



Civil Justice Subcommittee

Wednesday, January 11, 2012

11:30 AM

404 HOB

**Dean Cannon
Speaker**

**Eric Eisnaugle
Chair**

Committee Meeting Notice

HOUSE OF REPRESENTATIVES

Civil Justice Subcommittee

Start Date and Time: Wednesday, January 11, 2012 11:30 am

End Date and Time: Wednesday, January 11, 2012 02:00 pm

Location: 404 HOB

Duration: 2.50 hrs

Consideration of the following bill(s):

HB 243 Expert Testimony by Metz

HB 313 Premises Liability by Bemby

HB 671 Liens on Real Property by Wood

PCS for HB 823 -- Florida Uniform Principal and Income Act

HB 929 Unfair or Deceptive Acts or Practices Involving Motor Vehicles by Gaetz

HB 971 Judiciary by Gaetz

HB 4155 Declaratory Judgments by Stargel

HB 4157 District Courts of Appeal by Stargel

Workshop on Foreclosures

NOTICE FINALIZED on 01/09/2012 16:17 by Jones.Missy

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 243 Expert Testimony
SPONSOR(S): Metz and others
TIED BILLS: None IDEN./SIM. BILLS: SB 378

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee		Caridad	DC Bond NB
2) Judiciary Committee			

SUMMARY ANALYSIS

An expert witness is a person who has developed skill or knowledge in a particular subject, so that he or she may form an opinion that will assist the fact-finder during a hearing or trial. In evaluating whether testimony of a particular expert witness will be admitted in a Florida court, the court looks at whether or not the underlying basic principles of evidence are generally accepted within the scientific community. The standard is known as the *Frye* standard.

This bill rejects the *Frye* standard and provides a three-part test to determine whether or not expert testimony will be admitted in a particular case. This bill adopts a standard commonly referred to as the *Daubert* standard, which requires the court to determine if (1) the testimony is based upon sufficient facts or data; (2) the testimony is the product of reliable principles and methods; and (3) the witness has applied the principles and methods reliably to the facts of the case.

This bill does not appear to have a fiscal impact on state or local government.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Expert Witness

An expert witness is a person, who, through education or experience, has developed skill or knowledge in a particular subject, so that he or she may form an opinion that will assist the fact-finder.¹ Previously, both Federal and Florida courts used the standard established in *Frye v. United States*² to determine whether scientific and expert testimony could be admitted into evidence. In *Frye*, the court established a test regarding admitting expert testimony of new or novel theories. The court held that in order to introduce expert testimony deduced from a scientific principle or discovery, the principle or discovery "must be sufficiently established to have gained general acceptance in the particular field in which it belongs."³ Under the *Frye* standard, a judge must determine that the basic underlying principles of scientific evidence have been tested and accepted by the scientific community.

The Federal Rules of Evidence were formally promulgated in 1975. Federal courts still continued to use the *Frye* standard until 1993, though, when the United States Supreme Court held in *Daubert*⁴ that the *Frye* standard had been superseded by the Federal Rules of Evidence which provides in relevant part that:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.⁵

The Florida Evidence Code was established in 1979 and was patterned after the Federal Rules of Evidence. Section 90.102, F.S., provides that the Florida Evidence Code replaces and supersedes existing statutory or common law in conflict with its provisions. Section 90.702, F.S., relates to the admissibility of expert witness testimony and provides that:

If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to evidence at trial.⁶

Florida courts still use the *Frye* standard, however, for expert testimony.⁷ The Florida Supreme Court held in *Brim v. State* that "despite the federal adoption of a more lenient standard in *Daubert* . . . we have maintained the higher standard of reliability as dictated by *Frye*."⁸

In November 2007, the Florida Supreme Court decided *Marsh v. Valyou*.⁹ In the case, the court addressed a conflict between the 1st and the 5th Florida District Courts of Appeal regarding expert

¹ Bryan A. Garner, *Black's Law Dictionary*, 9th Edition (West Publishing Co. 2009), "expert."

² *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

³ *Id.* at 1013.

⁴ *Daubert v. Merrell Dow Pharmaceuticals*, 509 US. 579 (1993).

⁵ Rule 702, Federal Rules of Evidence.

⁶ Section 90.702, F.S.

⁷ *Flanagan v. State*, 625 So.2d 827 (Fla. 1993); *Hadden v. State*, 690 So.2d 573 (Fla. 1997).

⁸ *Brim v. State*, 695 So.2d 268, 271 (Fla. 1997).

⁹ *Marsh v. Valyou*, 977 So.2d 543 (Fla. 2007).

testimony on fibromyalgia.¹⁰ The court held that the testimony should have come in under pure opinion testimony¹¹ and in the alternative should have also come in under *Frye*. In the concurring opinion, Justice Anstead questioned why Florida still uses the *Frye* standard, stating that "we have never explained how *Frye* has survived the adoption of the rules of evidence."¹² Both the concurring and dissenting opinions concluded that *Frye* was superseded by the adoption of Florida's Evidence Code.

Effect of the Bill

This bill provides a standard regarding witness testimony that is more closely related to *Daubert* and the Federal Code of Evidence than *Frye*. This bill provides a three-part test to be used in determining whether an expert may testify. The test provides that an expert may testify in the particular field in which he or she is qualified in the form of an opinion or otherwise if:

- The testimony is based on sufficient facts or data,
- The testimony is the product of reliable principles and methods, and
- The witness has applied the principles and methods reliably to the facts.

The bill requires the courts of this state to interpret and apply the above requirements and s. 90.704, F.S., in accordance with *Daubert v. Merrel Dow Pharmaceuticals, Inc.*, and subsequent U.S. Supreme Court cases that reaffirm expert witness testimony under the *Daubert* standard. The *Daubert* standard laid out in the bill will also apply to all proposed expert testimony, including pure opinion testimony as discussed in *Marsh v. Valyou*. The bill also provides that *Frye v. United States* and subsequent Florida decisions applying and implementing *Frye* no longer apply to s. 90.702, F.S., or s. 90.704, F.S.

B. SECTION DIRECTORY:

Section 1 amends s. 90.702, F.S., regarding testimony by experts.

Section 2 amends s. 90.704, F.S., regarding the basis of opinion testimony by experts.

Section 3 provides an effective date of July 1, 2011.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None

2. Expenditures:

The change in standard to admit expert opinions in Florida courts may have an impact on the number of pre-trial hearings needed, but it is difficult to estimate due to the unavailability of data needed to quantify any increase or decrease in judicial workload.

In criminal proceedings, the state may incur costs, and it is difficult to affirmatively quantify, in that well-established evidentiary standards in areas involving mental health, substance abuse, cognitive dysfunction, dual diagnosis, psychosis, and other areas litigated in some criminal cases may be expanded beyond the already extensive body of testimony and evidence currently litigated.

¹⁰ Fibromyalgia is a chronic condition characterized by widespread pain in the muscles, ligaments and tendons, as well as fatigue and multiple tender points. See <http://www.mayoclinic.com/health/fibromyalgia/DS00079> (last visited November 28, 2011).

¹¹ Pure opinion testimony is based on the expert's personal experience and training and does not have to meet the *Frye* standard. See *Flanagan*, 625 So. 2d at 828.

¹² *Marsh* at 551.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

There is a balance between enactments of the Legislature and the Florida Supreme Court on matters relating to evidence. The Legislature has enacted and continues to revise ch. 90, F.S. (the Evidence Code), and the Florida Supreme Court tends to adopt these changes as rules. The Florida Supreme Court regularly adopts amendments to the Evidence Code as rules of court when it is determined that the matter is procedural rather than substantive. If the Florida Supreme Court views the changes in this bill as an infringement upon the Court's authority over practice and procedure, it may refuse to adopt the changes in the bill as a rule.¹³

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

¹³ See, e.g., *In re Florida Evidence Code*, 782 So.2d 339 (Fla. 2000) (Florida Supreme Court adopting Evidence Code to the extent it is procedural and rejecting hearsay exception as a rule of court); compare *In re Florida Evidence Code*, 372 So.2d 1369 (Fla. 1979) (Florida Supreme Court adopting Florida Evidence Code to the extent it is procedural), clarified, *In re Florida Evidence Code*, 376 So.2d 1161 (Fla. 1979).

1 A bill to be entitled
 2 An act relating to expert testimony; amending s.
 3 90.702, F.S.; providing that a witness qualified as an
 4 expert by knowledge, skill, experience, training, or
 5 education may testify in the form of an opinion as to
 6 the facts at issue in a case under certain
 7 circumstances; requiring the courts of this state to
 8 interpret and apply the principles of expert testimony
 9 in conformity with specified United States Supreme
 10 Court decisions; subjecting pure opinion testimony to
 11 such requirements; amending s. 90.704, F.S.; providing
 12 that facts or data that are otherwise inadmissible in
 13 evidence may not be disclosed to the jury by the
 14 proponent of the opinion or inference unless the court
 15 determines that the probative value of the facts or
 16 data in assisting the jury to evaluate the expert's
 17 opinion substantially outweighs the prejudicial effect
 18 of the facts or data; providing an effective date.

19
 20 Be It Enacted by the Legislature of the State of Florida:

21
 22 Section 1. Section 90.702, Florida Statutes, is amended to
 23 read:

24 90.702 Testimony by experts.—

25 (1) If scientific, technical, or other specialized
 26 knowledge will assist the trier of fact in understanding the
 27 evidence or in determining a fact in issue, a witness qualified
 28 as an expert by knowledge, skill, experience, training, or

29 education may testify about it in the form of an opinion or
 30 otherwise, if:

31 (a) The testimony is based upon sufficient facts or data;

32 (b) The testimony is the product of reliable principles
 33 and methods; and

34 (c) The witness has applied the principles and methods
 35 reliably to the facts of the case; however, the opinion is
 36 admissible only if it can be applied to evidence at trial.

37 (2) The courts of this state shall interpret and apply the
 38 requirements of subsection (1) and s. 90.704 in accordance with
 39 *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579
 40 *(1993); General Electric Co. v. Joiner*, 522 U.S. 136 *(1997); and*
 41 *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 *(1999). Frye v.*
 42 *United States*, 293 F. 1013 *(D.C. Cir. 1923) and subsequent*
 43 *Florida decisions applying or implementing Frye no longer apply*
 44 *to subsection (1) or s. 90.704. All proposed expert testimony,*
 45 *including pure opinion testimony as discussed in Marsh v.*
 46 *Valyou*, 977 So. 2d 543 *(Fla. 2007), is subject to subsection (1)*
 47 *and s. 90.704.*

48 Section 2. Section 90.704, Florida Statutes, is amended to
 49 read:

50 90.704 Basis of opinion testimony by experts.—The facts or
 51 data upon which an expert bases an opinion or inference may be
 52 those perceived by, or made known to, the expert at or before
 53 the trial. If the facts or data are of a type reasonably relied
 54 upon by experts in the subject to support the opinion expressed,
 55 the facts or data need not be admissible in evidence. Facts or
 56 data that are otherwise inadmissible shall not be disclosed to

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57 | the jury by the proponent of the opinion or inference unless the
58 | court determines that their probative value in assisting the
59 | jury to evaluate the expert's opinion substantially outweighs
60 | their prejudicial effect.

61 | Section 3. This act shall take effect July 1, 2012.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 313 Premises Liability
SPONSOR(S): Bembry and others
TIED BILLS: None **IDEN./SIM. BILLS:** SB 802

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee		Caridad	PC Bond VB
2) Agriculture & Natural Resources Subcommittee			
3) Judiciary Committee			

SUMMARY ANALYSIS

Current law provides that private property owners who offer public opportunities for outdoor recreation on their property have limited liability for incidents occurring on the land if the property owner:

- Does not charge for entry to the property nor conduct commercial or other activity where profit is derived from public patronage on any part of the property; or
- Leases the property to the state for outdoor recreational purposes.

The bill allows private property owners who provide outdoor recreational opportunities on their land to enter into written agreements with the state, as opposed to a lease, and still receive the benefit of the limitation of liability.

The bill also provides limitation of liability protection to private landowners who make their land available to specific persons, as opposed to only the general public, for the purpose of hunting, fishing, or wildlife viewing. To benefit from this limitation of liability, the landowner must provide notice of the liability limits to the person or persons using the land in addition to the current requirement that the landowner make no profit from nor charge a fee for using the land.

This bill does not appear to have a fiscal impact on state or local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Liability to Persons on Land - In General

In tort law, a plaintiff must prove that a lawful duty exists, that the duty was breached, and that the plaintiff suffered damages as a result of the breach. Current tort law related to a landowner's duty to persons on his or her land is governed by the status of the person. There are two basic categories of persons on land: invitees and trespassers.

An invitee is a person who was invited to enter the land. Section 768.075(3)(a)1., F.S., defines invitation to mean "that the visitor entering the premises has an objectively reasonable belief that he or she has been invited or is otherwise welcome on that portion of the real property where injury occurs." A landowner owes certain duties to invitees, and can be sued in tort should the landowner fail a duty and a person is injured due to that failure. The duties owed to most invitees are: the duty to keep property in reasonably safe condition; the duty to warn of concealed dangers which are known or should be known to the property holder, and which the invitee cannot discover through the exercise of due care; and the duty to refrain from wanton negligence or willful misconduct.

A trespasser is any person who is not an invitee. This bill does not affect tort law related to trespassers.

Background

Under current law, a private property owner who provides public opportunities for outdoor recreation on his or her property has limited liability for incidents occurring on the land if the property owner:

- Does not charge for entry to the property nor conduct commercial or other activity where profit is derived from public patronage on any part of the property; or
- Leases the property to the state for outdoor recreational purposes.¹

A private property owner who qualifies under one of these two categories owes no duty of care to keep the property safe for people coming on the land or using the land, and has no duty to warn anyone entering the property about hazardous conditions, structures, or activities on the land. The law also provides that the private landowner is not liable for an injury caused by the acts or omissions of others on the property. However, the statute does not relieve the landowner of liability if there is a deliberate, willful, or malicious injury to persons or property.

Under current law, if a private landowner enters into a lease with the state, he or she may benefit from the liability protections under the statute. However, he or she will not receive protection from any other type of formal agreement for use of the property (i.e. an easement), and arguably has no protection if utilizing something short of a lease (i.e. oral license).²

Private landowners who make their land available to the general public for outdoor recreational activities are also afforded liability protection. However, this protection does not apply in instances where the landowner wishes to make the property available only to individuals or groups of individuals, instead of the general public. By contrast, other neighboring states do provide liability protection to landowners who provide limited public access.³

¹Section 375.251, F.S.

² An easement is "[a]n interest in land owned by another person, consisting in the right to use or control the land, or an area above or below it, for a specific limited purpose (such as to cross it for access to a public road)." Black's Law Dictionary (9th ed. 2009).

³ Georgia and Alabama provide landowner liability protection to landowners who allow people other than the general public to use their land for recreational purposes. *See, e.g.*, s. 51-2-22, GA Code ("Except as specifically recognized by or provided in Code Section 51-3-25, an owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes or to give warning of a dangerous condition, use, structure, or activity on the premises to persons entering for recreational purposes.").

Outdoor recreational purposes include, but are not limited to: hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, water skiing, motorcycling, and visiting historical, archaeological, scenic, or scientific sites.

Effect of Proposed Changes:

The bill amends s. 375.251, F.S., to provide that a private property owner who provides outdoor recreational opportunities on his or her land may enter into other types of "written agreements" with the state, as opposed to only a lease, and still receive the liability protections under the statute. The change also allows the state to execute written agreements with landowners without taking a leasehold interest in the property where the activities are conducted.

This bill also revises s. 375.251, F.S. to provide limitation of liability protection to a private landowner who makes his or her land available to any person — not only the general public — for the purpose of hunting, fishing, or wildlife viewing. To benefit from the limitation of liability, the landowner must provide notice of the liability limits to the person or persons using the land in addition to the current requirement that the landowner make no profit from nor charge a fee for using the land.

B. SECTION DIRECTORY:

Section 1 amends s. 375.251, F.S., regarding limitations on liability for private landowners who make their property available to others for outdoor recreational purposes.

Section 2 provides an effective date of July 1, 2012.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state government revenues.

2. Expenditures:

The bill does not appear to have any impact on state government expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have any impact on the private sector.

