

# The New Illinois Trust Code: Practical Pointers

BY DANIEL P. FELIX



**A summary of key provisions, including practical reminders, that should help trustees get up to speed quickly on the new Illinois Trust Code.**

**THE ILLINOIS TRUST CODE (“CODE”), WHICH BECOMES EFFECTIVE JAN. 1, 2020,** though primarily applied prospectively to trusts going into effect after 2019, contains some retroactive provisions.<sup>1</sup> It’s also fair to presume that older trusts will likely be increasingly viewed through the lens of this new statute.

The Code represents a multiyear effort to modify and adapt the Uniform Trust Code. The effort was led by a group of trust and estate attorneys, some of whom advise trustees and some of whom

1. See, e.g., 760 ILCS 3/813.2(b), (c).



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occasionally serve as trustees. The Illinois Attorney General was an active participant as well as other organizations.<sup>2</sup>

I've prepared a topic-oriented organization, moving progressively through the Code. I've noted several changes from the existing Illinois Trust and Trustees Act ("prior Act").<sup>3</sup> I've also noted questions for further resolution, inserted a couple of editorial comments, and have suggested items to add to your trust administration checklist. (See the sidebar on this page.)

Given the above, this article does not claim to be the last word on the Code. Among topics not addressed are pet trusts, trust creation, certain liability issues, and nonjudicial settlement. The latter two topics may prudently call for independent counsel's sage advice anyway.

## Beneficiary redefined

The Code reconfigures beneficiary definitions and categories, including to remove that of "primary beneficiary" under the prior Act for virtual representation purposes.<sup>4</sup>

The Code starts with defining a beneficiary as having a "present or future beneficial interest ... vested or contingent, assuming nonexercise [sic] of powers of appointment."<sup>5</sup> The term also includes nontrustees who have a power of appointment over trust property.<sup>6</sup>

The Code defines a current beneficiary as a recipient or potential recipient of trust income or principal and also includes charities as well as those with a power of appointment (POA) over trust property.<sup>7</sup>

In contrast, the presumptive remainder beneficiary describes both the beneficiary who would receive a distribution if the trust terminated on that date and the beneficiary who would take a distribution if the interests of the current beneficiaries ended without terminat-

ing the trust.<sup>8</sup>

Finally, the Code defines qualified beneficiaries as current beneficiaries, excluding charities, those with a power of appointment, and all presumptive remainder beneficiaries.<sup>9</sup> The Code also includes as qualified beneficiaries trust protectors of pets, other nontraditional trusts, and, for charitable trusts, the Illinois attorney general.<sup>10</sup>

## Where the terms of the trust do not prevail over the Code

The Code sets out 15 situations where the terms of the trust do not prevail over the default provisions of the Code. These exceptions run the range from basic (e.g., trust language modifying the trustee's duty of good faith<sup>11</sup>) to the esoteric, such as attempts to modify the Code's 21-year limitation on the life of trusts without an ascertainable beneficiary.<sup>12</sup> (See the sidebar, "15 Things a Trust Document Can't Modify.")

## Principal place of administration

The Code validates setting the place of trust administration the same as the trustee's principal place of business, or where at least

2. The core was a subgroup of the Chicago Bar Association Trust Law Committee, whose membership overlapped with the ISBA Trusts & Estates Section, and includes at least one corporate trustee. Besides the attorney general, third-party groups who provided input or support are reported to include: the AICPA, AARP, the Corporate Fiduciaries Association, the Illinois Bankers Association, the National Academy of Elder Law Attorneys, and the Uniform Law Commission. Thanks to Code codrafter Stuart Kohn for his helpful review and comments on this article.

3. 760 ILCS 5/ *et seq.*

4. 760 ILCS 5/16.1(a)(3)(A).

5. 760 ILCS 3/103(3)(A).

6. *Id.* § 103(3)(B). A charitable organization that "will or may" receive trust distribution is also identified in the next section. *Id.* § 103(3)(C).

