

12-1-2018

## HB 121 - Property, Wills, Trusts, and Estates

Colt Burnett

*Georgia State University College of Law*, [cburnett4@student.gsu.edu](mailto:cburnett4@student.gsu.edu)

Ben Dell'Orto

*Georgia State University College of Law*, [bdellorto1@student.gsu.edu](mailto:bdellorto1@student.gsu.edu)

Follow this and additional works at: <https://readingroom.law.gsu.edu/gsulr>

 Part of the [Estates and Trusts Commons](#), [Legislation Commons](#), [Property Law and Real Estate Commons](#), and the [State and Local Government Law Commons](#)

---

### Recommended Citation

Colt Burnett & Ben Dell'Orto, *HB 121 - Property, Wills, Trusts, and Estates*, 35 GA. ST. U. L. REV. (2018).

Available at: <https://readingroom.law.gsu.edu/gsulr/vol35/iss1/13>

This Peach Sheet is brought to you for free and open access by the Publications at Reading Room. It has been accepted for inclusion in Georgia State University Law Review by an authorized editor of Reading Room. For more information, please contact [mbutler@gsu.edu](mailto:mbutler@gsu.edu).

## WILLS, TRUSTS, AND ADMINISTRATION OF ESTATES

***Trusts: Amend Article 9 of Chapter 6 of Title 44 and Chapter 12 of Title 53 of the Official Code of Georgia Annotated, Relating to the Uniform Statutory Rule Against Perpetuities and Trusts, Respectively, so as to Revise and Modernize the Law Relative to Trusts; Allow for Trusts to Exist for a Longer Period of Time; Change Provisions Relating to the Validity of a Nonvested Property Interest; Change Provisions Relating to Minor or Unborn Beneficiaries; Provide for Nonjudicial Settlement Agreements with Respect to a Trust; Change Provisions Relating to the Transfer of Property in Trust; Change Provisions Relating to the Power to Direct Modification and Termination of Noncharitable Trusts and to Provide for Distribution of Trust Property to Another Trust; Provide for Definitions; Repeal Provisions Relating to Division and Consolidation of Trusts and Termination of Trusts; Change Provisions Relating to Modification or Termination of Uneconomic Trusts; Change Provisions Relating to Limitations on Creditors' Rights and Creditors' Claims Against a Settlor; Change Provisions Relating to Appointment and Vacancies of Trustees; Change Provisions Relating to Compensation and Extra Compensation of Trustees; Change Provisions Relating to Resignation of a Trustee; Change Provisions Relating to a Qualified Beneficiary Who is Not Sui Juris; Change Provisions Relating to Powers of Trustees; Provide for Trust Directors; Provide for Related Matters; Repeal Conflicting Laws; And for Other Purposes***

CODE SECTIONS: O.C.G.A. §§ 44-6-201 (amended), -203 (amended), -205 (amended); 53-12-8 (amended), -9 (new), -25, -61, -62, -63, -64, -65, -81, -82, -201, -210, -212, -220, -242, -243, -261, -263, -264, -303, -362 (amended), -500, -501, -502, -503, -504, -505, -506 (new)

BILL NUMBER: HB 121

GEORGIA LAWS: 2018 Ga. Laws 262

SUMMARY:

The Act amends several aspects of trust law, including updating the application of the Uniform Statutory Rule Against Perpetuities in Georgia by extending the time within which a nonvested property interest or power of appointment must vest from 90 to 360 years. The Act also allows for modifications of a trust without judicial approval in some cases. Many passages are simplified, including the calculation of compensation for a trustee, which can now be modified through different procedures. Finally, the Act codifies the role of trust directors.

EFFECTIVE DATE:

July 1, 2018

*History*

Georgia published its first official Code in 1860 and, with it, Georgia's first laws regarding trusts.<sup>1</sup> Like many states, the Georgia General Assembly based its trust law around English common law.<sup>2</sup> The first major overhaul of trust law in the Official Code of Georgia Annotated occurred in 1991 with the Georgia Trust Act.<sup>3</sup> The early 2000s saw an effort by the Uniform Law Commission to create the Uniform Trust Code (UTC), which identified “the greater use of trusts in recent years, both in family estate planning and in commercial transactions . . . .”<sup>4</sup> Thirty-two states have since adopted the UTC, including several near Georgia, and Connecticut and Illinois introduced the UTC in their state legislatures in 2018.<sup>5</sup> In

---

1. Mary F. Radford, GEORGIA TRUSTS AND TRUSTEES § 1:4 (2017).

2. *Id.*

3. *Id.*

4. UNIF. TRUST CODE PREFATORY NOTE (Unif. Law Comm'n 2010).

5. *Legislative Fact Sheet—Trust Code*, Unif. Law Comm'n, <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Trust%20Code> [https://perma.cc/2T49-5D8L] (last visited July 1, 2018). States having enacted the code include Alabama, Arizona, Arkansas, Colorado, the District of Columbia, Florida, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah,

2010, when Georgia performed a second major reform, it elected to adjust its own Code rather than adopt the UTC.<sup>6</sup> The Bar Committee chose not to replace the Georgia trust code with the UTC largely because Georgia was at the forefront of the codification movement and already had designed a trust Code.<sup>7</sup>

In creating the 2010 reform, Georgia legislators accessed and utilized both the text and debates recorded during the creation of the UTC.<sup>8</sup> However, the terms of Georgia trust law varied in some respects from the UTC, namely in the modification of irrevocable trusts.<sup>9</sup> The UTC allows modifications to irrevocable trusts without the difficulties present in the 2010 Georgia reform, particularly the requirement for judicial approval for modifying these types of trusts.<sup>10</sup> This extrajudicial modification allowance has been recognized as one of “only a few major . . . differences” between Georgia law and the UTC.<sup>11</sup>

The amendments which would ultimately come to form House Bill (“HB”) 121 were initially drafted by the Trust Code Revision Committee of the State Bar of Georgia’s Fiduciary Law Section.<sup>12</sup> The members of that committee determined that, although it was “not an opportune time to consider adoption of the [UTC],” some changes to the Code would be necessary.<sup>13</sup> Accordingly, the committee considered “evolving national trends in trust law” and concluded that it was time for an overhaul on Georgia law’s handling of the modification of irrevocable trusts.<sup>14</sup>

---

Vermont, Virginia, West Virginia, Wisconsin, and Wyoming. *Id.*

6. RADFORD, *supra* note 1, § 1:4.

7. Telephone Interview with Nick Djuric, Chair of the Trust Code Revision Committee of the Fiduciary Law section of the Georgia State Bar, at 5 min. 25 sec. (Aug. 7, 2018) (on file with Georgia State University Law Review) [hereinafter Djuric Interview].

8. RADFORD, *supra* note 1, § 1:5.

9. Jordan Alford, *Mr. Djuric Introduces Proposed Trust Code Provisions, HB 121 and HB 122*, Alford & Burkhardt, LLC (2017) (discussing a lecture by Nick Djuric, Chair of the Legislation Committee of the State Bar of Georgia Fiduciary Law Section).

10. *Id.*

11. RADFORD, *supra* note 1, § 1:5. Other differences include Georgia’s tradition of not generally treating revocable trusts as will substitutes, requirements for notifying beneficiaries of the existence of the trust, and Georgia’s statutory compensation for trustees, which HB 121 updated.