D. FISCAL COMMENTS:

There is the potential for a positive fiscal impact on the private sector in the form of reduced litigation. However, individuals using the land will be limited in the lawsuits they can bring against the landowners.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

Tort limitations may implicate judicial review under the access to courts provision of the state constitution. The Florida Supreme Court has held that the current statute does not deny access to courts.⁴

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

⁴ See *Abdin v. Fischer*, 374 So.2d 1379 (1979) (holding that s. 375.251, F.S., limiting liability of owners and lessees who provide the public with a park area for outdoor recreational purposes is a reasonable exercise of legislative power and does not violate Art. 1, s. 21, Fla. Const., regarding access to courts)

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1 A bill to be entitled
 2 An act relating to premises liability; amending s.
 3 375.251, F.S.; providing that an owner or lessee who
 4 makes an area available to another person for hunting,
 5 fishing, or wildlife viewing is entitled to certain
 6 limitations on liability if notice is provided to a
 7 person upon entry to the area; providing that an owner
 8 of an area who enters into a written agreement with
 9 the state for the area to be used for outdoor
 10 recreational purposes is entitled to certain
 11 limitations on liability; deleting a requirement that
 12 the area be leased to the state in order for the
 13 limitations on liability to apply; defining the term
 14 "area"; making technical and grammatical changes;
 15 providing an effective date.

16
 17 Be It Enacted by the Legislature of the State of Florida:

18
 19 Section 1. Section 375.251, Florida Statutes, is amended
 20 to read:

21 375.251 Limitation on liability of persons making
 22 available to public certain areas for recreational purposes
 23 without charge.—

24 (1) The purpose of this section ~~act~~ is to encourage
 25 persons to make land, water areas, and park areas available to
 26 the public ~~land, water areas and park areas~~ for outdoor
 27 recreational purposes by limiting their liability to persons
 28 using these areas ~~going thereon~~ and to third persons who may be

29 | damaged by the acts or omissions of persons using these areas
 30 | ~~going thereon.~~

31 | (2) (a) An owner or lessee who provides the public with an
 32 | ~~a park area or other land~~ for outdoor recreational purposes owes
 33 | no duty of care to keep that ~~park area or land~~ safe for entry or
 34 | use by others, or to give warning to persons entering or going
 35 | on that ~~park area or land~~ of any hazardous conditions,
 36 | structures, or activities on the area thereon. An owner or
 37 | lessee who provides the public with an ~~a park area or other land~~
 38 | for outdoor recreational purposes ~~shall not by providing that~~
 39 | ~~park area or land~~:

40 | 1. Is not ~~be~~ presumed to extend any assurance that the
 41 | ~~such park area or land~~ is safe for any purpose;;

42 | 2. Does not incur any duty of care toward a person who
 43 | goes on the ~~that park area or land~~;; or

44 | 3. Is not ~~Become~~ liable or responsible for any injury to
 45 | persons or property caused by the act or omission of a person
 46 | who goes on the ~~that park area or land~~.

47 | (b) Notwithstanding the inclusion of the term "public" in
 48 | this subsection and subsection (1), an owner or lessee who makes
 49 | available to any person an area primarily for the purposes of
 50 | hunting, fishing, or wildlife viewing is entitled to the
 51 | limitation on liability provided herein so long as the owner or
 52 | lessee gives notice of this provision to the person upon entry
 53 | to the area.

54 | (c) ~~(b)~~ The Legislature recognizes that an area offered for
 55 | outdoor recreational purposes may be subject to multiple uses.
 56 | The limitation of liability extended to an owner or lessee under

57 this subsection applies only if no charge is made for entry to
 58 or use of the area for outdoor recreational purposes and no
 59 other revenue is derived from patronage of the area for outdoor
 60 recreational purposes. ~~This section shall not apply if there is~~
 61 ~~any charge made or usually made for entering or using such park~~
 62 ~~area or land, or any part thereof, or if any commercial or other~~
 63 ~~activity, whereby profit is derived from the patronage of the~~
 64 ~~general public, is conducted on such park area or land, or any~~
 65 ~~part thereof.~~

66 (3) (a) An owner of an land or water area who enters into a
 67 written agreement concerning the area with ~~leased to~~ the state
 68 for outdoor recreational purposes owes no duty of care to keep
 69 the that land or water area safe for entry or use by others, or
 70 to give warning to persons entering or going on the area that
 71 ~~land or water~~ of any hazardous conditions, structures, or
 72 activities thereon. An owner who enters into a written agreement
 73 concerning the area with ~~leases land or water area to~~ the state
 74 for outdoor recreational purposes ~~shall not by giving such~~
 75 ~~lease:~~

76 1. Is not ~~be~~ presumed to extend any assurance that the
 77 ~~such land or water area~~ is safe for any purpose;;

78 2. Does not incur any duty of care toward a person who
 79 goes on the ~~leased land or water area~~ that is subject to the
 80 agreement; or

81 3. Is not ~~become~~ liable or responsible for any injury to
 82 persons or property caused by the act or omission of a person
 83 who goes on the ~~leased land or water area~~ that is subject to the
 84 agreement.

85 (b) This subsection applies to all persons going on the
 86 area that is subject to the agreement, including invitees,
 87 licensees, and trespassers. ~~The foregoing applies whether the~~
 88 ~~person going on the leased land or water area is an invitee,~~
 89 ~~licensee, trespasser, or otherwise.~~

90 (4) This section ~~act~~ does not relieve any person of
 91 liability that ~~which~~ would otherwise exist for deliberate,
 92 willful, or malicious injury to persons or property. This
 93 section does not ~~The provisions hereof shall not be deemed to~~
 94 create or increase the liability of any person.

95 (5) As used in this section, the term:

96 (a) "Area" includes land, water, and park areas.

97 (b) "Outdoor recreational purposes" includes ~~as used in~~
 98 ~~this act shall include,~~ but is not necessarily be limited to,
 99 hunting, fishing, wildlife viewing, swimming, boating, camping,
 100 picnicking, hiking, pleasure driving, nature study, water
 101 skiing, motorcycling, and visiting historical, archaeological,
 102 scenic, or scientific sites.

103 Section 2. This act shall take effect July 1, 2012.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 671 Liens on Real Property
SPONSOR(S): Wood
TIED BILLS: None IDEN./SIM. BILLS: SB 670

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee		Cary <i>JMC</i>	Bond <i>VB</i>
2) Community & Military Affairs Subcommittee			
3) Judiciary Committee			

SUMMARY ANALYSIS

Generally, liens against real property are not effective unless subsequent purchasers have notice of the lien. Notice can be actual notice or constructive notice. The filing of a lien in the county recorder's office provides constructive notice.

Some local governments do not record all liens in the county recorder's office. An appellate court decision upheld the validity of such an unrecorded lien relating to special assessment liens.

This bill renders ineffective against creditors and subsequent purchasers any government lien if it has not been properly recorded and provides requirements for such liens to be considered properly recorded.

This bill does not appear to have an impact on state revenues or expenditures. This bill may have a minimal indeterminate cost to those local governments that choose to record liens against real property.

This bill provides an effective date of July 1, 2012.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

A lien is a charge on property for payment of some debt, obligation or duty.¹ Florida is a "notice" state, where a subsequent mortgagee of real property for value and without notice (actual and constructive) of a prior mortgage or the said real property will prevail against the prior mortgagee.² Furthermore, Florida is a "lien theory" state, where a mortgage is a specific lien on a property.³ As a notice state and a lien theory state, liens are generally afforded precedence based on whether subsequent purchasers had notice of the lien. Notice can be either actual or constructive notice, unless statutes specifically require the filing of certain liens.⁴ The act of recording an instrument in accordance with s. 695.01, F.S., constitutes constructive notice of a prior encumbrance on the property which is the subject of the instrument.⁵

State and local governments are authorized to impose liens on real property for improvements, services, fines or penalties.⁶ In some cases, the lien is legally effective even if it is not recorded in the public records of the county in which the real property is located.⁷ This is known as a "hidden lien" because it is not readily determinable by searching the official records maintained by the clerk or county recorder related to the property.

Effect of Proposed Changes

This bill amends s. 695.01, F.S., to render ineffective against creditors or subsequent purchasers any lien against real property by a governmental entity unless the entity records the lien in the official records of the county in which the property is located. The bill requires such a notice of lien to contain the name of the owner of record, a description or address of the property, and the tax or parcel identification number applicable to the property as of the date of recording.

The bill provides an effective date of July 1, 2012.

B. SECTION DIRECTORY:

Section 1 amends s. 695.01, F.S., relating to recording conveyances.

Section 2 provides an effective date of July 1, 2012.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

¹ *Black's Law Dictionary*, 5th Ed., at 832.

² *Argent Mortg. Co., LLC v. Wachovia Bank N.A.*, 52 So.3d 796 at 799, (Fla 5th DCA 2010). *See also* s. 695.01, F.S.

³ Section 697.02, F.S.

⁴ "Actual notice" is defined as "notice expressly and actually given, and brought home to the party directly," while "constructive notice" is defined by as "information or knowledge of a fact imputed by law to a person (although he may not actually have it), because he could have discovered the fact by proper diligence, and his situation was such as to cast upon him the duty of inquiring into it." *Black's Law Dictionary*, 5th Ed., at 957-8.

⁵ *Lafitte v. Gigliotti Pipeline, Inc.*, 624 So.2d 844 at 845 (Fla. 2nd DCA 1993).

⁶ *See, e.g.*, s. 162.09(3), F.S., which allows local governments to file a lien in the public records upon valid order imposing a code enforcement fine; and s. 170.09, F.S., which provides for a superior priority of liens for special assessments.

⁷ *See Dade County v. Certain Lands*, 247 So.2d 787 (Fla. 3rd DCA 1971).

2. Expenditures:

The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill renders ineffective any liens against real property as to creditors or subsequent purchasers unless such lien is recorded. This bill will only affect local government expenditures if the local government elects to attempt to enforce the liens and they either:

- Do not include the recording cost in the lien; or
- Include the recording cost, but are unable to collect on the lien.

Local governments that already record all liens will not be impacted by this bill.

Because of the nature of hidden liens, it is impossible to estimate how many local governments do not record all liens, or how many additional liens will be filed as a result of this bill. The fee to record most single-page liens is \$10. The fee is set by statute in s. 28.24, F.S.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Purchasers of real property will no longer be liable for hidden liens. This may have a positive, indeterminate impact on the private sector to the extent that the sale and purchase of real property will not be encumbered by hidden liens.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not Applicable. This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditures of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

1 A bill to be entitled
 2 An act relating to liens on real property; amending s.
 3 695.01, F.S.; providing that a lien imposed on real
 4 property by a governmental or quasi-governmental
 5 entity for certain purposes is not valid against a
 6 creditor or subsequent purchasers unless the lien is
 7 recorded; specifying the required contents of the
 8 recorded notice of lien; providing an effective date.

9
 10 Be It Enacted by the Legislature of the State of Florida:

11
 12 Section 1. Subsection (3) is added to section 695.01,
 13 Florida Statutes, to read:

14 695.01 Conveyances and liens to be recorded.-

15 (3) A lien by a governmental entity or quasi-governmental
 16 entity which attaches to real property for an improvement,
 17 service, fine, or penalty is valid and effectual against
 18 creditors and subsequent purchasers for a valuable consideration
 19 only if the lien is recorded in the official records of the
 20 county in which the property is located. The recorded notice of
 21 lien must contain the name of the owner of record, a description
 22 or address of the property, and the tax or parcel identification
 23 number applicable to the property as of the date of recording.

24 Section 2. This act shall take effect July 1, 2012.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCS for HB 823 Florida Uniform Principal and Income Act

SPONSOR(S): Civil Justice Subcommittee

TIED BILLS: None IDEN./SIM. BILLS: SB 978

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Civil Justice Subcommittee		Cary <i>JMC</i>	Bond <i>YB</i>

SUMMARY ANALYSIS

Florida law governs the creation of wills and trusts and the administration of such instruments. Drafters of wills and trusts have broad authority to create parameters for administering the instrument within the documents, but the Florida statutes serve to provide default guidelines where the instrument is silent.

The Florida Uniform Principal and Income Act is modeled after the Uniform Principal and Income Act as drafted by the National Conference of Commissioners on Uniform State Laws. The Florida act is similar to the model act.

Practitioners have identified several issues with the act, including some misuse of the terms "fiduciary" and "trustee". Trustees are always fiduciaries, but fiduciaries are not always trustees. In some cases, the word "trustee" was used in a context where the provision should apply to all fiduciaries.

Furthermore, fluctuations in the stock market make it difficult to evaluate assets and can lead to a wide variance in distributions from year to year. This bill implements a "smoothing rule" where fiduciaries calculate the average fair market value of the current year assets and the two preceding years' assets. The bill also provides clarification for allocating assets between principal and income, including providing a new definition for "carrying value," which is the fair market value at the time the assets are received by the fiduciary.

The bill also modifies the default guidelines for several other aspects, including unitrusts, distribution of income, the partial liquidation rule, marital deductions, liquidating assets, income taxes, and property improvements.

This bill does not appear to have a fiscal impact on state or local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

In 2002, a modified version of the Uniform Principal and Income Act, as developed by the National Commissioners on Uniform State Laws in 1997, was enacted.¹ The act provides procedures for trustees administering an estate in differentiating principal from income and ensuring that the intention of the trust creator is the guiding principal for trustees.² The act provides default rules to trustees and fiduciaries where the will or trust instrument is silent.

The act defines principal as property held in trust for distribution to a remainder beneficiary when the trust terminates.³ Income is money or property that a fiduciary receives as current return from a principal asset.⁴

Effects of the Bill

Trustee and Fiduciary

Trustees and fiduciaries both have the responsibility to act primarily for another's benefit.⁵ However, a trustee is the owner of the legal title to the property of the trust.⁶ Current law defines a trustee to include an original, additional, or successor trustee, whether or not appointed or confirmed by a court.⁷ A fiduciary is a personal representative or a trustee. The term includes an executor, administrator, successor personal representative, special administrator, or a person performing substantially the same function.⁸ A trustee is always a fiduciary, but a fiduciary is not always a trustee.

The bill changes "trustee" to "fiduciary" throughout wherever the word "trustee" should also apply to fiduciaries that are not specifically designated as trustees. Furthermore, the bill amends s. 738.103, F.S., to provide that the chapter pertains to the administration of trusts administered in this state or under its law, and to any estate that is administered in this state unless the provision is limited in application to a trustee, rather than a fiduciary.

Carrying Value

The bill amends s. 738.102, F.S., to provide a new standard for valuing assets. The term "carrying value" is defined as the fair market value at the time the assets are received by the fiduciary, and a change in fiduciaries allows the majority of continuing fiduciaries to elect to adjust the carrying values to reflect the fair market value of the assets at the beginning of their administration. The bill amends s. 738.202, F.S. and s. 738.602(2), F.S., to apply the carrying value, which will simplify administration of trusts by not requiring the fiduciary to revalue the assets on each distribution date unless there is a

¹ Chapter 2002-42, L.O.F.

² The National Conference of Commissioners on Uniform State Laws, [http://www.nccusl.org/Narrative.aspx?title=Why States Should Adopt UPIA](http://www.nccusl.org/Narrative.aspx?title=Why%20States%20Should%20Adopt%20UPIA) (last checked Jan. 4, 2012).

³ Section 738.102(10), F.S.

⁴ Section 738.102(4), F.S.

⁵ See, e.g., *Black's Law Dictionary*, which defines a fiduciary as ". . . a person holding the character of a trustee, or a character analogous to that of a trustee, in respect to the trust and confidence involved in it and the scrupulous good faith and candor which it requires. A person having duty, created by his undertaking, to act primarily for another's benefit in matters connected with such undertaking." 5th Ed., at 563.

⁶ See, e.g., *Black's Law Dictionary*, which defines a trustee as a "Person holding property in trust. The person appointed, or required by law, to execute a trust; one in whom an estate, interest, or power is vested, under an express or implied agreement to administer or exercise it for the benefit or to the use of another called the cestui que trust. Person who holds title to res and administers it for others' benefit." 5th Ed., at 1357.

⁷ Section 738.102(13), F.S.

