (4) If this section applies to income from an asset, a
2182 fiduciary may apply the rules in this section to net gain
2183 or loss realized from the disposition of the asset after
2184 the decedent's death, an income interest's terminating
2185 event, or the preceding distribution by the fiduciary.

2186 (5) The carrying value or fair market value of trust
2187 assets shall be determined on an asset-by-asset basis and
2188 is conclusive if reasonable and determined in good faith.
2189 Determinations of fair market value based on appraisals
2190 performed within 2 years before or after the valuation date
2191 are presumed reasonable. The values of trust assets are
2192 conclusively presumed to be reasonable and determined in
2193 good faith unless proven otherwise in a proceeding
2194 commenced by or on behalf of a person interested in the
2195 trust within the time provided in s. 736.1008.

2196 738.701 When right to income begins and ends.-

2197 (1) An income beneficiary is entitled to net income in
2198 accordance with the terms of the trust from the date an
2199 income interest begins. The income interest begins on the
2200 date specified in the terms of the trust or, if no date is
2201 specified, on the date an asset becomes subject to:

2202 (a) the trust for the current income beneficiary; or

2203 (b) a successive interest for a successor beneficiary.

2204 (2) An asset becomes subject to a trust under
2205 paragraph (1) (a):

2206 (a) for an asset that is transferred to the trust
2207 during the settlor's life, on the date the asset is
2208 transferred;

2209 (b) for an asset that becomes subject to the trust
2210 because of a decedent's death, on the date of the

2211 decedent's death, even if there is an intervening period of
 2212 administration of the decedent's estate; or

2213 (c) for an asset that is transferred to a fiduciary by
 2214 a third party because of a decedent's death, on the date of
 2215 the decedent's death.

2216 (3) An asset becomes subject to a successive interest
 2217 under paragraph (1)(b) on the day after the preceding
 2218 income interest ends, as determined under subsection (4),
 2219 even if there is an intervening period of administration to
 2220 wind up the preceding income interest.

2221 (4) An income interest ends on the day before an
 2222 income beneficiary dies or another terminating event occurs
 2223 or on the last day of a period during which there is no
 2224 beneficiary to which a fiduciary may or must distribute
 2225 income.

2226 738.702 Apportionment of receipts and disbursements
 2227 when decedent dies or income interest begins.-

2228 (1) A fiduciary shall allocate an income receipt or
 2229 disbursement, other than a receipt to which s 738.601(2)
 2230 applies, to principal if its due date occurs before the
 2231 date on which:

2232 (a) for an estate, the decedent died; or

2233 (b) for a trust or successive interest, an income
 2234 interest begins.

2235 (2) If the due date of a periodic income receipt or
2236 disbursement occurs on or after the date on which a
2237 decedent died or an income interest begins, a fiduciary
2238 shall allocate the receipt or disbursement to income.

2239 (3) If an income receipt or disbursement is not
2240 periodic or has no due date, a fiduciary shall treat the
2241 receipt or disbursement under this section as accruing from
2242 day to day. The fiduciary shall allocate to principal the
2243 portion of the receipt or disbursement accruing before the
2244 date on which a decedent died or an income interest begins,
2245 and to income the balance.

2246 (4) A receipt or disbursement is periodic under
2247 subsections (2) and (3) if:

2248 (a) the receipt or disbursement must be paid at
2249 regular intervals under an obligation to make payments; or

2250 (b) the payor customarily makes payments at regular
2251 intervals.

2252 (5) An item of income or obligation is due under this
2253 section on the date the payor is required to make a
2254 payment. If a payment date is not stated, there is no due
2255 date.

2256 (6) Distributions to shareholders or other owners from
2257 an entity to which s. 738.401 applies are due:

2258 (a) on the date fixed by or on behalf of the entity
2259 for determining the persons entitled to receive the
2260 distribution;

2261 (b) if no date is fixed, on the date of the decision
2262 by or on behalf of the entity to make the distribution; or

2263 (c) if no date is fixed and the fiduciary does not
2264 know the date of the decision by or on behalf of the entity
2265 to make the distribution, on the date the fiduciary learns
2266 of the decision.

2267 (7) S. 733.817 controls over any provision of this
2268 chapter 738 to the contrary.

2269 738.703 Apportionment when income interest ends.-

2270 (1) As used in this section, the term "undistributed
2271 income" means net income received on or before the date on
2272 which an income interest ends. The term does not include an
2273 item of income or expense which is due or accrued or net
2274 income that has been added or is required to be added to
2275 principal under the terms of the trust.

