

SENATE SUBSTITUTE TO HB 441:

AS PASSED

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 claims for relief; to amend Part 4 of Article 9 of Title 11 of the Official Code of Georgia
 8 Annotated, relating to rights of third parties to secured transactions, so as to exclude qualified
 9 self-settled spendthrift trusts from restrictions on assignment; to provide for related matters;
 10 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~~ such beneficiary's interest in the manner set forth in this
 22 article;:

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

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

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

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

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

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

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

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

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

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

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

57 **SECTION 2.**

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

60 "53-12-82.

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

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

80 **SECTION 3.**

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

82 "ARTICLE 5A

83 53-12-90.

84 As used in this article, the term:

- 85 (1) 'Independent qualified trustee' means a qualified trustee who is not, and whose
 86 actions are not, subject to direction by:
- 87 (A) The settlor;
- 88 (B) Any natural person who is not a resident of Georgia;
- 89 (C) Any entity that is not authorized to engage in trust business within Georgia;
- 90 (D) The spouse of the settlor;
- 91 (E) A parent of the settlor;
- 92 (F) Any lineal descendants of the settlor, including adopted children and stepchildren;
- 93 (G) A sibling of the settlor;
- 94 (H) An employer of the settlor;
- 95 (I) A business entity in which the holdings of the settlor represent at least 30 percent
 96 of the total voting power of all interests entitled to vote;

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

98 (K) An employee of a business entity in which the settlor is an executive.

99 (2) 'Qualified interest' means the interest of a settlor of a qualified self-settled spendthrift
 100 trust to the extent that such interest entitles such settlor to receive distributions of income
 101 or principal or both in the sole discretion of one or more independent qualified trustees.

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

103 (A) Is created or declared in writing;

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

106 (C) Is irrevocable;

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

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

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

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

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

114 (F) Has, at all times, at least one independent qualified trustee;

115 (G) Can grant the settlor powers under the terms of the trust to direct trust investments
 116 and execute other management powers, not including the ordering or withholding of
 117 trust distributions;

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

120 (I) Is created with a trust instrument that includes a spendthrift provision that restrains
 121 both voluntary and involuntary transfer of the qualified interest.

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

129 53-12-91.

130 A settlor may transfer assets to a qualified self-settled spendthrift trust and retain in such
 131 trust a qualified interest, and, except as otherwise provided in this article, Code Sections
 132 53-12-80 and 53-12-82 shall not apply to such qualified interest.

133 53-12-92.

134 A vacancy in the position of an independent qualified trustee that occurs for any reason,
 135 whether or not there is another trustee then serving, shall be filled by a person eligible to
 136 serve as an independent qualified trustee and in the following order of priority:

- 137 (1) One designated pursuant to the terms of the trust to act as successor trustee;
 138 (2) One appointed by the settlor of the trust;
 139 (3) One appointed by the qualified beneficiaries by unanimous consent; and
 140 (4) One appointed by the court pursuant to Code Section 53-12-62.

141 53-12-93.

142 For the purpose of Code Sections 53-12-90, 53-12-91, and 53-12-92, no trust shall be
 143 considered revocable merely because the trust instrument includes one or more of the
 144 following rights, powers, or interests:

