

The House Committee on Judiciary offers the following substitute to HB 121:

A BILL TO BE ENTITLED
AN ACT

To amend Chapter 12 of Title 53 of the Official Code of Georgia Annotated, relating to trusts, so as to change provisions relating to minor or unborn beneficiaries; to change provisions relating to nonjudicial settlement agreements, the modification and termination of noncharitable trusts, and distribution to another trust; to change provisions relating to modification or termination of uneconomic trusts; to repeal provisions relating to division and consolidation of trusts and termination of trusts; to provide for related matters; to provide for an effective date; to repeal conflicting laws; and for other purposes.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

SECTION 1.

Chapter 12 of Title 53 of the Official Code of Georgia Annotated, relating to trusts, is amended by revising Code Section 53-12-8, relating to parent permitted to consent on behalf of minor or unborn child beneficiary if no conflict of interest, as follows:

"53-12-8.

~~For purposes of this chapter, a parent may represent and bind such parent's minor child or unborn child if a conservator or guardian for the child has not been appointed and there is no conflict of interest between the parent and child.~~

(a) Notice to a person who may represent and bind another person under this Code section shall have the same effect as if notice were given directly to such other person.

(b) The consent of a person who may represent and bind another person under this Code section shall be binding on the person represented unless the person represented objects to such representation before such consent would otherwise have become effective.

(c) Except as otherwise provided in Article 4 of this chapter, a person who under this Code section may represent a settlor who lacks capacity may receive notice and give a binding consent on such settlor's behalf.

(d) A settlor may not represent and bind a beneficiary under this Code section with respect to the termination or modification of a trust under Article 4 of this chapter.

(e) To the extent there is no conflict of interest between the holder of a power of appointment and the persons represented with respect to the particular question or dispute, such holder may represent and bind persons whose interests are as permissible appointees, as takers in default, or are otherwise subject to the power.

(f) To the extent there is no conflict of interest between the representative and the person represented or among those being represented with respect to a particular question or dispute:

(1) A conservator may represent and bind the estate that the conservator controls;

(2) A guardian may represent and bind his or her ward if a conservator of such ward's estate has not been appointed;

(3) An agent having authority to act with respect to the particular question or dispute may represent and bind the principal;

(4) A trustee may represent and bind the beneficiaries of the trust;

(5) A personal representative of a decedent's estate may represent and bind persons interested in such estate; and

(6) An ancestor may represent and bind an ancestor's minor or unborn descendant if a conservator or guardian for such descendant has not been appointed.

(g) Unless otherwise represented, a minor, incapacitated, or unborn individual, or a person whose identity or location is unknown and not reasonably ascertainable, may be represented by and bound by another having a substantially identical interest with respect to a particular question or dispute, but only to the extent there is no conflict of interest between the representative and the person represented with respect to such particular question or dispute.

(h) A person who would be eligible to receive distributions of income or principal from the trust upon the termination of the interests of all persons then currently eligible to receive distributions of income or principal may represent and bind contingent successor remainder beneficiaries, including, but not limited to, charitable entities, with respect to matters in which there is no conflict of interest between the representative and the persons represented with respect to a particular question or dispute.

(i) If the court determines that an interest is not represented under this Code section, or that the otherwise available representation might be inadequate, the court may appoint a representative to receive notice, give consent, and otherwise represent, bind, and act on behalf of a minor, incapacitated, or unborn individual, or a person whose identity or location is unknown. A representative may be appointed to represent several persons or interests. A representative may act on behalf of the individual represented with respect to any matter arising under this chapter, regardless of whether a judicial proceeding

concerning the trust is pending. In making decisions, a representative may consider the general benefit accruing to the living members of the individual's family."

SECTION 2.

Said chapter is further amended by adding a new Code section to read as follows:

"53-12-9.

(a) As used in this Code section, the term 'interested persons' means the trustee and all other persons whose consent would be required in order to achieve a binding settlement were the settlement to be approved by the court.

(b) Except as provided in subsection (c) of this Code section, the interested persons may enter into a binding nonjudicial settlement agreement with respect to any matter involving a trust.

(c) A nonjudicial settlement agreement:

(1) Shall be valid only to the extent it does not violate a material purpose of the trust and includes terms and conditions that could be properly approved by the court under this Code or other applicable law; and

(2) Shall not be valid with respect to any modification or termination of a noncharitable irrevocable trust when the settlor's consent would be required in order to achieve a binding settlement, if such settlement were to be approved by a court.

