



Taming the Trust
Code:
What's New and
What's Not in the
Illinois Trust Code

McLean County Bar Assn.
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Background

- Uniform Trust Code (UTC)
 - Adopted in 33 states and D.C.
- Illinois Trust Code (ITC)
 - Effective Date: 1/1/2020
 - Replaces Illinois Trusts and Trustees Act, and others
 - Does not change the Illinois Principal and Income Act
 - ITC provisions are *default* rules; except for certain mandatory rules (in Section 105(b)), terms of trust agreement will override ITC

The trust instrument may specify the **rights, powers, duties, limitations,** and **immunities** applicable to the trustee, beneficiary and others. The terms shall control if not contrary to law.

Default and Mandatory Rules

Exceptions where the ITC controls despite trust terms:

- 1 The requirements for creating a trust.
- 2 The trustee's duty to act in good faith.
- 3 The requirement that a trust have a lawful purpose not contrary to public policy.
- 4 The rules governing designated representatives as provided in Section 307.
- 5 The 21-year limitation on the enforcement of a non-charitable trust without an ascertainable beneficiary contained in subsection (a) of Section 409.
- 6 The court's power to modify or terminate a trust under Sections 411 through 417.
- 7 The effect of a spendthrift provision and the rights of certain creditors and assignees to reach a trust as provided in Article 5.
- 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.
- 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.
- 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.
- 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.
- 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.
- 13 The effect of an exculpatory term under Section 1008.
- 14 The rights under Sections 1010 through 1013 of a person other than a trustee or beneficiary.
- 15 The court's power to take action and exercise jurisdiction that may be necessary in the interests of equity.

○ Section 105: Default and Mandatory Rules

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What's Changed – An Overview

- New Duties to Account/Inform
- New/Expanded Trustee Powers
- Expanded Categories for Virtual Representation
- Standard for Modification/Termination of Trusts
- Impact on Trustee contest issues
 - Statute of limitations
 - Trustee removal

Effective Date Chart

	813.2 Applies (pre-2020 rules)	813.1 Applies (post-2020 rules)
Revocable Trusts Question: When Did the Trustee Start Acting?	If the trustee began acting prior to January 1, 2020, 813.2 applies	If the trustee begins acting on or after January 1, 2020, then 813.1 applies
Irrevocable Trusts Question: When did the Governing Instrument Become Irrevocable	If the governing Instrument was irrevocable before January 1, 2020, then 813.2 applies (regardless of when a trust is funded or is created under the terms of the instrument)	If the governing instrument becomes irrevocable on or after January 1, 2020, then 813.1 applies

What's Changed – Administration

(continued)

- Duty to Account to Qualified Beneficiaries (QBs)
 - Provide accounting to *all current beneficiaries*. CAN NOT BE MODIFIED.
 - Can provide accounting to representative of current beneficiary
 - Provide accounting to all presumptive remainder beneficiaries. Can be modified by trust.
 - Can provide accounting to representative of presumptive remainder beneficiary
 - Default Rule is All QB's can request a complete copy of the trust agreement
 - **Only applicable only to “Effective Date Trusts”**

What's Changed – Administration

(continued)

- Duty to Inform/Account to Qualified Beneficiaries (QBs)
 - Effective Date Trusts:
 - All trusts that become irrevocable on/after 1/1/20
AND
 - Trustee accepts appointment after 1/1/20 (i.e., if trust becomes irrevocable after 1/1/20 but trustee accepted appointment before 1/1/20, new rules don't apply)
 - Prior Illinois statute (incorporated into ITC) on duty to account applies to:
 - All trusts that become irrevocable before 1/1/20
OR
 - Trustee accepts appointment before 1/1/20 (i.e., trustee accepts appointment of revocable trust before 1/1/20, new rules don't apply to that TRUSTEE even if trust becomes irrevocable after 1/1/20)

What's Changed – Administration

(continued)

Delegation to 3rd Parties

Ability of a Trustee to Delegate Investment Functions is Unchanged
(see Article 9)

Former Duty not to Delegate Discretionary Acts has changed. Now a Trustee can delegate if done prudently.

