

CHAPTER 2012-49

Committee Substitute for Senate Bill No. 1050

An act relating to fiduciaries; amending s. 701.04, F.S.; requiring a mortgage holder to provide certain information within a specified time relating to the unpaid loan balance due under a mortgage if a mortgagor, a record title owner of the property, a fiduciary or trustee lawfully acting on behalf of a record title owner, or any person lawfully authorized to act on behalf of a mortgagor or record title owner of the property makes a written request under certain circumstances; allowing financial institutions to release certain mortgagor information to specified persons without penalty; amending s. 738.102, F.S.; defining the term “carrying value”; amending s. 738.103, F.S.; providing for application; amending s. 738.104, F.S.; deleting a provision authorizing a trustee to release the power to adjust between principal and income if the trustee desires to convert the form of certain trusts; limiting the power to adjust a trust; deleting a provision that provides for construction and application relating to the administration of trusts in this state or under this state’s law; amending s. 738.1041, F.S.; defining the term “average fair market value” and revising definition of the term “unitrust amount”; deleting a duplicative provision relating to conclusive determinations of the terms of a unitrust; revising provisions relating to an express total return unitrust; amending s. 738.105, F.S.; substituting the term “trustee” for “fiduciary” with respect to judicial control of discretionary powers; amending s. 738.201, F.S.; revising provisions relating to the determination and distribution of net income; amending s. 738.202, F.S.; revising provisions relating to distributions to residuary and remainder beneficiaries; amending ss. 738.301, 738.302, and 738.303, F.S.; substituting the term “fiduciary” for “trustee” to clarify that provisions apply to all fiduciaries; amending s. 738.401, F.S.; substituting the term “fiduciary” for “trustee” to clarify that provisions apply to all fiduciaries; revising how distributions from entities are allocated between income and principal; amending ss. 738.402, 738.403, 738.501, 738.502, 738.503, 738.504, and 738.601, F.S.; substituting the term “fiduciary” for “trustee” to clarify that provisions apply to all fiduciaries; amending s. 738.602, F.S.; substituting the term “fiduciary” for “trustee” to clarify that provisions apply to all fiduciaries; revising provisions relating to allocations to trusts; amending s. 738.603, F.S.; substituting the term “fiduciary” for “trustee” to clarify that provisions apply to all fiduciaries; revising provisions relating to the allocation between income and principal when liquidating assets; amending ss. 738.604, 738.605, 738.606, 738.607, 738.608, 738.701, 738.702, 738.703, and 738.704, F.S.; substituting the term “fiduciary” for “trustee” to clarify that provisions apply to all fiduciaries; amending s. 738.705, F.S.; substituting the term “fiduciary” for “trustee” to clarify that provisions apply to all fiduciaries; revising the method for allocating income taxes between income and principal; amending s. 738.801, F.S.; clarifying the

apportionment of expenses between tenants and remaindermen; providing an effective date.

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

Section 1. Section 701.04, Florida Statutes, is amended to read:

701.04 Cancellation of mortgages, liens, and judgments.—

(1) Within 14 days after receipt of the written request of a mortgagor, a record title owner of the property, a fiduciary or trustee lawfully acting on behalf of a record title owner, or any other person lawfully authorized to act on behalf of a mortgagor or record title owner of the property, the holder of a mortgage shall deliver or cause the servicer of the mortgage to deliver to the person making the request ~~mortgagor~~ at a place designated in the written request an estoppel letter setting forth the unpaid balance of the loan secured by the mortgage.

(a) If the mortgagor, or any person lawfully authorized to act on behalf of the mortgagor, makes the request, the estoppel letter must include an itemization of the including principal, interest, and any other charges properly due under or secured by the mortgage and interest on a per-day basis for the unpaid balance.

