

Senate Bill 186

By: Senators Cowsert of the 46th, Stone of the 23rd, Kennedy of the 18th, Rhett of the 33rd
and Beach of the 21st

AS PASSED SENATE

A BILL TO BE ENTITLED

AN ACT

1 To amend Chapter 12 of Title 53 of the Official Code of Georgia Annotated, relating to
2 trusts, so as to establish qualified self-settled spendthrift trusts; to provide for definitions; to
3 provide for exceptions for spendthrift provisions of trusts which are not within qualified
4 self-settled spendthrift trusts; to provide for claims by creditors for such trusts; to provide for
5 the creation of such trusts; to provide for transfers to such trusts; to provide for vacancies of
6 trustees; to provide for standards for such trusts to be considered nonrevocable; to provide
7 for claims for relief; to amend Part 4 of Article 9 of Title 11 of the Official Code of Georgia
8 Annotated, relating to rights of third parties to secured transactions, so as to exclude qualified
9 self-settled spendthrift trusts from restrictions on assignment; to provide for related matters;
10 to repeal conflicting laws; and for other purposes.

11 **BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:**

12 **SECTION 1.**

13 Chapter 12 of Title 53 of the Official Code of Georgia Annotated, relating to trusts, is
14 amended by revising Code Section 53-12-80, relating to spendthrift provisions, as follows:
15 "53-12-80.

16 Except as otherwise provided for in Article 5A of this chapter:

17 ~~(a)~~(1) A spendthrift provision shall only be valid if it prohibits both voluntary and
18 involuntary transfers;:

19 ~~(b)~~(2) A term of a trust providing that the interest of a beneficiary is held subject to a
20 spendthrift trust, or words of similar import, shall be sufficient to restrain both voluntary
21 and involuntary transfer of ~~the~~ such beneficiary's interest in the manner set forth in this
22 article;:

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

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

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

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

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

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

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

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

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

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

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

57 **SECTION 2.**

58 Said chapter is further amended by revising Code Section 53-12-82, relating to rules for
 59 trusts and consideration of assets of an inter vivos marital trust following death, as follows:
 60 "53-12-82.

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

- 63 (1) During the lifetime of the settlor, the property of a revocable trust shall be subject to
64 claims of ~~the~~ such settlor's creditors;
- 65 (2) With respect to an irrevocable trust:
- 66 (A) Creditors or assignees of the settlor may reach the maximum amount that can be
67 distributed to or for ~~the~~ such settlor's benefit during ~~the~~ such settlor's life or that could
68 have been distributed to or for ~~the~~ such settlor's benefit immediately prior to the settlor's
69 death, provided; that, if a trust has more than one settlor, the amount the creditors or
70 assignees of a particular settlor may reach shall not exceed ~~the~~ such settlor's interest in
71 the portion of the trust attributable to that settlor's contribution; and
- 72 (B) The portion of a trust that can be distributed to or for the settlor's benefit pursuant
73 to the power of a trustee, whether arising under the trust agreement or any other law,
74 to make a distribution to or for the benefit of a settlor for the purpose of reimbursing
75 ~~the~~ such settlor in an amount equal to any income taxes payable on any portion of the
76 trust principal and income that is treated as ~~the~~ such settlor's individual income under
77 applicable law shall not be considered an amount that can be distributed to or for ~~the~~
78 such settlor's benefit during ~~the~~ such settlor's life or that could have been distributed to
79 or for ~~the~~ such settlor's benefit immediately prior to ~~the~~ such settlor's death; and
- 80 (3) After the death of a settlor, and subject to the settlor's right to direct the source from
81 which liabilities shall be paid, the property of a trust that was revocable at ~~the~~ such
82 settlor's death or had become irrevocable as a result of the settlor's incapacity shall be
83 subject to claims of ~~the~~ such settlor's creditors to the extent the probate estate is
84 inadequate. Payments that would not be subject to the claims of ~~the~~ such settlor's
85 creditors if made by way of beneficiary designation to persons other than ~~the~~ such
86 settlor's estate shall not be made subject to such claims by virtue of this Code section
87 unless otherwise provided in the trust instrument.
- 88 (b)(1) As used in this subsection, the term:
- 89 (A) 'Inter vivos marital trust' means:
- 90 (i) A trust described in Section 2523(e) of the Internal Revenue Code of 1986, as it
91 existed on February 1, 2018;
- 92 (ii) A trust for which the election described in Section 2523(f) of the Internal
93 Revenue Code of 1986, as it existed on February 1, 2018, has been made; or
- 94 (iii) Another trust to the extent such trust's assets are attributable to a trust described
95 in division (i) or (ii) of this subparagraph.
- 96 (B) 'Settlor's spouse' means the spouse of the settlor at the time of the creation of an
97 inter vivos marital trust, regardless of whether such spouse is married to the settlor at
98 the time of such spouse's death.

