

SENATE SUBSTITUTE TO HB 197:

AS PASSED SENATE

**A BILL TO BE ENTITLED
AN ACT**

1 To amend Chapter 12 of Title 53 of the Official Code of Georgia Annotated, relating to
2 trusts, so as to establish qualified self-settled spendthrift trusts; to provide for definitions; to
3 provide for exceptions for spendthrift provisions of trusts which are not within qualified
4 self-settled spendthrift trusts; to provide for claims by creditors for such trusts; to provide for
5 the creation of such trusts; to provide for transfers to such trusts; to provide for vacancies of
6 trustees; to provide for standards for such trusts to be considered nonrevocable; to provide
7 for beneficiary rights to withdrawal; to amend Part 4 of Article 9 of Title 11 of the Official
8 Code of Georgia Annotated, relating to rights of third parties to secured transactions, so as
9 to exclude qualified self-settled spendthrift trusts from restrictions on assignment; to provide
10 for related matters; to repeal conflicting laws; and for other purposes.

11 **BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:**

SECTION 1.

12 Chapter 12 of Title 53 of the Official Code of Georgia Annotated, relating to trusts, is
13 amended by revising Code Section 53-12-80, relating to spendthrift provisions, as follows:
14 "53-12-80.
15

16 Except as otherwise provided for in Article 5A of this chapter:

17 ~~(a)~~(1) A spendthrift provision shall only be valid if it prohibits both voluntary and
18 involuntary transfers;:

19 ~~(b)~~(2) A term of a trust providing that the interest of a beneficiary is held subject to a
20 spendthrift trust, or words of similar import, shall be sufficient to restrain both voluntary
21 and involuntary transfer of the beneficiary's interest in the manner set forth in this article;:

22 ~~(c)~~(3) A beneficiary shall not transfer an interest in a trust in violation of a valid
23 spendthrift provision, and, except as otherwise provided in this Code section, a creditor
24 or assignee of the beneficiary shall not reach the interest or a distribution by the trustee
25 before its receipt by the beneficiary;:

26 ~~(d)~~(4) A spendthrift provision shall not be valid as to the following claims against a
 27 beneficiary's right to a current distribution to the extent the distribution would be subject
 28 to garnishment under Article 2 of Chapter 4 of Title 18 if the distribution were disposable
 29 earnings:

30 ~~(1)~~(A) Alimony or child support;

31 ~~(2)~~(B) Taxes or other governmental claims;

32 ~~(3)~~(C) Tort judgments;

33 ~~(4)~~(D) Judgments or orders for restitution as a result of a criminal conviction of the
 34 beneficiary; or

35 ~~(5)~~(E) Judgments for necessities.

36 The ability of a creditor or assignee to reach a beneficiary's interest under this **subsection**
 37 paragraph shall not apply to the extent that it would disqualify the trust as a special needs
 38 trust established pursuant to 42 U.S.C. Sections 1396p(d)(4)(A) or 1396p(d)(4)(C);:

39 ~~(e)~~(5) A provision in a trust instrument that a beneficiary's interest shall terminate or
 40 become discretionary upon an attempt by the beneficiary to transfer it, an attempt by the
 41 beneficiary's creditors to reach it, or upon the bankruptcy or receivership of the
 42 beneficiary shall be valid except to the extent of the proportion of trust property
 43 attributable to such beneficiary's contribution;:

44 ~~(f)~~(6) If a beneficiary is also a contributor to the trust, a spendthrift provision shall not
 45 be valid as to such beneficiary to the extent of the proportion of trust property attributable
 46 to such beneficiary's contribution. This **subsection paragraph** shall not apply to a special
 47 needs trust established pursuant to 42 U.S.C. Sections 1396p(d)(4)(A) or 1396p(d)(4)(C);:
 48 and

49 ~~(g)~~(7) Notwithstanding any other provision in this Code section, a spendthrift provision
 50 in a pension or retirement arrangement described in sections 401, 403, 404, 408, 408A,
 51 409, 414, or 457 of the federal Internal Revenue Code of 1986 shall be valid with
 52 reference to the entire interest of the beneficiary in the income, principal, or both, even
 53 if the beneficiary is also a contributor of trust property, except where a claim is made
 54 pursuant to a qualified domestic relations order as defined in 26 U.S.C. Section 414(p)."

