

House Bill No. 585

An act relating to the Florida Uniform Principal and Income Act; creating ss. 738.101, 738.102, 738.103, 738.104, 738.1041, 738.105, 738.201, 738.202, 738.301, 738.302, 738.303, 738.401, 738.402, 738.403, 738.501, 738.502, 738.503, 738.504, 738.601, 738.602, 738.603, 738.604, 738.605, 738.606, 738.607, 738.608, 738.701, 738.702, 738.703, 738.704, 738.705, 738.706, 738.801, 738.802, 738.803, and 738.804, F.S.; providing a short title; providing definitions; specifying a fiduciary's duties; providing general principles; providing a trustee's power to adjust between principal and income; providing for a unitrust alternative to certain trusts where the power to adjust is unavailable or not exercised; providing requirements, criteria, and procedures; providing for judicial control of certain discretionary powers; providing limitations; providing for determinations and distributions of net income; providing requirements; providing for distributions to residuary and remainder beneficiaries; providing for apportionment at beginning and end of an income interest; providing for entitlement to a right to income; providing for apportionment of receipts and disbursements under certain circumstances; providing for allocation of trust receipts during administration; specifying character of receipts; providing for distributions from trust or estate; providing for separate accounting by trustee of certain businesses or activities; providing for allocation of certain receipts not normally apportioned; providing for allocation of certain normally apportioned receipts; providing for allocation of disbursements from income and principal during administration of a trust; providing for certain transfers from income under certain circumstances; providing for payment of certain taxes; providing for adjustments between principal and income due to taxes; providing for uniform application and construction; providing severability; providing for application with respect to apportionment of expenses and improvements; providing for application; repealing ss. 738.01, 738.02, 738.03, 738.04, 738.05, 738.06, 738.07, 738.08, 738.09, 738.10, 738.11, 738.12, 738.13, 738.14, and 738.15, F.S., relating to principal and income of trusts; providing an effective date.

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

Section 1. Sections 738.101, 738.102, 738.103, 738.104, 738.1041, 738.105, 738.201, 738.202, 738.301, 738.302, 738.303, 738.401, 738.402, 738.403, 738.501, 738.502, 738.503, 738.504, 738.601, 738.602, 738.603, 738.604, 738.605, 738.606, 738.607, 738.608, 738.701, 738.702, 738.703, 738.704, 738.705, 738.706, 738.801, 738.802, 738.803, and 738.804, Florida Statutes, are created to read:

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

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

(1) “Accounting period” means a calendar year unless another 12-month period is selected by a fiduciary. The term includes a portion of a calendar year or other 12-month period that begins when an income interest begins or ends when an income interest ends.

(2) “Beneficiary” means, in the case of a decedent’s estate, an heir or devisee and, in the case of a trust, an income beneficiary or a remainder beneficiary.

(3) “Fiduciary” means a personal representative or a trustee. The term includes an executor, administrator, successor personal representative, special administrator, or a person performing substantially the same function.

(4) “Income” means money or property that a fiduciary receives as current return from a principal asset. The term includes a portion of receipts from a sale, exchange, or liquidation of a principal asset, to the extent provided in ss. 738.401-738.403 and s. 738.503.

(5) “Income beneficiary” means a person to whom net income of a trust is or may be payable.

(6) “Income interest” means the right of an income beneficiary to receive all or part of net income, whether the terms of the trust require the net income to be distributed or authorize the net income to be distributed in the trustee’s discretion.

(7) “Mandatory income interest” means the right of an income beneficiary to receive net income that the terms of the trust require the fiduciary to distribute.

(8) “Net income” means the total receipts allocated to income during an accounting period minus the disbursements made from income during the period, plus or minus transfers under this chapter to or from income during the period.

(9) “Person” means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, or any other legal or commercial entity or a government or governmental subdivision, agency, or instrumentality.

(10) “Principal” means property held in trust for distribution to a remainder beneficiary when the trust terminates.

(11) “Remainder beneficiary” means a person entitled to receive principal when an income interest ends.

(12) “Terms of a trust” means the manifestation of the intent of a grantor or decedent with respect to the trust, expressed in a manner that admits of its proof in a judicial proceeding, whether by written or spoken words or by conduct.

(13) "Trustee" includes an original, additional, or successor trustee, whether or not appointed or confirmed by a court.

738.103 Fiduciary duties; general principles.—

(1) In allocating receipts and disbursements to or between principal and income, and with respect to any matter within the scope of ss. 738.201 and 738.202 and ss. 738.301-738.303, a fiduciary:

(a) Shall administer a trust or estate in accordance with the terms of the trust or the will, even if there is a different provision in this chapter.

(b) May administer a trust or estate by the exercise of a discretionary power of administration given to the fiduciary by the terms of the trust or the will, even if the exercise of the power produces a result different from a result required or permitted by this chapter.

(c) Shall administer a trust or estate in accordance with this chapter if the terms of the trust or the will do not contain a different provision or do not give the fiduciary a discretionary power of administration.

(d) Shall add a receipt or charge a disbursement to principal to the extent the terms of the trust and this chapter do not provide a rule for allocating the receipt or disbursement to or between principal and income.

