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Modifying Trusts in Georgia

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Modifying Trusts

- A settlor, trustee, or beneficiaries of a trust may want to modify the trust for any number of reasons.
- Old trusts often have provisions that do not reflect changed circumstances or are inconsistent with a settlor's current intentions or estate plans.
- Probably the most common reason for modification of trusts is to change the identity or method of appointing successor trustees.
- In many cases, the treatment of trust modifications for purposes of income, estate, gift, and generation-skipping transfer taxes is either problematic or uncertain.

Modifying Trusts in Georgia

- Traditionally, under common law, an irrevocable trust could not be modified except by a court and then only for very specific reasons.
- Over the past 20 years or so, in Georgia and elsewhere, the law of trusts has changed to allow many more opportunities and methods to modify irrevocable trusts.

The Revised Georgia Trust Code of 2010 is chapter 12 of Title 53 of the Official Code of Georgia Annotated. Article 4 of the Trust Code contains most of the provisions relating to modification of trusts. In this presentation, section numbers refer to sections of the Trust Code.

Provision in Trust Instrument

- The instrument governing the trust (usually a will or trust agreement) may provide a power to modify the trust without court approval. (Section 53-12-61(a))
- The power might be conferred on a trustee, a trust director (who may be called a trust protector), or another individual.

Provision in Trust Instrument

- Often a power to modify in a trust instrument is limited to a specific purpose, such as ensuring the trust qualifies as an S corporation shareholder, or as a special needs trust, or as the beneficiary of a qualified retirement plan, or as a particular kind of charitable trust.
- But it is increasingly common to see a power given to a trust director (who may be called a trust protector) to modify the trust in any manner that is in the best interests of the beneficiaries.
- In exercising a power to modify, a trust director has the same fiduciary duty to the beneficiaries as a trustee would. (Section 53-12-503(a))
- Also, a trust director may not modify a trust to enlarge the duties or liabilities of a trustee without the trustee's consent. (Section 53-12-502(e)(1))

Reformation

- The Trust Code has long provided that “[i]f it is proved by clear and convincing evidence that the trust provisions were affected by a mistake of fact or law, whether in expression or inducement, the court may reform the trust provisions, even if unambiguous, to conform the provisions to the settlor’s intention.” (Section 53-12-60(a))
- A petition to reform a trust may be filed by a trustee, trust director, or a beneficiary (or, in the case of an unfunded testamentary trust, by the personal representative of the testator’s estate), and notice of the petition must be given to the trustee, trust director, and all qualified beneficiaries. (Section 53-12-60(b) and (c))
- “Clear and convincing evidence” is a high evidentiary standard.

Judicial Modification (Traditional)

- A trust could always be modified by a court, but only for specific reasons.
- Traditional judicial modifications are now commonly referred to as “(d) modifications” because they are provided for in Section 53-12-61(d).

Judicial Modification (Traditional)

- Since July 1, 2018, the Trust Code has provided for judicial modification in these circumstances:
 - Any provision may be modified “if, owing to circumstances not anticipated by the settlor, modification would further the purposes of such trust.” (Section 53-12-61(d)(1))
 - Administrative provisions may be modified “if continuation of such trust under its existing provisions would impair such trust’s administration.” (Section 53-12-61(d)(2))
 - A court may appoint “an additional trustee or special fiduciary if such appointment is necessary or helpful to the administration of such trust.” (Section 53-12-61(d)(3))
 - A trust may be modified “to achieve the settlor’s tax objectives.” A modification for tax purposes may have either prospective or retroactive effect. (Section 53-12-61(d)(4))
 - A court may divide a trust or consolidate two or more trusts into a single trust “if the division or consolidation would be helpful to the administration of such trust or trusts.” (Section 53-12-61(d)(5))
 - A court may terminate a trust “if the (A) [c]osts of administration are such that the continuance of such trust ... would defeat or substantially impair the purposes of such trust; (B) [p]urpose of such trust has been fulfilled or become illegal or impossible to fulfill; or (C) [c]ontinuance of such trust would impair the accomplishment of the purposes of such trust.” (Section 53-12-61(d)(6))

Judicial Modification (Traditional)

- A petition for judicial modification may be brought by a trustee, trust director, or a beneficiary (or, in the case of an unfunded testamentary trust, by the personal representative of the testator's estate). (Section 53-12-61(e))
- Notice of a petition for judicial modification must be given to the settlor, if living, the trustee, any trust director, all qualified beneficiaries, any holder of a power of appointment over the trust property. The court may also direct that notice be given to other persons. (Section 53-12-61(f))
- The Trust Code requires notice be given "by delivery of a copy of the petition by certified or registered mail or statutory overnight delivery with return receipt requested at least 31 days before the entry of an order granting the petition." (Section 53-12-61(m)(1)(B)(i))
- Anyone receiving notice has standing to intervene and to file a caveat or objection to the petition within 30 days of receiving or waiving notice. (Section 53-12-61(m)(1)(B)(ii))