12. FIDUCIARY LAW SECTION TR. CODE REVISION COMM., PROPOSED AMENDMENTS TO THE REVISED GEORGIA TRUST CODE OF 2010 1 (2016) [hereinafter Proposed Amendments]. GSU College of Law Professor Samuel Donaldson acted as reporter for this committee.

13. *Id.*

14. *Id.*

The legislature first attempted to enact these changes during the 2016–2017 legislative session.<sup>15</sup> That version of the bill, which consisted of only seven sections, focused largely on creating a framework for modifying irrevocable trusts without court involvement.<sup>16</sup> The House Judiciary Committee reported a single substitute bill with minor changes on January 31, 2017, but the bill was ultimately recommitted, as were many bills that year originating from State Bar committees.<sup>17</sup>

The 2017–2018 version of the bill expanded HB 121’s reach considerably, taking it from nine sections to twenty-six.<sup>18</sup> Many of the additions came from HB 122, originally proposed in 2017 and subsequently withdrawn.<sup>19</sup> Whereas the first bill appeared to be an attempt to put Georgia on “equal footing” with states that have adopted the UTC, the third version demonstrated a broader goal to update some of Georgia’s other trust laws as well, even some that conflict with the UTC.<sup>20</sup> One instance appears in Section 15, which changed the compensation for a trustee from a percentage based on the value of the trust to a dollar amount plus a percentage of the trust’s value.<sup>21</sup> The UTC has no statutory amounts and simply awards the trustee “compensation that is reasonable under the circumstances.”<sup>22</sup>

Another issue not considered in the original version HB 121 is an extension of the length of time that property interests could remain nonvested under the Georgia Rule Against Perpetuities. This extension was originally included in HB 122 during the 2016–2017 session.<sup>23</sup> As far back as 2013, the Fiduciary Law Section had recommended that same change, but it was never adopted.<sup>24</sup> Additionally, the creation of the term “trust director,” or a person

---

15. HB 121, as introduced, 2017 Ga. Gen. Assemb.

16. *Id.*

17. State of Georgia Final Composite Status Sheet, HB 121, May 10, 2018; Djuric Interview, *supra* note 7, at 7 min. 48 sec.

18. *Compare* HB 121, as introduced, 2017 Ga. Gen. Assemb, *with* HB 121, as introduced, 2018 Ga. Gen. Assemb.

19. *See* Georgia General Assembly, HB 122, Bill Tracking, <http://www.legis.ga.gov/Legislation/en-US/display/20172018/HB/122> [<https://perma.cc/6T3G-TJEH>].

20. *Id.*

21. HB 121 (LC 29 7796ERS), § 15, p. 13, ll. 431–505, 2018 Ga. Gen. Assemb.

22. Unif. Trust Code § 708 (Unif. Law Comm’n 2010).

23. HB 122, as introduced, § 1, p. 1, ll. 8–17, 2017 Ga. Gen. Assemb.

24. FIDUCIARY LAW SECTION TR. CODE REVISION COMM., *supra* note 12, at 1.

who has some trustee responsibilities without being a full trustee, is a change included in HB 121, but it was not included in either of the original bills.<sup>25</sup> The breadth of the Act demonstrates a desire by Georgia lawmakers to not just update individual aspects of the Code, but to take this once-in-a-decade opportunity to modernize the trust Code in many respects while still maintaining the idiosyncrasies of the Georgia trust Code that have remained structurally the same for nearly thirty years.<sup>26</sup>

### *Bill Tracking of HB 121*

#### *Consideration and Passage by the House*

Representative Chuck Efstoration (R-104th) sponsored HB 121 in the House.<sup>27</sup> The House read the bill for the first time on January 25, 2017, and committed it to the Judiciary Committee.<sup>28</sup> The House read the bill a second time on January 26, 2017.<sup>29</sup> On January 31, 2017, the Committee amended the bill in part and favorably reported the bill by Committee substitute.<sup>30</sup> The Committee substitute repealed Code section 53-12-63, which related to the division and consolidation of trusts, and Code section 53-12-64, which related to the termination of trusts, and placed provisions relating to division and consolidation of trusts in revised Code section 53-12-61.<sup>31</sup> No other changes were made between the first and second versions of the bill.<sup>32</sup> However, on March 30, 2017, the House withdrew HB 121, and sent it back to the Committee for revision.<sup>33</sup> HB 121 saw no other activity during the 2016–2017 legislative session.<sup>34</sup>

---

25. HB 121 (LC 29 7796ERS), § 25, p. 27, ll. 916–937, 2018 Ga. Gen. Assemb.

26. *Compare* 1991 Ga. Laws 810 (formerly found at O.C.G.A. § 53-12-1 (1991)), *with* O.C.G.A. § 53-12-1 (2018).

27. *See* Georgia General Assembly, HB 121, Bill Tracking, <http://www.legis.ga.gov/Legislation/en-US/display/20172018/HB/121> [<https://perma.cc/NGL9-RY73>] [hereinafter HB 121 Bill Tracking].

28. *Id.*

29. *Id.*

30. *Id.*

31. HB 121 (LC 29 7308ERS), p. 1, ll. 5–6, 2017 Ga. Gen. Assemb.

32. *Compare* HB 121 (LC 29 7271ER), 2017 Ga. Gen. Assemb., *with* HB 121 (LC 29 7308ERS), 2017 Ga. Gen. Assemb.

33. HB 121 Bill Tracking, *supra* note 27.

34. *Id.*

On February 7, 2018, HB 121 was reintroduced to the Georgia General Assembly.<sup>35</sup> Every substantive section from the second version remained, with some minor changes.<sup>36</sup> However, there were many additions to this third version.<sup>37</sup> The Committee substitute changed most of the bill's description to include the additional sections.<sup>38</sup> The third version of HB 121 included an entirely new first section, which revised Code section 44-6-201, the Statutory Rule Against Perpetuities, to “vest[] or terminate[] [an interest] within 360 years after its creation,” rather than the former ninety-year time limit.<sup>39</sup>

Section 2 was new in the bill's third version; it related to a court's ability to reform a disposition in a way that most approximates a transferor's intent.<sup>40</sup> Section 3 was original to the bill's third version and related to court reform of nonvested dispositions created before July 2018, which was the Act's effective date.<sup>41</sup> Section 4 in the third version, which appeared as Section 1 in the former version, addressed parental consent on behalf of minor or unborn child beneficiaries.<sup>42</sup> The third version added a definition of “consent,” defining it as “an action related to the granting of powers to a trustee, modification or termination of a trust, a trustee's duty to report, a trustee's compensation, the conversion of a trust to a unitrust, the appointment, resignation, or removal of a trustee, and other similar actions.”<sup>43</sup>

The new Section 5, which addresses interested persons entering into binding non-judicial settlements, was the former Section 2, and there were no changes between the versions.<sup>44</sup> Section 6 was added to the third version of HB 121, and it amended subsection (a) of Code section 53-12-25, relating to transfers of property in trust, by adding the following language:

---

35. *Id.*

36. *Compare* HB 121 (LC 29 7308ERS), 2017 Ga. Gen. Assemb., *with* HB 121 (LC 29 7796ERS), 2018 Ga. Gen. Assemb.