2276 (2) Except as otherwise provided in subsection (3),
2277 when a mandatory income interest of a beneficiary ends, the
2278 fiduciary shall pay the beneficiary's share of the
2279 undistributed income that is not disposed of under the
2280 terms of the trust to the beneficiary or, if the
2281 beneficiary does not survive the date the interest ends, to
2282 the beneficiary's estate.

2283 (3) If a beneficiary has an unqualified power to
 2284 withdraw more than five percent of the value of a trust
 2285 immediately before an income interest ends:

2286 (a) the fiduciary shall allocate to principal the
 2287 undistributed income from the portion of the trust which
 2288 may be withdrawn; and

2289 (b) subsection (2) applies only to the balance of the
 2290 undistributed income.

2291 (4) When a fiduciary's obligation to pay a fixed
 2292 annuity or a fixed fraction of the value of assets ends,
 2293 the fiduciary shall prorate the final payment as required
 2294 to preserve an income tax, gift tax, estate tax, or other
 2295 tax benefit.

2296 738.801 Uniformity of application and construction.—
 2297 In applying and construing this act, consideration shall be
 2298 given to the need to promote uniformity of the law with
 2299 respect to its subject matter among states that enact it.

2300 738.802 Relation to electronic signatures in global
 2301 and national commerce act.— This chapter modifies, limits,
 2302 or supersedes the Electronic Signatures in Global and
 2303 National Commerce Act, 15 U.S.C. ss. 7001 et seq., but does
 2304 not modify, limit, or supersede Section 101(c) of that act,
 2305 15 U.S.C. s. 7001(c), or authorize electronic delivery of
 2306 any of the notices described in s. 103(b) of that act, 15

2307 U.S.C. s. 7003(b). This chapter also does not modify,
2308 limit, or supersede s. 117.285.

2309 738.803 Severability.—If any provision of this chapter
2310 or its application to any person or circumstance is held
2311 invalid, the invalidity does not affect other provisions or
2312 applications of this chapter which can be given effect
2313 without the invalid provision or application, and to this
2314 end the provisions of this chapter are severable.

2315 738.804 Application.—Except as provided in the terms
2316 of the trust or this chapter, this chapter shall apply to
2317 any receipt or expense received or incurred and any
2318 disbursement made after January 1, [year after enactment],
2319 by any trust or decedent's estate, whether established
2320 before or after January 1, [year after enactment], and
2321 whether the asset involved was acquired by the trustee or
2322 personal representative before or after January 1, [year
2323 after enactment]. Receipts or expenses received or
2324 incurred and disbursements made before January 1, [year
2325 after enactment], shall be governed by the law of this
2326 state in effect at the time of the event, except as
2327 otherwise expressly provided in the terms of the trust or
2328 in this chapter.

2329 Section 2. This act shall take effect on [_____].
2330

2331 END

PROPOSED NEW F.S. 736.05057

736.05057 Transfer of tenants by the entirety property to trust

(1) As used in this section:

(a) “TBE trust property ” means any property owned by married persons as tenants by the entirety at the time of its transfer to the trustee of a trust to which this section applies.

(b) “Proceeds” means:

1. Assets attributable to the sale, lease, exchange or other disposition of TBE trust property;
2. Income attributable to TBE trust property;
3. Claims arising out of a loss or damage to TBE trust property, and proceeds of insurance payable to the trustee on account thereof.

(2) Any TBE trust property transferred by settlors to the trustee of a trust, and the proceeds of such TBE trust property, have the same exemption from the claims of the settlors’ respective separate creditors as the TBE trust property and proceeds would have if owned by the settlors as tenants by the entirety if the settlors are both living and remain married to each other and the terms of the TBE trust provide that:

(a) The TBE trust is revocable by either or both of the settlors, and if the TBE trust is revoked when the parties are married to each other the trustee must immediately distribute all TBE trust property and proceeds to the settlors as tenants by the entirety;

(b) The TBE trust property and its proceeds will be held in trust for the settlors’ benefit during their marriage to each other, during which time the trustee may distribute income or principal only to the settlors or otherwise as the settlors may direct by the terms of the TBE trust; and

(c) Upon the death of the first settlor, the surviving settlor has the power, exercisable alone in his or her individual capacity, to revoke the TBE trust as to the TBE trust property and its proceeds, or to vest full title to such TBE trust property and proceeds in the surviving settlor, individually.

(3) This section applies if one, both, or neither of the settlors serves as trustee of the trust.