⁸ Section 738.102(3), F.S.

non pro-rata distribution to one or more beneficiaries, in which case the bill provides guidelines on how to make the distribution.

Unitrusts

A "unitrust" is a "trust from which a fixed percentage of the net fair market value of the trust's assets, valued annually, is paid each year to the beneficiary."⁹ The value of assets in a unitrust are calculated by the "fair market value" method, which is the fair market value of assets held by the trust as otherwise determined under this chapter, reduced by all known noncontingent liabilities.¹⁰

The bill provides new rules for valuing assets for unitrusts. The bill amends s. 738.1041(1)(a), F.S., to add a definition for "average fair market value" which includes what is commonly referred to as the "smoothing rule." This rule is intended to reduce the large differences in amounts distributable to a beneficiary from year to year depending on large market fluctuations by using the average fair market value over the past three years to value assets. The bill then implements the smoothing rule in the definition of "unitrust amount" in s. 738.1041(1)(f), F.S.

Determination and Distribution of Net Income

Current law requires a fiduciary, in certain situations, to distribute to the beneficiary who receives a pecuniary amount outright the interest provided by will, the terms of the trust, or applicable law. However, this was model act language and there are no situations where this law applies in Florida. Current law also contains language from the model act that implies that there is a statutory right to income on an outright pecuniary device in Florida, where such a right does not exist.¹¹

The bill amends s. 738.201(3), F.S., to remove unnecessary language referencing "applicable law" where there is no applicable law and to remove model act language pertaining to a statutory right to income on an outright pecuniary device, which is not a right in Florida.

Character of Receipts

Current law provides a default provision for determining whether assets should be allocated to principal or income: payments in excess of 20% of the entities' assets are presumed to be liquidating distributions which are allocated to principal (the 20% partial liquidation rule). However, certain entities pay large dividends that may exceed this limit despite not being liquidating assets.¹²

The bill amends s. 738.401, F.S., to retain the 20% partial liquidation rule for non-publicly-traded entities, but only after the trust or estate has received a cumulative minimum return of 3% annually. The bill provides a framework for allocating dividends and other stock payments which exceed 10% of fair market value of the trust's interest in that entity, and provides rules for different types of entities, such as publicly-traded companies, partnerships, subchapter S corporations, and other entities.

Marital Trusts and Deductions

Current law contains one method of computing income from assets held in marital trusts and another more complex method of computing the allocation of principal and income for non-marital trusts.¹³

The bill amends s. 738.602(4), F.S., to simplify the method for computing income held in non-marital trusts. The bill also amends s. 738.602(5), F.S., to ensure that the estate or gift tax marital deduction applies to not only federal tax laws, but tax laws of other states where the trust is administered in

⁹ Black's Law Dictionary, 5th Ed., at 1376.

¹⁰ Section 738.1041(1)(b), F.S.

¹¹ Section 738.201, F.S.

¹² Section 738.401, F.S.

¹³ Compare s. 738.602(4) and (5), F.S.

Florida. The bill also amends s. 738.606(1), F.S., to clarify that the marital deduction in that section can apply to the IRS or a comparable law of any state.

Liquidating Asset

Assets in a trust that are expected to produce receipts for a limited period of time are allocated such that 10% of the payments go to income and the rest is applied to principal. The Internal Revenue Service (IRS) recently ruled that the safe harbor was between 3 % and 5% to income, putting Florida trusts at risk for additional tax liabilities.

The bill amends s. 738.603(2), F.S., to change the percentage of limited-duration assets applied to income from 10% to 5% to comply with an IRS ruling that 5% is the maximum safe harbor for such an allocation.

Disbursements from Income

Current law requires fiduciaries to make certain disbursements from income, providing that the disbursements are not income from property used to discharge liabilities or disbursements paying from principal which were incurred in connection with the settlement of a decedent's estate or the winding up of a terminating income interest.¹⁴

The bill amends s. 738.701, F.S., to add an additional exclusion from disbursements from income, payments from income or principal including, at the fiduciary's discretion, attorney, accountant, or fiduciary fees, court costs, other administration expenses, and interest on death taxes.

Income Taxes

Current law provides guidelines for paying income taxes out of a trust, including guidelines specifically for paying taxes on an entity's taxable income. Current law also requires payment from income to the extent receipts from the entity are allocated to income and from principal to the extent that receipts from the entity are allocated to principal and the trust's share of the entity's taxable income exceeds the total of such receipts. Receipts allocated to principal or income are reduced by the amount distributed to a beneficiary from principal or income for which the trust receives a deduction in calculating the tax.¹⁵

The bill amends s. 738.705, F.S., to provide new guidelines for paying income taxes out of a trust. The bill provides that an income tax required to be paid on the trust or estate's share of an entity's taxable income is to be paid proportionally from income to the extent the receipts from the entity are allocated to income, from principal to the extent the receipts from the entity are allocated to principal, and from principal to the extent that the income taxes payable by the trust or estate exceed the total distributions from the entity. Then, the fiduciary is to adjust income or principal receipts to the extent that the trust or estate's income taxes are reduced, but not eliminated, because the trust or estate receives a deduction for payments made to a beneficiary, with additional guidelines to provide clarity to the fiduciary.

Improvements

Under the common law, when a tenant of a property had a life estate, the tenant was generally responsible for the maintenance of the property while the holder of the remainder interest, or the remainderman, was responsible for capital improvements. The original adoption of the act attempted to codify the common law rule, but the wording of the act could lead to different conclusion for the apportionment of expenses because the act used terms common in trust law, which did not exist at common law.

The bill amends s. 738.801, F.S., to provide definitions and additional guidelines for apportioning expenses between the life tenant and the remainderman. Life tenants are responsible for paying

¹⁴ Section 738.701, F.S.

¹⁵ Section 738.705, F.S.

ordinary expenses and maintenance, recurring insurance premiums, and other expenses which are the result of the property's use by the tenant. The remainderman is responsible for paying mortgage debt not allocated to the tenant, expenses due to title other than the tenant's estate, environmental expenses, and extraordinary repairs. If either party incurs an expense for personal benefit without the consent of the other, that party bears the expense in full. For improvements that add value to the property forming part of the principal, the expense is split between the tenant and the remainderman, with the tenant paying to the extent that the improvement increases the value of the tenant's estate.

Effective Date

The bill provides an effective date of January 1, 2013, in order to provide practitioners enough lead time to prepare for the changes in the law.

B. SECTION DIRECTORY:

Section 1 amends s. 738.102, F.S., providing an additional definition.

Section 2 amends s. 738.103, F.S., relating to fiduciary duties.

Section 3 amends s. 738.104, F.S., relating to the trustee's power to adjust between principal and income.

Section 4 amends s. 738.1041, F.S., relating to total return unitrusts.

Section 5 amends s. 738.105, F.S., relating to judicial control of discretionary powers.

Section 6 amends s. 738.201, F.S., relating to determination and distribution of net income.

Section 7 amends s. 738.202, F.S., relating to distribution to residuary and remainder beneficiaries.

Section 8 amends s. 738.301, F.S., relating to right to income.

Section 9 amends s. 738.302, F.S., relating to apportionment of receipts and disbursements.

Section 10 amends s. 738.303, F.S., relating to apportionment when income interest ends.

Section 11 amends s. 738.401, F.S., relating to the character of receipts.

Section 12 amends s. 738.402, F.S., relating to distribution from trust or estate.

Section 13 amends s. 738.403, F.S., relating to business and other activities conducted by fiduciaries.

Section 14 amends s. 738.501, F.S., relating to principal receipts.

Section 15 amends s. 738.502, F.S., relating to rental property.

Section 16 amends s. 738.503, F.S., relating to the obligation to pay money.

Section 17 amends s. 738.504, F.S., relating to insurance policies and similar contracts.

Section 18 amends s. 738.601, F.S., relating to insubstantial allocations.

Section 19 amends s. 738.602, F.S., relating to payments from deferred compensation plans, annuities, and retirement plans or accounts.

Section 20 amends s. 738.603, F.S., relating to liquidating assets.

Section 21 amends s. 738.604, F.S., relating to minerals, water, and other natural resources.

Section 22 amends s. 738.605, F.S., relating to timber.

Section 23 amends s. 738.606, F.S., relating to property not productive of income.

Section 24 amends s. 738.607, F.S., relating to derivatives and options.

Section 25 amends s. 738.608, F.S., relating to asset-backed securities.

Section 26 amends s. 738.701, F.S., relating to disbursements from income.

Section 27 amends s. 738.702, F.S., relating to disbursements from principal.

Section 28 amends s. 738.703, F.S., relating to transfers from income to principal for depreciation.

Section 29 amends s. 738.704, F.S., relating to transfers from income to reimburse principal.

Section 30 amends s. 738.705, F.S., relating to income taxes.

Section 31 amends s. 738.801, F.S., relating to apportionment of expenses for improvements.

Section 32 provides an effective date of January 1, 2013.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action require the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

1 A bill to be entitled
2 An act relating to the Florida Uniform Principal and
3 Income Act; amending s. 738.102, F.S.; defining the
4 term "carrying value"; amending s. 738.103, F.S.;
5 providing for application of chapter; amending s.
6 738.104, F.S.; deleting authority of a trustee to
7 adjust if converting the form of the trust; limiting
8 the power to adjust a trust; deleting a provision
9 regarding application of law to trusts; amending s.
10 738.1041, F.S.; defining the term "average fair market
11 value" and revising the term "unitrust amount";
12 deleting a duplicative provision relating to
13 conclusive determinations of the terms of a unitrust;
14 revising provisions relating to an express total
15 return unitrust; amending s. 738.105, F.S.;
16 substituting the term "trustee" for "fiduciary" with
17 respect to judicial control of discretionary powers;
18 amending s. 738.201, F.S.; revising provisions
19 relating to the determination and distribution of net
20 income; amending s. 738.202, F.S.; revising provisions
21 relating to distributions to residuary and remainder
22 beneficiaries; amending ss. 738.301, 738.302, and
23 738.303, F.S.; substituting the term "fiduciary" for
24 "trustee" to clarify that provisions apply to all
25 fiduciaries; amending s. 738.401, F.S.; substituting
26 the term "fiduciary" for "trustee" to clarify that
27 provisions apply to all fiduciaries; revising how
28 distributions from entities are allocated between

29 income and principal; amending ss. 738.402, 738.403,
30 738.501, 738.502, 738.503, 738.504, and 738.601, F.S.;
31 substituting the term "fiduciary" for "trustee" to
32 clarify that provisions apply to all fiduciaries;
33 amending s. 738.602, F.S.; substituting the term
34 "fiduciary" for "trustee" to clarify that provisions
35 apply to all fiduciaries; revising provisions relating
36 to allocations to trusts; amending s. 738.603, F.S.;
37 substituting the term "fiduciary" for "trustee" to
38 clarify that provisions apply to all fiduciaries;
39 revising provisions relating to the allocation between
40 income and principal when liquidating assets; amending
41 ss. 738.604, 738.605, 738.606, 738.607, 738.608,
42 738.701, 738.702, 738.703, and 738.704, F.S.;
43 substituting the term "fiduciary" for "trustee" to
44 clarify that provisions apply to all fiduciaries;
45 amending s. 738.705, F.S.; substituting the term
46 "fiduciary" for "trustee" to clarify that provisions
47 apply to all fiduciaries; revising the method for
48 allocating income taxes between income and principal;
49 amending s. 738.801, F.S.; clarifying the
50 apportionment of expenses between tenants and
51 remaindermen; amending s. 738.804, F.S.; transferring
52 a provision relating to applicability; providing an
53 effective date.

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

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Section 1. 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 2. Subsection (2) of section 738.103, Florida Statutes, is amended 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 3. Subsections (5) and (11) of section 738.104,

85 Florida Statutes, are amended to read:

86 738.104 Trustee's power to adjust.-

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

90 ~~(b)~~ A trustee may release the entire power to adjust
 91 conferred by subsection (1) or may release only the power to
 92 adjust from income to principal or the power to adjust from
 93 principal to income if the trustee is uncertain about whether
 94 possessing or exercising the power will cause a result described
 95 in paragraphs (3) (a)-(e) or paragraph (3) (g) or if the trustee
 96 determines that possessing or exercising the power will or may
 97 deprive the trust of a tax benefit or impose a tax burden not
 98 described in subsection (3).

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

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

108 Section 4. Section 738.1041, Florida Statutes, is amended
 109 to read:

110 738.1041 Total return unitrust.-

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

112 (a) "Average fair market value" means the average of the

113 fair market values of assets held by the trust at the beginning
 114 of the current and each of the 2 preceding years, or for the
 115 entire term of the trust if there are less than 2 preceding
 116 years, and adjusted as follows:

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

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

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

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

134 (d)(e) "Income trust" means a trust, created by either an
 135 inter vivos or a testamentary instrument, which directs or
 136 permits the trustee to distribute the net income of the trust to
 137 one or more persons, either in fixed proportions or in amounts
 138 or proportions determined by the trustee and regardless of
 139 whether the trust directs or permits the trustee to distribute
 140 the principal of the trust to one or more such persons.

141 (e)~~(d)~~ "Interested distributee" means a person to whom
 142 distributions of income or principal can currently be made and
 143 who has the power to remove the existing trustee and designate
 144 as successor a person who may be a "related or subordinate
 145 party," ~~as defined in the Internal Revenue Code, 26 U.S.C. s.~~
 146 ~~672(e)~~, with respect to such distributee.

147 (f)~~(e)~~ "Interested trustee" means an individual trustee to
 148 whom the net income or principal of the trust can currently be
 149 distributed or would be distributed if the trust were then to
 150 terminate and be distributed, any trustee whom an interested
 151 distributee has the power to remove and replace with a related
 152 or subordinate party ~~as defined in paragraph (d)~~, or an
 153 individual trustee whose legal obligation to support a
 154 beneficiary may be satisfied by distributions of income and
 155 principal of the trust.

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

159 (h)~~(f)~~ "Unitrust amount" means the amount determined by
 160 multiplying the average fair market value of the assets as
 161 calculated in defined in paragraph (1) (a)~~(b)~~ by the percentage
 162 calculated under paragraph (2) (b).

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

168 (a) The trustee adopts a written statement regarding trust

169 distributions which ~~that~~ provides:

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

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

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

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

184 (b) The trustee determines the terms of the unitrust under
 185 one of the following methods:

186 1. A disinterested trustee determines, or if there is no
 187 trustee other than an interested trustee, the interested trustee
 188 appoints a disinterested person who, in its sole discretion but
 189 acting in a fiduciary capacity, determines for the interested
 190 trustee:

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

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

196 c. Which assets, if any, are to be excluded in determining

197 the unitrust amount; or

198 2. The interested trustee or disinterested trustee
 199 administers the trust such that:

200 a. The percentage used to calculate the unitrust amount is
 201 50 percent of the ~~applicable federal~~ rate as defined in the
 202 Internal Revenue Code, 26 U.S.C. s. 7520, in effect for the
 203 month the conversion under this section becomes effective and
 204 for each January thereafter; however, if the percentage
 205 calculated exceeds 5 percent, the unitrust percentage is shall
 206 ~~be~~ 5 percent and if the percentage calculated is less than 3
 207 percent, the unitrust percentage is shall be 3 percent; and

208 b. The fair market value of the trust shall be determined
 209 at least annually on an asset-by-asset basis, reasonably and in
 210 good faith, in accordance with ~~the provisions of~~ s. 738.202(5),
 211 except the following property shall not be included in
 212 determining the value of the trust:

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

224 (II) Any asset specifically given to a beneficiary and the

225 | return on investment on such property, which return on
 226 | investment shall be distributable to the ~~such~~ beneficiary; ~~or~~.

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

229 | (c) The trustee sends written notice of its intention to
 230 | take such action, along with copies of the ~~such~~ written
 231 | statement regarding trust distributions and this section, and,
 232 | if applicable, the determinations of ~~either~~ the trustee or the
 233 | disinterested person to:

- 234 | 1. The grantor of the trust, if living.
- 235 | 2. All living persons who are currently receiving or
 236 | eligible to receive distributions of income from ~~of~~ the trust.
- 237 | 3. All living persons who would receive distributions of
 238 | principal of the trust if the trust were to terminate at the
 239 | time of ~~the~~ giving ~~of~~ such notice ~~(without regard to the~~
 240 | exercise of any power of appointment,~~)~~ or, if the trust does not
 241 | provide for its termination, all living persons who would
 242 | receive or be eligible to receive distributions of income or
 243 | principal of the trust if the persons identified in subparagraph
 244 | 2. were deceased.
- 245 | 4. All persons acting as advisers or protectors of the
 246 | trust.

