

House Bill 456

By: Representatives Weldon of the 3rd, Fleming of the 121st, and Evans of the 42nd

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:

12 style="text-align:center">**SECTION 1.**

13 Chapter 12 of Title 53 of the Official Code of Georgia Annotated, relating to trusts, is
14 amended in Code Section 53-12-2, relating to definitions, by revising paragraphs (6) through
15 (16) as follows:

16 "(6) 'Independent qualified trustee' means a qualified trustee who is not, and whose
17 actions are not, subject to direction by:

18 (A) The settlor;

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

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

21 (D) The spouse of the settlor;

22 (E) A parent of the settlor;

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

24 (G) A sibling of the settlor;

25 (H) An employer of the settlor;

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

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

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

30 (7) 'Nonresident' means an individual who does not reside in Georgia.

31 ~~(7)~~(8) 'Person' means an individual, corporation, partnership, association, joint-stock
 32 company, business trust, unincorporated organization, limited liability company, or other
 33 legal entity, including any of the foregoing acting as a fiduciary.

34 ~~(8)~~(9) 'Private foundation' means a private foundation as defined in Section 509 of the
 35 federal Internal Revenue Code.

36 ~~(9)~~(10) 'Property' means any type of property, whether real or personal, tangible or
 37 intangible, legal or equitable.

38 ~~(10)~~(11) 'Qualified beneficiary' means a living individual or other existing person who,
 39 on the date of determination of beneficiary status:

40 (A) Is a distributee or permissible distributee of trust income or principal;

41 (B) Would be a distributee or permissible distributee of trust income or principal if the
 42 interests of the distributees described in subparagraph (A) of this paragraph terminated
 43 on that date without causing the trust to terminate; or

44 (C) Would be a distributee or permissible distributee of trust income or principal if the
 45 trust terminated on that date.

46 The Attorney General has the rights of a qualified beneficiary with respect to a charitable
 47 trust as defined in Code Section 53-12-170, and a person appointed to enforce a trust
 48 created for the care of an animal under Code Section 53-12-28 also has the rights of a
 49 qualified beneficiary.

50 ~~(11)~~(12) 'Qualified interest' means the interest of a settlor in a qualified self-settled
 51 spendthrift trust to the extent that such interest entitles the settlor to receive distributions
 52 of income or principal or both in the sole discretion of an independent qualified trustee.
 53 A settlor may have a qualified interest in a qualified self-settled spendthrift trust and also
 54 have an interest in the same trust that is not a qualified interest, and the rules of Code
 55 Sections 53-12-80 and 53-12-82 shall apply to each interest of the settlor in the same trust
 56 other than the qualified interest of the settlor.

57 (13) 'Qualified self-settled spendthrift trust' means a trust as described in Code Section
 58 53-12-85.

59 (14) 'Qualified trustee' means any person who is a natural person residing within Georgia
 60 or a legal entity authorized to engage in trust business within Georgia and who maintains
 61 or arranges for custody within this state some or all of the property that has been
 62 transferred to the trust by the settlor, maintains records within this state for the trust on

63 an exclusive or nonexclusive basis, prepares or arranges for the preparation within this
 64 state of fiduciary income tax returns for the trust, or otherwise materially participates
 65 within this state in the administration of the trust. A trustee is not a qualified trustee if
 66 the authority of such trustee to make distributions of income or principal or both are
 67 subject to the direction of someone who, were that person a trustee of the trust, would not
 68 meet the requirements of a qualified trustee.

69 (15) 'Settlor' means the person who creates the trust, including a testator in the case of
 70 a testamentary trust.

71 ~~(12)~~(16) 'Spendthrift provision' means a provision in a trust instrument that prohibits
 72 transfers of a beneficiary's interest in the income or principal or both.

73 ~~(13)~~(17) 'Trust' means an express trust or an implied trust but shall not include trusts
 74 created by statute or the Constitution of Georgia.

75 ~~(14)~~(18) 'Trust instrument' means the document, including any testamentary instrument,
 76 that contains the trust provisions.

77 ~~(15)~~(19) 'Trust property' means property the legal title to which is held by the trustee.
 78 The term also includes choses in action, claims, and contract rights, including a
 79 contractual right to receive death benefits as the designated beneficiary under a policy of
 80 insurance, contract, employees' trust, or other arrangement.

81 ~~(16)~~(20) 'Trustee' means the person or persons holding legal title to the property in trust."

