

# HIGHLIGHTS OF THE 2010 REVISION OF THE GEORGIA TRUST CODE

By Mary F. Radford\*

Georgia State University College of Law

## BACKGROUND

### 1. GEORGIA'S 1991 TRUST ACT

The 2010 Georgia Trust Code is not the first comprehensive codification of trust law in Georgia. The "Georgia Trust Act" (Chapter 12 of Title 53) was enacted in 1991 after extensive study by the first Georgia Trust Code Revision Committee of the Fiduciary Law Section of the State Bar of Georgia. The 2010 Code builds upon the statutory structure of the 1991 Act.

### 2. THE UNIFORM TRUST CODE ("UTC")

The UTC was approved in 2000 by the National Conference of Commissioners on Uniform State Laws (NCCUSL) (now the Uniform Law Commissioners or ULC). Amendments to the UTC were added in 2001, 2003, 2004, and 2005. To date, the UTC has been adopted in whole or in part by the District of Columbia and the following states: Alabama, Arizona, Arkansas, Kansas, Maine, Missouri, Michigan, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Virginia, and Wyoming. The 1991 Trust Act of the State of Georgia was one of the models used by the drafters of the UTC.

### 3. THE GEORGIA TRUST CODE REVISION PROCESS

The Georgia Trust Code Revision Committee examined the Georgia trust law in monthly meetings beginning in July, 2003. The Committee was chaired by William Linkous (Atlanta) and Professor Mary Radford (Georgia State University College of Law) served as the Reporter. Committee members were: Julian Friedman (Savannah), Greg Fullerton (Albany), Tom Jones (Atlanta), David Laney (Columbus), Faryl Moss (Atlanta), Albert Reichert (Macon), Ann Salo (Atlanta), John Spears (Decatur), and Rees Sumerford (Brunswick). Sadly, two of the committee members, David Laney and Faryl Moss, did not live to see the proposed Code become Georgia law.

---

\* © 2010 Mary F. Radford. All rights reserved. This article originally appeared in *Georgia Probate Notes*, May/June 2010.

The deliberations of the Committee included an examination of each section of the 1991 Georgia Trust Act and a comparison of the section to its counterpart, if any, in the UTC and the statutes of other states (including variations of the UTC provisions in states that have adopted the UTC). In addition, the most recent versions of the Uniform Prudent Investor Act, the Uniform Principal and Income Act, and the Uniform Testamentary Additions to Trusts Act were considered.

Beginning in 2005, Professor Radford, often accompanied by other members of the Trust Code Revision Committee, gave presentations about and received comments on the proposed Code at bar meetings and seminars throughout the state of Georgia. In 2006, the draft of the proposed Code was put on the website of the Fiduciary Law Section and members of the Section were invited to make comments and suggestions about the proposals. In 2007, the officers of the Fiduciary Law Section formed a Trust Code Steering Committee that consisted of members of the original Trust Code Revision Committee and a number of new members, including practitioners and bank officers from throughout the state. This committee engaged in extensive deliberations that revolved primarily around the provisions relating to trustee compensation and trustee investments. Changes were made to the draft and were discussed at length at the 2007 and 2008 Fiduciary Law Institutes.

The Trust Code was introduced into the Georgia General Assembly in 2009. The sponsors of the bill were Senators Bill Hamrick, Bill Cowsert, John Crosby and Ed Tarver. The bill was passed by the Senate, with only one negative vote, in March, 2009. However, the bill did not reach the floor of the House of Representatives that year. Representative Wendell Willard was instrumental in steering the bill through the House Judiciary Committee in the 2010 session. The bill passed the House with only two negative votes in February, 2010. However, because the House had made some amendments to the bill, it was referred back to the Senate. The Senate passed the bill on April 20, 2010, but added an amendment of its own, so the bill then had to go back to the House of Representatives. The House passed the bill in the last hours of the 2010 legislative session, by a vote of 154–3. [The Governor signed the act on May 27, 2010.]

## **DESCRIPTION OF SELECTED PROVISIONS**

The following is a description of the major revisions that the 2010 Georgia Trust Code would make to Georgia law. These provisions are described in roughly the order in which they appear in the new Code.

### **I. GENERAL PROVISIONS**

The new Trust Code replaces Chapter 12 of Title 53. O.C.G.A. § 53-12-2 contains definitions for use throughout the Trust Code.

