

MAKING THE MOST OF YOUR TRUST: EXAMINING THE NEW ILLINOIS TRUST CODE

On July 12, 2019, Governor Pritzker signed HB 1471, creating the Illinois Trust Code (ITC). The ITC, essentially a new set of laws applicable to various trusts in Illinois, is effective January 1, 2020. Its precursor was the Illinois Trusts and Trustees Act. The ITC was developed primarily to reflect the Uniform Trust Code (UTC) in its terminology, structure and numbering system. As of 2019, 33 states along with the District of Columbia have adopted some version of the Uniform Trust Code. The ITC, however, has many Illinois unique legislative solutions for retaining provisions related to Illinois specific issues.

CHANGES TO LAW

The ITC introduced many new changes to the law from the old Illinois Trusts and Trustees Act. One of the most significant changes is evident in Sections 813.1 and 813.2 regarding the duty to inform and account. Other provisions of note include changes to exculpatory language, life insurance, default and mandatory rules, and the ability to delegate. These changes present drafting possibilities as well as new opportunities for advisors and various interested parties.

A major advantage of the ITC is that it has largely codified Illinois trust law. This is a significant shift from current law, where a fair amount of the law of trusts is only covered in case law authority. The ITC codifies trust matters that previously were only addressed in judicial opinions that could vary from district to district. Having these principles codified makes the interpretation and application of the law more consistent across the state.

One of the most significant changes is regarding the duty to inform and account.

DRAFTING OPPORTUNITIES

A majority of the ITC is elective, meaning the settlor can override provisions of the ITC in the trust instrument. However, certain provisions in the ITC may not be overridden regardless of how the trust instrument is drafted. Drafting attorneys will want to consider how the mandatory provisions will impact the trusts they are drafting, and consider whether to rely on the default provisions in the rest of the ITC or to draft their own provisions on those topics to best meet their clients’ needs. There are also new kinds of trusts permitted. Now, a grantor can create a trust without a beneficiary with a non-charitable purpose, as long as the statutory requirements are met.

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NEW OPPORTUNITIES

A new opportunity arising under the ITC involves modifying or terminating a noncharitable irrevocable trust. The prior standard in Illinois, which relied on case law, generally required a showing of changed circumstances that could not have been anticipated at the time the trust was signed to enact a modification. Now, under Section 411 of the ITC, modification is permitted if all the beneficiaries consent and the modification is not inconsistent with any material purpose of the trust. In addition, a termination is permitted where all of the beneficiaries consent and a court determines that continuance of the trust is not necessary to achieve any material purpose of the trust.

EXHIBIT 1: SUMMARIZATION CHART OF SELECT PROVISIONS: NEW LAW VS. OLD LAW

| Preexisting Law – Illinois Trusts and Trustees Act | | New Law – Illinois Trust Code | | Effective Dates of New Law | Impact of Change |
|--|---|-------------------------------|---|----------------------------|------------------|
| Provision | Text | Provision | Text | | |
| 760 ILCS 5/3 (2) | Applicable to every trust created by will, deed, agreement, declaration or other agreement. | Section 102: Scope | Except as otherwise provided, the ITC applies to express trusts, charitable or non-charitable, and trusts created pursuant to a statute, judgment, or decree that requires the trust to be administered in the manner of an express trust. The ITC expressly lists certain types of trusts to which the ITC does not apply. | January 1, 2020 | No Change |

| Preexisting Law – <i>Illinois Trusts and Trustees Act</i> | | New Law –Illinois Trust Code | | Effective Dates | Impact |
|---|---|---|---|-----------------|-------------|
| Provision | Text | Provision | Text | | |
| 760 ILCS 5/8.5 (f) | Knowledge of the terms of the trust may not be inferred solely from the fact that a copy of all or part of the trust instrument is held by the person relying upon the certification. | Section 104: Knowledge | A person has knowledge of a fact if the person has actual knowledge of it, has received a notice or notification of it, or has reason to know it from all the facts and circumstances known at the time in question. | January 1, 2020 | Moderate |
| 760 ILCS 5/3 (1) | The person establishing a trust may specify in the instrument the rights, powers, duties, limitations and immunities applicable to the trustee, beneficiaries and others. Those provisions will control if not otherwise contrary to law. | Section 105: Default and Mandatory Rules* | The trust instrument specifies rights, powers, duties, limitations and immunities applicable to the trustee, beneficiaries and others. Those provisions will control if not otherwise contrary to law. In addition, specific terms of the trust will prevail over any provision of the ITC other than the 15 listed exceptions, which cannot be overridden by the trust document. <i>See page 8 for specific exceptions.</i> | January 1, 2020 | Significant |
| N/A | <i>No statutory provision. Case law recognizes that the law designated in the trust agreement governs. See Wachovia Bank v. Moody Bible Institute of Chicago, 642 S.E.2d 118 (Ga. Ct. App. 2007). See also Restatement 2d Conflict of Laws.</i> The law designated in the trust instrument controls. If no law was designated, then the jurisdiction having the most significant relationship to the matter at issue controls. | Section 107: Governing Law | Unless otherwise provided for in the trust instrument, the laws of the State of Illinois govern the administration of a trust while the trust is administered in Illinois. | January 1, 2020 | No change |