Judicial Modification (Traditional)

- The court may, “in its sound discretion,” hold a hearing on a petition for judicial modification, but no hearing is required if no person with standing files a caveat or objection. (Section 53-12-61(n))
- The court may grant a petition for modification over the objection of a trustee, trust director, or beneficiary.
- An order for judicial modification must “conform as nearly as practicable to the intention of the settlor.” (Section 53-12-61(h))

Judicial Modification (Consent of Beneficiaries)

- Since July 1, 2018, the Trust Code has permitted the judicial modification of trusts by consent of the beneficiaries.
- Modification of trusts by consent of the beneficiaries are permitted both during the lifetime of the settlor or after the settlor's death. (Section 53-12-61(b) and (c))
- The judicial modification of a trust by consent of the beneficiaries may also involve the termination of a trust, division of a trust, or the consolidation of two or more trusts. (Section 53-12-61(j))
- Charitable trusts (trusts that are exclusively for charitable purposes) may not be modified under Section 53-12-61(b) or (c). (Section 53-12-61(k))

Judicial Modification (Consent of Beneficiaries)

- During the settlor's lifetime, the court *"shall approve"* a petition to modify a trust, *"even if the modification or termination is inconsistent with a material purpose of the trust,"* if:
 - The settlor consents
 - All qualified beneficiaries consent
 - The trustee has received notice of the proposed modification(Section 53-12-61(b))
- This is now commonly referred to as a "(b) modification" because it is provided for in Section 53-12-61(b).
- A petition for a "(b) modification" may be brought by a trustee, trust director, beneficiary, or settlor. (Section 53-12-61(e))
- The settlor's power to consent may be exercised as an agent under a power of attorney (if expressly authorized in the power of attorney and trust instrument) or the settlor's conservator or guardian. (Section 53-12-61(b)(1)–(3))

Judicial Modification (Consent of Beneficiaries)

- After the settlor's death, the court "*shall approve*" a petition to modify a trust if:
 - All qualified beneficiaries consent
 - The trustee has received notice of the proposed modification
 - The court concludes that the modification is not inconsistent with any material purpose of the trust
(Section 53-12-61(c))
- This is now commonly referred to as a "(c) modification" because it is provided for in Section 53-12-61(c).
- A petition for a "(c) modification" may be brought by a trustee, trust director, or beneficiary.
(Section 53-12-61(e))

Judicial Modification (Consent of Beneficiaries)

- Before January 1, 2021, a “(b) modification” or “(c) modification” required the consent of the trust’s “beneficiaries.” Now, only the consent of “qualified beneficiaries” is required.
- “Qualified beneficiaries” are the current beneficiaries of the trust (i.e., permissible distributees of trust income or principal), those who would become beneficiaries if interest of the current beneficiaries terminated without the trust terminating, and those who would become beneficiaries if the trust terminated. (Section 53-12-2(10)). This generally includes the current and successor lifetime beneficiaries and the “first-line” remainder beneficiaries.
- The identification of qualified beneficiaries can be difficult in the case of trusts designed to last for several generations or until the end of the applicable rule against perpetuities (possibly as long as 360 years after the creation of the trust in Georgia).
- It may be possible for some beneficiaries to represent other beneficiaries in consenting to a “(b) modification” or “(c) modification.”

Judicial Modification (Consent of Beneficiaries)

- Since January 1, 2021, for either a “(b) modification” or “(c) modification,” notice must be given to the trustee “by delivery of a copy of the petition by certified or registered mail or statutory overnight delivery with return receipt requested and with delivery restricted to addressee at least 31 days before the entry of an order granting the petition.” (Section 53-12-61(m)(1)(A)(i))
- The trustee has standing to intervene and has 30 days in which “to file a caveat or objection to the petition showing that one or more of the applicable requirements of subsection (b) or (c) of this Code section has or have not been satisfied.” (Section 53-12-61(m)(1)(A)(ii))
- For a “(c) modification,” an objecting trustee may attempt to show that the modification is inconsistent with a material purpose of the trust.
- The court may grant a petition for modification over the objection of a trustee.