55 SECTION 2.

56 Said chapter is further amended by revising Code Section 53-12-82, relating to creditors'
 57 claims against a settlor, as follows:

58 "53-12-82.

59 Whether or not the trust instrument contains a spendthrift provision, the following rules
 60 shall apply:

- 61 (1) During the lifetime of the settlor, the property of a revocable trust shall be subject to
 62 claims of the settlor's creditors;
- 63 (2) With respect to an irrevocable trust, except to the extent as provided in Article 5A of
 64 this chapter, creditors or assignees of the settlor may reach the maximum amount that can
 65 be distributed to or for the settlor's benefit during the settlor's life or that could have been
 66 distributed to or for the settlor's benefit immediately prior to the settlor's death. If a trust
 67 has more than one settlor, the amount the creditors or assignees of a particular settlor may
 68 reach shall not exceed the settlor's interest in the portion of the trust attributable to that
 69 settlor's contribution; and
- 70 (3) After the death of a settlor, and subject to the settlor's right to direct the source from
 71 which liabilities shall be paid, the property of a trust that was revocable at the settlor's
 72 death or had become irrevocable as a result of the settlor's incapacity shall be subject to
 73 claims of the settlor's creditors to the extent the probate estate is inadequate. Payments
 74 that would not be subject to the claims of the settlor's creditors if made by way of
 75 beneficiary designation to persons other than the settlor's estate shall not be made subject
 76 to such claims by virtue of this Code section unless otherwise provided in the trust
 77 instrument."

78 **SECTION 3.**

79 Said chapter is further amended by adding a new article to read as follows:

80 "ARTICLE 5A

81 53-12-90.

82 As used in this article, the term:

83 (1) 'Independent qualified trustee' means a qualified trustee who is not, and whose
 84 actions are not, subject to direction by:

85 (A) The settlor;

86 (B) Any natural person who is not a resident of Georgia;

87 (C) Any entity that is not authorized to engage in trust business within Georgia;

88 (D) The spouse of the settlor;

89 (E) A parent of the settlor;

90 (F) Any lineal descendants of the settlor, including adopted children and stepchildren;

91 (G) A sibling of the settlor;

92 (H) An employer of the settlor;

93 (I) A business entity in which the holdings of the settlor represent at least 30 percent
 94 of the total voting power of all interests entitled to vote;

95 (J) A subordinate employee of the settlor; or

96 (K) A subordinate employee of a business entity in which the settlor is an executive.

97 (2) 'Qualified interest' means the interest of a settlor to the extent that such interest
 98 entitles the settlor to receive distributions of income or principal or both in the sole
 99 discretion of an independent qualified trustee.

100 (3) 'Qualified self-settled spendthrift trust' means a trust that:

101 (A) Is created or declared in writing;

102 (B) Is signed by the settlor or an agent for the settlor acting under a power of attorney
 103 containing express authorization;

104 (C) Is irrevocable;

105 (D) Was created during the lifetime of a settlor;

106 (E) Has, at all times when distributions could be made to the settlor pursuant to the
 107 qualified interest, at least one beneficiary other than the settlor to whom:

108 (i) Income may be distributed, if the qualified interest relates to trust income;

109 (ii) Principal may be distributed, if the qualified interest relates to trust principal; or

110 (iii) Both income and principal may be distributed, if the qualified interest relates to
 111 both trust income and principal;

112 (F) Has, at all times, at least one qualified trustee who may be, but need not be, an
 113 independent qualified trustee;

114 (G) Is created with a trust instrument which expressly incorporates the law of this state
 115 in governing the validity, construction, and administration of the trust; and

116 (H) Is created with a trust instrument that includes a spendthrift provision that restrains
 117 both voluntary and involuntary transfer of the qualified interest.

