



GASLOWITZ  
FRANKEL LLC

4500 SunTrust Plaza  
303 Peachtree Street, NE  
Atlanta, Georgia 30308-3243

404.892.9797  
fax: 404.892.1311

www.gaslowitzfrankel.com

Attorneys at Law

Brian M. Deutsch  
Craig M. Frankel  
Adam R. Gaslowitz  
LeAnne M. Gilbert  
Lisa C. Lambert  
Suzanne F. Sturdivant  
A. Kirk Susong

September 12, 2007

**Via E-Mail**

**(wanda@gacapitalpartners.com)**

Mr. Matt Patton, Chairman ACL  
c/o Georgia Capital Partners  
3715 Northside Parkway, NW  
Bldg. 300, Suite 615  
Atlanta, GA 30327

**Re: Proposal of The Fiduciary Law Section  
Revision of The Trust Code of Georgia**

Dear Sir or Madam:

On behalf of the Fiduciary Law Section of the State Bar of Georgia, we would like to submit for consideration by the Advisory Committee on Legislation, the following proposal for legislation to be brought before the 2008 Georgia General Assembly.

1. **Proposed Legislation:** Specific legislation has been prepared and is attached hereto as Exhibit A. The proposed legislation amends Title 53 of the Official Code of Georgia by repealing Chapter 12 of that Title (the "Georgia Trust Act") and replacing it with new Chapters 12, 13, 14, and 15. These chapters cover General Provisions (Ch. 12), Charitable Trusts (Ch. 13), Trustees (Ch. 14) and Trust Investments (Ch. 15). The proposed legislation is the product of a four-year study by the Trust Code Revision Committee of the Fiduciary Law Section of the State Bar of Georgia. The Committee was chaired by William Linkous. Professor Mary Radford of the Georgia State University College of Law served as the Reporter. Members of the Committee 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).

2. **Summary of the Proposed Legislation:** The new legislation will clarify, expand, and modernize the current Georgia Trust Code. The legislation proposed in Exhibit A includes rudimentary Comments that are designed to show the origin of the proposed new sections. In addition, attached hereto as Exhibit B is a summary of the provisions of the

Mr. Matt Patton, Chairman ACL  
c/o Georgia Capital Partners  
September 12, 2007  
Page 2

proposed legislation entitled "Highlights of the Proposed Revision of the Georgia Trust Code and Comparison of the Proposed Revision and the Uniform Trust Code."

3. **Summary of Existing Law:** The "Georgia Trust Act" (Chapter 12 of Title 53) was enacted in 1991. Since that enactment, numerous developments have occurred in trust law, both locally and nationally. Included among these was the promulgation of several uniform laws and portions of Restatement-Third on the Law of Trusts. The uniform laws include the Uniform Trust Code and new versions of the Uniform Prudent Investor Act, the Uniform Principal and Income Act, and the Uniform Testamentary Additions to Trusts Act. The drafters of the 1991 Georgia Trust Act did not have the opportunity to study these new acts and the Restatement. Also, as trust law has become more complex in recent years, it has become apparent that there are areas of trust law that the 1991 Act does not address or does not cover in sufficient detail. The proposed revision of the Georgia Trust Code adopts, where appropriate, provisions of the uniform acts and fills in the gaps in current Georgia trust law.

4. **Proponents/Opponents:** The Section Chairs listed in paragraph 5 were notified of the proposed legislation in June of 2007 and they were each asked to further advise their respective memberships that the proposal was posted on the Fiduciary Law Section's web site. We received no comments back from any of those sections. During the past four years, the trust code revision committee has met on a monthly basis. During the process, there were numerous meetings, seminars and other open forums where members of the bar were able to attend and voice opinions about the proposed code revision. During those sessions (including one held at the annual Fiduciary Law Institute this summer at St. Simons Island) the committee has received various comments about one provision or another of the proposed code revision and those comments were incorporated into subsequent drafts of the proposed code. However, at this point, we know of no opponents of the proposed Trust Code revision.

5. **Other Sections that may have an interest in the legislation:** The proposed legislation was posted on the Fiduciary Law Section website in June, 2007 and all members of the Section were notified of the posting. At the same time, William Linkous, the Chair of the Fiduciary Law Section Trust Code Revision Committee, wrote to the chairs of the following other Bar sections notifying them that the proposed legislation had been posted and urging them to encourage their members to review the proposed legislation and submit any comments:

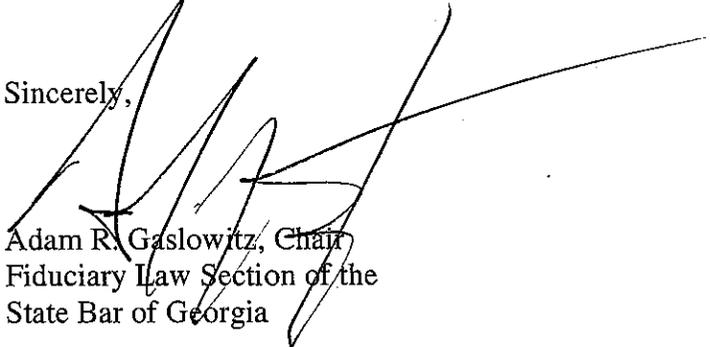
- Business Law
- Corporate Counsel Law
- Creditors' Rights Law
- Elder Law

Mr. Matt Patton, Chairman ACL  
c/o Georgia Capital Partners  
September 12, 2007  
Page 3

- Family Law
- General Practice & Trial
- Judicial
- Real Property Law
- Taxation Law
- Tort & Insurance Practice

6. **Recommendation:** The Fiduciary Law Section recommends that the State Bar of Georgia adopt this proposal.

Sincerely,



Adam R. Gaslowitz, Chair  
Fiduciary Law Section of the  
State Bar of Georgia

ARG/dcs

cc: R. Mark Williamson, Esq.  
Alan F. Rothschild, Jr., Esq.  
Richard E. Barnes, Esq.  
Nikola R. Djuric, Esq.  
Mary F. Radford, Esq.  
William J. Linkous, Jr., Esq.

**HIGHLIGHTS OF THE PROPOSED REVISION  
OF THE  
GEORGIA TRUST CODE  
and  
COMPARISON OF THE PROPOSED REVISION &  
THE UNIFORM TRUST CODE  
(As of September 10, 2007)**

**Mary F. Radford  
Georgia State University College of Law  
[mrادford@gsu.edu](mailto:mrادford@gsu.edu)**

## **BACKGROUND**

### **1. GEORGIA'S CURRENT TRUST CODE**

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.

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

The UTC was approved by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in 2000. Amendments to the UTC were added in 2001, 2003, 2004, and 2005. To date, the UTC has been adopted in whole or in significant part by the District of Columbia and the following 19 states: Alabama, Arkansas, Florida, Kansas, Maine, Missouri, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Virginia, and Wyoming.

The 1991 Trust Act of the State of Georgia was one of the models used by the drafters of the UTC. As noted in the Preliminary Commentary to the UTC, "While the Uniform Trust Code is the first comprehensive Uniform Act on the subject of trusts, comprehensive trust statutes are already in effect in several States. Notable examples include the statutes in California, Georgia, Indiana, Texas, and Washington, all of which were referred to in the drafting process." As described by UTC Reporter Professor David English, "While the U.T.C. is the first comprehensive *uniform* act on the subject of trusts, comprehensive trust statutes are already in effect in several states, with the statutes in California and Texas being the most widely known. *The U.T.C. is not directed*

*principally at these states*, but at states like Ohio whose statutes on trusts are scattered and incomplete.” David M. English, *The Uniform Trust Code (2002) and its Application to Ohio*, 30 Cap. U.L. Rev. 1 (2002) (emphasis added). None of the states named in the Preliminary Comments to the UTC have adopted the UTC nor have other states, such as New York and Illinois, that already have in place extensive statutory trust law. Texas recently has enacted a new trust code but it only “cherry-picked” the UTC (See UTC Notes, Summer, 2006; Kara Blanco, *The Best of Both Worlds: Incorporating Provisions of the Uniform Trust Code into Texas Law*, 38 Tex. Tech L. Rev. 1105 (2006).

The Preliminary Comments to the UTC indicate that “[m]uch of the Uniform Trust Code is a codification of the common law of trusts.” However, there remains some controversy as what this “common law” is. The Preliminary Comments state that “The Uniform Trust Code was drafted in close coordination with the writing of the Restatement Third [of Trusts].” Portions of this Restatement were adopted by the American Law Institute in 1996 and many other portions on under consideration. This Restatement has not met with unanimous approval by practitioners in fiduciary law. For example, the Arizona Trust Code Revision Committee, which has recently released a draft of its proposed Arizona Trust Code, provides in its Code that the “court shall look to the Restatement, Second of Trusts for interpretation of the common law and not to subsequent Restatements.”

### **3. THE GEORGIA TRUST CODE REVISION COMMITTEE**

The current Georgia Trust Code Revision Committee has been examining the Georgia trust law in monthly meetings since July, 2003. The Committee is chaired by William Linkous (Atlanta) and Professor Mary Radford (Georgia State University College of Law) serves as the Reporter. Committee members are: 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). The Committee plans to present the complete revision to the State Bar of Georgia in late 2007 with the hope that it will be introduced in the Georgia General Assembly in 2008.

The deliberations of the Committee include an examination of each section of the current 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 have been considered.

### **4. STRUCTURE OF THE PROPOSED TRUST CODE**

The proposed Trust Code will replace Chapter 12 of Title 53 of the Georgia Code with four new chapters: Chapter 12: GENERALPROVISIONS; Chapter 13: CHARITABLE TRUSTS; Chapter 14: TRUSTEES; Chapter 15: TRUST INVESTMENTS

## **5. DESCRIPTION OF SELECTED PROVISIONS**

The following is a description of revisions that are currently under consideration by the Trust Code Revision Committee.

### **CHAPTER 12**

#### **A. General Provisions**

GOVERNING LAW: The current Georgia Trust Code contains no provisions that dictate which state's laws apply when trust matters are at issue. Under consideration is the adoption of two new provisions:

##### **1) 53-12-5 *Law governing the Validity of a Trust***

*a) As to real property, the validity of a trust is determined by the law that would be applied by the courts of the situs.*

*b) As to all other property, the validity of a trust is determined by:*

*(1) 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; or*

*(2) in the absence of a controlling designation in the trust provisions, the law of the jurisdiction having the most significant relationship to the matter at issue.*

This provision is modeled after Sections 270 and 278 of the Restatement of the Conflict of Laws and UTC Sec. 107. The Comment to this section will include 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: (from Comments to UTC Sec. 107): "the place of the trust's creation, the location of the trust property, the domicile of the settlor, the trustee and the beneficiaries".

##### **2) 53-12-6 *Law Governing the Meaning and Effect of Trust Provisions***

*The meaning and effect of the trust provisions are determined by:*

- (1) 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; or*
- (2) in the absence of a controlling designation in the trust instrument, the law of the jurisdiction having the most significant relationship to the matter at issue.*

This section is based on UTC Sec. 107. The Comment to this section will point out that the settlor may designate the laws of one jurisdiction for interpretation of the administrative terms and the laws of a different jurisdictions for the interpretation of the dispositive terms.

WHEN TRUST AND CHAPTERS CONFLICT: Like the UTC, the current Georgia Trust Code and the proposed 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 current Trust Code, in OCGA Sec. 53-12-3, contains a skeletal list of those provisions of the statute that may not be modified by the settlor in the trust instrument. Proposed Sec. 53-12-3 expands and refines this list. The proposed new section reads as follows:

**53-12-3** *a) The effect of the provisions of Chapters 12 through 15 may be varied by the trust instrument except:*

- 1) As to any requirements in Article 2 of this Chapter relating to the creation and validity of express trusts;*
- 2) As to the effect of the rules set forth in Article 5 of this Chapter relating to spendthrift trusts;*
- 3) As to the power of the beneficiaries to modify a trustee's compensation as set forth in Code section 53-14-6;*
- 4) As to the duty of a trustee to administer the trust and to exercise discretionary powers in good faith, as set forth in Code sections 53-14-30 and 53-14-38;*
- 5) As to the effect of a provision relieving a trustee from liability, as set forth in Code section 53-14-53;*
- 6) As to the periods of limitation on actions, as set forth in Code sections 53-12-*

*25 and 53-14-57; and*

*7) As to the general investment standard, as set forth in Code section 53-15-1.*

*b) Nothing in a trust instrument shall prohibit or limit a court from taking any actions authorized by the provisions of Chapters 12 through 15 or elsewhere in the law of this state.*

## **B. Creation and Validity of Express Trusts**

1) **Writing requirement (53-12-10)**: The new Code will retain the requirement that an express trust be in writing and will add the requirement that the writing be signed by the settlor. Also, the Revision Committee recommends that the current Georgia statute that allows the creation of life insurance trusts by oral agreement (OCGA Sec. 53-12-22.1) be repealed.

2) **Trust property (53-12-10 and 53-12-15)**: The requirement that a trust have trust property will be retained. In addition, provisions will be added that require that a transfer of legal title to the property be made to the trustee and, in the case of real property that is transferred by the settlor to a trust of which the settlor is also the trustee, that the instrument of transfer be recorded.

3) **Beneficiary (53-12-10)**: The Code will refine 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 Code will also provide 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 proposed revision will add the definition of a “qualified beneficiary” (53-12-2(7)). Qualified beneficiaries are entitled to notice in more circumstances than are contingent beneficiaries (e.g., notice of the existence of an irrevocable trust). A “qualified beneficiary” is defined as follows:

*53-12-2(7) “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) Creation of trust by agent (53-12-10):** The new Code will clarify that an agent under a power of attorney may create a trust for a settlor if authorized to do so by the power of attorney.

**5) Capacity of Settlor to Create the Trust (53-12-13):** The UTC commentary indicates that many of the UTC provisions relating to revocable trusts revolve around the concept that people 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 Trust Code Revision Committee decided to retain the higher level capacity in the Georgia Code 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 (53-12-18):** Following a trend in the UTC and many states, the new Code will allow a trust to be set up with only non-humans (pets or other animals, such as show horses) as beneficiaries. At the termination of the trust, 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 will 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.

**7) In Terrorem Clauses (53-12-12):** The new Code will import from Georgia's probate code the provisions relating to in terrorem clauses that are found in OCGA Sec. 53-4-68.

### **C. Revocation, Reformation, Modification, Termination of Trusts:**

#### **1. Revocation: (Ch. 12, Article 3)**

a) Unlike the UTC, the current statute will retain the requirement that a settlor must expressly retain the power to revoke the trust in order for the trust to be revocable.

b) The revocation provisions carry forward the requirement of current law that, unless otherwise specified in the trust instrument, a revocation or modification 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.

c) The new Code will clarify 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.

d) The Code will add 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 or the power. Also the Code will state 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 Sec. 29-5-23. This Code section allows the conservator to exercise such powers only if the governing instrument allows the conservator to do so.

e) The new Code will provide 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. The Committee chose two years because that period coincides with the period beyond which a petition for Year's Support cannot be filed.

2. **Reformation (53-12-30):** 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 (53-12-31):** 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 Secs. 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. Current Georgia law does 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 provisions of a trust if continuation of the trust on its existing terms would impair the trust's administration; or

2) 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 the trust.

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 section is new.)

The new Code will retain the current provisions relating to division or consolidation of trusts (53-12-34).

**4. Termination:** The new Code will allow 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 of fulfillment; 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.

**D. Spendthrift & Discretionary Trusts:**

*1) Creditors of a beneficiary who is not the settlor:* Georgia currently has one of the most detailed and extensive spendthrift trust statutes (OCGA Sec. 53-12-28) of any state. The substance of that statute will be retained, 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 judgments” will be repealed. Georgia is the only state that currently has that exception.

*2) Self-Settled Trusts:* The 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:

**§ 53-12-42 Creditors’ claims against settlor**

*Whether or not the trust instrument contains a spendthrift provision, the following rules 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 may 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 will 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 is 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 new 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 committee decided to adopt the same variation of UTC Sec. 505(b) that was adopted by North Carolina:

*Sec. 53-12-43: a) The holder of a power of withdrawal, during the period that the power may be exercised, is treated in the same manner as the settlor of a revocable trust to the extent of the property subject to the power; and*

*b) The lapse, release, or waiver of a power of withdrawal shall not cause the holder to be treated as a settlor of the trust.*

4) *Discretionary Trusts (53-12-41)*: For discretionary trusts, a provision will be added that provides 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.

**E. Uniform Testamentary Additions to Trusts Act:** The Georgia statute will be updated to reflect changes made in the 1991 revision of UTATA. The proposed revision will also include this provision:

***§ 53-12-54 Trusts as beneficiaries***

*A trust under a testator's will may 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. Unless the beneficiary designation provides otherwise, the designation of a trust under a will as beneficiary shall not be treated as the designation of the testator's estate as beneficiary nor shall such property, once delivered to the trustee under the testator's will, be deemed to be part of the testator's estate.*

**F. Implied Trusts (Ch. 12, Article 7)**

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 will be retained.

### **CH. 13: CHARITABLE TRUSTS**

The current statutes relating to charitable trusts will be retained. The new Code will not adopt the provision of the UTC that allows the settlor to enforce the provisions of a charitable trust. The provisions related to private foundations will be retained but reorganized to make them more readable.

### **CH. 14: TRUSTEES**

**A. Trustees' Compensation (53-14-6)** : A new compensation schedule for trustees will be added. 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. The compensation schedule is as follows:

(1) one percent (1%) of the market value of any principal asset received upon the initial funding of the trust and at such time as additional principal assets are received; and (2) an annual fee equal to one percent (1%) of the market value of the trust 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. NOTE: This schedule applies to trustees only and has no effect on the current statutory fees for personal representatives or conservators.

**B. Trustees' Duties (53-14-30 through 53-14-37)**

The proposed revision will expand the statutory law related to trustees' duties. Much of the revision is modeled after language in the UTC. The statutory duties will 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 conflict of interest; Duty of impartiality. The revision will clarify that the trustee has no duty to investigate the resources of a beneficiary before making discretionary distributions.

### **C. Trustees' Powers (53-14-38 through 53-14-43)**

The UTC grants automatically to trustees most of the powers that are contained in current OCGA Sec. 53-12-232. Under current 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 current OCGA Sec. 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.

### **D. Certification of Trusts (53-14-45)**

UTC Sec. 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 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.

#### **E. Trustee Liability (Ch. 14, Art. 4)**

The proposed Code carries forward the provisions relating to the liability of trustees for breach of trust.

### **CH. 15: TRUST INVESTMENTS**

Article 1 of chapter 15 contains the general rules relating to trustee investments. Part One of this Article adopts many provisions from the Uniform Prudent Investor Act, which has been adopted in almost all states. The question of whether the statute should require trustees to diversify the trust investments has been highly debated. The proposal includes the following prudence and diversification statutes:

#### ***53-15-1 General Investment Standard***

*a) In investing and managing trust property, a trustee shall exercise the judgment and care under the circumstances then prevailing of a prudent person acting in a like capacity and familiar with such matters, considering the purposes, provisions, and distribution requirements*

*of the trust.*

*b) Among the factors that a trustee shall consider in investing and managing trust assets are such of the following as are relevant to the trust or its beneficiaries:*

- 1) general economic conditions;*
- 2) the possible effect of inflation or deflation;*
- 3) anticipated tax consequences;*
- 4) the attributes of the portfolio,*
- 5) the expected return from income and appreciation;*
- 6) needs for liquidity, regularity of income, and preservation or appreciation of capital;*
- 7) an asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries or to the settlor;*
- 8) the anticipated duration of the trust; and*
- 9) any special circumstances.*

*c) Any determination of liability for investment performance shall consider not only the performance of a particular investment but also the performance of the portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust..*

*d) A trustee who has special investment skills or expertise has a duty to use those special skills or expertise. A trustee who is named trustee in reliance upon the trustee's representation that the trustee has special investment skills or expertise will be held liable for failure to make use of that degree of skill or expertise.*

*e) A trustee may invest in any kind of property or type of investment consistent with the standards of this article.*

*f) A trustee that is a bank or trust company shall not be precluded from acquiring and retaining the securities of or other interests in an investment company or investment trust because the*

*bank or trust company or an affiliate provides services to the investment company or investment trust as investment adviser, custodian, transfer agent, registrar, sponsor, distributor, manager, or otherwise and receives compensation for such services.*

### **53-15-2 Diversification**

*A trustee shall diversify the investments of the trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying. The degree of diversification is subject to the general investment standard of Code section 53-15-1.*

Part Two of Article 1 of chapter 15 contains the provisions that were adopted in 2005 as the “Flexible Income Bill.” These include the trustee’s power to adjust between income and principal and the conversion of a trust to a unitrust. This Part also includes a statute that allows a settlor to create a unitrust (rather than just to convert an existing trust).

Article 2 of chapter 15 adopts the provisions of the most recent version of the Uniform Principal and Income Act.

## **6. COMPARISON OF THE PROPOSED GEORGIA CODE AND THE UTC**

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

A. Addition of the term “qualified beneficiaries.” OCGA 53-12-2. (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 53-12-10; UTC 402

D. Addition of provisions that deal with trusts for animals. OCGA 53-12-18; UTC 408

E. Clarify when a settlor’s agent or conservator could modify or revoke revocable trust OCGA 53-12-23; 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 53-12-25; UTC 604 (uses 3 yrs or 120 days after notice

G. Allow for reformation of trust by court to correct mistakes OCGA 53-12-30; UTC 415

H. Addition of more detailed provisions relating to modification of administrative and dispositive terms of trust by court OCGA 53-13-32; 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 53-12-31; 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 53-12-42; UTC 505

K. Provisions that explain creditors’ claim against property that is subject to withdrawal rights. OCGA 53-12-43; UTC 505

L. More extensive articulation of the various duties of a trustee, both in statute and in comments. OCGA Ch. 14 Art. 3; UTC 801-806

- M. Addition of duty to inform qualified beneficiaries of existence of irrevocable trust. OCGA 53-14-32; UTC 813
- N. Added express requirement that trustee exercise a discretionary power “in good faith.” OCGA 53-14-38; UTC 814
- O. Automatic granting of wide range of powers to all trustees rather than requiring incorporation of powers by reference. OCGA 53-14-40; UTC 815
- P. Power of trustee to give certification of trust rather than entire trust document to all but beneficiaries. OCGA 53-14-45; UTC 1013
- Q. Shorter statute of limitations to bring actions for breach trust 53-14-57 (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. 15 Art. 1, Part 1; UTC Art. 9, including codification of duty to diversify. OCGA 53-15-2

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

- A. Georgia continues to require express trusts to be in writing. OCGA 53-12-10
- 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 by expressed in the trust instrument. OCGA 53-12-20; UTC Sec. 602

2) Georgia requires same capacity to create revocable trust as to create irrevocable trust. OCGA 53-12-13; 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 53-12-41; 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 53-14-6; 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. OCFA 53-12-15

C. Requirement that legal title to property be transferred to trust. 53-12-15

D. Trust not terminated merely because the remainder is payable to the estate or heirs of the life beneficiary. OCGA 53-12-24

E. Georgia provides details in modification; termination; and division/consolidation statutes as to the notification of beneficiaries. OCGA 53-12-32, 53-12-33, 53-12-34

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 53-12-40; 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. 13.

J. More detailed provisions relating to the resignation of a trustee. OCGA 53-14-11;

UTC 705

K. Detailed provisions for both interim and final accountings by trustees. OCGA CH. 14, Art. 2

L. Georgia law clarifies that a trustee has no duty to investigate a beneficiary's outside resources before making a discretionary distribution. OCGA 53-14-35

M. Georgia law clarifies that trustee cannot give a warranty and bind the trust estate. OCGA 53-14-39.

N. Extensive provisions on foreign individuals and entities acting as trustees in Georgia. UTC has none. OCGA Ch. 14, Art. 5

O. Provisions relating to the conversion of an "income only" trust to a unitrust and the creation of a unitrust. OCGA 53-15-10

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. 15, Art. 2. OCGA 53-15-37.

**REVISED TRUST CODE OF GEORGIA**

**TABLE OF SECTIONS**

**CHAPTER 12: TRUSTS: GENERAL PROVISIONS**

**Article 1: In General**

§ 53-12-1 Short title; effective date of provisions

§ 53-12-2 (Definitions)

§ 53-12-3 When trust & chapters conflict

§ 53-12-4 Survival of common law & equity

§ 53-12-5 Law governing the validity of a trust

§ 53-12-5 Law governing the meaning and effect of trust provisions

§ 53-12-6 Jurisdiction

**Article 2: Creation and Validity of Express Trusts**

§ 53-12-10 Express trusts

§ 53-12-11 Formal and precatory words

§ 53-12-12. Trust purpose and conditions in terrorem

§ 53-12-13. Capacity of settlor

§ 53-12-14 Non-merger

§ 53-12-15 Transfer of property to trust

§ 53-12-16 Additions to trust property

§ 53-12-17. Construction; Parol evidence

§ 53-12-18 Trusts for animals

**Article 3: Revocable Trusts**

§ 53-12-20 Revocation generally

§ 53-12-21 Trustee's consent necessary to enlarge duties

§ 53-12-22 Notice to trustee

§ 53-12-23 Power of agent or conservator to revoke trust

§ 53-12-24 Trust not revocable because life estate holder has reversion

§53-12-25 Limitation on action contesting validity of revocable trust



- 1 § 53-12-72. Filing of deeds and amendments thereto, and filing a copy with
- 2 Secretary of State
- 3 § 53-12-73. Name of trust
- 4 § 53-12-74. Certificates of beneficial interest by trustees
- 5 § 53-12-75. Duties and powers of trustees resignation or removal; successor trustees
- 6 § 53-12-76. Investments by trustees
- 7 § 53-12-77. Returns by trust
- 8 § 53-12-78. How title vests on termination of estate
- 9 § 53-12-79. Merger of trust into a domestic corporation

10

11 **CHAPTER 13: CHARITABLE TRUSTS**

11

12 **Article 1: General Provisions**

12

13 **53-13-1 Definition; Charitable Purposes**

13

14 **53-13-2: Power to select purposes or beneficiaries**

14

15 **53-13-3 Cy pres**

15

16 **53-13-4 Duration of charitable trusts**

16

17 **Sec. 53-13-5 Attorney General**

17

18 **Article 2: Private Foundations**

18

19 **Part 1: Corporations**

19

20 **53-13-10. Automatic amendment of articles of incorporation of corporate private**  
21 **foundation**

20

21

22 **53-13-11. Amendment of articles of incorporation to exclude application of §53-13-**  
23 **10**

22

23

24 **53-13-12. Effect of Code Sections 53-13-10 and 53-13-11 as to forfeiture or reversion**  
25 **of corporate property**

24

25

26 **53-13-13. Election by Private Foundation to Distribute Such Property as will**  
27 **Enable Corporation to avoid Tax Liability**

26

27

28 **53-13-14 Effect of Code Sections 53-13-10 through 53-13-13 on Powers of the Court**  
29 **and Attorney General**

28

29

30

30 **Part 2 Trusts**

1 **53-13-15 Automatic Amendment of Governing Instrument of Private Foundation**  
2 **Trust, Charitable Trust, or Split-Interest Trust**

3 **53-13-16 Automatic Amendment of Governing Instrument of Private Foundation**  
4 **Trust or Charitable Trust as to Distribution of Trust Funds**

5 **53-13-17 Amendment of Governing Instrument of Private Foundation Trust,**  
6 **Charitable Trust, or Split-Interest Trust to Exclude Application of Code**  
7 **Sections 53-13-15 and 53-13-16.**

8 **53-13-18. Election by trustees of private foundation or charitable trust to distribute**  
9 **such trust principal as will enable trust to avoid tax liability; filing of written**  
10 **election with Attorney General; form of distribution; revocation of election**

11 **53-13-19. Commission of Trustees upon Distribution of Property in Kind from**  
12 **Trust**

13 **53-13-20. Effect of Code Sections 53-13-15 through 53-13-19 as to forfeiture or**  
14 **reversion of trust property or failure of trust**

15 **53-13-21 Effect of Code Sections 53-13-15 through 53-13-19 on Powers of Courts**  
16 **and Attorney General**

17

18 **CHAPTER 14 TRUSTEES**

19 **ARTICLE 1: Trustees Generally**

20 **Part 1: Appointment and Acceptance**

21 **53-14-1 Capacity of Trustee**

22 **53-14-2 Appointment and vacancies**

23 **53-14-3 Acceptance**

24 **53-14-4 Trustee's bond**

25 **53-14-5 Cotrustees generally**

26 **Part 2: Compensation**

27 **53-14-6 Compensation of trustee**

28 **53-14-7 Compensation of cotrustees and successor trustees**

29 **53-14-8 Extra compensation**

30 **53-14-9 Reimbursement of expenses.**

31 **53-14-10 Compensation from business enterprise**

1 **Part 3: Resignation and Removal**

2 **53-14-11 Resignation of Trustee**

3 **53-14-12 Removal of trustee**

4 **ARTICLE 2 Interim Accounting and Final Accounting**

5 **53-14-20 Interim Accounting**

6 **53-14-21 Final Accounting**

7 **53-14-22 Equitable accounting**

8 **ARTICLE 3: Trustees' Duties and Powers; Certification of Trusts; Registration**  
9 **and Deposit of Securities**

10 **Part 1: Duties of Trustee**

11 **53-14-30 Duties generally**

12 **53-14-31 Duty of prudent administration**

13 **53-14-32 Duty to inform as to existence of trust**

14 **53-14-33 Duty to provide reports and accounts**

15 **53-14-34 Duty to distribute income**

16 **53-14-35 No duty to investigate resources**

17 **53-14-36 Duty to avoid conflict of interest**

18 **53-14-37 Duty of impartiality**

19 **Part 2 Trustees' Powers**

20 **53-14-38 Discretionary powers**

21 **53-14-39 Reserved**

22 **53-14-40 Powers of trustees; additional powers that may be incorporated**

23 **53-14-41 Powers of corporate fiduciaries**

24 **53-14-42 Incorporation of powers by reference**

25 **53-14-43 Granting of powers by qualified beneficiaries**

26 **Part 3 Trustee who is also beneficiary**

27 **53-14-44 Exercise of power by trustee who is also beneficiary**

28 **Part 4 Certification of Trusts**

29 **53-14-45 Certification of trust by trustee**

30 **Part 5 Registration and Deposit of Securities**

31 **§ 53-14-46 How securities to be registered by corporate fiduciary**

1 § 53-14-47 Registration where two or more fiduciaries are acting jointly

2 § 53-14-48 Deposit of securities in clearing corporation

3 **ARTICLE 4 Trustee Liability**

4 § 53-14-50 Accountable to beneficiary; breach of trust

5 § 53-14-51 Actions for breach of trust

6 § 53-14-52 Damages for breach of trust; interest

7 § 53-14-53 Relief of trustee liability

8 § 53-14-54 Liability of successor trustee

9 § 53-14-55 Liability of cotrustee

10 § 53-4-56 Action against cotrustee

11 § 53-14-57 Limitation of actions

12 § 53-14-58 Personal liability of trustee

13 **ARTICLE 5 Foreign Entities and Non-Residents Acting as Trustees**

14 **53-14-60 Definitions**

15 **53-14-61 Nonresidenta acting as trustees**

16 **53-14-62 Foreign entities acting as trustees**

17 **53-14-63 Acting as fiduciary not transacting business within state; establishment of**  
18 **place of business prohibited**

19 **53-14-64 Filing Statement with Secretary of State; Appointment of Agent for**  
20 **Service**

21

22 **CHAPTER 15**

23 **TRUST INVESTMENTS**

24

25 **Article 1 Investments Generally**

26 **53-15-1 General Investment Standard**

27 **53-15-2 Diversification**

28 **53-15-3 Duties at inception of trusteeship**

29 **53-15-4 Reviewing compliance**

30 **53-15-5 Language invoking application of [article]**

31 **53-15-6 Application to existing trusts**

32 **53-15-7 Delegation**

33 **53-15-8 Duty of trustee as to receipts and disbursements**

- 1 **53-15-9 Power of adjustment**
- 2 **53-15-10 Conversion to unitrust**
- 3 **53-15-11 Abuse of trustee's discretion**
- 4 **53-15-12 Express Total Return Unitrusts**

5

6 **Article 2 Georgia Principal and Income Act**

7 **Part 1 General Provisions and Definitions**

8 **53-15-15 General**

9 **53-15-16 Definitions**

10 **Part 2**

11 **53-15-20 Payment of Interest on Pecuniary Amount**

12 **53-15-21 Payment of Expenses**

13

14 **Part 3 Apportionment at Beginning and End of Income Interest**

15 **53-15-22 WHEN THE RIGHT TO INCOME BEGINS AND ENDS**

16 **53-15-23 APPORTIONMENT OF RECEIPTS AND DISBURSEMENTS WHEN**

17 **DECEDENT DIES OR INCOME INTEREST BEGINS**

18 **53-15-24 APPORTIONMENT WHEN INCOME INTEREST ENDS**

19 **Part 4 Allocation of Receipts During Administration of Trust**

20 **Section 1 Receipts from Entities**

21 **53-15-25 CHARACTER OF RECEIPTS.**

22 **53-15-26 DISTRIBUTION FROM TRUST OR ESTATE.**

23 **53-15-27 BUSINESS AND OTHER ACTIVITIES CONDUCTED BY TRUSTEE**

24 **Section 2 Receipts Not Normally Apportioned**

25 **53-15-28 PRINCIPAL RECEIPTS.**

26 **53-15-29 RENTAL PROPERTY.**

27 **53-15-30 OBLIGATION TO PAY MONEY.**

28 **53-15-31 INSURANCE POLICIES AND SIMILAR CONTRACTS**

29 **15-15-32 INSUBSTANTIAL ALLOCATIONS NOT REQUIRED.**

1 **53-15-33 DEFERRED COMPENSATION, ANNUITIES, AND SIMILAR**  
2 **PAYMENTS**

3 **53-15-34 LIQUIDATING ASSET**

4 **53-15-35 MINERALS, WATER, AND OTHER NATURAL RESOURCES.**

5 **53-15-36 TIMBER.**

6 **53-15-37 PROPERTY NOT PRODUCTIVE OF INCOME.**

7 **53-15-38 DERIVATIVES AND OPTIONS.**

8 **53-15-39 ASSET-BACKED SECURITIES**

9 **Part 5 Allocation of Disbursements During Administration of Trust**

10 **53-15-40 DISBURSEMENTS FROM INCOME**

11 **53-15-41 DISBURSEMENTS FROM PRINCIPAL.**

12 **53-15-42 TRANSFERS FROM INCOME TO PRINCIPAL FOR**  
13 **DEPRECIATION.**

14 **53-15-43 TRANSFERS FROM INCOME TO REIMBURSE PRINCIPAL.**

15 **53-15-44 INCOME TAXES.**

16 **53-15-45 ADJUSTMENTS BETWEEN PRINCIPAL AND INCOME**  
17 **BECAUSE OF TAXES**

18

19

20 **PROPOSED CHANGES TO OCGA Sec. 7-1-242**

**CHAPTER 12: TRUSTS: GENERAL PROVISIONS**

**Article 1: In General**

- § 53-12-1 Short title; effective date of provisions
- § 53-12-2 Definitions
- § 53-12-3 When trust & chapters conflict
- § 53-12-4 Survival of common law & equity
- § 53-12-5 Law governing the validity of a trust
- § 53-12-6 Law governing the meaning and effect of trust provisions
- § 53-12-7 Jurisdiction

**Article 2: Creation and Validity of Express Trusts**

- § 53-12-10 Express trusts
- § 53-12-11 Formal and precatory words
- § 53-12-12. Trust purpose conditions in terrorem
- § 53-12-13. Capacity of settlor
- § 53-12-14 Non-merger
- § 53-12-15 Transfer of property to trust
- § 53-12-16 Additions to trust property
- § 53-12-17. Construction; Parol evidence
- § 53-12-18 Trusts for animals

**Article 3: Revocable Trusts**

- § 53-12-20 Revocation generally
- § 53-12-21 Trustee's consent necessary to enlarge duties
- § 53-12-22 Notice to trustee
- § 53-12-23 Power of agent or conservator to revoke trust
- § 53-12-24 Trust not revocable because life estate holder has reversion
- §53-12-25 Limitation on action contesting validity of revocable trust

**Article 4: Reformation, Modification, Division, Consolidation, Termination of Trusts**

- § 53-12-30 Reformation to correct mistakes
- § 53-12-31 Power to direct modification
- § 53-12-32 Modification of trust by court
- § 53-12-33 Division and consolidation of trusts
- § 53-12-34 Termination of trusts

**Article 5: Creditors' Claims; Spendthrift and Discretionary Provisions**

- § 53-12-40 Spendthrift provisions
- § 53-12-41 Limitations on creditors' rights to discretionary distributions
- § 53-12-42 Creditors' claims against settlor
- § 53-12-43 Creditors' claims against property that is subject to withdrawal rights

**Article 6: Testamentary Additions to Trusts;**

1 **Trusts as Beneficiaries of Retirement Plans**

2 **Part 1: Testamentary Additions to Trusts**

3 § 53-12-50. Short title

4 § 53-12-51 Making of testamentary additions to trusts

5 § 53-12-52 Limitations of duties and responsibilities of trustee

6 **Part 2: Trusts as Beneficiaries of Retirement Plans**

7 § 53-12-54 Trusts as beneficiaries

8

9

10

11

**Article 7: Implied Trusts**

12 § 53-12-60 Resulting trusts

13 § 53-12-61 Purchase money resulting trusts

14 § 53-12-62 Constructive trusts

15 § 53-12-63 Parol evidence

16

17

18

**Article 8: Creation by Deed to Acquire Beneficial Interest**

19 § 53-12-70. Definitions

20 § 53-12-71. Deeds to interests in property

21 § 53-12-72. Filing of deeds and amendments thereto, and filing a copy with  
22 Secretary of State

23 § 53-12-73. Name of trust

24 § 53-12-74. Certificates of beneficial interest by trustees

25 § 53-12-75. Duties and powers of trustees resignation or removal; successor trustees

26 § 53-12-76. Investments by trustees

27 § 53-12-77. Returns by trust

28 § 53-12-78. How title vests on termination of estate

29 § 53-12-79. Merger of trust into a domestic corporation

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34

**OCGA Title 53, Chapter 12**  
**TRUSTS: GENERAL PROVISIONS**

**Article 1 In General**

**§ 53-12-1 Short title; effective date of provisions**

a) Chapters 12 through 15 of this title shall be known and may be cited as the “Revised Georgia Trust Code of \_\_\_\_”.

b) Except to the extent it would impair vested rights and except as otherwise provided by law, the provisions contained in chapters 12 through 15 of this title shall apply to any trust regardless of the date it was created.