247 |
 248 | Notice under this paragraph shall be served informally~~,~~ in the
 249 | manner provided in the Florida Rules of Civil Procedure relating
 250 | to service of pleadings subsequent to the initial pleading.
 251 | Notice may be served on a legal representative or natural
 252 | guardian of a person without ~~the~~ filing ~~of~~ any proceeding or

253 approval of any court;

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

256 (e) No person receiving such notice objects, by written
 257 instrument delivered to the trustee, to the proposed action of
 258 the trustee or the determinations of the disinterested person
 259 within 60 days after service of such notice. An objection ~~under~~
 260 ~~this section~~ may be executed by a legal representative or
 261 natural guardian of a person without ~~the~~ filing ~~of~~ any
 262 proceeding or approval of any court.

263 (3) If a trustee desires to convert an income trust to a
 264 total return unitrust, reconvert a total return unitrust to an
 265 income trust, or change the percentage used to calculate the
 266 unitrust amount or the method used to determine a fair market
 267 value of the trust but does not have the ability to or elects
 268 not to do it under subsection (2), the trustee may petition the
 269 circuit court for such order as the trustee deems appropriate.
 270 In that event, the court, in its own discretion or on the
 271 petition of such trustee or any person having an income or
 272 remainder interest in the trust, may appoint a disinterested
 273 person who, acting in a fiduciary capacity, shall present such
 274 information to the court as is ~~shall be~~ necessary for the court
 275 to make a determination hereunder.

276 ~~(4) All determinations made pursuant to sub-subparagraph~~
 277 ~~(2)(b)2.b. shall be conclusive if reasonable and made in good~~
 278 ~~faith. Such determination shall be conclusively presumed to have~~
 279 ~~been made reasonably and in good faith unless proven otherwise~~
 280 ~~in a proceeding commenced by or on behalf of a person interested~~

281 ~~in the trust within the time provided in s. 736.1008. The burden~~
 282 ~~will be on the objecting interested party to prove that the~~
 283 ~~determinations were not made reasonably and in good faith.~~

284 (4)~~(5)~~ Following the conversion of an income trust to a
 285 total return unitrust, the trustee:

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

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

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

299 2. Net long-term capital gain described in the Internal
 300 Revenue Code, 26 U.S.C. s. 1222(7), for such year, or portion
 301 thereof, but only to the extent that the amount so allocated
 302 together with all other amounts, including amounts described in
 303 subparagraph 1., allocated to trust income for such year, or
 304 portion thereof, does not exceed the unitrust amount for such
 305 year, or portion thereof.

306 (5)~~(6)~~ In administering a total return unitrust, the
 307 trustee may, in its sole discretion but subject to the
 308 provisions of the governing instrument, determine:

309 (a) The effective date of the conversion.

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

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

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

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

319 (6)~~(7)~~ Conversion to a total return unitrust under ~~the~~
 320 ~~provisions of~~ this section does ~~shall~~ not affect any other
 321 provision of the governing instrument, if any, regarding
 322 distributions of principal.

323 (7)~~(8)~~ Any trustee or disinterested person who in good
 324 faith takes or fails to take any action under this section is
 325 ~~shall~~ not be liable to any person affected by such action or
 326 inaction, regardless of whether such person received written
 327 notice as provided in this section or ~~and regardless of whether~~
 328 such person was under a legal disability at the time of the
 329 delivery of such notice. Such person's exclusive remedy is ~~shall~~
 330 ~~be~~ to obtain, under subsection (8) ~~(9)~~, an order of the court
 331 directing the trustee to convert an income trust to a total
 332 return unitrust, to reconvert from a total return unitrust to an
 333 income trust, or to change the percentage used to calculate the
 334 unitrust amount. If a court determines that the trustee or
 335 disinterested person has not acted in good faith in taking or
 336 failing to take any action under this section, ~~the provisions of~~

337 s. 738.105(3) applies ~~apply~~.

338 ~~(8)(9)~~ If a majority in interest of ~~either~~ the income or
 339 remainder beneficiaries of an income trust has delivered to the
 340 trustee a written objection to the amount of the income
 341 distributions of the trust, and, if the trustee has failed to
 342 resolve the objection to the satisfaction of the objecting
 343 beneficiaries within 6 months after ~~from the~~ receipt of such
 344 written objection, ~~then~~ the objecting beneficiaries may petition
 345 the court in accordance with subsection (3).

346 ~~(9)(10)~~ This section pertains ~~shall be construed as~~
 347 ~~pertaining~~ to the administration of a trust and is applicable to
 348 any trust that is administered ~~either~~ in this state or under
 349 Florida law unless:

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

353 (b) The trust is a trust described in the Internal Revenue
 354 Code, 26 U.S.C. s. 170(f)(2)(B), s. 642(c)(5), s. 664(d), s.
 355 2702(a)(3), or s. 2702(b);

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

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

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

364 (d) The governing instrument expressly prohibits use of

365 this section by specific reference to the section. A provision
 366 in the governing instrument that, "The provisions of section
 367 738.1041, Florida Statutes, as amended, or any corresponding
 368 provision of future law, may ~~shall~~ not be used in the
 369 administration of this trust," or similar words reflecting such
 370 intent are ~~shall be~~ sufficient to preclude the use of this
 371 section, ~~or~~

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

374 ~~(10)(11)~~ The grantor of a trust may create an express
 375 total return unitrust that ~~which~~ will be ~~become~~ effective as
 376 provided in the trust instrument ~~document~~ without requiring a
 377 conversion under this section.

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

382 1.(a) That distributions from the trust will be unitrust
 383 amounts and the manner in which the unitrust amount will be
 384 calculated; ~~and the method in which the fair market value of the~~
 385 ~~trust will be determined.~~

386 2.(b) The percentage to be used to calculate the unitrust
 387 amount, provided the percentage used is not greater than 5
 388 percent nor less than 3 percent.

389 (b) The trust instrument may also contain provisions
 390 specifying:

391 1.(c) The method to be used in determining the fair market
 392 value of the trust, including whether to use an average fair

393 market value or the fair market value of the assets held by the
 394 trust at the beginning of the current year; or-

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

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

402 Section 5. Subsections (1), (3), and (4) of section
 403 738.105, Florida Statutes, are amended to read:

404 738.105 Judicial control of discretionary powers.-

405 (1) A court may ~~shall~~ not change a trustee's fiduciary's
 406 decision to exercise or not to exercise a discretionary power
 407 conferred by this chapter unless the court determines that the
 408 decision was an abuse of the trustee's fiduciary's discretion. A
 409 court may ~~shall~~ not determine that a trustee fiduciary abused
 410 its discretion merely because the court would have exercised the
 411 discretion in a different manner or would not have exercised the
 412 discretion.

413 (3) If a court determines that a trustee fiduciary has
 414 abused its discretion, the remedy is ~~shall be~~ to restore the
 415 income and remainder beneficiaries to the positions they would
 416 have occupied if the trustee fiduciary had not abused its
 417 discretion, in accordance with ~~according to~~ the following ~~rules~~:

418 (a) To the extent the abuse of discretion has resulted in
 419 no distribution to a beneficiary or a distribution that is too
 420 small, the court shall require the trustee fiduciary to

421 distribute from the trust to the beneficiary an amount the court
 422 determines will restore the beneficiary, in whole or in part, to
 423 his or her appropriate position.

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

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

439 (4) Upon the filing of a petition by the trustee
 440 ~~fiduciary~~, the court having jurisdiction over the trust ~~or~~
 441 ~~estate~~ shall determine whether a proposed exercise or
 442 nonexercise by the trustee ~~fiduciary~~ of a discretionary power
 443 conferred by this chapter will result in an abuse of the
 444 trustee's ~~fiduciary's~~ discretion. If the petition describes the
 445 proposed exercise or nonexercise of the power and contains
 446 sufficient information to inform the beneficiaries of the
 447 reasons for the proposal, the facts upon which the trustee
 448 ~~fiduciary~~ relies, and an explanation of how the income and

449 remainder beneficiaries will be affected by the proposed
 450 exercise or nonexercise of the power, a beneficiary who
 451 challenges the proposed exercise or nonexercise has the burden
 452 of establishing that such exercise or nonexercise will result in
 453 an abuse of discretion.

454 Section 6. Subsections (1) through (4) of section 738.201,
 455 Florida Statutes, are amended to read:

456 738.201 Determination and distribution of net income.—
 457 After a decedent dies, in the case of an estate, or after an
 458 income interest in a trust ends, the following rules apply:

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

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

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

471 (b) Paying from income or principal, in the fiduciary's
 472 discretion, fees of attorneys, accountants, and fiduciaries;
 473 court costs and other expenses of administration; and interest
 474 on death taxes. ~~7. but~~ The fiduciary may pay those expenses from
 475 income of property passing to a trust for which the fiduciary
 476 claims an estate tax marital or charitable deduction under the

477 Internal Revenue Code or comparable law of any state only to the
 478 extent the payment of those expenses from income will not cause
 479 the reduction or loss of the deduction.

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

487 (3) If A fiduciary shall distribute to a beneficiary who
 488 receives a pecuniary ~~devise~~ amount outright is also entitled to
 489 receive the interest or any other amount on the devise under the
 490 terms of provided by the will or, the terms of the trust, the
 491 fiduciary shall distribute the interest or other amount
 492 ~~applicable law~~ from net income determined under subsection (2)
 493 or from principal to the extent net income is insufficient. ~~If a~~
 494 ~~beneficiary is to receive a pecuniary amount outright from a~~
 495 ~~trust after an income interest ends and no interest or other~~
 496 ~~amount is provided for by the terms of the trust or applicable~~
 497 ~~law, the fiduciary shall distribute the interest or other amount~~
 498 ~~to which the beneficiary would be entitled under applicable law~~
 499 ~~if the pecuniary amount were required to be paid under a will.~~

500 (4) A fiduciary shall distribute the net income remaining
 501 after distributions required under subsections (1)-(3) by
 502 ~~subsection (3)~~ in the manner described in s. 738.202 to all
 503 other beneficiaries, including a beneficiary who receives a
 504 pecuniary amount in trust, even if the beneficiary holds an

505 unqualified power to withdraw assets from the trust or other
 506 presently exercisable general power of appointment over the
 507 trust.

508 Section 7. Section 738.202, Florida Statutes, is amended
 509 to read:

510 738.202 Distribution to residuary and remainder
 511 beneficiaries.—

512 (1) Each beneficiary described in s. 738.201(4) is
 513 entitled to receive a portion of the net income remaining after
 514 the application of s. 738.201(1)-(3), which is equal to the
 515 beneficiary's fractional interest in undistributed principal
 516 assets, using carrying values as of the distribution date. If a
 517 fiduciary makes more than one distribution of assets to
 518 beneficiaries to whom this section applies, each beneficiary,
 519 including one who does not receive part of the distribution, is
 520 entitled, as of each distribution date, to the net income the
 521 fiduciary ~~has~~ received after the date of death or terminating
 522 event or earlier distribution date but has not distributed as of
 523 the current distribution date.

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

526 (a) The beneficiary is entitled to receive a portion of
 527 the net income equal to the beneficiary's fractional interest in
 528 the carrying value of the undistributed principal assets
 529 immediately before the distribution date, excluding the amount
 530 of unpaid liabilities including assets that later may be sold to
 531 ~~meet principal obligations.~~

532 (b) The beneficiary's fractional interest in the

533 undistributed principal assets shall be calculated: ~~without~~
 534 ~~regard to~~

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

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

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

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

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

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

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

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

560 ~~(d) The distribution date for purposes of this section may~~

561 ~~be the date as of which the fiduciary calculates the value of~~
 562 ~~the assets if that date is reasonably near the date on which~~
 563 ~~assets are actually distributed.~~

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

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

575 (5) The carrying value or fair market value of trust
 576 assets shall be determined on an asset-by-asset basis and are
 577 ~~shall be~~ conclusive if reasonable and determined in good faith.
 578 Determinations of fair market value based on appraisals
 579 performed within 2 years before or after the valuation date are
 580 ~~shall be~~ presumed reasonable. The values ~~value~~ of trust assets
 581 are ~~shall be~~ conclusively presumed to be reasonable and
 582 determined in good faith unless proven otherwise in a proceeding
 583 commenced by or on behalf of a person interested in the trust
 584 within the time provided in s. 736.1008.

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

587 Section 8. Subsection (4) of section 738.301, Florida
 588 Statutes, is amended to read:

589 738.301 When right to income begins and ends.—An income
 590 beneficiary is entitled to net income from the date on which the
 591 income interest begins.

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

596 Section 9. Subsections (1) and (2) of section 738.302,
 597 Florida Statutes, are amended to read:

598 738.302 Apportionment of receipts and disbursements when
 599 decedent dies or income interest begins.—

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

606 (2) A fiduciary ~~trustee~~ shall allocate an income receipt
 607 or disbursement to income if the due date of the receipt or
 608 disbursement occurs on or after the date on which a decedent
 609 dies or an income interest begins and the due date is a periodic
 610 due date. An income receipt or disbursement shall be treated as
 611 accruing from day to day if the due date of the receipt or
 612 disbursement is not periodic or the receipt or disbursement has
 613 no due date. The portion of the receipt or disbursement accruing
 614 before the date on which a decedent dies or an income interest
 615 begins shall be allocated to principal and the balance shall be
 616 allocated to income.

617 Section 10. Subsections (2) and (3) of section 738.303,
 618 Florida Statutes, are amended to read:

619 738.303 Apportionment when income interest ends.—

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

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

636 Section 11. Section 738.401, Florida Statutes, is amended
 637 to read:

638 738.401 Character of receipts.—

639 (1) For purposes of this section, the term "entity" means
 640 a corporation, partnership, limited liability company, regulated
 641 investment company, real estate investment trust, common trust
 642 fund, or any other organization in which a fiduciary ~~trustee~~ has
 643 an interest other than a trust or estate to which s. 738.402
 644 applies, a business or activity to which s. 738.403 applies, or

645 an asset-backed security to which s. 738.608 applies.

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

649 (3) Except as otherwise provided in this section, a
 650 fiduciary ~~trustee~~ shall allocate the following receipts from an
 651 entity to principal:

652 (a) Property other than money.

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

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

658 (d) Money received from an entity that is a regulated
 659 investment company or a real estate investment trust if the
 660 money received ~~distributed~~ represents short-term or long-term
 661 capital gain realized within the entity.

662 (e) Money received from an entity listed on a public stock
 663 exchange during any year of the trust or estate which exceeds 10
 664 percent of the fair market value of the trust's or estate's
 665 interest in the entity on the first day of that year. The amount
 666 to be allocated to principal must be reduced to the extent that
 667 the cumulative distributions from the entity to the trust or
 668 estate allocated to income does not exceed a cumulative annual
 669 return of 3 percent of the fair market value of the interest in
 670 the entity at the beginning of each year or portion of a year
 671 for the number of years or portion of years in the period that
 672 the interest in the entity has been held by the trust or estate.

673 If a trustee has exercised a power to adjust under s. 738.104
 674 during any period the interest in the entity has been held by
 675 the trust, the trustee, in determining the total income
 676 distributions from that entity, must take into account the
 677 extent to which the exercise of that power resulted in income to
 678 the trust from that entity for that period. If the income of the
 679 trust for any period has been computed under s. 738.1041, the
 680 trustee, in determining the total income distributions from that
 681 entity for that period, must take into account the portion of
 682 the unitrust amount paid as a result of the ownership of the
 683 trust's interest in the entity for that period.

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

690 (5) Money is received in partial liquidation:

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

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

701
 702 This subsection does not apply to an entity to which subsection
 703 (7) applies.

