

What the new Illinois Trust Code means for trustees and beneficiaries

The Illinois legislature recently enacted, and the Governor signed, legislation that will create a new trust code for Illinois. The Illinois Trust Code (“Code”), as it will be known, generally follows the Uniform Trust Code (“UTC”) that has been enacted in 33 other states and the District of Columbia, although jurisdictions often make some modifications to the UTC. The Code will apply to all trusts governed by Illinois law beginning on January 1, 2020.

Most of the new Code is elective in that the creator of a trust (the “settlor”) can override the provisions of the Code in the trust instrument. However, certain provisions of the Code may not be overridden. Some of the provisions that cannot be overridden relate to certain notices and information that a trustee must provide to the trust beneficiaries. For trusts that become irrevocable after 2019, the trustee must notify each qualified beneficiary of the trust’s existence and whether the beneficiary may request trust accountings and a copy of the trust instrument. (A “qualified beneficiary” is basically one who could receive a distribution from the trust currently or is likely to receive trust property when the current beneficiaries die or the trust terminates.) This notice must be given within certain prescribed time periods, such as 90 days after the trust becomes irrevocable.

A trustee must also send an accounting to each current beneficiary at least annually, and to all beneficiaries after a trust terminates. Trusts that are irrevocable before 2020 and trustees of revocable trusts who begin to act before 2020 continue to be subject to current notice and accounting requirements, which could be modified by the settlor.

The Code also requires other notices and information be given to beneficiaries, but the settlor can modify or eliminate those requirements. These include such things as sending the beneficiaries the trustee’s name, address and phone number within 90 days of accepting a trusteeship (and also notification of any subsequent change to any of them), and notification in advance of any change in the rate of or method of determining the trustee’s compensation. Any beneficiary can also request a full copy of the trust instrument unless the trust instrument provides otherwise.

The Code differs from the UTC in one area related to notices to beneficiaries prior to the trustee taking certain actions. The Code specifically relieves a trustee of the duty to inform the beneficiaries in advance of transactions relating to trust property. So, for example, if a trustee determines to sell a piece of real estate or closely-held business interest owned by the trust, the trustee does not need to notify the beneficiaries in advance of making the sale.

The Code also makes clear that a beneficiary can act as trustee of a trust for his or her benefit and this will not cause creditors of the beneficiary to be able to reach the trust assets as long as the beneficiary/trustee can only make distributions based on an ascertainable standard. An “ascertainable” standard is one for such things as the beneficiary’s health, support and education. An ascertainable standard is also needed to keep the assets out of the beneficiary’s estate for federal estate tax purposes, so it is likely that it would be used in most situations where a beneficiary would be named to act as trustee.

The Code generally adopts the current provisions of the current Illinois Trust and Trustees Act related to nonjudicial settlement agreements that can be used to modify irrevocable trusts, “decanting” of irrevocable trusts to new trusts, total return trusts (trusts that distribute a fixed percentage of the value of the trust assets each year instead of trust income) and directed trusts (trusts that have investment or distribution advisors that direct the trustee to take actions).

One change that will make it easier to decant a trust without court approval relates to the notice provisions for decanting. Currently, in order to avoid court approval, there must be at least one competent current beneficiary and one competent presumptive remainder beneficiary. Thus, if there is a trust for an adult child that will be distributed to that child’s child (a grandchild of the settlor) at the adult child’s death and the grandchild is a minor, the trustee could not use the decanting statute without court approval. These notice provisions have been changed to now provide that no notice need be given to a minor beneficiary who has no representative (such as a parent).

The Code also changes the standard in Illinois for modifying or terminating a noncharitable irrevocable trust. Case law in Illinois generally requires a showing of changed circumstances that could not have been anticipated at the time the trust was signed in order to have a trust modified. Now, if the beneficiaries all consent, all that will be required to modify the trust is a showing that the modification is not inconsistent with any material purpose of the trust. A court can also terminate a trust with the consent of the beneficiaries if continuance of the trust is not necessary to achieve any material purpose of the trust. There could be gift tax issues with any modification or termination, but those may not be a concern in many situations.

Another provision of note relates to trustee exculpation provisions that are sometimes included in trust instruments. The Code provides that any provision that tries to limit a trustee's liability for a breach of trust is unenforceable to the extent it tries to relieve a trustee for liability for a breach committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries. It is also unenforceable if it was inserted as a result of an abuse by the trustee of a fiduciary or confidential relationship to the settlor unless the trustee can prove that the term is fair and that its contents were adequately communicated to the settlor. Thus, a provision added by the drafting attorney to exculpate himself or herself might not be enforceable unless independent counsel represents the settlor with respect to that clause. These provisions cannot be overridden by the settlor.

Though this article is only a brief overview of the new Code, the Code itself will have a significant impact on how trusts are administered in Illinois and on trusts (especially revocable trusts) that are now in existence. In light of the new law, now may be a beneficial time to have your estate plan reviewed.

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