COMMENT

Subsection (a) is new.

*Subsection (b): Here is a portion of the comment that appears at current 53-12-3:*

This section expresses the rule that the Georgia Trust Act applies to all trusts, including those created before its enactment. Additionally, this rule is subject to the constitutional provision that "No ... retroactive law ... shall be passed."

Ga. Const. 1983, Art. 1, § 1, para. 10. "Unlike the federal constitution, our state constitution protects not only against the impairment of contracts, but also against retroactive (or retrospective) laws. This provision prohibits the impairment of vested rights." Hayes v. Howell, 251 Ga. 580, 584 (1983) .

**§ 53-12-2 (Definitions):**

As used in Chapters 12 through 15 and except as otherwise provided, the term:

(1) “Ascertained standard” means a standard relating to an individual’s health, education, support, or maintenance within the meaning of Section 2041(b)(1)(A) or 2514(c)(1) of the Internal Revenue Code of 1986, or subsequent law of similar import.

(2) “Beneficiary” means a person for whose benefit property is held in trust, regardless of the nature of the interest, and includes any beneficiary, whether vested or contingent, born or unborn, ascertained or unascertained.

(3) “Express trust” means a trust as described in Code Section 53-12-10.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31

(4) “Implied Trust “ means a resulting trust as described in OCGA Sec. 53-12-60 or a constructive trust as described in OCGA 53-12-62..

(5) “Person” means an individual, corporation, partnership, association, joint-stock company, business trust, unincorporated organization, limited liability company, or other legal entity, including any of the foregoing acting as a fiduciary.

(6) “Property” means any type of property, whether real or personal, tangible or intangible, legal or equitable.

(7) “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.

(8) “Settlor” means the person who creates the trust, including a testator in the case of a testamentary trust. The terms “grantor” and “trustor” mean the same as “settlor.”

(9) “Trust” means an express trust or an implied trust.

(10) “Trust instrument” means the document or documents, including any testamentary instrument, that contains the trust provisions.

(11) “Trust property” means property the legal title to which is held by the trustee. The term also includes choses in action, claims, and contract rights, including a

1 contractual right to receive death benefits as designated beneficiary under a policy of  
2 insurance, contract, employees' trust or other arrangement. The terms "trust corpus" and  
3 "trust res" mean the same as "trust property."

4  
5 (12) "Trustee" means the person or persons holding legal title to the property in  
6 trust.

7  
8 **COMMENT**

9 #2: *(Modified; 2d sentence moved to 53-12-20, elements of a trust)*

10 #6 *(Modified, 2d sentence moved to definition of "Trust Property" )*

11 #7 (Term "qualified beneficiary" is modeled after UTC Sec. 103(13). From Comment to  
12 this UTC Section: "The qualified beneficiaries who take upon termination of the  
13 beneficiary's interest or of the trust can include takers in default of the exercise of a  
14 power of appointment. The term can also include the persons entitled to receive the trust  
15 property pursuant to the exercise of a power of appointment. Because the exercise of a  
16 testamentary power of appointment is not effective until the testator's death and probate  
17 of the will, the qualified beneficiaries do not include appointees under the will of a living  
18 person. Nor would the term include the objects of an unexercised inter vivos power."  
19 Also, "While the holder of a power of appointment is not considered a trust beneficiary  
20 under the common law of trusts, holders of powers are classified as beneficiaries under  
21 the Uniform Trust Code. Holders of powers are included on the assumption that their  
22 interests are significant enough that they should be afforded the rights of beneficiaries."  
23

24 #9 *Changed from original definition*

25 #10 *Added "testamentary instrument"*

26 #11 *First sentence modified, 2d sentence is from former definition of "Property"*

27 #12 *Changed "person" to "or persons"*

28  
29  
30 **§ 53-12-3 When trust & chapters conflict**

31 a) The effect of the provisions of Chapters 12 through 15 may be varied by the trust  
32 instrument except:

33 1) As to any requirements in Article 2 of this Chapter relating to the creation and  
34 validity of express trusts;

1           2) As to the effect of the rules set forth in Article 5 of this Chapter relating to  
2 spendthrift trusts;

3           3) As to the power of the beneficiaries to modify a trustee's compensation as set  
4 forth in Code section 53-14-6;

5           4) As to the duty of a trustee to administer the trust and to exercise discretionary  
6 powers in good faith, as set forth in Code sections 53-14-30 and 53-14-38;

7           5) As to the effect of a provision relieving a trustee from liability, as set forth in  
8 Code section 53-14-53;

9           6) As to the periods of limitation on actions, as set forth in Code sections 53-12-  
10 25 and 53-14-57; and

11          7) As to the general investment standard, as set forth in Code section 53-15-1.  
12

13 b) Nothing in a trust instrument shall prohibit or limit a court from taking any actions  
14 authorized by the provisions of Chapters 12 through 15 or elsewhere in the law of this  
15 state.

16           **COMMENT**

17 This section specifies that certain provisions of this Act cannot be varied by the settlor in  
18 the trust instrument, nor can the settlor limit the power of the court to take actions that are  
19 authorized by this act or by the laws of the state of Georgia. Similar provision appeared  
20 formerly in OCGA 53-12-3.  
21

22           **§ 53-12-4 Survival of common law & equity**

23           Except to the extent that the principles of common law and equity governing  
24 trusts are modified by Chapters 12 through 15 of this Title or another statute, those  
25 principles remain the law of this state.

26           **COMMENT**

27 Carries forward 53-12-7.  
28  
29

30           **53-12-5 Law governing the validity of a trust**

1 a) As to real property, the validity of a trust is determined by the law of the situs  
2 of the real property.

3  
4 b) As to all other property, the validity of a trust is determined by:

5 (1) the law of the jurisdiction designated in the trust instrument unless the  
6 effect of the designation is contrary to the public policy of the jurisdiction having the  
7 most significant relationship to the matter at issue; or

8  
9 (2) in the absence of an effective designation in the trust instrument, the law of the  
10 jurisdiction having the most significant relationship to the matter at issue.

11  
12 COMMENT

13 New. The Comment will point out that this section is modeled after  
14 Sections 270 and 278 of the Restatement of the Conflict of Laws and UTC Sec. 107. The  
15 Comment will include the following factors as the type of factors to be considered by a  
16 court when determining which jurisdiction has the most significant relationship to the  
17 matter at issue: (from Comments to UTC Sec. 107): “the place of the trust’s creation, the  
18 location of the trust property, the domicile of the settlor, the trustee and the  
19 beneficiaries”.

20  
21 **§ 53-12-6 Law governing the meaning and effect of trust provisions**

22 The meaning and effect of the trust provisions are determined by:

23 (a) the law of the jurisdiction designated in the trust instrument unless the effect of the  
24 designation is contrary to the public policy of the jurisdiction having the most significant  
25 relationship to the matter at issue; or

26  
27 (b) in the absence of an effective designation in the trust instrument, the law of the  
28 jurisdiction having the most significant relationship to the matter at issue.

29  
30 COMMENT

31 New.

1 The Comment will include the following factors as the type of factors to be considered by  
2 a court when determining which jurisdiction has the most significant relationship to the  
3 matter at issue: (from Comments to UTC Sec. 107): “ the place of the trust’s creation,  
4 the location of the trust property, the domicile of the settlor, the trustee and the  
5 beneficiaries”.

6 The **Comment** to this section will point out that the settlor may designate the laws of one  
7 jurisdiction for interpretation of the administrative provisions and the laws of a different  
8 jurisdictions for the interpretation of the dispositive provisions.

9  
10

11 **§ 53-12-7 Jurisdiction**

12 a) Trusts are peculiarly subjects of equity jurisdiction. Suits by or against a  
13 trustee which sound at law may be filed in a court of law.

14

15 b) Actions concerning the construction, administration or internal affairs of a  
16 trust shall be maintained in superior court except as otherwise provided in Code section  
17 15-9-127.

18

19 c) Any action by or against the trustee or to which the trustee is a party may be  
20 maintained in any court having jurisdiction over the parties and the subject matter except  
21 as provided in section (b) of this Code section.

22

COMMENT

23 Modification of 53-12-4.

24 *This is the comment that currently appears at 53-12-4:*

25 The first sentence of this section formerly was codified at OCGA § 53-12-1 and expresses  
26 the general rule that trusts are the subject of equity jurisdiction. The second sentence  
27 formerly was codified at OCGA § 53-12- 150; it expresses the rule that suits against a  
28 trust which sound at law, such as suits on a debt or a contract, may be filed in a court of  
29 law. The last sentence expresses the rule that a trustee proceeding on a cause of action  
30 that sounds at law may file suit in a court of law.

31 Causes of action that involve the "internal affairs" of a trust are generally the subject of  
32 equity jurisdiction. The Georgia Constitution, however, provides that: "Probate courts  
33 shall have such jurisdiction as now or hereafter provided by law, without regard to

1 uniformity." Ga. Const., Art. 6, § 3, para. 1. Pursuant to that constitutional provision,  
2 OCGA § 15-9-127 gives certain probate courts concurrent jurisdiction with superior courts  
3 over the appointment and resignation of trustees. See, *infra*, OCGA §§ 53-12-170,  
4 53-12-175; cf. § 53-12-176.

5

6 **Article 2 Creation and Validity of Express Trusts**

7 **§ 53-12-10 Express trusts**

8 (a) An express trust shall be created or declared in writing and signed by the settlor.

9

10 (b) An express trust shall have each of the following elements, ascertainable with  
11 reasonable certainty:

12 (1) An intention by a settlor to create a trust;

13 (2) Trust property;

14 (3) Except for charitable trusts, a beneficiary who is reasonably ascertainable at  
15 the time of the creation of the trust or reasonably ascertainable within the period of the  
16 rule against perpetuities;

17 (4) A trustee; and

18 (5) Trustee duties specified in the writing or provided by law.

19

20 (c) The requirement that a trust have a reasonably ascertainable beneficiary is satisfied if  
21 under the trust instrument the trustee or some other person has the power to select the  
22 beneficiaries based on a standard or in the discretion of the trustee or other person.

23

COMMENT

24

Modifies 53-12-20..

25

Old 53-12-6 (trust won't fail for lack of a trustee) is moved to Chapter 14.

26

The provisions of this Article cannot be varied by the trust instrument. See

27

Section 53-12-3.

28

*Subsection (a): Signing requirement is new*

29

*Subsection (b)(2) modified by adding clause about "the legal title..."*

30

*Subsection (b)(3) modified by moving sentence re: ascertainability from*

31

*definition. (Changed from "definitely" to "reasonably"). Comment will include a cross-*

32

*reference to the statutory RAP. Also, added cross-reference for charitable trusts.*

1            *Subsection (c) is modeled after California Probate Code § 15205.*

2            *Subsection (d): “active” is deleted. Explain that a trust is valid even if the only*  
3 *duty of the trustee is not to interfere with the beneficiary’s enjoyment of trust property.*  
4 *Get language from Restatement re: “passive” duties. Explain that the Statute of Uses (or*  
5 *any of its progeny in the Georgia code) is no longer valid in Georgia.*

6            The following Comment appears after 53-12-20:

7            (1) Section 53-12-20 (a) formerly was codified at OCGA § 53-12-23. The writing may be  
8 either formal or informal.

9            (2) Although § 53-12-20 (b) states the essential elements of a trust, it is subject to two  
10 exceptions. First, the temporary lack of a trustee will not cause a trust to fail. See  
11 OCGA § 53-12-6, *infra*. Also, the Uniform Testamentary Additions to Trusts Act, enacted  
12 in Georgia in 1968, Ga. Laws 1968, p. 1068, and now codified at OCGA § 53-12-70 et  
13 *seq.*, *infra*, allows testamentary pourovers into unfunded trusts. See  
14 Clymer v. Mayo, 473 N.E.2d 1084 (Mass. 1985).

15

16

17            **§ 53-12-11 Formal and precatory words**

18            a) No formal words are necessary to create an express trust.

19

20            b) Words otherwise precatory in nature will create a trust only if they are sufficiently  
21 imperative to show a settlor’s intention to impose enforceable duties on a trustee, and if  
22 all other elements of an express trust are present.

23

Comment

24            Carries forward 53-12-21

25

26            **§ 53-12-12. Trust purpose and conditions in terrorem**

27            a) A trust may be created for any lawful purpose.

28            b) A condition in terrorem shall be void unless there is a direction in the trust instrument  
29 as to the disposition of the property if the condition in terrorem is violated, in which  
30 event the direction in the trust instrument shall be carried out.

31

32

Comment

33            Subsection (a) carries forward 53-12-23.

1 Subsection (b) is modeled after 53-4-68(b)

2

3 **§ 53-12-13. Capacity of settlor**

4 A person has capacity to create an inter vivos trust to the extent that person has legal  
5 capacity to transfer title to property inter vivos. A person has capacity to create a  
6 testamentary trust to the extent that person has legal capacity to devise or bequeath  
7 property by will.

8 

Comment

9 Carries forward 53-12-22.

10

11 **§ 53-12-14 Non-Merger**

12 No trust is invalid or terminated and no merger of title to trust property occurs merely  
13 because the trustee or trustees are the same person or persons as the beneficiary or  
14 beneficiaries of the trust.

15 

Comment

16 New.

17

18 **§ 53-12-15 Transfer of property to trust**

19 a) Transfer of property to a trust requires a transfer of legal title to the trustee.

20 b) For any interest in real property to become trust property in a trust of which  
21 any transferor is a trustee, the instrument of conveyance shall additionally be recorded in  
22 the appropriate real property records.

23 

COMMENT

24 New. The Comment will point out that one of the requirements for a valid trust is that  
25 trust property actually be transferred to and accepted by the trustee (OCGA Sec. 53-12-10  
26 and the definition in OCGA Sec. 53-12-2(11).) This statute requires that the transferor  
27 perform whatever acts are necessary to transfer legal title of the property to the trustee.  
28 Additionally, if the transferor is also one of the trustees and the property transferred is  
29 real property, the deed or other instrument of conveyance must be recorded. This  
30 requirement applies even if there are co-trustees, one of whom is not the transferor of the  
31 property.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31

**§ 53-12-16 Additions to trust property**

Property may be added to an existing trust from any source in any manner if the addition is not prohibited by the trust instrument and the property is acceptable to the trustee.

Comment

*Modified 53-12-25 by adding the words “not prohibited”*

**§ 53-12-17. Construction; Parol evidence**

When the construction of an express trust is at issue, the court may hear parol evidence of the circumstances surrounding the settlor at the time of the execution of the trust and parol evidence to explain all ambiguities, both latent and patent.

Comment

Carries forward 53-12-27.

**§ 53-12-18 Trusts for animals**

(a) A trust may be created to provide for the care of an animal that is alive during the settlor's lifetime. The trust terminates upon the death of the animal or, if the trust was created to provide for the care of more than one animal alive during the settlor's lifetime, upon the death of the last surviving animal.

(b) A trust authorized by this section may be enforced by a person appointed in the trust instrument or, if no person is so appointed, by a person appointed by the court. A person having an interest in the welfare of the animal may request the court to appoint a person to enforce the trust or to remove a person appointed.

(c) Upon termination of a trust authorized by this section, the trustee shall transfer any unexpended trust property in the following order:

(i) as directed in the trust instrument;

(ii) if the trust was created in a nonresiduary clause in the settlor's will or in a codicil to the settlor's will, under the residuary clause in the settlor's will; and

1 (iii) if no taker is produced by the application of subparagraph (i) or (ii), to the  
2 settlor, if living, and if not to the settlor's heirs, as determined under OCGA Sec. 53-2-1.

3 **Comment**

4 *New. (The Committee did not use "domesticated or pet animal" because to avoid*  
5 *questions as to which animals fit into that category. The Committee also did not use*  
6 *subsection (c) of UTC 408 under the theory that a settlor should be able to give as much*  
7 *as he wants to such a trust. The property will eventually go to the remainder*  
8 *beneficiaries. Subsection c is modeled after Uniform Probate Code Sec. 2-907. No time*  
9 *period for the termination of these trusts is included in the statute. The Georgia Rule*  
10 *against Perpetuities provides:*

11 OCGA 44-6-201. (a) A nonvested property interest is invalid unless:

12 (1) When the interest is created, it is certain either to vest or to terminate within the  
13 lifetime of an individual then alive or within 21 years after the death of that individual; or

14 (2) The interest either vests or terminates within 90 years after its creation.

15 *It is assumed that animals that are alive at the date of the creation of the trust will not*  
16 *live beyond 90 years.*

17  
18 **Article 3 Revocable Trusts**

19 **§ 53-12-20 Revocation and modification generally**

20 a) A settlor shall have no power to modify or revoke a trust in the absence of an express  
21 reservation of such power.

22  
23 b) A power to revoke will be deemed to include a power to modify and an unrestricted  
24 power to modify will be deemed to include a power to revoke.

25  
26 c) Any revocation or modification of an express trust must be in writing and signed by  
27 the settlor.

28 **Comment**

29 Replaces 53-12-150. *Subsection (c) modified by adding first phrase and signature*  
30 *requirement. This provision does not include the provision in UTC 602(c)(2)(A) that*  
31 *allows a revocable trust to be modified or revoked by a later will or codicil that*

1 specifically devises property that would otherwise have passed in accordance with the  
2 terms of the trust.

3

4 **§ 53-12-21. Trustee's consent necessary to enlarge duties**

5 In exercising a power to modify the trust instrument, the settlor may not enlarge the  
6 duties or liabilities of the trustee without the trustee's express consent.

7

Comment

8

*Modifies 53-12-151. Added first phrase and "or liabilities"*

9

10 **§ 53-12-22 Notice to trustee**

11 A trustee is not liable for failing to act in accordance with the terms and conditions of an  
12 amendment or revocation of a trust of which the trustee had no notice.

13

*Comment: NEW*

14

15 **§ 53-12-23 Power of agent or conservator to revoke trust**

16 a) A settlor's powers with respect to revocation, amendment, or distribution of trust  
17 property may be exercised by an agent under a power of attorney only to the extent  
18 expressly authorized by the trust instrument or the power.

19

20 b) A settlor's powers with respect to revocation, amendment, or distribution of trust  
21 property may be exercised by the settlor's conservator only as provided in OCGA Sec.  
22 29-5-23.

23

**COMMENT**

24 a) New Code section. UTC Sec. 602(e). See Title 10, Ch. 6, Art. 2 of this Code for a  
25 description of the relations between principals and agents.

26

27 b) New Code section. Conservatorship statute allows conservator, without court  
28 authority, to revoke a revocable trust set up by the ward or exercise such other powers of  
29 revocation, amendment, or withdrawal that are exercisable by the ward only if the  
30 governing instrument expressly allows a conservator to revoke the trust or exercise the  
31 powers.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30

**§ 53-12-24 Trust not revocable because life estate holder has reversion**

No trust shall 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.

COMMENT

This provision, which is a modified version of former Ga. Code Ann. 108-111.1, subsection (c) clarifies that the holdings of Woodward and Moore will not render a trust revocable merely because the holder of the life interest in the trust has a power to appoint the trust property or has a reversion in the property or because the remainder beneficiary of the trust is the estate of the holder of the life interest.

The Comment will point out the OCGA Sec. 44-6-2 is not applicable to trusts.

**§53-12-25 Limitation on action contesting validity of revocable trust**

a) Any judicial proceeding to contest the validity of a trust that was revocable immediately before the settlor's death must be commenced within two years of the settlor's death.

b) Upon the death of the settlor of a trust that was revocable immediately before the settlor's death, the trustee may proceed to distribute the trust property in accordance with the trust provisions. The trustee is not subject to liability for doing so unless:

(1) the trustee knows of a pending judicial proceeding contesting the validity of the trust; or

(2) a potential contestant has notified the trustee in writing of a possible judicial proceeding to contest the trust and a judicial proceeding is commenced within 60 days after the contestant sent the notification.

1 c) A beneficiary of a trust that is determined to have been invalid is liable to return any  
2 distribution received.

3

4

5

6

**Comment**

7 Modeled after UTC Sec. 604. Two years chosen to coincide with Year's Support time  
8 limitation. Did not adopt UTC 604(a)(2) as that might be misconstrued to require the  
9 trustee to give notice and it is unclear as to who should be notified.

10 See also 53-14-57 (limitations on actions against trustees)

11 The provisions of this Section cannot be varied by the trust instrument. See Section 53-  
12 12-3.

13

14

15 **Article 4 Reformation, Modification, Division, Consolidation, Termination of**

16

**Trusts**

17

18 **§ 53-12-30 Reformation to correct mistakes**

19 a) If it is proved by clear and convincing evidence that the trust provisions were affected  
20 by a mistake of fact or law, whether in expression or inducement, the court may reform  
21 the trust provisions, even if unambiguous, to conform the provisions to the settlor's  
22 intention.

23

24 b) A petition for reformation may be filed by the trustee or any beneficiary, or, in the case  
25 of an unfunded testamentary trust, the personal representative of the settlor's estate.

26

27 c) Notice of a petition for reformation of the trust shall be given to the trustee and all  
28 beneficiaries.

29

30

COMMENT

1 This section and the accompanying Comment are modeled after UTC Sec. 415. This  
2 section applies whether the mistake is one of expression or one of inducement. A mistake  
3 of expression occurs when the trust provisions misstate the settlor's intention, fail to  
4 include a provisions that was intended to be included, or include a provision that was not  
5 intended to be excluded. A mistake in the inducement occurs when the trust provisions  
6 accurately reflect what the settlor intended to be included or excluded but this intention  
7 was based on a mistake of fact or law. See Restatement (Third) of Property: Donative  
8 Transfers Section 12.1 cmt. i (Tentative Draft No. 1, approved 1995). Mistakes of  
9 expression are frequently caused by scriveners' errors while mistakes of inducement often  
10 trace to errors of the settlor.

11  
12 Reformation is different from resolving an ambiguity. Resolving an ambiguity involves  
13 the interpretation of language already in the instrument. Reformation, on the other hand,  
14 may involve the addition of language not originally in the instrument, or the deletion of  
15 language originally included by mistake, if necessary to conform the instrument to the  
16 settlor's intent. In determining the settlor's original intent, the court may consider  
17 evidence relevant to the settlor's intention even though it contradicts an apparent plain  
18 meaning of the text. Because reformation may involve the addition of language to the  
19 instrument, or the deletion of language that may appear clear on its face, reliance on  
20 extrinsic evidence is essential. To guard against the possibility of unreliable or contrived  
21 evidence in such circumstance, the higher standard of clear and convincing proof is  
22 required. See Restatement (Third) of Property: Donative Transfers Section 12.1 cmt. e  
23 (Tentative Draft No. 1, approved 1995).

24  
25 **§ 53-12-31 Power to direct modification**

26 The trust instrument may confer upon a trustee or other person a power to modify the  
27 trust.

28 **COMMENT**

29 New. From UTC Sec. 808(c). Include a cross-reference to 53-12-20 et seq. re:  
30 modification of revocable trust by settlor.

31

1    **§ 53-12-32 Modification of trust by court**

2    a) The court may:

3           1) modify the administrative or dispositive provisions of a trust if, owing to  
4    circumstances not known to or anticipated by the settlor, compliance with the provisions  
5    of the trust would defeat or substantially impair the accomplishment of the purposes of  
6    the trust;

7           2) modify the administrative provisions of a trust if continuation of the trust under  
8    its existing provisions would impair the trust's administration; or

9           3) modify the trust by the appointment of an additional trustee or special fiduciary  
10   if the court considers the appointment necessary for the administration of the trust.

11

12   b) A petition for modification may be filed by the trustee or any beneficiary, or, in the  
13   case of an unfunded testamentary trust, the personal representative of the settlor's estate.

14

15   c) Notice of a petition to modify the trust shall be given to the trustee and all  
16   beneficiaries.

17

18   d) The court may modify the trust regardless of whether it contains spendthrift or other  
19   similar protective provisions.

20

21   e) An order for modification shall conform as nearly as practicable to the intention of the  
22   settlor.

23

24

**COMMENT**

25   This section replaces former Code section 53-12-153. The modification procedure  
26   described in this Code section supplements and does not replace any other method of  
27   modification available at common law.

28           For purposes of this Code section, the term "beneficiary" includes any  
29   beneficiary, whether vested or contingent, born or unborn, ascertained or unascertained.

30           Subsection a(3) is amended to clarify that the court may appoint any trustee, not  
31   just a "replacement " trustee.

1 >>> Add cross-reference to section dealing with the approval of trust modification or  
2 modification of agreement between settlor and trustee or separate written agreement  
3 among beneficiaries and trustee relating to trustee compensation, Sec. 53-14-6  
4  
5

6 **§ 53-12-33 Division and consolidation of trusts**

7 (a) The court may order the division of a single trust into two or more trusts or the  
8 consolidation of two or more trusts into a single trust if the division or consolidation:

9 (1) Is consistent with the intent of the settlor with regard to any trust to be consolidated or  
10 divided;

11 (2) Would facilitate administration of the trust or trusts; and

12 (3) Would be in the best interest of all beneficiaries.  
13

14 b) A petition for division or consolidation may be filed by the trustee or any beneficiary  
15 or, in the case of an unfunded testamentary trust, the personal representative of the  
16 settlor's estate.  
17

18 c) Notice of a petition to divide or consolidate a trust or trusts shall be given to the trustee  
19 and all beneficiaries of each trust.  
20

21 d) Subsection (a) of this Code section may apply to one or more trusts created by the  
22 same or different instruments or by the same or different persons.  
23

24 e) Subsection (a) of this Code section shall not limit the right of the trustee acting in  
25 accordance with the applicable provisions of the governing instrument to divide or  
26 consolidate trusts.

27 **COMMENT**

28 This Code section carries forward former OCGA Sec. 53-12-152(b). The new Code  
29 section eliminates the provision in subparagraph (3) of Sec. 53-12-152(b) that provides  
30 that the division or consolidation would "not impair materially" the respective interests of  
31 the beneficiaries. The deletion of this language is not meant to signal a change in the law

1 but rather only a recognition that a division or consolidation would not be in a  
2 beneficiary's best interest (as required in both the former and the current Code section) if  
3 it were to impair a beneficiary's interest.

4 For purposes of this Code section, the term "beneficiary" includes any  
5 beneficiary, whether vested or contingent, born or unborn, ascertained or unascertained.

6  
7  
8 **§ 53-12-34 Termination of trusts**

9 a) The trust instrument may confer upon a trustee or other person a power to terminate  
10 the trust.

11  
12 b) The court may terminate a trust and order distribution of the trust property if:

13 1) the costs of administration are such that the continuance of the trust, the  
14 establishment of the trust if it is to be established, or the distribution from a probate estate  
15 would defeat or substantially impair the purposes of the trust;

16 2) the purpose of the trust has been fulfilled or become illegal or impossible of  
17 fulfillment; or

18 3) owing to circumstances not known to or anticipated by the settlor, the  
19 continuance of the trust would defeat or substantially impair the accomplishment of the  
20 purposes of the trust.

21  
22 c) A petition for termination may be filed by the trustee or any beneficiary or, in the case  
23 of an unfunded testamentary trust, the personal representative of the settlor's estate.

24  
25 d) Notice of a petition to terminate the trust shall be given to the trustee, all beneficiaries,  
26 any holder of a power of appointment over the trust property, and such other persons as  
27 the court may direct.

28  
29 e) The court may terminate the trust regardless of whether it contains spendthrift or other  
30 similar protective provisions.

31

1 f) Distribution of the trust property under the order for termination shall be made to or  
2 among the current beneficiaries and the vested remainder beneficiaries, or, if there are no  
3 vested remainder beneficiaries, among the current beneficiaries and the contingent  
4 remainder beneficiaries. The order shall specify the appropriate share, if any, of each  
5 current and remainder beneficiary who is to share in the proceeds of the trust, so as to  
6 conform as nearly as practicable to the intention of the settlor or testator. The order may  
7 direct that the interest of a minor beneficiary, or any portion thereof, be converted into  
8 qualifying property and distributed to a custodian pursuant to Article 5 of Chapter 5 of  
9 Title 44, “The Georgia Transfers to Minors Act.”

10  
11 **COMMENT**

12 This section replaces former Code section 53-12-152(a). The termination procedure  
13 described in this Code section supplements and does not replace any other method of  
14 termination available at common law. Subsection (a) modeled after UTC 808(c)

15  
16 For purposes of this Code section, the term “beneficiary” includes any  
17 beneficiary, whether vested or contingent, born or unborn, ascertained or unascertained.

18  
19 **Article 5: Creditors’ Claims; Spendthrift and Discretionary Provisions**

20  
21 **§ 53-12-40 Spendthrift provisions**

22 a) 1) For purposes of this section, the term “spendthrift provision” means a  
23 provision in a trust instrument that prohibits transfers of a beneficiary’s interest in the  
24 income, principal or both.

25  
26 2) A spendthrift provision is valid only if it prohibits both voluntary and  
27 involuntary transfers.

28  
29 3) A term of a trust providing that the interest of a beneficiary is held subject to a  
30 “spendthrift trust,” or words of similar import, is sufficient to restrain both

1 voluntary and involuntary transfer of the beneficiary's interest in the manner set  
2 forth in this article.

3

4 4) A beneficiary may not transfer an interest in a trust in violation of a valid  
5 spendthrift provision and, except as otherwise provided in this Code section, a  
6 creditor or assignee of the beneficiary may not reach the interest or a distribution  
7 by the trustee before its receipt by the beneficiary.

8

9 b) A spendthrift provision is not valid as to the following claims against a beneficiary's  
10 right to a current distribution to the extent the distribution would be subject to  
11 garnishment under the laws of this state if the distribution were disposable earnings:

- 12 (1) Alimony or child support;  
13 (2) Taxes or other governmental claims; or  
14 (3) Judgments for necessities.

15 The ability of a creditor or assignee to reach a beneficiary's interest under this subsection  
16 will not apply to the extent it would disqualify the trust as a special needs trust  
17 established pursuant to 42 U.S.C. Secs. 1396p(d)(4)(A), 1396p(d)(4)(C), or any  
18 subsequent statute of similar import.

19

20 c ) A provision in a trust instrument that a beneficiary's interest shall terminate or  
21 become discretionary upon an attempt by the beneficiary to transfer it, an attempt by the  
22 beneficiary's creditors to reach it, or upon the bankruptcy or receivership of the  
23 beneficiary shall be valid except to the extent of the proportion of trust property  
24 attributable to that beneficiary's contribution.

25

26 d) If a beneficiary is also a contributor to the trust, a spendthrift provision is not valid as  
27 to that beneficiary to the extent of the proportion of trust property attributable to that  
28 beneficiary's contribution. This subsection (d) shall not apply to a special needs trust  
29 established pursuant to 42 U.S.C. Secs. 1396p(d)(4)(A), 1396p(d)(4)(C), or any  
30 subsequent statute of similar import.

31

1 e) Notwithstanding any other provision in this Code section, a spendthrift provision in a  
2 pension or retirement arrangement described in sections 401, 403, 404, 408, 408A, 409,  
3 414, or 457 of the Internal Revenue Code of 1986, or any subsequent statute of similar  
4 import, is valid with reference to the entire interest of the beneficiary in the income,  
5 principal or both, even if the beneficiary is also a contributor of trust property, except  
6 where a claim is made pursuant to a qualified domestic relations order as defined in 26  
7 U.S.C. Section 414(p), or any subsequent statute of similar import.

8  
9 COMMENT

10 Former 53-12-28

11 The rules in this Article relating to spendthrift trusts cannot be varied by the trust  
12 instrument. See Section 53-12-3.

13 Subsection (a) is modeled after UTC Sec. 502.

14 Subsection (b): tort judgments have been eliminated as an exception to the spendthrift  
15 trust rules

16 Subsection (d): Comment will explain that these federal law subsections covered self-  
17 settled special needs trusts and community trusts. It will include a cross reference to the  
18 Georgia Community Trust Act, Ch. 10 of Title 30.

19 Subsection (e) clarifies that state law does not govern the protection of a settlor's interest  
20 in retirement arrangements that are governed by federal law. This subsection reflects the  
21 protection of interests in retirement arrangements that is provided by federal statutory  
22 and case law.

23  
24 **§ 53-12-41 Limitations on creditors' rights to discretionary distributions**

25 A transferee or creditor of a beneficiary may not compel the trustee to pay any amount  
26 that is payable only in the trustee's discretion regardless of whether the trustee is also a  
27 beneficiary. This section does not apply to the extent of the proportion of trust property  
28 attributable to the beneficiary's contribution.

29 COMMENT

30 New

31

1 **§ 53-12-42 Creditors' claims against settlor**

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

4 (a) During the lifetime of the settlor, the property of a revocable trust is subject to  
5 claims of the settlor's creditors.

6  
7 (b) With respect to an irrevocable trust, creditors or assignees of the settlor may  
8 reach the maximum amount that can be distributed to or for the settlor's benefit  
9 during the settlor's life or that could have been distributed to or for the settlor's  
10 benefit immediately prior to the settlor's death. If a trust has more than one  
11 settlor, the amount the creditors or assignees of a particular settlor may reach may  
12 not exceed the settlor's interest in the portion of the trust attributable to that  
13 settlor's contribution.

14  
15 (c) After the death of a settlor, and subject to the settlor's right to direct the source  
16 from which liabilities will be paid, the property of a trust that was revocable at the  
17 settlor's death or had become irrevocable as a result of the settlor's incapacity is  
18 subject to claims of the settlor's creditors to the extent the probate estate is  
19 inadequate. Payments that would not be subject to the claims of the settlor's  
20 creditors if made by way of beneficiary designation to persons other than the  
21 settlor's estate shall not be made subject to such claims by virtue of this  
22 subsection unless otherwise provided in the trust instrument.

23  
24 COMMENT: This section is modeled after UTC Sec. 505.

25 Subsection c clarifies that payments that would not be subject to the claims of the  
26 settlor's creditors if made to a beneficiary (e.g., life insurance, retirement plan benefits)  
27 will not be subject to the settlor's creditors' claims merely because they are directed to be  
28 paid to a revocable trust established by the settlor before death.

29  
30 **§ 53-12-43 Creditors' claims against property that is subject to withdrawal rights**

31 a) The holder of a power of withdrawal, during the period that the power may be

1 exercised, is treated in the same manner as the settlor of a revocable trust to the extent of  
2 the property subject to the power; and

3  
4 b) The lapse, release, or waiver of a power of withdrawal shall not cause the holder to be  
5 treated as a settlor of the trust.

6  
7 COMMENT: Modeled after UTC 505(b) with North Carolina variation.

8  
9 **Article 6: Testamentary Additions to Trusts;**  
10 **Trusts as Beneficiaries of Retirement Plans**

11  
12 **Part 1: Testamentary Additions to Trusts**

13 **§ 53-12-50. Short title**

14 This part shall be known and may be cited as the “Georgia Testamentary Additions to  
15 Trusts Act.”

16 **Comment**

17 This part modifies 53-12-70 et seq. This part substantially mirrors the Uniform  
18 Testamentary Additions to Trusts Act of 1991 (“UTATA”). Under former OCGA Sec.  
19 53-12-71 (b)(2) amendments to the trust that were made after the testator’s death were  
20 respected only “if the testator’s will so provides.” UTATA subsection (b) does not  
21 contain the requirement that the “will so provides.” The new Code reflects the wording  
22 of UTATA. Former OCGA Sec. 53-12-71(c) (which now appears as Code section 53-12-  
23 51(b)) was amended to add the words “Unless the testator’s will provides otherwise.”  
24 Section 53-12-74 is repealed as unnecessary.