(2) In exercising the power to adjust under s. 738.104(1) or a discretionary power of administration regarding a matter within the scope of this chapter, whether granted by the terms of a trust, a will, or this chapter, a fiduciary shall administer a trust or estate impartially, based on what is fair and reasonable to all of the beneficiaries, except to the extent the terms of the trust or the will clearly manifest an intention that the fiduciary shall or may favor one or more of the beneficiaries. A determination in accordance with this chapter is presumed to be fair and reasonable to all of the beneficiaries.

738.104 Trustee's power to adjust.—

(1) A trustee may adjust between principal and income to the extent the trustee considers necessary if the trustee invests and manages trust assets as a prudent investor, the terms of the trust describe the amount that may or shall be distributed to a beneficiary by referring to the trust's income, and the trustee determines, after applying the rules in s. 738.103(1), that the trustee is unable to comply with s. 738.103(2).

(2) In deciding whether and to what extent to exercise the power conferred by subsection (1), a trustee shall consider all factors relevant to the trust and its beneficiaries, including the following factors to the extent they are relevant:

(a) The nature, purpose, and expected duration of the trust.

(b) The intent of the grantor.

(c) The identity and circumstances of the beneficiaries.

(d) The needs for liquidity, regularity of income, and preservation and appreciation of capital.

(e) The assets held in the trust; the extent to which the assets consist of financial assets, interests in closely held enterprises, tangible and intangible personal property, or real property; the extent to which an asset is used by a beneficiary; and whether an asset was purchased by the trustee or received from the grantor.

(f) The net amount allocated to income under the other sections of this chapter and the increases or decreases in the value of the principal assets, which the trustee may estimate as to assets for which market values are not readily available.

(g) Whether and to what extent the terms of the trust give the trustee the power to invade principal or accumulate income or prohibit the trustee from invading principal or accumulating income and the extent to which the trustee has exercised a power from time to time to invade principal or accumulate income.

(h) The actual and anticipated effect of economic conditions on principal and income and effects of inflation and deflation.

(i) The anticipated tax consequences of an adjustment.

(3) A trustee may not make an adjustment:

(a) That diminishes the income interest in a trust that requires all of the income to be paid at least annually to a spouse and for which an estate tax or gift tax marital deduction would be allowed, in whole or in part, if the trustee did not have the power to adjust;

(b) That reduces the actuarial value of the income interest in a trust to which a person transfers property with the intent to qualify for a gift tax exclusion;

(c) That changes the amount payable to a beneficiary as a fixed annuity or a fixed fraction of the value of the trust assets;

(d) From any amount that is permanently set aside for charitable purposes under a will or the terms of a trust unless both income and principal are so set aside;

(e) If possessing or exercising the power to adjust causes an individual to be treated as the owner of all or part of the trust for income tax purposes and the individual would not be treated as the owner if the trustee did not possess the power to adjust;

(f) If possessing or exercising the power to adjust causes all or part of the trust assets to be included for estate tax purposes in the estate of an individual who has the power to remove a trustee or appoint a trustee, or both, and

the assets would not be included in the estate of the individual if the trustee did not possess the power to adjust;

(g) If the trustee is a beneficiary of the trust; or

(h) If the trustee is not a beneficiary of the trust but the adjustment would benefit the trustee directly or indirectly.

(4) If paragraph (3)(e), paragraph (3)(f), paragraph (3)(g), or paragraph (3)(h) applies to a trustee and there is more than one trustee, a cotrustee to whom the provision does not apply may make the adjustment unless the exercise of the power by the remaining trustee is not permitted by the terms of the trust.

(5) A trustee may release the entire power to adjust conferred by subsection (1) or may release only the power to adjust from income to principal or the power to adjust from principal to income if the trustee is uncertain about whether possessing or exercising the power will cause a result described in paragraphs (3)(a)-(f) or paragraph (3)(h) or if the trustee determines that possessing or exercising the power will or may deprive the trust of a tax benefit or impose a tax burden not described in subsection (3). The release may be permanent or for a specified period, including a period measured by the life of an individual.

(6) Terms of a trust that limit a trustee's power to adjust between principal and income do not affect the application of this section unless it is clear from the terms of the trust that the terms are intended to deny the trustee the power to adjust conferred by subsection (1).

(7) Nothing in this chapter is intended to create or imply a duty to make an adjustment and no inference of impropriety shall be made as a result of a trustee not exercising the power to adjust conferred by subsection (1).

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

(a) A trustee shall not have the power to adjust under this section if, within 60 days after the date of the statement required in subsection (9), a super majority of the trust beneficiaries deliver to the trustee a written objection to the application of this section to such trust. An objection shall be deemed to be delivered to the trustee on the date the objection is mailed to the mailing address listed in the notice provided in subsection (9).

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

(c) If an objection is delivered to the trustee, then the trustee may petition the circuit court for an order quashing the objection and vesting in such trustee the power to adjust under this section. The burden will be on the objecting beneficiaries to prove that the power to adjust would be inequitable, illegal, or otherwise in contravention of the grantor's intent. The court may award costs and attorney's fees relating to the trustee's petition in the same manner as in chancery actions. When costs and attorney's fees are to

be paid out of the trust, the court may, in its discretion, direct from which part of the trust they shall be paid.

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

(e)1. If a trustee makes a good faith effort to comply with the notice provisions of subsection (9), but fails to deliver notice to one or more beneficiaries entitled to such notice, neither the validity of the notice required under this subsection nor the trustee's power to adjust under this section shall be affected until the trustee has actual notice that one or more beneficiaries entitled to notice were not notified. Until the trustee has actual notice of the notice deficiency, the trustee shall have all of the powers and protections granted a trustee with the power to adjust under this chapter.