## **A. GOVERNING LAW**

The current Georgia Trust Code contains no provisions that dictate which state's laws apply when trust matters are at issue. The revised Code contains two new provisions. O.C.G.A. § 53-12-4 states which law will govern the validity of a trust. If the trust contains real property, the validity of a trust is determined by the law that would be applied by the courts of the situs of that real property. As to all other property, the validity of a trust is determined by the law of the jurisdiction designated in the trust provisions unless the effect of the designation of that jurisdiction's law is contrary to a public policy of the jurisdiction having the most significant relationship to the matter at issue. If there is no jurisdiction designated in the trust provisions, the governing law will be the law of the jurisdiction that has the most significant relationship to the matter at issue. This provision is modeled after §§ 270 and 278 of the Restatement of the Conflict of Laws and UTC §107. The Comment to UTC §107 lists the following factors as the type of factors to be considered by a court when determining which jurisdiction has the most significant relationship to the matter at issue: "the place of the trust's creation, the location of the trust property, the domicile of the settlor, the trustee and the beneficiaries."

New O.C.G.A. § 53-12-5 explains which law will govern the meaning and effect of trust provisions. The governing law will be the law of the jurisdiction designated in the trust instrument unless the effect of the designation of that jurisdiction's law is contrary to a public policy of the jurisdiction having the most significant relationship to the matter at issue. If there is no designated governing law, the meaning and effect of trust provisions will be governed by the law of the jurisdiction that has the most significant relationship to the matter at issue. This section is also based on UTC § 107. A settlor may designate the laws of one jurisdiction for the meaning and effect of the administrative terms and the laws of a different jurisdiction for the meaning and effect of the dispositive terms.

## **B. WHEN TRUST AND CHAPTERS CONFLICT**

Like the UTC, the 1991 Georgia Trust Act and the 2010 Georgia Trust Code are "default statutes." For the most part, the provisions of the trust instrument prevail over any contrary provisions in the statute.

The 1991 Trust Code, in O.C.G.A. § 53-12-3, contained a skeletal list of those provisions of the statute that could not be modified by the settlor in the trust instrument. New O.C.G.A. § 53-12-7 expands and refines this list. The new section provides that the following provisions in the Code may not be varied or waived by a settlor:

- 1) Any requirements relating to the creation and validity of express trusts;
- 2) The rules relating to spendthrift trusts;
- 3) The provision relating to the power of the beneficiaries to modify a trustee's compensation;

- 4) The duty of a trustee to administer the trust and to exercise discretionary powers in good faith;
- 5) The effect of a provision that relieves a trustee from liability; and
- 6) The periods of limitation on actions.

### **C. CREATION AND VALIDITY OF EXPRESS TRUSTS**

1) **Writing requirement (§ 53-12-20)**: The new Code retains the requirement that an express trust be in writing and adds the requirement that the writing be signed by the settlor. An agent under a power of attorney that expressly authorizes the agent to do so may sign for the settlor. The Georgia statute that allowed for the creation of life insurance trusts by oral agreement (OCGA § 53-12-22.1) was repealed.

2) **Trust property (§§ 53-12-20 and 53-12-25)**: The requirement that a trust have trust property is retained. In addition, provisions are added to require a transfer to the trustee of legal title to the property and, in the case of real property that is transferred by the settlor to a trust of which the settlor is also the trustee, to require the instrument of transfer to be recorded.

3) **Beneficiary (§ 53-12-20)**: The new Code refines the requirement that the trust have a beneficiary by requiring that, except in the case of a charitable trust, the trust have a beneficiary who is “reasonably (as opposed to “definitely” in the UTC) ascertainable” within the Rule against Perpetuities period. The new Code provides that the requirement for a reasonably ascertainable beneficiary is “satisfied if under the trust instrument the trustee or some other person has the power to select the beneficiaries based on a standard or in the discretion of the trustee or other person.” (This latter section is modeled after California law.)

The new Code adds the definition of a “qualified beneficiary” (§ 53-12-2(10)). Qualified beneficiaries are entitled to notice in more circumstances than are contingent and more remote beneficiaries (e.g., notice of the existence of an irrevocable trust). A “qualified beneficiary” is defined as follows:

“Qualified beneficiary” means a living individual or other existing person who, on the date of determination of beneficiary status :

- (A) is a distributee or permissible distributee of trust income or principal;
- (B) would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in subparagraph (A) terminated on that date without causing the trust to terminate; or
- (C) would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.