| Preexisting Law – <i>Illinois Trusts and Trustees Act</i> | | New Law – Illinois Trust Code | | Effective Dates | Impact |
|---|--|--|--|-----------------|-----------|
| Provision | Text | Provision | Text | | |
| 760 ILCS 5/2 (2) | The principal place of administration is the state in which the trustee is located and administering the trust. | Section 108: Principle Place of Administration | The ITC adds an explicit provision not requiring the trustee to inform the beneficiaries or any other interested party about the availability of Section 108 (Principal Place of Administration). Additionally, the ITC does not require the trustee to review to determine if any action should be taken to transfer the place of administration unless specifically requested, in writing, by a beneficiary. | January 1, 2020 | No Change |
| 760 ILCS 5/18 | This Act shall be liberally construed and the rule that statutes in derogation of the common law shall be strictly construed does not apply. The invalidity of any provision of this Act shall not affect the remainder of the Act. | Section 112: Rules of Construction | The rules of construction applicable to wills and the disposition of property by will are also applicable as appropriate to the interpretation of the trust agreement and the disposition of trust property. | January 1, 2020 | No Change |
| 760 ILCS 5/16.1 (a) | Illinois law allows (1) persons with a substantially identical interest, (2) the primary beneficiaries, (3) a guardian or agent under a POA for the beneficiary, (4) a parent of the beneficiary, and (5) a court appointed representative to represent a beneficiary that is a minor, disabled, unborn or unable to be identified or located. | Section 305: Appointment of Representative | If the court determines that representation of an incapacitated, unborn, or unascertainable beneficiary might be inadequate, the court may appoint a representative for any non-judicial matter to receive any notice, information, accounting, or report on behalf of the beneficiary and to represent and bind the beneficiary. The court may also appoint a guardian ad litem in any judicial proceeding to represent the interests of, bind, and approve any order or agreement for the beneficiary. | January 1, 2020 | Moderate |

| Preexisting Law – <i>Illinois Trusts and Trustees Act</i> | | New Law –Illinois Trust Code | | Effective Dates | Impact |
|---|---|-------------------------------------|---|-----------------|-------------|
| Provision | Text | Provision | Text | | |
| N/A | <p><i>No statutory provision. Case law indicated that in some cases a presumptive remainder beneficiary of a revocable trust had standing to contest its amendment or revocation.</i></p> <p><i>See In re Estate of Michalak, 934 N.E.2d 697 (Ill. App. Ct., 1st Dist. 2010).</i></p> | Section 603: Settlor's Powers | While a grantor of a revocable trust is living and not incapacitated, the trustee only has a duty to the grantor. If the grantor becomes incapacitated, the trustee only owes duties to the settlor and to any other current beneficiary. If the settlor becomes incapacitated, then a current beneficiary can contest or challenge the actions of the trustee only with respect to provisions related to that current beneficiary's interest in the trust. | January 1, 2020 | Moderate |
| N/A | <p><i>No statutory provision. Case law recognizes common law duty of loyalty.</i></p> <p><i>See Dick v. People's Mid Illinois Corp., 242 Ill. App. 3d 297 (1993), In re Estate of Hawley, 183 Ill. App. 3d 107 (1989), Laubner v. J.P. Morgan Chase Bank, 386 Ill. App. 3d. 457 (2008).</i></p> | Section 802(c): Duty of Loyalty | The ITC codifies the duty of loyalty and a number of exceptions to the rule. | January 1, 2020 | No change |
| 760 ILCS 5/5.1 | A trustee is not allowed to delegate any acts involving judgment or discretion, except for investments where it was prudent to do so, or where the trust instrument allowed the trustee to do so. | Section 807: Delegation by Trustee* | A trustee is allowed to delegate any duties and powers that a prudent trustee of comparable skills could properly delegate, as long as the trustee exercises reasonable care in the selecting and monitoring the delegee. | January 1, 2020 | Significant |