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

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

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

(9)(a) A trustee of a trust in existence on January 1, 2003, that is not prohibited under subsection (3) from exercising the power to adjust shall, any time prior to initially exercising the power, provide to all reasonably ascertainable current beneficiaries described in s. 737.303(4)(b)1. and all reasonably ascertainable remainder beneficiaries described in s. 737.303(4)(b)2. a statement containing the following:

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

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

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

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

(c) The statement referred to in this subsection shall be served informally, in the manner provided in the Florida Rules of Civil Procedure relating to service of pleadings subsequent to the initial pleading.

(d) For purposes of subsection (8) and this subsection, a "super majority of the trust beneficiaries" means at least two-thirds in interest of the reasonably ascertainable current beneficiaries described in s. 737.303(4)(b)1. or two-thirds in interest of the reasonably ascertainable remainder beneficiaries described in s. 737.303(4)(b)2., if the interests of the beneficiaries are reasonably ascertainable; otherwise, it means two-thirds in number of either such class.

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

738.1041 Total return unitrust.—

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

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

(b) "Income trust" means a trust, created by either an inter vivos or a testamentary instrument, which directs or permits the trustee to distribute the net income of the trust to one or more persons, either in fixed proportions or in amounts or proportions determined by the trustee. Notwithstanding the foregoing, no trust that otherwise is an "income trust" shall qualify hereunder, if it may be subject to taxation under the Internal Revenue Code, 26 U.S.C. s. 2001 or s. 2501, until the expiration of the period for filing the return therefor, including extensions.

(c) "Interested distributee" means a person to whom distributions of income or principal can currently be made who has the power to remove the existing trustee and designate as successor a person who may be a "related or subordinate party," as defined in the Internal Revenue Code, 26 U.S.C. s. 672(c), with respect to such distributee.

(d) "Interested trustee" means an individual trustee to whom the net income or principal of the trust can currently be distributed or would be

distributed if the trust were then to terminate and be distributed, any trustee who may be removed and replaced by an interested distributee, or an individual trustee whose legal obligation to support a beneficiary may be satisfied by distributions of income and principal of the trust.

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

(a) The trustee adopts a written statement regarding trust distributions that provides:

1. In the case of a trust being administered as an income trust, that future distributions from the trust will be unitrust amounts rather than net income, and indicates the manner in which the unitrust amount will be calculated and the method in which the fair market value of the trust will be determined.

2. In the case of a trust being administered as a total return unitrust, that:

a. Future distributions from the trust will be net income rather than unitrust amounts; or

b. The percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust will be changed, and indicates the manner in which the new unitrust amount will be calculated and the method in which the new fair market value of the trust will be determined;

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

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

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

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

2. The trustee administers the trust such that:

a. The percentage used to calculate the unitrust amount is 50 percent of the applicable federal rate as defined in the Internal Revenue Code, 26 U.S.C. s. 7520, in effect for the month the conversion under this section becomes effective and for each January thereafter; however, the percentage shall never be greater than 5 percent nor less than 3 percent; and

b. The fair market value of the trust shall be determined at least annually on an asset-by-asset basis, reasonably and in good faith, in accordance

with the provisions of s. 738.202(5), except the following property shall not be included in determining the value of the trust:

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

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

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

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

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

Notice under this paragraph shall be served informally, in the manner provided in the Florida Rules of Civil Procedure relating to service of pleadings subsequent to the initial pleading;

(d) At least one person receiving notice under each of subparagraphs (c)2. and 3. is legally competent; and

(e) No person receiving such notice objects, by written instrument delivered to the trustee, to the proposed action of the trustee or the determinations of the disinterested person within 60 days after receipt of such notice.

(3) If a trustee desires to convert an income trust to a total return unitrust, reconvert a total return unitrust to an income trust, or change the percentage used to calculate the unitrust amount or the method used to determine a fair market value of the trust but does not have the ability to or elects not to do it under subsection (2), the trustee may petition the circuit

court for such order as the trustee deems appropriate. In that event, the court, in its own discretion or on the petition of such trustee or any person having an income or remainder interest in the trust, may appoint a disinterested person who, acting in a fiduciary capacity, shall present such information to the court as shall be necessary for the court to make a determination hereunder.

(4) All determinations made pursuant to sub-subparagraph (2)(b)2.b. shall be conclusive if reasonable and made in good faith. Such determination shall be conclusively presumed to have been made reasonably and in good faith unless proven otherwise in a proceeding commenced by or on behalf of a person interested in the trust within the time provided in s. 737.307. The burden will be on the objecting interested party to prove that the determinations were not made reasonably and in good faith.

(5) The unitrust amount shall not be less than the net income of the trust, determined without regard to the provisions of subsection (6), for:

(a) A trust for which a marital deduction has been taken for federal tax purposes under the Internal Revenue Code, 26 U.S.C. s. 2056 or s. 2523, during the lifetime of the spouse for whom the trust was created; or

(b) A trust to which the generation-skipping transfer tax due under the Internal Revenue Code, 26 U.S.C. s. 2601 does not apply by reason of any effective date or transition rule.

Paragraph (a) will not apply to any trust to the extent that the use of a total return unitrust is recognized for federal tax purposes under the Internal Revenue Code, 26 U.S.C. s. 2056 or s. 2523. Paragraph (b) will not apply to any trust to the extent that the use of a total return unitrust is recognized for federal tax purposes under the Internal Revenue Code, 26 U.S.C. s. 2601.