No vacancy if another co-trustee is acting unless it would impair administration. Vacancy is filled as provided in the trust agreement, or one can be appointed by the income beneficiaries or a court

What's Changed – Administration

(continued)

- Affiliated Investments
 - Financial institution may purchase any affiliated investment if otherwise a prudent investment
 - Total compensation (for institution as fiduciary and for affiliated investment) must be reasonable
 - Must provide annual disclosure indicating affiliated nature and compensation (explanation of how computed)

What's Changed – Administration (continued)

Directed Trusts

- The Illinois Directed Trustee Act was re-codified in ITC section 808 (not the UTC's directed trust statute or the ULC's Uniform Directed Trust Act)
- One new change is that a directing party now has a duty to give notice to the beneficiaries (in the same way a trustee would under 813.1) of contact information, changes in compensation, etc. This is not a mandatory provision so a grantor may provide otherwise in the trust agreement.

What's Changed – Administration (continued)

Upon the termination of a trust:

1. The trustee has a duty to expeditiously distribute
2. A trustee has a right to require a written approval of accounts
3. A trustee may request a refunding agreement
4. A trustee may withhold a reasonable reserve for debts, expenses, taxes pending the receipt of an approval of accounts and refunding agreement or a judicial settlement of accounts

What's Changed – Administration

(continued)

- Life Insurance
 - Limited duties for trust-owned life insurance
 - Determination as to whether policy is proper investment
 - No diversification of policies or insurers
 - Inquiry into financial condition of insured
 - Preventing lapse if no readily marketable assets to pay premiums
 - Investigation of policy options
 - Applicable to Effective Date Trusts and any other trusts where the trustee provides notice to settlor or QB of opt into statute (and no objection in 90 days)

What's Changed – Administration

(continued)

- Virtual Representation
 - Prior categories
 - Beneficiaries with substantially similar interest/no conflicts represent minors, unborns, incapacitated, or unlocated beneficiaries
 - Parent/Guardian represent minors if no conflict
 - Primary beneficiaries (really, QBs) represent any future, successor, contingent beneficiary
 - No statement regarding conflict
 - No requirement that those future, successor or contingent beneficiaries be minor, unborn, etc.
 - Court appointed GAL

What's Changed - Administration

(continued)

- Virtual Representation
 - New category #1: Holders of Powers of Appointment
 - Holder of GPOA or very broad LPOA represents all persons who interest may be eliminated by power (i.e., all appointees and takers in default)
 - No statement regarding conflict
 - No requirement that those persons represented be minor, unborn, etc.
 - Holder of LPOA represents all persons who interest may be eliminated by power (i.e., all appointees and takers in default) if no conflict
 - No requirement that those persons represented be minor, unborn, etc.

What's Changed – Administration

(continued)

- Virtual Representation
 - New category #2: Designated representative (DR)
 - Any person with legal capacity designated in the trust instrument to represent a QB
 - No statement as to conflict
 - No requirement that QB be minor, unborn, etc. EXCEPT
 - Limitations:
 - No DR if QB is competent and age 30 or over
 - DR cannot be trustee
 - DR cannot be another QB unless named by settlor in instrument or family member of the QB
 - DR is fiduciary and must act in good faith/best interest of QB

What's Changed – Modification/Termination

- By NJSA only
 - Modify any administrative provision
 - Add/eliminate trustee powers
 - Approve accounts/release/compensation of trustee
 - Change situs
 - **Modify dispositive provisions/beneficial interest if in connection with the resolution of an ambiguity or dispute**

What's Changed – Modification/Termination (continued)