(d) Any interested person may request the court approve a nonjudicial settlement agreement, determine whether the representation as provided in Code Section 53-12-8 was adequate, or determine whether such agreement contains terms and conditions the court could have properly approved.

(e) An agreement entered into in accordance with this Code section shall be final and binding on the interested persons as if ordered by a court with competent jurisdiction over the trust, the trust property, and the interested persons."

SECTION 3.

Said chapter is further amended by revising Code Section 53-12-61, relating to power to direct modification, as follows:

"53-12-61.

(a) The trust instrument may confer upon a trustee or other person a power to modify or terminate the trust without court approval.

(b) During the settlor's lifetime, the court shall approve a petition to modify or terminate a noncharitable irrevocable trust, even if the modification or termination is inconsistent with a material purpose of the trust, if the settlor and all the beneficiaries consent to such modification or termination and the trustee has received notice of the proposed

modification or termination. A settlor's power to consent to such trust's modification or termination may be exercised by:

(1) An agent under a power of attorney only to the extent expressly authorized by the power of attorney and the terms of the trust;

(2) The settlor's conservator with the approval of the court supervising the conservatorship if an agent is not so authorized; or

(3) The settlor's guardian with the approval of the court supervising the guardianship if an agent is not so authorized and a conservator has not been appointed.

(c) Following the settlor's death the court shall approve a petition to:

(1) Modify a noncharitable irrevocable trust if all the beneficiaries consent, the trustee has received notice of the proposed modification, and the court concludes that modification is not inconsistent with any material purpose of such trust; and

(2) Terminate a noncharitable irrevocable trust if all the beneficiaries consent, the trustee has received notice of the proposed termination, and the court concludes that continuance of such trust is not necessary to achieve any material purpose of such trust.

(d) The court may, upon petition:

(1) Modify the trust if, owing to circumstances not anticipated by the settlor, modification would further the purposes of such trust;

(2) Modify the administrative provisions of a trust if continuation of such trust under its existing provisions would impair such trust's administration;

(3) Modify the trust by the appointment of an additional trustee or special fiduciary if such appointment is necessary or helpful to the administration of such trust;

(4) Modify the trust to achieve the settlor's tax objectives, with such modification to have either prospective or retroactive effect;

(5) Order the division of a single trust into two or more trusts or the consolidation of two or more trusts, whether created by the same or different trust instruments or by the same or different persons, into a single trust if the division or consolidation would be helpful to the administration of such trust or trusts; or

(6) Terminate a trust and order distribution of the trust property if the:

(A) Costs of administration are such that the continuance of such trust, the establishment of such trust if it is to be established, or the distribution from a probate estate would defeat or substantially impair the purposes of such trust;

(B) Purpose of such trust has been fulfilled or become illegal or impossible to fulfill; or

(C) Continuance of such trust would impair the accomplishment of the purposes of such trust.

(e) A proceeding to approve a proposed modification or termination under this Code section may be commenced by a trustee or beneficiary. A proceeding to approve a proposed modification or termination under subsection (b) of this Code section may be commenced by a trustee, beneficiary, or settlor. In the case of an unfunded testamentary trust, a petition for modification or termination under this Code section may be filed by the personal representative of the settlor's estate.

(f) No later than 30 days after filing the petition for modification or termination, notice of a petition to modify or terminate a trust under subsection (d) of this Code section shall be given to the settlor, the trustee, all the beneficiaries, any holder of a power of appointment over the trust property, and such other persons as the court may direct.

(g) The court may modify or terminate a trust as provided in this Code section regardless of whether it contains spendthrift provisions or other similar protective provisions.

(h) An order under subsection (d) of this Code section shall conform as nearly as practicable to the intention of the settlor.

(i) Distribution of the trust property under an order for termination shall be made to or among the current beneficiaries and the vested remainder beneficiaries, or, if there are no vested remainder beneficiaries, among the current beneficiaries and the contingent remainder beneficiaries. The order shall specify the appropriate share, if any, of each current and remainder beneficiary who is to share in the proceeds of the trust so as to conform as nearly as practicable to the intention of the settlor. The order may direct that the interest of a minor beneficiary, or any portion thereof, be converted into qualifying property and distributed to a custodian pursuant to Article 5 of Chapter 5 of Title 44, "The Georgia Transfers to Minors Act."

SECTION 4.

