House Bill 406 (AS PASSED HOUSE AND SENATE)
By: Representatives Willard of the 49th and Oliver of the 83rd

A BILL TO BE ENTITLED
AN ACT

To amend Article 10 of Chapter 12 of Title 53 of the Official Code of Georgia Annotated, relating to allocation of principal and income, so as to change provisions relating to the duty of the trustee as to receipts and expenditures; to provide for general principles relating to the allocation of principal and income; to provide for the discretionary power of a trustee to adjust the trust receipts between principal and income; to provide for requirements and prohibitions in adjustments; to provide for the criteria and procedure for conversion to a unitrust; to provide for judicially approved conversion; to provide for requirements and prohibitions in conversions; to provide for remedies; to correct a cross-reference; to amend Article 9 of Chapter 12 of Title 53 of the Official Code of Georgia Annotated, relating to trustees´ duties and liabilities, so as to provide for exclusions of certain remedies; to amend Code Section 15-9-127 of the Official Code of Georgia Annotated, relating to a probate court´s additional concurrent jurisdiction with the superior court, so as to provide for concurrent jurisdiction for probate courts and superior courts on certain matters; to provide for related matters; to repeal conflicting laws; and for other purposes.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

SECTION 1.

Code Section 15-9-127 of the Official Code of Georgia Annotated, relating to a probate court´s additional concurrent jurisdiction with the superior court, is amended by striking the word "and" from the end of paragraph (6), by striking the symbol "." at the end of paragraph (7) and inserting in lieu thereof the symbol and word "; and", and by adding a new paragraph (8) to read as follows:

″(8) Conversion to a unitrust and related matters pursuant to Code Section 53-12-221.″

SECTION 2.

Article 9 of Chapter 12 of Title 53 of the Official Code of Georgia Annotated, relating to trustees´ duties and liabilities, is amended by striking subsection (a) of Code Section 53-12-192, relating to actions and remedies in breach of trust, and inserting in lieu thereof the following:

"(a) ~~If~~ Notwithstanding the remedy set forth in subsection (c) of Code Section 53-12-222 for an abuse of discretion as provided in Code Sections 53-12-220 and 53-12-221, if a trustee commits a breach of trust, or threatens to commit a breach of trust, a beneficiary shall have a cause of action:

(1) To recover damages;

(2) To compel the trustee to perform the trustee´s duties;

(3) To enjoin the trustee from committing a breach of trust;

(4) To compel the trustee to redress a breach of trust by payment of money or otherwise;

(5) To appoint a receiver or temporary trustee to take possession of the trust property and administer the trust;

(6) To remove the trustee;

(7) To reduce or deny compensation of the trustee."

SECTION 3.

Said article is further amended by striking subsection (a) of Code Section 53-12-193, relating to measure of liability of trustee to beneficiary, and inserting in lieu thereof the following:

"(a) ~~A~~ Notwithstanding the remedy set forth in subsection (c) of Code Section 53-12-222 for an abuse of discretion as provided in Code Sections 53-12-220 and 53-12-221, a trustee who commits a breach of trust is personally chargeable with any damages resulting from the breach of trust including but not limited to:

(1) Any loss or depreciation in value of the trust property as a result of the breach of trust with interest;

(2) Any profit made by the trustee through the breach of trust with interest;

(3) Any amount that would reasonably have accrued to the trust or beneficiary if there had been no breach of trust with interest; and

(4) In the discretion of the court, expenses of litigation, including reasonable attorney´s fees incurred by the beneficiary in bringing an action on the breach or threat to commit a breach."

SECTION 4.

Article 10 of Chapter 12 of Title 53 of the Official Code of Georgia Annotated, relating to allocation of principal and income, is amended by striking in its entirety Code Section

53-12-211, relating to the duty of a trustee as to receipts and expenditures, and inserting in lieu thereof the following:

″53-12-211.