25  
26  
27 **§ 53-12-51 Making of testamentary additions to trusts**

28 (a) A devise or bequest, the validity of which is determinable by the law of this state, may  
29 be made by a will to the trustee or trustees of a trust established or to be established by  
30 the testator or by the testator and some other person or persons or by some other person  
31 or persons (including a funded or unfunded life insurance trust, even if the trustor has

1 reserved any or all rights of ownership of the insurance contracts) if the trust is identified  
2 in the testator's will and its provisions are set forth in a written instrument, other than a  
3 will, executed before or concurrently with the execution of the testator's will or in the  
4 valid last will of a person who has predeceased the testator (regardless of the existence,  
5 size, or character of the corpus of the trust and notwithstanding the requirements of  
6 paragraph (2) of subsection (b) of Code Section 53-12-20). The devise or bequest shall  
7 not be invalid because the trust is amendable, revocable, or both or because the trust was  
8 amended after the execution of the will or after the death of the testator.

9  
10 (b) Unless the testator's will provides otherwise, the property so devised or bequeathed:

11 (1) Shall not be deemed to be held under a testamentary trust of the testator but  
12 shall become a part of the trust to which it is devised or bequeathed; and

13 (2) Shall be administered and disposed of in accordance with the provisions of the  
14 instrument or will setting forth the terms of the trust, including any amendments  
15 thereto made before or after the testator's death.

16  
17 (c) Unless the testator's will provides otherwise, a revocation or termination of the trust  
18 before the death of the testator shall cause the devise or bequest to lapse.

19  
20 **§ 53-12-52 Limitations of duties and responsibilities of trustee**

21 The trustee or trustees of a trust established by the testator or others as provided in Code  
22 Section 53-12-71 shall not be required to inquire into or audit the actions of the executor  
23 or executors of the testator's estate or to make any claim against the executor or  
24 executors unless specifically directed to do so by the settlor or settlors in the trust  
25 instrument. In the event that the trustee or trustees are authorized or directed by the settlor  
26 or settlors in the trust instrument to pay or advance any part or all of the trust property to  
27 the executor or executors of the testator's estate for the payment of debts, taxes, and  
28 expenses of administration of the testator's estate, the trustee or trustees shall not be  
29 liable for the application of the trust property so paid or advanced and shall not be liable  
30 for any act done or omitted to be done by the executor or executors with regard to the  
31 trust property.

1

2 **§ 53-12-53 Effect on prior and subsequent wills**

3 This Part shall apply to all devises or bequests made in the will of a testator dying on or  
4 after May 31, 1968, whether the will is executed before or after such date. This Part shall  
5 not invalidate a devise or bequest to a trustee made by a will executed prior to May 31,  
6 1968, by a testator dying prior to such date.

7

8

9 **Part 2: Trusts as Beneficiaries**

10 **§ 53-12-54 Trusts as beneficiaries**

11 A trust under a testator's will may be designated as the beneficiary of the testator's  
12 qualified retirement plan, individual retirement account (IRA), other retirement plan, or  
13 life insurance policies on the life of the testator so long as the testator's will is admitted to  
14 probate in solemn form, whether the designation occurs before or after the execution of  
15 the will. Unless the beneficiary designation provides otherwise, the designation of a trust  
16 under a will as beneficiary shall not be treated as the designation of the testator's estate as  
17 beneficiary nor shall such property, once delivered to the trustee under the testator's will,  
18 be deemed to be part of the testator's estate.

19

COMMENT

20 This section is new. This section clarifies that the designation of a trust under a testator's  
21 will as beneficiary of retirement plans or life insurance policies is not deemed to be a  
22 designation of the testator's estate as the beneficiary of such proceeds.

23

24

**Article 7: Implied Trusts**

25 **§ 53-12-60 Resulting trusts**

26 A resulting trust is a trust implied for the benefit of the settlor or the settlor's successors  
27 in interest when it is determined that the settlor did not intend that the holder of the legal  
28 title to the trust property also should have the beneficial interest in the property, under  
29 any of the following circumstances:

30

(1) A trust is created but fails, in whole or in part, for any reason;

31

(2) A trust is fully performed without exhausting all the trust property; or

1 (3) A purchase money resulting trust as defined in subsection (a) of Code Section 53-12-  
2 92 is established.

3 

Comment

4 Carries forward 53-12-91. *Reference provisions on survival of common law and equity*  
5 *in Comment*

6

7 **§ 53-12-61 Purchase money resulting trusts**

8 (a) A purchase money resulting trust is a resulting trust implied for the benefit of the  
9 person paying consideration for the transfer to another person of legal title to real or  
10 personal property.

11 (b) Except as provided in subsection (c) of this Code section, such payment of  
12 consideration shall create a presumption in favor of a resulting trust, but this presumption  
13 is rebuttable by a preponderance of the evidence.

14 (c) If the payor of consideration and transferee of the property are husband and wife,  
15 parent and child, or siblings, a gift shall be presumed, but this presumption is rebuttable  
16 by clear and convincing evidence.

17 

Comment

18 Carries forward 53-12-92.

19

20 **§ 53-12-62 Constructive trusts**

21 (a) A constructive trust is a trust implied whenever the circumstances are such that the  
22 person holding legal title to property, either from fraud or otherwise, cannot enjoy the  
23 beneficial interest in the property without violating some established principle of equity.

24 (b) The person claiming the beneficial interest in the property may be found to have  
25 waived the right to a constructive trust by subsequent ratification or long acquiescence.

26 

Comment

27 Carries forward 53-12-93

28

29 **§ 53-12-63 Parol evidence**

1 In all cases in which a trust is sought to be implied, the court may hear parol evidence of  
2 the nature of the transaction, the circumstances, and the conduct of the parties, either to  
3 imply or rebut the trust.

4 Comment

5 Carries forward 53-12-94.

6

7

8

9

**Article 8: Creation by Deed to Acquire Beneficial Interest**

10 **§ 53-12-70. Definitions**

11 As used in this article, the term:

12 (1) "Deed" means and includes any written agreement, declaration of trust, or other  
13 instrument which creates a trust estate in the trustee or trustees named therein and sets  
14 forth the terms and conditions of the trust and which indicates an intention, either  
15 expressly or by implication, that the trust estate created therein should be subject to this  
16 article, but the term shall not include a warranty deed, quitclaim deed, bill of sale, or  
17 other instrument that conveys title to property to a trustee, merely by virtue of such fact  
18 alone.

19 (2) "Estate" means any alienable interest in property, legal or equitable, freehold or  
20 nonfreehold, possessory or nonpossessory.

21 (3) "Property" means and includes improved or unimproved property, real or personal,  
22 leaseholds, mortgages, notes, or other obligations secured by property or any interest  
23 therein, or other interests in such property.

24

COMMENT

25 This Article carries forward the provisions of OCGA Secs. 53-12-50 through 53-12-59  
26 (Article 3 of Title 53).

27

28

29 **§ 53-12-71. Deeds to interests in property**

30 The owners of property located in this state or persons desiring to acquire beneficial  
31 ownership of such property may create by deed an estate therein and in the improvements

1 made thereon and in the property to be acquired, for the benefit of themselves and such  
2 other persons, whether sui juris or not, who may contribute to the improvement or  
3 development or acquisition of the property and their assigns or transferees, provided that  
4 the deed creating the estate shall provide for the improvement or development of the  
5 property covered thereby or for the acquisition of the property and the trustee or trustees  
6 therein named and their successors shall have some active duty to perform in and about  
7 the trust property or the management or control of the same. The deed creating the estate  
8 shall be recorded as provided in Code section 53-12-72.. When such an estate is created,  
9 the legal title to the property and all the property added thereto or substituted therefor  
10 shall vest and remain in the trustee or trustees named and his or their successors, in  
11 accordance with the terms of the deed, with all the powers conferred thereby upon the  
12 trustee, and shall not during the continuance of the estate pass to or vest in the  
13 beneficiaries. At the end of 25 years from the date of the deed creating the estate, the title  
14 to such of the property as may then belong to the estate shall vest in the beneficiaries;  
15 and, if the deed creating the estate so provides, a renewal of the estate may be made at the  
16 end of the 25 years, upon the terms and conditions and in the manner therein set forth, for  
17 a like period; provided, however, that in the alternative to the period of 25 years and the  
18 renewal thereof, if the deed so provides, the estate may be created for any period of time  
19 specified therein which does not extend beyond any number of lives in being and 21  
20 years thereafter.

21  
22

23 **§ 53-12-72. Filing of deeds and amendments thereto, and filing a copy with**  
24 **Secretary of State**

25 (a) The deed creating a trust estate as provided in Code section 53-12-71 shall, within 30  
26 days of the execution thereof, be filed by the trustee in the office of the clerk of the  
27 superior court of the county in which the principal office of the trust is located. The  
28 trustee shall concurrently pay to the clerk the fee prescribed in Code Section 15-6-77.  
29 Upon the deed being filed with the clerk and the fees being paid, the clerk shall forthwith  
30 deliver to the trustee or his attorney two certified copies of the deed, the filing of the clerk  
31 thereon, and a receipt for the costs which have been paid to the clerk.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31

(b) Upon receiving the two certified copies of the deed, the trustee or his attorney shall present the same to the Secretary of State and shall concurrently therewith pay \$ 5.00 to the Secretary of State for the use of the state. The Secretary of State shall thereupon attach to one of the certified copies of the deed a certificate in substantially the following form:

STATE OF GEORGIA  
OFFICE OF THE SECRETARY OF STATE

This is to certify that a copy of the attached certified copy of a deed, declaration, or agreement of trust dated \_\_\_\_\_, by and between \_\_\_\_\_ as grantor(s) and \_\_\_\_\_ as trustee(s), which states that the trustee(s) may use the name of \_\_\_\_\_, has been duly filed in the office of the Secretary of State and the fees paid therefor, as provided by law.

WITNESS my hand and official seal this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
Secretary of State

(c) The certified copy of the deed, together with the certificate of the Secretary of State thereon, shall be received as evidence in any court or proceeding as evidence of the existence of the trust and of its nature, terms, and conditions.

(d) The Secretary of State, at any time, upon the request of any person, shall make and certify additional copies of the deed, filing of the clerk, and certificate of the Secretary of State, upon payment to him of a fee of \$ 1.00, plus 10¢ per 100 words for copying, and the additional certified copies shall be likewise admitted in evidence with like force and effect.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30

(e) Any amendment of a deed shall be filed with the clerk of the superior court and the Secretary of State in the same manner and under the same conditions required in the filing of the original deed, and the fees payable upon the filing shall be computed as if the filing were of an original deed.

**§ 53-12-73. Name of trust**

If the deed creating a trust estate under Code Section 53-12-71 so provides, the trustee or trustees may conduct and transact the affairs of the trust estate under a business or trade name, which name shall be set forth in the deed. The name may include the word "trust" but may not include the words "trust company."

**§ 53-12-74. Certificates of beneficial interest by trustees**

When an estate is created pursuant to Code Section 53-12-71 and from time to time thereafter, the trustee or trustees shall issue such certificates of beneficial interest as may be provided for by the deed to the persons who are beneficially interested in the estate or who become so interested therein in accordance with the provisions of the deed. The certificates shall pass and be transferred as personalty and in the same manner as shares of stock in corporations and shall be subject to levy and sale under attachment or execution or any other process in like manner as shares of stock. The trustee or person in charge of the estate representing the trustee shall be subject to the same demand as that provided by Code Sections 11-8-112 and 9-13-58 for the levying officer to make upon the officers of a corporation. Persons having claims against the estate may enforce the same by action against the trustee or trustees thereof in like manner as actions against corporations, and service thereof may be perfected by serving the trustee or trustees, if residents of this state, and if not, then by publication. The venue of such actions shall be the same as that of similar actions against private corporations, but neither the trustees nor the beneficiaries of the estate shall be personally or individually liable therefor except in cases where officers and stockholders of private corporations would be liable under the

1 law.

2

3

4 **§ 53-12-75. Duties and powers of trustees resignation or removal; successor trustees**

5 The trustee or trustees of a trust created under Code Section 53-12-57 shall have sole and  
6 exclusive management and control of the property, in accordance with the terms of the  
7 deed creating the estate. The exercise by the trustee or trustees of any power granted or  
8 conferred by the deed, including the power to lease, encumber, and sell, when exercised  
9 in accordance with the terms thereof, shall be as valid and effective to all intents and  
10 purposes as if the trustee or trustees were the sole and exclusive owners of the property in  
11 his or their own right. The trustee or trustees may resign or be removed and their  
12 successors may be appointed in the manner and in accordance with the terms fixed by the  
13 deed creating the estate. The same rights, powers, and title over and to the property shall  
14 belong to and be vested in the new trustee or trustees as are conferred upon the original  
15 trustee or trustees by the deed creating the estate. The death of a trustee shall not operate  
16 to cast title upon his heirs, devisees, executors, or administrators, but the same shall vest  
17 in his successor, when appointed.

18

19

20 **§ 53-12-76. Investments by trustees**

21 In addition to investments in any property, as such word is defined in Code Section 53-  
22 12-70, the trustee or trustees of a trust created under Code Section 53-12-71 may invest  
23 any funds of the trust estate in investments authorized to be made by trustees under the  
24 laws of this state; provided, however, that the deed creating the estate may further limit or  
25 expand the powers and authority of the trustee or trustees with respect to investments,  
26 including the power to invest in property located outside this state. The trustee or trustees  
27 are authorized and empowered, in accordance with the terms of the deed creating the  
28 estate, from corpus or from income or from both, to repurchase or redeem any issued and  
29 outstanding certificates of beneficial interest.

30

31 **§ 53-12-77. Returns by trust**

1 Each trust created pursuant to this article shall make a return to the Secretary of State,  
2 upon the creation of the trust and annually thereafter, in the same manner and embracing  
3 the same information, insofar as applicable, as returns by corporations which are required  
4 to be made under Articles 1 and 16 of Chapter 2 of Title 14, including the provisions with  
5 regard to fees, penalty for noncompliance, and recording and certifying of copies of the  
6 returns.

7

8

9 **§ 53-12-78. How title vests on termination of estate**

10 Upon the termination of the estate created under Code Section 53-12-71, the legal title to  
11 all the property belonging to the estate which is then undisposed of shall pass to and vest  
12 in the persons who are, at that time, the beneficiaries of the estate, in shares  
13 corresponding with their respective interest as beneficiaries.

14

15 **§ 53-12-79. Merger of trust into a domestic corporation**

16 (a) Any trust created pursuant to this article may be merged into a domestic corporation  
17 for profit organized under the laws of this state and subject to Title 14 if the deed creating  
18 the trust expressly authorizes the merger.

19

20

21 (b) With respect to the required procedure for the merger and the rights of dissenting  
22 shareholders:

23 (1) The trust shall comply with any applicable provisions of the deed creating the trust  
24 and with the following Code sections, as if the trust were a domestic corporation:

25 (A) Subsection (b) of Code Section 14-2-1103, relating to director approval of a plan of  
26 merger, as if the trustee or trustees of the trust were a board of directors of a domestic  
27 corporation;

28 (B) Subsections (c) through (i) of Code Section 14-2-1103, relating to shareholder  
29 approval, and Code Sections 14-2-1301 through 14-2-1332, relating to rights of  
30 dissenting shareholders, as if the holders of certificates of beneficial interest in the trust  
31 were shareholders of a domestic corporation; and

1 (C) Code Sections 14-2-1105 and 14-2-1105.1, relating to execution of articles of merger  
2 and filing of the articles, together with other required documents, with the Secretary of  
3 State; and

4 (2) The domestic corporation into which the trust is merged shall comply with the  
5 provisions of Title 14 relating to the merger of domestic corporations, in the same  
6 manner as if the trust being merged into it were a domestic corporation.

7

8 (c) Upon compliance with the requirements of this Code section and the filing of articles  
9 of merger providing for a merger of the trust into a domestic corporation in the manner  
10 provided in Code Sections 14-2-1105 and 14-2-1105.1, the Secretary of State shall treat  
11 the merger as if it were a merger of corporations under Code Sections 14-2-1105 and 14-  
12 2-1105.1.

13

14

15 (d) If the Secretary of State issues a certificate of merger, the merger shall become  
16 effective as of the time of delivery to the Secretary of State of the articles of merger so  
17 certified, as provided in Code Section 14-2-1105, or at such later time and date as the  
18 articles specify, not to exceed 60 days from the date of delivery of the articles to the  
19 Secretary of State. When the merger has become effective:

20 (1) The trust and the domestic corporation into which the trust is merged shall be a single  
21 domestic corporation;

22 (2) The separate existence of the trust shall cease;

23 (3) The domestic corporation shall continue to have all the rights, privileges, immunities,  
24 and powers and shall be subject to all the duties and liabilities of a corporation organized  
25 under Title 14;

26 (4) The domestic corporation shall thereupon and thereafter possess all the rights,  
27 privileges, immunities, and franchises, of a public as well as of a private nature, of the  
28 trust; and all property, real, personal, and mixed, all debts due on whatever account,  
29 including subscriptions to shares, all other choses in action, and all and every other  
30 interest of or belonging to or due to the trust shall be taken and deemed to be transferred  
31 to and vested in the domestic corporation without further act or deed; and the title to any

1 real property or any interest therein vested in the trust shall not revert or be in any way  
2 impaired by reason of the merger;

3 (5) The domestic corporation shall thenceforth be responsible and liable for all the  
4 liabilities and obligations of the trust. Any claim existing or action or proceeding pending  
5 by or against the trust may be prosecuted as if the merger had not taken place, or the  
6 domestic corporation may be substituted in its place. Neither the rights of creditors nor  
7 any liens upon the property of the trust shall be impaired by the merger; and

8 (6) The articles of incorporation of the domestic corporation shall be deemed to be  
9 amended to the extent, if any, that changes in its articles of incorporation are stated in the  
10 plan of merger.

11  
12  
13  
14  
15  
16  
17

**CHAPTER 13: CHARITABLE TRUSTS**

**Article 1: General Provisions**

**53-13-1 Definition; Charitable Purposes**

**53-13-2: Power to select purposes or beneficiaries**

**53-13-3 Cy pres**

**53-13-4 Duration of charitable trusts**

**Sec. 53-13-5 Attorney General**

**Article 2: Private Foundations**

**Part 1: Corporations**

**53-13-10. Automatic amendment of articles of incorporation of corporate private foundation**

**53-13-11. Amendment of articles of incorporation to exclude application of §53-13-10**

**53-13-12. Effect of Code Sections 53-13-10 and 53-13-11 as to forfeiture or reversion of corporate property**

**53-13-13. Election by Private Foundation to Distribute Such Property as will Enable Corporation to avoid Tax Liability**

**53-13-14 Effect of Code Sections 53-13-10 through 53-13-13 on Powers of the Court and Attorney General**

**Part 2 Trusts**

**53-13-15 Automatic Amendment of Governing Instrument of Private Foundation Trust, Charitable Trust, or Split-Interest Trust**

**53-13-16 Automatic Amendment of Governing Instrument of Private Foundation Trust or Charitable Trust as to Distribution of Trust Funds**

**53-13-17 Amendment of Governing Instrument of Private Foundation Trust, Charitable Trust, or Split-Interest Trust to Exclude Application of Code Sections 53-13-15 and 53-13-16.**

**53-13-18. Election by trustees of private foundation or charitable trust to distribute such trust principal as will enable trust to avoid tax liability; filing of written election with Attorney General; form of distribution; revocation of election**

1 **53-13-19. Effect of Code Sections 53-13-15 through 53-13-18 as to forfeiture or**  
2 **reversion of trust property or failure of trust**

3 **53-13-20 Effect of Code Sections 53-13-15 through 53-13-18 on Powers of Courts**  
4 **and Attorney General**

5  
6 **CHAPTER 13**

7 **CHARITABLE TRUSTS**

8  
9 **Article 1: General Provisions**  
10

11 **53-13-1 Definition; Charitable Purposes**

12 a) A charitable trust is one in which the settlor provides that the trust property shall be  
13 used for charitable purposes.

14  
15 b) Charitable purposes include the following:

16 (1) The relief of poverty;

17 (2) The advancement of education;

18 (3) The advancement of ethics and religion;

19 (4) The advancement of health;

20 (5) The advancement of science and the arts and humanities;

21 (6) The protection and preservation of the environment;

22 (7) The improvement, maintenance, or repair of cemeteries, other places of  
23 disposition of human remains, and memorials;

24 (8) The prevention of cruelty to animals;

25 (9) Governmental purposes; and

26 (10) Other similar subjects having for their object the relief of human suffering or  
27 the promotion of human civilization;

28  
29 c) If the settlor provides for both charitable and noncharitable purposes, the provisions  
30 relating to the charitable purposes shall be governed by this article.

31  
32 COMMENT

1 Subsection (a): Former 53-12-111, first sentence.

2

3 Subsection (b): Former 53-12-110. The expansion of the list of proper subject of charity  
4 was not intended to change in the law but rather to make the law more descriptive of the  
5 proper subject of charity in Georgia.

6 Subsection 7 was interpreted expansively by the Supreme Court of the United States in  
7 Jones v. Habersham, 170 US 174 (1883). The new language in this section is meant to be  
8 inclusive and to include but not be limited to cemeteries, mausoleums, graves, gravesites,  
9 columbariums, and memorials.

10 Subsection (c): Former 53-12-11, second sentence

11

12 **53-13-2: Power to select purposes or beneficiaries**

13 The settlor of a charitable trust may retain the power to select the charitable  
14 purposes or charitable beneficiaries, or may grant the trustee or any other person  
15 the power to select charitable purposes or charitable beneficiaries or to engage in  
16 the charitable purposes, without rendering the trust void for indefiniteness.

17 Comment

18 53-12-111. *Same as original language, except “direct” to “grant..the power” in line 2*

19

20 **53-13-3 Cy pres**

21 If a charitable trust or gift cannot be executed in the manner provided by the settlor or  
22 donor, the superior court shall exercise equitable powers in such a way as will as nearly  
23 as possible effectuate the intention of the settlor or donor.

24 Comment

25 Replaces 53-12-113

26

27 **53-13-4 Duration of charitable trusts**

28 A charitable trust is valid even though under the trust provisions it is to continue for an  
29 indefinite or unlimited period.

30 Comment

31 53-12-114

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30

**Sec. 53-13-5 Attorney General**

In all cases in which the rights of beneficiaries under a charitable trust are involved, the Attorney General or the district attorney of the circuit in which the major portion of trust res lies shall represent the interests of the beneficiaries and the interests of this state as parens patriae in all legal matters pertaining to the administration and disposition of such trust. The Attorney General or the district attorney may bring or defend actions and, insofar as an action of this nature may be deemed an action against the state, the state expressly gives its consent thereto. The venue of such actions may be in any county in the state in which a substantial number of persons who are the beneficiaries of the trust reside. Process shall be directed to the Attorney General or to the district attorney of the circuit in which the major portion of the trust res lies. Service may be perfected by mailing a copy of the petition and process by the clerk of the superior court of the county in which it is filed to the Attorney General or to the district attorney of the circuit in which the major portion of the trust res lies. Any judgment determining rights under any charitable trusts shall be binding on the beneficiaries if the Attorney General or the district attorney of the circuit in which the major portion of the trust res lies is a party and is served as provided in this Code section.

Comment

Former 53-12-115.  
Warren v. Board of Regents, 247 Ga, App, 758 (2001): Attorney General is not the exclusive entity authorized to bring suit to enforce a charitable trust. But those seeking to enforce must demonstrate a “special interest.” See also, Harris v. Brown, 124 Ga. 310 (1905).  
Cross-reference OCGA 53-12-116(I).

**Article 2: Private Foundations**  
**Part 1: Corporations**

1 **53-13-10. Automatic amendment of articles of incorporation of corporate private**  
2 **foundation**

3 Notwithstanding any provision therein to the contrary and except as provided in Code  
4 Section 53-13-11, the articles of incorporation of any corporation which is a private  
5 foundation, as defined in Section 509 of the Internal Revenue Code, shall be amended  
6 automatically as of the later of the date of incorporation or January 1, 1972, to provide  
7 that the corporation shall:

8 (1) Not engage in any act of self-dealing, as defined in Section 4941(d) of the Internal  
9 Revenue Code, which would give rise to any liability for the tax imposed by Section  
10 4941 of the Internal Revenue Code;

11 (2) Not retain any excess business holdings, as defined in Section 4943(c) of the Internal  
12 Revenue Code, which would give rise to any liability for the tax imposed by Section  
13 4943 of the Internal Revenue Code;

14 (3) Not make any investments which would jeopardize the carrying out of any of the  
15 exempt purposes of the corporation, within the meaning of Section 4944 of the Internal  
16 Revenue Code, so as to give rise to any liability for the tax imposed by Section 4944 of  
17 the Internal Revenue Code;

18 (4) Not make any taxable expenditures, as defined in Section 4945(d) of the Internal  
19 Revenue Code, which would give rise to any liability for the tax imposed by Section  
20 4945 of the Internal Revenue Code; and

21 (5) Distribute for the purpose specified in its articles of incorporation for each taxable  
22 year amounts at least sufficient to avoid any liability for the tax imposed by Section 4942  
23 of the Internal Revenue Code.

24 COMMENT: Former OCGA Sec. 53-12-120

25

26 **53-13-11. Amendment of articles of incorporation to exclude application of §53-13-**  
27 **10**

28 Any corporation which is a private foundation, as defined in Section 509 of the Internal  
29 Revenue Code, may amend its articles of incorporation expressly to exclude the  
30 application of Code Section 53-13-10 or any portion thereof in the manner provided by

1 Article 10 of Chapter 2 of Title 14 or Article 8 of Chapter 3 of Title 14, whichever is  
2 applicable.

3 COMMENT: Former OCGA Sec. 53-12-121

4

5

6

7 **53-13-12. Effect of Code Sections 53-13-10 and 53-13-11 as to forfeiture or reversion**  
8 **of corporate property**

9 Nothing contained in Code Sections 53-13-10 and 53-13-11 shall cause or be construed  
10 to cause a forfeiture or reversion of any of the property of a corporation which is subject  
11 to such Code sections.

12 COMMENT: Former OCGA Sec. 53-12-122. Changed “trust” to “corporation”  
13 and deleted final clause: “ or to make the purposes of the trust impossible of  
14 accomplishment.”

15

16

17 **53-13-13. Election by Private Foundation to Distribute Such Property as will**  
18 **Enable Corporation to avoid Tax Liability**

19 With respect to property held by a corporation which is a private foundation, as defined  
20 in Section 509 of the Internal Revenue Code, and which is subject to conditions which  
21 permit distributions to the extent of the net income of the property each year but do not  
22 permit distributions of the property or any part thereof itself, the directors of the  
23 corporation may elect to distribute so much of the property as may be necessary to enable  
24 the corporation to avoid liability for any tax imposed by Section 4942 of the Internal  
25 Revenue Code in the same manner as if the corporation were a trust described in Code  
26 Section 53-13-18 and the property were the only property held in the trust and as if the  
27 directors were the trustees of the trust.

28 COMMENT: Former 53-12-130

29

30 **53-13-14 Effect of Code Sections 53-13-10 through 53-13-13 on Powers of the Court**  
31 **and Attorney General**

1 Nothing in Code Sections 53-13-10 through 53-13-13 shall impair the rights and powers  
2 of the courts or the Attorney General of this state with respect to any corporation.

3 COMMENT: Combines former 53-12-122 and 53-12-132 as it relates to  
4 corporations.

5

6

7

## **Part 2 Trusts**

### **8 53-13-15 Automatic Amendment of Governing Instrument of Private Foundation 9 Trust, Charitable Trust, or Split-Interest Trust**

10 Notwithstanding any provision therein to the contrary and except as provided in Code  
11 Section 53-13-17, the governing instrument of any trust which is a private foundation, as  
12 defined in Section 509 of the Internal Revenue Code, a charitable trust, as defined in  
13 Section 4947(a)(1) of the Internal Revenue Code, or a split-interest trust, as defined in  
14 Section 4947(a)(2) of the Internal Revenue Code, shall be amended automatically as of  
15 the later of the inception of the trust or January 1, 1972, to include provisions which  
16 prohibit the trustees of the trust from:

17 (1) Engaging in any act of self-dealing, as defined in Section 4941(d) of the  
18 Internal Revenue Code, which would give rise to any liability for the tax imposed  
19 by Section 4941 of the Internal Revenue Code;

20 (2) Retaining any excess business holdings, as defined in Section 4943(c) of the  
21 Internal Revenue Code, which would give rise to any liability for the tax imposed  
22 by Section 4943 of the Internal Revenue Code;

23 (3) Making any investments which would jeopardize the carrying out of any of  
24 the exempt purposes of the trust, within the meaning of Section 4944 of the  
25 Internal Revenue Code, so as to give rise to any liability for the tax imposed by  
26 Section 4944 of the Internal Revenue Code; and

27 (4) Making any taxable expenditures, as defined in Section 4945(d) of the Internal  
28 Revenue Code, which would give rise to any liability for the tax imposed by  
29 Section 4945 of the Internal Revenue Code.

1 However, in the case of a split-interest trust, as defined in Section 4947(a)(2) of the  
2 Internal Revenue Code, paragraphs (1) through (4) of this Code section shall apply only  
3 to the extent required by Section 4947 of the Internal Revenue Code.

4 COMMENT: Former 53-12-124

5

6

7

8

9 **53-13-16 Automatic Amendment of Governing Instrument of Private Foundation**  
10 **Trust or Charitable Trust as to Distribution of Trust Funds**

11 Notwithstanding any provision therein to the contrary and except as provided in Code  
12 Section 53-13-17, the governing instrument of any trust which is a private foundation, as  
13 defined in Section 509 of the Internal Revenue Code, or which is a charitable trust, as  
14 defined in Section 4947(a)(1) of the Internal Revenue Code, shall be amended  
15 automatically as of the later of the inception of the trust or January 1, 1972, to include a  
16 provision which requires the trustees to distribute, for the purposes specified in the  
17 governing instrument, for each taxable year, amounts at least sufficient to avoid any  
18 liability for the tax imposed by Section 4942 of the Internal Revenue Code.

19 COMMENT: Former 53-12-125

20

21 **53-13-17 Amendment of Governing Instrument of Private Foundation Trust,**  
22 **Charitable Trust, or Split-Interest Trust to Exclude Application of Code Sections**  
23 **53-13-15 and 53-13-16.**

24 The trustees of any trust which is a private foundation, as defined in Section 509 of the  
25 Internal Revenue Code, a charitable trust, as defined in Section 4947(a)(1) of the Internal  
26 Revenue Code, or a split-interest trust, as defined in Section 4947(a)(2) of the Internal  
27 Revenue Code, may, without judicial proceedings, amend the governing instrument of the  
28 trust expressly to exclude the application of Code Sections 53-13-15, 53-13-16, or both,  
29 by executing a written amendment to the trust and filing a duplicate original of the  
30 amendment with the Attorney General of this state, whereupon the Code section or Code  
31 sections, as the case may be, shall not apply to the trust.

COMMENT: Former 53-12-126

**53-13-18. Election by trustees of private foundation or charitable trust to distribute such trust principal as will enable trust to avoid tax liability; filing of written election with Attorney General; form of distribution; revocation of election**

(a) With respect to any trust which is a private foundation, as defined in Section 509 of the Internal Revenue Code, or a charitable trust, as defined in Section 4947(a)(1) of the Internal Revenue Code, the governing instrument of which permits distributions to the extent of the net income of the trust each year but does not permit distributions from trust principal, the trustees of the trust may elect, without judicial proceedings and notwithstanding any provision to the contrary contained in the governing instrument of the trust, to distribute in any year, for the purposes specified in the governing instrument, that amount from the principal of the trust which, when added to the income of the trust available for distribution during such year, will enable the trust to avoid any liability for the tax imposed by Section 4942 of the Internal Revenue Code, by filing a written election, which may be a continuing one, with the Attorney General of this state to have this Code section and Code Section 53-13-13 apply to the trust. A distribution from trust principal pursuant to the election shall only be in the form of cash or securities which are either listed or admitted to unlisted trading privileges upon any stock exchange or are quoted regularly in any newspaper or newspapers having a general circulation in this state.

(b) Any election made under subsection (a) of this Code section may be revoked at any time by filing written notice of revocation with the Attorney General of this state.

COMMENT: Former Code Section 53-12-129

**53-13-19. Effect of Code Sections 53-13-15 through 53-13-18 as to forfeiture or reversion of trust property or failure of trust**

Nothing contained in Code Sections 53-13-15 through 53-13-19 shall cause or be construed to cause a forfeiture or reversion of any of the property of a trust which is

1 subject to such Code sections or to make the purposes of the trust impossible of  
2 accomplishment.

3 COMMENT: Combines former 53-12-127 and 53-12-132. Former 53-12-131 is  
4 eliminated as unnecessary.

5

6 **53-13-20 Effect of Code Sections 53-13-15 through 53-13-18 on Powers of Courts**  
7 **and Attorney General**

8 Nothing in Code Sections 53-13-15 through 53-13-19 shall impair the rights and powers  
9 of the courts or the Attorney General of this state with respect to any trust.

10 COMMENT: Combines former 53-12-128 & 53-12-133. Deleted reference in  
11 former 53-12-133 to corporations.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31

**CHAPTER 14 TRUSTEES**

**ARTICLE 1: Trustees Generally**

**Part 1: Appointment and Acceptance**

- 53-14-1 Capacity of Trustee**
- 53-14-2 Appointment and vacancies**
- 53-14-3 Acceptance**
- 53-14-4 Trustee’s bond**
- 53-14-5 Cotrustees generally**

**Part 2: Compensation**

- 53-14-6 Compensation of trustee**
- 53-14-7 Compensation of cotrustees and successor trustees**
- 53-14-8 Extra compensation**
- 53-14-9 Reimbursement of expenses.**
- 53-14-10 Compensation from business enterprise**

**Part 3: Resignation and Removal**

- 53-14-12 Resignation of Trustee**
- 53-14-12 Removal of trustee**

**ARTICLE 2 Interim Accounting and Final Accounting**

- 53-14-20 Interim Accounting**
- 53-14-21 Final Accounting**
- 53-14-22 Equitable accounting**

**ARTICLE 3: Trustees’ Duties and Powers; Certification of Trusts; Registration  
and Deposit of Securities**

**Part 1: Duties of Trustee**

- 53-14-31 Duties generally**
- 53-14-31 Duty of prudent administration**
- 53-14-32 Duty to inform as to existence of trust**

1 **53-14-33 Duty to provide reports and accounts**

2 **53-14-34 Duty to distribute income**

3 **53-14-35 No duty to investigate resources**

4 **53-14-36 Duty to avoid conflict of interest**

5 **53-14-37 Duty of impartiality**

6

7

**Part 2 Trustees' Powers**

8 **53-14-39 Discretionary powers**

9 **[53-14-39 Reserved]**

10 **53-14-40 Powers of trustees; additional powers that may be incorporated**

11 **53-14-41 Powers of corporate fiduciaries**

12 **53-14-42 Incorporation of powers by reference**

13 **53-14-43 Granting of powers by qualified beneficiaries**

14

15 **Part 3 Trustee who is also beneficiary**

16 **53-14-44 Exercise of power by trustee who is also beneficiary**

17

18 **Part 4 Certification of Trusts**

19 **53-14-46 Certification of trust by trustee**

20

21 **Part 5 Registration and Deposit of Securities**

22

23 **§ 53-14-46 How securities to be registered by corporate fiduciary**

24 **§ 53-14-47 Registration where two or more fiduciaries are acting jointly**

25 **§ 53-14-48 Deposit of securities in clearing corporation**

26

27 **ARTICLE 4 Trustee Liability**

28 **§ 53-14-50 Accountable to beneficiary; breach of trust**

29 **§ 53-14-51 Actions for breach of trust**

30 **§ 53-14-52 Damages for breach of trust; interest**

31 **§ 53-14-53 Relief of trustee liability**

32 **§ 53-14-54 Liability of successor trustee**

1 § 53-14-55 Liability of cotrustee

2 § 53-4-56 Action against cotrustee

3 § 53-14-57 Limitation of actions

4 § 53-14-58 Personal liability of trustee

5

6 **ARTICLE 5 Foreign Entities and Non-Residents Acting as Trustees**

7 **53-14-60 Definitions**

8 **53-14-61 Nonresidenta acting as trustees**

9 **53-14-62 Foreign entities acting as trustees**

10 **53-14-63 Acting as fiduciary not transacting business within state; establishment of**  
11 **place of business prohibited**

12 **53-14-65 Filing Statement with Secretary of State; Appointment of Agent for**  
13 **Service**

14

15

**CHAPTER 14: TRUSTEES**

**Article 1: Trustees Generally**

**Part 1: Appointment and Acceptance**

**53-14-1 Capacity of Trustee**

A trustee must have legal capacity under Georgia law to acquire, hold, and transfer title to property. An individual is eligible to serve as a trustee regardless of citizenship or residency. If the trustee is a corporation, partnership or other entity, it must have the power to act as a trustee in Georgia.

**Comment: (former 53-12-24)** The terms “partnership or other entity” are added. The Comment to this section will cross-reference OCGA Sec. 7-1-242 and Parts 2 & 3 of Article 16 of 53-12 (foreign corporations). The second sentence is new statutory language that reflects existing law. See Munford v. MacLellan, 1988, 258 Ga. 679, 373 S.E.2d 368. The Comment will note that subsections (b) and (c) of former OCGA Sec. 53-12-24 have been replaced with the following new statute (Non-Merger of Trusts.)