(6) Following the conversion of an income trust to a total return unitrust, the trustee:

(a) Shall treat the unitrust amount as if it were net income of the trust for purposes of determining the amount available, from time to time, for distribution from the trust.

(b) May allocate to trust income for each taxable year of the trust, or portion thereof:

1. Net short-term capital gain described in the Internal Revenue Code, 26 U.S.C. s. 1222(5), for such year, or portion thereof, but only to the extent that the amount so allocated together with all other amounts allocated to trust income, as determined under the provisions of this chapter without regard to this section and s. 738.104, for such year, or portion thereof, does not exceed the unitrust amount for such year, or portion thereof.

2. Net long-term capital gain described in the Internal Revenue Code, 26 U.S.C. s. 1222(7), for such year, or portion thereof, but only to the extent that the amount so allocated together with all other amounts, including amounts described in subparagraph 1., allocated to trust income for such year, or

portion thereof, does not exceed the unitrust amount for such year, or portion thereof.

(7) In administering a total return unitrust, the trustee may, in its sole discretion but subject to the provisions of the governing instrument, determine:

(a) The effective date of the conversion.

(b) The timing of distributions, including provisions for prorating a distribution for a short year in which a beneficiary's right to payments commences or ceases.

(c) Whether distributions are to be made in cash or in kind or partly in cash and partly in kind.

(d) If the trust is reconverted to an income trust, the effective date of such reconversion.

(e) Such other administrative issues as may be necessary or appropriate to carry out the purposes of this section.

(8) Conversion to a total return unitrust under the provisions of this section shall not affect any other provision of the governing instrument, if any, regarding distributions of principal.

(9) In the case of a trust for which a marital deduction has been taken for federal tax purposes under the Internal Revenue Code, 26 U.S.C. s. 2056 or s. 2523, the spouse otherwise entitled to receive the net income of the trust shall have the right, by written instrument delivered to the trustee, to compel the reconversion during his or her lifetime of the trust from a total return unitrust to an income trust, notwithstanding anything in this section to the contrary, unless the use of a total return unitrust is recognized for federal tax purposes under the Internal Revenue Code, 26 U.S.C. s. 2056 or s. 2523.

(10) Any trustee or disinterested person who in good faith takes or fails to take any action under this section shall not be liable to any person affected by such action or inaction, regardless of whether such person received written notice as provided in this section and regardless of whether such person was under a legal disability at the time of the delivery of such notice. Such person's exclusive remedy shall be to obtain, under subsection (11), an order of the court directing the trustee to convert an income trust to a total return unitrust, to reconvert from a total return unitrust to an income trust, or to change the percentage used to calculate the unitrust amount.

(11) If a majority in interest of either the income or remainder beneficiaries of an income trust has delivered to the trustee a written objection to the amount of the income distributions of the trust, and, if the trustee has failed to resolve the objection to the satisfaction of the objecting beneficiaries within 6 months from the receipt of such written objection, then the objecting beneficiaries may petition the court in accordance with subsection (3).

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

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

(b) The trust is a trust described in the Internal Revenue Code, 26 U.S.C. s. 170(f)(2)(B), s. 642(c)(5), s. 664(d), s. 1361(d), s. 2702(a)(3), or s. 2702(b);

(c) One or more persons to whom the trustee could distribute income have a power of withdrawal over the trust that is not subject to an ascertainable standard under the Internal Revenue Code, 26 U.S.C. s. 2041 or s. 2514, or that can be exercised to discharge a duty of support he or she possesses;

(d) The governing instrument expressly prohibits use of this section by specific reference to the section. A provision in the governing instrument that, "The provisions of section 738.1041, Florida Statutes, as amended, or any corresponding provision of future law, shall not be used in the administration of this trust," or similar words reflecting such intent shall be sufficient to preclude the use of this section; or

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

738.105 Judicial control of discretionary powers.—

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

(2) The decisions to which subsection (1) applies include:

(a) A determination under s. 738.104(1) of whether and to what extent an amount should be transferred from principal to income or from income to principal.

(b) A determination of the factors that are relevant to the trust and trust beneficiaries, the extent to which such factors are relevant, and the weight, if any, to be given to the relevant factors, in deciding whether and to what extent to exercise the power conferred by s. 738.104(1).

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

(a) To the extent the abuse of discretion has resulted in no distribution to a beneficiary or a distribution that is too small, the court shall require the fiduciary to distribute from the trust to the beneficiary an amount the court

determines will restore the beneficiary, in whole or in part, to his or her appropriate position.

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

(c) To the extent the court is unable, after applying paragraphs (a) and (b), to restore the beneficiaries, the trust, or both, to the positions they would have occupied if the fiduciary had not abused its discretion, the court may require the fiduciary to pay an appropriate amount from its own funds to one or more of the beneficiaries or the trust or both.

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

(5) If an action is instituted alleging an abuse of discretion in the exercise or nonexercise of the power of adjustment conferred by s. 738.104(1) and the court determines that no abuse of discretion has occurred, the trustee's costs and attorney's fees incurred in defending the action shall be paid from the trust assets.