| Preexisting Law – <i>Illinois Trusts and Trustees Act</i> | | New Law –Illinois Trust Code | | Effective Dates | Impact |
|---|---|--|---|---|--------------------|
| Provision | Text | Provision | Text | | |
| 760 ILCS 5/11 | Trustee is required to provide accounting (at least annually) to current income beneficiaries, and to remainder beneficiaries at the termination of the trust. Except for certain actions of the trustee, there is no statutory duty of notice or duty to inform. | Section 813: Duty to Inform and Account* | Incorporates existing Illinois statute on duty to account for trusts that were irrevocable prior to January 1, 2020. Required notices to all Qualified Beneficiaries include instances where (1) the trust becomes irrevocable, (2) there’s a new trustee or change in the trustee contact, (3) the trustee resigns, (4) the trustee changes, and (5) the trustee’s compensation changes. | Applicable to all trusts that were irrevocable after January 1, 2020 and any trustee who accepts trusteeship after January 1, 2020. | Significant |
| N/A | <i>No statutory provision. Case law states a trustee may withhold distribution at termination pending receipt of an account approval from the beneficiary or court.</i> <i>See First Midwest Bank/ Joliet v. Dempsey, 509 N.E.2d 791 (Ill. App. 1987).</i> | Section 817: Distribution Upon Termination | At termination, trustee should act expeditiously in making distributions to the beneficiary. However, the trustee has the right to request written approval of trustee’s accountings to the beneficiary and refunding for liabilities otherwise payable from the trust to the extent of beneficiary’s share of the distribution. Trustee may retain reasonable reserve until approval or refunding is provided. | January 1, 2020 | Moderate |

| Preexisting Law – <i>Illinois Trusts and Trustees Act</i> | | New Law –Illinois Trust Code | | Effective Dates | Impact |
|---|---|-------------------------------------|---|--|--------------------|
| Provision | Text | Provision | Text | | |
| N/A | <i>No statutory or common law provisions.</i> | Section 913: Life Insurance* | Trustee has limited duties regarding trust-owned life insurance. Applies to trusts that become irrevocable after January 1, 2020 and trusts created after January 1, 2020. Applies to trusts before January 1, 2020 if the trustee sends notice to the settlor (or all beneficiaries if the settlor is deceased) that this Section is applicable and the settlor (or beneficiaries) do not object within 90 days. | Applicable to all trusts that become irrevocable after January 1, 2020 and trusts created after January 1, 2020 if the trustee notifies the settlor that this Section applies and the settlor (or beneficiaries) does not object within 90 days. | Significant |
| 760 ILCS 5/5.2 | Statutory authorization to invest in affiliated mutual funds. | Section 914: Affiliated Investments | Expanded the authorization to include any type of affiliated investment. | January 1, 2020 | Moderate |
| 760 ILCS 5/16.4 (n)(2) | The creator of a trust may exonerate the trustee from personal liability. | Section 1008: Exculpatory Language* | An exculpatory provision is invalid if the trustee drafts it or causes it to be drafted unless the trustee can show it is objectively fair and disclosed to the settlor. | January 1, 2020 | Significant |
| 760 ILCS 5/16.1 (7) | Although a trustee’s act is unauthorized, constituting a breach of trust, the beneficiary’s ratification of the act will bar him/her from holding the trustee liable. | Section 1009: Beneficiary Consent | A trustee is not liable to a beneficiary for breach of trust if the beneficiary consented to the conduct, ratified the conduct or released the trustee. | January 1, 2020 | No change |

*These provisions are discussed in greater detail in the Provisions of Note section to follow.

PROVISIONS OF NOTE

Default and Mandatory Rules (Section 105)

The primary difference regarding default and mandatory rules between the Illinois Trusts and Trustees Act and the ITC are the exceptions outlined in the ITC. The ITC provides that while specific terms of a trust generally prevail over any provision in the ITC, there are 15 exceptions where specific terms of a trust will concede to the ITC. Those exceptions are:

EXHIBIT 2: EXCEPTIONS WHERE THE ITC CONTROLS DESPITE TRUST TERMS

- Section 105 (b)(1) The requirements for creating a trust.

 - Section 105 (b)(2) The trustee’s duty to act in good faith.

 - Section 105 (b)(3) The requirement that a trust have a lawful purpose not contrary to public policy.

 - Section 105 (b)(4) The rules governing designated representatives as provided in Section 307.

 - Section 105 (b)(5) The 21-year limitation on the enforcement of a non-charitable trust without an ascertainable beneficiary contained in subsection (a) of Section 409.