704 (6) Money may not ~~is not received in partial liquidation,~~
 705 ~~nor may money~~ be taken into account in determining any excess
 706 under paragraph (5) (b), to the extent that the cumulative
 707 distributions from the entity to the trust or the estate
 708 allocated to income do not exceed the greater of: such money
 709 ~~does not exceed the amount of income tax a trustee or~~
 710 ~~beneficiary must pay on taxable income of the entity that~~
 711 ~~distributes the money.~~

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

727 (b) If the entity is treated as a partnership, subchapter
 728 S corporation, or a disregarded entity pursuant to the Internal

729 Revenue Code of 1986, as amended, the amount of income tax
 730 attributable to the trust's or estate's ownership share of the
 731 entity, based on its pro rata share of the taxable income of the
 732 entity that distributes the money, for the number of years or
 733 portion of years that the interest in the entity was held by the
 734 fiduciary, calculated as if all of that tax was incurred by the
 735 fiduciary.

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

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

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

756 (c) The remainder of the distribution, if any, is treated

757 as principal.

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

759 1. "Investment entity" means an entity, other than a
 760 business activity conducted by the trustee described in s.
 761 738.403 or an entity that is listed on a public stock exchange,
 762 which is treated as a partnership, subchapter S corporation, or
 763 disregarded entity pursuant to the Internal Revenue Code of
 764 1986, as amended, and which normally derives 50 percent or more
 765 of its annual cumulative net income from interest, dividends,
 766 annuities, royalties, rental activity, or other passive
 767 investments, including income from the sale or exchange of such
 768 passive investments.

769 2. "Private trustee" means a trustee who is a natural
 770 person, but only if the trustee is unable to use the power to
 771 adjust between income and principal with respect to receipts
 772 from entities described in this subsection pursuant to s.
 773 738.104. A bank, trust company, or other commercial trustee is
 774 not considered a private trustee.

775 (8) This section shall be applied before ss. 738.705 and
 776 738.706 and does not modify or change any of the provisions of
 777 those sections.

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

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

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

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

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

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

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

813 ~~3. "Investment entity" means a targeted entity that~~
 814 ~~normally derives 50 percent or more of its annual cumulative net~~
 815 ~~income from interest, dividends, annuities, royalties, rental~~
 816 ~~activity, or other passive investments, including income from~~
 817 ~~the sale or exchange of such passive investments.~~

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

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

828 ~~6. "Undistributed cumulative net income" means the trust's~~
 829 ~~pro rata share of cumulative net income, less all prior~~
 830 ~~distributions from the targeted entity to the trust that have~~
 831 ~~been allocated to income.~~

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

835 ~~(8) A trustee may rely upon a statement made by an entity~~
 836 ~~about the source or character of a distribution, about the~~
 837 ~~amount of profits of a targeted entity, or about the nature and~~
 838 ~~value of assets of an investment entity if the statement is made~~
 839 ~~at or near the time of distribution by the entity's board of~~
 840 ~~directors or other person or group of persons authorized to~~

841 ~~exercise powers to pay money or transfer property comparable to~~
 842 ~~those of a corporation's board of directors.~~

843 Section 12. Section 738.402, Florida Statutes, is amended
 844 to read:

845 738.402 Distribution from trust or estate.—A fiduciary
 846 ~~trustee~~ shall allocate to income an amount received as a
 847 distribution of income from a trust or an estate in which the
 848 trust has an interest other than a purchased interest and ~~shall~~
 849 allocate to principal an amount received as a distribution of
 850 principal from such a trust or estate. If a fiduciary ~~trustee~~
 851 purchases an interest in a trust that is an investment entity,
 852 or a decedent or donor transfers an interest in such a trust to
 853 a fiduciary ~~trustee~~, s. 738.401 or s. 738.608 applies to a
 854 receipt from the trust.

855 Section 13. Section 738.403, Florida Statutes, is amended
 856 to read:

857 738.403 Business and other activities conducted by
 858 fiduciary ~~trustee~~.—

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

868 (2) A fiduciary ~~trustee~~ who accounts separately for a

869 business or other activity may determine the extent to which the
 870 net cash receipts of the ~~such~~ business or activity must be
 871 retained for working capital, the acquisition or replacement of
 872 fixed assets, and other reasonably foreseeable needs of the
 873 business or activity, and the extent to which the remaining net
 874 cash receipts are accounted for as principal or income in the
 875 trust's general accounting records. If a fiduciary ~~trustee~~ sells
 876 assets of the business or other activity, other than in the
 877 ordinary course of the business or activity, the fiduciary must
 878 ~~trustee shall~~ account for the net amount received as principal
 879 in the trust's general accounting records to the extent the
 880 fiduciary ~~trustee~~ determines that the amount received is no
 881 longer required in the conduct of the business.

882 (3) Activities for which a fiduciary ~~trustee~~ may maintain
 883 separate accounting records include:

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

886 (b) Farming.

887 (c) Raising and selling livestock and other animals.

888 (d) Management of rental properties.

889 (e) Extraction of minerals and other natural resources.

890 (f) Timber operations.

891 (g) Activities to which s. 738.607 ~~738.608~~ applies.

892 Section 14. Section 738.501, Florida Statutes, is amended
 893 to read:

894 738.501 Principal receipts.—A fiduciary ~~trustee~~ shall
 895 allocate to principal:

896 (1) To the extent not allocated to income under this

897 chapter, assets received from a transferor during the
 898 transferor's lifetime, a decedent's estate, a trust with a
 899 terminating income interest, or a payor under a contract naming
 900 the trust or its fiduciary trustee as beneficiary.

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

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

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

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

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

915 Section 15. Section 738.502, Florida Statutes, is amended
 916 to read:

917 738.502 Rental property.--~~If To the extent~~ a fiduciary
 918 ~~trustee~~ accounts for receipts from rental property pursuant to
 919 this section, the fiduciary trustee shall allocate to income an
 920 amount received as rent of real or personal property, including
 921 an amount received for cancellation or renewal of a lease. An
 922 amount received as a refundable deposit, including a security
 923 deposit or a deposit that is to be applied as rent for future
 924 periods, must ~~shall~~ be added to principal and held subject to

925 the terms of the lease and is not available for distribution to
 926 a beneficiary until the fiduciary's ~~trustee's~~ contractual
 927 obligations have been satisfied with respect to that amount.

928 Section 16. Subsections (1), (2), and (3) of section
 929 738.503, Florida Statutes, are amended to read:

930 738.503 Obligation to pay money.—

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

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

940 (3) The increment in value of a bond or other obligation
 941 for the payment of money bearing no stated interest but payable
 942 at a future time in excess of the price at which it was issued
 943 or purchased, if purchased after issuance, is distributable as
 944 income. If the increment in value accrues and becomes payable
 945 pursuant to a fixed schedule of appreciation, it may be
 946 distributed to the beneficiary who was the income beneficiary at
 947 the ~~this~~ time of increment from the first principal cash
 948 available or, if none is available, when the increment is
 949 realized by sale, redemption, or other disposition. If ~~When~~
 950 unrealized increment is distributed as income but out of
 951 principal, the principal must ~~shall~~ be reimbursed for the
 952 increment when realized. If, in the reasonable judgment of the

953 fiduciary ~~trustee~~, exercised in good faith, the ultimate payment
 954 of the bond principal is in doubt, the fiduciary ~~trustee~~ may
 955 withhold the payment of incremental interest to the income
 956 beneficiary.

957 Section 17. Subsections (1) and (2) of section 738.504,
 958 Florida Statutes, are amended to read:

959 738.504 Insurance policies and similar contracts.—

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

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

975 Section 18. Section 738.601, Florida Statutes, is amended
 976 to read:

977 738.601 Insubstantial allocations not required.—If a
 978 fiduciary ~~trustee~~ determines that an allocation between
 979 principal and income required by s. 738.602, s. 738.603, s.
 980 738.604, s. 738.605, or s. 738.608 is insubstantial, the

981 fiduciary ~~trustee~~ may allocate the entire amount to principal
 982 unless one of the circumstances described in s. 738.104(3)
 983 applies to the allocation. This power may be exercised by a
 984 cofiduciary under ~~co~~~~trustee~~ in the circumstances described in s.
 985 738.104(4) and may be released for the reasons and in the manner
 986 described in s. 738.104(5). An allocation is presumed to be
 987 insubstantial if:

- 988 (1) The amount of the allocation would increase or
- 989 decrease net income in an accounting period, as determined
- 990 before the allocation, by less than 10 percent; or
- 991 (2) The value of the asset producing the receipt for which
- 992 the allocation would be made is less than 10 percent of the
- 993 total value of the trust's assets at the beginning of the
- 994 accounting period.

995 Section 19. Section 738.602, Florida Statutes, is amended
 996 to read:

997 738.602 Payments from deferred compensation plans,
 998 annuities, and retirement plans or accounts.—

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

1000 (a) "Fund" means a private or commercial annuity, an
 1001 individual retirement account, an individual retirement annuity,
 1002 a deferred compensation plan, a pension plan, a profit-sharing
 1003 plan, a stock-bonus plan, an employee stock-ownership plan, or
 1004 another similar arrangement in which federal income tax is
 1005 deferred.

1006 (b) "Income of the fund" means income that is determined
 1007 according to subsection (2) or subsection (3).

1008 (c) "Nonseparate account" means a fund for which the value

1009 of the participant's or account owner's right to receive
 1010 benefits can be determined only by the occurrence of a date or
 1011 event as defined in the instrument governing the fund.

1012 (d) "Payment" means a distribution from a fund that a
 1013 fiduciary ~~trustee~~ may receive over a fixed number of years or
 1014 during the life of one or more individuals because of services
 1015 rendered or property transferred to the payor in exchange for
 1016 future payments. The term includes a distribution made in money
 1017 or property from the payor's general assets or from a fund
 1018 created by the payor or payee.

1019 (e) "Separate account" means a fund holding assets
 1020 exclusively for the benefit of a participant or account owner
 1021 and:

1022 1. The value of such assets or the value of the separate
 1023 account is ascertainable at any time; or

1024 2. The administrator of the fund maintains records that
 1025 show receipts and disbursements associated with such assets.

1026 (2)(a) For a fund that is a separate account, income of
 1027 the fund shall be determined:

1028 1. As if the fund were a trust subject to the provisions
 1029 of ss. 738.401-738.706; or

1030 2. As a unitrust amount calculated by multiplying the fair
 1031 market value of the fund as of the first day of the first
 1032 accounting period and, thereafter, as of the last day of the
 1033 accounting period that immediately precedes the accounting
 1034 period during which a payment is received by the percentage
 1035 determined in accordance with s. 738.1041(2)(b)2.a. The
 1036 fiduciary ~~trustee~~ shall determine such percentage as of the

1037 first month that the fiduciary's ~~trustee's~~ election to treat the
 1038 income of the fund as a unitrust amount becomes effective. For
 1039 purposes of this subparagraph, "fair market value" means the
 1040 fair market value of the assets held in the fund as of the
 1041 applicable valuation date determined as provided in this
 1042 subparagraph. The fiduciary ~~trustee~~ is not liable for good faith
 1043 reliance upon any valuation supplied by the person or persons in
 1044 possession of the fund. If the fiduciary ~~trustee~~ makes or
 1045 terminates an election under this subparagraph, the fiduciary
 1046 ~~trustee~~ shall make such disclosure in a trust disclosure
 1047 document that satisfies the requirements of s. 736.1008(4)(a).

1048 (b) The fiduciary may ~~trustee shall have discretion to~~
 1049 elect the method of determining the income of the fund pursuant
 1050 to this subsection and may change the method of determining
 1051 income of the fund for any future accounting period.

1052 (3) For a fund that is a nonseparate account, income of
 1053 the fund is a unitrust amount determined by calculating the
 1054 present value of the right to receive the remaining payments
 1055 under 26 U.S.C. s. 7520 of the Internal Revenue Code as of the
 1056 first day of the accounting period and multiplying it by the
 1057 percentage determined in accordance with s. 738.1041(2)(b)2.a.
 1058 The fiduciary ~~trustee~~ shall determine the unitrust amount as of
 1059 the first month that the fiduciary's ~~trustee's~~ election to treat
 1060 the income of the fund as a unitrust amount becomes effective.

1061 (4) Except for those trusts described in subsection (5),
 1062 the fiduciary ~~trustee~~ shall allocate to income the lesser of the
 1063 payment received from a fund or the income determined under
 1064 subsection (2) or subsection (3). Any remaining amount of the

1065 payment shall be allocated to principal ~~a payment from a fund as~~
 1066 ~~follows:~~

1067 ~~(a) That portion of the payment the payor characterizes as~~
 1068 ~~income shall be allocated to income, and any remaining portion~~
 1069 ~~of the payment shall be allocated to principal.~~

1070 ~~(b) To the extent that the payor does not characterize any~~
 1071 ~~portion of a payment as income or principal and the trustee can~~
 1072 ~~ascertain the income of the fund by the fund's account~~
 1073 ~~statements or any other reasonable source, the trustee shall~~
 1074 ~~allocate to income the lesser of the income of the fund or the~~
 1075 ~~entire payment and shall allocate to principal any remaining~~
 1076 ~~portion of the payment.~~

1077 ~~(c) If the trustee, acting reasonably and in good faith,~~
 1078 ~~determines that neither paragraph (a) nor paragraph (b) applies~~
 1079 ~~and all or part of the payment is required to be made, the~~
 1080 ~~trustee shall allocate to income 10 percent of the portion of~~
 1081 ~~the payment that is required to be made during the accounting~~
 1082 ~~period and shall allocate the balance to principal. If no part~~
 1083 ~~of a payment is required to be made or the payment received is~~
 1084 ~~the entire amount to which the trustee is entitled, the trustee~~
 1085 ~~shall allocate the entire payment to principal. For purposes of~~
 1086 ~~this paragraph, a payment is not "required to be made" to the~~
 1087 ~~extent the payment is made because the trustee exercises a right~~
 1088 ~~of withdrawal.~~

1089 (5) For a trust that which, in order to qualify for the
 1090 estate or gift tax marital deduction under the Internal Revenue
 1091 Code or comparable law of any state, entitles the spouse to all
 1092 of the income of the trust, and the terms of the trust are

1093 silent as to the time and frequency for distribution of the
 1094 income of the fund, ~~then:~~

1095 (a) For a fund that is a separate account, unless the
 1096 spouse directs the fiduciary ~~trustee~~ to leave the income of the
 1097 fund in the fund, the fiduciary ~~trustee~~ shall withdraw and pay
 1098 to the spouse, at least no less frequently than annually:

1099 1. All of the income of the fund determined in accordance
 1100 with subparagraph (2)(a)1.; or

1101 2. The income of the fund as a unitrust amount determined
 1102 in accordance with subparagraph (2)(a)2.

1103 (b) For a fund that is a nonseparate account, the
 1104 fiduciary ~~trustee~~ shall withdraw and pay to the spouse, at least
 1105 ~~no less frequently than~~ annually, the income of the fund as a
 1106 unitrust amount determined in accordance with subsection (3).

1107 (6) This section does not apply to payments to which s.
 1108 738.603 applies.

1109 Section 20. Section 738.603, Florida Statutes, is amended
 1110 to read:

1111 738.603 Liquidating asset.—

1112 (1) For purposes of this section, the term "liquidating
 1113 asset" means an asset the value of which will diminish or
 1114 terminate because the asset is expected to produce receipts for
 1115 a period of limited duration. The term includes a leasehold,
 1116 patent, copyright, royalty right, and right to receive payments
 1117 for ~~during a period of~~ more than 1 year under an arrangement
 1118 that does not provide for the payment of interest on the unpaid
 1119 balance. The term does not include a payment subject to s.
 1120 738.602, resources subject to s. 738.604, timber subject to s.

1121 738.605, an activity subject to s. 738.607, an asset subject to
 1122 s. 738.608, or any asset for which the fiduciary trustee
 1123 establishes a reserve for depreciation under s. 738.703.

1124 (2) A fiduciary trustee shall allocate to income 5 ~~10~~
 1125 percent of the receipts from the carrying value of a liquidating
 1126 asset and the balance to principal. Amounts allocated to
 1127 principal will reduce the carrying value of the liquidating
 1128 asset, but not below zero. Amounts received in excess of the
 1129 remaining carrying value must be allocated to principal.