**53-14-2 Appointment and vacancies**

(a) The settlor may appoint trustees, or grant that power to others, including trust beneficiaries.

(b) A trust shall never fail for want of a trustee.

(c) If the trust instrument names a person to fill a vacancy or provides a method of appointing a trustee, any vacancy shall be filled or appointment made as provided in the trust instrument.

(d) In all other cases, the court, on petition of an interested person, may appoint any number of trustees consistent with the intention of the settlor and the interests of the beneficiaries.

1 (e) The petition provided for in subsection (d) of this Code section shall be served upon  
2 all qualified beneficiaries or their guardians or conservators. The court shall appoint a  
3 guardian ad litem for each non-sui juris beneficiary who has no guardian or conservator  
4 and service of notice of the petition shall be made on such guardian ad litem.

5  
6 (f) A trustee appointed as a successor trustee shall have all the authority of the original  
7 trustee.

8 **COMMENT:**

9 Former 53-12-170. Subsection (b) is modified to add provisions from UTC  
10 704(a). Subsection (d) carries forward former 53-23-6. {The Comment will  
11 indicate that subsection e is intended to allow the court to appoint more or fewer  
12 than the original number of trustees)

13 The term “qualified beneficiary” is defined in OCGA 53-12-2.  
14

15 **53-14-3 Acceptance**

16 (a) The acceptance of a trust is necessary to constitute a person as trustee. Acceptance  
17 may be effected by acts as well as words. After acceptance, the trustee may not decline  
18 the trusteeship.

19  
20 (b) Except as otherwise provided in subsection (c), a person designated as trustee accepts  
21 the trusteeship:

22 (1) by substantially complying with a method of acceptance provided in the  
23 trust instrument; or

24 (2) if the trust instrument does not provide a method or the method provided  
25 in the trust instrument is not expressly made exclusive, by accepting delivery of the trust  
26 property, exercising powers or performing duties as trustee, or otherwise indicating  
27 acceptance of the trusteeship.

28  
29 (c) A person designated as trustee, without accepting the trusteeship, may act to preserve  
30 the trust property if, as soon as practicable, the person rejects or declines the trusteeship.

1           **Comment:** Subsection (a) carries over former OCGA Sec. 53-12-171.  
2 Subsections (b) and (c) are from UTC Sec. 701.

3

4 **53-14-4 Trustee's bond**

5 (a) A trustee is not required to give a bond to secure performance of the trustee's duties  
6 unless:

7           (1) The trust instrument requires a bond; or

8           (2) A bond is found by the court to be necessary to protect the interests of  
9 beneficiaries or creditors of the trust, even though the trust instrument waives the  
10 requirement of a bond.

11

12 (b) Even though a bond has been required pursuant to subsection (a) of this Code section  
13 or the trust instrument requires a bond, the court may excuse the requirement, reduce or  
14 increase the amount of a bond, release a surety, or permit the substitution of another bond  
15 with the same or different sureties.

16

17 (c) The cost of the bond shall be charged against the trust.

18

19 d) If a bond is required, the bond shall be:

20           1) Secured by an individual who is a domiciliary of this state or by a licensed  
21 commercial surety authorized to transact business in this state;

22           2) Payable to the court for the benefit of interested persons as their interests may  
23 appear;

24           3) Conditioned upon the faithful discharge of the trustee's duties; and

25           4) If imposed by the court, in an amount and with sureties and liabilities as  
26 required by the court.

27

28 (e) Any other law to the contrary:

29           1) a financial institution, trust company, national or state bank, savings bank, or  
30 savings and loan association described in Code Section 7-1-242 that seeks to serve as a  
31 trustee under any trust created under or governed by the laws of this state is not required

1 to give bond for the faithful performance of its duties unless its combined capital, surplus,  
2 and undivided profits are less than \$3 million as reflected in its last statement filed with  
3 the Comptroller of the Currency of the United States or the commissioner of banking and  
4 finance;

5 2) in every case in which the trustee of any trust is required to give bond for the  
6 faithful performance of the trustee's duties in such fiduciary capacity, the bond shall be in  
7 a value equal to double the value of the trust estate; provided, however, that the trustee  
8 may give bond in an amount equal to the value of the trust estate if the bond is secured by  
9 a licensed commercial surety authorized to transact business in this state. For purposes  
10 of this paragraph (e)(2), the term "trust estate" shall exclude real property and  
11 improvements thereon held by the trustee in a fiduciary capacity; provided that upon the  
12 conversion of any such real property into personalty, the trustee shall give a new bond  
13 including the value of the personalty into which the real property has been converted.

14  
15  
16 (f) The trustee and any surety shall be held and deemed joint and several obligors and  
17 may be subjected jointly and severally to liability in the same action. No prior judgment  
18 establishing the liability of the trustee shall be necessary before an action is brought  
19 against the sureties on the bond.

20  
21 (g) When a judgment has been obtained against the principal and surety or sureties on  
22 the bond of a trustee, a levy may be made upon any property of any defendant in fi. fa.

23  
24 (h) A court of competent jurisdiction shall be authorized to enter a judgment and to issue  
25 a writ of execution against the principal and surety or sureties on the bond of a trustee  
26 and shall be further authorized to grant judgment and execution in favor of the surety or  
27 sureties against the principal upon payment of the judgment by the surety or sureties.

28  
29 (i) Failure to comply with this Code section shall not make void or voidable or otherwise  
30 affect an act or transaction of a trustee with any third party.

31 COMMENT

1 Replaces 53-12-174  
2 (Subsection (f) is modeled after 29-5-46 and 53-7-16)  
3 (Subsections (g) and (h) are modeled after 53-7-22)

4  
5  
6

7 **53-14-5 Cotrustees generally**

8 The authority of cotrustees to act on behalf of the trust shall be as follows:

9

10 (1) A power vested in two or more trustees may only be exercised by their unanimous  
11 action, provided, however, that a cotrustee may delegate to one or more other cotrustees  
12 the performance of ministerial acts;

13

14 (2) If a vacancy occurs in the office of a cotrustee, the remaining cotrustee or cotrustees  
15 may act unless or until the vacancy is filled; and

16

17 (3) While a cotrustee is unable to act because of inaccessibility, illness, or other  
18 temporary incapacity, the remaining cotrustee or cotrustees may act as if they were the  
19 only trustees when necessary to accomplish the purposes of the trust.

20

**Comment**

21 Former 53-12-172. For cotrustees' compensation, see 53-14-7\_. For cotrustees' liability  
22 see 53-14-55.

23

24

**Part 2: Compensation**

25 **53-14-6 Compensation of trustee**

26 (a) Trustees shall be compensated in accordance with either the trust instrument or any  
27 separate written agreement between the trustee and the settlor. After the settlor's death or  
28 incapacity or while the trust is irrevocable, the trust instrument or the agreement relating  
29 to the trustee's compensation may be modified as follows:

30

(1) If all the qualified beneficiaries are sui juris, or if some of the qualified

31

beneficiaries are not sui juris but all of them have a guardian or conservator, the

1 trustee and the sui juris qualified beneficiaries and the guardians or conservators  
2 of non-sui juris qualified beneficiaries may by unanimous consent modify the  
3 trust instrument or agreement relating to the trustee's compensation without  
4 receiving the approval of any court;

5

6 (2) If one or more of the non-sui juris qualified beneficiaries has no guardian or  
7 conservator, and all of the other qualified beneficiaries, including the guardians or  
8 conservators of non-sui juris qualified beneficiaries, and the trustee are in  
9 agreement, any sui juris qualified beneficiary or the guardian or conservator of a  
10 non-sui juris beneficiary or the trustee shall petition the court to approve a  
11 modification of the trust instrument or agreement relating to the trustee's  
12 compensation. The court shall appoint a guardian ad litem for each non-sui juris  
13 beneficiary who does not have a guardian or conservator and service of notice of  
14 the petition for modification of the trustee's compensation shall be made on each  
15 such guardian ad litem. The court shall hold a hearing and shall either allow or  
16 deny the modification that is requested in the petition.

17

18 (b) If there is no provision for trustee compensation in the trust instrument and there is  
19 no separate written agreement between the trustee and the settlor relating to the trustee's  
20 compensation, a separate written agreement relating to the trustee's compensation may be  
21 entered into between the trustee and the qualified beneficiaries as follows:

22 (1) If all the qualified beneficiaries are sui juris or if some of the qualified  
23 beneficiaries are not sui juris but the all of them have a guardian or conservator,  
24 the trustee and the qualified beneficiaries and the guardians or conservators of  
25 non-sui juris beneficiaries may by unanimous consent enter into an agreement  
26 relating to the trustee's compensation without receiving the approval of any court;

27

28 (2) If one or more of the non-sui juris qualified beneficiaries has no guardian or  
29 conservator, and all of the sui juris qualified beneficiaries including the guardians  
30 or conservators of non-sui juris qualified beneficiaries, and the trustee are in  
31 agreement, any sui juris qualified beneficiary or the guardian or conservator of a

1 non-sui juris beneficiary or the trustee shall petition the court to approve an  
2 agreement relating to the trustee's compensation. The court shall appoint a  
3 guardian ad litem for each non-sui juris beneficiary who does not have a guardian  
4 or conservator and service of notice of the petition for approval of the agreement  
5 shall be made on such guardians ad litem.. The court shall hold a hearing and  
6 shall either allow or deny the agreement that is requested in the petition.

7

8 (c) In all other cases, the trustee shall be entitled to compensation as follows:

9 (1) one percent (1%) of cash and the fair market value of any other principal asset  
10 received upon the initial funding of the trust and at such time as additional principal  
11 assets are received; and

12

13 (2) an annual fee equal to one percent (1%) of cash and the market value of the  
14 other principal assets valued as of the last day of the trust accounting year prorated based  
15 on the length of service by the trustee during that year.

16

17 COMMENT

18 Replaces 53-12-173. This provision cannot be varied by the trust instrument. See  
19 Section 53-12-3.

20 Comment will clarify that no compensation shall be received for property that is  
21 received by a successor trustee

22 "Qualified beneficiary" is defined in 53-12-2

23 [Transition rule: The compensation provided in this subsection shall be effective for the  
24 first trust accounting year beginning after the effective date of this Act.]

25

26

27 **53-14-7 Compensation of cotrustees and successor trustees**

28 Unless any separate written agreement provides otherwise:

29 (a) Compensation among cotrustees shall be apportioned as they shall agree or  
30 according to the services rendered by each;

1 (b) The annual fee paid pursuant to subsection (c)(2) of Code Section 53-14-6  
2 shall be apportioned among trustees and successor trustees according to the  
3 proportion of time each rendered services during the year.

4 COMMENT

5 Replaces 53-12-173. Initial funding fee is not apportioned among successive trustees  
6 This is OCGA Sec. 53-12-173(c).

7  
8 **53-14-8 Extra compensation**

9 (a) A trustee who is receiving compensation as described in subsection (c) of Code  
10 Section 53-14-6 may petition the court for compensation that is greater than the  
11 compensation allowed under that subsection. Service of notice of the petition for extra  
12 compensation shall be made on all qualified beneficiaries or their guardians or  
13 conservators. The court shall appoint a guardian ad litem for each non-sui juris qualified  
14 beneficiary who does not have a guardian or conservator and service of notice of the  
15 petition for modification of the trustee's compensation shall be made on each such  
16 guardian ad litem.

17  
18 (b) After hearing any objection, the court shall allow such extra compensation as the  
19 court deems reasonable. The allowance of extra compensation shall be conclusive as to  
20 all parties in interest.

21 COMMENT

22 New. Changed because former Code referred to the Guardianship Code, which would  
23 have put jurisdiction for this matter in the probate court.

24 Qualified beneficiaries is defined in 53-12-2.

25  
26 **53-14-9 Reimbursement of expenses.**

27 A trustee is entitled to be reimbursed out of the trust property for reasonable  
28 expenses that were properly incurred in the administration of the trust.

29 Comment

30 New. (This is modeled after the first subsection of UTC Sec. 709.)

31

1 **53-14-10 Compensation from business enterprise**

2 (a) Any trustee may receive compensation for services, as specified in this subsection,  
3 from a corporation or other business enterprise, where the trust estate owns an interest in  
4 the corporation or other business enterprise, provided that:

5 (1) The services provided by the trustee to the corporation or other business  
6 enterprise are of a managerial, executive, or business advisory nature;

7 (2) The compensation received for the services is reasonable; and

8 (3) The services are performed and the trustee is paid pursuant to a contract  
9 executed by the trustee and the corporation or business enterprise, which contract is  
10 approved by a majority of those members of the board of directors or other similar  
11 governing authority of the corporation or business enterprise who are not officers or  
12 employees of the trustee and are not related to the trustee and provided, further, the  
13 contract is approved by the court.

14

15 (b) Any trustee receiving compensation from a corporation or other business enterprise  
16 for services to it as described in subsection (a) of this Code section shall not receive extra  
17 compensation in respect to such services as provided in Code Section 53-14-8; provided,  
18 however, that nothing in this Code section shall prohibit the receipt by the trustee of extra  
19 compensation for services rendered in respect to other assets or matters involving the  
20 trust estate.

21

22 (c) Nothing in this Code section shall prohibit the receipt by trustees of normal  
23 commissions and compensation for the usual services performed by trustees pursuant to  
24 law or pursuant to any fee agreement executed by the settlor.

25

26 (d) The purpose of this Code section is to enable additional compensation to be paid to  
27 trustees for business management and advisory services to corporations and business  
28 enterprises pursuant to contract, without the necessity of petitioning for extra  
29 compensation pursuant to Code Section 53-14-7.

30

Comment

31 Former 53-12-173.1.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31

**Part 3: Resignation and Removal**

**53-14-11 Resignation of Trustee**

- (a) A trustee may resign:
  - (1) In the manner and under the circumstances described in the trust instrument;
  - (2) Upon petition to the court showing that all of the qualified beneficiaries are sui juris or that of the non-sui juris qualified beneficiaries have guardians or conservators and that all the qualified beneficiaries or their guardians or conservators have agreed in writing to the resignation;
  - (3) If all the sui juris qualified beneficiaries and their guardians or conservators are not in agreement, or if one or more of the qualified beneficiaries is not sui juris and has no guardian or conservator, upon petition to the court showing to the satisfaction of the court that:
    - (A) The trustee is unable to continue serving as trustee due to age, illness, infirmity, or similar reason;
    - (B) Greater burdens have devolved upon the office of trustee than those which were originally contemplated or should have been contemplated when the trust was accepted and the assumption of the additional burdens would work a hardship upon the trustee;
    - (C) Disagreement exists between one or more of the beneficiaries of the trust and the trustee in respect to the trustee’s management of the trust, which disagreement and conflict appear detrimental to the best interests of the trust;
    - (D) The resignation of the trustee will result in or permit substantial financial benefit to the trust;
    - (E) The resigning trustee is one of two or more acting trustees and the cotrustee or cotrustees will continue in office with no detriment to the trust contemplated; or
    - (F) The resignation would not be disadvantageous to the trust.
- (b) The petition to the court provided for in paragraph (3) of subsection (a) of this Code

1 section shall be served upon all qualified beneficiaries or their guardians or conservators.  
2 The court shall appoint a guardian ad litem for each non-juris beneficiary who does not  
3 have a guardian or conservator and service of notice of the petition for resignation shall  
4 be made on each such guardian ad litem.

5

6 (c) The resignation of a trustee shall not relieve the trustee from liability for any actions  
7 prior to the resignation except to the extent the trustee is relieved by the court in the  
8 appropriate proceeding, or to the extent relieved by the trust instrument.

9

10 (d) If the resignation would create a vacancy required to be filled, then the resignation  
11 shall not be effective until the successor accepts the trust.

12

13 COMMENT

14 53-12-175

15 Qualified beneficiary is defined in 53-12-2.

16

17 **53-14-12 Removal of trustee**

18 (a) A trustee may be removed:

19

(1) In accordance with the provisions of the trust instrument; or

20

(2) Upon petition to the court by any interested person showing good cause.

21

22 (b) In the discretion of the court, in order to protect the trust property or the interests of  
23 any beneficiary, on its own motion or on motion of a cotrustee or other interested person,  
24 the court may compel the trustee whose removal is being sought to surrender trust  
25 property to a cotrustee or to a receiver or temporary trustee pending a decision on a  
26 petition for removal of a trustee or pending appellate review of such decision. To the  
27 extent the court deems necessary, the powers of the trustee also may be suspended.

28

COMMENT

29 From former 53-12-176. Include the factors from the UTC (as amended) to a Comment  
30 and some selected factors from the Restatement. (3d) Sec. 37: Comment will say that  
31 these grounds are illustrative but not exhaustive

1 FACTORS from UTC 706 (with committee modification):

2 The court may remove a trustee if:

- 3 (1) the trustee has committed a ~~serious~~ breach of trust;
- 4 (2) lack of cooperation among cotrustees substantially impairs the  
5 administration of the trust;
- 6 (3) because of unfitness, unwillingness, or persistent failure of the  
7 trustee to administer the trust effectively, the court determines that  
8 removal of the trustee best serves the interests of the beneficiaries;
- 9 or
- 10 (4) there has been a substantial change of circumstances or  
11 removal is requested by all of the qualified beneficiaries, the court  
12 finds that removal of the trustee best serves the interests of all of  
13 the beneficiaries and is not inconsistent with a material purpose of  
14 the trust, and a suitable cotrustee or successor trustee is available

15

16 FACTORS from Restatement 3d Sec. 37:

17 lack of capacity to administer the trust; want of skill; refusal or inability to  
18 give bond, if bond is required; repeated or flagrant failure or delay in  
19 providing proper information or accountings to beneficiaries; unwarranted  
20 preference to the interests of one or more beneficiaries

21

22 **ARTICLE 2 Interim Accounting and Final Accounting**

23 **53-14-20 Interim Accounting**

24 (a) At any time following 12 months from the date of acceptance of a trust, but not more  
25 frequently than once every 12 months, a trustee may petition the court to approve an  
26 interim accounting, relieving the trustee from liability for the period covered by the  
27 interim accounting.

28

29 (b) The petition shall set forth:

30

1 (1) The name and address of the trustee;

2 (2) Any provisions of the trust relating to matters that will be covered by the  
3 interim accounting;

4 (3) The beneficiaries of the trust, specifying any beneficiary believed to be in  
5 need of a guardian ad litem;

6 (4) The period which the accounting covers;

7 (5) A statement of receipts and disbursements of the trust that have occurred  
8 since the trustee's acceptance of the trust or since the effective date of the last  
9 accounting;

10 (6) In a separate schedule, the principal on hand at the beginning of the  
11 accounting period and the status at that time of its investment; the investments received  
12 from the settlor and still held; additions to principal during the accounting period, with  
13 dates and sources of acquisition; investments collected, sold, or charged off during the  
14 accounting period, with the consequent loss or gain and whether credited to principal or  
15 income; investments made during the accounting period, with the date, source, and cost  
16 of each; deductions from the principal during the accounting period, with the date and  
17 purpose of each; and principal on hand at the end of the accounting period, how invested,  
18 and the estimated market value of each investment;

19 (7) In a separate schedule, the income on hand at the beginning of the accounting  
20 period and in what form held; income received during the accounting period, when, and  
21 from what source; income paid out during the accounting period, when, to whom, and for  
22 what purpose; and income on hand at the end of the accounting period and how invested;

23 (8) A statement of the assets and liabilities of the trust as of the end of the  
24 accounting period; and

25 (9) Other information reasonably necessary to explain or understand the  
26 accounting.

27

28 c) The petition shall be served as provided by law on the beneficiaries of the trust and the  
29 surety on the trustee's bond, if any.

30

1 d) Upon review of the petition and after considering any objections thereto and any  
2 evidence presented, the court may approve the trustee's interim accounting or enter  
3 judgment granting appropriate relief. If no objection to the petition is filed within the  
4 time allowed by law after service, or if the parties consent, the petition may be approved  
5 without notice, hearing, or further proceedings. The final judgment of the court shall be  
6 binding on all parties.

7  
8 e) Costs and expenses, including reasonable attorney's fees of the trustee, shall be taxed  
9 against the trust, unless otherwise directed by the court.

10  
11 **COMMENT**

12 Modeled after 53-7-73 and 53-12-190(b). For purposes of this Code section, the term  
13 "beneficiary" means any beneficiary, whether vested or contingent, born or unborn,  
14 ascertained or unascertained. See Code section 53-14-33 on the trustee's duty to account  
15 to qualified beneficiaries of an irrevocable trust.

16  
17  
18 **53-14-21 Final Accounting**

19 a) If the trustee resigns, is removed, or dies, or upon the termination of the trust, a  
20 beneficiary or the successor trustee may petition the court to require the trustee or the  
21 trustee's personal representative to appear before the court for a final accounting.  
22 Alternatively, the trustee or the trustee's personal representative may petition the court to  
23 approve a final accounting relieving the trustee from liability for the period covered by  
24 the final accounting. The settlement period shall begin from the acceptance of the  
25 trusteeship by the trustee or the end of the period covered by the last interim accounting.

26 b) The petition shall set forth:

27 (1) The name and address of the trustee;

28 (2) The beneficiaries of the trust, specifying any beneficiary believed to be in  
29 need of a guardian ad litem;

1           (3) The period which the accounting covers; and

2

3           (4) If the petition is filed by the trustee or the trustee's personal representative,  
4 the petition shall also include the information required to be filed by trustees in  
5 conjunction with the approval of an interim accounting as set forth in Code Section 53-  
6 14-20(b).

7

8 c) The petition shall be served as provided by law on the beneficiaries, the trustee, the  
9 trustee's personal representative, if any, and the surety on the trustee's bond, if any.

10

11 d) Upon review of the trustee's final accounting and after considering any objections  
12 thereto and any evidence presented, the court may approve the final accounting or enter  
13 judgment granting appropriate relief. If no objection to the petition is filed within the  
14 time allowed by law after service, or if the parties consent, the petition may be approved  
15 without notice, hearing, or further proceedings. The final judgment of the court shall be  
16 binding on all parties.

17

18 e) Costs and expenses, including reasonable attorney's fees of the trustee, shall be taxed  
19 against the trust, unless otherwise directed by the court.

20

21 **COMMENT**

22 Modeled after 53-7-73 and 53-12-190(b). For purposes of this Code section, the term  
23 "beneficiary" means any beneficiary, whether vested or contingent, born or unborn,  
24 ascertained or unascertained. See Code section 53-14-33 on the trustee's duty to account  
25 to qualified beneficiaries of an irrevocable trust.

26

27 **53-14-22 Equitable accounting**

28 Nothing in this Article shall restrict the right of any party to seek an equitable accounting.

29

1 **ARTICLE 3: Trustees' Duties and Powers; Certification of Trusts; Registration**  
2 **and Deposit of Securities**  
3 **Part 1: Duties of Trustee**  
4

5 **53-14-30 Duties generally**

6 a) The duties contained in this chapter are in addition to and not in limitation of  
7 the common law duties of the trustee, except to the extent inconsistent therewith.

8 b) Upon acceptance of a trusteeship, the trustee shall administer the trust in good  
9 faith, in accordance with its provisions and purposes.

10  
11 **COMMENT**

12 From 53-12-190(a) Use references to other sources that appear in the  
13 Comment to that Code Section.. Subsection (b): (from UTC 801) .  
14 The provisions of this section cannot be varied by the trust instrument.  
15 See Section 53-12-3.

16  
17 **53-14-31 Duty of prudent administration**

18 In administering a trust, the trustee shall exercise the judgment and care of a prudent  
19 person acting in a like capacity and familiar with such matters, considering the purposes,  
20 provisions, distribution requirements, and other circumstances of the trust.

21 **COMMENT**

22 Section is modeled after UTC 804

23 (From UTC Sec. 805): The trustee in administering the trust may incur costs that are  
24 reasonable in relation to the trust property, the purposes of the trust, and  
25 the skills of the trustee.

26 (From UTC 809): A trustee shall take reasonable steps to take control of and protect the  
27 trust property.

28 (From UTC 810(a) & (b): A trustee shall keep adequate records of the administration of  
29 the trust.

30 A trustee shall keep trust property separate from the trustee's own property.

1 (From UTC 811): A trustee shall take reasonable steps to enforce claims of the trust and  
2 to defend claims against the trust.

3

4 **53-14-32 Duty to inform as to existence of trust**

5 a) Within 60 days after the date of creation of an irrevocable trust or of the date on which  
6 a revocable trust becomes irrevocable, the trustee shall notify the qualified beneficiaries  
7 of the trust of the existence of the trust and the name and mailing address of the trustee.

8 In full satisfaction of this obligation, the trustee may deliver the notice to the guardian or  
9 conservator of any non sui-juris beneficiary.

10

11 b) All irrevocable trusts in existence on the effective date of this Act will be deemed to  
12 have waived this provision unless the trust instrument says otherwise.

13 COMMENT

14 Qualified beneficiary is defined in 53-12-2.

15

16 **53-14-33 Duty to provide reports and accounts**

17 a) On reasonable request by any qualified beneficiary or the guardian or conservator of a  
18 non-sui juris qualified beneficiary, the trustee shall provide the qualified beneficiary with  
19 a report of information, to the extent relevant to that beneficiary's interest, about the  
20 assets, liabilities, receipts, and disbursements of the trust, the acts of the trustee, and the  
21 particulars relating to the administration of the trust, including the trust provisions that  
22 describe or affect that beneficiary's interest.

23

24 b) (1) The trustee shall account at least annually, at the termination of the trust, and  
25 upon a change of trustees, to each qualified beneficiary of an irrevocable trust to whom  
26 income is required or authorized in the trustee's discretion to be distributed currently, and  
27 to any person who may revoke the trust. At the termination of the trust, the trustee shall  
28 also account to each remainder beneficiary. Upon a change of trustees, the trustee shall  
29 also account to the successor trustee. In full satisfaction of this obligation, the trustee  
30 may deliver the accounting to the guardian or conservator of any qualified beneficiary  
31 who is non-sui juris.

1 (2) An accounting furnished to a qualified beneficiary pursuant to paragraph (1)  
2 of this subsection shall contain a statement of receipts and disbursements of principal and  
3 income that have occurred during the last complete fiscal year of the trust or since the last  
4 accounting to that beneficiary and a statement of the assets and liabilities of the trust as of  
5 the end of the accounting period;

6  
7 d)) The trustee is not required to report information or account to a qualified beneficiary  
8 who has waived in writing the right to a report or accounting and has not withdrawn that  
9 waiver;

10  
11 e) Nothing in this Code section shall affect the power of a court to require or excuse an  
12 accounting.

13  
14 COMMENT: from OCGA Sec. 53-12-190(b). See Sections 53-12-20 & 53-12-21 on  
15 petitions for interim and final accountings.

16  
17 **53-14-34 Duty to distribute income**

18 The trustee shall distribute all net income derived from the trust at least annually.

19  
20 COMMENT: (from OCGA Sec. 53-12-190(c))

21  
22  
23 **53-14-35 No duty to investigate resources**

24 A trustee is under no duty to investigate the resources of any beneficiary when  
25 determining whether to distribute trust property to that beneficiary.

26 COMMENT: new

27  
28 **53-14-36 Duty to avoid conflict of interest**

29 a) A trustee shall administer the trust solely in the interests of the beneficiaries.

30 .  
31 (b) This section does not preclude the following transactions, if fair to the beneficiaries:

1 (1) An agreement between a trustee and a beneficiary relating to the appointment  
2 or compensation of the trustee;

3 (2) Payment of reasonable compensation to the trustee;

4 (3) Performing and receiving reasonable compensation for performing services of  
5 a managerial, executive, or business advisory nature for a corporation or other business  
6 enterprise, where the trust estate owns an interest in the corporation or other business  
7 enterprise,

8 COMMENT: (This is taken from OCGA Sec. 53-12-173.1)

9

10

11

12 **53-14-37 Duty of impartiality**

13 Except to the extent that the governing instrument clearly manifests an intention that the  
14 trustee shall or may favor one or more of the beneficiaries, a trustee shall administer a  
15 trust impartially based on what is fair and reasonable to all of the beneficiaries and with  
16 due regard to the respective interests of income beneficiaries and remainder beneficiaries.

17

18 COMMENT: (Formerly OCGA Sec. 53-12-221(b)). The language in the  
19 last clause is from OCGA Sec. 53-12-211 as it existed prior to the 2005  
20 amendment.

21

22

**Part 2 Trustees' Powers**

23 **53-14-38 Discretionary powers**

24 Notwithstanding the breadth of discretion granted to a trustee in the trust instrument,  
25 including the use of such terms as "absolute", "sole", or "uncontrolled", the trustee shall  
26 exercise a discretionary power in good faith.

27

COMMENT

28 Modeled after UTC Sec. 814(a). The provisions of this section cannot be varied  
29 by the trust instrument. See Section 53-12-3.

30

31 **53-14-39 Reserved**

1 **53-14-40 Powers of trustees; additional powers that may be incorporated**

2 a) As used in this Code section, the term “fiduciary” means the one or more personal  
3 representatives of the estate of a decedent or the one or more trustees of a  
4 testamentary or inter vivos trust, whichever in a particular case is appropriate.

5  
6 b) A trustee of an express trust, without court authorization, is authorized:

7 1) To sell, exchange, grant options upon, partition, or otherwise dispose of any  
8 property or interest therein which the fiduciary may hold from time to time, at public or  
9 private sale or otherwise, with or without warranties or representations, upon such terms  
10 and conditions, including credit, and for such consideration as the fiduciary shall deem  
11 advisable, and to transfer and convey the property or interest therein which is at the  
12 disposal of the fiduciary, in fee simple absolute or otherwise, free of all trust; the party  
13 dealing with the fiduciary shall not be under a duty to follow the proceeds or other  
14 consideration received;

15  
16 2) To invest and reinvest in any property which the fiduciary shall deem  
17 advisable, including but not limited to: common or preferred stocks, bonds, debentures,  
18 notes, mortgages, or other securities, in or outside the United States; insurance contracts  
19 on the life of any beneficiary or of any person in whom a beneficiary has an insurable  
20 interest or in annuity contracts for any beneficiary; in any real or personal property;  
21 investment trusts, including the securities of or other interests in any open-end or closed-  
22 end management investment company or investment trust registered under the Investment  
23 Company Act of 1940, as from time to time amended; and participations in common trust  
24 funds;

25  
26 3) To the extent and upon such terms and conditions and for such periods of time  
27 as the fiduciary shall deem necessary or advisable, to continue or participate in the  
28 operation of any business or other enterprise, whatever its form or organization,  
29 including, but not limited to, the power:

30 (A) To effect incorporation, dissolution, or other change in the form of the  
31 organization of the business or enterprise;

1 (B) To dispose of any interest therein or acquire the interest of others  
2 therein;

3 (C) To contribute or invest additional capital thereto or to lend money  
4 thereto in any such case upon such terms and conditions as the fiduciary  
5 shall approve from time to time; and

6 (D) To determine whether the liabilities incurred in the conduct of the  
7 business are to be chargeable solely to the part of the trust set aside for use  
8 in the business or to the trust as a whole.

9 In all cases in which the fiduciary is required to file accounts in any court or in  
10 any other public office, it shall not be necessary to itemize receipts,  
11 disbursements, and distributions of property; but it shall be sufficient for the  
12 fiduciary to show in the account a single figure or consolidation of figures, and  
13 the fiduciary shall be permitted to account for money and property received from  
14 the business and any payments made to the business in lump sum without  
15 itemization;

16  
17 4) To form a corporation or other entity and to transfer, assign, and convey to the  
18 corporation or entity all or any part of the trust property in exchange for the stock,  
19 securities, obligations of or other interests in any such corporation or entity, and to  
20 continue to hold the stock, securities, obligations, and interests;

21  
22 5) To continue any farming operation and to do any and all things deemed  
23 advisable by the fiduciary in the management and maintenance of the farm and the  
24 production and marketing of crops and dairy, poultry, livestock, orchard, and forest  
25 products, including, but not limited to, the following powers:

26 (A) To operate the farm with hired labor, tenants, or sharecroppers;

27 (B) To lease or rent the farm for cash or for a share of the crops;

28 (C) To purchase or otherwise acquire farm machinery, equipment, and  
29 livestock;

1 (D) To construct, repair, and improve farm buildings of all kinds needed,  
2 in the fiduciary's judgment, for the operation of the farm;

3 (E) To make or obtain loans or advances at the prevailing rate or rates of  
4 interest for farm purposes, such as for production, harvesting, or  
5 marketing; or for the construction, repair, or improvement of farm  
6 buildings; or for the purchase of farm machinery, equipment, or livestock;

7 (F) To employ approved soil conservation practices, in order to conserve,  
8 improve, and maintain the fertility and productivity of the soil;

9 (G) To protect, manage, and improve the timber and forest on the farm  
10 and to sell the timber and forest products when it is to the best interest of  
11 the trust;

12 (H) To ditch, dam, and drain damp or wet fields and areas of the farm  
13 when and where needed;

14 (I) To engage in the production of livestock, poultry, or dairy products and  
15 to construct such fences and buildings and to plant pastures and crops as  
16 may be necessary to carry on such operations;

17 (J) To market the products of the farm; and

18 (K) In general, to employ good husbandry in the farming operation;

19

20 6) To manage real property:

21 (A) To improve, manage, protect, and subdivide any real property;

22 (B) To dedicate, or withdraw from dedication, parks, streets, highways, or  
23 alleys;

24 (C) To terminate any subdivision or part thereof;

25 (D) To borrow money for the purposes authorized by this paragraph for  
26 the periods of time and upon the terms and conditions as to rates,  
27 maturities, and renewals as the fiduciary shall deem advisable and to  
28 mortgage or otherwise encumber the property or part thereof, whether in  
29 possession or reversion;

1 (E) To lease the property or part thereof, the lease to commence at the  
2 present or in the future, upon the terms and conditions, including options  
3 to renew or purchase, and for the period or periods of time as the fiduciary  
4 deems advisable even though the period or periods may extend beyond the  
5 duration of the trust;

6 (F) To make gravel, sand, oil, gas, and other mineral leases, contracts,  
7 licenses, conveyances, or grants of every nature and kind which are lawful  
8 in the jurisdiction in which the property lies;

9 (G) To manage and improve timber and forests on the property, to sell the  
10 timber and forest products, and to make grants, leases, and contracts with  
11 respect thereto;

12 (H) To modify, renew, or extend leases;

13 (I) To employ agents to rent and collect rents;

14 (J) To create easements and to release, convey, or assign any right, title, or  
15 interest with respect to any easement on the property or part thereof;

16 (K) To erect, repair, or renovate any building or other improvement on the  
17 property and to remove or demolish any building or other improvement in  
18 whole or in part; and

19 (L) To deal with the property and every part thereof in all other ways and  
20 for such other purposes or considerations as it would be lawful for any  
21 person owning the same to deal with the property either in the same or in  
22 different ways from those specified elsewhere in this paragraph;

23  
24 7) To lease personal property of the trust or part thereof, the lease to commence  
25 at the present or in the future, upon the terms and conditions, including options to renew  
26 or purchase, and for the period or periods of time as the fiduciary deems advisable even  
27 though the period or periods may extend beyond the duration of the trust;

28

1           8)     (a) To pay debts, taxes, assessments, compensation of the fiduciary and  
2                     other expenses incurred in the collection, care, administration, and  
3                     protection of the trust.

4  
5                     (b) To pay from the trust all charges that the fiduciary deems necessary or  
6                     appropriate to comply with laws regulating environmental conditions and  
7                     to remedy or ameliorate any such conditions which the fiduciary  
8                     determines adversely affect the trust or otherwise are liabilities of the trust  
9                     and to apportion all such charges among the several bequests and trusts  
10                    and the interests of the beneficiaries in such manner as the fiduciary deems  
11                    fair, prudent, and equitable under the circumstances.