 - Section 105 (b)(6) The court’s power to modify or terminate a trust under Sections 411 through 417.

 - Section 105 (b)(7) The effect of a spendthrift provision and the rights of certain creditors and assignees to reach a trust as provided in Article 5.

 - Section 105 (b)(8) The requirement under subsection (e) of Section 602 that an agent under a power of attorney must have express authorization in the agency to exercise a settlor’s powers under a revocable trust.

 - Section 105 (b)(9) The court’s power under subsection (b) of Section 708 to adjust a trustee’s compensation specified in the trust instrument as unreasonably low or high.

 - Section 105 (b)(10) For trusts that are irrevocable after the effective date of the ITC, the trustee’s duty under paragraph (b)(1) of Section 813.1 to provide information to the qualified beneficiaries.

 - Section 105 (b)(11) For trusts that are irrevocable after the effective date of the ITC, the trustee’s duty under paragraph (b)(2) of Section 813.1 to provide accountings to current trust beneficiaries.

 - Section 105 (b)(12) For trusts becoming irrevocable after the effective date of the ITC, the trustee’s duty under paragraph (b)(4) of Section 813.1 to provide accountings to remainder trust beneficiaries when the trust terminates.

 - Section 105 (b)(13) The effect of an exculpatory term under Section 1008.

 - Section 105 (b)(14) The rights under Sections 1010 through 1013 of a person other than a trustee or beneficiary.

 - Section 105 (b)(15) The court’s power to take action and exercise jurisdiction that may be necessary in the interests of equity.
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Delegation by Trustee (Section 807)

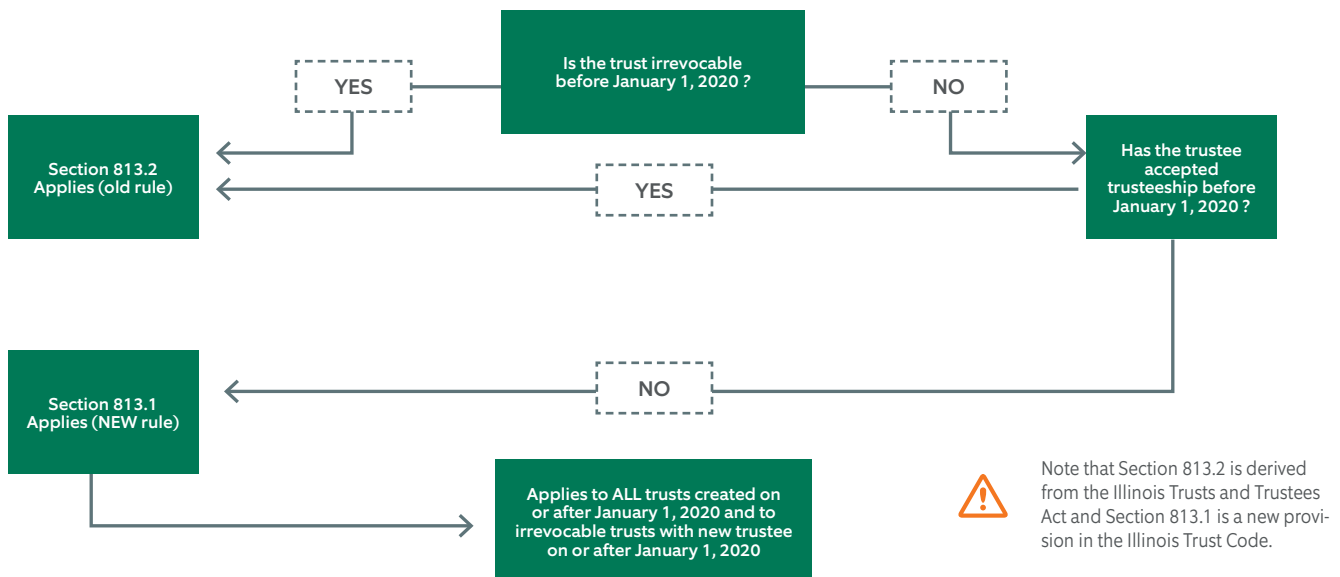
The Illinois Trusts and Trustees Act prohibited a trustee from delegating any acts involving judgment or discretion. There was an exception, however, for investments where delegation of judgment or discretion was prudent or instances where the trust instrument permitted the trustee to do so. The ITC is distinct from the Illinois Trusts and Trustees Act in this regard. The ITC provides that a trustee may delegate powers that a prudent trustee of comparable skills could delegate under the circumstances, as long as the trustee exercises reasonable care in selecting the agent, defining the scope and terms of the delegation, and monitoring the agent. In essence, while a trustee is given broad discretion in choosing to exercise this new ability to delegate, the Trustee’s obligations under the ability to delegate is tri-fold, requiring careful selection of the agent, defining the scope and terms of the delegation, and supervising the agent.