7. *Id.* § 103(9).

8. *Id.* § 103(28).

9. *Id.* § 103(30).

10. *Id.* §§ 110(a), (b).

11. *Id.* § 105(b)(2).

12. *Id.* § 105(b)(5).

## ILLINOIS TRUST CODE CHECKLIST\* >>

- Have the trustee's liability insurance broker review section 1010 especially.
- Categorize the beneficiaries in your trusts.
- Review your trusts for the 15 situations an irrevocable trust can't modify.
- Without further clarification of the safe harbor, trustees should continually inquire as to the appropriate place of trust administration.
- Review existing trusts to consider seeking protection under the new safe harbor. Also, review and document the circumstances providing insurable interest.
- Inquire about and document representatives.
- Without clear, express, and agreed governance, trustees may want to consider avoiding cotrustee assignments.
- For trustees, ensure that the trust's purpose has been articulated, especially if not already done by the settlor through the trust document or otherwise.
- Document actions regarding agent selection and communication. Consider a firm-wide as well as a trust-wide program to enhance compliance.
- Log and document the sending of notices and accountings and the receipt of requests, and consider establishing the safe-harbor delivery procedure.
- Conduct an inventory and analysis as to prudent fiduciary and other liability insurance needs. Determine property of insufficient value when making an administration plan and inventory of the trust's contents. Consider also adding as a footnote to the accounting as applicable.
- Conduct a due-diligence inquiry on the investment manager.
- Include the circumstances considered when preparing the trust's investment policy statement.

\* For a more complete checklist, see the November 2018 issue of the ISBA's Trusts & Estates Section newsletter.

THE CODE SETS OUT 15 SITUATIONS WHERE THE TERMS OF THE TRUST DO NOT PREVAIL OVER THE DEFAULT PROVISIONS OF THE CODE. THESE EXCEPTIONS RUN THE RANGE FROM BASIC (E.G., TRUST LANGUAGE MODIFYING THE TRUSTEE’S DUTY OF GOOD FAITH) TO THE ESOTERIC, SUCH AS ATTEMPTS TO MODIFY THE CODE’S 21-YEAR LIMITATION ON THE LIFE OF TRUSTS WITHOUT AN ASCERTAINABLE BENEFICIARY.

part of the administration actually occurs.<sup>36</sup>

Nevertheless, trustees are now under a “continuing duty” to administer the trust in a place “appropriate to its purpose, its administration, and the interests of the beneficiaries.”<sup>37</sup> (There’s a nice question on how to comply with a “continuing duty.” Perhaps, that’s to visit the issue initially, annually thereafter, and also upon certain changes of circumstance.)

The Code permits a trustee to transfer the place of administration to that appropriate place with notice.<sup>38</sup> However, the authority to transfer terminates with a qualified beneficiary’s objection.<sup>39</sup>

The Code contains a potential safe harbor. The provision relieves trustees from a duty to inform the beneficiaries of

the availability of this section (including all the above provisions on place of administration), and removes the duty to review “the trust instrument” to determine whether “any action” should be taken unless requested by a qualified beneficiary.<sup>40</sup> It’s not clear how this provision relates to the continuing duty to administer in an appropriate place.

It is clear that this provision requires the trustee to address the place of administration on the request of a qualified beneficiary. Further, the objection of a qualified beneficiary would seem to serve as a valid excuse for the trustee not changing the place.

The language of this safe harbor doesn’t appear to relieve the trustee from considering tax and other attributes of place that are outside the trust instrument, especially given the U.S. Supreme Court’s recent decision putting the places of the trust and beneficiary as relevant to the ability of the beneficiary’s state of residence to impose income taxes.<sup>41</sup> (For an in-depth discussion of this case, see Richard Sugar’s article on page 32.)