4) **In Terrorem Clauses (§ 53-12-22)**: The new Code imports from Georgia’s probate code the provisions relating to *in terrorem* clauses that are found in O.C.G.A. § 53-4-68.

5) **Capacity of Settlor to Create the Trust (§ 53-12-23)**: The UTC commentary indicates that many of the UTC provisions relating to revocable trusts revolve around the concept that peo-

ple in most states use revocable trusts as will substitutes. Consequently, the UTC lowers the capacity requirement for establishing a revocable trust from the capacity to contract to the lower level of testamentary capacity. The new Georgia Code does not follow this approach but rather retains the higher level of capacity for two reasons: 1) the use of revocable living trusts as will substitutes is not as pervasive in Georgia as it is in some states; and 2) the execution of a trust does not require the protective formalities (e.g., witnesses) that are required for the execution of a will.

6) **Trusts for Animals (§ 53-12-28):** Following a trend in the UTC and many states, the new Code allows a trust to be set up with only non-humans (pets or other animals, such as show horses) as beneficiaries. Upon the death of the animal, any unused assets will be transferred as provided by the terms of the trust or the will or, if there are no such terms, to the settlor, if living, or to the heirs of the settlor. The trust can last through the lifetime of the animal. The trust may be enforced by a person who is identified in the trust or by someone appointed by the court.

#### **D. REVOCATION, REFORMATION, MODIFICATION, TERMINATION**

##### **1) Revocation:**

- a) Unlike the UTC, which makes all trusts revocable unless they are designated as irrevocable, the new Georgia statute retains the requirement that a settlor must expressly reserve the power to revoke or modify the trust in order for the trust to be revocable or capable of modification by the settlor. (O.C.G.A. § 53-12-40).
- b) The revocation provisions of the new Code carry forward the requirement of the 1991 law that, unless otherwise specified in the trust instrument, a revocation or modification of the trust must be in writing. This provision does not include the provision in UTC § 602(c)(2)(A) that allows a revocable trust to be modified or revoked by a later will or codicil that specifically devises property that would otherwise have passed in accordance with the terms of the trust. (O.C.G.A. § 53-12-40(c)).
- c) The new Code adds a provision that allows a settlor's agent under a power of attorney to revoke or modify the trust but only to the extent expressly authorized by the terms of the trust and by the power. (O.C.G.A. § 53-12-43) Also the Code states that a settlor's powers with respect to revocation, amendment, or distribution of trust property may be exercised by the settlor's conservator only as provided in OCGA § 29-5-23. That Code section allows the conservator to exercise such powers only if the governing instrument allows the conservator to do so.
- d) The new Code clarifies that a trust will not be considered to be revocable merely because the life beneficiary has a reversion in or a power of appointment over assets of the trust or because the life beneficiary's heirs or estate have a remainder interest therein. (O.C.G.A. § 53-12-44).
- e) The new Code provides that any judicial proceeding to contest the validity of a trust that was revocable at the settlor's death must be commenced within two years of the

settlor's death. Two years was chosen because that period coincides with the period beyond which a petition for Year's Support cannot be filed. (O.C.G.A. § 53-12-45).

2) **Reformation (§ 53-12-60):** The new Code contains provisions that allow the court to reform a trust so as to make it conform with the settlor's intent if "it is proved by clear and convincing evidence that the trust provisions were affected by a mistake of fact or law, whether in expression or inducement."

3) **Modification (§ 53-12-62):** Some controversy has arisen in connection with the UTC provision that would allow the settlor and beneficiaries of an irrevocable trust to agree among themselves to revoke or modify the trust. Some believe that this power in a settlor would constitute a sufficient amount of control to bring the value of the assets of the trust back into the settlor's estate under §§ 2036 and 2038 of the Internal Revenue Code. Consequently, the UTC drafters made that provision an "optional" one and those states that did not already allow such modification procedure have not adopted that provision. The 1991 Georgia law did not allow this modification procedure and thus the new Code will not add it. A modification of a trust that cannot be modified by its terms must be accomplished by the court. The new statute allows the court to: 1) modify the administrative or dispositive provisions of a trust if, owing to circumstances not known to or anticipated by the settlor or testator, compliance with the provisions of the trust would defeat or substantially impair the accomplishment of the purposes of such trust; 2) modify the administrative provisions of a trust if continuation of the trust on its existing terms would impair such trust's administration; or 3) modify the trust by the appointment of an additional trustee or special fiduciary if the court considers the appointment necessary for the administration of the trust. (This last subsection is new.)