(b) If a record title owner of the property, or any person lawfully authorized to act on behalf of a mortgagor or record title owner of the property, makes the request:

1. The request must include a copy of the instrument showing title in the property or lawful authorization.

2. The estoppel letter may include the itemization of information required under paragraph (a), but must at a minimum include the total unpaid balance due under or secured by the mortgage on a per-day basis.

3. The mortgagee or servicer of the mortgagee acting in accordance with a request in substantial compliance with this paragraph is expressly discharged from any obligation or liability to any person on account of the release of the requested information, other than the obligation to comply with the terms of the estoppel letter.

(c) A mortgage holder may provide the financial information required under this subsection to a person authorized under this subsection to request the financial information notwithstanding s. 655.059.

(2) Whenever the amount of money due on any mortgage, lien, or judgment has been ~~shall be~~ fully paid to the person or party entitled to the payment thereof, the mortgagee, creditor, or assignee, or the attorney of record in the case of a judgment, to whom ~~the such payment was shall have been made,~~ shall execute in writing an instrument acknowledging satisfaction of the said mortgage, lien, or judgment and have the instrument same

acknowledged, or proven, and duly entered of record in the book provided by law for such purposes in the official records of the proper county. Within 60 days after of the date of receipt of the full payment of the mortgage, lien, or judgment, the person required to acknowledge satisfaction of the mortgage, lien, or judgment shall send or cause to be sent the recorded satisfaction to the person who has made the full payment. In the case of a civil action arising out of the ~~provisions of this section~~, the prevailing party is ~~shall be~~ entitled to attorney ~~attorney's~~ fees and costs.

(3)(2) Whenever a writ of execution has been issued, docketed, and indexed with a sheriff and the judgment upon which it was issued has been fully paid, it ~~is shall be~~ the responsibility of the party receiving payment to request, in writing, addressed to the sheriff, return of the writ of execution as fully satisfied.

Section 2. Present subsections (3) through (13) of section 738.102, Florida Statutes, are renumbered as subsections (4) through (14), respectively, and a new subsection (3) is added to that section, to read:

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

(3) “Carrying value” means the fair market value at the time the assets are received by the fiduciary. For the estates of decedents and trusts described in s. 733.707(3), after the grantor’s death, the assets are considered received as of the date of death. If there is a change in fiduciaries, a majority of the continuing fiduciaries may elect to adjust the carrying values to reflect the fair market value of the assets at the beginning of their administration. If such election is made, it must be reflected on the first accounting filed after the election. For assets acquired during the administration of the estate or trust, the carrying value is equal to the acquisition costs of the asset.

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

738.103 Fiduciary duties; general principles.—

(3) Except as provided in s. 738.1041(9), this chapter pertains to the administration of a trust and is applicable to any trust that is administered in this state or under its law. This chapter also applies to any estate that is administered in this state unless the provision is limited in application to a trustee, rather than a fiduciary.

Section 4. Subsections (5) and (11) 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.~~

(b) 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)-(e) or paragraph (3)(g) 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).

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

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

Section 5. Section 738.1041, Florida Statutes, is amended to read:

738.1041 Total return unitrust.—

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

(a) “Average fair market value” means the average of the fair market values of assets held by the trust at the beginning of the current and each of the 2 preceding years, or for the entire term of the trust if there are less than 2 preceding years, and adjusted as follows:

1. If assets have been added to the trust during the years used to determine the average, the amount of each addition is added to all years in which such addition was not included.

2. If assets have been distributed from the trust during the years used to determine the average, other than in satisfaction of the unitrust amount, the amount of each distribution is subtracted from all years in which such distribution was not included.

~~(b)(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. ss. 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.

~~(c)(b)~~ “Fair market value” means the fair market value of the assets held by the trust as otherwise determined under this chapter, reduced by all known noncontingent liabilities.

~~(d)(e)~~ “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 and regardless of whether the trust directs or permits the trustee to distribute the principal of the trust to one or more such persons.