~~(a) A trust shall be administered with due regard to the respective interests of income beneficiaries and remainder beneficiaries. A trust is so administered with respect to the allocation of receipts and expenditures if a receipt is credited or an expenditure is charged to income or principal or partly to each:~~

~~(1) In accordance with the terms of the trust notwithstanding contrary provisions of this chapter;~~

~~(2) In the absence of any contrary terms of the trust in accordance with the provisions of this chapter; or~~

~~(3) If neither of the preceding rules of administration is applicable, in accordance with what is reasonable and equitable in view of:~~

~~(A) The interests of income beneficiaries as well as of remainder beneficiaries; and~~

~~(B) The manner in which a prudent person acting in a like capacity would act in the management of the property of another.~~

~~(b) If the trust gives the trustee discretion in crediting a receipt or charging an expenditure to income or principal or partly to each, no inference that the trustee has improperly exercised such discretion shall arise from the fact that the trustee has made an allocation contrary to a subsequent provision of this chapter.~~

(a) In allocating receipts and disbursements to or between principal and income and with respect to any matter within the scope of this chapter, the following shall apply:

(1) A trustee shall administer a trust in accordance with the governing instrument, even if there is a different provision in this chapter;

(2) A trustee may administer a trust by the exercise of a discretionary power of administration regarding a matter within the scope of this chapter given to the trustee by the governing instrument, even if the exercise of the power produces a result different from a result required or permitted by this chapter. No inference that the trustee has improperly exercised the discretionary power shall arise from the fact that the trustee has made an allocation contrary to a provision of this chapter;

(3) A trustee shall administer a trust in accordance with this chapter if the governing instrument does not contain a different provision or does not give the trustee a discretionary power of administration regarding a matter within the scope of this chapter; and

(4) A trustee shall add a receipt or charge a disbursement to principal to the extent that the governing instrument and this chapter do not provide a rule for allocating the receipt or disbursement to or between principal and income.

(b) In exercising a discretionary power of administration regarding a matter within the scope of this chapter, whether granted by the governing instrument or this chapter, including Code Section 53-12-220, relating to a trustee´s power to adjust, and Code Section 53-12-221, relating to the power to convert to unitrust, a trustee shall administer a trust impartially based on what is fair and reasonable to all of the beneficiaries, except to the extent that the governing instrument clearly manifests an intention that the trustee shall or may favor one or more of the beneficiaries. A determination in accordance with this chapter is presumed to be fair and reasonable to all of the beneficiaries.″

SECTION 5.

Said article is further amended by striking Code Section 53-12-218, relating to timber, and inserting in lieu thereof the following:

″53-12-218.

If any part of the principal consists of land from which merchantable timber may be removed, the receipts from taking the timber from the land shall be allocated in accordance with ~~paragraph (3) of~~ subsection (a) of Code Section 53-12-211.″

SECTION 6.

Said article is further amended by adding at the end thereof three new Code Sections 53-12-220, 53-12-221, and 53-12-222 to read as follows:

″53-12-220.

(a) Subject to subsections (c) and (f) of this Code section, a trustee may adjust between principal and income by allocating an amount of income to principal or an amount of principal to income to the extent the trustee considers appropriate if:

(1) The governing instrument describes what may or must be distributed to a beneficiary by referring to the trust´s income; and

(2) The trustee determines, after applying the rules in subsection (a) of Code Section 53-12-211, that the trustee is unable to comply with subsection (b) of Code Section 53-12-211.

(b) In deciding whether and to what extent to exercise the power conferred by subsection (a) of this Code section, a trustee may consider, among other things, all of the following:

(1) The size of the trust;

(2) The nature and estimated duration of the trust;

(3) The liquidity and distribution requirements of the trust;

(4) The needs for regular distributions and preservation and appreciation of capital;

(5) The expected tax consequences of an adjustment;

(6) The net amount allocated to income under this chapter and the increase or decrease in the value of the principal assets, which the trustee may estimate as to assets for which market values are not readily available;

(7) The assets held in the trust; the extent to which they consist of financial assets, interests in closely held enterprises, and tangible and intangible personal property or real property; the extent to which an asset is used by a beneficiary; and whether an asset was purchased by the trustee or received from the settlor or testator;

(8) To the extent reasonably known to the trustee, the needs of the beneficiaries for present and future distributions authorized or required by the governing instrument;

(9) Whether and to what extent the governing instrument gives the trustee the power to invade principal or accumulate income or prohibits the trustee from invading principal or accumulating income, and the extent to which the trustee has exercised a power from time to time to invade principal or accumulate income;

(10) The intent of the settlor or testator; and

(11) The actual and anticipated effect of economic conditions on principal and income and effects of inflation and deflation on the trust.