- 145 (1) A power of appointment, exercisable by the settlor through a will or other written
 146 instrument effective only upon the death of such settlor;
 147 (2) The qualified interest in the trust;
 148 (3) The right of a settlor to receive income or principal pursuant to an ascertainable
 149 standard;
 150 (4) The right of a settlor, at any time, and from time to time, to release, in writing
 151 delivered to the independent qualified trustee, all or any part of the retained interest of
 152 such settlor in such trust;
 153 (5) Annual receipt by the settlor of a percentage, not to exceed 5 percent and specified
 154 in the trust instrument, of the initial value of the trust assets or the value of such assets
 155 determined from time to time pursuant to such trust instrument;
 156 (6) The right of the settlor to remove an independent qualified trustee and appoint a new
 157 independent qualified trustee;
 158 (7) The potential or actual use of real property by a settlor when such real property is
 159 held under a personal residence trust;
 160 (8)(A) As used in this paragraph, the term 'qualified interest' shall have the same
 161 meaning as defined by 26 U.S.C. Section 2702.
 162 (B) The potential or actual receipt of use by a settlor of a qualified interest;
 163 (9) The ability of a qualified trustee, whether pursuant to discretion or direction, to pay,
 164 upon the death of a settlor, all or any part of debts owed by such settlor at the time of
 165 such settlor's death, the expenses of administering the estate of such settlor, or any estate
 166 inheritance tax imposed on or with respect to the estate of such settlor; and
 167 (10) The potential or actual receipt of income or principal by a settlor to pay, in whole
 168 or in part, income taxes due on trust income, or the direct payment of such taxes to the

169 applicable tax authorities, pursuant to a provision in the trust instrument that expressly
 170 provides for the direct payment of such taxes or reimbursement of such settlor for such
 171 tax payments.

172 53-12-94.

173 (a) A spendthrift provision contained in a qualified self-settled spendthrift trust shall not
 174 be valid as to the following claims against a settlor's or other beneficiary's right to a current
 175 distribution to the extent the distribution would be subject to garnishment under Chapter
 176 4 of Title 18 if the distribution were disposable earnings:

177 (1) Alimony or child support;

178 (2) Taxes or other governmental claims;

179 (3) Tort judgments;

180 (4) Judgments or orders for restitution as a result of a criminal conviction of the
 181 beneficiary;

182 (5) Judgments for necessities or

183 (6) Contract judgments.

184 (b) Except as otherwise provided in Code Section 53-12-95, a spendthrift provision
 185 contained in a qualified self-settled spendthrift trust shall be valid as to all other claims
 186 against a settlor's or other beneficiary's right to a current distribution.

187 53-12-95.

188 (a) As used in this Code section, the term 'financial institution' shall have the same
 189 meaning as set forth in Code Section 7-1-911.

190 (b) A creditor with a claim against the settlor of a qualified self-settled spendthrift trust
 191 may bring a cause of action or claim for relief with respect to a transfer of assets to a
 192 qualified self-settled spendthrift trust under Article 4 of Chapter 2 of Title 18, the 'Uniform
 193 Voidable Transactions Act.' A transfer of assets to a qualified self-settled spendthrift
 194 trust may be considered a transfer to an insider under Article 4 of Chapter 2 of Title
 195 18.

196 (c) A financial institution and its successors or assigns may bring a cause of action or
 197 claim for relief against a trustee, settlor, qualified self-settled spendthrift trust, other
 198 beneficiary, or recipient with respect to assets currently within or at any time part of a
 199 qualified self-settled spendthrift trust that the settlor or other beneficiary has listed or
 200 disclosed at any time on the financial institution's application or any other financial
 201 disclosure provided to obtain, renew, extend, modify, or maintain credit, or in connection
 202 with credit, from the financial institution, including periodic reporting requirements, as
 203 being an asset of the settlor or beneficiary, regardless of whether a subsequent financial

204 statement or disclosure thereafter provided that the applicable asset was subject to a
 205 qualified self-settled spendthrift trust. The financial institution and its successors or assigns
 206 shall not be precluded from recovering such assets transferred to such qualified self-settled
 207 spendthrift trust or the value of such assets."

208 **SECTION 4.**

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

214 "(d) **Term restricting assignment generally ineffective.** Except as otherwise provided
 215 in subsection (e) of this Code section and Code Sections 11-2A-303, 11-9-407, ~~and~~
 216 53-12-80 through 53-12-83, and Article 5A of Chapter 12 of Title 53 and subject to
 217 subsection (h) of this Code section, a term in an agreement between an account debtor and
 218 an assignor or in a promissory note shall be ineffective to the extent that it:

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

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

227 **SECTION 5.**

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

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

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

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

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

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

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

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

258 **SECTION 6.**

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