37. HB 121 (LC 29 7796ERS), 2018 Ga. Gen. Assemb.

38. *Id.* p. 1, ll. 1–17.

39. *See id.* § 1, p. 1, ll. 20–28.

40. *Id.* § 2, p. 2, ll. 30–44.

41. *Id.* § 3, pp. 2–3, ll. 46–61.

42. *Id.* § 4, p. 3, ll. 74–78.

43. HB 121 (LC 29 7796ERS), § 4, p. 3, ll. 74–78, 2018 Ga. Gen. Assemb.

44. *Id.* § 5, p. 3, ll. 123–45.

Transfer of property in trust shall require a transfer of legal title to the trustee. In any transfer of property or any interest in property, if a trust is named as a grantee, whether such trust is held under the laws of this state or of any other jurisdiction, then such transfer is deemed to have been made to the trustee of such trust as though the trustee of such trust had been named as grantee instead of the trust.<sup>45</sup>

The next section in the third version, Section 7, merely added the words “consolidate” and “divide” to subsection (a) of Code section 53-12-61, relating to the power to modify or terminate a trust.<sup>46</sup> Section 7 was the former Section 3 of earlier versions of the bill.<sup>47</sup> Section 8 was the former Section 4 and amended Code section 53-12-62, which related to modification of trusts by courts, by adding the words, “as it existed on February 1, 2018” after the appearance of each citation to the Internal Revenue Code.<sup>48</sup> Section 9 replicated the former Section 5, repealing Code section 53-12-63.<sup>49</sup> Section 10 replicated the former Section 6, repealing Code section 53-12-64.<sup>50</sup> Finally, Section 11 replicated the former Section 7, amending Code section 53-12-65, relating to the modification or termination of uneconomic trusts.<sup>51</sup>

Each section beyond Section 11 in the third version of HB 121, specifically Sections 12 through 25, were new to the bill. Section 12 amends Code section 53-12-81, relating to limitations on creditors’ rights.<sup>52</sup> Section 13 amends Code section 53-12-82, relating to creditors’ claims against a settlor.<sup>53</sup> Section 14 amends subsections (d) and (f) of Code section 53-12-201, relating to appointment and vacancies of trustees.<sup>54</sup> Section 15 amends Code section 53-12-210, relating to trustee compensation, and includes a fee calculation chart.<sup>55</sup> Section 16 amends Code section 53-12-212, relating to extra

---

45. *Id.* § 6, p. 5, ll. 146–53.

46. *Id.* § 7, p. 5, l. 159.

47. *Id.* § 7, p. 5, ll. 154–222.

48. *Id.* § 8, pp. 9–10, ll. 285–325.

49. HB 121 (LC 29 7796ERS), § 9, p. 11, ll. 348–50, 2018 Ga. Gen. Assemb.

50. *Id.* § 10, p. 11, ll. 351–53.

51. *Id.* § 11, p. 11, ll. 354–65.

52. *Id.* § 12, p. 11, ll. 366–75.

53. *Id.* § 13, pp. 11–13, ll. 376–420.

54. *Id.* § 14, p. 13, ll. 421–30.

55. HB 121 (LC 29 7796ERS), § 15, pp. 13–15, ll. 431–505, 2018 Ga. Gen. Assemb.



compensation for trustees.<sup>56</sup> Section 17 amends Code section 53-12-220, relating to trustee resignation.<sup>57</sup> Section 18 amends Code section 53-12-242, relating to the duty to inform as to the existence of a trust.<sup>58</sup> Section 19 amends Code section 53-12-243, relating to the duty to provide reports and accounts.<sup>59</sup> Section 20 amends Code section 53-12-261, relating to the powers of trustees.<sup>60</sup> Section 21 amends subsections (d) and (e) of Code section 53-12-263, relating to the incorporation of powers by reference.<sup>61</sup> Section 22 amends Code section 53-12-264, relating to the granting of powers by qualified beneficiaries.<sup>62</sup> Section 23 amends Code section 53-12-303, relating to relief from liability.<sup>63</sup> Section 24 amends Code section 53-12-362, relating to converting a trust to a unitrust.<sup>64</sup>

Section 25 adds several new Code sections under a new Article 18, including: Code section 53-12-500, defining the terms “directed trustee,” “power of appointment,” “power of direction,” and “trust director”; Code section 53-12-501, relating to the application of the Article; Code section 53-12-502, relating to a trust director’s powers of direction; Code section 53-12-503, further delineating powers of direction; Code section 53-12-504, addressing the functions of a directed trustee; Code section 53-12-505, relating to liability; and Code section 53-12-506, relating to rules applicable to both trustees and trust directors.<sup>65</sup> Additionally, the section denoting the bill’s effective date, formerly Section 8, was removed.<sup>66</sup> The House read HB 121 for a third time on February 26, 2018; it passed by a vote of 170 to 4.<sup>67</sup>

---

56. *Id.* § 16, p. 15, ll. 506–16.

57. *Id.* § 17, pp. 16–17, ll. 517–59.

58. *Id.* § 18, p. 17, ll. 560–67.

59. *Id.* § 19, p. 17, ll. 568–76.

60. *Id.* § 20, pp. 17–25, ll. 577–842.

61. HB 121 (LC 29 7796ERS), § 21, p. 25, ll. 843–63, 2018 Ga. Gen. Assemb.

62. *Id.* § 22, p. 25, ll. 864–73.

63. *Id.* § 23, pp. 25–26, ll. 874–90.

64. *Id.* § 24, pp. 26–27, ll. 891–913.

65. *Id.* § 25, pp. 27–31, ll. 914–1081.

66. *Id.* § 26, p. 32, ll. 1082–1083.

67. HB 121 Bill Tracking, *supra* note 27.

*Consideration and Passage by the Senate*

Senator Jesse Stone (R-23rd) sponsored HB 121 in the Senate.<sup>68</sup> The Senate first read HB 121 on February 28, 2018.<sup>69</sup> The Senate assigned HB 121 to the Senate Committee on Judiciary, which made no amendments to the bill.<sup>70</sup> The Committee favorably reported HB 121 on March 14, 2018.<sup>71</sup> The Senate read the bill for a second time on March 15, 2018, and for a third time on March 23, 2018.<sup>72</sup> HB 121 passed in the Senate on March 23, 2018, by a vote of 42 to 1.<sup>73</sup> The House sent the bill to Governor Nathan Deal (R) on April 2, 2018. Governor Deal signed the bill into law on May 3, 2018, and the bill became effective on July 1, 2018.<sup>74</sup>

*The Act*

The Act amends Article 9 of Chapter 6 of Title 44 and Chapter 12 of Title 53, relating respectively to the Uniform Statutory Rule Against Perpetuities and trusts, of the Official Code of Georgia Annotated.<sup>75</sup> The overall purpose of the Act is to revise and modernize Georgia's trust Code.<sup>76</sup>

*Section 1*

The first section of the Act amends Code section 44-6-201 by extending the safe harbor duration found in Georgia's version of the Rule Against Perpetuities from 90 years to 360 years.<sup>77</sup> This amendment strongly benefits "dynasty" trusts, those that exist for many generations, and means new Georgia trusts will be able to last for 360 years.<sup>78</sup>

---

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. HB 121 Bill Tracking, *supra* note 27.

74. *Id.*

75. 2018 Ga. Laws 262.