(c) A trustee may not make an adjustment under this Code section if any of the following apply:

(1) The adjustment would diminish the income interest in a trust which requires all of the income to be paid at least annually to a spouse and for which a federal estate tax or gift tax marital deduction would be allowed, in whole or in part, if the trustee did not have the power to make the adjustment;

(2) The adjustment would reduce the actuarial value of the income interest in a trust to which a person transfers property with the intent to qualify for a federal gift tax exclusion;

(3) The adjustment would change the amount payable to a beneficiary as a fixed annuity or a fixed fraction of the value of the trust assets;

(4) The adjustment is from any amount which is permanently set aside for charitable purposes under the governing instrument and for which a federal estate or gift tax deduction has been taken, unless both income and principal are so set aside;

(5) If:

(A) Possessing or exercising the power to make an adjustment would cause an individual to be treated as the owner of all or part of the trust for federal income tax purposes; and

(B) The individual would not be treated as the owner if the trustee did not possess the power to make an adjustment;

(6) If:

(A) Possessing or exercising the power to make an adjustment would cause all or part of the trust assets to be subject to federal estate, gift, or generation-skipping transfer tax with respect to an individual; and

(B) The assets would not be subject to federal estate, gift, or generation-skipping tax with respect to the individual if the trustee did not possess the power to make an adjustment;

(7) If the trustee is a beneficiary of the trust; or

(8) If the trust has been converted under Code Section 53-12-221.

(d) If paragraph (5), (6), or (7) of subsection (c) of this Code section applies to a trustee and there is more than one trustee, a cotrustee to whom the provision does not apply may make the adjustment unless the exercise of the power by the remaining trustee or trustees is prohibited by the governing instrument.

(e)(1) If paragraph (2) of this subsection applies, a trustee may release any of the following:

(A) The entire power conferred by subsection (a) of this Code section;

(B) The power to adjust from income to principal; or

(C) The power to adjust from principal to income.

(2) A release under paragraph (1) of this subsection is permissible if either of the following apply:

(A) The trustee is uncertain about whether possessing or exercising the power will cause a result described in paragraphs (1) through (6) of subsection (c) of this Code section; or

(B) The trustee determines that possessing or exercising the power will or may deprive the trust of a tax benefit or impose a tax burden not described in subsection (c) of this Code section.

(3) The release may be permanent or for a specified period, including a period measured by the life of an individual.

(f) A governing instrument which limits the power of a trustee to make an adjustment between principal and income does not affect the application of this Code section unless it is clear from the governing instrument that it is intended to deny the trustee the power of adjustment conferred by subsection (a) of this Code section.

53-12-221.

(a) Unless expressly prohibited by the governing instrument, a trustee may release the power to adjust under Code Section 53-12-220 and convert a trust into a unitrust as described in this Code section if all of the following apply:

(1) The trustee determines that the conversion will enable the trustee to better carry out the intent of the settlor or testator and the purposes of the trust;

(2) The trustee gives written notice of the trustee´s intention to release the power to adjust and to convert the trust into a unitrust and of how the unitrust will operate, including what initial decisions the trustee will make under this Code section, to all the sui juris beneficiaries who:

(A) Are currently eligible to receive income from the trust; and

(B) Would receive, if no powers of appointment were exercised, a distribution of principal if the trust were to terminate immediately prior to the giving of notice;

(3) There is at least one sui juris beneficiary under subparagraph (A) of paragraph (2) of this subsection and at least one sui juris beneficiary under subparagraph (B) of paragraph (2) of this subsection; and

(4) No sui juris beneficiary objects to the conversion to a unitrust in a writing delivered to the trustee within 60 days of the mailing of the notice under paragraph (2) of this subsection.

(b)(1) The trustee may petition the superior court to approve the conversion to a unitrust.

(2) A beneficiary may request a trustee to convert to a unitrust. If the trustee does not convert, the beneficiary may petition the superior court to order the conversion.

(3) The court shall approve the conversion or direct the requested conversion if the court concludes that the conversion will enable the trustee to better carry out the intent of the settlor or testator and the purposes of the trust.