12  
13           9)     To receive additional property from any source and to administer the  
14                    additional property as a portion of the appropriate trust under the management of the  
15                    fiduciary, provided that the fiduciary shall not be required to receive the property without  
16                    the fiduciary's consent;

17  
18           10)    In dealing with one or more fiduciaries of the estate or any trust created by  
19                    the decedent or the settlor or any spouse or child of the decedent or settlor and  
20                    irrespective of whether the fiduciary is a personal representative or trustee of such other  
21                    estate or trust:

22                    (A) To sell real or personal property of the estate or trust to such fiduciary  
23                    or to exchange such property with such fiduciary upon such terms and  
24                    conditions as to sale price, terms of payment, and security as shall seem  
25                    advisable to the fiduciary; and the fiduciary shall be under no duty to  
26                    follow the proceeds of any such sale; and

27                    (B) To borrow money from the estate or trust for such periods of time and  
28                    upon such terms and conditions as to rates, maturities, renewals, and  
29                    securities as the fiduciary shall deem advisable for the purpose of paying  
30                    debts of the decedent or settlor, taxes, the costs of the administration of the  
31                    estate or trust, and like charges against the estate or trust or any part

1                   thereof or of discharging any other liabilities of the estate or trust and to  
2                   mortgage, pledge, or otherwise encumber such portion of the estate or  
3                   trust as may be required to secure the loan or loans and to renew the loans;  
4

5                   (11) To borrow money for such periods of time and upon such terms and  
6                   conditions as to rates, maturities, renewals, and security as the fiduciary shall deem  
7                   advisable for the purpose of paying debts, taxes, or other charges against the trust or any  
8                   part thereof, and to mortgage, pledge, or otherwise encumber such portion of the trust as  
9                   may be required to secure the loan or loans; and to renew existing loans either as maker  
10                  or endorser;

11  
12                  (12) To make loans or advances for the benefit or the protection of the trust;

13  
14                  (13) To vote shares of stock or other ownership interests owned by the trust, in  
15                  person or by proxy, with or without power of substitution;

16  
17                  (14) To hold a security in the name of a nominee or in other form without  
18                  disclosure of the fiduciary relationship, so that title to the security may pass by delivery;  
19                  but the fiduciary shall be liable for any act of the nominee in connection with the security  
20                  so held;

21  
22                  (15) To exercise all options, rights, and privileges to convert stocks, bonds,  
23                  debentures, notes, mortgages, or other property into other stocks, bonds, debentures,  
24                  notes, mortgages, or other property; to subscribe for other or additional stocks, bonds,  
25                  debentures, notes, mortgages, or other property; and to hold the stocks, bonds,  
26                  debentures, notes, mortgages, or other property so acquired as investments of the trust so  
27                  long as the fiduciary shall deem advisable;

28  
29                  (16) To unite with other owners of property similar to any which may be held at  
30                  any time in the trust, in carrying out any plan for the consolidation or merger, dissolution

1 or liquidation, foreclosure, lease, or sale of the property or the incorporation or  
2 reincorporation, reorganization or readjustment of the capital or financial structure of any  
3 corporation, company, or association the securities of which may form any portion of an  
4 estate or trust; to become and serve as a member of a shareholders' or bondholders'  
5 protective committee; to deposit securities in accordance with any plan agreed upon; to  
6 pay any assessments, expenses, or sums of money that may be required for the protection  
7 or furtherance of the interest of the beneficiaries of any trust with reference to any such  
8 plan; and to receive as investments of the trust any securities issued as a result of the  
9 execution of such plan;

10  
11 17) To adjust the interest rate from time to time on any obligation, whether  
12 secured or unsecured, constituting a part of the trust;

13  
14 18) To continue any obligation, whether secured or unsecured, upon and after  
15 maturity, with or without renewal or extension, upon such terms as the fiduciary shall  
16 deem advisable, without regard to the value of the security, if any, at the time of the  
17 continuance;

18  
19 19) To foreclose, as an incident to the collection of any bond, note, or other  
20 obligation, any deed to secure debt or any mortgage, deed of trust, or other lien securing  
21 the bond, note, or other obligation and to bid in the property at the foreclosure sale or to  
22 acquire the property by deed from the mortgagor or obligor without foreclosure; and to  
23 retain the property so bid in or taken over without foreclosure;

24  
25 20) To carry such insurance coverage as the fiduciary shall deem advisable;

26  
27 21) To collect, receive, and issue receipts for rents, issues, profits, and income  
28 of the trust;

29  
30 22) a) To compromise, adjust, mediate, arbitrate, or otherwise deal with and  
31 settle claims involving the trust or the trustee;

1           b) To compromise, adjust, mediate, arbitrate, bring or defend actions on,  
2 abandon, or otherwise deal with and settle claims in favor of or against the trust as the  
3 fiduciary shall deem advisable; the fiduciary's decision shall be conclusive between the  
4 fiduciary and the beneficiaries of the trust and the person against or for whom the claim is  
5 asserted, in the absence of fraud by such persons, and, in the absence of fraud, bad faith,  
6 or gross negligence of the fiduciary, shall be conclusive between the fiduciary and the  
7 beneficiaries of the trust;

8           c) To compromise all debts, the collection of which are doubtful, belonging to the  
9 trust when such settlements will advance the interests of those represented;

10  
11           23) To employ and compensate, out of income or principal or both and in such  
12 proportion as the fiduciary shall deem advisable, persons deemed by the fiduciary needful  
13 to advise or assist in the administration of any trust, including, but not limited to, agents,  
14 accountants, brokers, attorneys at law, attorneys in fact, investment brokers, rental agents,  
15 realtors, appraisers, and tax specialists; and to do so without liability for any neglect,  
16 omission, misconduct, or default of the agent or representative, provided such person was  
17 selected and retained with due care on the part of the fiduciary;

18  
19           24) To acquire, receive, hold, and retain undivided the principal of several trusts  
20 created by a single instrument until division shall become necessary in order to make  
21 distributions; to hold, manage, invest, reinvest, and account for the several shares or parts  
22 of shares by appropriate entries in the fiduciary's books of account and to allocate to each  
23 share or part of share its proportionate part of all receipts and expenses; provided,  
24 however, that this paragraph shall not defer the vesting in possession of any share or part  
25 of share of the trust;

26  
27           25) To set up proper and reasonable reserves for taxes, assessments, insurance  
28 premiums, depreciation, obsolescence, amortization, depletion of mineral or timber  
29 properties, repairs, improvements, and general maintenance of buildings or other property  
30 out of rents, profits, or other income received;

31

1           26) To value assets of the trust and to distribute them in cash or in kind, or partly  
2 in cash and partly in kind, in divided or undivided interests, as the fiduciary finds to be  
3 most practical and in the best interest of the distributees, the fiduciary being able to  
4 distribute types of assets differently among the distributees;

5  
6           27) To transfer money or other property distributable to a beneficiary who is  
7 under age 21, an adult for whom a guardian or conservator has been appointed, or an  
8 adult who the fiduciary reasonably believes is incapacitated by distributing such money  
9 or property directly to the beneficiary or applying it for the beneficiary's benefit, or by:

10           A) distributing it to the beneficiary's conservator or, if the beneficiary does not  
11 have a conservator, the beneficiary's guardian;

12           B) distributing it to the beneficiary's custodian under the Georgia Transfers to  
13 Minors Act or similar state law and for that purpose creating a custodianship and  
14 designating a custodian;

15           C) distributing it to the beneficiary's custodial trustee under the Uniform  
16 Custodial Trust Act, and, for that purpose, creating a custodial trust;

17           D) distributing it to any other person, whether or not appointed guardian or  
18 conservator by any court, who shall, in fact, have the care and custody of the  
19 person of the beneficiary;

20 The fiduciary shall not be under any duty to see to the application of the distributions so  
21 made if the fiduciary exercised due care in the selection of the person, including the  
22 beneficiary, to whom the payments were made; and the receipt of the person shall be full  
23 acquittance to the fiduciary.

24  
25           28) To make, modify, and execute contracts and other instruments, under seal or  
26 otherwise, as the fiduciary deems advisable.

27  
28           29) To serve without making and filing inventory and appraisalment, without  
29 filing any annual or other returns or reports to any court, and without giving bond; but, in  
30 addition to any rights the beneficiaries may have under [53-12-190(b)], the fiduciary shall

1 furnish to the income beneficiaries, at least annually, a statement of receipts and  
2 disbursements.

3

4

5

6

COMMENT

7 Replaces 53-12-232. This section is a change in Georgia law because it now grants  
8 automatically to trustees those powers that under the former Code had to be incorporated  
9 by reference into the trust. Section 53-14-42 also allows these powers to be incorporated  
10 by reference in the event that the trust is subject to the laws of a jurisdiction other than  
11 Georgia that does not grant trustees broad automatic powers.

12 Trustees have these automatic powers regardless of when the trust was created.

13 Powers:

14 1) *QUESTION OF WHETHER TRUSTEES CAN GIVE WARRANTIES IS STILL UNDER*  
15 *CONSIDERATION*

16 2) *(Slight modification from current statute)*

17 3) *No change*

18 4) *(Slight change from current statute; added "or other interests in")*

19 5) *(Slight change from current statute; eliminated the requirement that it be received by*  
20 *the fiduciary pursuant to the will or trust)*

21 6) *(No changes from current statute)*

22 *(The committee decided to make the powers in 6(D) & (E) above that relate to real*  
23 *property apply to all trust property. The power to borrow already exists in power # 12.*

24 *This new power applies the power to lease to personal property.)*

25 7) *see above*

26 8) *(No changes from current statute):*

27 9) *(No changes from current statute):*

28 10) *(Added language regarding fiduciary serving in more than one capacity):*

29 11) *(Reference to corporate fiduciary borrowing from its own banking department moved*  
30 *to a separate statute on powers of corporate fiduciaries)*

31 12) *No change*

32 13) *(Slight modification of wording)*

33 14) *(Change "stock" to "security" in last part of sentence)*

- 1 15) *No change*
- 2 16) *slight modification in wording:*
- 3 17) *slight modification in wording:*
- 4 18) *no change*
- 5 19) *added “deed to secure debt”:*
- 6 20) *deleted reference to public liability & types of companies:*
- 7 21) *deleted reference to public liability & types of companies:*
- 8 22) *add mediate; subsection (b) was added to incorporate the provisions that appear at*
- 9 *53-12-263:*
- 10 23) *slight word change; consider whether this should be moved to be a separate section:*
- 11 24) *no change:*
- 12 25) *no change:*
- 13 26) *Revised language*
- 14 27) *revised version of former power #32:*
- 15 28) *Added “modify”:*
- 16 29) *No change*

17

### 18 **53-14-41 Powers of corporate fiduciaries**

19 A corporate fiduciary, without authorization by the court, may exercise the following  
20 powers:

- 21 1) To retain stock or other securities of its own issue received on the creation of the trust  
22 or later contributed to the trust, including the securities into which the securities  
23 originally received or contributed may be converted or which may be derived therefrom  
24 as a result of merger, consolidation, stock dividends, splits, liquidations, and similar  
25 procedures; and the corporate fiduciary may exercise by purchase or otherwise any rights,  
26 warrants, or conversion features attaching to any such securities; and the authority  
27 described in this subsection shall apply to the exchange or conversion of stock or  
28 securities of the corporate fiduciary’s own issue, whether or not any new stock or  
29 securities received in exchange therefor are substantially equivalent to those originally  
30 held; and such authority shall also apply to the continued retention of all new stock and  
31 securities resulting from merger, consolidation, stock dividends, splits, liquidations, and

1 similar procedures and received by virtue of such conversion or exchange of stock or  
2 securities of the corporate fiduciary's own issue, whether or not the new stock or  
3 securities are substantially equivalent to those originally received by the fiduciary. The  
4 foregoing authority shall have reference, inter alia, to the exchange of such stock or  
5 securities for stock or securities of any holding company which owns stock or other  
6 interests in one or more other corporations including the corporate fiduciary, whether the  
7 holding company is newly formed or already existing and whether or not any of the  
8 corporations own assets identical or similar to the assets of or carry on a business  
9 identical or similar to the corporation whose stock or securities were previously received  
10 by the fiduciary and the continued retention of stock or securities, or both, of the holding  
11 company; and such authority shall apply regardless of whether any of the corporations  
12 have officers, directors, employees, agents, or trustees in common with the corporation  
13 whose stock or securities were previously received by the fiduciary.

14

15 2) To borrow money from its own banking department for such periods of time and  
16 upon such terms and conditions as to rates, maturities, renewals, and security as the  
17 fiduciary shall deem advisable for the purpose of paying debts, taxes, or other charges  
18 against the estate or any trust or any part thereof, and to mortgage, pledge, or otherwise  
19 encumber such portion of the estate or any trust as may be required to secure the loan or  
20 loans; and to renew existing loans either as maker or endorser;

21

COMMENT

22 First power: *(From former 53-12-288)*

23 Second power *(From 53-12-232(12))*

24

25 **53-14-42 Incorporation of powers by reference**

26 (a) By an expressed intention of the testator or settlor contained in a will or in an  
27 instrument in writing whereby an express trust is created, any or all of the powers or any  
28 portion thereof enumerated in this Part, as they exist at the time of the signing of the will  
29 by the testator or at the time of the signing by the first settlor who signs the trust  
30 instrument, may be, by appropriate reference made thereto, incorporated in the will or

1 other written instrument with the same effect as though such language were set forth  
2 verbatim in the instrument.

3  
4 (b) At any time after the execution of a revocable trust, the settlor or anyone who is  
5 authorized by the trust instrument to modify the trust may incorporate any or all of the  
6 powers or any portion thereof enumerated in this article, as they exist at the time of the  
7 incorporation.

8  
9 (c ) Incorporation of one or more of the powers contained in this article, by reference to  
10 the appropriate portion of Code Section 53-14-40, shall be in addition to and not in  
11 limitation of the common-law or statutory powers of the fiduciary.

12  
13 (d) (1) A provision in any will or trust instrument which incorporates powers by  
14 citation to Georgia Laws 1973, page 846; Code 1933, Section 108-1204  
15 (Harrison); or Code Section 53-15-3 or Code Section 53-12-232 and which was  
16 valid under the law in existence at the time the will was signed by the testator or  
17 at the time of the signing by the first settlor who signs the trust instrument shall be  
18 effective notwithstanding the subsequent repeal of such statute.

19 (2) A provision in any will or trust instrument which was signed by the testator or  
20 by the first settlor to sign after June 30, 1991, but before July 1, 1992, and which  
21 incorporates powers by citation to Code Section 53-15-3 shall be deemed to mean  
22 and refer to the corresponding powers contained in Code Section 53-12-232.

23  
24 (e) If any or all of the powers contained in this article are incorporated by reference into a  
25 will by a testator:

26 (1) The term “trust” includes the estate held by the personal representative;

27  
28 (2) The terms “trustee” or “fiduciary” include the personal representative; and

29  
30 (3) The term “beneficiaries of the trust” includes distributees of the estate.

31

COMMENT

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29

Subsection (b) is new.  
For trusts, even though the trustee has many of the powers automatically under Georgia law, an incorporation would ensure that these powers are retained should the trust be transferred to and governed by the laws of another state.

This language is modeled after that that appears in current 53-12-232 & 53-12-252.

**53-14-43 Granting of powers by qualified beneficiaries**

The qualified beneficiaries of a trust that omits any of the powers in Code Section 53-14-40 may by unanimous consent authorize but not require the court to grant to the trustee those powers. With respect to any qualified beneficiary who is non-sui juris, such consent may be given by the duly appointed conservator, if any, or if none, by the duly appointed guardian, if any, or if none, by either parent in the case of a minor, or, if none, by a guardian ad litem appointed to represent the non-sui juris qualified beneficiary.

COMMENT

Qualified beneficiary is defined in 53-12-2.

**Part 3 Trustee who is also beneficiary**

**53-14-44 Exercise of power by trustee who is also beneficiary**

(a) Subject to subsection c), and unless the trust provisions expressly indicate that a rule in this subsection does not apply:

(1) a person other than a settlor who is a beneficiary and trustee of a trust that confers on the trustee a power to make discretionary distributions to or for the trustee's personal benefit may exercise the power only in accordance with an ascertainable standard ; and

(2) a trustee may not exercise a power to make discretionary distributions to satisfy a legal obligation of support that the trustee personally owes another person.

1 (b) A power whose exercise is limited or prohibited by subsection (a) may be exercised  
2 by a majority of the remaining trustees whose exercise of the power is not so limited or  
3 prohibited. If the power of all trustees is so limited or prohibited, the court may appoint a  
4 special fiduciary with authority to exercise the power.

5 (c) Subsection (a) does not apply to:

6 (1) a power held by the settlor's spouse who is the trustee of a trust for which a  
7 marital deduction, as defined in Section 2056(b)(5) or 2523(e) of the Internal  
8 Revenue Code of 1986, or subsequent law of similar import, was previously  
9 allowed;

10 (2) any trust during any period that the trust may be revoked or amended by its  
11 settlor; or

12 (3) a trust if contributions to the trust qualify for the annual exclusion under  
13 Section 2503(c) of the Internal Revenue Code of 1986, or subsequent law of  
14 similar import.

15

16 COMMENT

17 Former 53-12-190 is replaced with UTC Sec. 814(b) - (d)

18

19

20

#### **Part 4 Certification of Trusts**

##### **53-14-45 Certification of trust by trustee**

21 (a) The trustee may present a certification of trust to any person other than a beneficiary  
22 in lieu of providing a copy of the trust instrument to establish the existence or the trust  
23 provisions.  
24

25

26 (b) The certification of trust shall contain some or all the following information:

27

(1) that the trust exists and the date of the trust and any amendments;

28

(2) the identity of each settlor;

- 1 (3) the identity and address of each current trustee and, if more than one, the  
2 number and identity of those required to exercise the powers of the trustee;  
3 (4) the relevant powers of the trustee and any restrictions or limitations on those  
4 powers;  
5 (5) the revocability or irrevocability of the trust;  
6 (6) how trust property should be titled;  
7 (7) except as specifically disclosed in the certification, that the transaction at issue  
8 requires no consent or action by any person other than the certifying trustee; and  
9 (8) such other information as the trustee deems appropriate.

10

11 (c) The certification must be signed by each trustee.

12

13 (d) The certification must state that the trust has not been revoked, modified, or amended  
14 in any manner that would cause the representations contained in the certification to be  
15 incorrect.

16

17 (e) The certification need not contain the dispositive provisions of the trust.

18

19 (f) The recipient of a certification may require the trustee to furnish copies of those  
20 excerpts from the original trust instrument and any amendments that designate the trustee  
21 and confer upon the trustee the power to act in the pending transaction.

22

23 (g) A person who acts in reliance upon the certification without knowledge that any  
24 information therein is incorrect is not liable to any person for so acting and may assume  
25 without inquiry that the information is correct.

26 (h) A person who in good faith enters into a transaction in reliance upon the certification  
27 may enforce the transaction as if the information in the certification were correct.

28

29 (i) A person making a demand for the trust instrument in addition to a certification of

1 trust or excerpts is liable for damages, including court costs and attorney's fees, if the  
2 court determines that the demand was not made in good faith.

3  
4 (j) This section does not limit the right of a person to obtain a copy of the trust instrument  
5 in a judicial proceeding concerning the trust.

6  
7 (k) A certification in recordable form may be recorded in the office of the clerk of  
8 superior court.

9  
10 *COMMENT*

11 New. Modeled after and substantially similar to UTC Sec. 1013. Cross-reference to 53-  
12 14-32, which states what information must be furnished to a qualified beneficiary.

13  
14 **Part 5 Registration and Deposit of Securities**

15 **§ 53-14-46 How securities to be registered by corporate fiduciary**

16 Whenever a bank or trust company is duly authorized to act and is acting as a fiduciary,  
17 which term shall include an executor, administrator, trustee, guardian, or conservator and  
18 has a nominee or nominees in whose name securities, including, without limitation,  
19 bonds, stocks, notes, and other evidences of title to intangible personal property, held as a  
20 fiduciary, may be registered, it shall be lawful to register securities in the name of the  
21 nominee or nominees without mention of the fiduciary relationship in the instrument  
22 evidencing the securities or on the books of the issuer of the same, provided that:

23 (1) The records of the corporate fiduciary shall at all times clearly show that the  
24 securities are held by the corporate fiduciary in its capacity as fiduciary, together  
25 with the beneficial owner or owners thereof and all facts relating to its ownership,  
26 possession, and holding thereof; and

27 (2) The corporate fiduciary shall not be relieved of liability for the safe custody,  
28 control, and proper distribution of the securities by reason of the registration of  
29 same in the name of any nominee.

30 *COMMENT*

31 Former 53-12-300

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31

**§ 53-14-47 Registration where two or more fiduciaries are acting jointly**

If two or more fiduciaries are acting jointly in reference to any securities, it shall be lawful to register the property in the name of any nominee or any joint corporate fiduciary; and, in the event that more than one corporate fiduciary is acting, it shall be lawful to register securities in the name of any nominee of any one of the corporate fiduciaries.

COMMENT

Former 53-12-301

**§ 53-14-48 Deposit of securities in clearing corporation**

(a) Any fiduciary holding securities in its fiduciary capacity, any bank or trust company holding securities as a custodian or managing agent, and any bank or trust company holding securities as custodian for a fiduciary is authorized to deposit or arrange for the deposit of the securities in a clearing corporation, as defined in Article 8 of Title 11. When the securities are deposited, certificates representing securities of the same class of the same issuer may be merged and held in bulk, in the name of the nominee of the clearing corporation, with any other such securities deposited in the clearing corporation by any person, regardless of the ownership of the securities, and certificates of small denominations may be merged into one or more certificates of larger denomination. The records of the fiduciary and the records of the bank or trust company acting as custodian, as managing agent, or as custodian for a fiduciary shall at all times show the name of the party for whose account the securities are deposited. Title to the securities may be transferred by bookkeeping entry on the books of the clearing corporation without physical delivery of certificates representing the securities.

(b) A bank or trust company depositing securities pursuant to this Code section shall be subject to such rules and regulations as, in the case of state chartered institutions, the commissioner of banking and finance and, in the case of national banking associations, the comptroller of the currency may from time to time issue.

1 (c) A bank or trust company acting as custodian for a fiduciary, on demand by the  
2 fiduciary, shall certify in writing to the fiduciary the securities deposited by the bank or  
3 trust company in the clearing corporation for the account of the fiduciary. A fiduciary, on  
4 demand by any party to a judicial proceeding for the settlement of the fiduciary's account  
5 or on demand by the attorney for the party, shall certify in writing to the party the  
6 securities deposited by the fiduciary in the clearing corporation for its account as the  
7 fiduciary.

8

9 (d) This Code section shall apply to any fiduciary holding securities in its fiduciary  
10 capacity and to any bank or trust company holding securities as a custodian, managing  
11 agent, or custodian for a fiduciary acting on April 13, 1973, or acting thereafter,  
12 regardless of the date of the agreement, instrument, or court order by which it is  
13 appointed and regardless of whether or not the fiduciary, custodian, managing agent, or  
14 custodian for a fiduciary owns capital stock of the clearing corporation.

15

COMMENT

16 Former 53-12-302

17

18

**ARTICLE 4 Trustee Liability**

19 **§ 53-14-50 Accountable to beneficiary; breach of trust**

20 The trustee is accountable to the beneficiary for the trust property. A violation by the  
21 trustee of any duty that the trustee owes the beneficiary is a breach of trust.

22

COMMENT

23

(No change from 53-12-191. See UTC 1001(a))

24

**§ 53-14-51 Actions for breach of trust**

25

(a If a trustee commits a breach of trust, or threatens to commit a breach of trust, a  
26 beneficiary shall have a cause of action to seek:

27

(1) To recover damages;

28

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

- 1 (3) To require an accounting;
- 2 (4) To enjoin the trustee from committing a breach of trust;
- 3 (5) To compel the trustee to redress a breach of trust by payment of money or otherwise;
- 4 (6) To appoint a temporary trustee to take possession of the trust property and administer
- 5 the trust or to suspend a trustee with or without the appointment of a temporary trustee;
- 6 (7) To remove the trustee;
- 7 (8) To reduce or deny compensation of the trustee.

8

9 (b) When trust assets are misapplied and can be traced in the hands of persons affected  
10 with notice of the misapplication, the trust shall attach to the assets. A creditor of a trust  
11 may follow assets in the hands of beneficiaries even if they were received without notice.

12

13 (c) The remedy set forth in subsection (c) of Code section 53-15-11 is the exclusive  
14 remedy for an abuse of discretion as provided in Code sections 53-15-9 and 53-15-10.

15

16 (d) The provision of remedies for breach of trust does not prevent resort to any other  
17 appropriate remedy provided by statute or common law.

18

19 **COMMENT**

20 Subsection (a): Some variations from current 53-12-192. See UTC 1001(b). See  
21 former 53-12-173.

22 Subsection (c): clarifying the language that formerly appeared at the beginning of  
23 subsection (a).

24

25

26 **§ 53-14-52 Damages for breach of trust; interest**

27 (a) A trustee who commits a breach of trust is personally chargeable with any damages  
28 resulting from the breach of trust, including but not limited to:

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

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

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

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

3

4 (b) If the trustee is liable for interest, then the amount of the liability for interest shall be  
5 the greater of the following amounts:

6 (1) The amount of interest that accrues at the legal rate on judgments; or

7 (2) The amount of interest actually received.

8

9 **COMMENT**

10 Carries forward former law 53-12-193.

11

12 **§ 53-14-53 Relief of trustee liability**

13 (a) No provision in a trust instrument is effective to relieve the trustee of liability for  
14 breach of trust committed in bad faith or with reckless indifference to the interests of the  
15 beneficiaries.

16 (b) A trustee of a revocable trust is not liable to a beneficiary for any act performed or  
17 omitted pursuant to written direction from a person holding the power to revoke,  
18 including a person to whom the power to direct the trustee is delegated. If the trust is  
19 revocable in part, then this subsection applies with respect to the interest of the  
20 beneficiary in that part of the trust property.

21 (c) Whenever a trust reserves to the settlor or vests in an advisory or investment  
22 committee or in any other person, including a cotrustee, to the exclusion of one or more  
23 trustees, authority to direct the making or retention of of any investment, the excluded  
24 trustee shall be liable, if at all, only as a ministerial agent and not as trustee for any loss  
25 resulting from the making or retention or any investment pursuant to the authorized  
26 direction.

27

28 **COMMENT**

29 From 53-12-194

30 a) Deleted “intentionally” in subsection (a) because the term “in bad faith” includes a  
31 breach that is committed “intentionally.” (The UTC does not include this term.)

1  
2           b) Delete the last clause of subsection (a) relating to profits. The UTC  
3 intentionally did not include this. There are reasonable circumstances under which a  
4 settlor may want to allow the trustee to retain profits from the trust.

5  
6           c) The Committee chose not to adopt UTC Secs. 1008(a)(2) and (b).

7  
8           d) Subsection (b) is retained as is. (See UTC Sec. 603(a)).

9  
10          e) Language changes in subsection (c) to make it more readable.

11  
12          e) Language changes in subsection (c) to make it more readable.

13  
14   **§ 53-14-54 Liability of successor trustee**

15   (a) A successor trustee is liable to the beneficiary for breach of trust involving acts or  
16 omissions of a predecessor trustee only:

17   (1) If the successor trustee knows or reasonably should have known of a situation  
18 constituting a breach of trust committed by the predecessor trustee and the successor  
19 trustee improperly permits it to continue;

20   (2) If the successor trustee neglects to take reasonable steps to compel the predecessor to  
21 deliver the trust property to the successor trustee; or

22  
23   (3) If the successor trustee neglects to take reasonable steps to redress a breach of trust  
24 committed by the predecessor trustee in a case where the successor trustee knows or  
25 reasonably should have known of the predecessor trustee's breach.

26  
27   (b) A trustee succeeding a trustee who was also the settlor is not liable to the beneficiary  
28 for any action taken or omitted to be taken by the prior trustee; nor does such successor  
29 trustee have a duty to institute any action against such prior trustee or to file any claim  
30 against such prior trustee's estate for any of the prior trustee's acts or omissions as trustee.  
31 This subsection applies only with respect to a trust or any portion of a trust that was  
32 revocable by the settlor during the time that the settlor served as trustee and committed  
33 the act or omission.

34   COMMENT: from former 53-12-195

1 **§ 53-14-55 Liability of cotrustee**

2 (a) A trustee is liable to the beneficiary for a breach committed by a cotrustee:

3 (1) If the trustee participates in a breach of trust committed by the cotrustee;

4 (2) If the trustee improperly delegates the administration of the trust to the cotrustee;

5 (3) If the trustee approves, knowingly acquiesces in, or conceals a breach of trust  
6 committed by the cotrustee;

7

8 (4) If the trustee negligently enables the cotrustee to commit a breach of trust;

9

10 (5) If the trustee neglects to take reasonable steps to compel the cotrustees to redress a  
11 breach of trust in a case where the trustee knows or reasonably should have known of the  
12 breach of trust.

13

14 (b) If two or more cotrustees are jointly liable to the beneficiary, each cotrustee is entitled  
15 to contribution from the other, as determined by the degree of each co-trustee's fault.

16 COMMENT: carries forward 53-12-196

17 **§ 53-4-56 Action against cotrustee**

18 (a) A trustee may maintain an action against a cotrustee to:

19 (1) Compel the cotrustee to perform duties required under the trust;

20 (2) Enjoin the cotrustee from committing a breach of trust; or

21 (3) Compel the cotrustee to redress a breach of trust committed by the cotrustee.

22

23 (b) The provision of remedies for breach of trust does not prevent resort to any other  
24 appropriate remedy provided by statute or common law.

25 COMMENT: former 53-12-197

26

1    **§ 53-14-57 Limitation of actions**

2    (a) Unless a claim is previously barred by adjudication, consent, limitation, or otherwise,  
3    if a beneficiary has received a written report that adequately discloses the existence of a  
4    claim against the trustee for breach of trust, the claim is barred as to that beneficiary  
5    unless a proceeding to assert the claim is commenced within two years after receipt of the  
6    report. A report adequately discloses existence of a claim if it provides sufficient  
7    information so that the beneficiary knows of the claim or reasonably should have  
8    inquired into the existence of the claim. If the beneficiary has not received a report which  
9    adequately discloses the existence of a claim against the trustee for breach of trust, the  
10   claim is barred as to that beneficiary unless a proceeding to assert the claim is  
11   commenced within six years after the beneficiary discovered, or reasonably should have  
12   discovered, the subject of the claim.

13

14   (b) A successor trustee's claim against a predecessor trustee is barred unless a proceeding  
15   to assert the claim is commenced within two years after the successor trustee takes office.

16

17   (c) A trustee's claim against a cotrustee is barred unless a proceeding to assert the claim is  
18   commenced within two years after the date the cause of action against the cotrustee  
19   arises.

20

21    COMMENT: Replaces 53-12-198. Reduces statute of limitations to two years in cases  
22    in which the beneficiary has received a written report that adequately discloses the  
23    existence of a claim. The UTC statute of limitations in one year for all claims.

24    The provisions of this Section cannot be varied by the trust instrument. See Section 53-  
25    12-3.

26    The following transition rule appeared in former 53-12-198:

27                    With respect to a claim which accrued prior to July 1, 1991, the claim is  
28                    barred unless a proceeding to assert the claim is commenced either prior to

1                   the date the claim would have been barred had this Code section not been  
2                   enacted or within six years from July 1, 1991, whichever is sooner.

3

4   **§ 53-14-58 Personal liability of trustee**

5   (a) A trustee shall not be personally liable on any warranty made in any conveyance  
6   unless the intention to create a personal liability is distinctly expressed..

7

8   (b) Unless otherwise provided in the contract, a trustee is not personally liable on  
9   contracts properly entered into in the trustee's fiduciary capacity unless the trustee fails to  
10   reveal the trustee's representative capacity in the contract.

11

12   (c) A judgment rendered in an action brought against the trust shall impose no personal  
13   liability on the trustee or the beneficiary.

14

**COMMENT**

15   From 53-12-199 and 53-8-14. See 53-14-39, which prohibits a trustee from binding the  
16   trust estate with a warranty. See OCGA Sec. 10-8-86 (signature of trustee)

17   Subsection (b) contains provisions similar to those in UTC Sec. 1010(A)

18

19

20                   **ARTICLE 5 Foreign Entities and Non-Residents Acting as Trustees**

21   **53-14-60 Definitions**

22   For purposes of this article, the term

23   a) "Foreign entity" means:

1 (1) Any financial institution whose deposits are federally insured which is organized or  
2 existing under the laws of any state of the United States, other than Georgia, or any  
3 subsidiary of such financial institution;

4 (2) Any corporation or other entity organized or existing under the laws of any state of  
5 the United States other than Georgia; and

6  
7 (3) Any federally chartered financial institution whose deposits are federally insured  
8 having its principal place of business in any state of the United States, other than  
9 Georgia, or any subsidiary of such financial institution.

10  
11 b) “Nonresident” means an individual who does not reside in Georgia.

12  
13 COMMENT

14 From former 53-12-390. The contiguous state requirement has been deleted.

15 *“Nonresident trustee” is new and is added so that we can deal with both individuals and*  
16 *corporate trustees in the same Article.*

17  
18 **53-14-61 Nonresidents acting as trustees**

19 a) Any nonresident who is eligible to serve as a trustee under Code section 53-12-[24]  
20 may act as a trustee in this state pursuant to the terms of this Code section.

21  
22 b) Any nonresident trustee who acts as a trustee in this state shall be deemed to have  
23 consented to service upon the Secretary of State of any summons, notice, or process in  
24 connection with any action or proceeding in the courts of this state growing out of or  
25 based upon any act or failure to act on the part of the trustee unless the trustee shall  
26 designate as the agent for such service some person who may be found and served with  
27 notice, summons, or process in this state by a designation to be filed, from time to time,  
28 in the office of the Secretary of State, giving the name of the agent and the place in this  
29 state where the agent may be found and served.

30

1 c) If a nonresident trustee fails to designate a person who may be found and served with  
2 summons, notice, or process in this state, service of summons, notice, or process shall be  
3 made upon the trustee by serving a copy of the petition or other pleading, with process  
4 attached thereto on the Secretary of State. The service shall be sufficient service upon the  
5 nonresident trustee, provided that notice of the service and a copy of the petition and  
6 process is forthwith sent by registered or certified mail or statutory overnight delivery by  
7 the plaintiff or the plaintiff's agent to the trustee, in the state where the trustee resides,  
8 and the return receipt is appended to the summons or other process and filed with the  
9 summons, petition, and other papers in the court where the action is pending. The  
10 Secretary of State shall charge and collect a fee as set out in Code Section 45-13-26 for  
11 service of process on him under this Code section.

12  
13 COMMENT

14 New; see 53-12-391

15 > will note that these requirements were in current Sections 53-12-370 and -371  
16 but applied only to foreign trustees of real property.

17 >will cross reference OCGA Sec. 53-12-24. ("Capacity of Trustee")

18  
19 **53-14-62 Foreign entities acting as trustees**

20 (a) Any foreign entity, as defined in Code section 53-12-60, may act in this state as  
21 trustee, executor, administrator, guardian, or any other like or similar fiduciary capacity,  
22 whether the appointment is by law, will, deed, inter vivos trust, security deed, mortgage,  
23 deed of trust, court order, or otherwise without the necessity of complying with any law  
24 of this state relating to the qualification of foreign entities to do business in this state or  
25 the licensing of foreign entities to do business in this state, except as provided in this  
26 article, and notwithstanding any prohibition, limitation, or restriction contained in any  
27 other law of this state, provided only that:

28 i) the foreign entity is eligible to act as a fiduciary in this state under Code  
29 Section 7-1-242; and

1           ii) the foreign entity is authorized to act in the fiduciary capacity in the state in  
2 which it is incorporated or organized, or, if the foreign entity is a national banking  
3 association, in the state in which it has its principal place of business.

4  
5       (b) The foreign entity seeking to exercise fiduciary powers in this state, upon qualifying  
6 in this state to act in any of such fiduciary capacities, shall not be required by law to give  
7 bond, if bond is relieved by the instrument, law, or court order in which such entity has  
8 been designated to act in such fiduciary capacity.

9  
10       (c) Nothing in this article shall be construed to prohibit or make unlawful any activity in  
11 this state by a bank or other entity which is not incorporated or organized under the laws  
12 of this state or by a national bank which does not have its principal place of business in  
13 this state, which activity would be lawful in the absence of this article.

14  
15           COMMENT: This section replaces former OCGA Sec. 53-12-391. The  
16 “reciprocity” requirement is eliminated.

17  
18       **53-14-63 Acting as fiduciary not transacting business within state; establishment of**  
19 **place of business prohibited**

20 A foreign entity, insofar as it acts in a fiduciary capacity in this state pursuant to this  
21 article, shall not be required to obtain a certificate of authority to transact business in this  
22 state as required by Article 15 of Chapter 2 of Title 14, but no such foreign entity shall  
23 establish or maintain in this state a place of business, branch office, or agency for the  
24 conduct in this state of business as a fiduciary.

25  
26       COMMENT: This section carries forward provisions similar to those in OCGA Sec. 53-  
27 12-392

28  
29       **53-14-64 Filing Statement with Secretary of State; Appointment of Agent for**  
30 **Service**

1 a) Prior to the time when any foreign entity acts pursuant to the authority of this article in  
2 any fiduciary capacity in this state, the foreign entity shall file with the Secretary of State  
3 a verified statement which shall state:

4 (1) The correct name of the foreign entity;

5 (2) The name of the state under the laws of which it is incorporated or organized, or, if  
6 the foreign entity is a national banking association, a statement of that fact;

7 (3) The address of its principal business office;

8 (4) In what fiduciary capacity it desires to act in this state;

9 (5) That it is authorized to act in a similar fiduciary capacity in the state in which it is  
10 incorporated or organized, or, if it is a national banking association, in which it has its  
11 principal place of business, and the basis on which it is eligible to act as a fiduciary in  
12 Georgia under Code section 7-1-242; and

13 (6) The name and address of a person who may be found and served with notice,  
14 summons, or process in this state and who is designated by the foreign entity as its agent  
15 for such service. .

16  
17 b) The statement shall be verified by an officer of the foreign entity, and there shall be  
18 filed with it such certificates of public officials and copies of documents certified by  
19 public officials as may be necessary to show that the foreign entity is authorized to act in  
20 a fiduciary capacity similar to those in which it desires to act in this state, in the state in  
21 which it is incorporated or organized, or, if it is a national banking association, in which  
22 it has its principal place of business.