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

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

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

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

(b) Paying from income or principal, in the fiduciary's discretion, fees of attorneys, accountants, and fiduciaries; court costs and other expenses of

administration; and interest on death taxes, but the fiduciary may pay those expenses from income of property passing to a trust for which the fiduciary claims an estate tax marital or charitable deduction only to the extent the payment of those expenses from income will not cause the reduction or loss of the deduction.

(c) Paying from principal all other disbursements made or incurred in connection with the settlement of a decedent's estate or the winding up of a terminating income interest, including debts, funeral expenses, disposition of remains, family allowances, and death taxes and related penalties that are apportioned to the estate or terminating income interest by the will, the terms of the trust, or applicable law.

(3) A fiduciary shall distribute to a beneficiary who receives a pecuniary amount outright the interest or any other amount provided by the will, the terms of the trust, or applicable law from net income determined under subsection (2) or from principal to the extent net income is insufficient. If a beneficiary is to receive a pecuniary amount outright from a trust after an income interest ends and no interest or other amount is provided for by the terms of the trust or applicable law, the fiduciary shall distribute the interest or other amount to which the beneficiary would be entitled under applicable law if the pecuniary amount were required to be paid under a will.

(4) A fiduciary shall distribute the net income remaining after distributions required by subsection (3) in the manner described in s. 738.202 to all other beneficiaries, including a beneficiary who receives a pecuniary amount in trust, even if the beneficiary holds an unqualified power to withdraw assets from the trust or other presently exercisable general power of appointment over the trust.

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

738.202 Distribution to residuary and remainder beneficiaries.—

(1) Each beneficiary described in s. 738.201(4) is entitled to receive a portion of the net income equal to the beneficiary's fractional interest in undistributed principal assets, using values as of the distribution date. If a fiduciary makes more than one distribution of assets to beneficiaries to whom this section applies, each beneficiary, including one who does not receive part of the distribution, is entitled, as of each distribution date, to the net income the fiduciary has received after the date of death or terminat-

ing event or earlier distribution date but has not distributed as of the current distribution date.

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

(a) The beneficiary is entitled to receive a portion of the net income equal to the beneficiary's fractional interest in the undistributed principal assets immediately before the distribution date, including assets that later may be sold to meet principal obligations.

(b) The beneficiary's fractional interest in the undistributed principal assets shall be calculated without regard to property specifically given to a beneficiary and property required to pay pecuniary amounts not in trust.

(c) The beneficiary's fractional interest in the undistributed principal assets shall be calculated on the basis of the aggregate value of those assets as of the distribution date without reducing the value by any unpaid principal obligation.

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

(3) If a fiduciary does not distribute all of the collected but undistributed net income to each person as of a distribution date, the fiduciary shall maintain appropriate records showing the interest of each beneficiary in that net income.

(4) A fiduciary may apply the rules in this section, to the extent the fiduciary considers appropriate, to net gain or loss realized after the date of death or terminating event or earlier distribution date from the disposition of a principal asset if this section applies to the income from the asset.

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

738.301 When right to income begins and ends.—An income beneficiary is entitled to net income from the date on which the income interest begins.

(1) An income interest begins on the date specified in the terms of the trust or, if no date is specified, on the date an asset becomes subject to a trust or successive income interest.

(2) An asset becomes subject to a trust:

(a) On the date the asset is transferred to the trust in the case of an asset that is transferred to a trust during the transferor's life;

(b) On the date of a testator's death in the case of an asset that becomes subject to a trust by reason of a will, even if there is an intervening period of administration of the testator's estate; or

(c) On the date of an individual's death in the case of an asset that is transferred to a fiduciary by a third party because of the individual's death.

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

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

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

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

(2) A trustee shall allocate an income receipt or disbursement to income if the due date of the receipt or disbursement occurs on or after the date on which a decedent dies or an income interest begins and the due date is a periodic due date. An income receipt or disbursement shall be treated as accruing from day to day if the due date of the receipt or disbursement is not periodic or the receipt or disbursement has no due date. The portion of the receipt or disbursement accruing before the date on which a decedent dies or an income interest begins shall be allocated to principal and the balance shall be allocated to income.

(3) An item of income or an obligation is due on the date the payor is required to make a payment. If a payment date is not stated, there is no due date for the purposes of this chapter. Distributions to shareholders or other owners from an entity to which s. 738.401 applies are deemed to be due on the date fixed by the entity for determining who is entitled to receive the distribution or, if no date is fixed, on the declaration date for the distribution. A due date is periodic for receipts or disbursements that shall be paid at regular intervals under a lease or an obligation to pay interest or if an entity customarily makes distributions at regular intervals.

(4) Nothing in this section shall prevent the application of s. 733.817 to apportion tax to the income recipient under this section.

738.303 Apportionment when income interest ends.—

(1) For purposes of this section, "undistributed income" means net income received before the date on which an income interest ends. The term does not include an item of income or expense that is due or accrued or net

income that has been added or is required to be added to principal under the terms of the trust.

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

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

738.401 Character of receipts.—

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

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

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

(a) Property other than money.

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

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

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

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

(5) Money is received in partial liquidation:

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

(b) If the total amount of money and property received in a distribution or series of related distributions is greater than 20 percent of the entity's gross assets, as shown by the entity's year-end financial statements immediately preceding the initial receipt.

(6) Money is not received in partial liquidation, nor may money be taken into account under paragraph (5)(b), to the extent such money does not exceed the amount of income tax a trustee or beneficiary must pay on taxable income of the entity that distributes the money.