118 (4) 'Qualified trustee' means any person who is a natural person residing within this state
 119 or a legal entity authorized to engage in trust business within this state and who maintains
 120 or arranges for custody within this state some or all of the property that has been
 121 transferred to the trust by the settlor, maintains records within this state for the trust on
 122 an exclusive or nonexclusive basis, prepares or arranges for the preparation within this
 123 state of fiduciary income tax returns for the trust, or otherwise materially participates
 124 within this state in the administration of the trust.

125 53-12-91.

126 (a) A settlor may transfer assets to a qualified self-settled spendthrift trust and retain in
 127 such trust a qualified interest, and, except as otherwise provided in this article, Code
 128 Section 53-12-80, and paragraph (2) of Code Section 53-12-82 shall not apply to such
 129 qualified interest. A settlor may have a qualified interest in a qualified self-settled
 130 spendthrift trust and also have an interest in the same trust that is not a qualified interest.

131 and the rules of Code Sections 53-12-80 and 53-12-82 shall apply to each interest of the
 132 settlor in the same trust other than the qualified interest.

133 (b) Within 30 days of transferring an asset to a qualified self-settled spendthrift trust, a
 134 settlor shall notify all of his or her known creditors of such transfer by certified mail or
 135 statutory overnight delivery.

136 53-12-92.

137 (a) A vacancy in the position of qualified trustee that occurs for any reason, whether or not
 138 there is another trustee then serving, shall be filled by a person eligible to serve as a
 139 qualified trustee and in the following order of priority:

140 (1) One designated pursuant to the terms of the trust to act as successor trustee;

141 (2) One appointed by the qualified beneficiaries by unanimous consent; and

142 (3) One appointed by the court pursuant to Code Section 53-12-62.

143 (b) A vacancy in the position of independent qualified trustee that occurs for any reason,
 144 whether or not there is another trustee then serving, shall be filled by a person eligible to
 145 serve as an independent qualified trustee and in the following priority:

146 (1) One designated pursuant to the terms of the trust to act as successor trustee;

147 (2) One appointed by the qualified beneficiaries by unanimous consent; and

148 (3) One appointed by the court pursuant to Code Section 53-12-62.

149 53-12-93.

150 No trust shall be considered revocable merely because the trust instrument includes one or
 151 more of the following rights, powers, or interests:

152 (1) A power of appointment, exercisable by the settlor through a will or other written
 153 instrument effective only upon the death of a settlor, other than a power to appoint to the
 154 estate of a settlor or the creditors of the estate of a settlor;

155 (2) The qualified interest in the trust;

156 (3) The right of a settlor to receive income or principal pursuant to an ascertainable
 157 standard;

158 (4) The potential or actual receipt of income by a settlor from a charitable remainder
 159 unitrust or charitable remainder annuity trust as defined by 26 U.S.C. Section 664(d) and
 160 the right of the settlor, at any time, and from time to time, to release, in writing delivered
 161 to the qualified trustee, all or any part of the retained interest of the settlor in such trust;

162 (5) Annual receipt by the settlor of a percentage, not to exceed 5 percent and specified
 163 in the trust instrument, of the initial value of the trust assets or the value of such assets
 164 determined from time to time pursuant to the trust instrument;

165 (6) The right of the settlor to remove a trustee and appoint a new trustee;

166 (7) The potential or actual use of real property by a settlor when such real property is
 167 held under a personal residence trust;

168 (8)(A) As used in this paragraph, the term 'qualified interest' shall have the same
 169 meaning as defined by 26 U.S.C. Section 2702.

170 (B) The potential or actual receipt of use by a settlor of a qualified interest;

171 (9) The ability of a qualified trustee, whether pursuant to discretion or direction, to pay,
 172 upon the death of a settlor, all or any part of debts owed by the settlor at the time of death,
 173 the expenses of administering the estate of the settlor, or any estate inheritance tax
 174 imposed on or with respect to the estate of the settlor; and

175 (10) The potential or actual receipt of income or principal by a settlor to pay, in whole
 176 or in part, income taxes due on trust income, or the direct payment of such taxes to the
 177 applicable tax authorities, pursuant to a provision in the trust instrument that expressly
 178 provides for the direct payment of such taxes or reimbursement of the settlor for such tax
 179 payments.

180 53-12-94.