(e)(d) “Interested distributee” means a person to whom distributions of income or principal can currently be made and 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(e),~~ with respect to such distributee.

(f)(e) “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 whom an interested distributee has the power to remove and replace with a related or subordinate party ~~as defined in paragraph (d),~~ or an individual trustee whose legal obligation to support a beneficiary may be satisfied by distributions of income and principal of the trust.

(g) “Related or subordinate party” has the same meaning as provided in 26 U.S.C. s. 672(c) of the Internal Revenue Code, or any successor provision thereof.

(h)(f) “Unitrust amount” means the amount determined by multiplying the average fair market value of the assets as calculated ~~defined~~ in paragraph (a) (b) by the percentage calculated under paragraph (2)(b).

(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 which ~~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) The trustee determines the terms of the unitrust under one of the following methods:

1. A disinterested trustee determines, or if there is no trustee other than an interested trustee, the interested trustee appoints a disinterested person who, in its sole discretion but acting in a fiduciary capacity, determines for the interested 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 interested trustee or disinterested 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, if the percentage calculated exceeds 5 percent, the unitrust percentage ~~is shall be~~ 5 percent and if the percentage calculated is less than 3 percent, the unitrust percentage ~~is shall be~~ 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 is shall be deemed to be~~ the unitrust amount with respect to such property; however, the unitrust amount ~~must 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 the ~~such~~ beneficiary; ~~or~~;

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

(c) The trustee sends written notice of its intention to take such action, along with copies of the ~~such~~ written statement regarding trust distributions

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 from ~~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. Notice may be served on a legal representative or natural guardian of a person without the filing of any proceeding or approval of any court;

(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 service of such notice. An objection ~~under this section~~ may be executed by a legal representative or natural guardian of a person without the filing of any proceeding or approval of any court.

(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 is ~~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. 736.1008. The~~

~~burden will be on the objecting interested party to prove that the determinations were not made reasonably and in good faith.~~

~~(4)(5)~~ 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.

~~(5)(6)~~ 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.

~~(6)(7)~~ Conversion to a total return unitrust under the provisions of this section does shall not affect any other provision of the governing instrument, if any, regarding distributions of principal.

~~(7)(8)~~ Any trustee or disinterested person who in good faith takes or fails to take any action under this section is 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 or ~~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 is ~~shall be~~ to obtain, under subsection (8) ~~(9)~~, 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. If a court determines that the trustee or disinterested person has not acted in good faith in taking or failing to take any action under this section, ~~the provisions of s. 738.105(3) apply~~ applies apply.

~~(8)(9)~~ 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 after ~~from~~ the receipt of such written objection, ~~then~~ the objecting beneficiaries may petition the court in accordance with subsection (3).

~~(9)(10)~~ This section pertains ~~shall be construed as pertaining~~ to the administration of a trust and is applicable to any trust that is administered either in this state or 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. 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:

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

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

(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, may ~~shall~~ not be used in the administration of this trust," or similar words reflecting such intent are ~~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.~~

~~(10)(11)~~ The grantor of a trust may create an express total return unitrust ~~that which will be become~~ effective as provided in the trust instrument document without requiring a conversion under this section.

~~(a)~~ An express total return unitrust created by the grantor of the trust ~~is shall be~~ treated as a unitrust ~~under this section~~ only if the terms of the trust instrument document contain all of the following provisions:

~~1.(a)~~ That distributions from the trust will be unitrust amounts and 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.(b)~~ 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 trust instrument may also contain provisions specifying:

~~1.(c)~~ The method to be used in determining the fair market value of the trust, including whether to use an average fair market value or the fair market value of the assets held by the trust at the beginning of the current year; or-

~~2.(d)~~ Which assets, if any, are to be excluded in determining the unitrust amount.

(c) This section establishes the method of determining the fair market value of the trust if the trust instrument is silent as to subparagraph (b)1., and to specify those assets, if any, which are to be excluded in determining the unitrust amount if the trust instrument is silent as to subparagraph (b)2.