The new Code retains the current provisions relating to division or consolidation of trusts (OCGA § 53-12-63).

4. **Termination: (§ 53-12-64):** The new Code allows the court to approve the termination of a trust if: 1) the costs of administration are such that the continuance of the trust, the establishment of the trust if it is to be established, or the distribution from a probate estate would defeat or substantially impair the purposes of the trust; 2) the purpose of the trust has been fulfilled or become illegal or impossible to fulfill; or 3) owing to circumstances not known to or anticipated by the settlor or testator, the continuance of the trust would defeat or substantially impair the accomplishment of the purposes of the trust.

The new Code adds a section that allows for the termination by the trustee after notice of "un-economic trusts," which are defined as trusts either having a total value less than \$50,000 or for which the trustee's annual fee for administering the trust is five percent (5.00%) or more of the market value of the principal assets of the trust as of the last day of the preceding trust accounting year. (O.C.G.A. §53-12-65). "Cemetery trusts," which are trusts that were established for the purpose of maintaining cemetery plots, are subject to a special provision.

## **E. SPENDTHRIFT TRUSTS & DISCRETIONARY TRUSTS**

1) **Creditors of a beneficiary who is not the settlor: (§ 53-12-80):** The 1991 Georgia Trust Act contains one of the most detailed and extensive spendthrift trust statutes of any state. The substance of that statute is retained in the new Code, with some modifications and refinements, including an exception of application of the statute to special needs trusts and community trusts, which are subject to their own federal and state laws. The exception to the spendthrift trust rules for tort judgment creditors will be expanded to include an exception for creditors who have orders for criminal restitution against the beneficiary.

a) **Discretionary Trusts (§ 53-12-81):** For discretionary trusts, a provision is added to provide that a creditor of a beneficiary may not compel the trustee to pay any amount that is payable only in the trustee's discretion regardless of whether the trustee is also a beneficiary. Just as with spendthrift trusts, this protection will not apply to the extent of the proportion of trust property attributable to the beneficiary's contribution.

2) **Self-Settled Trusts (Claims by creditors of the settlor):** The Revision Committee discussed the fact that there is little or no case law in Georgia that gives guidance as to the degree to which a creditor of a settlor can reach the settlor's interest in a trust. The Committee debated at length what are and should be a creditor's rights to make claims against a self-settled trust. The Committee decided to adopt the following provisions, which are modeled after UTC Sec. 505:

### **§ 53-12-82 Creditors' claims against settlor**

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

- (a) During the lifetime of the settlor, the property of a revocable trust is subject to claims of the settlor's creditors.
- (b) With respect to an irrevocable trust, creditors or assignees of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit during the settlor's life or that could have been distributed to or for the settlor's benefit immediately prior to the settlor's death. If a trust has more than one settlor, the amount the creditors or assignees of a particular settlor may reach shall not exceed the settlor's interest in the portion of the trust attributable to that settlor's contribution.
- (c) After the death of a settlor, and subject to the settlor's right to direct the source from which liabilities shall be paid, the property of a trust that was revocable at the settlor's death or had become irrevocable as a result of the settlor's incapacity shall be subject to claims of the settlor's creditors to the extent the probate estate is inadequate. Payments that would not be subject to the claims of the settlor's creditors if made by way of beneficiary designation to persons other than the settlor's estate shall not be made subject to such claims by virtue of this subsection unless otherwise provided in the trust instrument.

The last sentence of subsection (c) reflects that fact that recent Georgia laws have made insurance proceeds exempt from the claims of creditors.

**3) Claims of creditors against an interest that is subject to withdrawal rights**

The new Code adopts the same variation of UTC § 505(b) that was adopted by North Carolina. O.C.G.A. § 53-12-83 provides that the holder of a power of withdrawal, during the period that the power may be exercised, will be treated in the same manner as the settlor of a revocable trust to the extent of the property subject to the power; and the lapse, release, or waiver of a power of withdrawal will not cause the holder to be treated as a settlor of the trust.

**F. UNIFORM TESTAMENTARY ADDITIONS TO TRUSTS ACT (Ch. 12, Art. 6)**

This uniform act allows a testator to provide in the will that the residue of the estate will “pour over” into a trust that was created by the testator during life. This is a very flexible estate-planning technique because the trust can be amended after the will has been executed, without the need to amend the will or to re-execute the will with all of the formalities required by Georgia law. The Georgia statute is updated to reflect changes made in the 1991 revision of UTATA. The revision also includes a provision (§ 53-12-120) that allows a trust under a testator’s will to be designated as the beneficiary of the testator’s qualified retirement plan, individual retirement account (IRA), other retirement plan, or life insurance policies on the life of the testator so long as the testator’s will is admitted to probate in solemn form, whether the designation occurs before or after the execution of the will.

