PROPOSED AMENDMENTS TO THE REVISED GEORGIA TRUST CODE OF 2010

State Bar of Georgia, Fiduciary Law Section
Trust Code Revision Committee
December 13, 2016

In 2015, the Executive Committee appointed a new Trust Code Revision Committee to consider elements of the Uniform Trust Code and evolving national trends in trust law that are not part of Georgia law. The sense of the Executive Committee was that it was not an opportune time to consider adoption of the Uniform Trust Code in Georgia and expected that the changes to trust law proposed by the Trust Code Revision Committee would take the form of amendments to the Georgia Trust Code of 2010. The Trust Code Revision Committee discussed the question of adopting the Uniform Trust Code and reached the same conclusion as the Executive Committee.

The Trust Code Revision Committee decided that the subject of its first set of proposed amendments to the Georgia Trust Code of 2010 would be the modification of trusts. Attached is proposed legislation.

The proposed legislation will change the Georgia Trust Code by specifically providing five methods for modifying an irrevocable trust: (a) court-approved modification with the consent of the settlor and all beneficiaries; (b) court-approved modification after the death of the settlor but with the consent of all beneficiaries, provided the modification is not inconsistent with any material purpose of the trust; (c) discretionary modifications by the court to facilitate efficient administration of the trust; (d) trustee distribution of trust property from an existing trust to a new or amended trust (decanting); and (e) nonjudicial modification with the consent of all parties that would otherwise be required to participate in a court-approved modification. The legislation also provides a mechanism for ensuring that unborn and unascertained beneficiaries are represented in the trust modification process by providing a statutory mechanism for one party to receive notice and give consent on behalf of another party. The provisions relating to court-approved modification, nonjudicial settlement agreements, and representation are based on provisions in the Uniform Trust Code. The decanting provisions are based on various state decanting laws and the new Uniform Trust Decanting Act. The legislation also increases from $50,000 to $100,000 the maximum size of a trust that can be terminated on the basis of being insufficient to justify the cost of administration.

At the recommendation of the legislative advisors to the State Bar of Georgia, the proposed legislation approved by the Legislation Committee of the Fiduciary Law Section amending the Uniform Statutory Rule Against Perpetuities has been combined with the proposed legislation amending the Georgia Trust Code. This legislation provides...
for a 360-year permissible vesting period (in lieu of the current 90-year permissible
vesting period) for a nonvested property interest or power of appointment created after
June 30, 2017. The Fiduciary Law Section proposed this same legislation in 2013, but it
was not adopted by the Georgia General Assembly.

The Fiduciary Law Section intends for this proposed legislation to be introduced
in the session of the Georgia General Assembly that convenes in January 2017. If you
have any comments on the proposed legislation, please send them to Nick Djuric at
nick.djuric@sutherland.com.

**Trust Code Revision Committee**

Nikola R. Djuric, Atlanta, Chairman
Richard E. Barnes, Valdosta
Kimberly E. Civins, Atlanta
Adam R. Gaslowitz, Atlanta
Blake N. Melton, Columbus
David L. Miraldi, Atlanta (Georgia Bankers Association)
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James D. Spratt Jr., Atlanta
Jeremy T. Ware, Atlanta, ex officio (from July 1, 2016)
Hillary S. Stringfellow, Brunswick, ex officio (to June 30, 2016)
Professor Samuel A. Donaldson, Reporter (GSU College of Law)
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 representation, nonjudicial settlement agreements, the modification and termination of noncharitable trusts, distribution to another trust, and modification or termination of uneconomic trusts; to amend Article 9 of Chapter 6 of Title 44 of the Official Code of Georgia Annotated, relating to the Uniform Statutory Rule Against Perpetuities, so as to change provisions relating to the validity of nonvested property interest or power of appointment; 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 Sections 53-12-8 as follows:

[Old Code Section 53-12-8 omitted from this draft.]

“53-12-8. Representation

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

(b) The consent of a person who may represent and bind another person under this Code section is binding on the person represented unless the person represented objects to the representation before the 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 the 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, the holder may represent and bind persons whose interests, as permissible appointees, takers in default, or otherwise, are 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 the ward if a conservator of the 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 the estate; and

(6) an ancestor may represent and bind the ancestor’s minor or unborn descendant if a conservator or guardian for the 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 the 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 the particular question or dispute.