Section 6. Subsections (1), (3), and (4) of section 738.105, Florida Statutes, are amended to read:

738.105 Judicial control of discretionary powers.—

(1) A court may ~~shall~~ not change a trustee's 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 trustee's fiduciary's discretion. A court may ~~shall~~ not determine that a trustee fiduciary abused its discretion merely because the court would have exercised the discretion in a different manner or would not have exercised the discretion.

(3) If a court determines that a trustee fiduciary has abused its discretion, the remedy is ~~shall be~~ to restore the income and remainder beneficiaries to the positions they would have occupied if the trustee

fiduciary had not abused its discretion, in accordance with ~~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 trustee ~~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 trustee ~~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 or, the trust, or both, to the positions they would have occupied if the trustee ~~fiduciary~~ had not abused its discretion, the court may require the trustee ~~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 trustee ~~fiduciary~~, the court having jurisdiction over the trust ~~or estate~~ shall determine whether a proposed exercise or nonexercise by the trustee ~~fiduciary~~ of a discretionary power conferred by this chapter will result in an abuse of the trustee's ~~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 trustee ~~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.

Section 7. Subsections (1) through (4) of section 738.201, Florida Statutes, are amended to read:

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 under the Internal Revenue Code or comparable law of any state 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) ~~If A fiduciary shall distribute to a beneficiary who receives a pecuniary devise amount outright is also entitled to receive the interest or any other amount on the devise under the terms of provided by the will or, the terms of the trust, the fiduciary shall distribute the interest or other amount 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 under subsections (1)-(3) ~~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.

Section 8. Section 738.202, Florida Statutes, is amended to read:

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 remaining after the application of s. 738.201(1)-(3), which is equal to the beneficiary's fractional interest in undistributed principal assets, using carrying 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 terminating 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 applies ~~rules apply~~:

(a) The beneficiary is entitled to receive a portion of the net income equal to the beneficiary's fractional interest in the carrying value of the undistributed principal assets immediately before the distribution date, excluding the amount of unpaid liabilities ~~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~~

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

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

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

4.(e) The beneficiary's fractional interest in the undistributed principal assets shall be calculated On the basis of the aggregate carrying value of those assets determined under subsection (1) as of the distribution date without reducing the value by any unpaid principal obligation.

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

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

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

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

~~(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 provisions of 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 carrying value or fair market value of trust assets shall be determined on an asset-by-asset basis and ~~are shall be~~ conclusive if reasonable and determined in good faith. Determinations of fair market value based on appraisals performed within 2 years before or after the valuation date ~~are shall be~~ presumed reasonable. The values value of trust assets ~~are 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. 736.1008.

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

Section 9. Subsection (4) of section 738.301, Florida Statutes, is amended to read:

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.

(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 fiduciary trustee may distribute income.

Section 10. Subsections (1) and (2) of section 738.302, Florida Statutes, are amended to read:

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

(1) A fiduciary ~~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 fiduciary ~~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.

Section 11. Subsections (2) and (3) of section 738.303, Florida Statutes, are amended to read:

738.303 Apportionment when income interest ends.—

(2) When a mandatory income interest ends, the fiduciary ~~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 fiduciary's ~~trustee's~~ obligation to pay a fixed annuity or a fixed fraction of the value of the trust's assets ends, the fiduciary ~~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.

Section 12. Section 738.401, Florida Statutes, is amended to read:

738.401 Character of receipts.—

(1) For purposes of this section, the term “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 fiduciary ~~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 fiduciary ~~trustee~~ shall allocate to income money received from an entity.

(3) Except as otherwise provided in this section, a fiduciary ~~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 or estate'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 received distributed represents short-term or long-term capital gain realized within the entity.