Judicial Modification (Consent of Beneficiaries)

- The Georgia Court of Appeals has held that a trust can be modified by consent of the beneficiaries to provide for a nonjudicial mechanism for removing a trustee, even when the trustee objected to the modification and there was no cause shown for removal. The court held that the modification statute was not inconsistent with the trustee removal statute. (*Glass v. Faircloth*, 354 Ga. App. 326, 840 S.E.2d 724 (2020))
- Nevertheless, depending on specific facts and circumstances, a court might conclude that a modification to provide for a nonjudicial mechanism for removing a trustee is inconsistent with a material purpose of the trust.

Modification by NJSA

- Under common law and, since July 1, 2018, the Trust Code, “the trustee, any trust director, and all other persons whose interests would be affected may enter into a binding nonjudicial settlement agreement [“NJSA”] with respect to any matter involving the trust.” (Section 53-12-9(a))
- With some exceptions, the modification of an irrevocable trust can often be accomplished through an NJSA.
- A modification by NJSA is valid “only to the extent it does not violate a material purpose of the trust and includes terms and conditions that could be properly approved by the court under [the Trust Code] or other applicable law.” (Section 53-12-9(b)(1))

Modification by NJSA

- A modification by NJSA is not valid if it would be a “(b) modification” (judicial modification by consent of beneficiaries during settlor’s lifetime) that requires the settlor’s consent. (53-12-9(b)(2))
- Nevertheless, a “(d) modification” (traditional judicial modification) may be accomplished by nonjudicial settlement agreement during the settlor’s lifetime because it does not require the settlor’s consent.
- An NJSA is binding on all parties to the agreement—including minor, unborn, and unknown beneficiaries who are represented under Section 53-12-8—as if the NJSA had been ordered by a court. (Section 53-12-9(c))
- Any party whose interests would be affected by an NJSA may request that a court approve the NJSA, determine whether representation under Section 53-12-8 was adequate, determine whether the NJSA violates a material purpose of the trust, or determine whether the NJSA contains terms and conditions the court could have properly approved.

Modification by Decanting

- “Decanting” refers to a trustee’s distribution of trust property from an original trust to a second trust (analogous to pouring wine from a bottle into another container) as an exercise of the trustee’s authority to invade the principal of the original trust for the benefit of one or more of the beneficiaries of the original trust.
- Decanting was (and still is) allowed under Georgia common law (Section 53-12-62(g)) but is now specifically provided for in the Trust Code.
- If all of the property in the original trust is distributed to the second trust and the second trust contains provisions that are different from the original trust, a decanting has essentially accomplished a modification of the original trust. (In fact, the Trust Code anticipates that the second trust may be “an amended version of the original trust.”) (Section 53-12-62(a)(2))

Modification by Decanting

- Occasionally a will or trust instrument may specifically provide for decanting (sometimes referred to as “distribution in further trust”) through the exercise of a trustee’s power to make discretionary distributions or a beneficiary’s power of appointment.
- In that case, the trustee does not need to rely on the decanting statute.

Modification by Decanting

- Georgia’s decanting statute provides that a trustee with “authority to invade the principal of the original trust to make distributions to or for the benefit of one or more of the beneficiaries” may exercise this authority by distributing all or part of the principal of the original trust to a second trust. (Section 53-12-62(b)(2))
- The second trust:
 - Shall not include *as a current beneficiary* any person that is not a current beneficiary of income or principal of the original trust
 - Shall not include *as a beneficiary* any person that is not a beneficiary of the original trust
(Section 53-12-62(b)(2)(A) and (B))
- However, the second trust may give a power of appointment to a current beneficiary of principal of the original trust, and the permissible appointees of the power of appointment may include persons who *are not beneficiaries* of the original trust or the second trust. (Section 53-12-62(h))

Modification by Decanting

- The trustee may decant whether the trustee's authority to invade principal is discretionary or is limited to a standard (such as amounts necessary for a beneficiary's health, maintenance, or support) so long as the distribution to the second trust would be allowed under the standard.
- A decanting may not extend the permissible period of the rule against perpetuities that applies to the original trust. (Section 53-12-62(e))
- A trustee may not decant in any manner that would prevent a contribution to the original trust from qualifying for the gift tax annual exclusion, the estate tax marital deduction, an income, gift, or estate tax charitable deduction, or other tax benefit. (Section 53-12-62(i))
- If the original trust owns S corporation stock, the trustee may not decant to a second trust that is not a permissible S corporation shareholder. (Section 53-12-62(k))
- A trustee may decant a grantor trust into a non-grantor trust, or a non-grantor trust into a grantor trust (unless the grantor objects). If the original trust is a grantor trust and gives the grantor a power to turn off grantor trust status, the second trust must give the grantor the same power (unless the grantor objects). (Section 53-12-62(j))