76. *Id.*

77. 2018 Ga. Laws 262, § 1, at 262–63.

78. 2018 Ga. Laws 262, § 1, at 262–63; Ian M. Fisher, *Georgia's New Trust Law*, HOFFMAN &

### *Section 2*

Section 2 updates Code section 44-6-203 to reflect the 360-year extension to the Rule Against Perpetuities, added in Code section 44-6-201.<sup>79</sup> Section 2 further amends Code section 44-6-203 by permitting a court to reform a disposition or gift so long as it is within the number of years permitted by law, which is now 360 years rather than ninety.<sup>80</sup>

### *Section 3*

Section 3 deals with the applicability of these legislative changes to the Uniform Statutory Rule Against Perpetuities under Article 9 of Title 44 of the Georgia Code. All of these listed changes became effective July 1, 2018.<sup>81</sup>

### *Section 4*

HB 121 significantly expands Code section 53-12-8. Where the statute previously only permitted a parent to represent and bind his or her minor or unborn child, the new iteration introduces expanded abilities to consent for many different groups of people, including a settlor who lacks capacity, an estate, a ward, a principal, a beneficiary of a trust, the persons interested in an estate, and the minor or unborn children of an ancestor.<sup>82</sup> The bill also recognizes consent in a variety of different contexts, including, but not limited to: “action related to the granting of powers to a trustee, modification or termination of a trust, a trustee’s duty to report, a trustee’s compensation, the conversion of a trust to a unitrust, the appointment, resignation, or removal of a trustee, and other similar actions.”<sup>83</sup> The statute also codifies the ability of representatives to bind people with whom they have a certain relationship, with respect

---

ASSOCIATES, LLC, <http://hoffmanstatelaw.com/georgias-new-trust-law/> [https://perma.cc/4FPZ-HBCZ] (last visited Aug. 7, 2018).

79. 2018 Ga. Laws 262, § 2, at 263.

80. *Id.*

81. *Id.*

82. O.C.G.A. § 53-12-8 (Supp. 2018).

83. *Id.*

to a particular question or dispute, so long as the representative and the persons represented do not have a conflict of interest.<sup>84</sup> The expansion of Code section 53-12-8 allows for the removal of other Code sections' wording that described who could consent or receive notice on behalf of qualified beneficiaries.<sup>85</sup>

### *Section 5*

The binding nonjudicial settlement agreement law, found in Code section 53-12-9, is completely new.<sup>86</sup> The law purports to enable parties to do what a judge could do, but without going through a court-based process, as long as all the proper parties or their proper representatives are notified and give consent.<sup>87</sup> Nonjudicial settlement agreements will not be valid if the trust modification requires the settlor's consent.<sup>88</sup> Experts believe allowing settlements outside of court may make trust modifications less costly and time-consuming.<sup>89</sup>

### *Section 6*

Section 6 amends Code section 53-12-25 by changing the phrase "to a trust" to "in trust" and adds language relating to the transfer of property to "in trust."<sup>90</sup>

### *Section 7*

Section 7 amends and expands the power of direct modification or termination of a trust under Code section 53-12-61.<sup>91</sup> A trust agreement may provide a trustee or other person the power to

---

84. O.C.G.A. § 53-12-8(f) (Supp. 2018).

85. See O.C.G.A. § 53-12-8.

86. 2018 Ga. Laws 262, § 5, at 265.

87. O.C.G.A. § 53-12-9 (Supp. 2018); Richard Morgan, *The Power to Change an Otherwise Irrevocable Trust (HB 121)*, MORGAN AND DISALVO, P.C., <https://morgandisalvo.com/the-power-to-change-an-otherwise-irrevocable-trust-hb121/> [<https://perma.cc/77ZB-VHKP>] (last visited Aug. 7, 2018).

88. Morgan, *supra* note 88.

89. *Id.*

90. 2018 Ga. Laws 262, § 6, at 266; see *supra* note 45 and accompanying text.

91. 2018 Ga. Laws 262, § 7, at 266–67.

modify, consolidate, divide, or terminate the trust without court approval.<sup>92</sup> If a trustee or other person seeks a modification during a settlor's lifetime, the court must approve a petition to effect the change once the settlor and beneficiaries consent to it and the trustee has received notice of the proposed change; the court must approve a petition under these circumstances even if doing so is inconsistent with the material purpose of the trust.<sup>93</sup> If a modification is sought after the settlor's death, the court must approve a petition to modify if all beneficiaries consent, the trustee has received notice of the proposed modification, and the court concludes the modification is not inconsistent with a material purpose of the trust.<sup>94</sup> If termination is instead sought following the settlor's death, the court must terminate the trust if the beneficiaries consent, the trustee received notice, and the court concluded that continuance of the trust would not be necessary to achieve its material purpose.<sup>95</sup>

Furthermore, judicial modification of noncharitable trusts is permitted under the amendments to Code section 53-12-61 either: (1) where the settlor and beneficiaries have consented (even if the modification is contrary to the purpose of the trust); (2) where all of the beneficiaries have consented after the settlor's death; or (3) to facilitate an efficient administration of the trust.<sup>96</sup> Finally, there are other scenarios in which a court may approve a petition to modify a trust filed during the settlor's lifetime and after his or her death.<sup>97</sup>

### *Section 8*

Although much of the statutory language granting courts the right to modify trusts existed in Code section 53-12-62 before the 2018 amendments, most of that language was replaced with the provisions of Code section 53-12-61 as described above. In Code section 53-12-62, lawmakers added the "power to decant."<sup>98</sup> The power to decant is

---

92. O.C.G.A. § 53-12-61(a) (Supp. 2018).

93. O.C.G.A. § 53-12-61(b) (Supp. 2018).

94. O.C.G.A. § 53-12-61(c) (Supp. 2018).

95. O.C.G.A. § 53-12-61(c)(2) (Supp. 2018).

96. O.C.G.A. § 53-12-61(c)(1) (Supp. 2018).

97. O.C.G.A. § 53-12-61(d) (Supp. 2018).

98. Ian M. Fisher, *Georgia's New Trust Law*, Hoffman & Associates, LLC, <http://hoffmanestatelaw.com/georgias-new-trust-law/> [https://perma.cc/FCK4-NG9T] (last visited Aug.

the ability to distribute property from an “original trust” (an existing trust) to a “second trust” (a new or amended trust).<sup>99</sup> A trustee can pour the trust property into a new trust and leave behind unwanted or unfavorable terms of agreement. The beneficiaries of the second trust must all be beneficiaries of the first trust.<sup>100</sup>

Before decanting an original trust, the trustee must provide notice to all beneficiaries and any living settlors describing the manner in which the trustee intends to exercise the power.<sup>101</sup> Additionally, the second trust may include a power of appointment which could be used to benefit a person who was not a beneficiary of the original trust.<sup>102</sup> The Rule Against Perpetuities period of the first trust will not be extended by decanting the original trust into the second trust.<sup>103</sup> Finally, the trustee’s power to decant the original trust can be limited by discretionary standards of distribution, such as health, education, maintenance, or support.<sup>104</sup>

### *Section 9*

Section 9 repeals Code section 53-12-63, relating to the division and consolidation of trusts, effective July 1, 2018.<sup>105</sup> As noted above in the description of Section 7, division and consolidation provisions now exist in Code section 53-12-61.<sup>106</sup>

### *Section 10*

Section 10 repeals Code section 53-12-64, relating to termination of trusts, effective July 1, 2018.<sup>107</sup> As noted above in the description of Section 7, termination provisions were added to Code section 53-12-61.<sup>108</sup>

---

7, 2018).