Said chapter is further amended by revising Code Section 53-12-62, relating to modification of trust by court, as follows:

"53-12-62.

~~(a) The court may:~~

~~(1) Modify the administrative or dispositive provisions of a trust if, owing to circumstances not known to or anticipated by the settlor, compliance with the provisions of the trust would defeat or substantially impair the accomplishment of the purposes of such trust;~~

~~(2) Modify the administrative provisions of a trust if continuation of the trust under its existing provisions would impair such trust's administration; or~~

~~(3) Modify the trust by the appointment of an additional trustee or special fiduciary if the court considers the appointment necessary for the administration of the trust.~~

~~(b) A petition for modification may be filed by the trustee or any beneficiary or, in the case of an unfunded testamentary trust, the personal representative of the settlor's estate.~~

~~(c) Notice of a petition to modify the trust shall be given to the trustee and all beneficiaries.~~

~~(d) The court may modify the trust regardless of whether it contains spendthrift provisions or other similar protective provisions.~~

~~(e) An order for modification shall conform as nearly as practicable to the intention of the settlor.~~

(a) As used in this Code section, the term:

(1) 'Original trust' refers to the trust from which principal is being distributed.

(2) 'Second trust' refers to the trust to which assets are being distributed from the original trust, whether a separate trust or an amended version of the original trust.

(b)(1) As used in this subsection, the term 'current beneficiary' means a person who, on the date of distribution to the second trust, is a distributee or permissible distributee of trust income or principal.

(2) Unless the original trust instrument expressly provides otherwise, a trustee, other than a person who contributed property to the trust, with authority to invade the principal of the original trust to make distributions to or for the benefit of one or more of the beneficiaries may also, independently or with court approval, exercise such authority by distributing all or part of the principal of the original trust to a trustee of a second trust; provided, however, that the second trust shall not include as a:

(A) Current beneficiary any person that is not a current beneficiary of income or principal of the original trust; or

(B) Beneficiary any person that is not a beneficiary of the original trust.

(c) Except as provided in this Code section, a trustee may exercise the power to invade the principal of the original trust under subsection (b) of this Code section without the consent of the settlor or the beneficiaries of the original trust if such trustee provides written notice of such trustee's decision to exercise the power to such settlor, if living, and those persons then entitled to annual reports from the trustee of the original trust. Such notice shall:

(1) Describe the manner in which such trustee intends to exercise such power;

(2) Specify the date such trustee proposes to distribute to the second trust; and

(3) Be delivered at least 60 days before the proposed distribution to the second trust.

(d) The exercise of the power to invade the principal of the original trust under subsection (b) of this Code section shall be by an instrument in writing, signed and acknowledged by the trustee, and filed with the records of the original trust.

(e) The exercise of the power to invade the principal of the original trust under subsection (b) of this Code section shall not extend the permissible period of the rule against perpetuities that applies to such original trust.

(f) This Code section shall not be construed to abridge the right of any trustee who has a power of invasion to distribute property in further trust that arises under any other law or under common law, and nothing in this Code section shall be construed to imply that the common law does not permit the exercise of a power to invade the principal of a trust in the manner authorized under subsection (b) of this Code section.

(g) A second trust may confer a power of appointment upon a beneficiary of the original trust to whom or for the benefit of whom the trustee has the power to distribute the principal of such original trust. For purposes of this subsection, the permissible appointees of the power of appointment conferred upon a beneficiary may include persons who are not beneficiaries of such original trust or second trust.

(h) If any contribution to the original trust qualified for the annual exclusion under Section 2503(b) of the federal Internal Revenue Code, the marital deduction under Section 2056(a) or 2523(a) of the federal Internal Revenue Code, or the charitable deduction under Section 170(a), 642(c), 2055(a), or 2522(a) of the federal Internal Revenue Code, is a direct skip qualifying for treatment under Section 2642(c) of the federal Internal Revenue Code, or qualified for any other specific tax benefit that would be lost by the existence of the authorized trustee's authority under subsection (b) of this Code section for income, gift, estate, or generation-skipping transfer tax purposes under the federal Internal Revenue Code, then the authorized trustee shall not have the power to distribute the principal of a trust pursuant to subsection (b) of this Code section in a manner that would prevent the contribution to the original trust from qualifying for such exclusion, deduction, or other tax benefit or would reduce such exclusion, deduction, or other tax benefit that was originally claimed with respect to such contribution.

