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# WILLS, TRUSTS, AND ESTATES Investments, Sales, and Conveyances: Authorize Executors and Trustees to Invest in the Securities of or Other Interests of Certain Investment Companies or Investment Trusts, Provide That Such Fiduciary Power May Be Incorporated by Reference

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## WILLS, TRUSTS, AND ESTATES

### *Investments, Sales, and Conveyances: Authorize Executors and Trustees to Invest in the Securities of or Other Interests of Certain Investment Companies or Investment Trusts, Provide That Such Fiduciary Power May Be Incorporated by Reference*

CODE SECTIONS: O.C.G.A. §§ 53-8-2, 53-12-232 (amended)  
BILL NUMBER: HB 1821  
ACT NUMBER: 1031  
SUMMARY: The Act provides that corporate trustees or executors shall not be precluded from investing in securities or other interests of certain investment companies or investment trusts because of other services provided to those companies or trusts by the trustees or executors. Further, the Act provides that the fiduciary power to invest in such companies or trusts may be incorporated by reference in a will or trust agreement.  
EFFECTIVE DATE: July 1, 1992

### *History*

Prior to 1972, the General Assembly imposed a strict, "bright line" rule to determine whether a fiduciary could permissibly invest funds in particular categories of investment.<sup>1</sup> The Georgia Code prior to 1972 set forth "legal lists for fiduciary investments," which in effect dictated what investments fiduciaries could and could not undertake.<sup>2</sup> Further, the Georgia Code provided that "[a]ny other investments [outside the classes of investments enumerated by the Code] shall be made under an order of the Superior Court . . . or else at the risk of the trustee."<sup>3</sup> Thus, before 1972, Georgia law imposed a strict liability standard for investments made by fiduciaries that were not within the purview of the statutory "legal lists" of the Georgia Code.<sup>4</sup>

The General Assembly did away with these legal lists in 1972 and adopted the "prudent person" standard for evaluating the propriety of

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1. Nat Stern, *The Scope of Permissible Investments by Fiduciaries Under Georgia Law*, 19 GA. ST. B.J. 6 (1982).

2. *Id.* at 6-7; see GA. CODE §§ 108-402, -417 to -421 (Harrison 1933).

3. GA. CODE ANN. § 108-417 (Harrison 1933).

4. Stern, *supra* note 1, at 8.

fiduciary investments.<sup>5</sup> This standard further provided that within the limits of the prudence requirement, "an executor or trustee is authorized to acquire and retain every kind of property (real, personal, or mixed) and every kind of investment, specifically including, but not by way of limitation, bonds, debentures, and other corporate obligations, and stocks, preferred or common."<sup>6</sup> One commentator has noted that:

[i]n light of the Legislature's decision to discard the legal lists, this language suggests a willingness to permit fiduciaries to invest in accordance with modern investment theory rather than be bound by traditional, exceedingly narrow, and inordinately cautious attitudes. "Modern [investment] theory . . . gives investment managers greater freedom to make commitments and adopt techniques that only a short time ago the law would have treated as a breach of duty."<sup>7</sup>

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The Act amends certain provisions of chapter eight of title 53 of the Code to include investments in securities of management fund investment companies and trusts among the authorized investments by executors and trustees.<sup>8</sup> Additionally, the Act adds a new subsection to affirmatively allow executors or trustees which are banks or trust companies to invest in the interests of investment companies or trusts to which they provide other services in return for compensation.<sup>9</sup>

The Act adds language to the former Code section 53-8-2(c) and also creates a new subsection, 53-8-2(e).<sup>10</sup> The former section 53-8-2(c) provided in relevant part: "[A]n executor or trustee is authorized to acquire and retain every kind of property (real, personal, or mixed) and every kind of investment, *specifically including, but not by way of limitation, bonds, debentures, and other corporate obligations, and stocks, preferred or common.*"<sup>11</sup> The Act adds to the end of that

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5. *Id.* at 6. This "prudent person" standard is now contained in O.C.G.A. § 53-8-2(b) (Supp. 1992).

6. 1988 Ga. Laws 725 (formerly found at O.C.G.A. § 53-8-2(c) (Supp. 1991)).

7. Stern, *supra* note 1, at 7 (citing Harvey E. Bines, *Modern Portfolio Theory and Investment Management Law: Refinement of Legal Doctrine*, 76 COLUM. L. REV. 721, 797 (1976)) (footnote omitted).

8. O.C.G.A. § 53-8-2 (Supp. 1992).

9. *Id.* § 53-8-2(e) (Supp. 1992).

10. *Id.* § 53-8-2(e), (e) (Supp. 1992).