**G. IMPLIED TRUSTS (Ch. 12, Article 7) (§§ 53-12-130 et seq.)**

Georgia has detailed and extensive provisions relating to implied (resulting and constructive) trusts. As has been evidenced by recent appellate cases, these statutes seem to work well and thus are retained in the new Code.

**H. CHARITABLE TRUSTS (§§ 53-12-170 et seq.)**

The 1991 statutes relating to charitable trusts are retained. The new Code adopts the provision of the UTC that allows the settlor to enforce the provisions of a charitable trust. The provisions related to private foundations are retained but reorganized to make them more readable.

**II. TRUSTEES AND TRUST ADMINISTRATION (§§ 53-12-200 et seq.)**

The new provisions on trustees contain several basic rules relating to trustees and co-trustees. It begins with provisions that deal with the capacity of a trustee; filling vacancies in the office of trustee; acceptance of the trust by the trustee; bonds of trustees (which are typically not required); and the division of responsibilities between and among co-trustees.

**A. Trustees' Compensation (§ 53-12-210)**

The 2010 Code contains a new compensation schedule for trustees. This schedule will be used only if the trust does not contain a compensation schedule or there is no separate compensation agreement between the settlor and the trustee or the beneficiaries and the trustee. This Code section provides rules for the modification of the trust provisions relating to compensation.

The compensation schedule for corporate trustees is that set forth in the trustee's published fee schedule, provided the fees are reasonable under the circumstances. For individual trustee, suggested compensation schedule is as follows:

- (A) one percent (1%) of cash and the fair market value of any other principal asset received upon the initial funding of the trust and at such time as additional principal assets are received; and
- (B) an annual fee calculated in accordance with the following schedule based upon the cash and the market value of the other principal assets valued as of the last day of the trust accounting year prorated based on the length of service by the trustee during that year.

Percentage Fee	Market Value
1.75% / year on the first	\$ 500,000
1.25% / year on the next	\$ 500,000
1.00% / year on the next	\$1,000,000
0.85% / year on the next	\$3,000,000
.50% / year on values over	\$5,000,000

**B. Trustee Resignation and Removal; Accountings (§§ 53-12-220 through 53-12-221; 53-12-230 through 53-12-231)**

These Code sections basically carry forward 1991 law regarding the resignation and removal of trustees and trustee accountings. Interim accountings are also allowed.

**C. Trustees' Duties (§ 53-12-240 et seq.)**

The new Code expands the statutory law related to trustees' duties. These duties are in addition to and not a replacement for the trustee duties set out in common law. Much of the revision is modeled after language in the UTC. The statutory duties include: duty of prudent administration; duty to inform as to existence of trust; duty to provide reports and accountings; duty to distribute income; duty to avoid conflicts of interest; duty of impartiality. The revision clarifies that the trustee has no duty to investigate the resources of a beneficiary before making discretionary distributions.

- 1) **Duty to Inform:** O.C.G.A. § 53-12-242 requires the trustee to notify the qualified beneficiaries of an irrevocable trust of the existence of the trust within 60 days of its creation. This duty has received much attention in other states and even led to the

repeal of the UTC in Arizona within months of its enactment. The proposed Georgia Code would make this provision *waivable* by the settlor of the trust and provides that the settlor of any irrevocable trust that is in existence on the effective date of the Georgia Code is deemed to have waived this notice unless the trust instrument expressly states otherwise.

**D. Trustees' Powers (§§ 53-12-260 through 53-12-264)**

The UTC grants automatically to trustees most of the powers that are contained in current O.C.G.A. § 53-12-232. Under the 1991 Georgia law, a trustee's "automatic" powers are quite limited but a settlor may incorporate the long list of powers into the trust agreement. After extensive discussion, the Committee decided to follow the UTC approach so that trustees, merely by virtue of being trustees, are automatically granted most of the powers that appear in O.C.G.A. § 53-12-232. In addition, the Code will allow these powers to be incorporated by reference. In that way, a settlor can ensure that the trustee has those powers even if the applicable law governing the trust is changed to that of another jurisdiction.