(c) In deciding whether to exercise the power to convert to a unitrust as provided by subsection (a) of this Code section, a trustee may consider, among other things, all of the following:

(1) The size of the trust;

(2) The nature and estimated duration of the trust;

(3) The liquidity and distribution requirements of the trust;

(4) The needs for regular distributions and preservation and appreciation of capital;

(5) The expected tax consequences of the conversion;

(6) The assets held in the trust; the extent to which they consist of financial assets, interests in closely held enterprises, and tangible and intangible personal property or real property; and the extent to which an asset is used by a beneficiary;

(7) To the extent reasonably known to the trustee, the needs of the beneficiaries for present and future distributions authorized or required by the governing instrument;

(8) Whether and to what extent the governing instrument gives the trustee the power to invade principal or accumulate income or prohibits the trustee from invading principal or accumulating income and the extent to which the trustee has exercised a power from time to time to invade principal or accumulate income; and

(9) The actual and anticipated effect of economic conditions on principal and income and effects of inflation and deflation on the trust.

(d) After a trust is converted to a unitrust, all of the following apply:

(1) The trustee shall follow an investment policy seeking a total return for the investments held by the trust, whether the return is to be derived from:

(A) Appreciation of capital;

(B) Earnings and distributions from capital; or

(C) Both appreciation of capital and earnings and distributions from capital;

(2) The trustee shall make regular distributions in accordance with the governing instrument construed in accordance with the provisions of this Code section;

(3) The term 'income' in the governing instrument shall mean an annual unitrust distribution equal to 4 percent of the net fair market value of the trust´s assets, whether such assets would be considered income or principal under other provisions of this chapter, averaged over the lesser of:

(A) The three preceding years; or

(B) The period during which the trust has been in existence;

(4) The trustee can determine the fair market value of the property in the trust by appraisal or other reasonable method or estimate; and

(5) The fair market value of the trust property shall not include the value of any residential property or any tangible personal property that, as of the first business day of the current valuation year, one or more of the current beneficiaries of the trust have or had the right to occupy or have had the right to possess or control, other than in his or her capacity as trustee of the trust, and instead the right of occupancy or the right to possession or control shall be deemed to be the unitrust amount with respect to such residential property.

(e) The trustee may in the trustee´s discretion from time to time determine all of the following:

(1) The effective date of a conversion to a unitrust;

(2) The provisions for prorating a unitrust distribution for a short year in which a beneficiary´s right to payments commences or ceases;

(3) The frequency of unitrust distributions during the year;

(4) The effect of other payments from or contributions to the trust on the trust´s valuation;

(5) Whether to value the trust´s assets annually or more frequently;

(6) What valuation dates to use;

(7) How frequently to value nonliquid assets and whether to estimate their value; and

(8) Any other matters necessary for the proper functioning of the unitrust.

(f)(1) Expenses which would be deducted from income if the trust were not a unitrust may not be deducted from the unitrust distribution.

(2) Unless otherwise provided by the governing instrument, the unitrust distribution shall be paid from net income, as such term would be determined if the trust were not a unitrust. To the extent net income is insufficient, the unitrust distribution shall be paid from net realized short-term capital gains. To the extent income and net realized short-term capital gains are insufficient, the unitrust distribution shall be paid from net realized long-term capital gains. To the extent income and net realized short-term and long-term capital gains are insufficient, the unitrust distribution shall be paid from the principal of the trust.

(g) The trustee or, if the trustee declines to do so, a beneficiary may petition the superior court to:

(1) Select a payout percentage different than 4 percent;

(2) Provide for a distribution of net income, as would be determined if the trust were not a unitrust, in excess of the unitrust distribution if such distribution is necessary to preserve a tax benefit;

(3) Average the valuation of the trust´s net assets over a period other than three years; or

(4) Reconvert from a unitrust. Upon a reconversion, the power to adjust under Code Section 53-12-220 shall be revived.

(h) A conversion to a unitrust does not affect a provision in the governing instrument directing or authorizing the trustee to distribute principal or authorizing a beneficiary to withdraw a portion or all of the principal.