(i) The exercise of the power to invade the principal of the original trust under subsection (b) of this Code section shall be subject to the following limitations:

(1) The second trust need not qualify as a grantor trust for federal income tax purposes, even if the original trust does qualify as a grantor trust, except that if such original trust qualifies as a grantor trust because of the application of Section 672(f)(2)(A) of the federal Internal Revenue Code, such second trust may not include or omit a term that, if included in or omitted from the original trust instrument, would have prevented such original trust from qualifying under such section;

(2) The second trust may qualify as a grantor trust for federal income tax purposes, even if the original trust does not so qualify, except that if such original trust does not so qualify and such second trust will so qualify, in whole or in part, with respect to the

242 settlor, such second trust shall grant such settlor or another person a power that would
243 cause such second trust to cease to be a grantor trust for federal income tax purposes
244 unless such settlor objects in a writing delivered to the trustee before the date the trustee
245 proposes to distribute from such original trust to such second trust; and

246 (3) When both the original trust and the second trust qualify as grantor trusts for federal
247 income tax purposes and such original trust grants the settlor or another person the power
248 to cause such original trust to cease to be a grantor trust, such second trust shall grant an
249 equivalent power to the settlor or another person unless such settlor objects in a writing
250 delivered to the trustee before the date the trustee proposes to distribute from such
251 original trust to such second trust.

252 (j) During any period when the original trust owns stock in a Subchapter 'S' corporation
253 as defined in Section 1361(a)(1) of the federal Internal Revenue Code, an authorized
254 trustee shall not exercise a power authorized by subsection (b) of this Code section to
255 distribute part or all of the stock of the Subchapter 'S' corporation to a second trust that is
256 not a permitted shareholder under Section 1361(c)(2) of the federal Internal Revenue Code.

257 (k) A trustee or other person that reasonably relies on the validity of a distribution of
258 property of the original trust to the second trust under subsection (b) of this Code section
259 or any other law or common law shall not be liable for any action or failure to act as a
260 result of such reliance.

261 (l) This Code section shall not create or imply a duty for a trustee to exercise a power
262 conferred by this Code section.

263 (m) If exercise of the power to invade the principal of the original trust would be effective
264 under subsection (b) of this Code section except that the second trust in part does not
265 comply with this Code section, such exercise of the power shall be effective, a provision
266 in such second trust that is not permitted under this Code section shall be void to the extent
267 necessary to comply with this Code section, and a provision required by this Code section
268 to be in such second trust that is not contained in such second trust shall be deemed to be
269 included in such second trust to the extent necessary to comply with this Code section.

270 (n) The settlor of the original trust shall be deemed to be the settlor of the second trust with
271 respect to the portion of the principal of the original trust subject to the exercise of the
272 power to invade the principal of such original trust under subsection (b) of this Code
273 section.

274 (o) A debt, liability, or other obligation enforceable against property of the original trust
275 shall be enforceable to the same extent against the property when held by the second trust
276 after exercise of the power to invade the principal of such original trust under subsection
277 (b) of this Code section.

278 (p) This Code section shall not apply to a trust held solely for charitable purposes."

279 **SECTION 5.**

280 Said chapter is further amended by repealing Code Section 53-12-63, relating to division and
281 consolidation of trusts, and designating it as reserved.

282 **SECTION 6.**

283 Said chapter is further amended by repealing Code Section 53-12-64, relating to termination
284 of trusts, and designating it as reserved.

285 **SECTION 7.**

286 Said chapter is further amended by revising subsection (a) of Code Section 53-12-65, relating
287 to modification or termination of uneconomic trust, as follows:

288 "(a) After notice to the qualified beneficiaries, the trustee of a trust consisting of trust
289 property either having a total value less than ~~\$50,000.00~~ \$100,000.00 or for which the
290 trustee's annual fee for administering the trust is 5 percent or more of the market value of
291 the principal assets of the trust as of the last day of the preceding trust accounting year may
292 terminate the trust if the trustee concludes that the value of the trust property is insufficient
293 to justify the cost of administration, provided that in the case of a cemetery trust, notice
294 shall be given to the Attorney General. For purposes of this subsection, the term 'cemetery
295 trust' means a trust the sole purpose of which is to hold and invest property to be used for
296 the maintenance and care of cemetery plots."

297 **SECTION 8.**

298 This Act shall become effective on July 1, 2017.

299 **SECTION 9.**

300 All laws and parts of laws in conflict with this Act are repealed.