(7) A trustee may rely upon a statement made by an entity about the source or character of a distribution if the statement is made at or near the time of distribution by the entity's board of directors or other person or group of persons authorized to exercise powers to pay money or transfer property comparable to those of a corporation's board of directors.

738.402 Distribution from trust or estate.—A trustee shall allocate to income an amount received as a distribution of income from a trust or an estate in which the trust has an interest other than a purchased interest and shall allocate to principal an amount received as a distribution of principal from such a trust or estate. If a trustee purchases an interest in a trust that is an investment entity, or a decedent or donor transfers an interest in such a trust to a trustee, s. 738.401 or s. 738.608 applies to a receipt from the trust.

738.403 Business and other activities conducted by trustee.—

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

(2) A trustee who accounts separately for a business or other activity may determine the extent to which the net cash receipts of such business or activity must be retained for working capital, the acquisition or replacement of fixed assets, and other reasonably foreseeable needs of the business or activity, and the extent to which the remaining net cash receipts are accounted for as principal or income in the trust's general accounting records. If a trustee sells assets of the business or other activity, other than in the ordinary course of the business or activity, the trustee shall account for the net amount received as principal in the trust's general accounting records to the extent the trustee determines that the amount received is no longer required in the conduct of the business.

(3) Activities for which a trustee may maintain separate accounting records include:

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

- (b) Farming.
- (c) Raising and selling livestock and other animals.
- (d) Management of rental properties.
- (e) Extraction of minerals and other natural resources.
- (f) Timber operations.
- (g) Activities to which s. 738.608 applies.

738.501 Principal receipts.—A trustee shall allocate to principal:

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

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

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

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

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

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

738.502 Rental property.—To the extent a trustee accounts for receipts from rental property pursuant to this section, the trustee shall allocate to income an amount received as rent of real or personal property, including an amount received for cancellation or renewal of a lease. An amount received as a refundable deposit, including a security deposit or a deposit that is to be applied as rent for future periods, shall be added to principal and held subject to the terms of the lease and is not available for distribution to a beneficiary until the trustee's contractual obligations have been satisfied with respect to that amount.

738.503 Obligation to pay money.—

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

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

(3) The increment in value of a bond or other obligation for the payment of money bearing no stated interest but payable at a future time in excess of the price at which it was issued or purchased, if purchased after issuance, is distributable as income. If the increment in value accrues and becomes payable pursuant to a fixed schedule of appreciation, it may be distributed to the beneficiary who was the income beneficiary at this time of increment from the first principal cash available or, if none is available, when the increment is realized by sale, redemption, or other disposition. When unrealized increment is distributed as income but out of principal, the principal shall be reimbursed for the increment when realized. If, in the reasonable judgment of the trustee, exercised in good faith, the ultimate payment of the bond principal is in doubt, the trustee may withhold the payment of incremental interest to the income beneficiary.

(4) This section does not apply to an obligation to which s. 738.602, s. 738.603, s. 738.604, s. 738.605, s. 738.607, or s. 738.608 applies.

738.504 Insurance policies and similar contracts.—

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

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

(3) This section does not apply to a contract to which s. 738.602 applies.

738.601 Insubstantial allocations not required.—If a trustee determines that an allocation between principal and income required by s. 738.602, s. 738.603, s. 738.604, s. 738.605, or s. 738.608 is insubstantial, the trustee may allocate the entire amount to principal unless one of the circumstances described in s. 738.104(3) applies to the allocation. This power may be exercised by a cotrustee in the circumstances described in s. 738.104(4) and may be released for the reasons and in the manner described in s. 738.104(5). An allocation is presumed to be insubstantial if:

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

(2) The value of the asset producing the receipt for which the allocation would be made is less than 10 percent of the total value of the trust's assets at the beginning of the accounting period.

738.602 Deferred compensation, annuities, and similar payments.—

(1) For purposes of this section, “payment” means a payment that a trustee may receive over a fixed number of years or during the life of one or more individuals because of services rendered or property transferred to the payor in exchange for future payments. The term includes a payment made in money or property from the payor’s general assets or from a separate fund created by the payor, including a private or commercial annuity, an individual retirement account, and a pension, profit-sharing, stock-bonus, or stock-ownership plan.

(2) With respect to payments that may be characterized as interest, dividends, or their equivalent:

(a) A trustee shall allocate to income in the following order:

1. First, payments characterized by the payor as interest or dividends or as a payment made in lieu of interest or dividends.

2. Second, all other payments to the extent that the trustee, reasonably and in good faith, determines that such payments represent interest, dividends, or their equivalent.

(b) A trustee shall allocate to principal the balance of any payment not characterized as, or otherwise determined to be, interest, dividends, or their equivalent.

(3) If no part of a payment is characterized as, or otherwise determined to be, interest, a dividend, or an equivalent payment and all or part of the payment is required to be made, a trustee shall allocate to income 10 percent of the part that is required to be made during the accounting period and the balance to principal. If no part of a payment is required to be made or the payment received is the entire amount to which the trustee is entitled, the trustee shall allocate the entire payment to principal. For purposes of this subsection, a payment is not “required to be made” to the extent the payment is made because the trustee exercises a right of withdrawal.

(4) If, to obtain an estate tax marital deduction for a trust, a trustee must allocate more of a payment to income than provided for by this section, the trustee shall allocate to income the additional amount necessary to obtain the marital deduction.