99. O.C.G.A. § 53-12-62(b)(2) (Supp. 2018).

100. O.C.G.A. § 53-12-62(b)(2)(B) (Supp. 2018).

101. O.C.G.A. § 53-12-62(c) (Supp. 2018).

102. O.C.G.A. § 53-12-62(g) (Supp. 2018).

103. O.C.G.A. § 53-12-62(e) (Supp. 2018).

104. *See generally* O.C.G.A. § 53-12-62.

105. 2018 Ga. Laws 262, § 9, at 270.

106. *See supra* notes 93–99 and accompanying text.

107. 2018 Ga. Laws 262, § 10, at 270.

108. *See supra* notes 93–99 and accompanying text.

*Section 11*

Section 11 amends Code section 53-12-65 to permit the termination of a trust, after notice to any qualified beneficiaries, if the total value of the trust is less than \$100,000 and if the trustee believes the value of the trust property does not justify the cost of administration.<sup>109</sup> This amendment increased the minimum value from \$50,000 to \$100,000.<sup>110</sup>

*Section 12*

Section 12 amends Code section 53-12-81 to clarify limitations on a creditor's rights to discretionary distributions when a trust has a spendthrift clause.<sup>111</sup> Section 12 adds that a creditor cannot compel a trustee to pay any amount that is payable only in the trustee's discretion, regardless of whether the "discretion is expressed in the form of a standard of distribution, including, but not limited to, health, education, maintenance, and support, and whether such trustee is also a beneficiary."<sup>112</sup> This addition clarifies that a trustee's discretion does not provide a beneficiary with *any* property rights to which a beneficiary's creditor can attach.<sup>113</sup>

*Section 13*

Code section 53-12-82 relates to the claims a creditor has available against a settlor.<sup>114</sup> Some of the changes to the statute merely clean up the way it is organized to make room for new subsections. For example, the word "creditors" now appears in subsection (a)(2)(A) instead of subsection (a)(2).<sup>115</sup> However, the amendment makes two significant changes to the statute. First, it brings Georgia law in

---

109. 2018 Ga. Laws 262, § 11, at 270–71.

110. *Compare* 2010 Ga. Laws 579, § 1, at 588 (formerly found at O.C.G.A. § 53-12-65(a) (2011)), *with* 2018 Ga. Laws 262, § 11, at 270–71.

111. 2018 Ga. Laws 262, § 12, at 271.

112. *Id.*

113. *Big and Important Changes to GA Law Become Effective on July 1, 2018*, MORGAN AND DISALVO, P.C., <https://morgandisalvo.com/news-alert-big-and-important-changes-to-ga-law-become-effective-on-july-1-2018-2/> [<https://perma.cc/9ETS-CKD6>] (last visited Aug. 7, 2018).

114. O.C.G.A. § 53-12-82 (Supp. 2018).

115. O.C.G.A. § 53-12-81(a)(2)(A) (2018).

harmony with federal tax law by adding subsection (a)(2)(B), clarifying that a trustee's discretion to reimburse a settlor for income tax liability owed on income earned by a trust is not to be considered as an amount that can be distributed to or for the settlor's benefit.<sup>116</sup> This gives trustees the authority to reimburse a trust settlor for tax liability on the trust's income.<sup>117</sup> Second, the amendment defines *inter vivos* marital trusts by reference to federal tax law under section 26 U.S.C. § 2523(e), which did not formerly exist under Georgia law.<sup>118</sup> An *inter vivos* marital trust can be set up by one spouse for the other's benefit and causes any trust property to benefit the surviving spouse when the other spouse dies.<sup>119</sup>

#### *Section 14*

When there is a trustee vacancy, the qualified beneficiaries may appoint a trustee by unanimous consent under Code section 53-12-201.<sup>120</sup> This statute previously required the qualified beneficiaries be *sui juris*, or "of full age."<sup>121</sup> This language was repealed as no longer necessary due to expanded representation provisions in new Code section 53-12-8.<sup>122</sup> Similar provisions were repealed in Sections 16, 17, 18, 19, 22 and 23. If they were not, the statute required that a petition for a court-appointed trustee be delivered to the guardian or conservator of a qualified beneficiary.<sup>123</sup> Also, the court was required to appoint a guardian ad litem for each beneficiary who is either not of age or who has no guardian or conservator.<sup>124</sup>

---

116. 2018 Ga. Laws 262, § 13, at 271.

117. O.C.G.A. § 53-12-81(a)(2)(B) (Supp. 2018).

118. 2018 Ga. Laws 262, § 13, at 272.

119. O.C.G.A. § 53-12-81(b)(2) (Supp. 2018).

120. O.C.G.A. § 53-12-201(d) (2018).

121. 2011 Ga. Laws 551, § 10, at 556 (formerly found at O.C.G.A. § 53-12-201(d) (2011)).

122. See 2018 Ga. Laws 262, § 14, at 272.

123. 2010 Ga. Laws 579, § 1, at 602 (formerly found at O.C.G.A. § 53-12-201(f) (2011)).

124. *Id.*



*Section 15*

Previously, when the trust instrument did not describe the trustee's compensation, or the parties did not agree on it, the trustee received compensation based on a percentage of the market value of the trust.<sup>125</sup> The percentage varied based on the value of the trust, ranging from 1.25% for a trust with a value of less than \$500,000 to 0.5% for a trust with a value of more than \$5,000,000.<sup>126</sup> The law now sets a percentage of the market value (1.75%) for a trust valued at \$500,000 or less, and sets a fixed dollar amount with a percentage added (\$15,000.00 plus 1% of the excess over \$1 million where the value is between one and two million dollars).<sup>127</sup> The values remain the same, but the amended table in HB 121 is far simpler.<sup>128</sup>

*Section 16*

All qualified beneficiaries must now receive notice, whereas a trustee petitioning the court for additional compensation previously had to provide notice to guardians and conservators of beneficiaries.<sup>129</sup> Further, the language "service of notice" is replaced with "notice."<sup>130</sup>

*Section 17*

Under Section 17, a trustee may resign without petitioning the court if she provides thirty days' notice to the qualified beneficiaries, the living settlor, or all co-trustees.<sup>131</sup> However, the trustee may still petition the court, although various reasons to resign which were previously codified are removed.<sup>132</sup> A section requiring notice to

---

125. 2010 Ga. Laws 579, § 1, at 605 (formerly found at O.C.G.A. § 53-12-210(c)(2)(B) (2011)).

126. *Id.*

127. O.C.G.A. § 53-12-210(c)(2)(B) (2018).

128. *Id.*

129. O.C.G.A. § 53-12-212(a) (Supp. 2018); 2010 Ga. Laws 579, § 1, at 606 (formerly found at O.C.G.A. § 53-12-212(a) (2011)).

130. 2018 Ga. Laws 262, § 16, at 273–74.

131. 2018 Ga. Laws 262, § 17, at 274.