## Jurisdiction & venue

The Code expands the personal jurisdiction of Illinois over both trustees and

### 15 Things a Trust Document Can’t Modify

Of special note for trusts that become irrevocable after the end of the year, a trust may not modify the trustee’s duty to provide: 1) certain information to qualified beneficiaries;<sup>13</sup> 2) accountings to current beneficiaries;<sup>14</sup> or 3) accountings to beneficiaries receiving any portion of the trust residue.<sup>15</sup> A trust document may also not alter:

- 4) the requirements for creating a trust;<sup>16</sup>
- 5) a trustee’s duty to act in good faith;<sup>17</sup>
- 6) the trust’s purpose, which must be both lawful and not against public policy;<sup>18</sup>
- 7) the rules as to designated representatives;<sup>19</sup>
- 8) the 21-year life span of noncharitable trusts without an ascertainable beneficiary;<sup>20</sup>
- 9) the power of a court to modify or terminate a trust<sup>21</sup> whether the stakeholders all agree<sup>22</sup> or because of: unanticipated circumstances,<sup>23</sup> the inability to administer efficiently,<sup>24</sup> the cy pres doctrine,<sup>25</sup> uneconomic trust,<sup>26</sup> corrections,<sup>27</sup> the need to achieve the settlor’s tax objectives,<sup>28</sup> or the desire to combine or divide trusts;<sup>29</sup>
- 10) the effect of a spendthrift provision and the rights of certain creditors and assignees;<sup>30</sup>
- 11) the requirement that a POA must have express authorization in the POA document to exercise a settlor’s powers in a revocable trust;<sup>31</sup>
- 12) the power of a court to adjust trustee fees that are “unreasonably” high or low;<sup>32</sup>
- 13) the ineffectiveness of certain exculpatory provisions;<sup>33</sup>
- 14) the rights of third parties who deal with the trust in contract, tort, through partnership, or in reliance on the trust’s certificate;<sup>34</sup> and
- 15) as a catchall, for a court to act in equity.<sup>35</sup>

13. *Id.* § 105(b)(10) (referencing *id.* § 813.1(b)(1)).

14. *Id.* § 105(b)(11) (referencing *id.* § 813.1(b)(2)).

15. *Id.* § 105(b)(12) (referencing *id.* § 813.1(b)(4)).

16. *Id.* § 105(b)(1).

17. *Id.* § 105(b)(2).

18. *Id.* § 105(b)(3).

19. *Id.* § 105(b)(4).

20. *Id.* § 105(b)(5).

21. *Id.* § 105(b)(6).

22. *Id.* § 411.

23. *Id.* § 412.

24. *Id.*

25. *Id.* § 413.

26. *Id.* § 414.

27. *Id.* § 415.

28. *Id.* § 416.

29. *Id.* § 417.

30. *Id.* § 105(b)(7).

31. *Id.* § 105(b)(8).

32. *Id.* § 105(b)(9).

33. *Id.* § 105(b)(13).

34. *Id.* § 105(b)(14).

35. *Id.* § 105(b)(15).

36. *Id.* §§ 108(a)(1), (2).

37. *Id.* § 108(b).

38. *Id.* § 108(c).

39. *Id.* § 108(e).

40. *Id.* § 108(f).

41. *North Carolina Department of Revenue v. Kimberley Rice Kaestner 1992 Family Trust*, No. 18-457 (U.S. Jun. 21, 2019).

## ISBA RESOURCES >>

- ISBA Free On-Demand CLE, *Illinois Trust Code—What You Need to Know* (recorded Oct. 2019), [law.isba.org/2BLovKw](http://law.isba.org/2BLovKw).
- Michael J. Fleck, *The Illinois Trust Code: What Is It and What Do I Need to Know? Parts 1-3*, Trusts & Estates (Aug., Sept., Oct. 2019), [law.isba.org/2BUXNzv](http://law.isba.org/2BUXNzv).
- Susan Bart, *Behind the Scenes: Drafting the New Illinois Trust Code*, Trusts & Estates (Aug. 2019), [law.isba.org/2BHJDBt](http://law.isba.org/2BHJDBt).

beneficiaries where the state is the principal place of administration.<sup>42</sup> This provision serves also as a reminder that where the place of administration is not Illinois, Illinois lawyer trustees may be subject to personal jurisdiction in that other locale.