(h) 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, no matter whether a judicial proceeding concerning the trust is pending. In making decisions, a representative may consider 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 53-12-9, relating to nonjudicial settlement agreements, as follows:

“53-12-9. Nonjudicial settlement agreements

(a) For purposes of this Code section, “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 is 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.

(d) Any interested person may request the court to approve a nonjudicial settlement agreement, to determine whether the representation as provided in Code section 53-12-8 was adequate, and to determine whether the 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 a competent jurisdiction over the trust, the trust property, and the interested persons.”

SECTION 3.

Said chapter is further amended by revising Code Sections 53-12-61 as follows:

[Old Code Section 53-12-61 omitted from this draft.]

“53-12-61. Modification or termination of noncharitable trust

(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 beneficiaries consent to the modification or termination and the trustee has received notice of the proposed modification or termination. A settlor’s power to consent to the trust’s modification or termination may be exercised by an agent under a power of attorney only to the extent expressly authorized by the power of attorney and the terms of the trust; by the settlor’s conservator with the approval of the court supervising the conservatorship if an agent is not so authorized; or by 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:
   (1) The court shall approve a petition to modify a noncharitable irrevocable trust if all 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 the trust; and
   (2) The court shall approve a petition to terminate a noncharitable irrevocable trust if all beneficiaries consent, the trustee has received notice of the proposed termination, and the court concludes that continuance of the trust is not necessary to achieve any material purpose of the 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 the 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 the appointment is necessary or helpful to the administration of the 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 the trust or trusts; or
   (6) Terminate a trust and order distribution of the trust property if the costs of administration are such that the continuance of the trust, the establishment of the trust if it is to be established, or the distribution from a
probate estate would defeat or substantially impair the purposes of the trust; the purpose of the trust has been fulfilled or become illegal or impossible to fulfill; or the continuance of the trust would impair the accomplishment of the purposes of the trust.

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

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

(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 Sections 53-12-62 as follows:

[Old Code Section 53-12-62 omitted from this draft.]

“53-12-62. Distribution to another trust

(a) Unless the original trust instrument expressly provides otherwise, a trustee (other than a settlor) with authority to invade the principal of the original trust to make distributions to or for the benefit of one or more 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 may not:
   (1) Include as a distributee or permissible distributee a person that is not a distributee or permissible distributee of income or principal of the original trust, unless the beneficiary to be included is an after-born or after-adopted descendant; or
   (2) Include as a beneficiary or successor a person that is not a beneficiary of the original trust.

(b) Except as provided in this Code section, a trustee may exercise the power to invade the principal of the original trust under subsection (a) of this Code section without the consent of the settlor or beneficiaries of the original trust if the trustee provides written notice of the trustee’s decision to exercise the power to the settlor, if living, and those persons then entitled to annual reports from the trustee of the original trust. The notice must:
   (1) Describe the manner in which the trustee intends to exercise the power;
   (2) Specify the date the trustee proposes to distribute to the second trust; and
   (3) Be delivered at least sixty (60) days before the proposed distribution to the second trust.

(c) The exercise of the power to invade the principal of the original trust under subsection (a) 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.

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

(f) The 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 principal of the original trust. For purposes of this subsection of this Code section, the permissible appointees of the power of appointment conferred upon a beneficiary may include persons who are not beneficiaries of the original or second trust.

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

(h) The exercise of the power to invade the principal of the original trust under subsection (a) of this Code section shall also 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 the original trust qualifies as a grantor trust because of the application of section 672(f)(2)(A) of the Internal Revenue Code, the second trust may not include or omit a term that, if included in or omitted from the original trust instrument, would have prevented the 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 the original trust does not so qualify and the second trust will so qualify, in whole or in part, with respect to the settlor, the second trust must grant the
settlor or another person a power that would cause the second trust to cease
to be a grantor trust for federal income tax purposes unless the settlor
objects in a writing delivered to the trustee before the date the trustee
proposes to distribute from the original trust to the second trust; and

(3) Where both the original trust and the second trust qualify as
grantor trusts for federal income tax purposes and the original trust grants
the settlor or another person the power to cause the original trust to cease to
be a grantor trust, the second trust must grant an equivalent power to the
settlor or other person unless the settlor objects in a writing delivered to the
trustee before the date the trustee proposes to distribute from the original
trust to the second trust.