82 **SECTION 2.**

83 Said chapter is further amended by revising Code Section 53-12-80, relating to spendthrift
 84 provisions, as follows:

85 "53-12-80.

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

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

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

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

96 ~~(d)~~(4) A spendthrift provision shall not be valid as to the following claims against a
 97 beneficiary's right to a current distribution to the extent the distribution would be subject

98 to garnishment under Article 2 of Chapter 4 of Title 18 if the distribution were disposable
99 earnings:

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

101 (2)(B) Taxes or other governmental claims;

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

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

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

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

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

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

119 ~~(g)(7)~~ Notwithstanding any other provision in this Code section, a spendthrift provision
120 in a pension or retirement arrangement described in sections 401, 403, 404, 408, 408A,
121 409, 414, or 457 of the federal Internal Revenue Code of 1986 shall be valid with
122 reference to the entire interest of the beneficiary in the income, principal, or both, even
123 if the beneficiary is also a contributor of trust property, except where a claim is made
124 pursuant to a qualified domestic relations order as defined in 26 U.S.C. Section 414(p)."

125 **SECTION 3.**

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

128 "53-12-82.

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

131 (1) During the lifetime of the settlor, the property of a revocable trust shall be subject to
132 claims of the settlor's creditors;

133 (2) With respect to an irrevocable trust, except to the extent as provided in Article 5A of
 134 this chapter, creditors or assignees of the settlor may reach the maximum amount that can
 135 be distributed to or for the settlor's benefit during the settlor's life or that could have been
 136 distributed to or for the settlor's benefit immediately prior to the settlor's death. If a trust
 137 has more than one settlor, the amount the creditors or assignees of a particular settlor may
 138 reach shall not exceed the settlor's interest in the portion of the trust attributable to that
 139 settlor's contribution; and

140 (3) After the death of a settlor, and subject to the settlor's right to direct the source from
 141 which liabilities shall be paid, the property of a trust that was revocable at the settlor's
 142 death or had become irrevocable as a result of the settlor's incapacity shall be subject to
 143 claims of the settlor's creditors to the extent the probate estate is inadequate. Payments
 144 that would not be subject to the claims of the settlor's creditors if made by way of
 145 beneficiary designation to persons other than the settlor's estate shall not be made subject
 146 to such claims by virtue of this Code section unless otherwise provided in the trust
 147 instrument."

148 **SECTION 4.**

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

150 "ARTICLE 5A

151 53-12-90.

152 (a) A qualified self-settled spendthrift trust shall be created or declared in writing and
 153 signed by the settlor or an agent for the settlor acting under a power of attorney containing
 154 express authorization.

155 (b) A qualified self-settled spendthrift trust shall:

156 (1) Be irrevocable;

157 (2) Be created during the lifetime of a settlor;

158 (3) Have, at all times when distributions could be made to the settlor pursuant to the
 159 qualified interest of a settlor, at least one beneficiary other than the settlor to whom:

160 (A) Income may be distributed, if the qualified interest of the settlor relates to trust
 161 income;

162 (B) Principal may be distributed, if the qualified interest of the settlor relates to trust
 163 principal; or

164 (C) Both income and principal may be distributed, if the qualified interest of the settlor
 165 relates to both trust income and principal;

166 (4) Have, at all times, at least one qualified trustee who may be, but need not be, an
167 independent qualified trustee;
168 (5) Be created with a trust instrument which expressly incorporates the law of this state
169 in governing the validity, construction, and administration of the trust; and
170 (6) Be created with a trust instrument which includes a spendthrift provision as described
171 in Code Section 53-12-91, that restrains both voluntary and involuntary transfer of the
172 qualified interest of the settlor.

173 53-12-91.

174 (a) A settlor may transfer assets to a qualified self-settled spendthrift trust. No transfer by
175 a settlor to a qualified self-settled spendthrift trust shall, to the extent of the qualified
176 interest of the settlor, be deemed to have been made with intent to delay, hinder, or defraud
177 creditors, for purposes of Article 4 of Chapter 2 of Title 18, the 'Uniform Fraudulent
178 Transfers Act,' merely because it is made to a trust with respect to which the settlor retains
179 a qualified interest and merely because it is made without consideration.

180 (b) The following shall be applicable if more than one transfer is made by a settlor to a
181 qualified self-settled spendthrift trust:

182 (1) Any subsequent transfer made by a settlor shall be disregarded when determining
183 whether a claim of a creditor is valid with respect to a prior transfer;

184 (2) The four-year limitation period for a cause of action with respect to a fraudulent
185 transfer as provided for in subsection (c) of this Code section shall be calculated based
186 upon the date a subsequent transfer occurred; and

187 (3) Any distribution to a beneficiary shall be deemed to have been made from the latest
188 transfer.

