

House Bill 441

By: Representatives Fleming of the 121<sup>st</sup>, Morris of the 156<sup>th</sup>, Coomer of the 14<sup>th</sup>, and Beskin of the 54<sup>th</sup>

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 provide for claims for relief; to amend Part 4 of  
8 Article 9 of Title 11 of the Official Code of Georgia Annotated, relating to rights of third  
9 parties to secured transactions, so as to exclude qualified self-settled spendthrift trusts from  
10 restrictions on assignment; to provide for related matters; to repeal conflicting laws; and for  
11 other purposes.

12 BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

13 SECTION 1.

14 Chapter 12 of Title 53 of the Official Code of Georgia Annotated, relating to trusts, is  
15 amended by revising Code Section 53-12-80, relating to spendthrift provisions, as follows:  
16 "53-12-80.

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

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

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

24 ~~(c)~~(3) A beneficiary shall not transfer an interest in a trust in violation of a valid  
25 spendthrift provision, and, except as otherwise provided in this Code section, a creditor

26 or assignee of ~~the~~ such beneficiary shall not reach the interest or a distribution by the  
 27 trustee before its receipt by ~~the~~ such beneficiary.;

28 ~~(d)~~(4) A spendthrift provision shall not be valid as to the following claims against a  
 29 beneficiary's right to a current distribution to the extent ~~the~~ such distribution would be  
 30 subject to garnishment under Article 1 of Chapter 4 of Title 18 if ~~the~~ such distribution  
 31 were disposable earnings:

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

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

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

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

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

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

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

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

51 ~~(g)~~(7) Notwithstanding any other provision in this Code section, a spendthrift provision  
 52 in a pension or retirement arrangement described in sections 401, 403, 404, 408, 408A,  
 53 409, 414, or 457 of the federal Internal Revenue Code of 1986 shall be valid with  
 54 reference to the entire interest of the beneficiary in the income, principal, or both, even  
 55 if ~~the~~ such beneficiary is also a contributor of trust property, except where a claim is  
 56 made pursuant to a qualified domestic relations order as defined in 26 U.S.C. Section  
 57 414(p)."

## 58 SECTION 2.

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

61 "53-12-82.

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

64 (1) During the lifetime of the settlor, the property of a revocable trust shall be subject to  
65 claims of ~~the~~ such settlor's creditors;

66 (2) With respect to an irrevocable trust, except to the extent as provided in Article 5A of  
67 this chapter, creditors or assignees of the settlor may reach the maximum amount that can  
68 be distributed to or for ~~the~~ such settlor's benefit during ~~the~~ such settlor's life or that could  
69 have been distributed to or for ~~the~~ such settlor's benefit immediately prior to ~~the~~ such  
70 settlor's death. If a trust has more than one settlor, the amount the creditors or assignees  
71 of a particular settlor may reach shall not exceed ~~the~~ such settlor's interest in the portion  
72 of the trust attributable to ~~that~~ such settlor's contribution; and

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

81 **SECTION 3.**

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

83 "ARTICLE 5A

84 53-12-90.

85 As used in this article, the term:

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

88 (A) The settlor;

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

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

91 (D) The spouse of the settlor;

92 (E) A parent of the settlor;

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

94 (G) A sibling of the settlor;

- 95 (H) An employer of the settlor;  
 96 (I) A business entity in which the holdings of the settlor represent at least 30 percent  
 97 of the total voting power of all interests entitled to vote;  
 98 (J) A subordinate employee of the settlor; or  
 99 (K) A subordinate employee of a business entity in which the settlor is an executive.
- 100 (2) 'Qualified interest' means the interest of a settlor to the extent that such interest  
 101 entitles such settlor to receive distributions of income or principal or both in the sole  
 102 discretion of an independent qualified trustee.
- 103 (3) 'Qualified self-settled spendthrift trust' means a trust that:
- 104 (A) Is created or declared in writing;  
 105 (B) Is signed by the settlor or an agent for such settlor acting under a power of attorney  
 106 containing express authorization;  
 107 (C) Is irrevocable;  
 108 (D) Was created during the lifetime of a settlor;  
 109 (E) Has, at all times when distributions could be made to the settlor pursuant to the  
 110 qualified interest, at least one beneficiary other than such settlor to whom:
- 111 (i) Income may be distributed, if the qualified interest relates to trust income;  
 112 (ii) Principal may be distributed, if the qualified interest relates to trust principal; or  
 113 (iii) Both income and principal may be distributed, if the qualified interest relates to  
 114 both trust income and principal;
- 115 (F) Has, at all times, at least one qualified trustee who may be, but need not be, an  
 116 independent qualified trustee;  
 117 (G) Can grant the settlor powers under the terms of the trust to direct trust investments  
 118 and execute other management powers, not including the ordering or withholding of  
 119 trust distributions;  
 120 (H) Is created with a trust instrument which expressly incorporates the law of this state  
 121 in governing the validity, construction, and administration of the trust; and  
 122 (I) Is created with a trust instrument that includes a spendthrift provision that restrains  
 123 both voluntary and involuntary transfer of the qualified interest.
- 124 (4) 'Qualified trustee' means any person who is a natural person residing within this state  
 125 or a legal entity authorized to engage in trust business within this state and who maintains  
 126 or arranges for custody within this state some or all of the property that has been  
 127 transferred to the trust by the settlor, maintains records within this state for the trust on  
 128 an exclusive or nonexclusive basis, prepares or arranges for the preparation within this  
 129 state of fiduciary income tax returns for the trust, or otherwise materially participates  
 130 within this state in the administration of the trust.