132. O.C.G.A. § 53-12-220(a)(3)(F) (Supp. 2018); 2010 Ga. Laws 579, § 1, at 607 (formerly found at O.C.G.A. § 53-12-220(a) (2011)). Potential reasons included age and illness, disagreements between the trustee and beneficiaries, or the trustee's inability to perform the task for other reasons. *Id.*

guardians or conservators is no longer present.<sup>133</sup> Courts may add conditions to preserve the trust where necessary.<sup>134</sup> If resigning would leave a vacancy, a trustee must continue to serve until replaced and that trustee remains liable for any action until her replacement.<sup>135</sup>

### *Section 18*

When an irrevocable trust is created, or a revocable trust becomes irrevocable, the trustee must only notify the qualified beneficiaries.<sup>136</sup>

### *Section 19*

Language requiring trustees to provide reports concerning the trust when requested by guardians and conservators of non-*sui juris* beneficiaries is removed.<sup>137</sup>

### *Section 20*

A definition of the term “fiduciary,” as applied to Code section 53-12-261 has been removed, with “fiduciary” now meaning “trustee.”<sup>138</sup> The Act adds new language that allows a trustee to exercise, without court approval, all powers provided in the trust instrument, powers a property owner would typically possess, and any other “appropriate” powers.<sup>139</sup> Additionally, the language “property held by the fiduciary” replaces the word “trust” in several places so as to apply equally to estates.<sup>140</sup> The Act adds the phrase “estate or” before “trust” in several locations for the same reason.<sup>141</sup> The trustee now must serve the best interest of “persons” to whom she owes care, rather than the trust itself, when selling or maintaining timber located on farm property, dealing with other owners securities

---

133. Compare O.C.G.A. § 53-12-220(b) (Supp. 2018), with 2010 Ga. Laws 579, § 1, at 607 (formerly found at O.C.G.A. § 53-12-220(b) (2011)).

134. O.C.G.A. § 53-12-220(b).

135. O.C.G.A. § 53-12-220(d) (Supp. 2018).

136. O.C.G.A. § 53-12-242(a) (Supp. 2018).

137. 2018 Ga. Laws 262, § 19, at 274.

138. O.C.G.A. § 53-12-261(a) (2018).

139. 2018 Ga. Laws 262, § 20, at 275.

140. *Id.* at 275–81.

141. *Id.*

contained in the trust, or negotiating claims.<sup>142</sup> Where a trustee would previously make loans from the trust for the benefit or protection of the trust, a trustee may now make loans out of the property that she considers “fair and reasonable under the circumstances.”<sup>143</sup> The trustee may also have a lien on future distributions for repayment of loans where a loan is made to a beneficiary.<sup>144</sup> A trustee may still vote shares of stock, although the Act changes the language from “stock or other ownership interests owned by the trust” to “stock or other ownership interest held by the fiduciary.”<sup>145</sup>

In addition, Section 20 allows trustees to determine what qualifies as income or principal within the trust or estate, including securities purchases, dividends on securities, or income.<sup>146</sup> The trustee has discretion on how expenses, costs, and taxes are charged between principal and income.<sup>147</sup> All the powers described in the Code section are subject to the fiduciary duty described within the chapter.<sup>148</sup> The Code section also includes definitions to apply where a probate court grants a personal representative any powers within the section.<sup>149</sup>

### *Section 21*

Provisions incorporating former Code section 15-12-261, describing powers of trustees, remain effective.<sup>150</sup> Definitions at the end of the section were reformatted but remain the same in effect.<sup>151</sup>

### *Section 22*

A qualified beneficiary who is not of age may now grant powers instead of needing a guardian or conservator to do so.<sup>152</sup>

---

142. O.C.G.A. § 53-12-261(b)(5)(G) (2018).

143. O.C.G.A. § 53-12-261(b)(12) (Supp. 2018).

144. *Id.*

145. 2018 Ga. Laws 262, § 20, at 278.

146. *Id.* at 280–81.

147. O.C.G.A. § 53-12-261(b)(28)(A)–(C) (Supp. 2018).

148. O.C.G.A. § 53-12-261(c) (Supp. 2018).

149. O.C.G.A. § 53-12-261(d) (Supp. 2018).

150. *Id.* § 53-12-263(d)(1) (2018).

151. *Id.* § 53-12-263(e) (2018).

152. O.C.G.A. § 53-12-264 (2018).

*Section 23*

While a trustee was previously not liable for an act performed under the direction of a person delegated the power to direct the trustee, that protection is now limited to a person who can revoke the trust, rather than someone who can direct the trustee.<sup>153</sup> Former Code section 53-12-303(c), which provided protections to a trustee where the trustee is excluded from some decisions regarding an investment in favor of a committee or co-trustee, is removed.<sup>154</sup>

*Section 24*

In various places, the language is changed to “such trustee” instead of “the trustee.”<sup>155</sup> When a trustee converts a trust into a unitrust, Section 24 removes language requiring notice to guardians or conservators.<sup>156</sup>

*Section 25*

This section adds the following new Code sections to the Chapter under a new Article 18.

*Code section 53-12-500*

This section defines a “directed trustee” as a “trustee that is subject to a trust director’s power of direction.”<sup>157</sup> “Power of appointment” is a power allowing a non-fiduciary to designate an ownership interest or a new power of appointment over a trust property.<sup>158</sup> “Power of direction” includes the power to administer investments within a trust, to consent or veto the trustee’s actions, and to represent a beneficiary.<sup>159</sup>

---

153. O.C.G.A. § 53-12-303(b) (2018).

154. O.C.G.A. § 53-12-303 (2018).

155. *See* O.C.G.A. § 53-12-362 (2018).

156. *Id.*

157. O.C.G.A. § 53-12-500(1)–(4) (2018).

158. O.C.G.A. § 53-12-500(2) (2018).

159. O.C.G.A. § 53-12-500(3) (2018).

*Code section 53-12-501*

Article 18 applies where a trust creates a trust director, regardless of how the position is technically named.<sup>160</sup> It does not apply to a power of appointment, appointment of trustees or trust directors, revocation and amendment powers of the settlor, certain beneficiary powers, and powers held in a non-fiduciary capacity to achieve the settlor's tax objectives.<sup>161</sup> A power of both appointment and direction is considered a power of appointment for purposes of the Chapter.<sup>162</sup>

*Code section 53-12-502*

A trust director is treated under the same rules as a trustee regarding payback provisions under Medicaid and a charitable interest.<sup>163</sup> A beneficiary who is also a trust director is still limited under Code section 53-12-270 regarding discretionary trust distributions.<sup>164</sup> A trust director cannot give a trustee more power without her consent, and the trustee is not liable where she fails to follow a modification she was unaware of.<sup>165</sup>

*Code section 53-12-503*

A trust director is under the same fiduciary duties as a trustee.<sup>166</sup> A trust director's power may be contingent upon the occurrence of an event, including the request of a beneficiary.<sup>167</sup> A trustee may, if allowed under the trust document, delegate her power to the trustee.<sup>168</sup> A trust director has the responsibility to keep trustees and other trust directors informed and respond to requests for information regarding the trust director's powers and duties.<sup>169</sup> The trust director is not liable where she relied on information provided by a trustee or

