

## Senate Bill No. 2450

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

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

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

738.104 Trustee's power to adjust.—

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

~~(b) A trustee or~~ 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).

~~(c) A~~ The 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.

(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 until the statement required in subsection (9) is provided and either no objection is made or any objection which is made has been terminated.

1. An objection is made 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).

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

(b) An objection or consent 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. The statement may be served on a legal representative or natural guardian of a beneficiary without the filing of any proceeding or approval of any court.

(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.

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

738.1041 Total return unitrust.—

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

(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 ~~whom who may be removed and replaced by an interested distributee~~ has the power to remove and replace with a related or subordinate party as defined in paragraph (c), 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:

(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, if the percentage calculated exceeds 5 percent, the unitrust percentage shall never be greater than 5 percent and if the percentage calculated is not less than 3 percent, the unitrust percentage 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 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. 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;

(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. 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.

(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:

(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;

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

738.202 Distribution to residuary and remainder beneficiaries.—

(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 before or 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.

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

738.401 Character of receipts.—

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

(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 realized within the entity for federal income tax purposes.

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

Approved by the Governor May 23, 2003.

Filed in Office Secretary of State May 23, 2003.