(4) One or both of the settlors can transfer property that is not TBE trust property to the trustee of a trust described in this section, and any such property retains, inside the trust or as distributed from the trust, its character as property that is not TBE trust property.

(5) Unless provided to the contrary in a writing signed by both settlors, TBE trust property and proceeds in a trust to which this section applies shall be treated as being owned by the settlors as tenants by the entirety for purposes of determining a settlor's marital property rights under Ch. 61 and for purposes of part II of ch. 732.

(6) If the settlors' marriage terminates by the death of the first settlor to die, all TBE trust property and proceeds that were exempt from the claims of the first deceased settlor's separate creditors under this section immediately prior to his or her death have the same exemption from such claims after his or her death as would have applied had the settlors held the TBE trust property outside of the trust as tenants by the entirety.

(7) After the death of the first settlor:

(a) All TBE trust property and proceeds to which this section applies are subject to the claims of the surviving settlor's separate creditors to the same extent that such TBE trust property and proceeds would be so subject if owned by the surviving settlor individually.

(b) For purposes of Ch. 739, the surviving settlor can disclaim trust TBE trust property and proceeds to which this section applies, and the surviving settlor's beneficial interest in such

property and proceeds, as if such TBE trust property and proceeds were owned by the settlors as tenants by the entirety immediately before the death of the first settlor.

(8) If the settlors' marriage terminates by dissolution, invalidity or annulment, upon the court's order dissolving or annulling the marriage or the court's determination that the marriage was invalid, the exemption from the claims of the settlors' separate creditors provided for in subsection (2) immediately terminates.

(9) During the settlors' marriage, for purposes of ss. 732.401 and 732.4015, property used by the settlors as their homestead is treated as property owned by them as tenants by the entirety, and it is not protected homestead for purposes of the devise restrictions under Art. X, Sec. 4(c) of the State Constitution. If the settlors' marriage terminates by the death of the first settlor to die, there is no devise of the homestead within the meaning of s. 732.4015. After the surviving settlor's death the homestead is property to which s. 732.401 and s. 732.4015 apply.

(10) In any proceeding relating to the exemption of property or proceeds from the claims of a separate creditor of either or both settlors, the burden to prove such exemption is the same as if the TBE trust property or proceeds were owned by the settlors or settlor individually.

(11) The provisions of this section are in addition to, and not in derogation of, rights under the common law allowing property titled in the name of a trustee of a trust to be, or to be treated as, tenants by the entirety property.

(12) This section applies to all TBE trust property transferred by settlors to the trustee of a trust that satisfies the requirements of subsection (2) on or after July 1, 202[____].

INFORMATION ITEM –

Revocable Transfer on Death Deed Act

WHITE PAPER

REVOCABLE TRANSFER ON DEATH DEED ACT

I. SUMMARY

The proposed Revocable Transfer-on-Death Deed Act (“RTODD Act”) seeks to provide certainty where an individual, for purposes of estate planning, seeks to transfer real property to another but retain control of the real property for life while the beneficiary of the property has only an expectancy interest which can be revoked by the transferor without the consent of the beneficiary.

The RTODD Act brings uniformity and clarity to the transfer by providing clear definitions, authorities, limitations, and a form deed for the transfer by transferor, and authority for a disclaimer of the transfer by the beneficiary. The RTODD Act provides for enforcement of voluntary and involuntary liens against the transferor and safeguards to the beneficiary against the enforcement of certain involuntary liens against the real property after the death of the transferor. The RTODD Act also provides protection to the transferor against any liens recorded against the beneficiary during the life of the transferor. The RTODD Act is another tool in estate planning and especially useful when dealing with small estates. It provides an advantage for easily modifying estate plans in a statutorily clear way with regards to real property owned individually.

Missouri in 1989 was the first state to enact a statute covering the revocable transfer-on-death deed. Later, the Uniform Real Property Transfer on Death Act (URPTODA) was drafted by the National Conference of Commissioners on Uniform State Laws in 2009. To date 19 states have enacted some form of the URPTODA and it has been introduced in 3 other states.¹ Over half of all states recognize transfer-on-death deeds in their statutes as of 2020.² Texas has recognized enhanced life estate deeds by common law and transfer on death deeds by statutory authority as of 2015.³ California enacted changes to its laws governing transfer-on-death deeds effective January 1, 2022, to provide greater safeguards.⁴

The RTODD Act provides greater safeguards and certainty to transferors, beneficiaries, and creditors than Florida’s common law version of the enhanced life estate deed (ELE deed). Also, because there is no statutory authority for the ELE deed in Florida, a court decision could greatly change the interpretation given to the effect of an ELE deed. Some practitioners, regardless, are used to the ELE deed in Florida and this proposed legislation does not seek to replace the use of the ELE deed. The RTODD Act provides a form and statutory guidance for a clear understanding of its use and effect.