---

160. See O.C.G.A. § 53-12-501 (2018).

161. O.C.G.A. § 53-12-501(b)(1)–(5) (2018).

162. O.C.G.A. § 53-12-501(c) (2018).

163. O.C.G.A. § 53-12-502(b)(1)–(2) (2018).

164. O.C.G.A. § 53-12-502(c) (2018).

165. O.C.G.A. § 53-12-502(d)(1)–(2) (2018).

166. O.C.G.A. § 53-12-503(a)(1) (2018).

167. O.C.G.A. § 53-12-503(b) (2018).

168. O.C.G.A. § 53-12-503(c) (2018).

169. O.C.G.A. § 53-12-503(d) (2018).

another trust director.<sup>170</sup> No duty is created regarding health care where the trust director is licensed or has some certification to provide healthcare.<sup>171</sup> A trust director's duties and liability are limited to the position's description within the trust instrument but include the duties within said description.<sup>172</sup>

*Code section 53-12-504*

A directed trustee must obey a trust director unless it would result in misconduct, and she is not liable when she relies on information from the trust director.<sup>173</sup> The trustee is also not liable if she fails to provide information to beneficiaries based on a failure of the trust director.<sup>174</sup> She also must report to and respond to questions from the trust director.<sup>175</sup> A directed trustee is under little obligation to evaluate, monitor, challenge, or report the trust director.<sup>176</sup>

*Code section 53-12-505*

A trust instrument may provide a co-trustee the same protections against another co-trustee that a directed trustee receives, regarding obeying instructions.<sup>177</sup>

*Code section 53-12-506*

A trust director is covered by many of the same rules as trustees.<sup>178</sup> The trust director also may use the same defenses a trustee would use under similar circumstances in an action for breach of trust.<sup>179</sup> A trust

---

170. O.C.G.A. § 53-12-503(e) (2018).

171. O.C.G.A. § 53-12-503(f) (2018).

172. O.C.G.A. § 53-12-503 (2018).

173. O.C.G.A. § 53-12-504(a) (2018).

174. O.C.G.A. § 53-12-504(d) (2018).

175. O.C.G.A. § 53-12-504(b)(2) (2018).

176. O.C.G.A. § 53-12-504(e)(1)(A) (2018).

177. O.C.G.A. § 53-12-505 (2018).

178. *See* O.C.G.A. § 53-12-506(a) (2018). These rules include O.C.G.A. §§ 201–204, 210–214, 220–221, and 320. *Id.*

179. O.C.G.A. § 53-12-506(b) (2018).

director of a Georgia trust is subject to the State's personal jurisdiction.<sup>180</sup>

### *Section 26*

Section 26 mandates that all laws conflicting with HB 121 are repealed.<sup>181</sup>

### *Analysis*

Overall, these modifications of the Georgia trust Code serve to make Georgia a more attractive location to create a trust, particularly compared to surrounding states.<sup>182</sup> And while many trusts are handled by national banks which seek states that, unlike Georgia, do not have a state income tax, at a minimum these amendments modernize Georgia law and bring the state trust Code into harmony with neighboring states in the Southeast.<sup>183</sup> Sponsors of HB 121 have highlighted that many states have already implemented similar provisions to their trust laws and, one purpose of HB 121 is to make Georgia trust law consistent with other states.<sup>184</sup>

### *The Rule Against Perpetuities*

The 1986 federal generation-skipping transfer tax initially appeared to defeat the purpose of the Rule Against Perpetuities.<sup>185</sup> Under the traditional Rule, families could shelter their assets in a trust, avoiding transfer taxes for as long as the Rule allowed.<sup>186</sup> The generation-skipping transfer tax effectively taxed property at each generation, meaning a trust that paid out to one's grandchildren would be subject to tax as if it were paid out to one's children and

---

180. O.C.G.A. § 53-12-506(c) (2018).

181. 2018 Ga. Laws 262, § 26, at 287.

182. Alford, *supra* note 9; Djuric Interview, *supra* note 7, at 52 min., 20 sec.

183. Djuric Interview, *supra* note 7, at 49 min., 30 sec.

184. Telephone Interview with Rep. Chuck Efstrotation (R-104th) at 8 min., 22 sec. (Aug. 3, 2018) (on file with Georgia State University Law Review) [hereinafter Efstrotation Interview].

185. Djuric Interview, *supra* note 7, at 21 min., 25 sec.

186. *Id.*

then to the grandchildren.<sup>187</sup> However, Congress also permitted a generation-skipping exemption amount, wherein a certain dollar amount could be exempt from gift tax, estate tax, and the generation-skipping transfer tax, at all levels.<sup>188</sup> Under the Tax Cuts and Jobs Act, an individual settlor has a basic exemption of \$10 million, and couples have a \$20 million basic exemption.<sup>189</sup> Thus, the Rule Against Perpetuities has become a relevant limitation on trust property again, and wealthy people have a strong interest in securing a long perpetuities period.<sup>190</sup> Today, the majority of states have either repealed or adopted a very long permissible perpetuities time period for trusts.<sup>191</sup> Georgia felt the need to follow suit and adopted a 360-year perpetuity period akin to Florida and Tennessee.<sup>192</sup> An important effect of this change is that a Georgia trust may now exist for 360 years.<sup>193</sup>

### *Simplification of Language*

Much of HB 121 serves to simplify the Chapter as previously written, trimming words such as “guardians and conservators” from the legislation where no longer needed and shortening many of the paragraphs.<sup>194</sup> This simplification makes the Chapter easier to read. Although some of these changes do not have a practical effect, modernizing and simplifying the language still helps those interpreting the statute in the future. For example, the new statutory trustee compensation table provides the exact same values as before, but it reads more clearly because it simply provides a dollar value to which a percentage applies instead of requiring the addition of several percentages.<sup>195</sup> This was one of the major points of confusion

---

187. *Id.*

188. *Id.* at 24 min., 49 sec.

189. Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 11061, 131 Stat. 2054, 2091 (codified at 26 U.S.C. § 2010(c)(3)(C)). In March 2018, the IRS announced that the basic exclusion amount, adjusted for inflation, is \$11.2 million.

190. Djuric Interview, *supra* note 7, at 26 min., 39 sec.

191. *Id.* at 6 min., 45 sec.

192. *Id.* at 28 min., 40 sec.; *see also* Fla. Stat. § 689.225 (2018); Tenn. Code Ann. § 66-1-202(f) (2018).

193. O.C.G.A. § 44-6-200 (Supp. 2018).

194. *See generally* 2018 Ga. Laws 262.

195. O.C.G.A. § 53-12-210(c).



that constituents identified with the trust Code when Representative Chuck Efration (R-104th) reached out to them over what changes were necessary.<sup>196</sup>

### *Notification and Representation of Beneficiaries*

Under the Georgia trust Code, beneficiaries are often required to receive notice of and consent to actions such as a modification of the trust or a change in trustee compensation.<sup>197</sup> Prior to the enactment of HB 121, the trust Code described only very limited circumstances under which another person could receive notice or give consent for a beneficiary who was not *sui juris*.<sup>198</sup> HB 121 greatly expanded the circumstances under which one person can represent and bind a beneficiary.