99 (2) Subject to Article 4 of Chapter 2 of Title 18, after the death of the settlor's spouse,
 100 the assets of an inter vivos marital trust shall be deemed to have been contributed by the
 101 settlor's spouse and not by the settlor."

102 **SECTION 3.**

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

104 "ARTICLE 5A

105 53-12-90.

106 As used in this article, the term:

107 (1) 'Independent qualified trustee' means a qualified trustee who is not, and whose
 108 actions are not, subject to direction by:

109 (A) The settlor;

110 (B) Any natural person who is not a resident of Georgia;

111 (C) Any entity that is not authorized to engage in trust business within Georgia;

112 (D) The spouse of the settlor;

113 (E) A parent of the settlor;

114 (F) Any lineal descendants of the settlor, including adopted children and stepchildren;

115 (G) A sibling of the settlor;

116 (H) An employer of the settlor;

117 (I) A business entity in which the holdings of the settlor represent at least 30 percent
 118 of the total voting power of all interests entitled to vote;

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

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

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

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

125 (A) Is created or declared in writing;

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

128 (C) Is irrevocable;

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

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

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

- 133 (ii) Principal may be distributed, if the qualified interest relates to trust principal; or
 134 (iii) Both income and principal may be distributed, if the qualified interest relates to
 135 both trust income and principal;
 136 (F) Has, at all times, at least one independent qualified trustee;
 137 (G) Can grant the settlor powers under the terms of the trust to direct trust investments
 138 and execute other management powers, not including the ordering or withholding of
 139 trust distributions;
 140 (H) Is created with a trust instrument which expressly incorporates the law of this state
 141 in governing the validity, construction, and administration of the trust; and
 142 (I) Is created with a trust instrument that includes a spendthrift provision that restrains
 143 both voluntary and involuntary transfer of the qualified interest.
 144 (4) 'Qualified trustee' means any person who is a natural person residing within this state
 145 or a legal entity authorized to engage in trust business within this state and who maintains
 146 or arranges for custody within this state some or all of the property that has been
 147 transferred to the trust by the settlor, maintains records within this state for the trust on
 148 an exclusive or nonexclusive basis, prepares or arranges for the preparation within this
 149 state of fiduciary income tax returns for the trust, or otherwise materially participates
 150 within this state in the administration of the trust.

151 53-12-91.

152 A settlor may transfer assets to a qualified self-settled spendthrift trust and retain in such
 153 trust a qualified interest, and, except as otherwise provided in this article, Code Sections
 154 53-12-80 and 53-12-82 shall not apply to such qualified interest.

155 53-12-92.

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

- 159 (1) One designated pursuant to the terms of the trust to act as successor trustee;
 160 (2) One appointed by the settlor of the trust;
 161 (3) One appointed by the qualified beneficiaries by unanimous consent; and
 162 (4) One appointed by the court pursuant to Code Section 53-12-61.

163 53-12-93.