(i) During any period when the original trust owns stock in a subchapter S
corporation as defined in section 1361(a)(1) of the Internal Revenue Code,
an authorized trustee shall not exercise a power authorized by subsection
(a) of this Code section to distribute part or all of the stock of the S
corporation to a second trust that is not a permitted shareholder under
section 1361(c)(2) of the Internal Revenue Code.

(j) A trustee or other person that reasonably relies on the validity of a
distribution of property of the original trust to the second trust under
subsection (a) of this Code section or any other statute or common law is
not liable for any action or failure to act as a result of the reliance.

(k) This Code section does not create or imply a duty for a trustee to
exercise a power conferred by this Code section.

(l) If exercise of the power to invade principal of the original trust would be
effective under subsection (a) of this Code section except that the second
trust in part does not comply with this Code section, the exercise of the
power is effective, a provision in the second trust that is not permitted
under this Code section is void to the extent necessary to comply with this
Code section, and a provision required by this Code section to be in the
second trust that is not contained in the second trust is deemed to be
included in the second trust to the extent necessary to comply with this
Code section.

(m) The settlor of the original trust is deemed to be the settlor of the second
trust with respect to the portion of the principal of the original trust subject
to the exercise of the power to invade the principal of the original trust
under subsection (a) of this Code section.
(n) A debt, liability, or other obligation enforceable against property of the original trust is enforceable to the same extent against the property when held by the second trust after exercise of the power to invade the principal of the original trust under subsection (a) of this Code section.

(o) For purposes of this Code section, the term “original trust” refers to the trust from which principal is being distributed and the term “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.

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

SECTION 5.

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

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

SECTION 6.

Article 9 of Chapter 6 of Title 44 of the Official Code of Georgia Annotated, relating to the Uniform Statutory Rule Against Perpetuities, is amended by revising paragraph (2) of subsections (a) through (c) of Code Section 44-6-201, relating to the validity of nonvested property interest or power of appointment, as follows:

“(2) The condition precedent either is satisfied or becomes impossible to satisfy within 90 360 years after its creation.”

“(2) The interest either vests or terminates within 90 360 years after its creation.”
“(2) The power is irrevocably exercised or otherwise terminates within 90 360 years after its creation.”

SECTION 7.

Said article is further amended by revising Code Section 44-6-203, relating to reform of disposition by court to approximate transferor’s plan of distribution, as follows:

“44-6-203.

Upon the petition of an interested person, a court shall reform a disposition in the manner that most closely approximates the transferor’s manifested plan of distribution and is within the 90 number of years allowed by paragraph (2) of subsection (a), paragraph (2) of subsection (b), or paragraph (2) of subsection subsection (a), (b), or (c) of Code Section 44-6-201 if:

(1) A nonvested property interest or a power of appointment becomes invalid under Code Section 44-6-201;

(2) A class gift is not but might still become invalid under Code Section 44-6-201 and the time has arrived when the share of any class member is to take effect in possession or enjoyment; or

(3) A nonvested property interest that is not validated by paragraph (1) of subsection (a) of Code Section 44-6-201 can vest, but not within 90 360 years after its creation.”

SECTION 8.

Said article is further amended by revising Code Section 44-6-205, relating to the applicability of this article and court reform of nonvested dispositions created before this article became effective, as follows:

“44-6-205.

(a) Except as extended by subsection (b) of this Code section, this article applies to a nonvested property interest or a power of appointment that is created on or after May 1, 1990 July 1, 2017. For purposes of this Code section only, a nonvested property interest or a power of appointment created by the exercise of a
power of appointment is created when the power is irrevocably exercised or when a revocable exercise becomes irrevocable.

(b) With respect to a nonvested property interest or a power of appointment that was created before May 1, 1990 July 1, 2017, and that violates this state’s rule against perpetuities as that rule existed before May 1, 1990 July 1, 2017, a court upon the petition of an interested party may exercise its equitable power to reform the disposition in the manner that most closely approximates the transferor’s manifested plan of distribution and is within the limits of the rule against perpetuities applicable when the nonvested property interest or power of appointment was created.”

SECTION 9.

This Act shall become effective on July 1, 2017.

SECTION 10.

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