(e) Money received from an entity listed on a public stock exchange during any year of the trust or estate which exceeds 10 percent of the fair market value of the trust's or estate's interest in the entity on the first day of that year. The amount to be allocated to principal must be reduced to the extent that the cumulative distributions from the entity to the trust or estate allocated to income does not exceed a cumulative annual return of 3 percent of the fair market value of the interest in the entity at the beginning of each year or portion of a year for the number of years or portion of years in the period that the interest in the entity has been held by the trust or estate. If a trustee has exercised a power to adjust under s. 738.104 during any period the interest in the entity has been held by the trust, the trustee, in determining the total income distributions from that entity, must take into account the extent to which the exercise of that power resulted in income to the trust from that entity for that period. If the income of the trust for any period has been computed under s. 738.1041, the trustee, in determining the total income distributions from that entity for that period, must take into account the portion of the unitrust amount paid as a result of the ownership of the trust's interest in the entity for that period.

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

This subsection does not apply to an entity to which subsection (7) applies.

(6) ~~Money may not is not received in partial liquidation, nor may money be taken into account in determining any excess under paragraph (5)(b), to the extent that the cumulative distributions from the entity to the trust or the estate allocated to income do not exceed the greater of: 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.~~

(a) A cumulative annual return of 3 percent of the entity's carrying value computed at the beginning of each period for the number of years or portion of years that the entity was held by the fiduciary. If a trustee has exercised a power to adjust under s. 738.104 during any period the interest in the entity has been held by the trust, the trustee, in determining the total income distributions from that entity, must take into account the extent to which exercise of the power resulted in income to the trust from that entity for that period. If the income of a trust for any period has been computed pursuant to s. 738.1041, the trustee, in determining the total income distributions from the entity for that period, must take into account the portion of the unitrust amount paid as a result of the ownership of the trust's interest in the entity for that period; or

(b) If the entity is treated as a partnership, subchapter S corporation, or a disregarded entity pursuant to the Internal Revenue Code of 1986, as amended, the amount of income tax attributable to the trust's or estate's ownership share of the entity, based on its pro rata share of the taxable income of the entity that distributes the money, for the number of years or portion of years that the interest in the entity was held by the fiduciary, calculated as if all of that tax was incurred by the fiduciary.

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

(a) The trustee shall first treat as income of the trust all of the money or property received from the investment entity in the current year which would be considered income under this chapter if the trustee had directly held the trust's pro rata share of the assets of the investment entity. For this purpose, all distributions received in the current year must be aggregated.

(b) The trustee shall next treat as income of the trust any additional money or property received in the current year which would have been considered income in the prior 2 years under paragraph (a) if additional money or property had been received from the investment entity in any of those prior 2 years. The amount to be treated as income shall be reduced by any distributions of money or property made by the investment entity to the trust during the current and prior 2 years which were treated as income under this paragraph.

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

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

1. "Investment entity" means an entity, other than a business activity conducted by the trustee described in s. 738.403 or an entity that is listed on a public stock exchange, which is treated as a partnership, subchapter S corporation, or disregarded entity pursuant to the Internal Revenue Code of 1986, as amended, and which normally derives 50 percent or more of its annual cumulative net income from interest, dividends, annuities, royalties,

rental activity, or other passive investments, including income from the sale or exchange of such passive investments.

2. “Private trustee” means a trustee who is a natural person, but only if the trustee is unable to use the power to adjust between income and principal with respect to receipts from entities described in this subsection pursuant to s. 738.104. A bank, trust company, or other commercial trustee is not considered a private trustee.

(8) This section shall be applied before ss. 738.705 and 738.706 and does not modify or change any of the provisions of those sections.

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

~~(b) If trust assets include any interest in an investment entity, the designated amount of moneys or property received from the investment entity shall be treated by the trustee in the same manner as if the trustee had directly held the trust’s pro rata share of the assets of the investment entity attributable to the distribution of such designated amount. Thereafter, distributions shall be treated as principal.~~

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

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

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

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

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

~~3. “Investment entity” means a targeted entity that normally derives 50 percent or more of its annual cumulative net income from interest, dividends,~~

annuities, royalties, rental activity, or other passive investments, including income from the sale or exchange of such passive investments.