II. CURRENT FLORIDA LAW

Florida, along with Michigan, Texas, Vermont and West Virginia, recognizes the ELE deed by common law. The grantor of this type of deed reserves a life estate with full control over the property and gifts the remainder to another, effective at the time of death of the grantor. The grantor, based on the powers in the deed, may have sufficient powers to convey, with or without consideration, the property to another without joinder of the remainderman, change the remainderman, or revoke the transfer. The remainderman is deemed by many practitioners to have a vested remainder subject to divestment. Judgment liens against the grantor might *or might not* survive the grantor's death. The remainderman has a vested remainder so judgment liens against the remainderman might *or might not* attach during the lifetime of the grantor. Since there is not statutory authority, the effect of these deeds may be subject to court interpretation depending on the form used and facts surrounding the conveyance.

The Florida Supreme Court in *Oglesby v. Lee*, 73 So. 840 (Fla. 1917) held that a grantor that reserves all control over the property on a deed to a remainderman can divest the remainderman and all grantees from the remainderman by conveying the property to a third party. The courts in Florida and other states have accepted the reservations of control over the property but depending on the verbiage in the deeds and factors surrounding the transfer, the opinions of practitioners differ regarding the rights and liabilities of the grantor, grantee and creditors. Due to lack of statutory authority, Florida's Uniform Title Standards (TS) have been updated to reflect solutions to common issues raised by the enhanced life estate deeds.⁵ TS 6.10 and 6.11, for example, provide that judgment liens against an ELE grantor, if not enforced prior to the death of the grantor, do not survive to attach to the interest of the remainderman. This is not a view shared by all practitioners, especially if the judgment lien attached prior to the reservation of the life estate, as it has the effect of removing a lien that has already attached to the property without any safeguards for the creditor to enforce the lien after the untimely death of the grantor resulting in a windfall for the remainderman.

Some other benefits of the ELE deed which should not be lost with the RTODD due to the same retention of full ownership rights by the transferor: (1) the ELE remainderman benefits from a stepped-up basis under IRC s. 1014 as a retained lifetime interest under IRC s. 2036(a); (2) the deed is not subject to documentary stamp taxes; (3) it is not deemed a gift for tax purposes during the lifetime of the ELE life estate holder,⁶ and (4) no transfer has occurred which would be subject the Medicaid 60 month look back period.⁷ Also, like an ELE deed the real property goes directly to the remainderman thereby avoiding probate.

III. EFFECTS OF THE PROPOSED RTODD ACT AS OPPOSED TO THE COMMON LAW ENHANCED LIFE ESTATE DEED

The proposed RTODD Act seeks to provide a balance between the interests of transferors, beneficiaries and creditors which is not specifically provided under the common law and brings certainty to the rights of each of those parties.

A few examples of the benefits of the RTODD Act over common law are as follows:

- Foremost, by statutory authority, the effects of the transfer as against transferors, beneficiaries, creditors are specifically set forth.
- The transferor retains all control over the property same as with an ELE deed so that any benefits regarding taxes or Medicaid should continue to apply.
- There is no uncertainty as to the extent of the control as the form of the revocable transfer-on-death deed is statutorily prescribed and refers to the statutory authority.
- If the remainderman predeceases the life tenant in an enhanced life estate deed, upon the death of the life tenant, the estate of the remainderman, unless held jointly with another surviving remainderman, must be probated as it is considered a vested remainder. Only if the primary and alternate beneficiary, if any, fail to survive the transferor, must a determination of the primary or alternate beneficiary's issue be required. If they should fail to survive leaving no issue, then the property shall pass as provided by the Florida Probate Code.
- Creditors with judgment liens against the life tenant might not be protected upon the death of the life tenant as there are inconsistencies in the way that the ELE is interpreted. Because the life tenant retains all control, the judgment lien could be deemed to attach and continue against the remainderman for the period provided under Ch. 55, F.S. On the other hand, some interpret the ELE deed as subject to Sec. 733.706, F.S., which requires judgment liens to be filed in the estate of the decedent in the same manner as other claims even though the property passing to the remainderman is not subject to administration. Some interpret the life tenant's interest similar to the treatment given a joint tenancy requiring the judgment creditor to execute on the judgment prior to the death of the life tenant. TS 6.10 and 6.11 have adopted this method of barring judgment liens as against the remainderman, i.e. the creditor must execute on the judgment lien prior to the life tenant's death. The proposed statute specifically provides that judgment liens against non-homestead property can only be enforced if execution or other process has been issued prior to the death of the transferor.

