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A bill to be entitled

An act relating to the Florida Uniform Principal and Income Act; amending s. 738.104, F.S.; revising language with respect to the trustee's power to adjust; authorizing the trustee to release certain powers; restricting the power to adjust under certain circumstances; providing for service of notice on a legal representative or natural guardian of a beneficiary without the filing of any proceeding or approval of any court; amending s. 738.1041, F.S.; redefining the term "interested trustee" for the purpose of a provision governing total return unitrust; providing for notice to be served in a described manner; providing that an objection may be executed by a legal representative or natural guardian without the filing of any proceeding or approval of any court; revising language with respect to power of withdrawal; amending s. 738.202, F.S.; revising language with respect to distribution to residuary and remainder beneficiaries; amending s. 738.401, F.S.; revising language with respect to character of receipts; providing for retroactive application; providing an effective date.

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

Section 1. Subsections (5), (8), and (9) of section 738.104, Florida Statutes, are amended to read:

738.104 Trustee's power to adjust.--

(5)(a) A trustee may release the entire power to adjust conferred by subsection (1) if the trustee desires to convert an income trust to a total return unitrust pursuant to s. 738.1041.



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31 (b) A trustee ~~or~~ may release the entire power to adjust
32 conferred by subsection (1) or may release only the power to
33 adjust from income to principal or the power to adjust from
34 principal to income if the trustee is uncertain about whether
35 possessing or exercising the power will cause a result described
36 in paragraphs (3)(a)-(f) or paragraph (3)(h) or if the trustee
37 determines that possessing or exercising the power will or may
38 deprive the trust of a tax benefit or impose a tax burden not
39 described in subsection (3).

40 (c) A ~~The~~ release under this subsection may be permanent
41 or for a specified period, including a period measured by the
42 life of an individual. Notwithstanding anything contrary to this
43 subsection, a release of the power to adjust pursuant to
44 paragraph (a) shall remain effective only for as long as the
45 trust is administered as a unitrust pursuant to s. 738.1041.

46 (8) With respect to a trust in existence on January 1,
47 2003:

48 (a) A trustee shall not have the power to adjust under
49 this section until the statement required in subsection (9) is
50 provided and either no objection is made or any objection which
51 is made has been terminated.

52 1. An objection is made if, within 60 days after the date
53 of the statement required in subsection (9), a super majority of
54 the trust beneficiaries deliver to the trustee a written
55 objection to the application of this section to such trust. An
56 objection shall be deemed to be delivered to the trustee on the
57 date the objection is mailed to the mailing address listed in
58 the notice provided in subsection (9).

59 2. An objection is terminated upon the earlier of the
60 receipt of consent from a super majority of trust beneficiaries



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61 of the class that made the objection, or the resolution of the
62 objection pursuant to paragraph (c).

63 (b) An objection or consent under this section may be
64 executed by a legal representative or natural guardian of a
65 beneficiary without the filing of any proceeding or approval of
66 any court.

67 (c) If an objection is delivered to the trustee, then the
68 trustee may petition the circuit court for an order quashing the
69 objection and vesting in such trustee the power to adjust under
70 this section. The burden will be on the objecting beneficiaries
71 to prove that the power to adjust would be inequitable, illegal,
72 or otherwise in contravention of the grantor's intent. The court
73 may award costs and attorney's fees relating to the trustee's
74 petition in the same manner as in chancery actions. When costs
75 and attorney's fees are to be paid out of the trust, the court
76 may, in its discretion, direct from which part of the trust they
77 shall be paid.

78 (d) If no timely objection is made or if the trustee is
79 vested with the power to adjust by court order, the trustee may
80 thereafter exercise the power to adjust without providing notice
81 of its intent to do so unless, in vesting the trustee with the
82 power to adjust, the court determines that unusual circumstances
83 require otherwise.

84 (e)1. If a trustee makes a good faith effort to comply
85 with the notice provisions of subsection (9), but fails to
86 deliver notice to one or more beneficiaries entitled to such
87 notice, neither the validity of the notice required under this
88 subsection nor the trustee's power to adjust under this section
89 shall be affected until the trustee has actual notice that one
90 or more beneficiaries entitled to notice were not notified.