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

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

6. “Undistributed cumulative net income” means the trust’s pro rata share of cumulative net income, less all prior distributions from the targeted entity to the trust that have been allocated to income.

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

(8) A trustee may rely upon a statement made by an entity about the source or character of a distribution, about the amount of profits of a targeted entity, or about the nature and value of assets of an investment entity 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.

Section 13. Section 738.402, Florida Statutes, is amended to read:

738.402 Distribution from trust or estate.—A fiduciary 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 fiduciary 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 fiduciary trustee, s. 738.401 or s. 738.608 applies to a receipt from the trust.

Section 14. Section 738.403, Florida Statutes, is amended to read:

738.403 Business and other activities conducted by fiduciary trustee.—

(1) If a fiduciary 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 or estate’s general accounting records, the fiduciary trustee may maintain separate accounting records for the transactions of the such business or other activity, whether or not the assets of such business or activity are segregated from other trust or estate assets.

(2) A fiduciary trustee who accounts separately for a business or other activity may determine the extent to which the net cash receipts of the ~~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 or estate's general accounting records. If a fiduciary trustee sells assets of the business or other activity, other than in the ordinary course of the business or activity, the fiduciary must ~~trustee shall~~ account for the net amount received as principal in the trust's or estate's general accounting records to the extent the fiduciary ~~trustee~~ determines that the amount received is no longer required in the conduct of the business.

(3) Activities for which a fiduciary 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. 738.607 ~~738.608~~ applies.

Section 15. Section 738.501, Florida Statutes, is amended to read:

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

(1) To the extent not allocated to income under this chapter, assets received from a donor transferor during the donor's ~~transferor's~~ lifetime, a decedent's estate, a trust with a terminating income interest, or a payor under a contract naming the trust, estate, or fiduciary 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 or estate 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; however, ~~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 fiduciary trustee may or shall distribute income.

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

Section 16. Section 738.502, Florida Statutes, is amended to read:

738.502 Rental property.—~~If To the extent~~ a fiduciary trustee accounts for receipts from rental property pursuant to this section, the fiduciary 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, must ~~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 fiduciary's trustee's contractual obligations have been satisfied with respect to that amount.

Section 17. Subsections (1), (2), and (3) of section 738.503, Florida Statutes, are amended to read:

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 fiduciary 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 fiduciary trustee shall allocate to principal an amount received from the sale, redemption, or other disposition of an obligation to pay money to the fiduciary 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 the ~~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. ~~If~~ When unrealized increment is distributed as income but out of principal, the principal must ~~shall~~ be reimbursed for the increment when realized. If, in the reasonable judgment of the fiduciary trustee, exercised in good faith, the ultimate payment of the bond principal is in doubt, the fiduciary trustee may withhold the payment of incremental interest to the income beneficiary.

Section 18. Subsections (1) and (2) of section 738.504, Florida Statutes, are amended to read:

738.504 Insurance policies and similar contracts.—

(1) Except as otherwise provided in subsection (2), a fiduciary trustee shall allocate to principal the proceeds of a life insurance policy or other contract in which the trust, estate, or fiduciary ~~its trustee~~ is named as beneficiary, including a contract that insures the trust, estate, or fiduciary ~~its trustee~~ against loss for damage to, destruction of, or loss of title to a trust or estate asset. The fiduciary 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 fiduciary trustee shall allocate to income the proceeds of a contract that insures the fiduciary 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.

Section 19. Section 738.601, Florida Statutes, is amended to read:

738.601 Insubstantial allocations not required.—If a fiduciary 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 fiduciary 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 cofiduciary under 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 or estate ~~trust's~~ assets at the beginning of the accounting period.

