

_____ Bill _____

By:

A BILL TO BE ENTITLED
AN ACT

To amend Article 10 of Chapter 12 of Title 53 of the Official Code of Georgia Annotated, specifying fiduciary duties; providing general principles; relating to the allocation of principal and income; to provide for the discretionary power to adjust; to provide for requirements, criteria and procedure for conversion to a unitrust; to provide for judicial control and remedies; to provide for Superior Court and Probate Court jurisdiction; to repeal conflicting laws; and for other purposes.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

SECTION 1.

Article 10 of Chapter 12 of Title 53 of the Official Code of Georgia Annotated, relating to income and principal, is amended by striking Code Section 53-12-211 in its entirety and inserting in lieu thereof the following:

"53-12-211. Fiduciary duties; general principles.

(a) Allocation.--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 fiduciary shall administer a trust or estate in accordance with the governing instrument, even if there is a different provision in this chapter.

(2) A fiduciary may administer a trust or estate by the exercise of a discretionary power of administration regarding a matter within the scope of this chapter given to the fiduciary 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 fiduciary has improperly exercised the discretionary power shall arise from the fact that the fiduciary has made an allocation contrary to a provision of this chapter.

(3) A fiduciary shall administer a trust or estate in accordance with this chapter if the governing instrument does

not contain a different provision or does not give the fiduciary a discretionary power of administration regarding a matter within the scope of this chapter.

(4) A fiduciary 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) Discretionary power.--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 sections 53-12-220 (relating to trustee's power to adjust) and 53-12-221 (relating to power to convert to unitrust), a fiduciary shall administer a trust or estate 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 fiduciary 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 2

Article 10 of Chapter 12 of Title 53 of the Official Code of Georgia Annotated, relating to income and principal, is amended by adding at the end thereof three new Code Sections 53-12-220, 53-12-221, and 53-12-222 read as follows:

"53-12-220. Trustee's power to adjust.

(a) Adjustment.--Subject to subsections (c) and (f), 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 section 53-12-211(a) (relating to fiduciary duties; general principles), that the trustee is unable to comply with section 53-12-211(b).

(b) Considerations.--In deciding whether and to what extent

to exercise the power conferred by subsection (a), 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 the other sections of 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, 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.
- (11) The actual and anticipated effect of economic conditions on principal and income and effects of inflation and deflation.

(c) Prohibited adjustments.--A trustee may not make an adjustment under this 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:

(i) 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

(ii) the individual would not be treated as the owner if the trustee did not possess the power to make an adjustment.

(6) If:

(i) possessing or exercising the power to make an adjustment would cause all or part of the trust assets to be subject to Federal estate or gift tax with respect to an individual; and

(ii) the assets would not be subject to Federal estate or gift 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.

(8) If the trust has been converted under Section 53-12-221 (relating to power to convert to unitrust).

(d) Permissible adjustment when otherwise prohibited.--If subsection (c) (5), (6) or (7) 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) Release of the power to adjust.--

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

(i) The entire power conferred by subsection (a).

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

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

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

(i) The trustee is uncertain about whether possessing or exercising the power will cause a result described in subsection (c) (1) through (6).

(ii) 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).

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

(f) Application.--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 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).

53-12-221. Power to convert to unitrust.

(a) Conversion.--Unless expressly prohibited by the governing instrument, a trustee may release the power under section 53-12-220 (relating to trustee's power to adjust) and convert a trust into a unitrust as described in this 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 section, to all the sui juris beneficiaries who:

(i) are currently eligible to receive income from the trust; and

(ii) 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 paragraph (2)(i) and at least one sui juris beneficiary under paragraph (2)(ii).

(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).

(b) Judicially approved conversion.--

(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) Consideration.--In deciding whether to exercise the power conferred by subsection (a), 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, 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.

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

(d) Post conversion.--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:

- (i) from appreciation of capital;
- (ii) from earnings and distributions from capital;
- or
- (iii) from both.

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

(3) The term "income" in the governing instrument shall mean an annual distribution (the unitrust distribution) equal to 4% (the payout percentage) 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:

- (i) the three preceding years; or
- (ii) the period during which the trust has been in existence.

(e) Discretion of trustee.--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.

(8) Whether to omit from the calculations trust property occupied or possessed by a beneficiary.

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

(f) Allocation.--

(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) Court orders.--The trustee may, or, if the trustee declines to do so, a beneficiary may petition the Superior Court to:

(1) Select a payout percentage different than 4%.

(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.

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

(h) Application.--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) Prohibited conversions.--A trustee may not convert a trust into a unitrust in any of the following circumstances:

(1) 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.

(2) 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.

(3) If:

(i) 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

(ii) the individual would not be treated as the owner if the trustee did not possess the power to convert.

(4) If:

(i) possessing or exercising the power to convert would cause all or part of the trust assets to be subject to Federal estate or gift tax with respect to an individual; and

(ii) the assets would not be subject to Federal estate or gift tax with respect to the individual if the trustee did not possess the power to convert.

(5) 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.

(6) If the trustee is a beneficiary of the trust.

(j) Permissible conversion when otherwise prohibited.--

(1) If subsection (i) (3), (4) or (6) 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.

(2) If subsection (i) (3), (4) or (6) applies to all the trustees, the trustees may petition the Superior Court to direct a conversion.

(k) Release of the power to convert.--

(1) A trustee may release the power conferred by subsection (a) to convert to a unitrust if any of the following apply:

(i) The trustee is uncertain about whether possessing or exercising the power will cause a result described in subsection (i) (3), (4) or (5).

(ii) 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 (i).

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

53-12-222. Judicial control of discretionary powers.

(a) Standard of review.--A court shall not change a fiduciary'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 fiduciary's discretion.

(b) Remedies.--Notwithstanding the actions and remedies and measure of liability for breach of trust as set forth in Sections 53-12-192 and 53-12-193, if a court determines that a fiduciary 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 fiduciary 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 fiduciary 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 fiduciary 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.

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

SECTION 3.

Article of Chapter 9 of Title 15 of the Official Code of Georgia Annotated, relating to concurrent jurisdiction of probate courts and superior courts, is amended by adding at the end thereof the following:

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

Section 4

Article of Chapter 12 of Title 53 of the Official Code of Georgia Annotated, relating to actions and remedies and measure of liability for breach of trust, is amended by adding at the beginning of Subparagraph (a) of Section 53-12-192 and 53-12-193, the following:

"Notwithstanding the remedy set forth in subparagraph Section 53-12-221,".

Section 5

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