- The statutory proposal provides that the real property, once it becomes vested in the beneficiary, is not subject to administration in the estate of the transferor. This comports with the Title Standards regarding the ELE deed which do not recognize the property to be an asset subject to administration in the estate of the grantor.
- Provides for protection of the spouse and minor children of the transferor when homestead property is being transferred, similar to the transfer under an ELE deed but statutorily authorizes a spousal waiver when no minor children involved.
- No notice to the remainderman is necessary in order to effectuate an ELE deed. The RTODD Act provides for that statutorily.
- To avoid conflicts between beneficiaries after revocation, it requires the recording of any subsequent deed which would constitute a revocation of an earlier beneficiary designation thereby providing constructive notice to the original beneficiary.
- Provides that the beneficiary's interest may be disclaimed pursuant to s. 739.101, et seq.

IV. SECTION-BY-SECTION ANALYSIS

The following summarizes the provisions of the RTODD Act:

Section 1. Provisions under the RTODD Act.

- (1) Provides for the short title "Florida Revocable Transfer-on-Death Deed Act."
- (2) Provides for the following definitions:
 - (a) A "Beneficiary" is limited to an individual, trustee or entity.
 - (b) An "Expectancy Interest" is defined as the interest of a beneficiary which carries no rights until after the death of the Transferor.
 - (c) "Real Property" for purposes of this statute is limited to a freehold interest in land, a condominium parcel, or a cooperative parcel.
 - (d) A "Revocable Transfer-on-Death Deed" is defined as one created under this statutory authority.
 - (e) A "Transferor" under this statute must be a natural person.
- (3) Applies to revocable transfer-on-death deeds recorded after the effective date of the Act.
- (4) Provides for non-exclusivity as to other methods of transferring real property.
- (5) Provides authority for execution of the revocable transfer-on-death deed:
 - (a) Provides a form deed;
 - (b) Authorizes a tenant-in-common to execute the deed but only as to the interest of the tenant-in-common; and
 - (c) Provides that the execution of the deed is not a change in ownership for all purposes.
- (6) Provides for revocation by deed:

- (a) Revocation is only effective by recordation of a subsequent deed;
 - (b) A tenant-in-common can revoke only the interest of that tenant-in-common;
 - (c) The beneficiary is entitled to the safeguards of s. 732.606;
 - (d) A dissolution of marriage revokes the designation of a spouse as a beneficiary unless otherwise specified in the revocable transfer-on-death deed, and cannot be revived by remarriage; and
 - (e) The slayer statute, s. 732.802, and statute regarding abuse of a spouse, s. 732.8031, both apply.
- (7) Provides for method of execution and recordation
- (a) The revocable transfer-on-death deed must be executed with the formalities of a deed and must be recorded.
 - (b) Requires court authority for a guardian or conservator to create or change a revocable transfer-on-death deed.
 - (c) Requires express authority per s. 709.2202 in the power of attorney for an attorney-in-fact to create or change a revocable transfer-on-death deed. The agent is subject to fiduciary duties under s. 709.2114.
- (8) Provides that notice, delivery, acceptance, or consideration is not required for the execution and recording of a revocable transfer-on-death deed.
- (9) Provides that during the life of the transferor, the revocable transfer-on-death deed does not affect any interest or right of the transferor or creditor of the transferor.
- (10) Provides a formula for succession should the beneficiary fail to survive the transferor.
- (11) Provides for limitations on the transfer if the transferor's homestead property is the subject of the revocable transfer-on-death deed in accordance with the protections of Article x, s. 4 of the Florida Constitution.
- (12) Provides for creditors' rights as follows:
- (a) During the life of the transferor, creditors of the transferor retain whatever rights have attached to the real property;
 - (b) During the life of the transferor, creditors of the beneficiary have no rights to the real property;
 - (c) At the transferor's death, title to the real property vests in the beneficiary by operation of law; and
 - (d) Enforcement of liens encumbering the specific real property as well as judgment liens against non-homestead real property for which execution or other process had been issued during the transferor's lifetime may be enforced against the beneficiary's title to the real property.
- (13) Provides for disclaimer by the beneficiary per s. 739.101, et seq.
- (14) Provides for a form revocable transfer-on-death deed.

Section 2. Provides for an effective date.

V. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

The proposal does not have a fiscal impact on state or local governments any different than the ELE deed currently in use.