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91 Until the trustee has actual notice of the notice deficiency,
 92 the trustee shall have all of the powers and protections granted
 93 a trustee with the power to adjust under this chapter.

94 2. When the trustee has actual notice that one or more
 95 beneficiaries entitled to notice under subsection (9) were not
 96 notified, the trustee's power to adjust under this section shall
 97 cease until all beneficiaries who are entitled to such notice,
 98 including those who were previously provided with such notice,
 99 are notified and given the opportunity to object as provided for
 100 under this subsection.

101 (f) The objection of a super majority of beneficiaries
 102 under this subsection shall be valid for a period of 1 year
 103 after the date of the notice set forth in subsection (9). Upon
 104 expiration of the objection, the trustee may thereafter give a
 105 new notice under subsection (9).

106 (g) Nothing in this section is intended to create or imply
 107 a duty of the trustee of a trust existing on January 1, 2003, to
 108 seek a power to adjust pursuant to this subsection or to give
 109 the notice described in subsection (9) if the trustee does not
 110 desire to have a power to adjust under this section, and no
 111 inference of impropriety shall be made as the result of a
 112 trustee not seeking a power to adjust pursuant to this
 113 subsection.

114 (9)(a) A trustee of a trust in existence on January 1,
 115 2003, that is not prohibited under subsection (3) from
 116 exercising the power to adjust shall, any time prior to
 117 initially exercising the power, provide to all reasonably
 118 ascertainable current beneficiaries described in s.
 119 737.303(4)(b)1. and all reasonably ascertainable remainder



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120 beneficiaries described in s. 737.303(4)(b)2. a statement
 121 containing the following:

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

125 2. A statement that unless a super majority of the
 126 beneficiaries objects to the application of this section to the
 127 trust within 60 days after the date the statement pursuant to
 128 this subsection was served, s. 738.104 shall apply to the trust;
 129 and

130 3. A statement that, if s. 738.104 applies to the trust,
 131 the trustee will have the power to adjust between income and
 132 principal and that such a power may have an effect on the
 133 distributions to such beneficiary from the trust.

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

137 (c) The statement referred to in this subsection shall be
 138 served informally, in the manner provided in the Florida Rules
 139 of Civil Procedure relating to service of pleadings subsequent
 140 to the initial pleading. The statement may be served on a legal
 141 representative or natural guardian of a beneficiary without the
 142 filing of any proceeding or approval of any court.

143 (d) For purposes of subsection (8) and this subsection, a
 144 "super majority of the trust beneficiaries" means at least two-
 145 thirds in interest of the reasonably ascertainable current
 146 beneficiaries described in s. 737.303(4)(b)1. or two-thirds in
 147 interest of the reasonably ascertainable remainder beneficiaries
 148 described in s. 737.303(4)(b)2., if the interests of the



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149 beneficiaries are reasonably ascertainable; otherwise, it means
150 two-thirds in number of either such class.

151 Section 2. Paragraph (d) of subsection (1), paragraphs
152 (b), (c), and (e) of subsection (2), and paragraph (c) of
153 subsection (12) of section 738.1041, Florida Statutes, are
154 amended to read:

155 738.1041 Total return unitrust.--

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

157 (d) "Interested trustee" means an individual trustee to
158 whom the net income or principal of the trust can currently be
159 distributed or would be distributed if the trust were then to
160 terminate and be distributed, any trustee whom ~~who may be~~
161 ~~removed and replaced by~~ an interested distributee has the power
162 to remove and replace with a related or subordinate party as
163 defined in paragraph (c), or an individual trustee whose legal
164 obligation to support a beneficiary may be satisfied by
165 distributions of income and principal of the trust.

