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WILLS, TRUSTS, AND ADMINISTRATION OF ESTATES

Trusts: Provide For Termination Of Irrevocable Trusts In Certain Circumstances

CODE SECTIONS:	O.C.G.A. §§ 53-12-3 (amended), 53-12-25 (repealed)
BILL NUMBER:	HB 1151
ACT NUMBER:	1465
SUMMARY:	The Act provides for the termination of otherwise irrevocable trusts which have become economically unfeasible to administer. A court is permitted to terminate such trusts under certain circumstances upon petition by the trustee or any beneficiary of the trust. The Act repeals Code section 53-12-25, which provided that a trust could be created only for a minor, an incompetent, or a person unfit to be entrusted with the management of property.
EFFECTIVE DATE:	July 1, 1988

History

For many years, Georgia law has permitted trusts to be established only for a minor, an incompetent, or a person who was unfit to be entrusted with the management of property,¹ unless there was a remainder over to another beneficiary.² This law seemed to indicate that a trust established for a minor would automatically terminate when the minor beneficiary attained majority, with both the legal and equitable title merging in the beneficiary. A trust for a competent adult laboring under no disability passed immediate title to the beneficiary; courts variously termed such a trust void or executed.³ However, courts exercised wide discretion in construing the spendthrift provision. For example, courts let spendthrift trusts stand unless the beneficiary could prove that the “grounds for the trust . . . never existed or . . . have ceased” to exist.⁴ Thus, a beneficiary could claim to be “cured” of such spending habits and file to

1. See CIVIL CODE OF GA. § 3149 (1895).
 2. *Sides v. Shewmaker*, 188 Ga. 672, 4 S.E.2d 829 (1939).
 3. See, e.g., *Munford v. Peeples*, 152 Ga. 31, 108 S.E. 454 (1921); *Lester v. Stephens*, 113 Ga. 495, 39 S.E. 109 (1901).
 4. *Sinnott v. Moore*, 113 Ga. 908, 913, 39 S.E. 415, 417 (1901).

have the trust annulled.⁵

In 1974, *Woodruff v. Trust Co.*⁶ disturbed the Georgia banking community by holding that a settlor who is the sole beneficiary of a trust has the right to terminate the trust, regardless of terms of irrevocability in the trust instrument itself. The court found that the right to terminate the trust was inherent, existing outside the terms of the trust instrument.⁷ The legislature responded to *Woodruff* by amending Code section 53-12-3 to provide that no executory trust "which is expressly or impliedly made irrevocable may be revoked or terminated . . . while the trust is executory."⁸ The *Woodruff* court refused to apply the 1973 amendment to the case retroactively.⁹

HB 1151 addresses the inability of an irrevocable trust to adapt to changing economic situations or unforeseen occurrences. If a trust is revocable, a settlor may amend the terms of the trust to meet changing economic circumstances. But, all trusts are irrevocable unless the settlors expressly retain rights to amend, modify, or revoke them.¹⁰ In addition, all testamentary trusts are irrevocable. Trustees and beneficiaries of such irrevocable trusts found themselves in a difficult position. Often the trust property was being depleted by the cost of administration, imposing a burden on the trustees and eroding the trust corpus so that the beneficiaries' shares were much less than they needed or expected.¹¹ To avoid this result, trustees resorted to informal self-help by deciding, together with the beneficiaries, to terminate the trust in order to save as much of the property as possible.¹² HB 1151 was a response to these self-help measures and resulted in the amendments to Code section 53-12-3.¹³

HB 1151

The Act amends Code section 53-12-3 by adding five new subsections, (d) through (h). Subsection (d) allows a court to terminate a trust "upon petition of the trustee, personal representative of the decedent's estate, or any beneficiary" of the trust.¹⁴ Before it can do so, the court must find

5. DeVaughn v. Hays, 140 Ga. 208, 78 S.E. 844 (1913).

6. 233 Ga. 135, 210 S.E.2d 321 (1974).

7. *Woodruff v. Trust Co.*, 233 Ga. at 138, 210 S.E.2d at 323.

8. 1973 Ga. Laws 844 (formerly found at O.C.G.A. § 53-12-3(b) (1982)). An executory trust is one in which "the trustee has any powers or duties in regard to the trust property." O.C.G.A. § 53-12-3(a) (Supp. 1988).

9. *Woodruff*, 233 Ga. at 141, 210 S.E.2d at 325.

10. G. BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* §§ 998—1001 (rev. 2d ed. 1983); *RESTATEMENT (SECOND) OF TRUSTS* §§ 330, 332, 367 (1959).

11. Telephone interview with Representative DuBose Porter, House District No. 119 (Apr. 4, 1988) [hereinafter Porter Interview].

12. *Id.* Representative Porter also noted that, once such an agreement was reached, it was sometimes submitted to the court for approval.

