

Chicago Daily Law Bulletin®

VOLUME 166, NO. 97

LAW BULLETIN MEDIA

New trust code is yet another reason to review your estate plan

For the longest time, Illinois refrained from joining the other states that had converted to some form of the Uniform Trust Code, and Illinois stood fast for years with the Illinois Trusts and Trustees Act. However, in 2019, the legislature finally passed the new version of the act, and the new Illinois Trust Code implemented so many changes that the legislature even changed the name.

Fortunately for clients with revocable living trusts in place, most of the changes impact the administration of the trust after death. For people with existing plans already in place, a client's testamentary wishes can still be honored and the new changes will not have an impact on the flow of funds to beneficiaries. Nonetheless, the code creates new administrative requirements for trustees and with proper planning, allows for the trust instrument to avoid some administrative requirements.

The rundown

The code affects all trusts that become irrevocable after Jan. 1, 2020. For all clients who have revocable trusts in place, the trust becomes irrevocable upon the death of the grantor and the trust would then be subject to the ITC. Trusts that were already irrevocable prior to Jan. 1, 2020, are still governed by the previous rules of the act.

However, should a new trustee take over a trust that was irrevocable prior to the code going into effect, the trust would then be subject to the new rules of the code. It is important to distinguish between which of the Illinois Trust Code's changes are mandatory and which can be modified, only taking effect if the trust document is silent on the issue.

Four different types of beneficiaries

The code has broken up the term "beneficiary" into four separate definitions. The distinctions are important because certain notices are required for one type of beneficiary, while they are optional for others.

- Beneficiary is the same as before, meaning a person or charitable organization who has a present or future interest in a trust.

- Current beneficiary is any beneficiary who is currently entitled to mandatory or permissible distributions.

- Presumptive remainder beneficiary is a beneficiary who would be eligible to receive distributions if all of the current beneficiaries were no longer living or if the trust were to terminate at that moment.

- Qualified beneficiary refers to any current or presumptive remainder beneficiary.

15 mandatory provisions which we are stuck with



THE BUZZ
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The code contains 15 mandatory provisions that cannot be drafted out of a trust. This is a huge change from prior Illinois law, which for the most part, allowed a trust instrument to specify the terms under which the trust would be governed, so long as the provisions were "not otherwise contrary to law." Some of these mandatory provisions are pulled

directly from prior law or slightly expanded upon, while a few others contain major changes.

The first of these major alterations is that all trusts must contain provisions for "designated representatives." This is a new term to trust drafting in Illinois, though it is not an entirely new concept. A designated representative is a trust tool similar to a "guardian of the person." A trust must either specifically name a designated representative or give the power to authorize a representative to someone who is not also a trustee. A designated representative acts on behalf of the beneficiary whom they represent, and can only represent a beneficiary who is under the age of 30 or one who is incapable of representing themselves.

The code has also increased the trustee's duty of providing notices and accountings from previous Illinois law. Within 90 days of a trust becoming irrevocable, the trustee must notify each qualified beneficiary of the following:

- The trust's existence.
- The beneficiary's right to request a complete copy of the trust instrument.
- Whether the beneficiary has a right to receive or request trust accountings.

Additionally, the trustee must send out annual trust accountings to all current beneficiaries. Lastly, upon the

trust's termination, the trustee must send a final accounting to all beneficiaries.

These are the two most significant mandatory changes in how the instrument must be drafted and the trustee's responsibilities. However, there is also a substantial amount of changes that are not required but which must still be addressed when drafting the trust. Any of the code provisions that are not addressed directly by the trust will be governed by the default code rules. Some of these provisions are designed to make the trustee's job simpler, while some require the trustee to take on considerably more responsibility if not otherwise addressed.

Drafting considerations to avoid certain aspects

While it is mandatory for the trustee to send annual accountings to all current beneficiaries under the default rule, a trustee must

also provide annual accountings to all presumptive remainder beneficiaries. However, the code allows the grantor to waive the accounting requirement for the presumptive remainder beneficiaries, so this must be expressly noted in the trust instrument. Additionally, when the new notice and accounting rules are combined with the designated representative provisions, the grantor has the opportunity to create a "silent trust," in which the settlor waives the trustee's duty to send accountings to beneficiaries who are under the age of 30. Instead, the trustee may send the annual accountings to that beneficiary's designated representative (nominated in the trust instrument or appointed by someone who has been given the power to nominate designated representatives) during the "silent period," which ends when the beneficiary turns 30. Addition-

ally, the code has reduced the statute of limitations for breach of trust actions regarding any accounting matters, from three years to two years.

The code also makes it easier for the trustee to delegate his responsibilities, whereas previously he could not delegate any discretionary powers. In this new law, the provisions allow for the trustee to delegate almost all of his powers and duties to an agent of his choosing. Given this, the trustee is required to exercise reasonable care in (1) selecting an agent (2) establishing the scope and terms of the delegation and (3) periodically reviewing the agent's actions. Moreover, a trustee will not be held personally liable for the actions of an agent so long as he used the above reasonable care in selecting and monitoring the agent.

Overall, there are some substantial changes to the laws surrounding trusts and

trust administration that need to be implemented in all trusts going forward. All existing trusts should be reviewed and amended to reflect the new code. In doing so, some of the administrative steps can be eased for the trustee. If the updates are not made to revocable living trusts prior to the grantor's death, it may be possible to amend them after the death of the grantor through a nonjudicial settlement agreement. However, there is no guarantee that the beneficiaries will all agree to the administrative changes being made.

If nothing else, the code is a wonderful reason to have your trusts reviewed and updated. Your successor trustees will be grateful and appreciative that you did.

— *A special thanks to Chubak & Tecson P.C. law clerk, Aaron Weinger Ward, for his contribution to this column.*