Section 20. Section 738.602, Florida Statutes, is amended to read:

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

(1) As used in ~~For purposes of this section, the term:~~

(a) “Fund” means a private or commercial annuity, an individual retirement account, an individual retirement annuity, a deferred compensation plan, a pension plan, a profit-sharing plan, a stock-bonus plan, an employee stock-ownership plan, or another similar arrangement in which federal income tax is deferred.

(b) “Income of the fund” means income that is determined according to subsection (2) or subsection (3).

(c) “Nonseparate account” means a fund for which the value of the participant’s or account owner’s right to receive benefits can be determined only by the occurrence of a date or event as defined in the instrument governing the fund.

(d) “Payment” means a distribution from a fund that a fiduciary 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 distribution made in money or property from the payor’s general assets or from a fund created by the payor or payee.

(e) “Separate account” means a fund holding assets exclusively for the benefit of a participant or account owner and:

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

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

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

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

2. As a unitrust amount calculated by multiplying the fair market value of the fund as of the first day of the first accounting period and, thereafter, as of the last day of the accounting period that immediately precedes the accounting period during which a payment is received by the percentage determined in accordance with s. 738.1041(2)(b)2.a. The fiduciary trustee shall determine such percentage as of the first month that the fiduciary’s trustee’s election to treat the income of the fund as a unitrust amount becomes effective. For purposes of this subparagraph, “fair market value” means the fair market value of the assets held in the fund as of the applicable valuation date determined as provided in this subparagraph. The fiduciary trustee is not liable for good faith reliance upon any valuation supplied by the person or persons in possession of the fund. If the fiduciary trustee makes or terminates an election under this subparagraph, the fiduciary trustee shall make such disclosure in a trust disclosure document that satisfies the requirements of s. 736.1008(4)(a).

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

(3) For a fund that is a nonseparate account, income of the fund is a unitrust amount determined by calculating the present value of the right to receive the remaining payments under 26 U.S.C. s. 7520 of the Internal

Revenue Code as of the first day of the accounting period and multiplying it by the percentage determined in accordance with s. 738.1041(2)(b)2.a. The fiduciary trustee shall determine the unitrust amount as of the first month that the fiduciary's trustee's election to treat the income of the fund as a unitrust amount becomes effective.

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

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

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

(c) ~~If the trustee, acting reasonably and in good faith, determines that neither paragraph (a) nor paragraph (b) applies and all or part of the payment is required to be made, the trustee shall allocate to income 10 percent of the portion of the payment that is required to be made during the accounting period and shall allocate 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 paragraph, a payment is not "required to be made" to the extent the payment is made because the trustee exercises a right of withdrawal.~~

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

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

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

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

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

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

Section 21. Section 738.603, Florida Statutes, is amended to read:

738.603 Liquidating asset.—

(1) For purposes of this section, the term “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 ~~for 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 fiduciary trustee establishes a reserve for depreciation under s. 738.703.

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

Section 22. Subsections (1), (3), and (4) of section 738.604, Florida Statutes, are amended to read:

738.604 Minerals, water, and other natural resources.—

(1) ~~If To the extent~~ a fiduciary trustee accounts for receipts from an interest in minerals or other natural resources pursuant to this section, the fiduciary 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.

(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 or estate.

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

Section 23. Section 738.605, Florida Statutes, is amended to read:

738.605 Timber.—

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

(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 or estate 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 fiduciary trustee shall deduct and transfer to principal a reasonable amount for depletion.

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

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

Section 24. Subsection (1) of section 738.606, Florida Statutes, is amended to read:

738.606 Property not productive of income.—

(1) If a marital deduction under the Internal Revenue Code or comparable law of any state is allowed for all or part of a trust the income of which must 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.