1130 Section 21. Subsections (1) and (4) of section 738.604,
 1131 Florida Statutes, are amended to read:

1132 738.604 Minerals, water, and other natural resources.—

1133 (1) ~~If To the extent~~ a fiduciary trustee accounts for
 1134 receipts from an interest in minerals or other natural resources
 1135 pursuant to this section, the fiduciary trustee shall allocate
 1136 such receipts as follows:

1137 (a) If received as nominal delay rental or nominal annual
 1138 rent on a lease, a receipt shall be allocated to income.

1139 (b) If received from a production payment, a receipt shall
 1140 be allocated to income if and to the extent the agreement
 1141 creating the production payment provides a factor for interest
 1142 or its equivalent. The balance shall be allocated to principal.

1143 (c) If an amount received as a royalty, shut-in-well
 1144 payment, take-or-pay payment, bonus, or delay rental is more
 1145 than nominal, 90 percent shall be allocated to principal and the
 1146 balance to income.

1147 (d) If an amount is received from a working interest or
 1148 any other interest not provided for in paragraph (a), paragraph

1149 (b), or paragraph (c), 90 percent of the net amount received
 1150 shall be allocated to principal and the balance to income.

1151 (4) If a trust or estate owns an interest in minerals,
 1152 water, or other natural resources on January 1, 2003, the
 1153 fiduciary ~~trustee~~ may allocate receipts from the interest as
 1154 provided in this chapter or in the manner used by the fiduciary
 1155 ~~trustee~~ before January 1, 2003. If the trust or estate acquires
 1156 an interest in minerals, water, or other natural resources after
 1157 January 1, 2003, the fiduciary ~~trustee~~ shall allocate receipts
 1158 from the interest as provided in this chapter.

1159 Section 22. Subsections (1), (2), and (4) of section
 1160 738.605, Florida Statutes, are amended to read:

1161 738.605 Timber.—

1162 (1) ~~If To the extent~~ a fiduciary ~~trustee~~ accounts for
 1163 receipts from the sale of timber and related products pursuant
 1164 to this section, the fiduciary ~~trustee~~ shall allocate such ~~the~~
 1165 net receipts as follows:

1166 (a) To income to the extent the amount of timber removed
 1167 from the land does not exceed the rate of growth of the timber
 1168 during the accounting periods in which a beneficiary has a
 1169 mandatory income interest;

1170 (b) To principal to the extent the amount of timber
 1171 removed from the land exceeds the rate of growth of the timber
 1172 or the net receipts are from the sale of standing timber;

1173 (c) To or between income and principal if the net receipts
 1174 are from the lease of timberland or from a contract to cut
 1175 timber from land owned by a trust or estate by determining the
 1176 amount of timber removed from the land under the lease or

1177 contract and applying the rules in paragraphs (a) and (b); or
 1178 (d) To principal to the extent advance payments, bonuses,
 1179 and other payments are not allocated pursuant to paragraph (a),
 1180 paragraph (b), or paragraph (c).

1181 (2) In determining net receipts to be allocated pursuant
 1182 to subsection (1), a fiduciary ~~trustee~~ shall deduct and transfer
 1183 to principal a reasonable amount for depletion.

1184 (4) If a trust or estate owns an interest in timberland on
 1185 January 1, 2003, the fiduciary ~~trustee~~ may allocate net receipts
 1186 from the sale of timber and related products as provided in this
 1187 chapter or in the manner used by the fiduciary ~~trustee~~ before
 1188 January 1, 2003. If the trust or estate acquires an interest in
 1189 timberland after January 1, 2003, the fiduciary ~~trustee~~ shall
 1190 allocate net receipts from the sale of timber and related
 1191 products as provided in this chapter.

1192 Section 23. Subsection (1) of section 738.606, Florida
 1193 Statutes, is amended to read:

1194 738.606 Property not productive of income.—

1195 (1) If a marital deduction under the Internal Revenue Code
 1196 or comparable law of any state is allowed for all or part of a
 1197 trust the income of which must ~~is required to~~ be distributed to
 1198 the grantor's spouse and the assets of which consist
 1199 substantially of property that does not provide the spouse with
 1200 sufficient income from or use of the trust assets, and if the
 1201 amounts the trustee transfers from principal to income under s.
 1202 738.104 and distributes to the spouse from principal pursuant to
 1203 the terms of the trust are insufficient to provide the spouse
 1204 with the beneficial enjoyment required to obtain the marital

1205 deduction, the spouse may require the trustee to make property
 1206 productive of income, convert property within a reasonable time,
 1207 or exercise the power conferred by ss. 738.104 and 738.1041. The
 1208 trustee may decide which action or combination of actions to
 1209 take.

1210 Section 24. Subsections (2) and (3) of section 738.607,
 1211 Florida Statutes, are amended to read:

1212 738.607 Derivatives and options.—

1213 (2) To the extent a fiduciary ~~trustee~~ does not account
 1214 under s. 738.403 for transactions in derivatives, the fiduciary
 1215 ~~trustee~~ shall allocate to principal receipts from and
 1216 disbursements made in connection with those transactions.

1217 (3) If a fiduciary ~~trustee~~ grants an option to buy
 1218 property from the trust or estate whether or not the trust or
 1219 estate owns the property when the option is granted, grants an
 1220 option that permits another person to sell property to the trust
 1221 or estate, or acquires an option to buy property for the trust
 1222 or estate or an option to sell an asset owned by the trust or
 1223 estate, and the fiduciary ~~trustee~~ or other owner of the asset is
 1224 required to deliver the asset if the option is exercised, an
 1225 amount received for granting the option shall be allocated to
 1226 principal. An amount paid to acquire the option shall be paid
 1227 from principal. A gain or loss realized upon the exercise of an
 1228 option, including an option granted to a grantor of the trust or
 1229 estate for services rendered, shall be allocated to principal.

1230 Section 25. Subsections (2) and (3) of section 738.608,
 1231 Florida Statutes, are amended to read:

1232 738.608 Asset-backed securities.—

1233 (2) If a trust or estate receives a payment from interest
 1234 or other current return and from other proceeds of the
 1235 collateral financial assets, the fiduciary ~~trustee~~ shall
 1236 allocate to income the portion of the payment which the payor
 1237 identifies as being from interest or other current return and
 1238 ~~shall~~ allocate the balance of the payment to principal.

1239 (3) If a trust or estate receives one or more payments in
 1240 exchange for the trust's or estate's entire interest in an
 1241 asset-backed security during a single accounting period, the
 1242 fiduciary ~~trustee~~ shall allocate the payments to principal. If a
 1243 payment is one of a series of payments that will result in the
 1244 liquidation of the trust's or estate's interest in the security
 1245 over more than a single accounting period, the fiduciary ~~trustee~~
 1246 shall allocate 10 percent of the payment to income and the
 1247 balance to principal.

1248 Section 26. Section 738.701, Florida Statutes, is amended
 1249 to read:

1250 738.701 Disbursements from income.—A fiduciary ~~trustee~~
 1251 shall make the following disbursements from income to the extent
 1252 they are not disbursements to which s. 738.201(2)-(a) ~~or (c)~~
 1253 applies:

1254 (1) One-half of the regular compensation of the fiduciary
 1255 ~~trustee~~ and of any person providing investment advisory or
 1256 custodial services to the fiduciary ~~trustee~~.

1257 (2) One-half of all expenses for accountings, judicial
 1258 proceedings, or other matters that involve both the income and
 1259 remainder interests.

1260 (3) All of the other ordinary expenses incurred in

1261 connection with the administration, management, or preservation
 1262 of trust property and the distribution of income, including
 1263 interest, ordinary repairs, regularly recurring taxes assessed
 1264 against principal, and expenses of a proceeding or other matter
 1265 that concerns primarily the income interest.

1266 (4) Recurring premiums on insurance covering the loss of a
 1267 principal asset or the loss of income from or use of the asset.

1268 Section 27. Subsection (1) of section 738.702, Florida
 1269 Statutes, is amended to read:

1270 738.702 Disbursements from principal.-

1271 (1) A fiduciary ~~trustee~~ shall make the following
 1272 disbursements from principal:

1273 (a) The remaining one-half of the disbursements described
 1274 in s. 738.701(1) and (2).

1275 (b) All of the trustee's compensation calculated on
 1276 principal as a fee for acceptance, distribution, or termination
 1277 and disbursements made to prepare property for sale.

1278 (c) Payments on the principal of a trust debt.

1279 (d) Expenses of a proceeding that concerns primarily
 1280 principal, including a proceeding to construe the trust or will,
 1281 or to protect the trust, estate, or its property.

1282 (e) Premiums paid on a policy of insurance not described
 1283 in s. 738.701(4) of which the trust or estate is the owner and
 1284 beneficiary.

1285 (f) Estate, inheritance, and other transfer taxes,
 1286 including penalties, apportioned to the trust.

1287 (g) Disbursements related to environmental matters,
 1288 including reclamation, assessing environmental conditions,

1289 remedying and removing environmental contamination, monitoring
 1290 remedial activities and the release of substances, preventing
 1291 future releases of substances, collecting amounts from persons
 1292 liable or potentially liable for the costs of such activities,
 1293 penalties imposed under environmental laws or regulations and
 1294 other payments made to comply with those laws or regulations,
 1295 statutory or common law claims by third parties, and defending
 1296 claims based on environmental matters.

1297 (h) Payments representing extraordinary repairs or
 1298 expenses incurred in making a capital improvement to principal,
 1299 including special assessments; however, a fiduciary ~~trustee~~ may
 1300 establish an allowance for depreciation out of income to the
 1301 extent permitted by s. 738.703.

1302 Section 28. Subsection (2) of section 738.703, Florida
 1303 Statutes, is amended to read:

1304 738.703 Transfers from income to principal for
 1305 depreciation.—

1306 (2) A fiduciary ~~trustee~~ may transfer to principal a
 1307 reasonable amount of the net cash receipts from a principal
 1308 asset that is subject to depreciation but may not transfer any
 1309 amount for depreciation:

1310 (a) Of that portion of real property used or available for
 1311 use by a beneficiary as a residence or of tangible personal
 1312 property held or made available for the personal use or
 1313 enjoyment of a beneficiary;

1314 (b) During the administration of a decedent's estate; or

1315 (c) Under this section if the fiduciary ~~trustee~~ is
 1316 accounting under s. 738.403 for the business or activity in

1317 which the asset is used.

1318 Section 29. Subsections (1), (2), and (3) of section
 1319 738.704, Florida Statutes, are amended to read:

1320 738.704 Transfers from income to reimburse principal.—

1321 (1) If a fiduciary ~~trustee~~ makes or expects to make a
 1322 principal disbursement described in this section, the fiduciary
 1323 ~~trustee~~ may transfer an appropriate amount from income to
 1324 principal in one or more accounting periods to reimburse
 1325 principal or to provide a reserve for future principal
 1326 disbursements.

1327 (2) Principal disbursements to which subsection (1)
 1328 applies include the following, but only to the extent the
 1329 fiduciary ~~trustee~~ has not been and does not expect to be
 1330 reimbursed by a third party:

1331 (a) An amount chargeable to income but paid from principal
 1332 because the amount is unusually large.

1333 (b) Disbursements made to prepare property for rental,
 1334 including tenant allowances, leasehold improvements, and
 1335 broker's commissions.

1336 (c) Disbursements described in s. 738.702(1)(g).

1337 (3) If the asset the ownership of which gives rise to the
 1338 disbursements becomes subject to a successive income interest
 1339 after an income interest ends, a fiduciary ~~trustee~~ may continue
 1340 to transfer amounts from income to principal as provided in
 1341 subsection (1).

1342 Section 30. Section 738.705, Florida Statutes, is amended
 1343 to read:

1344 738.705 Income taxes.—

1345 (1) A tax required to be paid by a fiduciary ~~trustee~~ based
 1346 on receipts allocated to income shall be paid from income.

1347 (2) A tax required to be paid by a fiduciary ~~trustee~~ based
 1348 on receipts allocated to principal shall be paid from principal,
 1349 even if the tax is called an income tax by the taxing authority.

1350 (3) A tax required to be paid by a fiduciary ~~trustee~~ on
 1351 the trust's or estate's share of an entity's taxable income
 1352 shall be paid proportionately:

1353 (a) From income to the extent receipts from the entity are
 1354 allocated to income; ~~and~~

1355 (b) From principal to the extent:
 1356 ~~1.~~ receipts from the entity are allocated to principal;
 1357 and

1358 ~~2. The trust's share of the entity's taxable income~~
 1359 ~~exceeds the total receipts described in paragraph (a) and~~
 1360 ~~subparagraph 1.~~

1361 (c) From principal to the extent that the income taxes
 1362 payable by the trust or estate exceed the total distributions
 1363 from the entity.

1364 (4) After applying subsections (1)-(3), the fiduciary
 1365 shall adjust income or principal receipts to the extent that the
 1366 trust's or estate's income taxes are reduced, but not
 1367 eliminated, because the trust or estate receives a deduction for
 1368 payments made to a beneficiary. The amount distributable to that
 1369 beneficiary as income as a result of this adjustment shall be
 1370 equal to the cash received by the trust or estate, reduced, but
 1371 not below zero, by the entity's taxable income allocable to the
 1372 trust or estate multiplied by the trust's or estate's income tax

1373 rate. The reduced amount shall be divided by the difference
 1374 between 1 and the trust's or estate's income tax rate in order
 1375 to determine the amount distributable to that beneficiary as
 1376 income before giving effect to other receipts or disbursements
 1377 allocable to that beneficiary's interest. For purposes of this
 1378 ~~section, receipts allocated to principal or income shall be~~
 1379 ~~reduced by the amount distributed to a beneficiary from~~
 1380 ~~principal or income for which the trust receives a deduction in~~
 1381 ~~calculating the tax.~~

1382 Section 31. Section 738.801, Florida Statutes, is amended
 1383 to read:

1384 (Substantial rewording of section. See
 1385 s. 738.801, F.S., for present text.)

1386 738.801 Apportionment of expenses; improvements.—

1387 (1) For purposes of this section, the term:

1388 (a) "Remainderman" means the holder of the remainder
 1389 interests after the expiration of a tenant's estate in property.

1390 (b) "Tenant" means the holder of an estate for life or
 1391 term of years in real property or personal property, or both.

1392 (2) If a trust has not been created, expenses shall be
 1393 apportioned between the tenant and remainderman as follows:

1394 (a) The following expenses are allocated to and shall be
 1395 paid by the tenant:

1396 1. All ordinary expenses incurred in connection with the
 1397 administration, management, or preservation of the property,
 1398 including interest, ordinary repairs, regularly recurring taxes
 1399 assessed against the property, and expenses of a proceeding or
 1400 other matter that concerns primarily the tenant's estate or use

1401 of the property.

1402 2. Recurring premiums on insurance covering the loss of
1403 the property or the loss of income from or use of the property.

1404 3. Any of the expenses described in subparagraph (b)3.
1405 which are attributable to the use of the property by the tenant.

1406 (b) The following expenses are allocated to and shall be
1407 paid by the remainderman:

1408 1. Payments on the principal of a debt secured by the
1409 property, except to the extent the debt is for expenses
1410 allocated to the tenant.

1411 2. Expenses of a proceeding or other matter that concerns
1412 primarily the title to the property, other than title to the
1413 tenant's estate.

1414 3. Except as provided in subparagraph (a)3., expenses
1415 related to environmental matters, including reclamation,
1416 assessing environmental conditions, remedying and removing
1417 environmental contamination, monitoring remedial activities and
1418 the release of substances, preventing future releases of
1419 substances, collecting amounts from persons liable or
1420 potentially liable for the costs of such activities, penalties
1421 imposed under environmental laws or regulations and other
1422 payments made to comply with those laws or regulations,
1423 statutory or common law claims by third parties, and defending
1424 claims based on environmental matters.

1425 4. Extraordinary repairs.

1426 (c) If the tenant or remainderman incurred an expense for
1427 the benefit of his or her own estate without consent or
1428 agreement of the other, he or she must pay such expense in full.