Modification by Decanting

- The trustee may decant with or without court approval. (Section 53-12-62(b)(2))
- The trustee may decant with or without the consent of the settlor or beneficiaries. (Section 53-12-62(c))
- However, the trustee must provide written notice of a decanting to the settlor (if living), any trust director, and beneficiaries who are entitled to annual reports from the trustee. The notice must describe “the manner in which such trustee intends to exercise such power” and the date on which the trustee proposes to make the distribution. (Section 53-12-62(d))
- Unless notice is waived, it must be delivered at least 30 days before the decanting. (Section 53-12-62(d))

Modification by Decanting

- Georgia's decanting statute applies to any trust "the meaning and effect of whose trust provisions are determined by the law of [Georgia]." It does not necessarily apply if a trust is administered in Georgia but the trust is governed by another state's law. (Section 53-12-62(q))
- Georgia's decanting statute does not apply to charitable trusts (trusts that are exclusively for charitable purposes). (Section 53-12-62(r))

Modification of Charitable Trusts

- Charitable trusts (trusts that are exclusively for charitable purposes) may *not* be modified through a judicial modification by consent of the beneficiaries (“(b) modification” or “(c) modification”) or under the decanting statute. However, they may be modified by a court through a traditional judicial modification (“(d) modification”) or a nonjudicial settlement agreement.
- Mixed trusts (trusts that have both charitable and non-charitable purposes) may be modified through a judicial modification, nonjudicial settlement agreement, or decanting.
- A charitable entity that is the beneficiary of a mixed trust may represent a beneficiary or be represented by another beneficiary in the same manner as an individual. (Section 53-12-8(i))
- The interests of the beneficiaries of a charitable trust or the unascertainable charitable beneficiaries of a mixed trust are represented by the Attorney General or district attorney (Sections 53-12-8(l) and 53-12-174)

Modification of Charitable Trusts

- A charitable trust may also be modified under the doctrine of cy pres: “If a charitable trust or gift cannot be executed in the manner provided by the settlor or donor, the superior court shall exercise equitable powers in such a way as will as nearly as possible effectuate the intention of the settlor or donor.” (Section 53-12-172)

Representation of Beneficiaries

- A modification may require the consent of beneficiaries (or qualified beneficiaries) who are minors, unborn, or unknown—or even just unavailable.
- Since July 1, 2018, in all trust matters, the consent of a representative is binding on a beneficiary who may be represented under Section 53-12-8 of the Trust Code, so long as the beneficiary who is represented does not object to the representation.
- A representation is valid only to the extent there is no conflict of interest between the representative and the beneficiary *with respect to the particular question or dispute*.
- Any person whose interests would be affected may request that a court determine whether an interest is represented under Section 53-12-8 or whether the representation is adequate. (Section 53-12-8(k))

Representation of Beneficiaries

- Section 53-12-8 provides for the following representations:
 - The holder of a power of appointment may represent and bind persons whose interests are as permissible appointees, as takers in default, or are otherwise subject to the power. (Section 53-12-8(e))
 - A conservator may represent and bind the estate that the conservator controls. (Section 53-12-8(f)(1))
 - A guardian may represent and bind his or her ward if a conservator of such ward's estate has not been appointed. (Section 53-12-8(f)(2))
 - An agent having authority to act with respect to the particular question or dispute may represent and bind the principal. (Section 53-12-8(f)(3))
 - A trustee may represent and bind the beneficiaries of the trust. (Section 53-12-8(f)(4))
 - A trust director may represent and bind the beneficiaries of the trust on a question or dispute relating to the trust director's powers of direction. (Section 53-12-8(f)(5))
 - A personal representative of a decedent's estate may represent and bind persons interested in such estate. (Section 53-12-8(f)(7))

Representation of Beneficiaries

- Section 53-12-8 provides for the following representations (continued):
 - An ancestor may represent and bind an ancestor's minor or unborn descendant if a conservator or guardian for such descendant has not been appointed. (Section 53-12-8(f)(8))
 - A person designated in the trust instrument to receive notice and provide consent on behalf of a beneficiary may represent and bind a beneficiary. (Section 53-12-8(f)(7))
 - A minor, incapacitated, or unborn individual, or a person whose identity or location is unknown and not reasonably ascertainable, may be represented by another having a substantially identical interest with respect to a particular question or dispute. (Section 53-12-8(g))
 - First-line remainder beneficiaries may represent contingent successor beneficiaries. (Section 53-12-8(h))
 - Since January 1, 2021, the representative of a person represented under Section 53-12-8 may represent and bind any other person who could be represented under Section 53-12-8 by the person being represented by the representative if the person being represented were living and sui juris. (This is sometimes referred to as "piggyback" or "daisy-chain" representation.) (Section 53-12-8(j))



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