**E. Distribution by Trustee Who Is Also A Beneficiary (§ 53-12-270)**

This provision prohibits a trustee who is also a beneficiary from making a discretionary distribution to himself or herself unless the distribution is made in accordance with an ascertainable standard.

**F. Certification of Trusts (§ 53-12-280)**

UTC § 1013 and statutes in a number of other states (e.g., California, Idaho, Indiana, Nebraska, Nevada, Michigan) allow the trustee to furnish to a third party a "certification" of the trust rather than furnishing the entire trust document. The new Code adopts this approach. The certification would contain relevant information such as: (1) the fact that the trust exists and the date of the trust and any amendments; (2) the identity of each settlor; (3) the identity and address of each current trustee and, if more than one, the number and identity of those required to exercise the powers of the trustee; (4) the relevant powers of the trustee and any restrictions or limitations on those powers; (5) the revocability or irrevocability of the trust; (6) how trust property should be titled; (7) except as specifically disclosed in the certification, that the transaction at issue requires no consent or action by any person other than the certifying trustee; and (8) such other information as the trustee deems appropriate. A person who acts in reliance upon the certification without knowledge that any information therein is incorrect will not be liable to any person for so acting and may assume without inquiry that the information is correct and a person who in good faith enters into a transaction in reliance upon the certification may enforce the transaction as if the information in the certification were correct. A person who demands to see the trust instrument in addition to a certification of the trust or relevant excerpts would be liable for damages,

including court costs and attorney's fees, if the court determines that the demand was not made in good faith.

#### **G. Trustee Liability & Limitations of Actions (Article 14)**

The new Code carries forward the provisions relating to the liability of trustees for breach of trust. The Code changes the statute of limitations for bringing actions for breach of trust to two years from the date a beneficiary has received a written report that adequately discloses the existence of a claim against the trustee for breach of trust; in all other cases, six years after the beneficiary discovered, or reasonably should have discovered, the subject of the claim. (O.C.G.A. § 53-12-307). The limitations period under the 1991 law is six years.

#### **H. Foreign Entities serving as Trustees in Georgia (Article 15):**

This Article of the new Code restricts those "foreign" entities who can exercise fiduciary powers in Georgia to the following: (A) Any financial institution whose deposits are federally insured which is organized or existing under the laws of any state of the United States, other than Georgia, or any subsidiary of such financial institution; (B) Any other corporation organized or existing under the laws of any state of the United States which borders upon this state, specifically, Florida, Alabama, Tennessee, North Carolina, or South Carolina; and (C) Any federally chartered financial institution whose deposits are federally insured having its principal place of business in any state of the United States, other than Georgia, or any subsidiary of such financial institution.

### **III: TRUST INVESTMENTS**

Article 16 contains the general rules relating to trustee investments.

**A.** Part One of this Article adopts many provisions from the Uniform Prudent Investor Act, which has been adopted in whole or in part in almost all states. Some provisions of the 1991 statute was a model for this uniform act.

The question of whether the statute should require trustees to diversify the trust investments has been highly debated. The new Code includes the following prudence statute:

#### **§ 53-12-341 Concentrated Holdings and Diversification**

A trustee shall reasonably manage the risk of concentrated holdings of assets in a trust by diversifying or by using other appropriate mechanisms, except as otherwise provided in this Code section, as follows:

1) The duty imposed by this Code section shall not apply if the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without complying with the duty.

2) The trustee shall not be liable for failing to comply with the duty imposed by this Code section to the extent that the terms of the trust instrument limit or waive the duty.

3) Except as provided in this paragraph, the duty imposed by this Code section shall apply on or after January 1, 2011. With respect to any trust that is or becomes irrevocable before January 1, 2011, the duty imposed by this Code section shall not apply:

(A) To the trust to the extent such trust instrument directs or permits the trustee to retain, invest, exchange or reinvest assets without regard to any duty to diversify, without the need to diversify or create a diversity of investments, or without liability for either depreciation or failing to diversify, or contains similar language expressing a settlor's intent to provide similar discretion to the trustee; or

(B) Absent gross neglect, with respect to an asset that was transferred to the trustee of such trust by any settlor or gratuitous transferor.

#### **B. Delegation of Duties by Trustee (§ 53-12-345)**

This provision carries forward provisions from the 1991 Georgia law and the Uniform Prudent Investor Rule that allow the trustee to delegate functions provided the trustee uses reasonable care, skill, and caution in choosing the agent, establishing the scope and terms of the delegation, and reviewing the agent's actions.