131 53-12-91.

132 (a) A settlor may transfer assets to a qualified self-settled spendthrift trust and retain in  
 133 such trust a qualified interest, and, except as otherwise provided in this article, Code  
 134 Section 53-12-80 and paragraph (2) of Code Section 53-12-82 shall not apply to such  
 135 qualified interest. A settlor may have a qualified interest in a qualified self-settled  
 136 spendthrift trust and also have an interest in the same trust that is not a qualified interest,  
 137 and the rules of Code Sections 53-12-80 and 53-12-82 shall apply to each interest of the  
 138 settlor in the same trust other than the qualified interest.

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

142 53-12-92.

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

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

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

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

155 53-12-93.

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

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

161 (2) The qualified interest in the trust;

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

164 (4) The potential or actual receipt of income by a settlor from a charitable remainder  
 165 unitrust or charitable remainder annuity trust as defined by 26 U.S.C. Section 664(d) and

166 the right of such settlor, at any time, and from time to time, to release, in writing  
167 delivered to the qualified trustee, all or any part of the retained interest of such settlor in  
168 such trust;

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

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

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

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

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

178 (9) The ability of a qualified trustee, whether pursuant to discretion or direction, to pay,  
179 upon the death of a settlor, all or any part of debts owed by such settlor at the time of  
180 such settlor's death, the expenses of administering the estate of such settlor, or any estate  
181 inheritance tax imposed on or with respect to the estate of such settlor; and

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

187 53-12-94.

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

191 53-12-95.

192 A qualified self-settled spendthrift trust shall not be valid as to the following claims against  
193 a settlor's or other beneficiary's right to a current distribution to the extent the distribution  
194 would be subject to garnishment under Article 1 of Chapter 4 of Title 18 if the distribution  
195 were disposable earnings:

196 (1) Alimony; or

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

198 53-12-96.

199 A creditor with a claim against the settlor of a qualified self-settled spendthrift trust may  
 200 bring a cause of action or claim for relief with respect to a transfer of assets to a qualified  
 201 self-settled spendthrift trust under Article 4 of Chapter 2 of Title 18, the 'Uniform Voidable  
 202 Transactions Act.'"

203 **SECTION 4.**

204 Part 4 of Article 9 of Title 11 of the Official Code of Georgia Annotated, relating to rights  
 205 of third parties to secured transactions, is amended by revising subsection (d) of Code  
 206 Section 11-9-406, relating to discharge of account debtor, notification of assignment,  
 207 identification and proof of assignment, and restrictions on assignment of accounts, chattel  
 208 paper, payment intangibles, and promissory notes ineffective, as follows:

209 "(d) **Term restricting assignment generally ineffective.** Except as otherwise provided  
 210 in subsection (e) of this Code section and Code Sections 11-2A-303, 11-9-407, ~~and~~  
 211 53-12-80 through 53-12-83, and Article 5A of Chapter 12 of Title 53 and subject to  
 212 subsection (h) of this Code section, a term in an agreement between an account debtor and  
 213 an assignor or in a promissory note shall be ineffective to the extent that it:

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

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

222 **SECTION 5.**

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

226 "(a) **Term restricting assignment generally ineffective.** Except as otherwise provided  
 227 in subsection (b) of this Code section, ~~or~~ in Code Section 53-12-80, or in Article 5A of  
 228 Chapter 12 of Title 53, a term in a promissory note or in an agreement between an account  
 229 debtor and a debtor which relates to a health care insurance receivable or a general  
 230 intangible, including a contract, permit, license, or franchise, and which term prohibits,  
 231 restricts, or requires the consent of the person obligated on the promissory note or the  
 232 account debtor to the assignment or transfer of, or creation, attachment, or perfection of a

233 security interest in, the promissory note, health care insurance receivable, or general  
 234 intangible, shall be ineffective to the extent that the term:

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

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

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

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

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

253 **SECTION 6.**

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