### *Modification of Irrevocable Trusts*

Allowing modifications of irrevocable trusts without judicial intervention also serves to make Georgia a more attractive location to create a trust.<sup>199</sup> The procedural difficulty of requiring court approval for modifications includes the various costs of holding a hearing, such as court costs and attorneys' fees. Allowing this simpler version of modification reduces these costs. Scholars have also observed that, on occasion, courts have refused to approve modifications even when no parties objected to them.<sup>200</sup> Furthermore, as a matter of public policy, the Fiduciary Section of the Georgia Bar wanted to make the trust creation and management process more flexible for settlors and beneficiaries.<sup>201</sup>

Sometimes assets may be held in trust for a child's entire lifetime, not just for tax credit reasons but to protect the assets from creditors or from future spouses in divorce situations.<sup>202</sup> When property is kept

---

196. Djuric Interview, *supra* note 7, at 17 min., 20 sec.

197. See O.C.G.A. § 53-12-210 (Supp. 2018).

198. 2010 Ga. Laws 579, § 1, at 604–05 (formerly found at O.C.G.A. § 53-12-210 (2011)).

199. Alford, *supra* note 9.

200. Ronald R. Volkmer, *Some Courts Are Hesitant to Make Trust Modifications*, 37 Est. Plan. 42, 42 (2010).

201. Djuric Interview, *supra* note 7, at 32 min., 30 sec.

202. *Id.*

in trust for long periods of time, situations and relationships change, and settlors may wish to modify their trusts to adjust to their changing needs.<sup>203</sup> In light of the fact that trusts are lasting much longer, modifications to trusts are now easier to carry out, for example, by granting beneficiaries certain powers of appointment or by creating flexible provisions in trust instruments that allow a trustee to modify a provision.<sup>204</sup>

### *Decanting*

Decanting is essentially a “do-over” where a trustee rewrites an old trust by distributing assets from it into a new trust with new terms for the benefit of one or more of the beneficiaries of the first trust.<sup>205</sup> A major benefit of decanting is that it can be done without the consent of a beneficiary.<sup>206</sup> Many trust and estate planning lawyers in Georgia have recognized and relied on a common law form of decanting set out in *Regents of the University System v. Trust Company of Georgia*.<sup>207</sup> The Act codified this decanting power.<sup>208</sup> Georgia’s decanting statute is based on Tennessee’s decanting statute and the Uniform Decanting Act.<sup>209</sup> Finally, even when a trustee decides to make a distribution with the decanting power, the trustee must still justify that distribution under the same fiduciary obligations it has and must justify *any* distribution under the previous law.<sup>210</sup> Problems could arise if a trustee decides to decant and cut out a beneficiary or change the beneficiary’s access to trust assets; although, in that instance, a beneficiary may oppose a decanting as a breach of trust.<sup>211</sup>

---

203. *Id.*

204. *Id.*

205. *Id.* at 34 min., 45 sec.

206. *Id.*

207. Djuric Interview, *supra* note 7, at 34 min., 45 sec.; *Regents of the Univ. Sys. v. Tr. Co. of Ga.*, 186 Ga. 498, 505, 198 S.E. 345, 350 (1938).

208. 2018 Ga. Laws 262, § 8, at 268.

209. Djuric Interview, *supra* note 7, 11 min. 46 sec.; *compare* O.C.G.A. § 53-12-62 (Supp. 2018), *with* TENN. CODE ANN. § 35-15-816 (2018), *and* UNIF. TRUST DECANTING ACT (Unif. Law Comm’n 2015).

210. Djuric Interview, *supra* note 7, at 37 min., 2 sec.

211. *Id.* at 37 min., 40 sec.

*Trust Directors*

HB 121 adds clarification about the role of a trust director.<sup>212</sup> Section 808 of the UTC included the term, but it did not provide much guidance on how trust directors and directed trustees were to work together.<sup>213</sup> This resulted in a general trend within the country of not using the term or having difficulty handling the balance of the roles of director and directed.<sup>214</sup> However, in 2017, the Uniform Law Commission created the Uniform Directed Trust Act (“UDTA”), which is largely duplicated in Code sections 53-12-500 through 53-12-506, in both substance and structure.<sup>215</sup> The Georgia statutes are so similar to the UDTA that the Uniform Law Commission considers Georgia to be one of the earliest states to enact the UDTA.<sup>216</sup>

Code section 53-12-503 dictates that a trust director has the same fiduciary responsibilities as a trustee, which prevents an individual from being negligent simply because she does not exactly fit the description of a “trustee.”<sup>217</sup> Where in some states, like Ohio, a directed trustee is only obligated to follow the orders of a trust director, Georgia law states that where a directed action would be “willful misconduct,” a trustee is not protected.<sup>218</sup> This distinction is crucial because it provides that two individuals are responsible for ensuring that misconduct does not occur.<sup>219</sup>

The ability to appoint a trust director provides the settlor with additional options in how to create his trust scheme.<sup>220</sup> Multiple individuals may now share responsibilities, and the settlor can allow an individual she does not want to have full trustee status to have some control over the future of the trust.<sup>221</sup> The settlor can give the trust director a wide range of potential responsibilities, and this can

---

212. O.C.G.A. §§ 53-12-500–06 (2018).

213. Kimberly Stein, *Advisors, Protectors, Directors, Oh My: An Overview of the Uniform Directed Trust Act*, 28 No. 4 PROB. L.J. OHIO NL 5 (2018).

214. *Id.*

215. *See generally* UNIF. DIRECTED TRUST ACT § 708 (Unif. Law Comm’n 2017).

216. *Directed Trust Act*, Unif. Law Comm’n, <http://www.uniformlaws.org/Act.aspx?title=Directed%20Trust%20Act> [<https://perma.cc/RKM6-E6N3>] (last visited Aug 9, 2018).

217. O.C.G.A. § 53-12-503 (Supp. 2018).

218. *Compare* OH. REV. CODE ANN. § 5808.07 (2018), *with* O.C.G.A. § 53-12-504 (Supp. 2018).

219. O.C.G.A. § 53-12-504(a) (Supp. 2018).

220. Stein, *supra* note 212.

221. *Id.*

ensure the trust will be maintained as the settlor desired.<sup>222</sup> For example, a trustee can delegate the responsibility of handling investments within a trust or assign a trust director that responsibility, and the trust director in that case will have specific standards to meet as a fiduciary.<sup>223</sup>

### *Uniform Trust Code*

Ultimately, as described in the introduction to the Fiduciary Law Section's proposed amendments, it is conspicuous that Georgia has chosen not to adopt the UTC. Although both of the committees suggested that it was "not an opportune time" to consider adopting the UTC, the ever-growing number of states that have adopted it make it a notable option in the future.<sup>224</sup> While maintaining the structure of the Georgia trust Code might be helpful to those already practicing in Georgia, bringing the trust Code's structure in line with the thirty-two states that have already adopted the UTC might make Georgia a more welcoming place to form a trust.<sup>225</sup> However, the Georgia Bar and Georgia legislature maintain that retaining the current Code form is helpful to Georgia fiduciaries and lawyers—and given that Georgia has maintained the structure of its Code for decades, that position is unlikely to change.<sup>226</sup>

*Colt Burnett & Ben Dell'Orto*

---

222. *Id.*

223. Djuric Interview, *supra* note 7, at 42 min., 46 sec.

224. PROPOSED AMENDMENTS, *supra* note 12, at 1.

225. *Legislative Fact Sheet—Trust Code*, *supra* note 5.

226. Djuric Interview, *supra* note 7, at 14 min., 55 sec.