1429 (d) Except as provided in paragraph (c), the cost of, or
 1430 special taxes or assessments for, an improvement representing an
 1431 addition of value to property forming part of the principal
 1432 shall be paid by the tenant if the improvement is not reasonably
 1433 expected to outlast the estate of the tenant. In all other
 1434 cases, only a part shall be paid by the tenant while the
 1435 remainder shall be paid by the remainderman. The part payable by
 1436 the tenant is ascertainable by taking that percentage of the
 1437 total that is found by dividing the present value of the
 1438 tenant's estate by the present value of an estate of the same
 1439 form as that of the tenant, except that it is limited for a
 1440 period corresponding to the reasonably expected duration of the
 1441 improvement. The computation of present values of the estates
 1442 shall be made by using the rate defined in 26 U.S.C. s. 7520,
 1443 then in effect and, in the case of an estate for life, the
 1444 official mortality tables then in effect under 26 U.S.C. s.
 1445 7520. Other evidence of duration or expectancy may not be
 1446 considered.

1447 (3) This section does not apply to the extent it is
 1448 inconsistent with the instrument creating the estates, the
 1449 agreement of the parties, or the specific direction of the
 1450 taxing or other statutes.

1451 (4) The common law applicable to tenants and remaindermen
 1452 supplements this section, except as modified by this section or
 1453 other laws.

1454 Section 32. This act shall take effect January 1, 2013.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 929 Unfair or Deceptive Acts or Practices Involving Motor Vehicles

SPONSOR(S): Gaetz

TIED BILLS: None IDEN./SIM. BILLS: SB 1512

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee		Cary <i>DMC</i>	Bond <i>WB</i>
2) Business & Consumer Affairs Subcommittee			
3) Rulemaking & Regulation Subcommittee			
4) Judiciary Committee			

SUMMARY ANALYSIS

Florida law prohibits deceptive and unfair trade practices. The law can be enforced by an enforcing authority, which is either a state attorney or the attorney general, or by individuals. There is a similar law prohibiting deceptive acts or practices specifically with respect to motor vehicles.

This bill requires individuals, prior to filing a civil suit under either law, to provide a notice-of-claim to the dealership. If the dealership pays the claim and an additional surcharge within the allotted time, the individual may not file suit.

The bill does not apply to actions by an enforcement authority, certified class action suits, other provisions of federal or state law, or personal injury or death claims.

This bill does not appear to have a fiscal impact on the state or local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

The Florida Deceptive and Unfair Trade Practices Act (FDUTPA) prohibits unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce.¹ The law can be enforced either by enforcing authorities, generally a state attorney or the Department of Legal Affairs (DLA)², or by a private suit filed by an individual.³ Additionally, there is a separate part of the chapter that applies specifically to motor vehicles.⁴

Effect of Proposed Changes

This bill amends s. 501.975, F.S., to add a new definition relating to motor vehicles. The bill defines "business day" as any day other than a Saturday, Sunday, or legal holiday.

This bill creates s. 501.977, F.S. This section requires consumers suing a motor vehicle dealer under either FDUTPA or its motor vehicle counterpart provision to provide the dealer with a 15-day notice prior to filing suit. The notice must include:

- A statement that the notice of claim is provided under that section of the statutes;
- The name, address, and telephone number of the claimant;
- The name and address of the dealer;
- The date and description of the transaction, event, or circumstances upon which the claim is based;
- The provisions of FDUTPA or its motor vehicle counterpart which the dealer is claimed to have violated and a specific description of the underlying facts that show the violation; and
- A comprehensive, detailed statement describing each item for which actual damages are claimed and recoverable under FDUTPA or its motor vehicle counterpart and the amount claimed for each item, including the method of calculating damages.

The bill requires DLA to adopt a notice-of-claim form that provides blank spaces for the required information. The bill requires the dealer to provide a copy of the form with the transaction, along with information regarding to whom the notice-of-claim must be sent. Failure to provide the form constitutes a waiver of the right-to-notice under this bill.

Each notice of claim must be accompanied by a copy of each transaction upon which the claim is based or upon which the claimant relied in asserting the claim. The claimant must send notice by certified or registered mail with return receipt requested to the dealer's registered agent, anybody mentioned in the law dealing with service of process on corporations if the dealer does not have a registered agent, or the dealer's business division if provided on the notice-of-claim form. The dealer is required to reimburse the claimant for the cost of postage if the dealer pays the claim.

A claimant may not initiate civil litigation against a dealer under either FDUTPA or its motor vehicle counterpart if the dealer pays, within 15 business days after receipt of the notice, the amount of claimed actual damages and a 10% surcharge, not to exceed \$500. Such a payment releases the dealer from liability to the claimant for the transaction, event, or circumstance described in the notice of claim.

¹ Section 501.204, F.S.

² Section 501.203(2), F.S.

³ Section 501.211, F.S.

⁴ Section 501.976, F.S.

The dealer is not required to pay the claimant's attorney fees in any civil litigation initiated under FDUTPA or its motor vehicle counterpart if the dealer responds to the claimant in writing, within 15 business days, and if a court or arbitrator agrees that the claimant has not substantially complied with the provisions of this bill, or if the claim is not supported by the underlying facts or by generally accepted accounting principles, or if the claim includes items that are not recoverable under either provision of law.

The bill provides that a dealer's payment of actual damages, or an offer to pay, is not an admission of liability by the dealer and is inadmissible as evidence under s. 90.408, F.S.⁵

The bill does not apply to:

- A claim for actual damages brought and certified as a maintainable class action;
- An action brought by an enforcing authority;
- An act or practice required or specifically authorized by federal law or any provision of state law except chapter 501; or
- A claim for personal injury or death or a claim for damage to tangible personal property other than the property that is the subject of the customer transaction.

B. SECTION DIRECTORY:

Section 1 amends s. 501.975, F.S., to add a new definition.

Section 2 creates s. 501.977, F.S., relating to disposal of claims before civil litigation.

Section 3 provides an effective date upon becoming law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

⁵ Section 90.408, F.S., relating to compromise and offers to compromise, provides that "evidence of an offer to compromise a claim which was disputed as to validity or amount, as well as any relevant conduct or statements made in negotiations concerning a compromise, is inadmissible to prove liability or absence of liability for the claim or its value."

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill appears to provide rule-making authority to the Department of Legal Affairs. The bill requires the DLA to create a notice-of-claim form, which may require the promulgation of an agency rule.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Section 1.01(11), F.S., defines registered mail and certified mail to be the same. The reference to registered mail in the bill appears unnecessary.

The bill contains an effective date upon becoming law, however the bill requires motor vehicle dealers to provide a form to customers during the transaction. The attorney general will not have the form immediately upon this bill becoming law, thereby subjecting dealers to waiver of rights under the law because dealers will not have the form available.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

1 A bill to be entitled
2 An act relating to unfair or deceptive acts or
3 practices involving motor vehicles; amending s.
4 501.975, F.S.; defining the term "business day" and
5 conforming provisions; creating s. 501.977, F.S.;
6 providing for the disposition of certain claims
7 against motor vehicle dealers before civil litigation;
8 requiring claimants to provide written notice of such
9 claims to motor vehicle dealers before initiating
10 litigation; specifying the required contents and
11 procedures for providing the written notices;
12 directing the Department of Legal Affairs to adopt a
13 notice-of-claim form; authorizing the department to
14 adopt rules; requiring motor vehicle dealers to
15 provide a copy of the notice-of-claim form to each
16 customer; authorizing claimants to initiate litigation
17 without prior notice to motor vehicle dealers that do
18 not provide copies of the notice-of-claim form;
19 prohibiting a claimant from initiating litigation
20 against a motor vehicle dealer that pays the actual
21 damages claimed plus a surcharge within a specified
22 period; limiting a motor vehicle dealer's further
23 liability upon payment of a claim; limiting a motor
24 vehicle dealer's liability for payment of attorney
25 fees under certain circumstances; tolling time
26 limitations for initiating litigation against motor
27 vehicle dealers under certain circumstances; limiting
28 admissibility of a motor vehicle dealer's payment or

29 offer to pay a claimant's actual damages; providing
 30 applicability; providing an effective date.

31

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

33

34 Section 1. Section 501.975, Florida Statutes, is amended
 35 to read:

36 501.975 Definitions.—As used in this part ~~s. 501.976~~, the
 37 term following terms shall have the following meanings:

38 (1) "Business day" means any day other than a Saturday,
 39 Sunday, or legal holiday.

40 (2)~~(1)~~ "Customer" includes a customer's designated agent.

41 (3)~~(2)~~ "Dealer" means a motor vehicle dealer as defined in
 42 s. 320.27, but does not include a motor vehicle auction as
 43 defined in s. 320.27(1)(c)4.

44 (4)~~(3)~~ "Replacement item" means a tire, bumper, bumper
 45 fascia, glass, in-dashboard equipment, seat or upholstery cover
 46 or trim, exterior illumination unit, grill, sunroof, external
 47 mirror and external body cladding. The replacement of up to
 48 three of these items does not constitute repair of damage if
 49 each item is replaced because of a product defect or damaged due
 50 to vandalism while the new motor vehicle is under the control of
 51 the dealer and the items are replaced with original manufacturer
 52 equipment, unless an item is replaced due to a crash, collision,
 53 or accident.

54 (5)~~(4)~~ "Threshold amount" means 3 percent of the
 55 manufacturer's suggested retail price of a motor vehicle or
 56 \$650, whichever is less.

57 ~~(6)~~(5) "Vehicle" means any automobile, truck, bus,
 58 recreational vehicle, or motorcycle required to be licensed
 59 under chapter 320 for operation over the roads of Florida, but
 60 does not include trailers, mobile homes, travel trailers, or
 61 trailer coaches without independent motive power.

62 Section 2. Section 501.977, Florida Statutes, is created
 63 to read:

64 501.977 Disposal of claims before civil litigation; notice
 65 of claim.-

66 (1) At least 15 days before a claimant may initiate civil
 67 litigation against a dealer under part II or this part, the
 68 claimant must provide the dealer with written notice of the
 69 claim and the claimant's good-faith intent to initiate
 70 litigation. The written notice of claim must include:

71 (a) A statement that the notice of claim is provided under
 72 this section.

73 (b) The name, address, and telephone number of the
 74 claimant.

75 (c) The name and address of the dealer.

76 (d) The date and description of the transaction, event, or
 77 circumstances upon which the claim is based.

78 (e) The provisions of part II or this part which the
 79 dealer is claimed to have violated and a specific description of
 80 the underlying facts that show the violation.

81 (f) A comprehensive, detailed statement describing each
 82 item for which actual damages are claimed and recoverable under
 83 part II or this part and the amount claimed for each item,
 84 including, to the extent applicable, the formula or basis by

85 which the damages are calculated.

86 (2) (a) The Department of Legal Affairs shall adopt a
 87 notice-of-claim form that provides blank spaces for the
 88 information required under subsection (1) and includes an
 89 explanation of part II and this part. The department shall
 90 publish a copy of its notice-of-claim form on the department's
 91 Internet website. The department may adopt rules to administer
 92 this paragraph.

93 (b) A dealer shall provide a copy of the department's
 94 notice-of-claim form to each customer at the time of each
 95 transaction, and the dealer must include on the form the name or
 96 position title and address of the person to whom the notice of
 97 claim must be provided under subsection (4) or the name and
 98 address of the dealer's business division assigned by the dealer
 99 with responsibility for processing claims.

100 (c) A dealer's failure to provide a copy of the
 101 department's notice-of-claim form to a claimant constitutes
 102 waiver of the dealer's right to notice under this section, and,
 103 notwithstanding subsection (1), the claimant may initiate civil
 104 litigation without providing the dealer with prior notice of the
 105 claim.

106 (3) Each notice of claim, to the extent applicable, must
 107 be accompanied by a copy of each transaction or other document
 108 upon which the claim is based or upon which the claimant relied
 109 in asserting the claim.

110 (4) (a) A notice of claim must be provided to the dealer by
 111 certified or registered United States mail, return receipt
 112 requested, to the dealer's registered agent, any person listed

113 in s. 48.081(1) if the dealer does not have a registered agent,
 114 or, if included on the notice-of-claim form provided to
 115 customers by the dealer, the dealer's business division assigned
 116 by the dealer with responsibility for processing claims.

117 (b) If the dealer pays the claim under paragraph (5)(a)
 118 and if requested by the claimant, the dealer shall reimburse the
 119 claimant for the postal costs of providing the notice.

120 (5) Notwithstanding any provision of part II or this part:

121 (a) A claimant may not initiate civil litigation against a
 122 dealer under part II or this part if the dealer, within 15
 123 business days after receipt of the notice of claim, pays to the
 124 claimant:

125 1. The amount of actual damages claimed in the notice
 126 under paragraph (1)(f).

127 2. A surcharge equal to 10 percent of the amount of actual
 128 damages claimed in the notice, not to exceed a surcharge of
 129 \$500. A claimant is not entitled to a surcharge if the dealer
 130 rejects or does not respond to the claimant's notice of claim.

131 (b) A dealer that pays the claimant for actual damages and
 132 the surcharge is not further liable to the claimant for the
 133 transaction, event, or circumstances described in the notice of
 134 claim.

135 (c) A dealer is not required to pay the claimant's
 136 attorney fees in any civil litigation initiated under part II or
 137 this part if the dealer, within 15 business days after receipt
 138 of the notice of claim, notifies the claimant in writing, and a
 139 court or arbitrator agrees, that:

140 1. The amount claimed is not supported by the underlying

141 facts described in the notice of claim or by generally accepted
 142 accounting principles or the amount claimed includes items that
 143 are not recoverable under part II or this part; or

144 2. The claimant has not substantially complied with this
 145 section.

146 (d) Any time limitation on initiating civil litigation
 147 under part II or this part is tolled for 15 business days, or
 148 for such other period as agreed to in writing by the parties,
 149 after the date that the notice of claim provided to the dealer
 150 under paragraph (4) (a) is postmarked by the United States Postal
 151 Service.

152 (6) A dealer's payment of the claimant's actual damages or
 153 offer to pay such damages is:

154 (a) Not an admission of any wrongdoing by the dealer.

155 (b) Inadmissible as evidence under s. 90.408.

156 (7) For purposes of this section, payment by a dealer is
 157 deemed paid on the date that a draft or other valid payment
 158 instrument is postmarked by the United States Postal Service,
 159 date-stamped with a verifiable tracking number by a common
 160 carrier, or delivered, if a postmark or verifiable tracking
 161 number is not available.

162 (8) This section does not apply to:

163 (a) A claim for actual damages brought and certified as a
 164 maintainable class action.

165 (b) An action brought by the enforcing authority as
 166 defined in s. 501.203.

167 (c) An act or practice required or specifically authorized
 168 by federal law or any provision of state law except chapter 501.

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169 | (d) A claim for personal injury or death or a claim for
170 | damage to tangible personal property other than the property
171 | that is the subject of the customer transaction.

172 | Section 3. This act shall take effect upon becoming a law.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 971 Judiciary
SPONSOR(S): Gaetz
TIED BILLS: None IDEN./SIM. BILLS: SB 1570

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee		Caridad DC	Bond NB
2) Government Operations Subcommittee			
3) Judiciary Committee			

SUMMARY ANALYSIS

The Florida Constitution and the Florida Rules of Judicial Administration allow the Chief Justice of the Supreme Court to temporarily assign retired justices and judges to any court in which they are qualified to serve. Under current law, a public employee or officer who retires or terminates participation in the Deferred Retirement Option Program (DROP) on or after July 1, 2010, and who becomes employed by an employer participating in the Florida Retirement System (FRS) during the first six months after retirement or termination of DROP, is not considered retired and may not receive retirement benefits. This prohibition currently applies to retired judges or justices serving temporary duty.

Trial court judgeships that become vacant during a judge's term and all appellate judgeships are filled by the Governor from a list of nominees provided by a judicial nominating commission (JNC). The number of members and composition of each JNC is provided for by statute.

The bill:

- Provides that if a retired judge or justice is assigned to temporary duty, such assignment does not affect his or her eligibility for benefits under the FRS;
- Provides that members of the JNC are not required to be practicing members of the bar;
- Deletes obsolete provisions relating to the staggering of terms for a member of the JNC.