181 A beneficiary who has the right to withdraw his or her entire beneficial interest in a trust
 182 shall be treated as its settlor to the extent of such withdrawal right, when such right to
 183 withdraw has lapsed, been released, or otherwise expired.

184 53-12-95.

185 A qualified self-settled spendthrift trust shall not be valid as to the following claims against
 186 a settlor's or other beneficiary's right to a current distribution to the extent the distribution
 187 would be subject to garnishment under Article 2 of Chapter 4 of Title 18 if the distribution
 188 were disposable earnings:

189 (1) Alimony; or

190 (2) Child support, including any judgment or order issued in another state."

191 **SECTION 4.**

192 Part 4 of Article 9 of Title 11 of the Official Code of Georgia Annotated, relating to rights
 193 of third parties to secured transactions, is amended by revising subsection (d) of Code
 194 Section 11-9-406, relating to terms restricting assignments, as follows:

195 **"(d) Term restricting assignment generally ineffective.** Except as otherwise provided
 196 in subsection (e) of this Code section and Code Sections 11-2A-303, 11-9-407, and
 197 53-12-80 through 53-12-83, and Article 5A of Chapter 12 of Title 53 and subject to
 198 subsection (h) of this Code section, a term in an agreement between an account debtor and
 199 an assignor or in a promissory note shall be ineffective to the extent that it:

200 (1) Prohibits, restricts, or requires the consent of the account debtor or person obligated
 201 on the promissory note to the assignment or transfer of, or the creation, attachment,
 202 perfection, or enforcement of a security interest in, the account, chattel paper, payment
 203 intangible, or promissory note; or

204 (2) Provides that the assignment, transfer, creation, attachment, perfection, or
 205 enforcement of the security interest may give rise to a default, breach, right of
 206 recoupment, claim, defense, termination, right of termination, or remedy under the
 207 account, chattel paper, payment intangible, or promissory note."

208 **SECTION 5.**

209 Said part is further amended by revising subsections (a) and (c) of Code Section 11-9-408,
 210 relating to restrictions on assignment of promissory notes, health care insurance receivables,
 211 and certain general intangibles, as follows:

212 "(a) **Term restricting assignment generally ineffective.** Except as otherwise provided
 213 in subsection (b) of this Code section, ~~or in Code Section 53-12-80, or in Article 5A of~~
 214 Chapter 12 of Title 53, a term in a promissory note or in an agreement between an account
 215 debtor and a debtor which relates to a health care insurance receivable or a general
 216 intangible, including a contract, permit, license, or franchise, and which term prohibits,
 217 restricts, or requires the consent of the person obligated on the promissory note or the
 218 account debtor to the assignment or transfer of, or creation, attachment, or perfection of a
 219 security interest in, the promissory note, health care insurance receivable, or general
 220 intangible, shall be ineffective to the extent that the term:

221 (1) Would impair the creation, attachment, or perfection of a security interest; or

222 (2) Provides that the assignment, transfer, creation, attachment, or perfection of the
 223 security interest may give rise to a default, breach, right of recoupment, claim, defense,
 224 termination, right of termination, or remedy under the promissory note, health care
 225 insurance receivable, or general intangible."

226 "(c) **Legal restrictions on assignment generally ineffective.** Except as otherwise
 227 provided in Code Section 53-12-80 or in Article 5A of Chapter 12 of Title 53, a rule of law,
 228 statute, or regulation that prohibits, restricts, or requires the consent of a government,
 229 governmental body or official, person obligated on a promissory note, or account debtor
 230 to the assignment or transfer of, or creation of a security interest in, a promissory note,
 231 health care insurance receivable, or general intangible, including a contract, permit, license,
 232 or franchise between an account debtor and a debtor, shall be ineffective to the extent that
 233 the rule of law, statute, or regulation:

234 (1) Would impair the creation, attachment, or perfection of a security interest; or

235 (2) Provides that the assignment, transfer, creation, attachment, or perfection of the
236 security interest may give rise to a default, breach, right of recoupment, claim, defense,
237 termination, right of termination, or remedy under the promissory note, health care
238 insurance receivable, or general intangible."

239 **SECTION 6.**

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