(5) This section does not apply to payments to which s. 738.603 applies.

738.603 Liquidating asset.—

(1) For purposes of this section, “liquidating asset” means an asset the value of which will diminish or terminate because the asset is expected to produce receipts for a period of limited duration. The term includes a leasehold, patent, copyright, royalty right, and right to receive payments during a period of more than 1 year under an arrangement that does not provide for the payment of interest on the unpaid balance. The term does not include a payment subject to s. 738.602, resources subject to s. 738.604, timber

subject to s. 738.605, an activity subject to s. 738.607, an asset subject to s. 738.608, or any asset for which the trustee establishes a reserve for depreciation under s. 738.703.

(2) A trustee shall allocate to income 10 percent of the receipts from a liquidating asset and the balance to principal.

738.604 Minerals, water, and other natural resources.—

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

(a) If received as nominal delay rental or nominal annual rent on a lease, a receipt shall be allocated to income.

(b) If received from a production payment, a receipt shall be allocated to income if and to the extent the agreement creating the production payment provides a factor for interest or its equivalent. The balance shall be allocated to principal.

(c) If an amount received as a royalty, shut-in-well payment, take-or-pay payment, bonus, or delay rental is more than nominal, 90 percent shall be allocated to principal and the balance to income.

(d) If an amount is received from a working interest or any other interest not provided for in paragraph (a), paragraph (b), or paragraph (c), 90 percent of the net amount received shall be allocated to principal and the balance to income.

(2) An amount received on account of an interest in water that is renewable shall be allocated to income. If the water is not renewable, 90 percent of the amount shall be allocated to principal and the balance to income.

(3) This chapter applies whether or not a decedent or donor was extracting minerals, water, or other natural resources before the interest became subject to the trust.

(4) If a trust owns an interest in minerals, water, or other natural resources on January 1, 2003, the trustee may allocate receipts from the interest as provided in this chapter or in the manner used by the trustee before January 1, 2003. If the trust acquires an interest in minerals, water, or other natural resources after January 1, 2003, the trustee shall allocate receipts from the interest as provided in this chapter.

738.605 Timber.—

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

(a) To income to the extent the amount of timber removed from the land does not exceed the rate of growth of the timber during the accounting periods in which a beneficiary has a mandatory income interest;

(b) To principal to the extent the amount of timber removed from the land exceeds the rate of growth of the timber or the net receipts are from the sale of standing timber;

(c) To or between income and principal if the net receipts are from the lease of timberland or from a contract to cut timber from land owned by a trust by determining the amount of timber removed from the land under the lease or contract and applying the rules in paragraphs (a) and (b); or

(d) To principal to the extent advance payments, bonuses, and other payments are not allocated pursuant to paragraph (a), paragraph (b), or paragraph (c).

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

(3) This chapter applies whether or not a decedent or transferor was harvesting timber from the property before the property became subject to the trust.

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

738.606 Property not productive of income.—

(1) If a marital deduction is allowed for all or part of a trust the income of which is required to be distributed to the grantor's spouse and the assets of which consist substantially of property that does not provide the spouse with sufficient income from or use of the trust assets, and if the amounts the trustee transfers from principal to income under s. 738.104 and distributes to the spouse from principal pursuant to the terms of the trust are insufficient to provide the spouse with the beneficial enjoyment required to obtain the marital deduction, the spouse may require the trustee to make property productive of income, convert property within a reasonable time, or exercise the power conferred by ss. 738.104 and 738.1041. The trustee may decide which action or combination of actions to take.

(2) In cases not governed by subsection (1), proceeds from the sale or other disposition of an asset are principal without regard to the amount of income the asset produces during any accounting period.

738.607 Derivatives and options.—

(1) For purposes of this section, "derivative" means a contract or financial instrument or a combination of contracts and financial instruments which gives a trust the right or obligation to participate in some or all changes in the price of a tangible or intangible asset or group of assets, or changes in a rate, an index of prices or rates, or other market indicator for an asset or a group of assets.

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

(3) If a trustee grants an option to buy property from the trust whether or not the trust owns the property when the option is granted, grants an option that permits another person to sell property to the trust, or acquires an option to buy property for the trust or an option to sell an asset owned by the trust, and the trustee or other owner of the asset is required to deliver the asset if the option is exercised, an amount received for granting the option shall be allocated to principal. An amount paid to acquire the option shall be paid from principal. A gain or loss realized upon the exercise of an option, including an option granted to a grantor of the trust for services rendered, shall be allocated to principal.

738.608 Asset-backed securities.—

(1) For purposes of this section, “asset-backed security” means an asset the value of which is based upon the right given the owner to receive distributions from the proceeds of financial assets that provide collateral for the security. The term includes an asset that gives the owner the right to receive from the collateral financial assets only the interest or other current return or only the proceeds other than interest or current return. The term does not include an asset to which s. 738.401 or s. 738.602 applies.

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

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

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

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

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

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

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

738.702 Disbursements from principal.—

(1) A trustee shall make the following disbursements from principal:

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

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

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

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

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

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

(g) Disbursements related to environmental matters, including reclamation, assessing environmental conditions, remedying and removing environmental contamination, monitoring remedial activities and the release of substances, preventing future releases of substances, collecting amounts from persons liable or potentially liable for the costs of such activities, penalties imposed under environmental laws or regulations and other payments made to comply with those laws or regulations, statutory or common law claims by third parties, and defending claims based on environmental matters.

