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## WILLS, TRUSTS, AND ADMINISTRATION OF ESTATES Trusts: Amend the Standard for Investments by Fiduciaries

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## WILLS, TRUSTS, AND ADMINISTRATION OF ESTATES

### *Trusts: Amend the Standard for Investments by Fiduciaries*

CODE SECTION:	O.C.G.A. § 53-8-2 (amended)
BILL NUMBER:	HB 1435
ACT NUMBER:	1250
SUMMARY:	The Act raises the standard of care applied to executors and trustees who make investments for others; the prudent man handling his own investments standard is changed to one of a prudent trustee handling the investments of others. The Act also permits trustees to consider individual investments in the context of the overall investment portfolio and provides factors to aid in determining the liability of executors and trustees for their investment performance.
EFFECTIVE DATE:	March 31, 1988

#### *History*

Prior to 1972, no legal standard measuring a trustee's investment performance existed.<sup>1</sup> A trustee could generally avoid liability by investing solely in "legals"; these investments are approved as sufficiently safe.<sup>2</sup> It was virtually impossible to hold liable a fiduciary who failed to take a reasonable chance and invested in items only on the legal list.<sup>3</sup>

In 1972, Code section 53-8-2 was enacted. This Act provided a prudent man standard to evaluate fiduciary investments.<sup>4</sup> The fiduciary was to manage trust money as a prudent man would manage his own accounts. The emphasis remained on stable, nonspeculative types of investments.<sup>5</sup> However, this law sometimes was interpreted to preclude the fiduciary investor from making speculative investments in order to remain absolutely safe from liability. A prudent man, so it was reasoned, would invest

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1. See McClatchey, *Fiduciary Problems of the Executor and Trustee: Conflicts of Interest, Violations of Fiduciary Duties; Surcharge, and Other Remedies of Beneficiaries*, 9 GA. ST. B.J. 187, 190 (1972).

2. *Id.* at 191.

3. *Id.* at 190.

4. 1972 Ga. Laws 450.

5. *Id.* at 451.

his own money in legals and not in speculative investments.<sup>6</sup>

This Code section was amended in 1973 to define certain terms, but the investment standard for fiduciaries remained unchanged.<sup>7</sup> Another amendment in 1976 clarified some tax effects of trusts, but again the fiduciary standard was not affected.<sup>8</sup>

In 1987, a class action suit brought against Citizens and Southern National Bank (C&S Bank) alleging imprudent trust fund investments reached trial, but was settled by the bank for thirty-three million dollars.<sup>9</sup> HB 1435 was introduced in the House during the 1988 legislative session. The bill was apparently a response to this case,<sup>10</sup> but the bill's sponsor rejects any such connection.<sup>11</sup> The case, however, is acknowledged as a "dominant factor" in the eventual passage of the bill by the legislature.<sup>12</sup>

### *HB 1435*

The Act amends Code section 53-8-2 by raising the standard of care applied to fiduciaries from that of the prudent man managing his own money to that of the prudent trustee managing money belonging to someone else.<sup>13</sup> Subsection (b) is amended by removing the "prudent man" language and inserting language which: (1) elevates the standard to a "prudent person acting in a like capacity and familiar with such matters" and (2) allows the trustee to consider general economic conditions, tax consequences, and beneficiary needs.<sup>14</sup> The fiduciary is held to a prudent trustee standard and may consider the entire context in which the investment is made. The new standard gives fiduciaries considerable discretion in making investment decisions.<sup>15</sup>

The Act amends subsection (c) by deleting language referring to a prudent man managing his own affairs and inserts language which allows the trustee to consider each individual investment as part of an overall investment strategy.<sup>16</sup> This change allows individual investment decisions to be evaluated in the context of the entire investment portfolio. Consequently, the trustee will not be liable for one poor investment if the rest

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6. McClatchey, *supra* note 1, at 191.

7. 1973 Ga. Laws 718.

8. 1976 Ga. Laws 1524.

9. Lundy, *Did C&S Settlement Spark Bank Bill?*, *Fulton County Daily Rep.*, Feb. 22, 1988, at 1, col. 3.

10. *Id.*

11. Telephone interview with Representative Lauren McDonald, Jr., House District No. 12 (Apr. 21, 1988) [hereinafter McDonald Interview]. *See also*, Lundy, *supra* note 9 (quoting others denying connection).

12. McDonald Interview, *supra* note 11.

13. O.C.G.A. § 53-8-2 (Supp. 1988).

14. O.C.G.A. § 53-8-2(b) (Supp. 1988).

15. McDonald Interview, *supra* note 11.

16. O.C.G.A. § 53-8-2(c) (Supp. 1988).

of the portfolio measures up to the appropriate fiduciary standard.<sup>17</sup>

Subsection (c) adds a list of factors which may be considered to determine the propriety of an investment decision. These factors include: the knowledge the trustee had or should have had about the nature and expected performance of the investment at the time he made the decision, the trust's entire portfolio, the general economy, and the beneficiaries' needs.<sup>18</sup> These factors are used to evaluate the performance of the individual beneficiary's portfolio as a whole.<sup>19</sup> Although this provision seems to be a response to the C&S Bank case, it is not clear whether the result would have been different had the new standard been in effect.<sup>20</sup>

Raising the standard of care for investments by a fiduciary may impose a heavy burden on private trustees.<sup>21</sup> The Act may discourage some private individuals from accepting appointments as trustees because the new standard requires that an individual trustee act with the same prudence and knowledge as a trained corporate trustee. The courts may look more leniently upon the individual trustee, but the Act does not differentiate between corporate and individual trustees. Until this ambiguity is resolved, a private individual may be taking a risk when he accepts a position as a trustee.

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17. McDonald Interview, *supra* note 11.

18. O.C.G.A. § 53-8-2(c) (Supp. 1988).

19. *Id.* The only amendment to the original bill was a clarification delineating the scope of a portfolio. Originally, the bill required consideration of the "performance of the portfolio as a whole." As amended, review entails "performance of the individual's portfolio as a whole." Compare HB 1435, as introduced, 1988 Ga. Gen. Assem. with O.C.G.A. § 53-8-2(c) (Supp. 1988).

20. McDonald Interview, *supra* note 11. In the C&S Bank case, the investments were examined individually, not as a whole.

21. *Id.* The sponsors did not consider this problem unmanageable.