166 (2) A trustee may, without court approval, convert an
167 income trust to a total return unitrust, reconvert a total
168 return unitrust to an income trust, or change the percentage
169 used to calculate the unitrust amount or the method used to
170 determine the fair market value of the trust if:

171 (b)1. The trustee determines, or if there is no trustee
172 other than an interested trustee, the trustee appoints a
173 disinterested person who, in its sole discretion but acting in a
174 fiduciary capacity, determines for the trustee:

175 a. The percentage to be used to calculate the unitrust
176 amount, provided the percentage used is not greater than 5
177 percent nor less than 3 percent;



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178 b. The method to be used in determining the fair market
179 value of the trust; and

180 c. Which assets, if any, are to be excluded in determining
181 the unitrust amount; or

182 2. The trustee administers the trust such that:

183 a. The percentage used to calculate the unitrust amount is
184 50 percent of the applicable federal rate as defined in the
185 Internal Revenue Code, 26 U.S.C. s. 7520, in effect for the
186 month the conversion under this section becomes effective and
187 for each January thereafter; however, if the percentage
188 calculated exceeds 5 percent, the unitrust percentage shall
189 never be greater than 5 percent and if the percentage calculated
190 is ~~not~~ less than 3 percent, the unitrust percentage shall be 3
191 percent; and

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

197 (I) Any residential property or any tangible personal
198 property that, as of the first business day of the current
199 valuation year, one or more current beneficiaries of the trust
200 have or have had the right to occupy, or have or have had the
201 right to possess or control (other than in his or her capacity
202 as trustee of the trust), and instead the right of occupancy or
203 the right to possession and control shall be deemed to be the
204 unitrust amount with respect to such property; however, the
205 unitrust amount shall be adjusted to take into account partial
206 distributions from or receipt into the trust of such property
207 during the valuation year.



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208 (II) Any asset specifically given to a beneficiary and the
 209 return on investment on such property, which return on
 210 investment shall be distributable to such beneficiary.

211 (III) Any asset while held in a testator's estate;

212 (c) The trustee sends written notice of its intention to
 213 take such action, along with copies of such written statement
 214 and this section, and, if applicable, the determinations of
 215 either the trustee or the disinterested person to:

- 216 1. The grantor of the trust, if living.
- 217 2. All living persons who are currently receiving or
 218 eligible to receive distributions of income of the trust.
- 219 3. All living persons who would receive distributions of
 220 principal of the trust if the trust were to terminate at the
 221 time of the giving of such notice (without regard to the
 222 exercise of any power of appointment) or, if the trust does not
 223 provide for its termination, all living persons who would
 224 receive or be eligible to receive distributions of income or
 225 principal of the trust if the persons identified in subparagraph
 226 2. were deceased.
- 227 4. All persons acting as advisers or protectors of the
 228 trust.

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 230 Notice under this paragraph shall be served informally, in the
 231 manner provided in the Florida Rules of Civil Procedure relating
 232 to service of pleadings subsequent to the initial pleading.
 233 Notice may be served on a legal representative or natural
 234 guardian of a person without the filing of any proceeding or
 235 approval of any court;

236 (e) No person receiving such notice objects, by written
 237 instrument delivered to the trustee, to the proposed action of



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238 the trustee or the determinations of the disinterested person
 239 within 60 days after receipt of such notice. An objection under
 240 this section may be executed by a legal representative or
 241 natural guardian of a person without the filing of any
 242 proceeding or approval of any court.

243 (12) This section shall be construed as pertaining to the
 244 administration of a trust and shall be available to any trust
 245 that is administered in this state under Florida law unless:

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

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

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

254 Section 3. Subsection (5) of section 738.202, Florida
 255 Statutes, is amended to read:

256 738.202 Distribution to residuary and remainder
 257 beneficiaries.--

258 (5) The value of trust assets shall be determined on an
 259 asset-by-asset basis and shall be conclusive if reasonable and
 260 determined in good faith. Determinations based on appraisals
 261 performed within 2 years before or after the valuation date
 262 shall be presumed reasonable. The value of trust assets shall be
 263 conclusively presumed to be reasonable and determined in good
 264 faith unless proven otherwise in a proceeding commenced by or on
 265 behalf of a person interested in the trust within the time
 266 provided in s. 737.307.



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267 Section 4. Paragraph (d) of subsection (3) of section
268 738.401, Florida Statutes, is amended to read:

269 738.401 Character of receipts.--

270 (3) A trustee shall allocate the following receipts from
271 an entity to principal:

272 (d) Money received from an entity that is a regulated
273 investment company or a real estate investment trust if the
274 money distributed represents ~~a distribution of~~ short-term or
275 long-term capital gain realized within the entity ~~for federal~~
276 ~~income tax purposes.~~

277 Section 5. This act shall take effect upon becoming a law
278 and shall apply retroactively to January 1, 2003.