- By Court with Beneficiary Consent
 - Requirements:
 - Only for non-charitable trusts
 - Consent of all beneficiaries (or representatives)
 - Exception (to *all* beneficiaries) where court finds that non-consenting beneficiary is treated equitably and modification/termination is consistent with purposes of trust
 - Court determination per below
 - Court Finding: modification or termination is not inconsistent with material purposes of trust
 - Spendthrift clause is a factor for court to consider

What's Changed – Modification/Termination of Trust

(continued)

- By Court
 - Requirements:
 - Requested by any trustee, beneficiary, or AG or settlor with respect to charitable interest
 - Court determination per below
 - Court Finding:
 - Change in circumstances not anticipated by settlor and modification/termination would further purposes
 - Cannot diminish or alter charitable interest unless cy pres applies
 - Modify any administrative term if current terms are impracticable, cause waste or impair administration
 - Modify (including who is trustee) or terminate if costs of administration too high

What's Changed – Trustee Contest

- Statute of Limitations
 - New Rule (for Effective Date Trusts): 2 years for all actions by trustee adequately disclosed in an accounting or otherwise
 - Applicable to person who receives the information and each person represented by that recipient
 - Adequate disclosure: sufficient information so that person knows of potential claim or should have inquired into existence of claim
 - Prior Rule (for pre-Effective Date Trusts): 3 years, with same standard as above

What's Changed – Trustee Contest (continued)

- Statute of Limitations
 - 5 Years:
 - Any claim not otherwise barred by 2-3 year rule
 - 5 years from first to occur of:
 - Resignation/removal/death of trustee
 - Termination of beneficiaries' interest
 - Termination of trust
 - 5 years from the time of discovery of fraudulent concealment of cause of action

What's Changed – Trustee Contest (continued)

- Causes for trustee removal by court
 - New basis:
 - All QB request removal OR
 - Substantial change in circumstances AND
 - Court finds removal best serves the interests of all beneficiaries, is not inconsistent with material purpose and there is suitable trustee

What's Changed – Trustee Contest (continued)

- Attorney's Fees
 - Court may award costs and expense, including reasonable attorney's fees to any party, to be paid by another party or from the trust that is subject of controversy, based on equities
 - Not necessarily a change in Illinois law, but may give judges more comfort in determination of fees now that there is a statute

Drafting Considerations

- Duty to account/inform
 - Should the trust agreement opt out of trustee's duty to account to/inform presumptive remainder beneficiary?
 - For non-opt out or mandatory provisions (account to current beneficiary and inform all QBs of trust existence once irrevocable):
 - Can or should the trust appoint a Designated Representative?
 - Can or should the trust give a current beneficiary a GPOA or very broad LPOA
 - Should the trust agreement opt out (or limit) duty to inform for changes in trustee, or changes in trustee compensation?

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Drafting Considerations

(continued)

- Standard for modification/termination of trust
 - Should the trust agreement limit the ability of beneficiaries to change the trustee or modify beneficial interest of trust?
 - Should trust agreement specify that the spendthrift clause is a material purpose
 - Should trust agreement specify reasons/basis for trustee removal (i.e., bad faith, breach)
- Should trust agreement preclude representation by GPOA/broad LPOA holder?



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As a member of Northern Trust's Legal Department, Jane provides legal counsel to the bank in its role as executor, trustee, and guardian.. She is licensed to practice law in Illinois and admitted to practice before the United States District Court for the Northern District of Illinois. Prior to joining Northern Trust in February, 2008, Jane spent 17 years as an estate planning attorney in private practice in Chicago. She is a Fellow of the American College of Trust and Estate Counsel (Committees on State Laws, Employee Benefits, and Diversity and Inclusivity). She is a member of the Chicago Bar Association where she served on the Task Force for the Illinois Trust Code and as Chair of the Estate and Gift Tax Subcommittee, and of the Chicago Estate Planning Council. She is a frequent author and lecturer on a wide range of estate and tax planning topics for groups including ACTEC, the Illinois Institution of Continuing Legal Education, the Heckerling Estate Planning Institute, and the University of Notre Dame Estate Planning Conference.

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