Ordinarily, venue is the county of the place of administration.<sup>43</sup> Presumably, this is the location of the office of the lawyer trustee.

## Insurance

The Code provides two welcome additions as to life insurance. First, the Code limits trustees' liability in the technical details of selection and retention of life insurance policies.<sup>44</sup> A prudent grantor may want to tweak this default provision to appropriately delegate the management of the insurance policy. Note that this safe harbor is available for existing trusts where the grantor (or if deceased, a majority of the beneficiaries) does not object within 90 days of due notice.<sup>45</sup>

In the second insurance change, the Code confirms under what circumstances trustees have an insurable interest in the life of an individual insured by trust-held life insurance.<sup>46</sup> The insurable interest shields the trust and trustee under insurance law by recognizing them as a stakeholder to the insurance transaction.

**Representatives.** The Code includes many provisions relating to representation of settlors, beneficiaries, and others. Representation is not limited to incapacity. The trust itself may appoint a designated representative—necessarily a fiduciary—to bind a qualified beneficiary under 30 years old.<sup>47</sup> Also, those with a power of

appointment have representative functions with optional fiduciary status.<sup>48</sup> Even with notice of representation, trustees are permitted to give information directly to the person represented without liability.<sup>49</sup>

## Modification & termination of a trust

The Code allows a trustee to terminate a trust with value of less than \$100,000 if the trustee determines that the continued administrative cost will “substantially impair the purpose of the trust.”<sup>50</sup> The next provision appears to allow a court to modify or terminate a trust apparently of any size (or to replace the trustee) on the finding that the value of the trust does not justify the administrative cost.<sup>51</sup> Either the trustee or a beneficiary may bring such a court action.<sup>52</sup>

## Accepting & declining the trustee role

The Code provides designated trustees 120 days to explore the option of accepting or declining their appointment.<sup>53</sup> During that time, trustee designates may inspect trust property, including for potential environmental liability,<sup>54</sup> and won't incur liability for actions taken in good faith.<sup>55</sup> The designates may also act without liability for good-faith actions to “preserve trust property” if they send a notice of declination within 120 days.<sup>56</sup> Though helpful when the designates decline appointment, this provision does not establish a safe harbor for action or inaction during the up-to-120 days before the trustee at last accepts appointment.

THE CODE PROVIDES TWO WELCOME ADDITIONS AS TO LIFE INSURANCE. FIRST, THE CODE LIMITS TRUSTEES' LIABILITY IN THE TECHNICAL DETAILS OF SELECTION AND RETENTION OF LIFE INSURANCE POLICIES .... SECOND ..., THE CODE CONFIRMS UNDER WHAT CIRCUMSTANCES TRUSTEES HAVE AN INSURABLE INTEREST IN THE LIFE OF AN INDIVIDUAL INSURED BY TRUST-HELD LIFE INSURANCE.

## Cotrustee

The Code makes noises, but provides little substance for remedying the too-often unrecognized and dangerous trap of serving as cotrustee. A dissenting trustee who “joins in an action” at the direction of the majority of trustees (whatever that may mean!) is not liable, unless the action constitutes a “serious breach of trust.”<sup>57</sup> So what are trustees supposed to do when there's a risk of “serious breach of trust,” which phrase the Code does not care to define? Well, first, cotrustees are ordinarily required to exercise reasonable care to both prevent their cofiduciary from committing a “serious breach” of trust and to have them cure it!<sup>58</sup> And what if those efforts fail? It seems, at the risk of being found to have “joined in the action,” the trustee would have to resign, thus leaving

42. 760 ILCS 3/202.

43. *Id.* § 204(a).

44. *Id.* § 913.

45. *Id.* § 913(c).

46. *Id.* § 113.