11. 1988 Ga. Laws 725 (formerly found at O.C.G.A. § 53-8-2(c) (Supp. 1991)) (emphasis added).

sentence the following language: "including the securities of or other interests in any open-end or closed-end management investment company or investment trust registered under the Investment Company Act of 1940, as from time to time amended."<sup>12</sup>

New subsection 53-8-2(e) permits banks and trust companies acting as executors or trustees of an investment company or investment trust to invest in the securities of that company or trust even though those banks or trust companies provide other fiduciary or financial services to that company or trust.<sup>13</sup>

The Act also allows the fiduciary power to undertake investments in open-end or closed-end management investments by executors or trustees to be incorporated by reference into a will or trust document.<sup>14</sup> Prior to the Act, the Code provided that a fiduciary's powers regarding investment trusts could be incorporated by reference into a will or trust document.<sup>15</sup> The Act adds the same language that was added to Code section 53-8-2(c) to affirmatively include management investment funds in the broader category of "investment trusts" which the earlier section 53-12-232(3) authorized as fiduciary powers that could be incorporated by reference.<sup>16</sup>

12. O.C.G.A. § 53-8-2(c) (Supp. 1992). These securities or interests are also known as "mutual funds." Black's Law Dictionary defines a "mutual fund" as:

A fund managed by an investment company in which money is raised through the sale of stock and subsequently invested in publicly traded securities. . . . There are two general types of mutual funds, "open-end" in which capitalization is not fixed and more shares may be sold at any time, and "closed-end" in which capitalization is fixed and only the number of shares originally authorized may be sold.

BLACK'S LAW DICTIONARY 1020 (6th ed. 1990); see also Georgia Bankers Assoc. GBA Legislative Update, Mar. 6, 1992, at 1 (reporting on the passage of HB 1821 by the House referring to HB 1821 as the "mutual fund bill").

13. *Id.* § 53-8-2(e) (Supp. 1992).

14. *Id.* § 53-12-232(3) (Supp. 1992).

15. O.C.G.A. § 53-12-232 provided:

The following powers may be incorporated by reference, as provided in this article . . .

(3) To invest and reinvest, as the fiduciary shall deem advisable, in common or preferred stocks, bonds, debentures, notes, mortgages, or other securities, in or outside the United States; in insurance contracts on the life of any beneficiary or of any person in whom a beneficiary has an insurable interest or in annuity contracts for any beneficiary; in any real or personal property; in investment trusts; in participations in common trust funds; and, generally, in such property as the fiduciary shall deem advisable even though the investment is not of the character approved by applicable law but for this paragraph.

1991 Ga. Laws 810 (formerly found at O.C.G.A. § 53-12-232(3) (Supp. 1991)) (emphasis added).

16. That language reads: "including the securities of or other interests in any open-

The primary purpose of the Act's allowance of the use of management investment company or trust funds by executors and trustees was to put state banks on an equal footing with national banks, which are permitted by federal law to invest in such funds while functioning as trustee or executor.<sup>17</sup> The General Assembly reasoned that since state banks acting as executors or trustees were already governed by the "prudent person" standard,<sup>18</sup> allowing these banks to invest in management investment company or trust funds would pose no fiduciary conflict because the prudence requirement sets an investment standard independent of the nature or type of investment.<sup>19</sup> Of course, the language of the Act unequivocally attaches the prudence requirement to such investments by these corporate fiduciaries.<sup>20</sup>

In effect, the provisions of the Act suggest on the part of the General Assembly "a willingness to permit fiduciaries to invest in accordance with modern investment theory . . . [and to] give investment managers greater freedom to make commitments and adopt techniques" that modern investment theory allows.<sup>21</sup> The affirmative inclusion of management investment company or trust funds in the statutory list of approved investments by executors and trustees is significant, in that

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end or closed-end management investment company or investment trust registered under the Investment Company Act of 1940, as from time to time amended . . . ." O.C.G.A. § 53-12-232(3) (Supp. 1992). The language is inserted immediately following "investment trusts" in the previous version of this Code section. See *supra* note 15 for text of the prior version of this Code section.

17. Georgia Bankers Association, *GBA Legislative Update*, Mar. 6, 1992, at 1.

18. That standard provides:

In acquiring, investing, reinvesting, exchanging, retaining, selling, and managing property for the benefit of another, an executor or trustee shall exercise the judgment and care, under the circumstances then prevailing, that a prudent person acting in a like capacity and familiar with such matters would use to attain the purposes of the account. In making investment decisions, an executor or trustee may consider the general economic conditions, the anticipated tax consequences of the investment, the anticipated duration of the account, and the needs of its beneficiaries.

O.C.G.A. § 53-8-2(b) (Supp. 1992).

19. Telephone Interview with Rep. Frank C. Pinkston, House District No. 100 (July 27, 1992). Rep. Pinkston was the chief sponsor of HB 1821 and is the Chairman of the House Committee on Banks and Banking, the Committee in which HB 1821 originated. *Id.*

20. The new O.C.G.A. § 53-8-2(c) kept the introductory language found in the old subsection, requiring that the investments which § 53-8-2(c) authorizes executors or trustees to make (now including mutual fund investments) be conducted "[w]ithin the limitations of the standard provided in subsection (b) of this Code section" (i.e., the "prudent person" standard). O.C.G.A. § 53-8-2(c) (Supp. 1992).

21. Stern, *supra* note 1, at 7 (citing Harvey E. Bines, *Modern Portfolio Theory and Investment Management Law: Refinement of Legal Doctrine*, 76 COLUM. L. REV. 721, 797 (1976)).

these types of investments are undoubtedly the most "modern" of modern investments.

*Jeffrey S. York*