13. *Id.*

14. O.C.G.A. § 53-12-3(d) (Supp. 1988).

that the costs of administering the trust are so high in proportion to the size of the trust that they "defeat or substantially impair the purpose of the trust,"¹⁵ "that the purpose of the trust has been fulfilled or has become illegal or impossible of fulfillment,"¹⁶ or that continuance of the trust would "defeat or substantially impair" the purposes of the trust due to circumstances neither known to nor anticipated by the grantor.¹⁷ In addition, before the court can terminate a trust, due notice must be given to all who have an interest in the trust.¹⁸

If the court decides to terminate the trust, it may order distribution of the trust property to each beneficiary, taking into account remaindermen as well as income beneficiaries.¹⁹ The number of shares distributed to each beneficiary should, as nearly as possible, effectuate the intent of the grantor.²⁰ If a beneficiary is a minor, his interest is converted into qualifying property and distributed to a custodian under the Georgia Gift to Minors Act.²¹ The court also has discretion to make other orders which may be needed to protect the interests of the beneficiaries and of the trustee.²²

HB 1151, as introduced, provided that a trustee may, in his sole discretion, terminate the trust in either of two situations.²³ Thus, when a corporate trustee administers a trust for a minimum fee or when an individual trustee administers a trust having a fair market value of less than \$50,000, the trust can be terminated if the trustee determines that the administrative cost of the trust defeats its purpose.²⁴ There was some concern in the House that the provision allowing termination of a trust in the "sole discretion" of the trustee would not offer adequate protection to small trusts.²⁵ Therefore, a House floor amendment deleted that entire

15. O.C.G.A. § 53-12-3(d)(1) (Supp. 1988).

16. O.C.G.A. § 53-12-3(d)(2) (Supp. 1988).

17. O.C.G.A. § 53-12-3(d)(3) (Supp. 1988).

18. O.C.G.A. § 53-12-3(d) (Supp. 1988).

19. *Id.*

20. *Id.*

21. *Id.* See O.C.G.A. §§ 44-5-110 to -124 (1982 & Supp. 1988).

22. O.C.G.A. § 53-12-3(d) (Supp. 1988).

23. HB 1151, as introduced, 1988 Ga. Gen. Assem. states:

Notwithstanding any other provision of this Code section, the trustee may, in its sole discretion, terminate the trust and distribute the trust property, including principal and undistributed income, to the beneficiaries in a manner which conforms as nearly as possible to the intention of the grantor, settlor, donor, or testator:

(1) In any case where a corporation is acting as trustee for minimum fee compensation under any applicable fee contract; or

(2) If any individual trustee of a trust with a fair market value of less than \$50,000.00 determines that, in relation to the cost of administration, the continuance of the trust pursuant to its existing terms will defeat or substantially impair accomplishment of the purposes of the trust.

24. *Id.*

25. Porter Interview, *supra* note 11.

section.²⁶

The Act also provides that a court, after a hearing with notice to all interested parties, may order trusts to be divided or consolidated upon petition of any party in interest to a trust.²⁷ In addition, the court can divide or consolidate a trust only if such action is consistent with the grantor's intent,²⁸ would "facilitate administration of the trust,"²⁹ and would "be in the best interests of all the beneficiaries."³⁰ Consolidation of several small trusts avoids duplication of administrative costs.

The Act applies new Code sections 53-12-3(d) through (g) to all trusts, whenever or wherever created or administered, whether inter vivos or testamentary, whether created by the same or different instruments, and whether created by the same or different persons.³¹ Further, the Act states that none of the new provisions is intended to limit the right of a trustee, acting in accordance with the trust instrument, to consolidate or divide trusts.³² In addition, the Act provides that the new amendments apply to all testamentary or inter vivos trusts, whether in existence on the effective date of the Act or created thereafter.³³ Finally, the Act repeals Code section 53-12-25 in its entirety.³⁴ By removing the restrictions of this section, the Act should render trusts more useful estate-planning tools which are more capable of reflecting the intent of the settlor.³⁵

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26. HB 1151 (HFA), 1988 Ga. Gen. Assem.

27. O.C.G.A. § 53-12-3(e) (Supp. 1988).

28. O.C.G.A. § 53-12-3(e)(1) (Supp. 1988).

29. O.C.G.A. § 53-12-3(e)(2) (Supp. 1988).

30. O.C.G.A. § 52-12-3(e)(3) (Supp. 1988).

31. O.C.G.A. § 53-12-3(f) (Supp. 1988).

32. O.C.G.A. § 53-12-3(g) (Supp. 1988).

33. O.C.G.A. § 53-12-3(h) (Supp. 1988).

34. 1988 Ga. Laws 1939.

35. Porter Interview, *supra* note 11.