VI. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

The proposed RTODD Act will facilitate estate planning and avoid, especially in small estates, the cost of preparing other estate planning devices and the time and expense of probating the estate. This device is only available to a natural person holding title to real property, alone or as a co-tenant, so it does not affect other assets subject to estate administration.

Use of the RTODD statutorily provides that judgment lien holders retain their rights if their judgment lien on non-homestead property for which execution or other process has been issued prior to the death of the transferor. It also provides that no judgment lien shall attach to the beneficiary's interest during the lifetime of the transferor. Liens directly encumbering the property and against the transferor are protected whether attaching before or after the execution of the revocable transfer-on-death deed. These provisions in the statute provide clarity and a balance of safeguards to transferors, beneficiaries and creditors and may impact the timing for collection of judgment liens as opposed to other types of conveyances.

VII. Constitutional Issues

The proposed RTODD Act impacts the devise of homestead and intestacy laws regarding homestead property but safeguards have been provided for protection of the spouse or minor child. This is similar to the ELE deed but the RTODD Act provides certainty in use and effect of the RTODD.

VIII. Other Interested Parties.

Other stakeholders include:

Business Law Section

Tax Law Section

Elder Law Section

Florida Pro Bono Legal Service Providers

Florida Association of Property Appraisers

¹ <https://www.uniformlaws.org/committees/community-home?communitykey=a4be2b9b-5129-448a-a761-a5503b37d884&tab=groupdetails>

² <https://www.thebalance.com/enhanced-life-estate-deed-3505518>

³ <https://www.deedclaim.com/texas/tod-deed-vs-lady-bird-deed/>

⁴ <https://www.deedclaim.com/blog/2022-updates-california-tod-deed/#:~:text=A%20California%20TOD%20deed%20is,when%20the%20current%20owner%20dies.&text=TOD%20deeds%E2%80%94which%20have%20become,real%20estate%20outside%20of%20probate.>

⁵ See Vo. XXXXII, No. 1, ActionLine, Fall 2020, pgs.57-59

⁶ <https://miamielderlawcarelawyers.com/blog/lady-bird-deed-part-2/> and https://www.browardbar.org/wp-content/uploads/staley-memorial/SpeakerLeonardEMondschein/Lady-Bird-Deed-Outline_%20Detailed.pdf

⁷ Section 1640.0613.01 of the Florida ESS Program Policy Manual. If an individual retains life estate using a lady bird deed or life estate with powers, no transfer has occurred. The individual retains full ownership powers in the property and it is only upon their death that the property transfers ownership to the remainderman. *See also*, Vol. XXXXI, No. 3, ActionLine, Spring, 2020, pgs. 22-23.

A bill to be entitled

An Act providing for a revocable transfer on death deed; providing definitions; providing that a transferor may record a deed during transferor's lifetime which shall become effective to convey real property to the beneficiary upon transferor's death; providing that transferor will retain fee simple title with the right to revoke the beneficiary's expectancy interest or replace the beneficiary; addressing creditors' rights; providing construction; providing sample form; providing an effective date.

Be it Enacted by the Legislature of the State of Florida:

Section 1. Section 689.30, Florida Statutes, is created to read:

689.30 Florida Revocable Transfer-on-Death Deed Act -

(1) SHORT TITLE. - This section may be cited as the "Florida Revocable Transfer-on-Death Deed Act."

(2) DEFINITIONS. - For all purposes of this act, the singular includes the plural and the plural includes the singular.

As used in this section, the term:

(a) "Beneficiary" means the individual, trustee, or entity named in a revocable transfer-on-death deed who shall become the owner of the real property pursuant to the revocable transfer-on-death deed only upon the death of the transferor.

(b) "Expectancy Interest" is the interest that a beneficiary takes under a revocable transfer-on-death deed and carries no rights in the real property until the interest vests at the transferor's death.

29 (c) "Real Property" means any freehold interest in land, a
30 condominium parcel as defined in s. 718.103(12), or a
31 cooperative parcel as defined in s. 719.103(14).

32 (d) "Revocable Transfer-on-Death Deed" means a deed created
33 pursuant to this Act that designates a beneficiary to become the
34 owner of real property upon the death of the transferor, which
35 remains revocable until the death of the transferor, and which
36 provides that the transferor retains all rights to the real
37 property during the transferor's life.

38 (e) "Transferor" means a natural person who owns real property
39 in an individual capacity.

40 (3) APPLICABILITY. - This Act applies to a revocable
41 transfer-on-death deed recorded after the effective date of
42 this Act.