23  
24 c) Any foreign entity that acts as a trustee in this state shall be deemed to have consented  
25 to service upon the Secretary of State of any summons, notice, or process in connection  
26 with any action or proceeding in the courts of this state growing out of or based upon any  
27 act or failure to act on the part of the trustee unless the trustee shall designate as the agent  
28 for such service some person who may be found and served with notice, summons, or  
29 process in this state by a designation to be filed, from time to time, in the office of the

1 Secretary of State, giving the name of the agent and the place in this state where the agent  
2 may be found and served.

3

4 d) If a foreign entity fails to designate a person who may be found and served with  
5 summons, notice, or process in this state, service of summons, notice, or process shall be  
6 made upon the foreign entity by serving a copy of the petition or other pleading, with  
7 process attached thereto on the Secretary of State. The service shall be sufficient service  
8 upon the foreign entity, provided that notice of the service and a copy of the petition and  
9 process is forthwith sent by registered or certified mail or statutory overnight delivery by  
10 the plaintiff or the plaintiff's agent to the foreign entity at the address that is on file with  
11 the Secretary of State and the return receipt is appended to the summons or other process  
12 and filed with the summons, petition, and other papers in the court where the action is  
13 pending. The Secretary of State shall charge and collect a fee as set out in Code Section  
14 45-13-26 for service of process on him under this Code section.

15

16 COMMENT: This section replaces former OCGA Secs. 53-12-392, -393. Subsection (c)  
17 allows a foreign entity to appoint an agent for service of process.

**CHAPTER 15**  
**TRUST INVESTMENTS**

**Article 1 Investments Generally**  
**Part 1 General Rules**

7 **53-15-13 General Investment Standard**

8 **53-15-14 Diversification**

9 **53-15-15 Duties at inception of trusteeship**

10 **53-15-16 Reviewing compliance**

11 **53-15-17 Language invoking application of [article]**

12 **53-15-18 Application to existing trusts**

13 **53-15-19 Delegation**

**Part 2 Power of Adjustment and Unitrusts**

15 **53-15-20 Duty of trustee as to receipts and disbursements**

16 **53-15-21 Power of adjustment**

17 **53-15-22 Conversion to unitrust**

18 **53-15-23 Abuse of trustee's discretion**

19 **53-15-24 Express Total Return Unitrusts**

**Article 2 Georgia Principal and Income Act**

**Part 1 General Provisions and Definitions**

25 **53-15-15 General**

26 **53-15-16 Definitions**

**Part 2**

28 **53-15-20 Payment of Interest on Pecuniary Amount**

29 **53-15-21 Payment of Expenses**

**Part 3 Apportionment at Beginning and End of Income Interest**

- 1 **53-15-22 WHEN THE RIGHT TO INCOME BEGINS AND ENDS**
- 2 **53-15-23 APPORTIONMENT OF RECEIPTS AND DISBURSEMENTS WHEN**
- 3 **DECEDENT DIES OR INCOME INTEREST BEGINS**
- 4 **53-15-24 APPORTIONMENT WHEN INCOME INTEREST ENDS**

5

6 **Part 4 Allocation of Receipts During Administration of Trust**

7 **Section 1 Receipts from Entities**

- 8 **53-15-25 CHARACTER OF RECEIPTS.**
- 9 **53-15-26 DISTRIBUTION FROM TRUST OR ESTATE.**
- 10 **53-15-27 BUSINESS AND OTHER ACTIVITIES CONDUCTED BY TRUSTEE**

11

12 **Section 2 Receipts Not Normally Apportioned**

- 13 **53-15-29 PRINCIPAL RECEIPTS.**
- 14 **53-15-29 RENTAL PROPERTY.**
- 15 **53-15-30 OBLIGATION TO PAY MONEY.**
- 16 **53-15-31 INSURANCE POLICIES AND SIMILAR CONTRACTS**
- 17 **15-15-32 INSUBSTANTIAL ALLOCATIONS NOT REQUIRED.**
- 18 **53-15-33 DEFERRED COMPENSATION, ANNUITIES, AND SIMILAR**
- 19 **PAYMENTS**
- 20 **53-15-34 LIQUIDATING ASSET**
- 21 **53-15-35 MINERALS, WATER, AND OTHER NATURAL RESOURCES.**
- 22 **53-15-36 TIMBER.**
- 23 **53-15-37 PROPERTY NOT PRODUCTIVE OF INCOME.**
- 24 **53-15-38 DERIVATIVES AND OPTIONS.**
- 25 **53-15-39 ASSET-BACKED SECURITIES**

26

27 **Part 5 Allocation of Disbursements During Administration of Trust**

- 28 **53-15-42 DISBURSEMENTS FROM INCOME**
- 29 **53-15-43 DISBURSEMENTS FROM PRINCIPAL.**
- 30 **53-15-42 TRANSFERS FROM INCOME TO PRINCIPAL FOR**
- 31 **DEPRECIATION.**

- 1 **53-15-43 TRANSFERS FROM INCOME TO REIMBURSE PRINCIPAL.**
- 2 **53-15-44 INCOME TAXES.**
- 3 **53-15-45 ADJUSTMENTS BETWEEN PRINCIPAL AND INCOME**
- 4 **BECAUSE OF TAXES**

5

6

**CHAPTER 15**

7

**TRUST INVESTMENTS**

8

9

**Article 1 Investments Generally**

10

**Part 1 General Rules**

11

12 **53-15-1 General Investment Standard**

13 a) In investing and managing trust property, a trustee shall exercise the judgment and  
14 care under the circumstances then prevailing of a prudent person acting in a like capacity  
15 and familiar with such matters, considering the purposes, provisions, and distribution  
16 requirements of the trust.

17

18 b) Among the factors that a trustee shall consider in investing and managing trust assets  
19 are such of the following as are relevant to the trust or its beneficiaries:

- 20 1) general economic conditions;
- 21 2) the possible effect of inflation or deflation;
- 22 3) anticipated tax consequences;
- 23 4) the attributes of the portfolio,
- 24 5) the expected return from income and appreciation;
- 25 6) needs for liquidity, regularity of income, and preservation or appreciation of  
26 capital;
- 27 7) an asset's special relationship or special value, if any, to the purposes of the  
28 trust or to one or more of the beneficiaries or to the settlor;
- 29 8) the anticipated duration of the trust; and
- 30 9) any special circumstances.

31

32 c) Any determination of liability for investment performance shall consider not only the  
33 performance of a particular investment but also the performance of the portfolio as a

1 whole and as a part of an overall investment strategy having risk and return objectives  
2 reasonably suited to the trust..

3

4 d) A trustee who has special investment skills or expertise has a duty to use those special  
5 skills or expertise. A trustee who is named trustee in reliance upon the trustee's  
6 representation that the trustee has special investment skills or expertise will be held liable  
7 for failure to make use of that degree of skill or expertise.

8

9 e) A trustee may invest in any kind of property or type of investment consistent with the  
10 standards of this article.

11

12 f) A trustee that is a bank or trust company shall not be precluded from acquiring and  
13 retaining the securities of or other interests in an investment company or investment trust  
14 because the bank or trust company or an affiliate provides services to the investment  
15 company or investment trust as investment adviser, custodian, transfer agent, registrar,  
16 sponsor, distributor, manager, or otherwise and receives compensation for such services.

17

18

#### COMMENT

19 This Part 1 adopts substantially the Uniform Prudent Investor Act.

20 This section is modeled after Section 2 of Uniform Prudent Investor Act & replaces 53-  
21 12-287. 53-12-287(d) moved to general duties)

22 The provisions of this Article cannot be varied by the trust instrument. See Section 53-  
23 12-3.

24 Subsection (a): This language expresses the current law, as stated in the first sentence of  
25 current OCGA Sec. 53-12-287. (“In acquiring, investing, reinvesting, exchanging,  
26 retaining, selling, and managing property for the benefit of another, a trustee shall  
27 exercise the judgment and care, under the circumstances then prevailing, that a prudent  
28 person acting in a like capacity and familiar with such matters would use to attain the  
29 purposes of the account.”)

30 Subsection (b): This subsection combines UPIA Sec. 2(c) factors with current Ga law  
31 (53-12-287(b)). The “needs of the beneficiaries” from the UPIA is subsumed under

1 subsection (a) “distribution requirements.” Include a portion of the UPIA Comment that  
2 describes #6 (heirlooms, etc.)

3 Subsection (c): This language is from current 53-12-287(c) and is used instead of the  
4 language in section 2(b) of the Uniform Act. The language of the last clause of the  
5 Uniform Act is subsumed into the language from current Georgia law.

6 Subsection (d): Second sentence is from Restatement 3<sup>rd</sup> of Trusts

7 Subsection (e): include language from Comment to Uniform Act

8 Subsection (f): from 53-12-287(e)

9

10

### 11 **53-15-2 Diversification**

12 A trustee shall diversify the investments of the trust unless the trustee reasonably  
13 determines that, because of special circumstances, the purposes of the trust are better  
14 served without diversifying. The degree of diversification is subject to the general  
15 investment standard of Code section 53-15-1.

16

#### 17 COMMENT

18 Sec. 3 of the Uniform Prudent Investor Act. The second sentence is taken from the  
19 Comment to the UPIA section. The Comments to the UPIA should be referenced for  
20 discussion of the parameters of the diversification rule.

21

### 22 **53-15-3 Duties at inception of trusteeship**

23 Within a reasonable time after accepting a trusteeship or receiving trust assets, a trustee  
24 shall review the trust assets and make and implement decisions concerning the retention  
25 and disposition of assets, in order to bring the trust portfolio into compliance with the  
26 purposes, provisions, distributions requirements, and other circumstances of the trust and  
27 with the requirements of this Article.

28

#### COMMENT

29 From Sec 4 of Uniform Prudent Investor Act

30

31

1 **53-15-4 Reviewing compliance**

2 Compliance with the investment rules of this [article] is determined in light of the facts  
3 and circumstances existing at the time of a trustee's decision or action and not by  
4 hindsight.

5 COMMENT

6 Uniform Prudent Investor Act Sec. 8

7  
8 **53-15-5 Language invoking application of article**

9 The following terminology or comparable language in the provisions of a trust, unless  
10 otherwise limited or modified, authorizes any investment or strategy permitted under this  
11 [Act]: "investments permissible by law for investment of trust funds," "legal  
12 investments," "authorized investments," "using the judgment and care under the  
13 circumstances then prevailing that persons of prudence, discretion, and intelligence  
14 exercise in the management of their own affairs, not in regard to speculation but in regard  
15 to the permanent disposition of their funds, considering the probable income as well as  
16 the probable safety of their capital," "prudent man rule," "prudent trustee rule," "prudent  
17 person rule," and "prudent investor rule."

18 COMMENT

19 Section 10 of Uniform Prudent Investor Act

20  
21 **53-15-6 Application to existing trusts**

22 This article applies to trusts existing on and created after its effective date. As applied to  
23 trusts existing on its effective date, this article governs only decisions or actions  
24 occurring after that date.

25 COMMENT

26 Section 11 of Uniform Prudent Investor Act

27  
28 **53-15-7 Delegation**

29 (a) A trustee may delegate investment and management functions that a prudent trustee of  
30 comparable skills could properly delegate under the circumstances. The trustee shall  
31 exercise reasonable care, skill, and caution in:

- 1 (1) Selecting an agent;  
2 (2) Establishing the scope and terms of the delegation consistent with the purposes and  
3 provisions of the trust; and  
4 (3) Reviewing periodically the agent's actions in order to monitor the agent's  
5 performance and compliance with the terms of the delegation.

6 (b) In performing a delegation function, an agent owes a duty to the trust to exercise  
7 reasonable care to comply with the terms of the delegation.

8 (c) A trustee who complies with the requirements of subsection (a) of this Code section,  
9 and who takes reasonable steps to compel an agent to whom the function was delegated  
10 to redress a breach of duty to the trust, is not liable to the beneficiaries of the trust or to  
11 the trust for the decisions or actions of the agent to whom the function was delegated.

12 (d) By accepting the delegation of a trust function from the trustee of a trust that is  
13 subject to the laws of this state, an agent waives the defense of lack of personal  
14 jurisdiction and submits to the jurisdiction of this state.

15 COMMENT

16 From 53-12-190. Section 9 of Uniform Prudent Investor Act contains similar provisions.

17  
18 **Part 2 Power of Adjustment and Unitrusts**

19  
20 **53-15-8 Duty of trustee as to receipts and disbursements**

21 In allocating receipts and disbursements to or between principal and income and with  
22 respect to any matter within the scope of Article 2 of this Chapter, the following shall  
23 apply:

24 (1) A trustee shall administer a trust in accordance with the governing instrument,  
25 even if there is a different provision in Article 2 of this Chapter;

26 (2) A trustee may administer a trust by the exercise of a discretionary power of  
27 administration regarding a matter within the scope of Article 2 of this Chapter  
28 given to the trustee by the governing instrument, even if the exercise of the power  
29 produces a result different from a result required or permitted by Article 2 of this

1 Chapter . No inference that the trustee has improperly exercised the discretionary  
2 power shall arise from the fact that the trustee has made an allocation contrary to  
3 a provision of Article 2 of this Chapter ;

4 (3) A trustee shall administer a trust in accordance with Article 2 of this Chapter  
5 if the governing instrument does not contain a different provision or does not give  
6 the trustee a discretionary power of administration regarding a matter within the  
7 scope of Article 2 of this Chapter; and

8 (4) A trustee shall add a receipt or charge a disbursement to principal to the extent  
9 that the governing instrument and Article 2 of this Chapter do not provide a rule  
10 for allocating the receipt or disbursement to or between principal and income.

11 COMMENT: former 53-12-211

12

13 **53-15-9 Power of adjustment**

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

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

19 (2) The trustee determines, after applying the rules in Code Section 53-15-8, that  
20 the trustee is unable to comply with Code Section 53-14-37.

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

23 (1) The size of the trust;

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

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

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

28 (5) The expected tax consequences of an adjustment;

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

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

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

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

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

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

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

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

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

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

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

5 (5) If:

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

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

11 (6) If:

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

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

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

19 (8) If the trust has been converted under Code Section 53-15-10.

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

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

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

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

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

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

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

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

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

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

15 COMMENT: former 53-12-220

16

17 **53-15-10 Conversion to unitrust**

18 (a) Unless expressly prohibited by the trust instrument, a trustee may release the power to  
19 adjust under Code Section 53-15-9 and convert a trust into a unitrust as described in this  
20 Code section if all of the following apply:

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

23 (2) The trustee gives written notice of the trustee's intention to release the power  
24 to adjust and to convert the trust into a unitrust and of how the unitrust will  
25 operate, including what initial decisions the trustee will make under this Code  
26 section, to:

27 i) the settlor, if living;

28 ii) All living persons who are currently receiving or eligible to  
29 receive distributions of income of the trust; and

1                   iii) Without regard to the exercise of any power of appointment, all  
2                   living persons who would receive principal of the trust if the trust  
3                   were to terminate at the time of the giving of such notice and all  
4                   living persons who would receive or be eligible to receive  
5                   distributions of income or principal of the trust if the interests of all  
6                   of the beneficiaries currently eligible to receive income under sub-  
7                   subparagraph (ii) of paragraph (2) of subsection (a) of this section  
8                   were to terminate at the time of the giving of such notice.

9                   If a beneficiary is not sui juris, such notice shall be given to the  
10                  beneficiary's conservator, if any, and if the beneficiary has no conservator,  
11                  to the beneficiary's guardian, including, in the case of a minor beneficiary,  
12                  the beneficiary's natural guardian

13                  (3) At least one person receiving notice under each of subparagraphs (ii) and (iii)  
14                  of paragraph (2) of subsection (a) of this section is legally competent; and

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

18  
19                  (b)   (1) The trustee may petition the superior court to order the conversion to a  
20                  unitrust.

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

24                  (3) The court shall order conversion if the court concludes that the conversion will  
25                  enable the trustee to better carry out the intent of the settlor or testator and the  
26                  purposes of the trust.

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

- 1 (1) The size of the trust;
- 2 (2) The nature and estimated duration of the trust;
- 3 (3) The liquidity and distribution requirements of the trust;
- 4 (4) The needs for regular distributions and preservation and appreciation of
- 5 capital;
- 6 (5) The expected tax consequences of the conversion;
- 7 (6) The assets held in the trust; the extent to which they consist of financial assets,
- 8 interests in closely held enterprises, and tangible and intangible personal property
- 9 or real property; and the extent to which an asset is used by a beneficiary;
- 10 (7) To the extent reasonably known to the trustee, the needs of the beneficiaries
- 11 for present and future distributions authorized or required by the governing
- 12 instrument;
- 13 (8) Whether and to what extent the governing instrument gives the trustee the
- 14 power to invade principal or accumulate income or prohibits the trustee from
- 15 invading principal or accumulating income and the extent to which the trustee has
- 16 exercised a power from time to time to invade principal or accumulate income;
- 17 and
- 18 (9) The actual and anticipated effect of economic conditions on principal and
- 19 income and effects of inflation and deflation on the trust.

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

- 21 (1) The trustee shall follow an investment policy seeking a total return for the
- 22 investments held by the trust, whether the return is to be derived from:
  - 23 (A) Appreciation of capital;
  - 24 (B) Earnings and distributions from capital; or
  - 25 (C) Both appreciation of capital and earnings and distributions from
  - 26 capital;
- 27 (2) The trustee shall make regular distributions in accordance with the governing
- 28 instrument construed in accordance with the provisions of this Code section;

1 (3) The term 'income' in the governing instrument shall mean an annual unitrust  
2 distribution equal to 4 percent of the net fair market value of the trust's assets or  
3 the payout percentage ordered under subsection (g)(1),, whether such assets  
4 would be considered income or principal under other provisions of this chapter,  
5 averaged over the lesser of:

6 (A) The three preceding years; or

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

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

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

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

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

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

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

23 (4) The effect of other payments from or contributions to the trust on the trust's  
24 valuation; (5) Whether to value the trust's assets annually or more frequently;

25 (6) What valuation dates to use;

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

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

- 1 (f) (1) Expenses which would be deducted from income if the trust were not a  
2 unitrust may not be deducted from the unitrust distribution.
- 3 (2) he unitrust distribution shall be paid from net income, as such term would be  
4 determined if the trust were not a unitrust. To the extent net income is insufficient,  
5 the unitrust distribution shall be paid from net realized short-term capital gains.  
6 To the extent income and net realized short-term capital gains are insufficient, the  
7 unitrust distribution shall be paid from net realized long-term capital gains. To the  
8 extent income and net realized short-term and long-term capital gains are  
9 insufficient, the unitrust distribution shall be paid from the principal of the trust.
- 10 (g) The trustee or, if the trustee declines to do so, a beneficiary may petition the superior  
11 court to:
- 12 (1) Select a payout percentage different from 4 percent but not lower than 3  
13 percent or higher than 5 percent;
- 14 (2) Provide for a distribution of net income, as would be determined if the trust  
15 were not a unitrust, in excess of the unitrust distribution if such distribution is  
16 necessary to preserve a tax benefit;
- 17 (3) Average the valuation of the trust's net assets over a period other than three  
18 years; or
- 19 (4) Reconvert from a unitrust. Upon a reconversion, the power to adjust under  
20 Code Section 53-15-9 shall be revived.
- 21 (h) A conversion to a unitrust does not affect a provision in the governing instrument  
22 directing or authorizing the trustee to distribute principal or authorizing a beneficiary to  
23 withdraw a portion or all of the principal.
- 24 (i) A trustee may not convert a trust into a unitrust in any of the following circumstances:
- 25 (1) If the conversion would result in the disallowance of a federal estate tax or gift  
26 tax marital deduction which would be allowed if the trustee did not have the  
27 power to convert;
- 28 (2) If payment of the unitrust distribution would change the amount payable to a  
29 beneficiary as a fixed annuity or a fixed fraction of the value of the trust assets;

1 (3) If the unitrust distribution would be made from any amount which is  
2 permanently set aside for charitable purposes under the governing instrument and  
3 for which a federal estate or gift tax deduction has been taken, unless both income  
4 and principal are so set aside;

5 (4) If:

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

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

11 (5) If:

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

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

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

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

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

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

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

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

6

7

#### COMMENT

8 From 53-12-221. The new section adds a level of beneficiaries who must receive written  
9 notice of the petition in subsection (a)(2) and clarified that the guardian or conservator of  
10 a non-sui juris could receive the notice on behalf of that beneficiary.

11

12 Subsection (b)(1): The Comment will note that probate judges with “expanded  
13 jurisdiction” also have this power.

14

#### 15 **53-15-11 Abuse of trustee’s discretion**

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

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

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

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

26 (c) If a court determines that a trustee has abused its discretion regarding a discretionary  
27 power conferred by Code sections 53-15-9 or 53-15-10, the remedy is to restore the  
28 income and remainder beneficiaries to the positions they would have occupied if the  
29 trustee had not abused its discretion, according to the following rules:

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

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

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

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

21 (d) No provision of this Code section or Code Sections 53-15-9 or 53-15-10 is intended  
22 to require a trustee to make an adjustment under Code Section 53-15-9 or a conversion  
23 under Code Section 53-15-10

24

25 COMMENT former 53-12-222

26

27 **53-15-12 Express Total Return Unitrusts**

28 (a) The following provisions shall apply to a trust which by its governing instrument  
29 requires the distribution at least annually of a unitrust amount equal to a fixed percentage  
30 of not less than three nor more than five percent per year of the net fair market value of

1 the trust's assets, valued at least annually, such trust to be referred to as an "express total  
2 return unitrust":

3

4 1. The unitrust amount may be determined by reference to the net fair market  
5 value of the trust's assets in one year or more than one year.

6 2. Distribution of such a fixed percentage unitrust amount is considered a  
7 distribution of all of the income of the total return unitrust and shall not be considered a  
8 fundamental departure from applicable state law, regardless of whether the total return  
9 unitrust is created and governed by Section 53-15-10 above or by the provisions of the  
10 governing instrument.

11 3. Such a distribution of the fixed percentage of not less than three percent nor  
12 more than five percent is considered to be a reasonable apportionment of the total return  
13 of a total return unitrust.

14 4. The governing instrument may or may not grant discretion to the trustee to  
15 adopt a consistent practice of treating capital gains as part of the unitrust distribution, to  
16 the extent that the unitrust distribution exceeds the net accounting income, or it may  
17 specify the ordering of such classes of income.

18 5. Unless the trust provisions specifically provide otherwise, or grant discretion to  
19 the trustee as set forth above, a distribution of the unitrust amount shall be considered to  
20 have been made from the following sources in order of priority:

21 (a) from net accounting income determined as if the trust were not a  
22 unitrust;

23 (b) from ordinary income not allocable to net accounting income;

24 (c) from net realized short-term capital gains;

25 (d) from net realized long-term capital gains; and

26 (e) from the principal of the trust estate

27 6. The trust document may provide that assets used by the trust beneficiary, such  
28 as a residence property or tangible personal property, may be excluded from the net fair  
29 market value for computing the unitrust amount. Such use may be considered equivalent  
30 to the "income" or unitrust amount.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29

(b) A trust which provides for a fixed percentage payout in excess of five percent per year shall be considered to have paid out all of the income of the total return unitrust, and to have paid out principal of the said trust to the extent that the fixed percentage payout exceeds five percent per year.

c) This Code section shall be effective for trusts established and wills executed on or after [effective date of this Act].

COMMENT: New. Modeled after Pennsylvania statute

**Article 2 Georgia Principal and Income Act**

COMMENT

This Article incorporates, with some slight modifications as noted, Articles 3-5 of the Uniform Principal & Income Act, as amended in 2000.

The provisions of Sections 103-105 of the Uniform Act are reflected in current Code sections 53-15-8 through 53-15-10.

Each current Georgia Code section is accompanied by two Comments – the “Comment (Georgia),” which explains what portion of the former Georgia Code is covered by the new Code section, and the “Comment (Uniform Principal & Income Act 2000),” which is the official Comment to the Uniform Act Code section published by the National Conference of Commissioners on Uniform State Laws. Some of the official Comments make reference to versions of the Uniform Principal & Income Act that were adopted in 1931 and 1962. The former Georgia Code (1991), in Code sections 53-12-210 through 53-12-219, incorporated some of the provisions from the 1962 Act. The following Comment appeared in the 1991 Code as an explanation of the Georgia principal and income rules:

1 This article is based on the Uniform Principal and Income Act. There are,  
2 however, substantial revisions. Section 53-12-210, *infra*, provides a different  
3 definition of inventory value than that provided by the Uniform Act, § 1. Section  
4 53-12-211 (a)(3)(B), *infra*, changes the prudent man standard to conform it to  
5 OCGA § 53-8-2. Cf. OCGA § 53-12-190 (a), *supra*. Section 5 of the Uniform Act  
6 was omitted because (a) is covered by OCGA § 53-12-219 (3), *infra*, and (b) and  
7 (c) are covered by OCGA §§ 53-2-96, 53-2-97, and 53-7-12. Section 9 of the  
8 Uniform Act proposes a complex provision for allocating receipts from taking  
9 natural resources from the land; the Georgia Trust Act simply allocates these  
10 receipts to principal. OCGA § 53-12-217 (a), *infra*. The Georgia Trust Act also  
11 rejects the approach of § 11 of the Uniform Act to other property subject to  
12 depletion. OCGA § 53-12-217 (a), *infra*. As to certain depletable property held on  
13 the effective date of the Act, § 9 of the Uniform Act directs the trustee to use the  
14 method of allocation used before the effective date. As to all depletable property  
15 specified in OCGA § 53-12-217, *infra*, and owned on the effective date of the  
16 Georgia Trust Act, the Act gives the trustee discretion to use either the method of  
17 allocation previously used or that provided by the Act. Section 12 of the Uniform  
18 Act, which addresses unproductive property and varies the common law rule, see  
19 Restatement, Second, Trusts, §§ 240, 241, was omitted; it is rendered unnecessary  
20 in Georgia in most cases by the portfolio investment rule codified at OCGA § 53-  
21 8-2. Section 13 of the Uniform Act is substantially rewritten; substantive changes  
22 include the removal of water rates as a charge against income, OCGA § 53-12-  
23 219 (a)(1), *infra*, and allowing the trustee discretion with reference to taking an  
24 allowance for depreciation as provided in OCGA § 53-12-219 (a)(2), *infra*.

25

26

## **Part 1 General Provisions and Definitions**

27

### **53-15-15 General**

28

This article may be cited as the “Georgia Principal and Income Act of \_\_\_\_.”

29

30

### **53-15-16 Definitions**

31

As used in this article, the term:

1           (1) “Accounting period” means a calendar year unless another 12-month period is  
2 selected by a fiduciary. The term includes a portion of a calendar year or other 12-month  
3 period that begins when an income interest begins or ends when an income interest ends.

4           (2) “Beneficiary” includes, in the case of a decedent’s estate, an heir and devisee  
5 and, in the case of a trust, an income beneficiary and a remainder beneficiary.

6           (3) “Fiduciary” means a personal representative or a trustee. The term includes an  
7 executor, administrator, successor personal representative, special administrator, and a  
8 person performing substantially the same function.

9           (4) “Income” means money or property that a fiduciary receives as current return  
10 from a principal asset. The term includes a portion of receipts from a sale, exchange, or  
11 liquidation of a principal asset, to the extent provided in Part 4 of this article.

12           (5) “Income beneficiary” means a person to whom net income of a trust is or may  
13 be payable.

14           (6) “Income interest” means the right of an income beneficiary to receive all or  
15 part of net income, whether the trust provisions require it to be distributed or authorize it  
16 to be distributed in the trustee’s discretion.

17           (7) “Mandatory income interest” means the right of an income beneficiary to  
18 receive net income that the trust provisions require the fiduciary to distribute.

19           (8) “Net income” means the total receipts allocated to income during an  
20 accounting period minus the disbursements made from income during the period, plus or  
21 minus transfers under this article to or from income during the period.



1 property subject to depletion, and the method for determining entitlement to income  
2 distributed from a probate estate).

3  
4 **“Net income.”** The reference to “transfers under this Act to or from income”  
5 means transfers made under Sections 104(a), 412(b), 502(b), 503(b), 504(a), and 506.

6  
7 **“Terms of a trust.”** This term was chosen in preference to “terms of the trust  
8 instrument” (the phrase used in the 1962 Act) to make it clear that the Act applies to oral  
9 trusts as well as those whose terms are expressed in written documents. The definition is  
10 based on the Restatement (Second) of Trusts § 4 (1959) and the Restatement (Third) of  
11 Trusts § 4 (Tent. Draft No. 1, 1996). Constructional preferences or rules would also  
12 apply, if necessary, to determine the terms of the trust.

13  
14 **Part 2**

15 **53-15-20 Payment of Interest on Pecuniary Amount**

16 a) If a beneficiary is to receive a pecuniary amount outright from a trust after an income  
17 interest ends, and no interest is provided for by the terms of the trust, the pecuniary  
18 amount usually bears interest at the legal rate [after the expiration of twelve months] from  
19 the date the income interest terminates.

20 b) The general rule in subsection (a) of this Code section yields to the equity and  
21 necessity of a particular case.

22  
23 **53-15-21 Payment of Expenses**

24 Expenses incurred in connection with the settlement of a decedent’s estate or the winding  
25 up of a terminating income interest, including interest and penalties concerning taxes,  
26 fees of attorneys and personal representatives and trustees and court costs, may be  
27 charged against the principal or income in the discretion of the personal representative or  
28 trustee.

29 **COMMENT (GEORGIA)**

30 This Article 2 replaces Article 2 of the Uniform Principal & Income Act (2000). Section  
31 53-13-10 carries forward to trusts the interest rules that apply for pecuniary testamentary  
32 gifts under wills. Section 53-13-11 carries forward former Code section 53-12-219(e)  
33 and expands that provision to apply not only to the settlement of decedent’s estates but  
34 also to the winding up of a terminating income interest in a trust.

35



1 if a settlor creates a trust for grandchildren before any grandchildren are born. When the  
2 first grandchild is born, the period preceding the date of birth is treated as having ended,  
3 followed by a successive income interest, and the apportionment rules in Sections 302  
4 and 303 apply accordingly if the terms of the trust do not contain different provisions.

5  
6 **53-15-23 APPORTIONMENT OF RECEIPTS AND DISBURSEMENTS WHEN**  
7 **DECEDENT DIES OR INCOME INTEREST BEGINS.**

8 (a) A trustee shall allocate an income receipt or disbursement to principal if its due date  
9 occurs before a decedent dies in the case of an estate or before an income interest begins  
10 in the case of a trust or successive income interest.

11 (b) A trustee shall allocate an income receipt or disbursement to income if its due date  
12 occurs on or after the date on which a decedent dies or an income interest begins and it is  
13 a periodic due date. An income receipt or disbursement must be treated as accruing from  
14 day to day if its due date is not periodic or it has no due date. The portion of the receipt or  
15 disbursement accruing before the date on which a decedent dies or an income interest  
16 begins must be allocated to principal and the balance must be allocated to income.

17 (c) An item of income or an obligation is due on the date the payer is required to make a  
18 payment. If a payment date is not stated, there is no due date for the purposes of this  
19 [*Chapter*]. Distributions to shareholders or other owners from an entity to which Code  
20 section 53-13-31 applies are deemed to be due on the date fixed by the entity for  
21 determining who is entitled to receive the distribution or, if no date is fixed, on the  
22 declaration date for the distribution. A due date is periodic for receipts or disbursements  
23 that must be paid at regular intervals under a lease or an obligation to pay interest or if an  
24 entity customarily makes distributions at regular intervals.

25  
26 **Comment (Georgia)**

27 This section is Section 302 of the Uniform Act. This section replaces former Code  
28 section 53-12-213(b) & (c).

29 **Comment (Uniform Principal & Income Act 2000)**

1 Prior Acts. Professor Bogert stated that “Section 4 of the [1962] Act makes a change with  
2 respect to the apportionment of the income of trust property not due until after the trust  
3 began but which accrued in part before the commencement of the trust. It treats such  
4 income as to be credited entirely to the income account in the case of a living trust, but to  
5 be apportioned between capital and income in the case of a testamentary trust. The [1931]  
6 Act apportions such income in the case of both types of trusts, except in the case of  
7 corporate dividends.” George G. Bogert, *The Revised Uniform Principal and Income Act*,  
8 38 *Notre Dame Law. 50, 52* (1962). The 1962 Act also provides that an asset passing to  
9 an inter vivos trust by a bequest in the settlor’s will is governed by the rule that applies to  
10 a testamentary trust, so that different rules apply to assets passing to an inter vivos trust  
11 depending upon whether they were transferred to the trust during the settlor’s life or by  
12 his will.

13 Having several different rules that apply to similar transactions is confusing. In order to  
14 simplify administration, Section 302 applies the same rule to inter vivos trusts (revocable  
15 and irrevocable), testamentary trusts, and assets that become subject to an inter vivos  
16 trust by a testamentary bequest.

17 Periodic payments. Under Section 302, a periodic payment is principal if it is due but  
18 unpaid before a decedent dies or before an asset becomes subject to a trust, but the next  
19 payment is allocated entirely to income and is not apportioned. Thus, periodic receipts  
20 such as rents, dividends, interest, and annuities, and disbursements such as the interest  
21 portion of a mortgage payment, are not apportioned. This is the original common law  
22 rule. Edwin A. Howes, Jr., *The American Law Relating to Income and Principal* 70  
23 (1905). In trusts in which a surviving spouse is dependent upon a regular flow of cash  
24 from the decedent’s securities portfolio, this rule will help to maintain payments to the  
25 spouse at the same level as before the settlor’s death. Under the 1962 Act, the pre-death  
26 portion of the first periodic payment due after death is apportioned to principal in the case  
27 of a testamentary trust or securities bequeathed by will to an inter vivos trust.

28 Nonperiodic payments. Under the second sentence of Section 302(b), interest on an  
29 obligation that does not provide a due date for the interest payment, such as interest on an  
30 income tax refund, would be apportioned to principal to the extent it accrues before a

1 person dies or an income interest begins unless the obligation is specifically given to a  
2 devisee or remainder beneficiary, in which case all of the accrued interest passes under  
3 Section 201(1) to the person who receives the obligation. The same rule applies to  
4 interest on an obligation that has a due date but does not provide for periodic payments. If  
5 there is no stated interest on the obligation, such as a zero coupon bond, and the proceeds  
6 from the obligation are received more than one year after it is purchased or acquired by  
7 the trustee, the entire amount received is principal under Section 406.

8

9 **53-15-24 APPORTIONMENT WHEN INCOME INTEREST ENDS.**

10 (a) In this section, “undistributed income” means net income received before the date on  
11 which an income interest ends. The term does not include an item of income or expense  
12 that is due or accrued or net income that has been added or is required to be added to  
13 principal under the terms of the trust.

14 (b) When a mandatory income interest ends, the trustee shall pay to a mandatory income  
15 beneficiary who survives that date, or the estate of a deceased mandatory income  
16 beneficiary whose death causes the interest to end, the beneficiary’s share of the  
17 undistributed income that is not disposed of under the terms of the trust unless the  
18 beneficiary has an unqualified power to revoke more than five percent of the trust  
19 immediately before the income interest ends. In the latter case, the undistributed income  
20 from the portion of the trust that may be revoked must be added to principal.

21 (c) When a trustee’s obligation to pay a fixed annuity or a fixed fraction of the value of  
22 the trust’s assets ends, the trustee shall prorate the final payment if and to the extent  
23 required by applicable law to accomplish a purpose of the trust or its settlor relating to  
24 income, gift, estate, or other tax requirements.

25

**Comment (Georgia)**

26 This is section 303 of the Uniform Act. This section replaces former Code section 53-12-  
27 213(d).

28

29

**Comment (Uniform Principal & Income Act 2000)**

1 Prior Acts. Both the 1931 Act (Section 4) and the 1962 Act (Section 4(d)) provide that a  
2 deceased income beneficiary's estate is entitled to the undistributed income. The Drafting  
3 Committee concluded that this is probably not what most settlors would want, and that,  
4 with respect to undistributed income, most settlors would favor the income beneficiary  
5 first, the remainder beneficiaries second, and the income beneficiary's heirs last, if at all.  
6 However, it decided not to eliminate this provision to avoid causing disputes about  
7 whether the trustee should have distributed collected cash before the income beneficiary  
8 died.

9 Accrued periodic payments. Under the prior Acts, an income beneficiary or his estate is  
10 entitled to receive a portion of any payments, other than dividends, that are due or that  
11 have accrued when the income interest terminates. The last sentence of subsection (a)  
12 changes that rule by providing that such items are not included in undistributed income.  
13 The items affected include periodic payments of interest, rent, and dividends, as well as  
14 items of income that accrue over a longer period of time; the rule also applies to expenses  
15 that are due or accrued.

16 Example – accrued periodic payments. The rules in Section 302 and Section 303 work in  
17 the following manner: Assume that a periodic payment of rent that is due on July 20 has  
18 not been paid when an income interest ends on July 30; the successive income interest  
19 begins on July 31, and the rent payment that was due on July 20 is paid on August 3.  
20 Under Section 302(a), the July 20 payment is added to the principal of the successive  
21 income interest when received. Under Section 302(b), the entire periodic payment of rent  
22 that is due on August 20 is income when received by the successive income interest.  
23 Under Section 303, neither the income beneficiary of the terminated income interest nor  
24 the beneficiary's estate is entitled to any part of either the July 20 or the August 20  
25 payments because neither one was received before the income interest ended on July 30.  
26 The same principles apply to expenses of the trust.