#### **C. "Flexible Income" Rules: (§§ 53-12-360 through 53-12-364)**

These provisions carry forward two methods by which a trustee may manage an "income only" trust in a way that deals impartially with both income and remainder beneficiaries. First, a trustee is allowed to adjust receipts between income and principal after considering a variety of factors and focusing on the fair treatment of both types of beneficiaries. (This is sometimes referred to as the "power of adjustment.") Second, the trustee may receive court permission to convert the trust into a "unitrust" that pays out a specified percentage of the trust assets every year to the income beneficiaries. The proposed Code also allows a settlor to create a trust that will be a unitrust from the outset and to treat the unitrust amounts as "income."

#### **D. Georgia Principal & Income Act (Article 17)**

This Article incorporates the most recent version of the Uniform Principal and Income Act, which gives detailed rules for the allocation of receipts and disbursements between income and principal.

### **AMENDMENT OF OTHER SECTIONS OF THE GEORGIA CODE**

The new Code amends O.C.G.A. § 7-1-242, which designates which entities may serve as fiduciaries in Georgia. The amendment adds to the list "a nonprofit corporation." This provision would apply, for example, to a charity that is operating as a nonprofit corporation rather than as a trust. (See *Chattowah Open Land Trust, Inc. v. Jones*, 281 Ga. 97, 636 S.E.2d 523 (2006)). Cur-

rent OCGA § 14-3-302(9) allows a non-profit corporation “[t]o be a promoter, *fiduciary*, shareholder, partner, member, associate, or manager of any partnership, joint venture, *trust*, or other entity ....”

The bill enacting the new Trust Code also amends a variety of sections of the Georgia Code to bring them into conformity with the new Code.

## **COMPARISON OF THE PROPOSED GEORGIA CODE AND THE UNIFORM TRUST CODE (“UTC”)**

### **A. UTC PROVISIONS OR CONCEPTS THAT ARE INCORPORATED INTO THE GEORGIA CODE**

A. Addition of the term “qualified beneficiaries.” OCGA 53-12-2(10). (The Georgia statute adds the requirements that, in order to be a “qualified beneficiary,” a beneficiary must be living.)

B. Addition of provisions that clarify which state’s laws govern the validity and the meaning & effect of the terms of the trust. OCGA 53-12-5, 53-12-6; UTC 107

C. Allow for the requirement that a trust have an “ascertainable beneficiary” to be satisfied if trustee or someone else has the power to select beneficiaries. OCGA 53-12-20; UTC 402

D. Addition of provisions that deal with trusts for animals. OCGA 53-12-28; UTC 408

E. Clarify when a settlor’s agent or conservator could modify or revoke revocable trust. OCGA 53-12-63; UTC 602

F. Addition of a limitation on the time period for bringing an action to contest the validity of a trust that was revocable at settlor’s death (2 yrs) OCGA 53-12-45; UTC 604 (uses 3 yrs or 120 days after notice)

G. Allow for reformation of trust by court to correct mistakes OCGA 53-12-60; UTC 415

H. Addition of more detailed provisions relating to modification of administrative and dispositive terms of trust by court OCGA 53-12-62; UTC 412

I. Codification of concept that the trust terms can confer upon the trustee or someone else the power to modify the trust. OCGA 53-12-61; UTC 808

J. Provisions that explain creditors’ rights against interest of settlor of in a revocable or irrevocable trust, both during settlor’s life and at settlor’s death. OCGA 53-12-82; UTC 505

K. Provisions that explain creditors’ claim against property that is subject to withdrawal rights. OCGA 53-12-83; UTC 505

L. More extensive articulation of the various duties of a trustee, both in statute and in comments. OCGA Ch. 12 Art. 13; UTC 801-806

M. Addition of duty to inform qualified beneficiaries of existence of irrevocable trust. OCGA 53-12-242; UTC 813

N. Added express requirement that trustee exercise a discretionary power “in good faith.” OCGA 53-12-260; UTC 814

O. Automatic granting of wide range of powers to all trustees rather than requiring incorporation of powers by reference. OCGA 53-12-261; UTC 815

P. Power of trustee to give certification of trust rather than entire trust document to all but beneficiaries. OCGA 53-12-280; UTC 1013

Q. Shorter statute of limitations to bring actions for breach trust 53-12-307 (2 yrs from written notice or 6 years from when beneficiary knew or should have known); UTC1005 (1 year of written notice or 5 years from termination of trust or resignation/removal/death of trustee