43 (4) NONEXCLUSIVITY. - This Act does not affect any other
44 method of transferring real property permitted by the laws
45 of Florida, including, but not limited to, quit-claim
46 deeds, warranty deeds, deeds to or from a trustee, deeds
47 creating or reserving a life estate, deeds creating or
48 reserving an enhanced life estate, or other deeds or
49 devises by will or trust.

50 (5) REVOCABLE TRANSFER-ON-DEATH DEED AUTHORIZED

51 (a) A revocable transfer-on-death deed must be in a form
52 substantially similar to the form set forth in s.
53 689.30(14).

54 (b) A co-owner of real property may execute a revocable
55 transfer-on-death deed only if the co-owner owns the real
56 property as a tenant in common and only as to that
57 individual's share. A revocable transfer-on-death deed by
58 one tenant in common does not affect the interests of any
59 other co-owner.

60 (c) The recordation of a revocable transfer-on-death deed is not
61 a change in ownership for all purposes, including, but not
62 limited to, transfer taxes under s. 201.02, any due-on-sale
63 clause, any notice or disclosure requirements, or property
64 owners or community association approval requirements.

65 (6) REVOCATION -

66 (a) A transferor may revoke a revocable transfer-on-death
67 deed as to some or all of the real property described in
68 that deed only by recording a subsequent deed. A transferor
69 may deed the real property to the transferor, to the
70 transferor and beneficiaries, or to a third party.

71 (b) A tenant in common may revoke a revocable transfer on
72 death deed only as to that co-owner's interest, and such
73 revocation has no effect on the interests of other co-
74 owners.

75 (c) A beneficiary of a revocable transfer-on-death deed is
76 entitled to the benefits pursuant to s. 732.606.

77 (d) The designation of the transferor's spouse as a
78 beneficiary in a revocable transfer-on-death deed is
79 revoked upon the dissolution of the transferor's marriage
80 to the spouse, unless otherwise specified in the revocable
81 transfer-on-death deed. If the transferor and the former
82 spouse remarry, the expectancy interest in favor of the
83 former spouse in a prior deed is not revived.

84 (e) The provisions of s. 732.802 and s. 732.8031 shall
85 apply to a beneficiary designation under this Act.

86 (7) EXECUTION AND RECORDATION

87 (a) A revocable transfer-on-death deed must be executed
88 with the formalities required by s. 689.01 and acknowledged
89 as required by s. 695.03. The revocable transfer-on-death
90 deed must be recorded according to law prior to the death
91 of the transferor or is of no force and effect.

92 (b) A guardian or conservator may not execute a revocable
93 transfer-on-death deed on behalf of a ward unless
94 authorized by a court.

95 (c) An agent under a power of attorney may not execute a
96 revocable transfer-on-death deed on behalf of a principal
97 unless the power of attorney expressly grants the power to
98 create or change beneficiary designations in accordance
99 with s. 709.2202. The actions of the agent are subject to
100 the agent's fiduciary duties under s. 709.2114.

101 (8) NOTICE, DELIVERY, ACCEPTANCE, CONSIDERATION NOT
102 REQUIRED

103 A revocable transfer-on-death deed is effective without
104 notice to, delivery to, acceptance by, or consideration
105 paid by the beneficiary during the transferor's life.

106 (9) EFFECT OF A REVOCABLE TRANSFER-ON-DEATH DEED DURING THE
107 TRANSFEROR'S LIFE AND AT DEATH

108 (a) During the transferor's life, a revocable transfer-on-
109 death deed does not:

- 110 1. affect any interest or right of the transferor or any
111 other owner, including the right to transfer or encumber
112 the real property;
- 113 2. create or affect an interest or right of a beneficiary
114 in the real property, even if the beneficiary has actual or
115 constructive notice of the revocable transfer-on-death
116 deed;
- 117 3. affect an interest or right of a secured or unsecured
118 creditor or future creditor of the transferor, even if the
119 creditor has actual or constructive notice of the revocable
120 transfer-on-death deed;
- 121 4. affect the transferor's or beneficiary's eligibility for
122 any form of public assistance, or create a legal or

123 equitable interest in favor of the beneficiary for purposes
124 of determining eligibility for public assistance; or
125 5. subject the real property to claims or process of a
126 creditor of the beneficiary.

127 (b) Real property rights vest in the beneficiary only upon
128 the death of the transferor and title vested in the
129 beneficiary upon the death of the transferor shall not be
130 subject to administration in the estate of the transferor.