47. *Id.* § 307(b)(1).

48. *Id.* § 302.

49. *Id.* § 301(e).

50. *Id.* § 414(a).

51. *Id.* § 414(b).

52. *Id.* § 410(b).

53. *Id.* § 701.

54. *Id.* § 701(c)(2).

55. *Id.* § 701(d).

56. *Id.* §§ 701(c), (d).

57. *Id.* § 703(h).

58. *Id.* § 703(g).



the trust with the bad actors. That's no solution.

## Trustee removal

The Code includes a list of reasons by which a court may remove trustees. Although apparently modifiable by the trust document, the Code specifically provides that a court may remove a trustee for these reasons:

- for committing a “serious breach” of trust;<sup>59</sup>
- where the lack of cotrustee coordination “substantially impairs” trust administration;<sup>60</sup>
- for lack of either fitness or willingness as well as for “persistent failure to administer the trust effectively” and that removal serves the trust’s purposes and beneficiaries;<sup>61</sup>
- there has been a “substantial change of circumstances;”<sup>62</sup> and
- when requested by all the qualified beneficiaries, on the finding of serving the best interests of those beneficiaries, assuming a suitable replacement is available and the removal is not inconsistent with the purpose of the trust.<sup>63</sup>

It’s worth noting that the Code relies on “the purpose of the trust” over a dozen times; yet, the Code does not define a trust’s purpose or instruct how to determine it.

## Agents of the trustee

For those duties and powers that trustees may delegate,<sup>64</sup> the Code requires trustees to “exercise reasonable care, skill and caution” in: a) selecting agents;<sup>65</sup> b) establishing the agents’ scope and terms consistent with the trust;<sup>66</sup> and c) reviewing “periodically” their actions and performance.<sup>67</sup>

By complying with the above, trustees are given a safe harbor and are not liable for the actions of their agents.<sup>68</sup>

## Duty to inform & account

The Code requires trustees to make disclosures of certain information to beneficiaries. The requirement is heaviest for those trusts effective beginning next

year and not modifiable. But, the Code requires trustees on older trusts to provide “a current account” at least annually to certain beneficiaries<sup>69</sup> and a final account on termination.<sup>70</sup>

On new trusts, trustees must notify within 90 days qualified beneficiaries of the trust’s existence,<sup>71</sup> their right to request a complete copy of the trust,<sup>72</sup> and whether they have a right to receive accountings.<sup>73</sup> And so, trustees must also provide complete copies of the trust to qualified beneficiaries on request.<sup>74</sup>

Trustees must also inform qualified beneficiaries:

- a) within 90 days of their name, address, phone number,<sup>75</sup> and of any later change in their contact information;<sup>76</sup>
- b) in advance regarding a change in their compensation;<sup>77</sup>
- c) of their resignation;<sup>78</sup> and
- d) within 90 days of the incapacity or death of another trustee.<sup>79</sup>

Qualified beneficiaries may waive their right to receive information and later revoke that waiver.<sup>80</sup> Apparently, neither charities nor those with a power of appointment may so waive.

Trustees must send a “trust accounting” at least annually to all current beneficiaries<sup>81</sup> and, unless the document provides otherwise, to all presumptive remainder beneficiaries<sup>82</sup> and on termination to all beneficiaries receiving trust residue.<sup>83</sup>

A representative may be the legally appropriate recipient. And trustees retain the option to provide trust information to any beneficiary<sup>84</sup> (including charities and those with a power of appointment who, by definition, are not qualified beneficiaries) and in certain limited circumstances may charge a reasonable fee to the requesting party.<sup>85</sup> If limited by a confidentiality restriction, trustees may require the beneficiary to agree to be equally bound.<sup>86</sup>

The Code expressly deems trustees’ compliance as a discharge of their duties under the Code and common law.<sup>87</sup>

The Code also extends a safe-harbor

presumption of delivery if the trustees follow certain routine procedures.<sup>88</sup>