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

- 167 (1) A power of appointment, exercisable by the settlor through a will or other written
 168 instrument effective only upon the death of such settlor;
- 169 (2) The qualified interest in the trust;
- 170 (3) The right of a settlor to receive income or principal pursuant to an ascertainable
 171 standard;
- 172 (4) The right of a settlor, at any time, and from time to time, to release, in writing
 173 delivered to the independent qualified trustee, all or any part of the retained interest of
 174 such settlor in such trust;
- 175 (5) Annual receipt by the settlor of a percentage, not to exceed 5 percent and specified
 176 in the trust instrument, of the initial value of the trust assets or the value of such assets
 177 determined from time to time pursuant to such trust instrument;
- 178 (6) The right of the settlor to remove an independent qualified trustee and appoint a new
 179 independent qualified trustee;
- 180 (7) The potential or actual use of real property by a settlor when such real property is
 181 held under a personal residence trust;
- 182 (8)(A) As used in this paragraph, the term 'qualified interest' shall have the same
 183 meaning as defined by 26 U.S.C. Section 2702.
- 184 (B) The potential or actual receipt of use by a settlor of a qualified interest;
- 185 (9) The ability of a qualified trustee, whether pursuant to discretion or direction, to pay,
 186 upon the death of a settlor, all or any part of debts owed by such settlor at the time of
 187 such settlor's death, the expenses of administering the estate of such settlor, or any estate
 188 inheritance tax imposed on or with respect to the estate of such settlor; and
- 189 (10) The potential or actual receipt of income or principal by a settlor to pay, in whole
 190 or in part, income taxes due on trust income, or the direct payment of such taxes to the
 191 applicable tax authorities, pursuant to a provision in the trust instrument that expressly
 192 provides for the direct payment of such taxes or reimbursement of such settlor for such
 193 tax payments.

194 53-12-94.

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

199 (1) Alimony or child support;

200 (2) A written agreement, judgment, or order of the court for division of marital property
 201 of a spouse or former spouse;

202 (3) Taxes or other governmental claims;

203 (4) Tort judgments;

204 (5) Judgments or orders for restitution as a result of a criminal conviction of the
205 beneficiary; or

206 (6) Judgments for necessities.

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

210 53-12-95.

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

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

218 (c) A financial institution and its successors or assigns may bring a cause of action or
219 claim for relief against a trustee, settlor, qualified self-settled spendthrift trust, other
220 beneficiary, or recipient with respect to assets currently within or at any time part of a
221 qualified self-settled spendthrift trust that the settlor or other beneficiary has listed or
222 disclosed at any time on the financial institution's application or any other financial
223 disclosure provided to obtain, renew, extend, modify, or maintain credit, or in connection
224 with credit, from the financial institution, including periodic reporting requirements, as
225 being an asset of the settlor or beneficiary, regardless of whether a subsequent financial
226 statement or disclosure thereafter provided that the applicable asset was subject to a
227 qualified self-settled spendthrift trust. The financial institution and its successors or assigns
228 shall not be precluded from recovering such assets transferred to such qualified self-settled
229 spendthrift trust or the value of such assets."

230 **SECTION 4.**

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

236 "(d) **Term restricting assignment generally ineffective.** Except as otherwise provided
237 in subsection (e) of this Code section and Code Sections 11-2A-303, 11-9-407, and

238 53-12-80 through 53-12-83, and Article 5A of Chapter 12 of Title 53 and subject to
 239 subsection (h) of this Code section, a term in an agreement between an account debtor and
 240 an assignor or in a promissory note shall be ineffective to the extent that it:

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

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

249 **SECTION 5.**

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

253 "(a) **Term restricting assignment generally ineffective.** Except as otherwise provided
 254 in subsection (b) of this Code section, ~~or~~ in Code Section 53-12-80, and in Article 5A of
 255 Chapter 12 of Title 53, a term in a promissory note or in an agreement between an account
 256 debtor and a debtor which relates to a health care insurance receivable or a general
 257 intangible, including a contract, permit, license, or franchise, and which term prohibits,
 258 restricts, or requires the consent of the person obligated on the promissory note or the
 259 account debtor to the assignment or transfer of, or creation, attachment, or perfection of a
 260 security interest in, the promissory note, health care insurance receivable, or general
 261 intangible, shall be ineffective to the extent that the term:

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

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

267 "(c) **Legal restrictions on assignment generally ineffective.** Except as otherwise
 268 provided in Code Section 53-12-80 and in Article 5A of Chapter 12 of Title 53, a rule of
 269 law, statute, or regulation that prohibits, restricts, or requires the consent of a government,
 270 governmental body or official, person obligated on a promissory note, or account debtor
 271 to the assignment or transfer of, or creation of a security interest in, a promissory note,
 272 health care insurance receivable, or general intangible, including a contract, permit, license,

273 or franchise between an account debtor and a debtor, shall be ineffective to the extent that
274 the rule of law, statute, or regulation:

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

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

280 **SECTION 6.**

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