This bill may have a fiscal impact on state government. Because the bill appears to provide an increase in benefits to members of the FRS, an actuarial study may be required to determine the estimated cost and to meet state constitutional requirements.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Retirement

A "senior judge" is an honorary designation that refers to a retired judge serving on assignment to temporary judicial duty. The Florida Constitution and the Florida Rules of Judicial Administration allow the Chief Justice of the Supreme Court to temporarily assign retired justices and judges to any court in which they are qualified to serve.¹ The Florida Rules of Judicial Administration define a retired judge as a judge who is not engaged in the practice of law and who has been a judicial officer of this state.² Retired judges must comply with continuing judicial education requirements, including completion of 30 hours of approved judicial education programs every three years.³

Section 25.073, F.S., provides that a retired justice or judge is a former justice or judge who is not engaged in the practice of law and who has not been defeated in seeking re-election or has not failed to be retained in seeking retention in his or her last judicial office.⁴ A justice or judge may not serve more than 60 days on temporary duty during a year without the approval of the Chief Justice.⁵

Retired judges may receive compensation as set by law.⁶ Only persons who meet the qualifications set forth in s. 25.073(1), F.S., may be compensated for service as retired justices or judges. Current law sets the compensation for retired justices or judges at not less than \$200 per day.⁷ According to the Florida Supreme Court's office, retired justices or judges are currently paid \$350 per day for service. In addition, retired justices or judges are entitled to necessary travel expenses.⁸

Chapter 121, F.S., relates to the Florida Retirement System (FRS). Section 121.021(39)(b), F.S., defines "termination", providing that:

"[T]ermination" for a member electing to participate in the Deferred Retirement Option Program [(DROP)] occurs when the program participant ceases all employment relationships with participating employers in accordance with statute.

However, the section further provides that any member of FRS who retires or terminates DROP participation on or after July 1, 2010, and who becomes employed by any FRS employer during the first six calendar months after such time, does not meet the requirements for "termination." Such individuals are not considered retired and, therefore, may not receive retirement benefits.

Section 121.091, F.S., sets out what retirement benefits are payable to an individual who has terminated employment under s. 121.021(39)(a), F.S., or begun participation in DROP. The statute provides that, any person whose retirement is effective on or after July 1, 2010, who is retired under this chapter, may be reemployed by an employer that participates in a state-administered retirement system and receive both retirement benefits and compensation from such employer.⁹ However, a person may not be reemployed by an employer participating in the Florida Retirement System before meeting the definition of "termination" in s. 121.021, F.S.

¹ Art. 5, s. (2)(b) Fla. Const.; Fla.R.Jud.Admin. 2.205(a)(3)(A).

² Fla. R.Jud.Admin. 2.205(a)(3)(B).

³ See Fla.R.Jud.Admin. 2.320.

⁴ Section 25.073(1), F.S.

⁵ See s. 25.073(2)(a), F.S.

⁶ See Fla.R.Jud.Admin. 2.030(a)(3)(A).

⁷ See s. 25.073(2)(a), F.S.

⁸ Section 25.073(2)(b), F.S.

⁹ Section 121.091(9)(c), F.S.

The bill provides that the definition of "termination" in s. 121.021(39)(b), F.S., relating to individuals participating in DROP, does not apply to a retired judge or justice assigned to temporary duty. Instead, termination occurs upon the judge's retirement from non-temporary, active duty as a judge. The bill also provides that s. 121.091(9)(c), F.S., does not apply to a retired judge serving temporary duty and that temporary duty under this section is not considered reemployment or employment after retirement for purposes of Chapter 121.

In sum, the bill provides that if a retired judge or justice is assigned to temporary duty, such assignment does not affect his or her eligibility for benefits under the Florida Retirement System.

Judicial Nominating Commission

Trial court judgeships that become vacant during a judge's term and all appellate judgeships are filled by the Governor from a list of nominees provided by a judicial nominating commission (JNC).¹⁰ The number of members and composition of each JNC is provided for by statute.¹¹ When an appellate judgeship becomes vacant, candidates submit their applications to the JNC for that court. The commission sends a list of three to six nominees to the Governor and the Governor fills the vacancy by selecting from that list.¹² Circuit and county court judges are determined by election¹³ but vacancies on the circuit or county courts that occur between elections are filled in the same manner as vacancies on the appellate bench.¹⁴

Article V, s. 11(d), Fla. Const., provides that a JNC must be created by general law for the Supreme Court, each district court of appeal, and each judicial circuit for all trial court within that circuit. Section 43.291, F.S., implements the constitutional provisions. Each JNC consists of nine members appointed by the Governor.¹⁵ Members serve 4 year terms.¹⁶ All JNC members must be residents of the territorial jurisdiction serviced by the JNC to which the member is appointed.¹⁷

The Governor may appoint five of the nine members of each JNC without input from the Florida Bar. Two of those five appointees must be members of The Florida Bar who are engaged in the practice of law.¹⁸ The remaining four members are appointed by the Governor from a list of nominees selected and provided by the Board of Governors of the Florida Bar. The Governor may reject all of the nominees recommended for the position and request that the Board submit a new list of three different nominees who have not previously been recommended by the Board. These four members of the JNC must be members of the Florida Bar engaged in the practice of law.

The bill revises qualifications for appointment to a JNC. Specifically, it eliminates the requirement that the four members appointed by the Governor to the JNC from the list provided by the Board of Governors of the Florida Bar be engaged in the practice of law. It also requires that all acts by the JNC be made with the concurrence of a majority of its "current" members.

The bill deletes obsolete provisions relating to the staggering of terms. It also provides that an appointment to a JNC — unless it is to a vacant, unexpired term — is for 4 years, and that each expired term or vacancy is filled by appointment in the same manner as the member whose position is filled.

B. SECTION DIRECTORY:

Section 1 amends s. 25.073, F.S., relating to retired justices or judges assigned to temporary duty.

¹⁰ See art. V, s.11, Fla. Const.

¹¹ See s. 43.291, F.S.

¹² See art. V, s. 11(a), Fla. Const.

¹³ Circuits and counties may, by local option, choose to select judges in the same manner as appellate judges are selected. See art. V, s. 10, Fla. Const.

¹⁴ See art. V, s. 11(b), Fla. Const.

¹⁵ Section 43.291(1), F.S.

¹⁶ Section 43.291(3), F.S.

¹⁷ Section 43.291(1)(a), (b), F.S.

¹⁸ Section 43.291(1)(b), F.S.

Section 2 amends s. 43.291, F.S., relating to Judicial Nominating Commissions.

Section 3 provides an effective date of July 1, 2012.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have any direct economic impact on the private sector.

D. FISCAL COMMENTS:

Article X, s. 14 of the State Constitution requires that benefit improvements under public pension plans in the State of Florida be concurrently funded on a sound actuarial basis, as set forth below:

SECTION 14. State retirement systems benefit changes.--A governmental unit responsible for any retirement or pension system supported in whole or in part by public funds shall not after January 1, 1977, provide any increase in the benefits to the members or beneficiaries of such system unless such unit has made or concurrently makes provision for the funding of the increase in benefits on a sound actuarial basis.

Article X, s. 14 of the State Constitution is implemented by statute under part VII of chapter 112, F.S., the "Florida Protection of Public Employee Retirement Benefits Act" (Act). The Act establishes minimum standards for the operation and funding of public employee retirement systems and plans in the State of Florida. It prohibits the use of any procedure, methodology, or assumptions the effect of which is to transfer to future taxpayers any portion of the costs which may reasonably have been expected to be paid by the current taxpayers.

The bill appears to require an actuarial study in order to determine the estimated cost and to meet the requirements of Article X, s. 14 of the State Constitution.¹⁹

III. COMMENTS

¹⁹ The Senate Committee on Governmental Oversight and Accountability published a report finding that the creation of an exception to the six-month termination period in s. 121.021(3), F.S., constitutes an increase in benefits which requires an actuarial study. *See* "Retired Judges Returning to Temporary Duty Status within Six Months of Retirement," September 2011.

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

1 A bill to be entitled

2 An act relating to the judiciary; amending s. 25.073,
 3 F.S.; providing that if a retired justice or judge is
 4 assigned to temporary duty, such assignment does not
 5 affect his or her eligibility for benefits under the
 6 Florida Retirement System; amending s. 43.291, F.S.;
 7 revising qualifications for appointment to a judicial
 8 nominating commission; specifying that acts of a
 9 judicial nominating commission must be made with a
 10 concurrence of a majority of its current members;
 11 deleting obsolete language; providing an effective
 12 date.

13
 14 Be It Enacted by the Legislature of the State of Florida:

15
 16 Section 1. Subsection (4) is added to section 25.073,
 17 Florida Statutes, to read:

18 25.073 Retired justices or judges assigned to temporary
 19 duty; additional compensation; appropriation.-

20 (4) For a retired judge consenting to temporary duty in
 21 any court, as assigned by the Chief Justice of the Supreme Court
 22 in accordance with s. 2, Art. V of the State Constitution:

23 (a) The definition of the term "termination" in s.
 24 121.021(39)(b) does not apply, and termination occurs upon the
 25 judge's retirement from non-temporary, active duty as a judge.

26 (b) Section 121.091(9)(c) does not apply, and such
 27 temporary duty is not considered reemployment or employment
 28 after retirement for purposes of chapter 121.

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29 Section 2. Subsections (1), (2), and (3) of section
 30 43.291, Florida Statutes, are amended to read:

31 43.291 Judicial nominating commissions.—

32 (1) Each judicial nominating commission shall be composed
 33 of the following members:

34 (a) Four members of The Florida Bar, appointed by the
 35 Governor, ~~who are engaged in the practice of law~~, each of whom
 36 is a resident of the territorial jurisdiction served by the
 37 commission to which the member is appointed. The Board of
 38 Governors of The Florida Bar shall submit to the Governor three
 39 recommended nominees for each position. The Governor shall
 40 select the appointee from the list of nominees recommended for
 41 that position, but the Governor may reject all of the nominees
 42 recommended for a position and request that the Board of
 43 Governors submit a new list of three different recommended
 44 nominees for that position who have not been previously
 45 recommended by the Board of Governors.

46 (b) Five members appointed by the Governor, each of whom
 47 is a resident of the territorial jurisdiction served by the
 48 commission to which the member is appointed, of which at least
 49 two are members of The Florida Bar engaged in the practice of
 50 law.

51 (2) A justice or judge may not be a member of a judicial
 52 nominating commission. A member of a judicial nominating
 53 commission may hold public office other than judicial office. A
 54 member of a judicial nominating commission is not eligible for
 55 appointment, during his or her term of office and for a period
 56 of 2 years thereafter, to any state judicial office for which

57 that commission has the authority to make nominations. All acts
 58 of a judicial nominating commission must be made with a
 59 concurrence of a majority of its current members.

60 (3) Appointments to a judicial nominating commission,
 61 except an appointment to fill a vacant, unexpired term, shall be
 62 for 4 years. Each expired term or vacancy shall be filled by
 63 appointment in the same manner as the member whose position is
 64 being filled. ~~Notwithstanding any other provision of this~~
 65 ~~section, each current member of a judicial nominating commission~~
 66 ~~appointed directly by the Board of Governors of The Florida Bar~~
 67 ~~shall serve the remainder of his or her term, unless removed for~~
 68 ~~cause. The terms of all other members of a judicial nominating~~
 69 ~~commission are hereby terminated, and the Governor shall appoint~~
 70 ~~new members to each judicial nominating commission in the~~
 71 ~~following manner:~~

72 ~~(a) Two appointments for terms ending July 1, 2002, one of~~
 73 ~~which shall be an appointment selected from nominations~~
 74 ~~submitted by the Board of Governors of The Florida Bar pursuant~~
 75 ~~to paragraph (1)(a);~~

76 ~~(b) Two appointments for terms ending July 1, 2003; and~~

77 ~~(c) Two appointments for terms ending July 1, 2004.~~

78
 79 ~~Every subsequent appointment, except an appointment to fill a~~
 80 ~~vacant, unexpired term, shall be for 4 years. Each expired term~~
 81 ~~or vacancy shall be filled by appointment in the same manner as~~
 82 ~~the member whose position is being filled.~~

83 Section 3. This act shall take effect July 1, 2012.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 4155 Declaratory Judgments

SPONSOR(S): Stargel

TIED BILLS: None IDEN./SIM. BILLS: None

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee		Caridad	<i>[Signature]</i> Bond <i>[Signature]</i>
2) Judiciary Committee			

SUMMARY ANALYSIS

Current law provides that the court may award costs in a declaratory judgment action. Another statute, applicable to all civil actions, provides that the prevailing party shall be awarded costs. The term "costs" does not include attorney's fees.

This bill repeals the specific statute relating to costs in a declaratory judgment action. Parties would still be awarded costs pursuant to the general statute.

This bill does not appear to have a fiscal impact on state or local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Chapter 86, F.S., relates to declaratory judgment actions. Section 86.081, F.S., provides that the court may award costs in declaratory judgment actions as are equitable. Section 57.041(1), F.S., provides that "the party recovering judgment shall recover all his or her legal costs and charges which shall be included in the judgment." While s. 86.081, F.S., provides that the court may award costs as are equitable,¹ s. 57.041, F.S., makes an award of costs mandatory.² A court explained:

Under section 57.041, the recovery of costs is generally available to any "party recovering judgment." This general provision may be displaced by context-specific statutory costs provisions. For example, in declaratory judgment proceedings, section 86.081, Florida Statutes (2005), provides that "[t]he court may award costs as are equitable." And in dissolution cases, section 61.16, Florida Statutes (2005), provides that "a reasonable amount" may be awarded for the costs of a party "after considering the financial resources of both parties." Although the standard for the award of costs may - based on specific statutory provisions - vary from the general standard set forth in section 57.041, it is universally true that costs are at issue when a lawsuit is brought.³

This bill repeals s. 86.081, F.S. Recovery of costs would therefore be governed under the general provisions of s. 57.041, F.S.

B. SECTION DIRECTORY:

Section 1 repeals s. 86.081, F.S., relating to costs in declaratory judgment actions.

Section 2 provides an effective date of July 1, 2011.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

¹ See *Davis v. Davis*, 301 So.2d 154 (Fla. 3d DCA 1974).

² See *Hendry Tractor Company v. Fernandez*, 432 So.2d 1315, 1316 (Fla. 1983).

³ *First Protective Insurance Company v. Featherston*, 978 So.2d 881, 884 (Fla. 2d DCA 2008).

The bill does not appear to have any direct economic impact on the private sector.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

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1 A bill to be entitled
2 An act relating to declaratory judgments; repealing s.
3 86.081, F.S., relating to a grant of authority to the
4 courts to award equitable costs in declaratory
5 judgment proceedings; providing an effective date.

6

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

8

9 Section 1. Section 86.081, Florida Statutes, is repealed.

10

 Section 2. This act shall take effect July 1, 2012.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 4157 District Courts of Appeal
SPONSOR(S): Stargel
TIED BILLS: None **IDEN./SIM. BILLS:** None

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee		Caridad DC	Bond NB
2) Judiciary Committee			

SUMMARY ANALYSIS

Current law provides that three judges on a district court of appeal shall consider each case and that the concurrence of a majority shall be necessary to a decision. The Florida Constitution provides that three judges on a district court shall consider each case and the concurrence of two shall be necessary to a decision. The statute restates the constitutional provision. This bill repeals the redundant statute.

This bill does not appear to have a fiscal impact on state or local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Section 35.13, F.S., provides that three judges on a district court of appeal shall consider each case and that the concurrence of a majority shall be necessary to a decision. Article V, s. 4(a), Fla. Const., provides that three judges on a district court shall consider each case and the concurrence of two shall be necessary to a decision. Section 35.13, F.S., restates the constitutional provision. This bill repeals the redundant statute.

B. SECTION DIRECTORY:

Section 1 repeals s. 35.13, F.S., relating to a quorum of a district court of appeal.

Section 2 provides an effective date of July 1, 2011.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have any direct economic impact on the private sector.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

The Office of the State Courts Administrator states: "Repeal of section 35.13 will have no impact on consideration of cases by district courts of appeal."

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

6 n/a

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A bill to be entitled
An act relating to district courts of appeal;
repealing s. 35.13, F.S., relating to requirements for
a quorum and requiring a majority for a decision;
providing an effective date.

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

Section 1. Section 35.13, Florida Statutes, is repealed.

Section 2. This act shall take effect July 1, 2012.