27 Beneficiary with an unqualified power to revoke. The requirement in subsection (b) to  
28 pay undistributed income to a mandatory income beneficiary or her estate does not apply  
29 to the extent the beneficiary has an unqualified power to revoke more than five percent of  
30 the trust immediately before the income interest ends. Without this exception, subsection

1 (b) would apply to a revocable living trust whose settlor is the mandatory income  
2 beneficiary during her lifetime, even if her will provides that all of the assets in the  
3 probate estate are to be distributed to the trust.

4 If a trust permits the beneficiary to withdraw all or a part of the trust principal after  
5 attaining a specified age and the beneficiary attains that age but fails to withdraw all of  
6 the principal that she is permitted to withdraw, a trustee is not required to pay her or her  
7 estate the undistributed income attributable to the portion of the principal that she left in  
8 the trust. The assumption underlying this rule is that the beneficiary has either provided  
9 for the disposition of the trust assets (including the undistributed income) by exercising a  
10 power of appointment that she has been given or has not withdrawn the assets because  
11 she is willing to have the principal and undistributed income be distributed under the  
12 terms of the trust. If the beneficiary has the power to withdraw 25% of the trust principal,  
13 the trustee must pay to her or her estate the undistributed income from the 75% that she  
14 cannot withdraw.

15  
16 **Part 4 Allocation of Receipts During Administration of Trust**

17 **Section 1 Receipts from Entities**

18 **53-15-25 CHARACTER OF RECEIPTS.**

19 (a) In this section, “entity” means a corporation, partnership, limited liability company,  
20 regulated investment company, real estate investment trust, common trust fund, or any  
21 other organization in which a trustee has an interest other than a trust or estate to which  
22 *Section 53-13-31* applies, a business or activity to which *Section 53-13-32 applies*, or an  
23 asset-backed security to which *Section 53-13-44* applies.

24 (b) Except as otherwise provided in this section, a trustee shall allocate to income money  
25 received from an entity.

26 (c) A trustee shall allocate the following receipts from an entity to principal:

27 (1) property other than money;

28 (2) money received in one distribution or a series of related distributions in  
29 exchange for part or all of a trust’s interest in the entity;

1 (3) money received in total or partial liquidation of the entity; and

2 (4) money received from an entity that is a regulated investment company or a  
3 real estate investment trust if the money distributed is a capital gain dividend for  
4 federal income tax purposes.

5 (d) Money is received in partial liquidation:

6 (1) to the extent that the entity, at or near the time of a distribution, indicates that  
7 it is a distribution in partial liquidation; or

8 (2) if the total amount of money and property received in a distribution or series  
9 of related distributions is greater than 20 percent of the entity's gross assets, as  
10 shown by the entity's year-end financial statements immediately preceding the  
11 initial receipt.

12 (e) Money is not received in partial liquidation, nor may it be taken into account under  
13 subsection (d)(2), to the extent that it does not exceed the amount of income tax that a  
14 trustee or beneficiary must pay on taxable income of the entity that distributes the money.

15 (f) A trustee may rely upon a statement made by an entity about the source or character of  
16 a distribution if the statement is made at or near the time of distribution by the entity's  
17 board of directors or other person or group of persons authorized to exercise powers to  
18 pay money or transfer property comparable to those of a corporation's board of directors.

19 **Comment (Georgia)**

20 This is Section 401 of the Uniform Act. This section replaces former Code section 53-  
21 12-214.

22 **Comment (Uniform Principal & Income Act 2000)**

23 Entities to which Section 401 applies. The reference to partnerships in Section 401(a) is  
24 intended to include all forms of partnerships, including limited partnerships, limited  
25 liability partnerships, and variants that have slightly different names and characteristics  
26 from State to State. The section does not apply, however, to receipts from an interest in  
27 property that a trust owns as a tenant in common with one or more co-owners, nor would  
28 it apply to an interest in a joint venture if, under applicable law, the trust's interest is  
29 regarded as that of a tenant in common.

1 Capital gain dividends. Under the Internal Revenue Code and the Income Tax  
2 Regulations, a “capital gain dividend” from a mutual fund or real estate investment trust  
3 is the excess of the fund’s or trust’s net long-term capital gain over its net short-term  
4 capital loss. As a result, a capital gain dividend does not include any net short-term  
5 capital gain, and cash received by a trust because of a net short-term capital gain is  
6 income under this Act.

7 Reinvested dividends. If a trustee elects (or continues an election made by its  
8 predecessor) to reinvest dividends in shares of stock of a distributing corporation or fund,  
9 whether evidenced by new certificates or entries on the books of the distributing entity,  
10 the new shares would be principal. Making or continuing such an election would be  
11 equivalent to deciding under Section 104 to transfer income to principal in order to  
12 comply with Section 103(b). However, if the trustee makes or continues the election for a  
13 reason other than to comply with Section 103(b), e.g., to make an investment without  
14 incurring brokerage commissions, the trustee should transfer cash from principal to  
15 income in an amount equal to the reinvested dividends.

16 Distribution of property. The 1962 Act describes a number of types of property that  
17 would be principal if distributed by a corporation. This becomes unwieldy in a section  
18 that applies to both corporations and all other entities. By stating that principal includes  
19 the distribution of any property other than money, Section 401 embraces all of the items  
20 enumerated in Section 6 of the 1962 Act as well as any other form of nonmonetary  
21 distribution not specifically mentioned in that Act.

22 Partial liquidations. Under subsection (d)(1), any distribution designated by the entity as a  
23 partial liquidating distribution is principal regardless of the percentage of total assets that  
24 it represents. If a distribution exceeds 20% of the entity’s gross assets, the entire  
25 distribution is a partial liquidation under subsection (d)(2) whether or not the entity  
26 describes it as a partial liquidation. In determining whether a distribution is greater than  
27 20% of the gross assets, the portion of the distribution that does not exceed the amount of  
28 income tax that the trustee or a beneficiary must pay on the entity’s taxable income is  
29 ignored.

1 Other large distributions. A cash distribution may be quite large (for example, more than  
2 10% but not more than 20% of the entity's gross assets) and have characteristics that  
3 suggest it should be treated as principal rather than income. For example, an entity may  
4 have received cash from a source other than the conduct of its normal business operations  
5 because it sold an investment asset; or because it sold a business asset other than one held  
6 for sale to customers in the normal course of its business and did not replace it; or it  
7 borrowed a large sum of money and secured the repayment of the loan with a substantial  
8 asset; or a principal source of its cash was from assets such as mineral interests, 90% of  
9 which would have been allocated to principal if the trust had owned the assets directly. In  
10 such a case the trustee, after considering the total return from the portfolio as a whole and  
11 the income component of that return, may decide to exercise the power under Section  
12 104(a) to make an adjustment between income and principal, subject to the limitations in  
13 Section 104(c).

14

15 **53-15-26 DISTRIBUTION FROM TRUST OR ESTATE.**

16 A trustee shall allocate to income an amount received as a distribution of income from a  
17 trust or an estate in which the trust has an interest other than a purchased interest, and  
18 shall allocate to principal an amount received as a distribution of principal from such a  
19 trust or estate. If a trustee purchases an interest in a trust that is an investment entity, or a  
20 decedent or donor transfers an interest in such a trust to a trustee, Section 53-13-30 or 53-  
21 13-44 applies to a receipt from the trust.

22

**Comment (Georgia)**

23 This is section 402 of the Uniform Act. This section had no counterpart in the former  
24 Code.

25

**Comment (Uniform Principal & Income Act 2000)**

26 Terms of the distributing trust or estate. Under Section 103(a), a trustee is to allocate  
27 receipts in accordance with the terms of the recipient trust or, if there is no provision, in  
28 accordance with this Act. However, in determining whether a distribution from another  
29 trust or an estate is income or principal, the trustee should also determine what the terms  
30 of the distributing trust or estate say about the distribution – for example, whether they  
31 direct that the distribution, even though made from the income of the distributing trust or

1 estate, is to be added to principal of the recipient trust. Such a provision should override  
2 the terms of this Act, but if the terms of the recipient trust contain a provision requiring  
3 such a distribution to be allocated to income, the trustee may have to obtain a judicial  
4 resolution of the conflict between the terms of the two documents.

5 Investment trusts. An investment entity to which the second sentence of this section  
6 applies includes a mutual fund, a common trust fund, a business trust or other entity  
7 organized as a trust for the purpose of receiving capital contributed by investors,  
8 investing that capital, and managing investment assets, including asset-backed security  
9 arrangements to which Section 415 applies. See John H. Langbein, *The Secret Life of the*  
10 *Trust: The Trust as an Instrument of Commerce*, 107 *Yale L.J.* 165 (1997).

11  
12 **53-15-27 BUSINESS AND OTHER ACTIVITIES CONDUCTED BY TRUSTEE.**

13 (a) If a trustee who conducts a business or other activity determines that it is in the best  
14 interest of all the beneficiaries to account separately for the business or activity instead of  
15 accounting for it as part of the trust's general accounting records, the trustee may  
16 maintain separate accounting records for its transactions, whether or not its assets are  
17 segregated from other trust assets.

18 (b) A trustee who accounts separately for a business or other activity may determine the  
19 extent to which its net cash receipts must be retained for working capital, the acquisition  
20 or replacement of fixed assets, and other reasonably foreseeable needs of the business or  
21 activity, and the extent to which the remaining net cash receipts are accounted for as  
22 principal or income in the trust's general accounting records. If a trustee sells assets of  
23 the business or other activity, other than in the ordinary course of the business or activity,  
24 the trustee shall account for the net amount received as principal in the trust's general  
25 accounting records to the extent the trustee determines that the amount received is no  
26 longer required in the conduct of the business.

27 (c) Activities for which a trustee may maintain separate accounting records include:

28 (1) retail, manufacturing, service, and other traditional business activities;

29 (2) farming;

- 1 (3) raising and selling livestock and other animals;
- 2 (4) management of rental properties;
- 3 (5) extraction of minerals and other natural resources;
- 4 (6) timber operations; and
- 5 (7) activities to which Section 53-13-43 applies.

6 **Comment (Georgia)**

7 This is section 403 of the Uniform Act. This section replaces former Code section 53-12-  
8 216.

9 **Comment (Uniform Principal & Income Act 2000)**

10 Purpose and scope. The provisions in Section 403 are intended to give greater flexibility  
11 to a trustee who operates a business or other activity in proprietorship form rather than in  
12 a wholly-owned corporation (or, where permitted by state law, a single-member limited  
13 liability company), and to facilitate the trustee's ability to decide the extent to which the  
14 net receipts from the activity should be allocated to income, just as the board of directors  
15 of a corporation owned entirely by the trust would decide the amount of the annual  
16 dividend to be paid to the trust. It permits a trustee to account for farming or livestock  
17 operations, rental properties, oil and gas properties, timber operations, and activities in  
18 derivatives and options as though they were held by a separate entity. It is not intended,  
19 however, to permit a trustee to account separately for a traditional securities portfolio to  
20 avoid the provisions of this Act that apply to such securities.

21 Section 403 permits the trustee to account separately for each business or activity for  
22 which the trustee determines separate accounting is appropriate. A trustee with a  
23 computerized accounting system may account for these activities in a "subtrust"; an  
24 individual trustee may continue to use the business and record-keeping methods  
25 employed by the decedent or transferor who may have conducted the business under an  
26 assumed name. The intent of this section is to give the trustee broad authority to select  
27 business record-keeping methods that best suit the activity in which the trustee is  
28 engaged.

1 If a fiduciary liquidates a sole proprietorship or other activity to which Section 403  
2 applies, the proceeds would be added to principal, even though derived from the  
3 liquidation of accounts receivable, because the proceeds would no longer be needed in  
4 the conduct of the business. If the liquidation occurs during probate or during an income  
5 interest's winding up period, none of the proceeds would be income for purposes of  
6 Section 201.

7 Separate accounts. A trustee may or may not maintain separate bank accounts for  
8 business activities that are accounted for under Section 403. A professional trustee may  
9 decide not to maintain separate bank accounts, but an individual trustee, especially one  
10 who has continued a decedent's business practices, may continue the same banking  
11 arrangements that were used during the decedent's lifetime. In either case, the trustee is  
12 authorized to decide to what extent cash is to be retained as part of the business assets  
13 and to what extent it is to be transferred to the trust's general accounts, either as income  
14 or principal.

15

## 16 **Section 2 Receipts Not Normally Apportioned**

### 17 **53-15-28 PRINCIPAL RECEIPTS.**

18 A trustee shall allocate to principal:

19 (1) to the extent not allocated to income under this [Act], assets received from a  
20 transferor during the transferor's lifetime, a decedent's estate, a trust with a  
21 terminating income interest, or a payer under a contract naming the trust or its  
22 trustee as beneficiary;

23 (2) money or other property received from the sale, exchange, liquidation, or  
24 change in form of a principal asset, including realized profit, subject to this  
25 [article];

26 (3) amounts recovered from third parties to reimburse the trust because of  
27 disbursements described in Section 53-13-51(a)(7) or for other reasons to the  
28 extent not based on the loss of income;

1 (4) proceeds of property taken by eminent domain, but a separate award made for  
2 the loss of income with respect to an accounting period during which a current  
3 income beneficiary had a mandatory income interest is income;

4 (5) net income received in an accounting period during which there is no  
5 beneficiary to whom a trustee may or must distribute income; and

6 (6) other receipts as provided in [Part 3].

7 **Comment (Georgia)**

8 This section is Section 404 of the Uniform Act. This section replaces former Code  
9 section 53-12-212(b). Items that appeared in the former Code section but do not appear  
10 in this Code section are covered in other sections of this Act, as follows:

11 former Code section 53-12-212(b)(3) (insurance) - see Section 53-13-36

12 former Code section 53-12-212(b)(4) (dividends) - see Section 53-13-30

13 former Code section 53-12-212(b)(5) (disposition of securities) - see Section 53-  
14 13-35

15 former Code section 53-12-212(b)(6) (depletion & timber) - see Sections 53-13-  
16 39 &

17 53-13-41

18 former Code section 53-12-212(b)(8) (depreciation) - see Section 53-13-32.

19 **Comment (Uniform Principal & Income Act 2000)**

20 Eminent domain awards. Even though the award in an eminent domain proceeding may  
21 include an amount for the loss of future rent on a lease, if that amount is not separately  
22 stated the entire award is principal. The rule is the same in the 1931 and 1962 Acts.

23

24 **53-15-29 RENTAL PROPERTY.**

25 To the extent that a trustee accounts for receipts from rental property pursuant to this  
26 section, the trustee shall allocate to income an amount received as rent of real or personal  
27 property, including an amount received for cancellation or renewal of a lease. An amount  
28 received as a refundable deposit, including a security deposit or a deposit that is to be  
29 applied as rent for future periods, must be added to principal and held subject to the terms

1 of the lease and is not available for distribution to a beneficiary until the trustee's  
2 contractual obligations have been satisfied with respect to that amount.

3 **Comment (Georgia)**

4 This section is Section 405 of the Uniform Act. This section replaces former Code  
5 section 53-12-212(a)(1).

6 **Comment (Uniform Principal & Income Act 2000)**

7 Application of Section 403. This section applies to the extent that the trustee does not  
8 account separately under Section 403 for the management of rental properties owned by  
9 the trust.

10 Receipts that are capital in nature. A portion of the payment under a lease may be a  
11 reimbursement of principal expenditures for improvements to the leased property that is  
12 characterized as rent for purposes of invoking contractual or statutory remedies for  
13 nonpayment. If the trustee is accounting for rental income under Section 405, a transfer  
14 from income to reimburse principal may be appropriate under Section 504 to the extent  
15 that some of the "rent" is really a reimbursement for improvements. This set of facts  
16 could also be a relevant factor for a trustee to consider under Section 104(b) in deciding  
17 whether and to what extent to make an adjustment between principal and income under  
18 Section 104(a) after considering the return from the portfolio as a whole.

19

20 **53-15-30 OBLIGATION TO PAY MONEY.**

21 (a) An amount received as interest, whether determined at a fixed, variable, or floating  
22 rate, on an obligation to pay money to the trustee, including an amount received as  
23 consideration for prepaying principal, must be allocated to income without any provision  
24 for amortization of premium.

25 (b) A trustee shall allocate to principal an amount received from the sale, redemption, or  
26 other disposition of an obligation to pay money to the trustee more than one year after it  
27 is purchased or acquired by the trustee, including an obligation whose purchase price or  
28 value when it is acquired is less than its value at maturity. If the obligation matures  
29 within one year after it is purchased or acquired by the trustee, an amount received in

1 excess of its purchase price or its value when acquired by the trust must be allocated to  
2 income.

3 (c) This section does not apply to an obligation to which Section 53-13-38, 53-13-39, 53-  
4 13-40, 53-13-41, 53-13-43, or 53-13-44.

5 **Comment (Georgia)**

6 This section is section 406 of the Uniform Act. This section replaces former Code  
7 sections 53-12-212(a)(2) and (a)(5) and 53-12-215.

8 **Comment (Uniform Principal & Income Act 2000)**

9 Variable or floating interest rates. The reference in subsection (a) to variable or floating  
10 interest rate obligations is intended to clarify that, even though an obligation's interest  
11 rate may change from time to time based upon changes in an index or other market  
12 indicator, an obligation to pay money containing a variable or floating rate provision is  
13 subject to this section and is not to be treated as a derivative financial instrument under  
14 Section 414.

15 Discount obligations. Subsection (b) applies to all obligations acquired at a discount,  
16 including short-term obligations such as U.S. Treasury Bills, long-term obligations such  
17 as U.S. Savings Bonds, zero-coupon bonds, and discount bonds that pay interest during  
18 part, but not all, of the period before maturity. Under subsection (b), the entire increase in  
19 value of these obligations is principal when the trustee receives the proceeds from the  
20 disposition unless the obligation, when acquired, has a maturity of less than one year. In  
21 order to have one rule that applies to all discount obligations, the Act eliminates the  
22 provision in the 1962 Act for the payment from principal of an amount equal to the  
23 increase in the value of U.S. Series E bonds. The provision for bonds that mature within  
24 one year after acquisition by the trustee is derived from the Illinois act. 760 ILCS 15/8  
25 (1996).

26 Subsection (b) also applies to inflation-indexed bonds – any increase in principal due to  
27 inflation after issuance is principal upon redemption if the bond matures more than one  
28 year after the trustee acquires it; if it matures within one year, all of the increase,  
29 including any attributable to an inflation adjustment, is income.

1 Effect of Section 104. In deciding whether and to what extent to exercise the power to  
2 adjust between principal and income granted by Section 104(a), a relevant factor for the  
3 trustee to consider is the effect on the portfolio as a whole of having a portion of the  
4 assets invested in bonds that do not pay interest currently.

5

6 **53-15-31 INSURANCE POLICIES AND SIMILAR CONTRACTS.**

7 (a) Except as otherwise provided in subsection (b), a trustee shall allocate to principal the  
8 proceeds of a life insurance policy or other contract in which the trust or its trustee is  
9 named as beneficiary, including a contract that insures the trust or its trustee against loss  
10 for damage to, destruction of, or loss of title to a trust asset. The trustee shall allocate  
11 dividends on an insurance policy to income if the premiums on the policy are paid from  
12 income, and to principal if the premiums are paid from principal.

13 (b) A trustee shall allocate to income proceeds of a contract that insures the trustee  
14 against loss of occupancy or other use by an income beneficiary, loss of income, or,  
15 subject to Section 53-13-32, loss of profits from a business.

16 (c) This section does not apply to a contract to which Section 53-13-38 applies.

17

**Comment (Georgia)**

18 This is Section 407 of the Uniform Act. This section replaces former Code section 53-  
19 12-212(b)(3).

20 (No Comment on Section 407 in Uniform Principal & Income Act 2000)

21

22 **15-15-32 INSUBSTANTIAL ALLOCATIONS NOT REQUIRED.**

23 If a trustee determines that an allocation between principal and income required by  
24 Section 53-13-38, 53-13-39, 53-13-40, 53-13-41 or 53-13-44 is insubstantial, the trustee  
25 may allocate the entire amount to principal unless one of the circumstances described in  
26 [power of adjustment statute] applies to the allocation. This power may be exercised by a  
27 cotrustee in the circumstances described in [power of adjustment statute] and may be  
28 released for the reasons and in the manner described in. [power of adjustment statute].

29 An allocation is presumed to be insubstantial if:

- 1 (1) the amount of the allocation would increase or decrease net income in an  
2 accounting period, as determined before the allocation, by less than 10 percent; or  
3 (2) the value of the asset producing the receipt for which the allocation would be  
4 made is less than 10 percent of the total value of the trust's assets at the beginning  
5 of the accounting period.

6

7

**Comment (Georgia)**

8

This is Section 408 of the Uniform Act. This section had no counterpart in the former  
9 Code.

10

**Comment (Uniform Principal & Income Act 2000)**

11

This section is intended to relieve a trustee from making relatively small allocations  
12 while preserving the trustee's right to do so if an allocation is large in terms of absolute  
13 dollars.

14

For example, assume that a trust's assets, which include a working interest in an oil well,  
15 have a value of \$1,000,000; the net income from the assets other than the working  
16 interest is \$40,000; and the net receipts from the working interest are \$400. The trustee  
17 may allocate all of the net receipts from the working interest to principal instead of  
18 allocating 10%, or \$40, to income under Section 411. If the net receipts from the working  
19 interest are \$35,000, so that the amount allocated to income under Section 411 would be  
20 \$3,500, the trustee may decide that this amount is sufficiently significant to the income  
21 beneficiary that the allocation provided for by Section 411 should be made, even though  
22 the trustee is still permitted under Section 408 to allocate all of the net receipts to  
23 principal because the \$3,500 would increase the net income of \$40,000, as determined  
24 before making an allocation under Section 411, by less than 10%. Section 408 will also  
25 relieve a trustee from having to allocate net receipts from the sale of trees in a small  
26 woodlot between principal and income.

27

While the allocation to principal of small amounts under this section should not be a  
28 cause for concern for tax purposes, allocations are not permitted under this section in  
29 circumstances described in Section 104(c) to eliminate claims that the power in this  
30 section has adverse tax consequences.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30

**53-15-33 DEFERRED COMPENSATION, ANNUITIES, AND SIMILAR PAYMENTS.**

(a) In this section, “payment” means a payment that a trustee may receive over a fixed number of years or during the life of one or more individuals because of services rendered or property transferred to the payer in exchange for future payments. The term includes a payment made in money or property from the payer’s general assets or from a separate fund created by the payer, including a private or commercial annuity, an individual retirement account, and a pension, profit-sharing, stock-bonus, or stock-ownership plan.

(b) To the extent that a payment is characterized as interest or a dividend or a payment made in lieu of interest or a dividend, a trustee shall allocate it to income. The trustee shall allocate to principal the balance of the payment and any other payment received in the same accounting period that is not characterized as interest, a dividend, or an equivalent payment.

(c) If no part of a payment is characterized as interest, a dividend, or an equivalent payment, and all or part of the payment is required to be made, a trustee shall allocate to income 10 percent of the part that is required to be made during the accounting period and the balance to principal. If no part of a payment is required to be made or the payment received is the entire amount to which the trustee is entitled, the trustee shall allocate the entire payment to principal. For purposes of this subsection, a payment is not “required to be made” to the extent that it is made because the trustee exercises a right of withdrawal.

(d) If, to obtain an estate tax marital deduction for a trust, a trustee must allocate more of a payment to income than provided for by this section, the trustee shall allocate to income the additional amount necessary to obtain the marital deduction.

(e) This section does not apply to payments to which Section 53-13-39 applies.

**Comment (Georgia)**

This is Section 409 of the Uniform Act. This section had no counterpart in the former Code.

1 **Comment (Uniform Principal & Income Act 2000)**

2 Scope. Section 409 applies to amounts received under contractual arrangements that  
3 provide for payments to a third party beneficiary as a result of services rendered or  
4 property transferred to the payer. While the right to receive such payments is a  
5 liquidating asset of the kind described in Section 410 (i.e., “an asset whose value will  
6 diminish or terminate because the asset is expected to produce receipts for a period of  
7 limited duration”), these payment rights are covered separately in Section 409 because of  
8 their special characteristics.

9 Section 409 applies to receipts from all forms of annuities and deferred compensation  
10 arrangements, whether the payment will be received by the trust in a lump sum or in  
11 installments over a period of years. It applies to bonuses that may be received over two or  
12 three years and payments that may last for much longer periods, including payments from  
13 an individual retirement account (IRA), deferred compensation plan (whether qualified or  
14 not qualified for special federal income tax treatment), and insurance renewal  
15 commissions. It applies to a retirement plan to which the settlor has made contributions,  
16 just as it applies to an annuity policy that the settlor may have purchased individually,  
17 and it applies to variable annuities, deferred annuities, annuities issued by commercial  
18 insurance companies, and “private annuities” arising from the sale of property to another  
19 individual or entity in exchange for payments that are to be made for the life of one or  
20 more individuals. The section applies whether the payments begin when the payment  
21 right becomes subject to the trust or are deferred until a future date, and it applies  
22 whether payments are made in cash or in kind, such as employer stock (in-kind payments  
23 usually will be made in a single distribution that will be allocated to principal under the  
24 second sentence of subsection (c)).

25 The 1962 Act. Under Section 12 of the 1962 Act, receipts from “rights to receive  
26 payments on a contract for deferred compensation” are allocated to income each year in  
27 an amount “not in excess of 5% per year” of the property’s inventory value. While “not  
28 in excess of 5%” suggests that the annual allocation may range from zero to 5% of the  
29 inventory value, in practice the rule is usually treated as prescribing a 5% allocation. The  
30 inventory value is usually the present value of all the future payments, and since the

1 inventory value is determined as of the date on which the payment right becomes subject  
2 to the trust, the inventory value, and thus the amount of the annual income allocation,  
3 depends significantly on the applicable interest rate on the decedent's date of death. That  
4 rate may be much higher or lower than the average long-term interest rate. The amount  
5 determined under the 5% formula tends to become fixed and remain unchanged even  
6 though the amount received by the trust increases or decreases.

7 Allocations Under Section 409(b). Section 409(b) applies to plans whose terms  
8 characterize payments made under the plan as dividends, interest, or payments in lieu of  
9 dividends or interest. For example, some deferred compensation plans that hold debt  
10 obligations or stock of the plan's sponsor in an account for future delivery to the person  
11 rendering the services provide for the annual payment to that person of dividends  
12 received on the stock or interest received on the debt obligations. Other plans provide that  
13 the account of the person rendering the services shall be credited with "phantom" shares  
14 of stock and require an annual payment that is equivalent to the dividends that would be  
15 received on that number of shares if they were actually issued; or a plan may entitle the  
16 person rendering the services to receive a fixed dollar amount in the future and provide  
17 for the annual payment of interest on the deferred amount during the period prior to its  
18 payment. Under Section 409(b), payments of dividends, interest or payments in lieu of  
19 dividends or interest under plans of this type are allocated to income; all other payments  
20 received under these plans are allocated to principal.

21 Section 409(b) does not apply to an IRA or an arrangement with payment provisions  
22 similar to an IRA. IRAs and similar arrangements are subject to the provisions in Section  
23 409(c).

24 Allocations Under Section 409(c). The focus of Section 409, for purposes of allocating  
25 payments received by a trust to or between principal and income, is on the payment right  
26 rather than on assets that may be held in a fund from which the payments are made. Thus,  
27 if an IRA holds a portfolio of marketable stocks and bonds, the amount received by the  
28 IRA as dividends and interest is not taken into account in determining the principal and  
29 income allocation except to the extent that the Internal Revenue Service may require  
30 them to be taken into account when the payment is received by a trust that qualifies for

1 the estate tax marital deduction (a situation that is provided for in Section 409(d)). An  
2 IRA is subject to federal income tax rules that require payments to begin by a particular  
3 date and be made over a specific number of years or a period measured by the lives of  
4 one or more persons. The payment right of a trust that is named as a beneficiary of an  
5 IRA is not a right to receive particular items that are paid to the IRA, but is instead the  
6 right to receive an amount determined by dividing the value of the IRA by the remaining  
7 number of years in the payment period. This payment right is similar to the right to  
8 receive a unitrust amount, which is normally expressed as an amount equal to a  
9 percentage of the value of the unitrust assets without regard to dividends or interest that  
10 may be received by the unitrust.

11 An amount received from an IRA or a plan with a payment provision similar to that of an  
12 IRA is allocated under Section 409(c), which differentiates between payments that are  
13 required to be made and all other payments. To the extent that a payment is required to be  
14 made (either under federal income tax rules or, in the case of a plan that is not subject to  
15 those rules, under the terms of the plan), 10% of the amount received is allocated to  
16 income and the balance is allocated to principal. All other payments are allocated to  
17 principal because they represent a change in the form of a principal asset; Section 409  
18 follows the rule in Section 404(2), which provides that money or property received from  
19 a change in the form of a principal asset be allocated to principal.

20 Section 409(c) produces an allocation to income that is similar to the allocation under the  
21 1962 Act formula if the annual payments are the same throughout the payment period,  
22 and it is simpler to administer. The amount allocated to income under Section 409 is not  
23 dependent upon the interest rate that is used for valuation purposes when the decedent  
24 dies, and if the payments received by the trust increase or decrease from year to year  
25 because the fund from which the payment is made increases or decreases in value, the  
26 amount allocated to income will also increase or decrease.

27 Marital deduction requirements. When an IRA is payable to a QTIP marital deduction  
28 trust, the IRS treats the IRA as separate terminable interest property and requires that a  
29 QTIP election be made for it. In order to qualify for QTIP treatment, an IRS ruling states  
30 that all of the IRA's income must be distributed annually to the QTIP marital deduction

1 trust and then must be allocated to trust income for distribution to the spouse. Rev. Rul.  
2 89-89, 1989-2 C.B. 231. If an allocation to income under this Act of 10% of the required  
3 distribution from the IRA does not meet the requirement that all of the IRA's income be  
4 distributed from the trust to the spouse, the provision in subsection (d) requires the trustee  
5 to make a larger allocation to income to the extent necessary to qualify for the marital  
6 deduction. The requirement of Rev. Rul. 89-89 should also be satisfied if the IRA  
7 beneficiary designation permits the spouse to require the trustee to withdraw the  
8 necessary amount from the IRA and distribute it to her, even though the spouse never  
9 actually requires the trustee to do so. If such a provision is in the beneficiary designation,  
10 a distribution under subsection (d) should not be necessary.

11 Application of Section 104. Section 104(a) of this Act gives a trustee who is acting under  
12 the prudent investor rule the power to adjust from principal to income if, considering the  
13 portfolio as a whole and not just receipts from deferred compensation, the trustee  
14 determines that an adjustment is necessary. See Example (5) in the Comment following  
15 Section 104.

16

17 **53-15-34 LIQUIDATING ASSET.**

18 (a) In this section, "liquidating asset" means an asset whose value will diminish or  
19 terminate because the asset is expected to produce receipts for a period of limited  
20 duration. The term includes a leasehold, patent, copyright, royalty right, and right to  
21 receive payments during a period of more than one year under an arrangement that does  
22 not provide for the payment of interest on the unpaid balance. The term does not include  
23 a payment subject to Section 53-13-38, resources subject to Section 53-13-40, timber  
24 subject to Section 53-13-41, an activity subject to Section 53-13-43, an asset subject to  
25 Section 53-13-44, or any asset for which the trustee establishes a reserve for depreciation  
26 under Section 53-13-52.

27 (b) A trustee shall allocate to income 10 percent of the receipts from a liquidating asset  
28 and the balance to principal.

29

**Comment (Georgia)**

1 This is Section 410 of the Uniform Act. Former Code section 53-12-217 covered  
2 property subject to depletion.

3 **Comment (Uniform Principal & Income Act 2000)**

4 Prior Acts. Section 11 of the 1962 Act allocates receipts from “property subject to  
5 depletion” to income in an amount “not in excess of 5%” of the asset’s inventory value.  
6 The 1931 Act has a similar 5% rule that applies when the trustee is under a duty to  
7 change the form of the investment. The 5% rule imposes on a trust the obligation to pay a  
8 fixed annuity to the income beneficiary until the asset is exhausted. Under both the 1931  
9 and 1962 Acts the balance of each year’s receipts is added to principal. A fixed payment  
10 can produce unfair results. The remainder beneficiary receives all of the receipts from  
11 unexpected growth in the asset, e.g., if royalties on a patent or copyright increase  
12 significantly. Conversely, if the receipts diminish more rapidly than expected, most of the  
13 amount received by the trust will be allocated to income and little to principal. Moreover,  
14 if the annual payments remain the same for the life of the asset, the amount allocated to  
15 principal will usually be less than the original inventory value. For these reasons, Section  
16 410 abandons the annuity approach under the 5% rule.

17 Lottery payments. The reference in subsection (a) to rights to receive payments under an  
18 arrangement that does not provide for the payment of interest includes state lottery prizes  
19 and similar fixed amounts payable over time that are not deferred compensation  
20 arrangements covered by Section 409.

21

22 **53-15-35 MINERALS, WATER, AND OTHER NATURAL RESOURCES.**

23 (a) To the extent that a trustee accounts for receipts from an interest in minerals or other  
24 natural resources pursuant to this section, the trustee shall allocate them as follows:

25 (1) If received as nominal delay rental or nominal annual rent on a lease, a receipt  
26 must be allocated to income.

27 (2) If received from a production payment, a receipt must be allocated to income  
28 if and to the extent that the agreement creating the production payment provides a  
29 factor for interest or its equivalent. The balance must be allocated to principal.

1 (3) If an amount received as a royalty, shut-in-well payment, take-or-pay  
2 payment, bonus, or delay rental is more than nominal, 90 percent must be  
3 allocated to principal and the balance to income.

4 (4) If an amount is received from a working interest or any other interest not  
5 provided for in paragraph (1), (2), or (3), 90 percent of the net amount received  
6 must be allocated to principal and the balance to income.

7 (b) An amount received on account of an interest in water that is renewable must be  
8 allocated to income. If the water is not renewable, 90 percent of the amount must be  
9 allocated to principal and the balance to income.

10 (c) This [Act] applies whether or not a decedent or donor was extracting minerals, water,  
11 or other natural resources before the interest became subject to the trust.

12 (d) If a trust owns an interest in minerals, water, or other natural resources on [the  
13 effective date of this [Act]], the trustee may allocate receipts from the interest as provided  
14 in this [Act] or in the manner used by the trustee before [the effective date of this [Act]].  
15 If the trust acquires an interest in minerals, water, or other natural resources after [the  
16 effective date of this [Act]], the trustee shall allocate receipts from the interest as  
17 provided in this [Act].

18 **Comment (Georgia)**

19 This is Section 411 of the Uniform Act. This section replaces Section 53-12-217 of the  
20 former Code.

21 **Comment (Uniform Principal & Income Act 2000)**

22 Prior Acts. The 1962 Act allocates to principal as a depletion allowance, 27-1/2% of the  
23 gross receipts, but not more than 50% of the net receipts after paying expenses. The  
24 Internal Revenue Code no longer provides for a 27-1/2% depletion allowance, although  
25 the major oil-producing States have retained the 27-1/2% provision in their principal and  
26 income acts (Texas amended its Act in 1993, but did not change the depletion provision).  
27 Section 9 of the 1931 Act allocates all of the net proceeds received as consideration for  
28 the “permanent severance of natural resources from the lands” to principal.

1 Section 411 allocates 90% of the net receipts to principal and 10% to income. A depletion  
2 provision that is tied to past or present Code provisions is undesirable because it causes a  
3 large portion of the oil and gas receipts to be paid out as income. As wells are depleted,  
4 the amount received by the income beneficiary falls drastically. Allocating a larger  
5 portion of the receipts to principal enables the trustee to acquire other income producing  
6 assets that will continue to produce income when the mineral reserves are exhausted.

7 Application of Sections 403 and 408. This section applies to the extent that the trustee  
8 does not account separately for receipts from minerals and other natural resources under  
9 Section 403 or allocate all of the receipts to principal under Section 408.

10 Open mine doctrine. The purpose of Section 411(c) is to abolish the “open mine  
11 doctrine” as it may apply to the rights of an income beneficiary and a remainder  
12 beneficiary in receipts from the production of minerals from land owned or leased by a  
13 trust. Instead, such receipts are to be allocated to or between principal and income in  
14 accordance with the provisions of this Act. For a discussion of the open mine doctrine,  
15 see generally 3A Austin W. Scott & William F. Fratcher, *The Law of Trusts* § 239.3 (4th  
16 ed. 1988), and *Nutter v. Stockton*, 626 P.2d 861 (Okla. 1981).