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

(2) If a principal asset is encumbered with an obligation that requires income from that asset to be paid directly to the creditor, the trustee shall transfer from principal to income an amount equal to the income paid to the creditor in reduction of the principal balance of the obligation.

738.703 Transfers from income to principal for depreciation.—

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

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

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

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

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

(3) The amount of depreciation taken for tax purposes with respect to an asset shall be presumed to be a reasonable amount of depreciation. An amount taken for depreciation shall not be considered unreasonable solely because it is greater or less than the amount taken for tax purposes.

(4) An amount transferred to principal need not be held as a separate fund.

738.704 Transfers from income to reimburse principal.—

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

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

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

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

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

(3) If the asset the ownership of which gives rise to the disbursements becomes subject to a successive income interest after an income interest ends, a trustee may continue to transfer amounts from income to principal as provided in subsection (1).

(4) To the extent principal cash is not sufficient to pay the principal balance of payments due on mortgaged property, income may be applied to such payment in order to avoid a default on any mortgage or security interest securing the property. Income shall be reimbursed for such payments out of the first available principal cash. If the asset the ownership of which gives rise to the disbursements described in this subsection becomes subject to a successive income interest after an income interest ends, all rights of the initial income interest shall lapse, and amounts remaining due from principal shall not be a lien on the assets of the trust.

738.705 Income taxes.—

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

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

(3) A tax required to be paid by a trustee on the trust's share of an entity's taxable income shall be paid proportionately:

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

(b) From principal to the extent:

1. Receipts from the entity are allocated to principal; and

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

(4) For purposes of this section, receipts allocated to principal or income shall be reduced by the amount distributed to a beneficiary from principal or income for which the trust receives a deduction in calculating the tax.

738.706 Adjustments between principal and income because of taxes.—

(1) A fiduciary may make adjustments between principal and income to offset the shifting of economic interests or tax benefits between income beneficiaries and remainder beneficiaries which arise from:

(a) Elections and decisions, other than those described in paragraph (b), that the fiduciary makes from time to time regarding tax matters;

(b) An income tax or any other tax that is imposed upon the fiduciary or a beneficiary as a result of a transaction involving or a distribution from the estate or trust; or

(c) The ownership by an estate or trust of an interest in an entity whose taxable income, whether or not distributed, is includable in the taxable income of the estate, trust, or a beneficiary.

(2) If the amount of an estate tax marital deduction or charitable contribution deduction is reduced because a fiduciary deducts an amount paid from principal for income tax purposes instead of deducting such amount for estate tax purposes, and as a result estate taxes paid from principal are increased and income taxes paid by an estate, trust, or beneficiary are decreased, each estate, trust, or beneficiary that benefits from the decrease in income tax shall reimburse the principal from which the increase in estate tax is paid. The total reimbursement shall equal the increase in the estate tax to the extent the principal used to pay the increase would have qualified for a marital deduction or charitable contribution deduction but for the payment. The proportionate share of the reimbursement for each estate, trust, or beneficiary whose income taxes are reduced shall be the same as such estate's, trust's, or beneficiary's proportionate share of the total decrease in income tax. An estate or trust shall reimburse principal from income.

738.801 Application with respect to apportionment of expenses; improvements.—

(1) The provisions of ss. 738.701-738.705, so far as applicable and excepting those dealing with costs of, or assessments for, improvements to property, shall govern the apportionment of expenses between tenants and remaindermen when no trust has been created, subject to any agreement of the parties or specific direction of the taxing or other statutes, but when either tenant or remainderman has incurred an expense for the benefit of his or her own estate without consent or agreement of the other, he or she shall pay such expense in full.

(2) Subject to the exceptions stated in subsection (1), the cost of, or special taxes or assessments for, an improvement representing an addition of value to property forming part of the principal shall be paid by the tenant when the improvement is not reasonably expected to outlast the estate of the tenant. In all other cases a part only shall be paid by the tenant, while the remainder shall be paid by the remainderman. The part payable by the tenant shall be ascertainable by taking that percentage of the total that is found by dividing the present value of the tenant's estate by the present value of an estate of the same form as that of the tenant except that it is limited for a period corresponding to the reasonably expected duration of the improvement. The computation of present values of the estates shall be made on the expectancy basis set forth in the official mortality tables, and no other evidence of duration or expectancy shall be considered.

738.802 Uniformity of application and construction.—In applying and construing this act, consideration shall be given to the need to promote uniformity of the law with respect to the act's subject matter among states that enact such act.

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

738.804 Application.—Except as provided in the trust instrument, the will, or this chapter, this chapter shall apply to any receipt or expense received or incurred and any disbursement made after January 1, 2003, by any trust or decedent's estate, whether established before or after January 1, 2003, and whether the asset involved was acquired by the trustee or personal representative before or after January 1, 2003. Receipts or expenses received or incurred and disbursements made before January 1, 2003, shall be governed by the law of this state in effect at the time of the event, except as otherwise expressly provided in the will or terms of the trust or in this chapter.

Section 2. Sections 738.01, 738.02, 738.03, 738.04, 738.05, 738.06, 738.07, 738.08, 738.09, 738.10, 738.11, 738.12, 738.13, 738.14, and 738.15, Florida Statutes, are repealed.

Section 3. This act shall take effect January 1, 2003.

Approved by the Governor April 16, 2002.

Filed in Office Secretary of State April 16, 2002.