189 (c) Notwithstanding Code Section 18-2-79, a creditor of a settlor may bring an action
190 under Article 4 of Chapter 2 of Title 18, the 'Uniform Fraudulent Transfers Act,' to obtain
191 relief against a transfer to a qualified self-settled spendthrift trust or otherwise obtain a
192 judgment on a claim against a settlor that existed on the date of the transfer by the settlor
193 to such trust within four years after the transfer was made. A creditor shall have only such
194 rights with respect to a transfer to a qualified self-settled spendthrift trust as provided for
195 in this Code section and Code Section 53-12-95. No person, except for the settlor or
196 beneficiaries of a qualified self-settled spendthrift trust, shall have any claim or cause of
197 action against any trustee, trust adviser, trust director, or any person involved in the
198 counseling, drafting, preparation, or execution of, or transfer to, a qualified self-settled
199 spendthrift trust.

200 (d) The original transfer date of assets to a trust not created in this state shall be deemed
201 the transfer date when administration of such trust is moved to this state and such trust
202 meets the requirements of a qualified self-settled spendthrift trust.

203 53-12-92.

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

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

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

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

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

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

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

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

216 53-12-93.

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

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

222 (2) The qualified interest of a settlor in the trust;

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

225 (4) The potential or actual receipt of income by a settlor from a charitable remainder
226 unitrust or charitable remainder annuity trust as defined by Section 664(d) of the federal
227 Internal Revenue Code and the right of the settlor, at any time, and from time to time, to
228 release, in writing delivered to the qualified trustee, all or any part of the retained interest
229 of the settlor in such trust;

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

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

234 (7) The potential or actual use of real property by a settlor when such real property is
 235 held under a personal residence trust as defined by Section 2702(c) of the federal Internal
 236 Revenue Code;

237 (8) The potential or actual receipt of use by a settlor of a qualified annuity interest as
 238 defined by Section 2702 of the federal Internal Revenue Code;

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

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

248 53-12-94.

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

252 53-12-95.

253 A qualified self-settled spendthrift trust shall not be valid as to the following claims against
 254 a settlor's right to a current distribution to the extent the distribution would be subject to
 255 garnishment under Article 2 of Chapter 4 of Title 18 if the distribution were disposable
 256 earnings:

257 (1) Alimony; or

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

259 **SECTION 5.**

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

263 **"(d) Term restricting assignment generally ineffective.** Except as otherwise provided
 264 in subsection (e) of this Code section and Code Sections 11-2A-303, 11-9-407, **and**
 265 53-12-80 through 53-12-83, and 53-12-90 through 53-12-95 and subject to subsection (h)
 266 of this Code section, a term in an agreement between an account debtor and an assignor or
 267 in a promissory note shall be ineffective to the extent that it:

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

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

276 **SECTION 6.**

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

280 "(a) **Term restricting assignment generally ineffective.** Except as otherwise provided
 281 in subsection (b) of this Code section, ~~or in Code Section 53-12-80, or in Code Sections~~
 282 53-12-90 through 53-12-95, a term in a promissory note or in an agreement between an
 283 account debtor and a debtor which relates to a health care insurance receivable or a general
 284 intangible, including a contract, permit, license, or franchise, and which term prohibits,
 285 restricts, or requires the consent of the person obligated on the promissory note or the
 286 account debtor to the assignment or transfer of, or creation, attachment, or perfection of a
 287 security interest in, the promissory note, health care insurance receivable, or general
 288 intangible, shall be ineffective to the extent that the term:

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

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

294 "(c) **Legal restrictions on assignment generally ineffective.** Except as otherwise
 295 provided in Code Section 53-12-80 or in Code Sections 53-12-90 through 53-12-95, a rule
 296 of law, statute, or regulation that prohibits, restricts, or requires the consent of a
 297 government, governmental body or official, person obligated on a promissory note, or
 298 account debtor to the assignment or transfer of, or creation of a security interest in, a
 299 promissory note, health care insurance receivable, or general intangible, including a
 300 contract, permit, license, or franchise between an account debtor and a debtor, shall be
 301 ineffective to the extent that the rule of law, statute, or regulation:

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

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

307 **SECTION 7.**

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