R. Incorporation of Uniform Prudent Investor Act. OCGA Ch. 12, Art. 16, Part 1; UTC Art. 9

## **B. MAJOR DIFFERENCES BETWEEN UTC AND GEORGIA CODE**

A. Georgia continues to require express trusts to be in writing. OCGA 53-12-20

B. Georgia does not incorporate the concept of “principal place of administration” of a trust. UTC 108

C. Georgia does not codify concept of non-judicial settlements. UTC 111

D. Georgia does not codify “virtual representation.” UTC Art. 3

E. Revocable trusts

1) Georgia retains the requirement that the power to revoke or modify be expressed in the trust instrument. OCGA 53-12-40; UTC Sec. 602

2) Georgia requires same capacity to create revocable trust as to create irrevocable trust. OCGA 53-12-23; UTC 601

3) Georgia does not codify concept that while the trust is revocable the rights of the beneficiaries are controlled exclusively by and the duties of the trustee are owed exclusively to the settlor. UTC 603

4) Georgia does not expressly allow a revocable trust to be amended by a later will or codicil that expressly refers to the trust or that specifically devises property that otherwise would have passed under the trust. UTC 602

NOTE: UTC General Comment to Art. 6 states that the UTC treats a revocable trust as “the functional equivalent of a will.”

F. Georgia does not allow the modification or termination of an irrevocable trust with only the consent of the settlor and all the beneficiaries – that is, without court approval. UTC 411

G. Georgia does not contain detailed provisions about compelling a trustee to exercise a discretionary standard. Georgia merely prohibits a creditor of a beneficiary from compelling the trustee to pay. OCGA 53-12-81; UTC 504

H. Georgia does not add the settlor to the list of those who can enforce the provisions of a charitable trust. UTC 405

I. Georgia has a compensation schedule for trustees for whom compensation has otherwise not been agreed upon. Georgia also has extensive provisions outlining the setting or modification of compensation by agreement of the beneficiaries after the trust

is irrevocable or the settlor is dead. The UTC provides for compensation that is “reasonable under the circumstances” and gives the court the power to award more or less compensation. OCGA 53-12-210; UTC 708

J. Georgia Code does not include various procedural rules of UTC Art. 1 & 2.

### **C. MAJOR PROVISIONS THAT THE GEORGIA CODE HAS THAT DO NOT APPEAR IN THE UTC**

A. Express trusts must be in writing.

B. Non-merger merely because one trustee is same person as one beneficiary. OCGA 53-12-24

C. Requirement that legal title to property be transferred to trust. 53-12-25

D. Trust not terminated merely because the remainder is payable to the estate or heirs of the life beneficiary. OCGA 53-12-44

E. Georgia provides details in modification; termination; and division/consolidation statutes as to the notification of beneficiaries. OCGA 53-12-62, 53-12-63, 53-12-64

F. Includes a limited exception to the spendthrift rules for a judgment for necessities. (Both Codes provide exceptions for alimony/child support and taxes, although Georgia’s exceptions are limited by the terms of Georgia’s garnishment statute.) OCGA 53-12-80; UTC 503

G. Testamentary Additions to Trusts provisions. OCGA CH. 12, Art. 6

H. Extensive provisions on implied trusts. UTC has none. OCGA Ch. 12 Art. 7

I. Extensive provisions on charitable trusts, including rules relating to private foundations. UTC has none. OCGA Ch. 12, Art. 9 & 10.

J. More detailed provisions relating to the resignation of a trustee. OCGA 53-12-220; UTC 705

K. Detailed provisions for both interim and final accountings by trustees. OCGA Ch. 12, Art. 12.

L. Georgia law clarifies that a trustee has no duty to investigate a beneficiary’s outside resources before making a discretionary distribution. OCGA 53-12-245

M. Georgia law clarifies that trustee can give a warranty and bind the trust estate. OCGA 53-12-261(b)(1).

N. Extensive provisions on foreign individuals and entities acting as trustees in Georgia. UTC has none. OCGA Ch. 12, Art. 15

O. Provisions relating to the conversion of an “income only” trust to a unitrust and the creation of a unitrust. OCGA 53-12-362

P. Georgia Principal & Income Act, modeled after Uniform act. This includes UPIA Sec. 413, which expands the trustee’s possible actions when a marital deduction trust is unproductive of income. OCGA CH. 12, Art. 17.