(i) A trustee may not convert a trust into a unitrust in any of the following circumstances:

(1) If the conversion would result in the disallowance of a federal estate tax or gift tax marital deduction which would be allowed if the trustee did not have the power to convert;

(2) If payment of the unitrust distribution would change the amount payable to a beneficiary as a fixed annuity or a fixed fraction of the value of the trust assets;

(3) If the unitrust distribution would be made from any amount which is permanently set aside for charitable purposes under the governing instrument and for which a federal

estate or gift tax deduction has been taken, unless both income and principal are so set aside;

(4) If:

(A) Possessing or exercising the power to convert would cause an individual to be treated as the owner of all or part of the trust for federal income tax purposes; and

(B) The individual would not be treated as the owner if the trustee did not possess the power to convert; or

(5) If:

(A) Possessing or exercising the power to convert would cause all or part of the trust assets to be subject to federal estate, gift, or generation-skipping transfer tax with respect to an individual; and

(B) The assets would not be subject to federal estate, gift, or generation-skipping transfer tax with respect to the individual if the trustee did not possess the power to convert.

(j)(1) If paragraph (4) or (5) of subsection (i) of this Code section applies to a trustee and there is more than one trustee, a cotrustee to whom the provision does not apply may convert the trust unless the exercise of the power by the remaining trustee or trustees is prohibited by the governing instrument; and

(2) If paragraph (4) or (5) of subsection (i) of this Code section applies to all the trustees, the trustees may petition the superior court to direct a conversion.

(k)(1) A trustee may release the power conferred by subsection (a) of this Code section to convert to a unitrust if either of the following apply:

(A) The trustee is uncertain about whether possessing or exercising the power to convert will cause a result described in paragraph (4) or (5) of subsection (i) of this Code section; or

(B) The trustee determines that possessing or exercising the power to convert will or may deprive the trust of a tax benefit or impose a tax burden not described in subsection (i) of this Code section.

(2) The release of the power to convert may be permanent or for a specified period, including a period measured by the life of an individual.

53-12-222.

(a) A court shall not change a trustee´s decision to exercise or not to exercise a discretionary power conferred by this chapter unless it determines that the decision was an abuse of the trustee´s discretion.

(b) The decisions to which subsection (a) of this Code section apply include:

(l) A determination of whether and to what extent an amount should be transferred from principal to income or from income to principal; and

(2) A determination of the factors that are relevant to the trust and its beneficiaries, the extent to which they are relevant, and the weight, if any, to be given to the relevant factors in deciding whether and to what extent to exercise the power conferred by this chapter.

(c) Notwithstanding the actions and remedies and measure of liability for breach of trust as set forth in Code Sections 53-12-192 and 53-12-193, if a court determines that a trustee has abused its discretion regarding a discretionary power conferred by this chapter, the remedy is to restore the income and remainder beneficiaries to the positions they would have occupied if the trustee had not abused its discretion, according to the following rules:

(1) To the extent that the abuse of discretion has resulted in no distribution to a beneficiary or a distribution which is too small, the court shall require the trustee to distribute from the trust to the beneficiary an amount that the court determines will restore the beneficiary, in whole or in part, to the beneficiary´s appropriate position;

(2) To the extent that the abuse of discretion has resulted in a distribution to a beneficiary which is too large, the court shall restore the beneficiaries, the trust, or both, in whole or in part, to their appropriate positions by requiring the trustee to withhold an amount from one or more future distributions to the beneficiary who received the distribution that was too large or requiring that beneficiary or that beneficiary´s estate to return some or all of the distribution to the trust, notwithstanding a spendthrift or similar provision;

(3) If the abuse of discretion concerns the power to convert a trust into a unitrust, the court shall require the trustee either to convert into a unitrust or to reconvert from a unitrust; and

(4) To the extent that the court is unable, after applying paragraphs (1), (2), and (3) of this subsection, to restore the beneficiaries, the trust, or both to the positions they would have occupied if the trustee had not abused its discretion, the court may require the trustee to pay an appropriate amount from its own funds to one or more of the beneficiaries, the trust, or both.

(d) No provision of this Code section or this chapter is intended to create or imply a duty to make an adjustment under Code Section 53-12-220 or a conversion under Code Section 53-12-221, and a trustee is not liable for not considering whether to make an adjustment or a conversion for choosing not to make an adjustment or a conversion.″

SECTION 7.

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