Duty to Inform and Account (Sections 813.1 and 813.2)

The duty to account under the Illinois Trusts and Trustees Act required trustees to provide an annual accounting to current income beneficiaries. In addition, the trustee was also required to provide an accounting to the remainder beneficiaries upon trust termination. Outside of certain trustee actions, such as delegating investment authority, investing in affiliated mutual funds, decanting the trust or converting the trust to a total return trust, the prior Act did not explicitly set forth a duty of notice or duty to inform.

The ITC adopts the statute from the Illinois Trusts and Trustees Act regarding accountings for trusts that were irrevocable before January 1, 2020 and broadens the notice and accounting requirements for accounts that become irrevocable after January 1, 2020. However, the ITC broadens the class of beneficiaries who receive accountings and further bolsters the duty with notice requirements for any trusts becoming irrevocable after January 1, 2020. For instance, if a trust was revocable as of January 1, 2020, and later becomes irrevocable on December 2, 2020, the new rules on accounting and notice will only apply once there is a change in trustee. Note that trusts which became irrevocable prior to January 1, 2020 will continue to be subject to the rules under the Trusts and Trustees Act, which is incorporated into the ITC.

EXHIBIT 3: VISUAL OF SECTIONS 813.1 AND 813.2



Life insurance (Section 913)

While a section for life insurance was not part of the Illinois Trusts and Trustees Act, it is a new ITC provision. The new ITC provision outlines the limited duties a trustee has with regard to trust-owned life insurance. A trustee can eliminate responsibility for: (1) determining whether trust-owned life insurance is a proper investment; (2) diversifying policies or insurers; (3) inquiring into the health or financial condition of the insured; (4) preventing a lapse if the trust does not receive or have readily marketable assets to pay the premiums; or (5) investigating the exercise of policy options, including borrowing or converting. This newly enacted section of the ITC is applicable to trusts created after January 1, 2020, trusts that become irrevocable after January 1, 2020, and to all trusts created before January 1, 2020, if the trustee sends notice to the settlor that this Section is applicable to the trust without objection from the settlor within 90 days. In essence, this section clearly outlines a trustee’s duties with regard to trust owned life insurance. Careful attention should be paid to this section for trusts adding or maintaining life insurance as a trust asset.

Exculpatory language (Section 1008)

A major change made by the ITC relates to the exculpation of trustees. Previously, under the Illinois Trusts and Trustees Act, the creator of a trust could exonerate the trustee from personal liability by including exculpatory language in the trust instrument. The ITC, on the other hand, varies from the standard set forth in the Illinois Trusts and Trustees Act. Although exculpatory language can still be included in a trust instrument under the ITC, the language is deemed invalid if the trustee drafts it or causes it to be drafted. A safe harbor, however, is extended to trustees who can show the language is objectively fair and was disclosed to the settlor. In the event the settlor was represented by independent counsel, this standard will be met. Therefore, trustees should strongly consider the implications of including exculpatory language in the trust instrument moving forward to avoid such protective language being declared invalid.

Provisions added by the ITC

The provisions added by the Illinois Trust Code include the following:

| ITC REFERENCE | DESCRIPTION |
|---|---|
| Section 109: Electronic Notices | Any notice or information required to be provided may be provided by electronic means. |
| Section 307: Designated Representatives | Allows a designated representative to act on behalf of and bind a beneficiary. The role of a designated representative terminates when a non-disabled beneficiary reaches age 30. |
| Section 409: Non-Charitable Purpose Trusts | Allows for the creation of non-charitable “purpose trusts” as can be created in Delaware. |
| Section 1011: Trust Holding General Partnership Interest | Provides that the trustee of a trust that owns a general partnership interest is not personally liable for the liability of the general partner. |

CONCLUSION

The ITC significantly changes the landscape from what trustees and other interested parties in Illinois were previously accustomed to under the Illinois Trusts and Trustees Act. A careful review of the changes between the ITC and Illinois Trusts and Trustees Act will benefit settlors, trustees, beneficiaries, and the like to maintain compliance with the new laws moving forward. In addition, settlors and involved advisors will benefit greatly from having a strong understanding of the rule changes in updating existing trust instruments or preparing new trust instruments for future planning.

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