## Powers

The Code provides expansive general powers for trustees without court authorization “to achieve the proper investment, management, and distribution” of trust property<sup>89</sup> including all those powers that unmarried individuals have over their own property,<sup>90</sup> subject only to the limitations of the document.<sup>91</sup>

The Code adds a dozen specific powers beyond those the prior Act provided. Among the noteworthy and helpful new specific powers are these:

- a) Trustees are empowered to procure liability insurance for themselves, their agents, and their beneficiaries.<sup>92</sup> Questions include whether this authority extends to procuring bonding and whether coverage also can be procured for directing trustees as well as trust protectors.
- b) Trustees may abandon or decline property of no value or of value insufficient “to justify its collection or continued administration.”<sup>93</sup>

59. *Id.* § 706(b)(1).

60. *Id.* § 706(b)(2).

61. *Id.* § 706(b)(3).

62. *Id.* § 706(b)(4).

63. *Id.*

64. *Id.* §§ 807(a), (b).

65. *Id.* § 807(b)(1).

66. *Id.* § 807(b)(2).

67. *Id.* § 807(b)(3).

68. *Id.* § 807(d).

69. *Id.* § 813.2(b).

70. *Id.* § 813.2(c).

71. *Id.* § 813.1(b)(1)(A).

72. *Id.* § 813.1(b)(1)(B).

73. *Id.* § 813.1(b)(1)(C).

74. *Id.* § 813.1(b)(6).

75. *Id.* § 813.1(d)(1)(A).

76. *Id.* § 813.1(d)(3).

77. *Id.* § 813.1(d)(1)(B).

78. *Id.* § 813.1(d)(1)(C).

79. *Id.* § 813.1(d)(2).

80. *Id.* § 813.1(g).

81. *Id.* § 813.1(b)(2).

82. *Id.* § 813.1(b)(3).

83. *Id.* § 813.1(b)(4).

84. *Id.* § 813.1(b)(5).

85. *Id.* § 813.1(e).

86. *Id.* § 813.1(f).

87. *Id.* § 813.1(b)(7).

88. *Id.* § 813.1(h).

89. *Id.* § 815(a)(2)(B).

90. *Id.* § 815(a)(2)(A).

91. *Id.* § 815(a)(2).

92. *Id.* § 816(11).

93. *Id.* § 816(12).

- c) Trustees are empowered to resolve a trust dispute via court, alternative dispute resolution, or nonjudicial settlement agreement.<sup>94</sup>
- d) Trustees are empowered post-termination to “wind up administration” expressly including to distribute trust property.<sup>95</sup>
- e) Trustees have the right to demand approval of their accounting and a refunding agreement at termination, but alas, apparently not before.<sup>96</sup>

### Investments

The Code retains, though in a different order, the prudent investor rule and all of the provisions of the prior Act, except

as to the modifiable limitation as to life insurance policies. The Code requires trustees to engage in a due-diligence inquiry before delegating investment functions.<sup>97</sup> This provision deepens the selection process required to enter the new safe harbor for delegation to other agents.

The Code also offers trustees additional circumstances that they *may* consider in making investment decisions. Of particular note: “[n]eeds for liquidity, regularity of income, and preservation or appreciation of capital”<sup>98</sup> and “[a]n asset’s special relationship or value, if any, to the purpose of the trust or to one or more of the beneficiaries.”<sup>99</sup>

Further, the Code provides that in making investment decisions, trustees

“may, but need not” consider other assets and trusts of the beneficiaries known to them.<sup>100</sup>

### Conclusion

The new Illinois Trust Code includes new options and obligations—and some uncertainties—for those serving as trustee. I hope this article serves as a running start for deepening your understanding. **■**

94. *Id.* § 816(23).

95. *Id.* § 816(26).

96. *Id.* § 817.

97. *Id.* § 909.

98. *Id.* § 902(c)(9).

99. *Id.* § 902(c)(10).

100. *Id.* § 902(d).