17 Effective date provision. Section 9(b) of the 1962 Act provides that the natural resources  
18 provision does not apply to property interests held by the trust on the effective date of the  
19 Act, which reflects concerns about the constitutionality of applying a retroactive  
20 administrative provision to interests in real estate, based on the opinion in the Oklahoma  
21 case of *Franklin v. Margay Oil Corporation*, 153 P.2d 486, 501 (Okla. 1944). Section  
22 411(d) permits a trustee to use either the method provided for in this Act or the method  
23 used before the Act takes effect. Lawyers in jurisdictions other than Oklahoma may  
24 conclude that retroactivity is not a problem as to property situated in their States, and this  
25 provision permits trustees to decide, based on advice from counsel in States whose law  
26 may be different from that of Oklahoma, whether they may apply this provision  
27 retroactively if they conclude that to do so is in the best interests of the beneficiaries.

28 If the property is in a State other than the State where the trust is administered, the trustee  
29 must be aware that the law of the property’s situs may control this question. The outcome  
30 turns on a variety of questions: whether the terms of the trust specify that the law of a

1 State other than the situs of the property shall govern the administration of the trust, and  
2 whether the courts will follow the terms of the trust; whether the trust's asset is the land  
3 itself or a leasehold interest in the land (as it frequently is with oil and gas property);  
4 whether a leasehold interest or its proceeds should be classified as real property or  
5 personal property, and if as personal property, whether applicable state law treats it as a  
6 movable or an immovable for conflict of laws purposes. See 5A Austin W. Scott &  
7 William F. Fratcher, *The Law of Trusts* §§ 648, at 531, 533-534; § 657, at 600 (4th ed.  
8 1989).

9

10 **53-15-36 TIMBER.**

11 (a) To the extent that a trustee accounts for receipts from the sale of timber and related  
12 products pursuant to this section, the trustee shall allocate the net receipts:

13 (1) to income to the extent that the amount of timber removed from the land does  
14 not exceed the rate of growth of the timber during the accounting periods in which  
15 a beneficiary has a mandatory income interest;

16 (2) to principal to the extent that the amount of timber removed from the land  
17 exceeds the rate of growth of the timber or the net receipts are from the sale of  
18 standing timber;

19 (3) to or between income and principal if the net receipts are from the lease of  
20 timberland or from a contract to cut timber from land owned by a trust, by  
21 determining the amount of timber removed from the land under the lease or  
22 contract and applying the rules in paragraphs (1) and (2); or

23 (4) to principal to the extent that advance payments, bonuses, and other payments  
24 are not allocated pursuant to paragraph (1), (2), or (3).

25 (b) In determining net receipts to be allocated pursuant to subsection (a), a trustee shall  
26 deduct and transfer to principal a reasonable amount for depletion.

27 (c) This [Act] applies whether or not a decedent or transferor was harvesting timber from  
28 the property before it became subject to the trust.

1 (d) If a trust owns an interest in timberland on [the effective date of this [Act]], the trustee  
2 may allocate net receipts from the sale of timber and related products as provided in this  
3 [Act] or in the manner used by the trustee before [the effective date of this [Act]]. If the  
4 trust acquires an interest in timberland after [the effective date of this [Act]], the trustee  
5 shall allocate net receipts from the sale of timber and related products as provided in this  
6 [Act].

7 **Comment (Georgia)**

8 This is Section 412 of the Uniform Act. This section replaces Section 53-12-218 of the  
9 former Code.

10 **Comment (Uniform Principal & Income Act 2000)**

11 Scope of section. The rules in Section 412 are intended to apply to net receipts from the  
12 sale of trees and by-products from harvesting and processing trees without regard to the  
13 kind of trees that are cut or whether the trees are cut before or after a particular number of  
14 years of growth. The rules apply to the sale of trees that are expected to produce lumber  
15 for building purposes, trees sold as pulpwood, and Christmas and other ornamental trees.  
16 Subsection (a) applies to net receipts from property owned by the trustee and property  
17 leased by the trustee. The Act is not intended to prevent a tenant in possession of the  
18 property from using wood that he cuts on the property for personal, noncommercial  
19 purposes, such as a Christmas tree, firewood, mending old fences or building new fences,  
20 or making repairs to structures on the property.

21 Under subsection (a), the amount of net receipts allocated to income depends upon  
22 whether the amount of timber removed is more or less than the rate of growth. The  
23 method of determining the amount of timber removed and the rate of growth is up to the  
24 trustee, based on methods customarily used for the kind of timber involved.

25 Application of Sections 403 and 408. This section applies to the extent that the trustee  
26 does not account separately for net receipts from the sale of timber and related products  
27 under Section 403 or allocate all of the receipts to principal under Section 408. The  
28 option to account for net receipts separately under Section 403 takes into consideration  
29 the possibility that timber harvesting operations may have been conducted before the  
30 timber property became subject to the trust, and that it may make sense to continue using

1 accounting methods previously established for the property. It also permits a trustee to  
2 use customary accounting practices for timber operations even if no harvesting occurred  
3 on the property before it became subject to the trust.

4  
5 **53-15-37 PROPERTY NOT PRODUCTIVE OF INCOME.**

6 (a) If a marital deduction is allowed for all or part of a trust whose assets consist  
7 substantially of property that does not provide the spouse with sufficient **income** from or  
8 use of the trust assets, and if the amounts that the trustee transfers from **principal** to  
9 **income** under Section 53-15-9 and distributes to the spouse from **principal** pursuant to  
10 the terms of the trust are insufficient to provide the spouse with the beneficial enjoyment  
11 required to obtain the marital deduction, the spouse may require the trustee to make  
12 property productive of **income**, convert property within a reasonable time, or exercise the  
13 power conferred by Section 53-15-9. The trustee may decide which action or combination  
14 of actions to take.

15  
16  
17 (b) In cases not governed by subsection (a), proceeds from the sale or other disposition  
18 of an asset are **principal** without regard to the amount of **income** the asset produces  
19 during any accounting period.

20  
21  
22  
23 **Comment (Georgia)**

24 This section carries replaces former Code section 53-12-287(d) and adopts Uniform Act  
25 Sex. 413. Due to the similarity between this Code section and Section 413 of the  
26 Uniform Act, the Comment to the Uniform Act is reproduced below.

27 **Comment (Uniform Principal & Income Act 2000)**

28 Prior Acts' Conflict with Uniform Prudent Investor Act. Section 2(b) of the Uniform  
29 Prudent Investor Act provides that "[a] trustee's investment and management decisions  
30 respecting individual assets must be evaluated not in isolation but in the context of the  
31 trust portfolio as a whole ... ." The underproductive property provisions in Section 12 of  
32 the 1962 Act and Section 11 of the 1931 Act give the income beneficiary a right to  
33 receive a portion of the proceeds from the sale of underproductive property as "delayed  
34 income." In each Act the provision applies on an asset by asset basis and not by taking  
35 into consideration the trust portfolio as a whole, which conflicts with the basic precept in  
36 Section 2(b) of the Prudent Investor Act. Moreover, in determining the amount of  
37 delayed income, the prior Acts do not permit a trustee to take into account the extent to

1 which the trustee may have distributed principal to the income beneficiary, under  
2 principal invasion provisions in the terms of the trust, to compensate for insufficient  
3 income from the unproductive asset. Under Section 104(b)(7) of this Act, a trustee must  
4 consider prior distributions of principal to the income beneficiary in deciding whether  
5 and to what extent to exercise the power to adjust conferred by Section 104(a).

6 Duty to make property productive of income. In order to implement the Uniform Prudent  
7 Investor Act, this Act abolishes the right to receive delayed income from the sale  
8 proceeds of an asset that produces little or no income, but it does not alter existing state  
9 law regarding the income beneficiary's right to compel the trustee to make property  
10 productive of income. As the law continues to develop in this area, the duty to make  
11 property productive of current income in a particular situation should be determined by  
12 taking into consideration the performance of the portfolio as a whole and the extent to  
13 which a trustee makes principal distributions to the income beneficiary under the terms of  
14 the trust and adjustments between principal and income under Section 104 of this Act.

15 Trusts for which the value of the right to receive income is important for tax reasons may  
16 be affected by Reg. § 1.7520-3(b)(2)(v) *Example (1)*, § 20.7520-3(b)(2)(v) *Examples (1)*  
17 and (2), and § 25.7520-3(b)(2)(v) *Examples (1)* and (2), which provide that if the income  
18 beneficiary does not have the right to compel the trustee to make the property productive,  
19 the income interest is considered unproductive and may not be valued actuarially under  
20 those sections.

21 Marital deduction trusts. Subsection (a) draws on language in Reg. § 20.2056(b)-5(f)(4)  
22 and (5) to enable a trust for a spouse to qualify for a marital deduction if applicable state  
23 law is unclear about the spouse's right to compel the trustee to make property productive  
24 of income. The trustee should also consider the application of Section 104 of this Act and  
25 the provisions of Restatement of Trusts 3d: Prudent Investor Rule § 240, at 186, app. §  
26 240, at 252 (1992). Example (6) in the Comment to Section 104 describes a situation  
27 involving the payment from income of carrying charges on unproductive real estate in  
28 which Section 104 may apply.

29 Once the two conditions have occurred – insufficient beneficial enjoyment from the  
30 property and the spouse's demand that the trustee take action under this section – the

1 trustee must act; but instead of the formulaic approach of the 1962 Act, which is triggered  
2 only if the trustee sells the property, this Act permits the trustee to decide whether to  
3 make the property productive of income, convert it, transfer funds from principal to  
4 income, or to take some combination of those actions. The trustee may rely on the power  
5 conferred by Section 104(a) to adjust from principal to income if the trustee decides that  
6 it is not feasible or appropriate to make the property productive of income or to convert  
7 the property. Given the purpose of Section 413, the power under Section 104(a) would be  
8 exercised to transfer principal to income and not to transfer income to principal.

9 Section 413 does not apply to a so-called “estate” trust, which will qualify for the marital  
10 deduction, even though the income may be accumulated for a term of years or for the life  
11 of the surviving spouse, if the terms of the trust require the principal and undistributed  
12 income to be paid to the surviving spouse’s estate when the spouse dies. Reg. §  
13 20.2056(c)-2(b)(1)(iii).

14  
15 **53-15-38 DERIVATIVES AND OPTIONS.**

16 (a) In this section, “derivative” means a contract or financial instrument or a combination  
17 of contracts and financial instruments which gives a trust the right or obligation to  
18 participate in some or all changes in the price of a tangible or intangible asset or group of  
19 assets, or changes in a rate, an index of prices or rates, or other market indicator for an  
20 asset or a group of assets.

21 (b) To the extent that a trustee does not account under Section 53-13-32 for transactions  
22 in derivatives, the trustee shall allocate to principal receipts from and disbursements  
23 made in connection with those transactions.

24 (c) If a trustee grants an option to buy property from the trust, whether or not the trust  
25 owns the property when the option is granted, grants an option that permits another  
26 person to sell property to the trust, or acquires an option to buy property for the trust or  
27 an option to sell an asset owned by the trust, and the trustee or other owner of the asset is  
28 required to deliver the asset if the option is exercised, an amount received for granting the  
29 option must be allocated to principal. An amount paid to acquire the option must be paid

1 from principal. A gain or loss realized upon the exercise of an option, including an option  
2 granted to a settlor of the trust for services rendered, must be allocated to principal.

3 **Comment (Georgia)**

4 This is Section 414 of the Uniform Act. This section had no counterpart in the former  
5 Code.

6 **Comment (Uniform Principal & Income Act 2000)**

7 Scope and application. It is difficult to predict how frequently and to what extent trustees  
8 will invest directly in derivative financial instruments rather than participating indirectly  
9 through investment entities that may utilize these instruments in varying degrees. If the  
10 trust participates in derivatives indirectly through an entity, an amount received from the  
11 entity will be allocated under Section 401 and not Section 414. If a trustee invests directly  
12 in derivatives to a significant extent, the expectation is that receipts and disbursements  
13 related to derivatives will be accounted for under Section 403; if a trustee chooses not to  
14 account under Section 403, Section 414(b) provides the default rule. Certain types of  
15 option transactions in which trustees may engage are dealt with in subsection (c) to  
16 distinguish those transactions from ones involving options that are embedded in  
17 derivative financial instruments.

18 Definition of “derivative.” “Derivative” is a difficult term to define because new  
19 derivatives are invented daily as dealers tailor their terms to achieve specific financial  
20 objectives for particular clients. Since derivatives are typically contract-based, a  
21 derivative can probably be devised for almost any set of objectives if another party can be  
22 found who is willing to assume the obligations required to meet those objectives.

23 The most comprehensive definition of derivative is in the Exposure Draft of a Proposed  
24 Statement of Financial Accounting Standards titled “Accounting for Derivative and  
25 Similar Financial Instruments and for Hedging Activities,” which was released by the  
26 Financial Accounting Standards Board (FASB) on June 20, 1996 (No. 162-B). The  
27 definition in Section 414(a) is derived in part from the FASB definition. The purpose of  
28 the definition in subsection (a) is to implement the substantive rule in subsection (b) that  
29 provides for all receipts and disbursements to be allocated to principal to the extent the  
30 trustee elects not to account for transactions in derivatives under Section 403. As a result,

1 it is much shorter than the FASB definition, which serves much more ambitious  
2 objectives.

3 A derivative is frequently described as including futures, forwards, swaps and options,  
4 terms that also require definition, and the definition in this Act avoids these terms. FASB  
5 used the same approach, explaining in paragraph 65 of the Exposure Draft:

6 The definition of *derivative financial instrument* in this Statement includes those  
7 financial instruments generally considered to be derivatives, such as forwards, futures,  
8 swaps, options, and similar instruments. The Board considered defining a derivative  
9 financial instrument by merely referencing those commonly understood instruments,  
10 similar to paragraph 5 of Statement 119, which says that "... a derivative financial  
11 instrument is a futures, forward, swap, or option contract, or other financial instrument  
12 with similar characteristics." However, the continued development of financial markets  
13 and innovative financial instruments could ultimately render a definition based on  
14 examples inadequate and obsolete. The Board, therefore, decided to base the definition of  
15 a derivative financial instrument on a description of the common characteristics of those  
16 instruments in order to accommodate the accounting for newly developed derivatives.  
17 (Footnote omitted.)

18 Marking to market. A gain or loss that occurs because the trustee marks securities to  
19 market or to another value during an accounting period is not a transaction in a derivative  
20 financial instrument that is income or principal under the Act – only cash receipts and  
21 disbursements, and the receipt of property in exchange for a principal asset, affect a  
22 trust's principal and income accounts.

23 Receipt of property other than cash. If a trustee receives property other than cash upon  
24 the settlement of a derivatives transaction, that property would be principal under Section  
25 404(2).

26 Options. Options to which subsection (c) applies include an option to purchase real estate  
27 owned by the trustee and a put option purchased by a trustee to guard against a drop in  
28 value of a large block of marketable stock that must be liquidated to pay estate taxes.

29 Subsection (c) would also apply to a continuing and regular practice of selling call  
30 options on securities owned by the trust if the terms of the option require delivery of the

1 securities. It does not apply if the consideration received or given for the option is  
2 something other than cash or property, such as cross-options granted in a buy-sell  
3 agreement between owners of an entity.

4  
5 **53-15-39 ASSET-BACKED SECURITIES.**

6 (a) In this section, “asset-backed security” means an asset whose value is based upon the  
7 right it gives the owner to receive distributions from the proceeds of financial assets that  
8 provide collateral for the security. The term includes an asset that gives the owner the  
9 right to receive from the collateral financial assets only the interest or other current return  
10 or only the proceeds other than interest or current return. The term does not include an  
11 asset to which Section 53-13-30 53-13-38 applies.

12 (b) If a trust receives a payment from interest or other current return and from other  
13 proceeds of the collateral financial assets, the trustee shall allocate to income the portion  
14 of the payment which the payer identifies as being from interest or other current return  
15 and shall allocate the balance of the payment to principal.

16 (c) If a trust receives one or more payments in exchange for the trust’s entire interest in  
17 an asset-backed security in one accounting period, the trustee shall allocate the payments  
18 to principal. If a payment is one of a series of payments that will result in the liquidation  
19 of the trust’s interest in the security over more than one accounting period, the trustee  
20 shall allocate 10 percent of the payment to income and the balance to principal.

21 **Comment (Georgia)**

22 This is Section 415 of the Uniform Act. This section had no counterpart in the former  
23 Code.

24 **Comment (Uniform Principal & Income Act 2000)**

25 Scope of section. Typical asset-backed securities include arrangements in which debt  
26 obligations such as real estate mortgages, credit card receivables and auto loans are  
27 acquired by an investment trust and interests in the trust are sold to investors. The source  
28 for payments to an investor is the money received from principal and interest payments  
29 on the underlying debt. An asset-backed security includes an “interest only” or a  
30 “principal only” security that permits the investor to receive only the interest payments

1 received from the bonds, mortgages or other assets that are the collateral for the asset-  
2 backed security, or only the principal payments made on those collateral assets. An asset-  
3 backed security also includes a security that permits the investor to participate in either  
4 the capital appreciation of an underlying security or in the interest or dividend return  
5 from such a security, such as the “Primes” and “Scores” issued by Americus Trust. An  
6 asset-backed security does not include an interest in a corporation, partnership, or an  
7 investment trust described in the Comment to Section 402, whose assets consist  
8 significantly or entirely of investment assets. Receipts from an instrument that do not  
9 come within the scope of this section or any other section of the Act would be allocated  
10 entirely to principal under the rule in Section 103(a)(4), and the trustee may then consider  
11 whether and to what extent to exercise the power to adjust in Section 104, taking into  
12 account the return from the portfolio as whole and other relevant factors.

13  
14

15 **Article 5 Allocation of Disbursements During Administration of Trust**

16 **53-15-40 DISBURSEMENTS FROM INCOME**

17 (a) A trustee shall make the following disbursements from income to the extent that they  
18 are not disbursements to which Section 53-13-11 applies:

- 19 (1) one-half of the regular compensation of the trustee and of any person  
20 providing investment advisory or custodial services to the trustee;
- 21 (2) one-half of all court costs, attorney’s fees, and other fees and expenses for  
22 accountings, judicial proceedings, or other matters that involve both the income  
23 and remainder interests;
- 24 (3) all of the other ordinary expenses incurred in connection with the  
25 administration, management, or preservation of trust property and the distribution  
26 of income, including interest, ordinary repairs, regularly recurring taxes assessed  
27 against principal, and court costs, attorney’s fees, and other fees and expenses of a  
28 proceeding or other matter that concerns primarily the income interest; and
- 29 (4) recurring premiums on insurance covering the loss of a principal asset or the  
30 loss of income from or use of the asset.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

(b) Any of the above disbursements made in connection with judicial proceedings may be varied by the order of the court.

(c) All other disbursements shall be made from principal.

**Comment (Georgia)**

This section is modeled after Section 501 of the Uniform Act. This section replaces former Code section 53-12-219(a) & 53-12-219(c). Subsection (a)(1) replaces former Code section 53-12-219(a)(5). The terms “court costs, attorney’s fees, and other fees” are added to subsections (b)(2) and (b)(3) in order to reflect the law in former Code sections 53-12-219(a)(3) and 53-12-219 (a)(4). Subsection (b) is added to reflect the law in former Code sections 53-12-219(a)(3) and 53-12-219 (a)(4). Subsection (c) carries forward former Code section 53-12-219(c).

**Comment (Uniform Principal & Income Act 2000)**

Trustee fees. The regular compensation of a trustee or the trustee’s agent includes compensation based on a percentage of either principal or income or both.  
Insurance premiums. The reference in paragraph (4) to “recurring” premiums is intended to distinguish premiums paid annually for fire insurance from premiums on title insurance, each of which covers the loss of a principal asset. Title insurance premiums would be a principal disbursement under Section 502(a)(5).  
Regularly recurring taxes. The reference to “regularly recurring taxes assessed against principal” includes all taxes regularly imposed on real property and tangible and intangible personal property.

**53-15-41 DISBURSEMENTS FROM PRINCIPAL.**

- (a) A trustee shall make the following disbursements from principal:
  - (1) the remaining one-half of the disbursements described in Section 53-13-50(a)(1) and (2);

- 1 (2) all of the trustee's compensation calculated on principal as a fee for
- 2 acceptance, distribution, or termination, and disbursements made to prepare
- 3 property for sale;
- 4 (3) payments on the principal of a trust debt;
- 5 (4) court costs, attorney's fees, and other fees and expenses of a proceeding that
- 6 concerns primarily principal, including a proceeding to construe the trust or to
- 7 protect the trust or its property;
- 8 (5) premiums paid on a policy of insurance not described in Section 501(4) of
- 9 which the trust is the owner and beneficiary;
- 10 (6) estate, inheritance, and other transfer taxes, including penalties, apportioned to
- 11 the trust; and
- 12 (7) disbursements related to environmental matters, including reclamation,
- 13 assessing environmental conditions, remedying and removing environmental
- 14 contamination, monitoring remedial activities and the release of substances,
- 15 preventing future releases of substances, collecting amounts from persons liable
- 16 or potentially liable for the costs of those activities, penalties imposed under
- 17 environmental laws or regulations and other payments made to comply with those
- 18 laws or regulations, statutory or common law claims by third parties, and
- 19 defending claims based on environmental matters.

20 (b) Any of the above disbursements made in connection with judicial proceedings may  
21 be varied by the order of the court.

22 (c) If a principal asset is encumbered with an obligation that requires income from that  
23 asset to be paid directly to the creditor, the trustee shall transfer from principal to income  
24 an amount equal to the income paid to the creditor in reduction of the principal balance of  
25 the obligation.

26 **Comment (Georgia)**

27 This section is modeled after Section 502 of the Uniform Act. This section replaces  
28 former Code Section 53-12-219(c) and enumerates those disbursements that are  
29 chargeable to principal. The terms "court costs, attorney's fees and other fees" are added

1 to subsection (a)(4), along with subsection (b) to reflect the provisions of former Code  
2 section 53-12-219.

3 **Comment (Uniform Principal & Income Act 2000)**

4 Environmental expenses. All environmental expenses are payable from principal, subject  
5 to the power of the trustee to transfer funds to principal from income under Section 504.

6 However, the Drafting Committee decided that it was not necessary to broaden this  
7 provision to cover other expenditures made under compulsion of governmental authority.

8 See generally the annotation at 43 A.L.R.4th 1012 (Duty as Between Life Tenant and  
9 Remainderman with Respect to Cost of Improvements or Repairs Made Under

10 Compulsion of Governmental Authority).

11 Environmental expenses paid by a trust are to be paid from principal under Section  
12 502(a)(7) on the assumption that they will usually be extraordinary in nature.

13 Environmental expenses might be paid from income if the trustee is carrying on a  
14 business that uses or sells toxic substances, in which case environmental cleanup costs  
15 would be a normal cost of doing business and would be accounted for under Section 403.

16 In accounting under that Section, environmental costs will be a factor in determining how  
17 much of the net receipts from the business is trust income. Paying all other environmental  
18 expenses from principal is consistent with this Act's approach regarding receipts – when  
19 a receipt is not clearly a current return on a principal asset, it should be added to principal  
20 because over time both the income and remainder beneficiaries benefit from this  
21 treatment. Here, allocating payments required by environmental laws to principal  
22 imposes the detriment of those payments over time on both the income and remainder  
23 beneficiaries.

24 Under Sections 504(a) and 504(b)(5), a trustee who makes or expects to make a principal  
25 disbursement for an environmental expense described in Section 502(a)(7) is authorized  
26 to transfer an appropriate amount from income to principal to reimburse principal for  
27 disbursements made or to provide a reserve for future principal disbursements.

28 The first part of Section 502(a)(7) is based upon the definition of an “environmental  
29 remediation trust” in Treas. Reg. § 301.7701-4(e)(as amended in 1996). This is not  
30 because the Act applies to an environmental remediation trust, but because the definition

1 is a useful and thoroughly vetted description of the kinds of expenses that a trustee  
2 owning contaminated property might incur. Expenses incurred to comply with  
3 environmental laws include the cost of environmental consultants, administrative  
4 proceedings and burdens of every kind imposed as the result of an administrative or  
5 judicial proceeding, even though the burden is not formally characterized as a penalty.

6 Title proceedings. Disbursements that are made to protect a trust's property, referred to in  
7 Section 502(a)(4), include an "action to assure title" that is mentioned in Section 13(c)(2)  
8 of the 1962 Act.

9 Insurance premiums. Insurance premiums referred to in Section 502(a)(5) include title  
10 insurance premiums. They also include premiums on life insurance policies owned by the  
11 trust, which represent the trust's periodic investment in the insurance policy. There is no  
12 provision in the 1962 Act for life insurance premiums.

13 Taxes. Generation-skipping transfer taxes are payable from principal under subsection  
14 (a)(6).

15

16 **53-15-42 TRANSFERS FROM INCOME TO PRINCIPAL FOR**  
17 **DEPRECIATION.**

18 (a) In this section, "depreciation" means a reduction in value due to wear, tear, decay,  
19 corrosion, or gradual obsolescence of a fixed asset having a useful life of more than one  
20 year.

21 (b) A trustee may transfer to principal a reasonable amount of the net cash receipts from a  
22 principal asset that is subject to depreciation, but may not transfer any amount for  
23 depreciation:

24 (1) of that portion of real property used or available for use by a beneficiary as a  
25 residence or of tangible personal property held or made available for the personal  
26 use or enjoyment of a beneficiary;

27 (2) during the administration of a decedent's estate; or

28 (3) under this section if the trustee is accounting under Section 403 for the  
29 business or activity in which the asset is used.

1 (c) An amount transferred to principal need not be held as a separate fund.

2 **Comment (Georgia)**

3 This section is Section 503 of the Uniform Act. This section replaces former 53-12-  
4 219(a)(2).

5 **Comment (Uniform Principal & Income Act 2000)**

6 Prior Acts. The 1931 Act has no provision for depreciation. Section 13(a)(2) of the 1962  
7 Act provides that a charge shall be made against income for "... a reasonable allowance  
8 for depreciation on property subject to depreciation under generally accepted accounting  
9 principles ... ." That provision has been resisted by many trustees, who do not provide for  
10 any depreciation for a variety of reasons. One reason relied upon is that a charge for  
11 depreciation is not needed to protect the remainder beneficiaries if the value of the land is  
12 increasing; another is that generally accepted accounting principles may not require  
13 depreciation to be taken if the property is not part of a business. The Drafting Committee  
14 concluded that the decision to provide for depreciation should be discretionary with the  
15 trustee. The power to transfer funds from income to principal that is granted by this  
16 section is a discretionary power of administration referred to in Section 103(b), and in  
17 exercising the power a trustee must comply with Section 103(b).

18 One purpose served by transferring cash from income to principal for depreciation is to  
19 provide funds to pay the principal of an indebtedness secured by the depreciable property.  
20 Section 504(b)(4) permits the trustee to transfer additional cash from income to principal  
21 for this purpose to the extent that the amount transferred from income to principal for  
22 depreciation is less than the amount of the principal payments.

23

24 **53-15-43 TRANSFERS FROM INCOME TO REIMBURSE PRINCIPAL.**

25 Wherever a charge that is properly allocable to income has been made or is expected to  
26 be made from principal because of the unusually large nature of the charge or otherwise,  
27 the trustee may transfer an appropriate amount from income to principal in one or more  
28 accounting periods to reimburse principal or to provide a reserve for future principal  
29 disbursements.

30 **Comment (Georgia)**

1 This Section is in lieu of Section 504 of the Uniform Act. This section replaces Section  
2 53-12-219(b) of the former Code.

3 **Comment (Uniform Principal & Income Act 2000)**

4 Prior Acts. The sources of Section 504 are Section 13(b) of the 1962 Act, which permits a  
5 trustee to “regularize distributions,” if charges against income are unusually large, by  
6 using “reserves or other reasonable means” to withhold sums from income distributions;  
7 Section 13(c)(3) of the 1962 Act, which authorizes a trustee to establish an allowance for  
8 depreciation out of income if principal is used for extraordinary repairs, capital  
9 improvements and special assessments; and Section 12(3) of the 1931 Act, which permits  
10 the trustee to spread income expenses of unusual amount “throughout a series of years.”  
11 Section 504 contains a more detailed enumeration of the circumstances in which this  
12 authority may be used, and includes in subsection (b)(4) the express authority to use  
13 income to make principal payments on a mortgage if the depreciation charge against  
14 income is less than the principal payments on the mortgage.

15

16 **53-15-44 INCOME TAXES.**

17 (a) A tax required to be paid by a trustee based on receipts allocated to income must be  
18 paid from income.

19 (b) A tax required to be paid by a trustee based on receipts allocated to principal must be  
20 paid from principal, even if the tax is called an income tax by the taxing authority.

21 (c) A tax required to be paid by a trustee on the trust’s share of an entity’s taxable income  
22 must be paid proportionately:

23 (1) from income to the extent that receipts from the entity are allocated to income;  
24 and

25 (2) from principal to the extent that:

26 (A) receipts from the entity are allocated to principal; and

27 (B) the trust’s share of the entity’s taxable income exceeds the total  
28 receipts described in paragraphs (1) and (2)(A).

1 (d) For purposes of this section, receipts allocated to principal or income must be reduced  
2 by the amount distributed to a beneficiary from principal or income for which the trust  
3 receives a deduction in calculating the tax.

4 **Comment (Georgia)**

5 This is Section 505 of the Uniform Act. This section replaces former Code section 53-  
6 12-219(a)(6).

7 **Comment (Uniform Principal & Income Act 2000)**

8 Electing Small Business Trusts. An Electing Small Business Trust (ESBT) is a creature  
9 created by Congress in the Small Business Job Protection Act of 1996 (P.L. 104-188).  
10 For years beginning after 1996, an ESBT may qualify as an S corporation stockholder  
11 even if the trustee does not distribute all of the trust's income annually to its  
12 beneficiaries. The portion of an ESBT that consists of the S corporation stock is treated as  
13 a separate trust for tax purposes (but not for trust accounting purposes), and the S  
14 corporation income is taxed directly to that portion of the trust even if some or all of that  
15 income is distributed to the beneficiaries.

16 A trust normally receives a deduction for distributions it makes to its beneficiaries.  
17 Subsection (d) takes into account the possibility that an ESBT may not receive a  
18 deduction for trust accounting income that is distributed to the beneficiaries. Only limited  
19 guidance has been issued by the Internal Revenue Service, and it is too early to anticipate  
20 all of the technical questions that may arise, but the powers granted to a trustee in  
21 Sections 506 and 104 to make adjustments are probably sufficient to enable a trustee to  
22 correct inequities that may arise because of technical problems.

23  
24 **53-15-45 ADJUSTMENTS BETWEEN PRINCIPAL AND INCOME**  
25 **BECAUSE OF TAXES.**

26 (a) A fiduciary may make adjustments between principal and income to offset the shifting  
27 of economic interests or tax benefits between income beneficiaries and remainder  
28 beneficiaries which arise from:

29 (1) elections and decisions, other than those described in subsection (b), that the  
30 fiduciary makes from time to time regarding tax matters;

1 (2) an income tax or any other tax that is imposed upon the fiduciary or a  
2 beneficiary as a result of a transaction involving or a distribution from the estate  
3 or trust; or

4 (3) the ownership by an estate or trust of an interest in an entity whose taxable  
5 income, whether or not distributed, is includable in the taxable income of the  
6 estate, trust, or a beneficiary.

7 (b) If the amount of an estate tax marital deduction or charitable contribution deduction is  
8 reduced because a fiduciary deducts an amount paid from principal for income tax  
9 purposes instead of deducting it for estate tax purposes, and as a result estate taxes paid  
10 from principal are increased and income taxes paid by an estate, trust, or beneficiary are  
11 decreased, each estate, trust, or beneficiary that benefits from the decrease in income tax  
12 shall reimburse the principal from which the increase in estate tax is paid. The total  
13 reimbursement must equal the increase in the estate tax to the extent that the principal  
14 used to pay the increase would have qualified for a marital deduction or charitable  
15 contribution deduction but for the payment. The proportionate share of the  
16 reimbursement for each estate, trust, or beneficiary whose income taxes are reduced must  
17 be the same as its proportionate share of the total decrease in income tax. An estate or  
18 trust shall reimburse principal from income.

19 **Comment (Georgia)**

20 This section is Section 506 of the Uniform Act. This section had no counterpart in the  
21 former Code.

22 **Comment (Uniform Principal & Income Act 2000)**

23 Discretionary adjustments. Section 506(a) permits the fiduciary to make adjustments  
24 between income and principal because of tax law provisions. It would permit  
25 discretionary adjustments in situations like these: (1) A fiduciary elects to deduct  
26 administration expenses that are paid from principal on an income tax return instead of on  
27 the estate tax return; (2) a distribution of a principal asset to a trust or other beneficiary  
28 causes the taxable income of an estate or trust to be carried out to the distributee and  
29 relieves the persons who receive the income of any obligation to pay income tax on the  
30 income; or (3) a trustee realizes a capital gain on the sale of a principal asset and pays a

1 large state income tax on the gain, but under applicable federal income tax rules the  
2 trustee may not deduct the state income tax payment from the capital gain in calculating  
3 the trust's federal capital gain tax, and the income beneficiary receives the benefit of the  
4 deduction for state income tax paid on the capital gain. See generally Joel C. Dobris,  
5 Limits on the Doctrine of Equitable Adjustment in Sophisticated Postmortem Tax  
6 Planning, 66 Iowa L. Rev. 273 (1981).

7 Section 506(a)(3) applies to a qualified Subchapter S trust (QSST) whose income  
8 beneficiary is required to include a pro rata share of the S corporation's taxable income in  
9 his return. If the QSST does not receive a cash distribution from the corporation that is  
10 large enough to cover the income beneficiary's tax liability, the trustee may distribute  
11 additional cash from principal to the income beneficiary. In this case the retention of cash  
12 by the corporation benefits the trust principal. This situation could occur if the  
13 corporation's taxable income includes capital gain from the sale of a business asset and  
14 the sale proceeds are reinvested in the business instead of being distributed to  
15 shareholders.

16 Mandatory adjustment. Subsection (b) provides for a mandatory adjustment from income  
17 to principal to the extent needed to preserve an estate tax marital deduction or charitable  
18 contributions deduction. It is derived from New York's EPTL § 11-1.2(A), which  
19 requires principal to be reimbursed by those who benefit when a fiduciary elects to  
20 deduct administration expenses on an income tax return instead of the estate tax return.  
21 Unlike the New York provision, subsection (b) limits a mandatory reimbursement to  
22 cases in which a marital deduction or a charitable contributions deduction is reduced by  
23 the payment of additional estate taxes because of the fiduciary's income tax election. It is  
24 intended to preserve the result reached in *Estate of Britenstool v. Commissioner*, 46 T.C.  
25 711 (1966), in which the Tax Court held that a reimbursement required by the  
26 predecessor of EPTL § 11-1.2(A) resulted in the estate receiving the same charitable  
27 contributions deduction it would have received if the administration expenses had been  
28 deducted for estate tax purposes instead of for income tax purposes. Because a fiduciary  
29 will elect to deduct administration expenses for income tax purposes only when the  
30 income tax reduction exceeds the estate tax reduction, the effect of this adjustment is that  
31 the principal is placed in the same position it would have occupied if the fiduciary had

1 deducted the expenses for estate tax purposes, but the income beneficiaries receive an  
2 additional benefit. For example, if the income tax benefit from the deduction is \$30,000  
3 and the estate tax benefit would have been \$20,000, principal will be reimbursed \$20,000  
4 and the net benefit to the income beneficiaries will be \$10,000.

5 Irrevocable grantor trusts. Under Sections 671-679 of the Internal Revenue Code (the  
6 “grantor trust” provisions), a person who creates an irrevocable trust for the benefit of  
7 another person may be subject to tax on the trust’s income or capital gains, or both, even  
8 though the settlor is not entitled to receive any income or principal from the trust.

9 Because this is now a well-known tax result, many trusts have been created to produce  
10 this result, but there are also trusts that are unintentionally subject to this rule. The Act  
11 does not require or authorize a trustee to distribute funds from the trust to the settlor in  
12 these cases because it is difficult to establish a rule that applies only to trusts where this  
13 tax result is unintended and does not apply to trusts where the tax result is intended.

14 Settlers who intend this tax result rarely state it as an objective in the terms of the trust,  
15 but instead rely on the operation of the tax law to produce the desired result. As a result it  
16 may not be possible to determine from the terms of the trust if the result was intentional  
17 or unintentional. If the drafter of such a trust wants the trustee to have the authority to  
18 distribute principal or income to the settlor to reimburse the settlor for taxes paid on the  
19 trust’s income or capital gains, such a provision should be placed in the terms of the trust.

20 In some situations the Internal Revenue Service may require that such a provision be  
21 placed in the terms of the trust as a condition to issuing a private letter ruling.

1 PROPOSED CHANGES TO OCGA Sec. 7-1-242

2 **7-1-242**

3 (a) No corporation, partnership, or other entity may lawfully act as a fiduciary in this  
4 state except: .....

5 (5) Attorneys at law licensed to practice in this state, whether organized as a  
6 professional corporation or otherwise;

7 (6) An investment adviser registered pursuant to the provisions of 15 U.S.C. 80b-  
8 3 or Code Section 10-5-3, provided this exception shall not authorize an  
9 investment adviser to act in any fiduciary capacity subject to the provisions of  
10 Title 53, relating to wills, trusts, and the administration of estates and Title 29,  
11 relating to guardianships and conservatorships;

12 ...

13 (8) a non-profit corporation

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28