

Senate Bill 517

By: Senators Kemp of the 3rd, Meyer von Bremen of the 12th and Johnson of the 1st

AS PASSED SENATE

**A BILL TO BE ENTITLED
AN ACT**

1 To amend Article 12 of Chapter 12 of Title 53 of the Official Code of Georgia Annotated,
2 relating to the powers of trustees, so as to impose certain restrictions on the extent to which
3 a trustee who is also a beneficiary of a trust may exercise discretionary powers of distribution
4 over income or principal for his or her own benefit; to provide for the application to
5 amendable trusts or trusts executed after enactment unless the terms of the trust expressly
6 provide otherwise and to trusts executed before enactment unless all interested parties elect
7 otherwise within three years; to provide for the appointment of an independent trustee to
8 exercise any otherwise proscribed powers; to provide for definitions; to repeal conflicting
9 laws; and for other purposes.

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

11 **SECTION 1.**

12 Article 12 of Chapter 12 of Title 53 of the Official Code of Georgia Annotated, relating to
13 the powers of trustees, is amended by adding a new Code section immediately following
14 Code Section 53-12-264, to be designated Code Section 53-12-265, to read as follows:

15 "53-12-265.

16 (a) Due to the inherent conflict of interest that exists between a trustee who is a beneficiary
17 and other beneficiaries of the trust, unless the terms of a trust refer specifically to this Code
18 section and provide expressly to the contrary, a trustee shall not exercise any of the
19 following powers conferred upon such trustee in his or her capacity as trustee (provided
20 that these restrictions shall not apply to a trustee who is the settlor of a trust that is
21 revocable or amendable by such settlor at the time the power is exercised or to a decedent's
22 or settlor's spouse who is the trustee of a testamentary or an inter vivos trust designed to
23 qualify for the federal estate or gift tax marital deduction under the Internal Revenue Code
24 or any subsequent statute of similar import):

25 (1) The power to make discretionary distributions of either principal or income to or for
26 the benefit of such trustee, except to provide for such trustee's health, education,

1 maintenance, or support as described under Sections 2041 and 2514 of the Internal
2 Revenue Code or any subsequent statute of similar import;

3 (2) The power to make discretionary allocations of receipts or expenses as between
4 principal and income, unless such trustee acts in a fiduciary capacity whereby such
5 trustee has no power to enlarge or shift any beneficial interest except as an incidental
6 consequence of the discharge of such trustee's fiduciary duties;

7 (3) The power to make discretionary distributions of either principal or income to satisfy
8 any legal support obligation of such trustee; or

9 (4) Any other power, including the right to remove or to replace any trustee, so as to
10 cause any of the powers enumerated in paragraphs (1), (2), or (3) of this subsection to be
11 exercised on behalf of, or for the benefit of, such trustee.

12 Any of the foregoing proscribed powers that is conferred upon two or more trustees may
13 be exercised by the trustee or trustees other than the restricted trustee, as defined in
14 subsection (d) of this Code section. If there is no trustee who is not a restricted trustee, any
15 party in interest, as defined in subsection (c) of this Code section, may apply to a court of
16 competent jurisdiction to appoint a cotrustee who is an independent trustee, as defined in
17 subsection (d) of this Code section, with respect to the restricted trustee, for the purpose
18 of exercising such power, and such power may be exercised by the independent trustee
19 appointed by the court.

20 (b) This Code section applies to:

21 (1) Any trust created under a governing instrument (will or trust) executed after June 30,
22 2002;

23 (2) Any trust created under a governing instrument (will or trust) executed before July
24 1, 2002, unless:

25 (A) At any time while the terms of the trust are revocable or amendable, the trust is
26 revoked or amended to refer specifically to this Code section and expressly provide
27 otherwise; or

28 (B) After the trust becomes irrevocable and unamendable, all parties in interest, as
29 defined in subsection (c) of this Code section, elect affirmatively, by written declaration
30 executed in the manner prescribed for the recordation of deeds in this state and
31 delivered to the trustee, not to be subject to the application of this Code section. Such
32 election must be made on or before the later of July 1, 2005, or the date that is three
33 years after the date on which the trust becomes irrevocable and unamendable. Prior to
34 the effectiveness of any timely election by the parties in interest of a trust not to be
35 subject to the provisions of this Code section, the provisions of this Code section, to the
36 extent otherwise applicable, shall apply to such trust.

1 However, the provisions of this Code section neither create a new cause of action nor
2 impair any existing cause of action which, in either case, relates to any power proscribed
3 by this Code section that was exercised before July 1, 2002.

4 (c) For the purposes of subsection (a) or (b) of this Code section:

5 (1) If the trust is revocable or amendable, the parties in interest are the person or persons
6 holding the power of revocation or amendment; or

7 (2) If the trust is not revocable or amendable, the parties in interest are all of the
8 following:

9 (A) Each trustee then serving;

10 (B) Each income beneficiary, as defined in subsection (d) of this Code section, then in
11 existence or, if any such income beneficiary has not attained majority or is otherwise
12 incapacitated, the person or persons, if any, empowered under applicable law to act on
13 behalf of such income beneficiary; and

14 (C) Each remainder beneficiary, as defined in subsection (d) of this Code section, then
15 in existence or, if any such remainder beneficiary has not attained majority or is
16 otherwise incapacitated, the person or persons, if any, empowered under applicable law
17 to act on behalf of such remainder beneficiary.

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

19 (1) 'Income beneficiary' means any person to whom distribution of income is to any
20 extent required or permitted at the time the provision using such term is applied.

21 (2) 'Independent trustee' means, with respect to any restricted trustee, any person who
22 would not be a related or subordinate party as to such restricted trustee, within the
23 meaning of Section 672 of the Internal Revenue Code or any subsequent statute of similar
24 import, determined as if such restricted trustee were the grantor of a trust.

25 (3) 'Remainder beneficiary' means any person to whom any portion of a trust would be
26 distributable if the trust were to terminate at the time the provision using such term is
27 applied.

28 (4) 'Restricted trustee' means any trustee whose exercise of any power is proscribed by
29 this Code section."

30 SECTION 2.

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