Section 25. Subsections (2) and (3) of section 738.607, Florida Statutes, are amended to read:

738.607 Derivatives and options.—

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

(3) If a fiduciary trustee grants an option to buy property from the trust or estate whether or not the trust or estate owns the property when the option is granted, grants an option that permits another person to sell property to the trust or estate, or acquires an option to buy property for the trust or estate or an option to sell an asset owned by the trust or estate, and the fiduciary 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 or estate for services rendered, shall be allocated to principal.

Section 26. Subsections (2) and (3) of section 738.608, Florida Statutes, are amended to read:

738.608 Asset-backed securities.—

(2) If a trust or estate receives a payment from interest or other current return and from other proceeds of the collateral financial assets, the fiduciary 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 or estate receives one or more payments in exchange for the trust's or estate's entire interest in an asset-backed security during a single accounting period, the fiduciary 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 or estate's interest in the security over more than a single accounting period, the fiduciary trustee shall allocate 10 percent of the payment to income and the balance to principal.

Section 27. Section 738.701, Florida Statutes, is amended to read:

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

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

Section 28. Subsection (1) of section 738.702, Florida Statutes, is amended to read:

738.702 Disbursements from principal.—

(1) A fiduciary 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 will, or to protect the trust, estate, or its property.
- (e) Premiums paid on a policy of insurance not described in s. 738.701(4) of which the trust or estate 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 fiduciary trustee may establish an allowance for depreciation out of income to the extent permitted by s. 738.703.

Section 29. Subsection (2) of section 738.703, Florida Statutes, is amended to read:

738.703 Transfers from income to principal for depreciation.—

(2) A fiduciary 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 fiduciary trustee is accounting under s. 738.403 for the business or activity in which the asset is used.

Section 30. Subsections (1), (2), and (3) of section 738.704, Florida Statutes, are amended to read:

738.704 Transfers from income to reimburse principal.—

(1) If a fiduciary trustee makes or expects to make a principal disbursement described in this section, the fiduciary 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 fiduciary 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 fiduciary trustee may continue to transfer amounts from income to principal as provided in subsection (1).

Section 31. Section 738.705, Florida Statutes, is amended to read:

738.705 Income taxes.—

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

(2) A tax required to be paid by a fiduciary 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 fiduciary trustee on the trust's or estate'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.~~

(c) From principal to the extent that the income taxes payable by the trust or estate exceed the total receipts from the entity.

(4) After applying subsections (1)-(3), the fiduciary shall adjust income or principal receipts to the extent that the trust's or estate's income taxes are reduced, but not eliminated, because the trust or estate receives a deduction for payments made to a beneficiary. The amount distributable to that

beneficiary as income as a result of this adjustment shall be equal to the cash received by the trust or estate, reduced, but not below zero, by the entity's taxable income allocable to the trust or estate multiplied by the trust's or estate's income tax rate. The reduced amount shall be divided by the difference between 1 and the trust's or estate's income tax rate in order to determine the amount distributable to that beneficiary as income before giving effect to other receipts or disbursements allocable to that beneficiary's interest. 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.

Section 32. Section 738.801, Florida Statutes, is amended to read:

(Substantial rewording of section. See s. 738.801, F.S., for present text.)

738.801 Apportionment of expenses; improvements.—

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

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

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

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

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

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

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

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

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

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

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

3. Except as provided in subparagraph (a)3., expenses 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.

4. Extraordinary repairs.

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

(d) Except as provided in paragraph (c), 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 if the improvement is not reasonably expected to outlast the estate of the tenant. In all other cases, only a part shall be paid by the tenant while the remainder shall be paid by the remainderman. The part payable by the tenant is 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 by using the rate defined in 26 U.S.C. s. 7520, then in effect and, in the case of an estate for life, the official mortality tables then in effect under 26 U.S.C. s. 7520. Other evidence of duration or expectancy may not be considered.

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

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

Section 33. This act shall take effect January 1, 2013.

Approved by the Governor April 6, 2012.

Filed in Office Secretary of State April 6, 2012.