131 (10) BENEFICIARIES

132 (a) A transferor may designate any individual, entity, or
133 trustee of any trust as beneficiary, or as alternate
134 beneficiary. Unless otherwise specified in the revocable
135 transfer-on-death deed:

136 1. If the primary beneficiary fails to survive the
137 transferor and no alternate beneficiary is named, that
138 beneficiary's share shall pass by representation per
139 stirpes to the issue of the primary beneficiary;

140 2. If the primary beneficiary fails to survive the
141 transferor and an alternate beneficiary is named who also
142 fails to survive the transferor, that share shall pass by
143 representation per stirpes to the issue of the alternate
144 beneficiary, or to the issue of the primary beneficiary if
145 the alternate beneficiary has no issue;

146 3. if the primary and alternate beneficiaries fail to
147 survive the transferor leaving no issue, that share shall
148 pass as provided in the Florida Probate Code; or

149 4. If beneficiaries are designated by terms indicating a
150 class, then the issue of any beneficiary who fails to
151 survive the transferor shall take that beneficiary's share
152 by representation per stirpes.

153 (b) If more than one beneficiary is designated and the type
154 of tenancy is not specified, multiple beneficiaries shall
155 take in accordance with s. 689.15.

156 (c) A beneficiary does not have any interest in the real
157 property during the lifetime of the transferor, including,
158 without limitation, any interest that may be sold,
159 conveyed, mortgaged, gifted, alienated, or otherwise
160 transferred or encumbered.

161 (11) HOMESTEAD. - If the transferor has executed a revocable
162 transfer-on-death deed describing real property that is the
163 transferor's homestead at the time of the transferor's death,
164 then consistent with the protections in Article x, s. 4 of the
165 Florida Constitution:

166 (a) if the transferor is survived by a minor child, the
167 revocable transfer-on-death deed is void.

168 (b) if the transferor is not survived by a minor child, but is
169 survived by a spouse, the revocable transfer-on-death deed is
170 valid if:

171 1. the revocable transfer-on-death deed gives the surviving
172 spouse the equivalent of a fee simple interest in the entire
173 interest held by the transferor at the time of the transferor's
174 death; or

175 2. the surviving spouse waived his or her rights to the
176 transferor's homestead residence at death pursuant to s. 732.702
177 or 732.7025 or other applicable Florida law.

178 (12) RIGHTS OF CREDITORS

179 (a) During the life of the transferor, creditors of the
180 transferor have whatever rights to attach the real property
181 as they would have if the transferor had not executed a
182 revocable transfer-on-death deed.

183 (b) During the transferor's lifetime, the interest of a
184 beneficiary is a mere expectancy interest. Creditors of

185 the beneficiary have no rights to the real property during
186 the life of the transferor.

187 (c) At the death of the transferor, the real property
188 described in a revocable transfer-on-death deed vests in
189 the beneficiary by operation of law.

190 (d) This section shall not be construed to prevent the
191 enforcement of mortgages, security interests, or liens
192 encumbering the specific real property described in the
193 revocable transfer-on-death deed, including judgement liens
194 against non-homestead real property for which execution or
195 other process had issued against the real property during
196 the transferor's lifetime.

197 (13) DISCLAIMER

198 A beneficiary may disclaim all or a part of any interest in
199 real property described in a revocable transfer-on-death
200 deed in accordance with s.739.101, et seq.

201 (14) FORM OF REVOCABLE TRANSFER-ON-DEATH DEED

202 Revocable transfer-on-death deeds may be in a form
203 substantially similar to the following:

204 **REVOCABLE TRANSFER ON-DEATH DEED**

205 (Florida Statute Sec. 689.30)

206 **THIS DEED MUST BE EXECUTED WITH THE FORMALITIES REQUIRED BY S.**
207 **689.01, ACKNOWLEDGED AS REQUIRED BY S. 695.03, AND RECORDED IN**
208 **THE OFFICIAL RECORDS OF THE COUNTY IN WHICH THE REAL PROPERTY**
209 **IS LOCATED PRIOR TO THE DEATH OF THE TRANSFEROR.**

210 This Revocable Transfer on Death Deed, executed this ___ day of
211 _____, _____, by _____ ("Transferor"), transfers the
212 following described real property located in
213 _____ County, Florida:

214 [insert property address, property appraiser's parcel
215 identification number, and legal description of the
216 Property or attach Exhibit A if more space is needed]

217 upon the death of the Transferor, without payment of
218 consideration and without warranties, to _____
219 ("Beneficiary") in accordance with Sec. 689.30, F.S.
220

221 Section 2. This act shall take effect July 1, 2023.
222
223