

Chapman Client Alert

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Current Issues Relevant to Our Clients

The New Illinois Trust Code: What It Means for Trustees and Trustmakers, Part IV

This Alert is the fourth installment in a six-part series on the new Illinois Trust Code (“ITC”), a version of the Uniform Trust Code (“UTC”), which goes into effect on January 1, 2020. This series highlights the significant changes to Illinois law and also notes where the Illinois statute varies from the UTC. Trustees, both individual and corporate, should be aware of these changes, and trustmakers (the creators or settlors of a trust) and their advisors should also be aware of these changes and consider the impact they may have on how trust property is managed.

This Alert covers the new rules that apply to beneficiary representation.

Representation

Illinois has long recognized that one or more beneficiaries can represent other beneficiaries who are minors, unborn or missing. Illinois law previously permitted (i) persons having a substantially identical interest, (ii) a guardian or agent under a power of attorney for the beneficiary, and (iii) a parent of the beneficiary to represent a beneficiary that is a minor, under a disability, unborn or unable to be identified or located. In each case, the person representing the beneficiary cannot have a conflict of interest with the beneficiary being represented.

In addition to the foregoing, the primary beneficiaries (i.e., the beneficiaries currently eligible to receive income or principal and all beneficiary that are presumptive remainder beneficiaries) can represent all future or successor beneficiaries.

Initially, representation only applied to court proceedings involving a trust. By statute, the representation was expanded to nonjudicial settlement agreements (“NJSAs”), and then for all purposes of the trust, including for receipt of accounts, notices and providing consents.

The ITC maintains the same scope of representation, that representation can be for all purposes of a trust, but adds three new categories of representatives.

Representation by Holders of General or Very Broad Limited Powers of Appointment

The ITC expands the current list of persons who may represent and bind beneficiaries to include the holder of a general power of appointment and holder of a very broad non-general power of appointment (i.e., a power that can be exercised in favor of any one except the power holder, the holder’s estate, creditors or creditors of holder’s estate). The power holder can represent all persons whose interests in the trust may be eliminated by the exercise or nonexercise of the power.

For the holder of a general power of appointment or a very broad non-general power of appointment, the statute does not qualify or limit the representation if there is a conflict of interest. There is also no qualifier that the representation is limited to minor, incapacitated, unborn, or missing beneficiaries.

Unless a trust agreement provides otherwise, an individual who holds a general power of appointment or a very broad limited power of appointment over the entirety of a trust can represent any other beneficiary, current or future, regardless of age, for all purposes and at all times the individual has that power of appointment.

Under the terms of the ITC, a trustee could satisfy his, her or its duty to provide an accounting or notice to all current beneficiaries and all presumptive remainder beneficiaries by providing the accounting and notice only to a beneficiary who holds a general power of appointment or a very broad non-general power of appointment over the whole trust. Moreover, unless the trust agreement states otherwise, the beneficiary holding such a power can represent all other beneficiaries in a court proceeding or in a NJSA.

You may wish to review our prior Client Alerts in this six part series on the ITC that covered the trustee’s duties to account and inform and the new provisions regarding modification and termination of a trust by a court and by NJSA.

Representation by Holders of Limited Powers of Appointment

The ITC also permits holders of a non-general or limited power of appointment to represent all persons whose interests in the trust may be eliminated by the exercise or nonexercise of the power.

Like holders of a general power, there is no qualifier that the representation be for minor, incapacitated, unborn, or missing beneficiaries. As such, the power holder can represent competent, adult beneficiaries under the ITC. However, the holder of a limited

power of appointment cannot have a conflict of interest with the beneficiaries being represented.

Because of this limitation, a person holding a limited power of appointment over an entire trust may not always, or for all purposes, be able to represent other beneficiaries. Instead, it will be a fact specific analysis as to whether, for the matter or issue at hand, there is or could be a conflict of interest between the power holder and the persons being represented. For most trusts, it would be likely that a holder of a limited power of appointment could not represent the other beneficiaries for purposes of accountings, but may be able to represent the other beneficiaries for a discrete transaction, such as a change in trustee or the sale of an asset, where there is no conflict of interest.

Representation by Designated Representative

The ITC permits a person designated in the trust instrument to represent any qualified beneficiaries. A designated representative may be named by the trustmaker either directly or by providing a process for selecting a designated representative in the instrument. It may be possible to add a designated representative by other means, such as through an NJSA, decanting a trust, or merging a trust with another trust that has a designated representative. However, the terms of the trust agreement and the change made to add a designated representative must be carefully reviewed to see if it is permissible.

There are limitations on who can be a designated representative and who can be represented. A designated representative cannot be appointed or act for a current beneficiary who is competent and over thirty. A trustee cannot be the designated representative. The designated representative cannot be another qualified beneficiary (i.e., another current or presumptive remainder beneficiary), unless the designated representative is a family member of the person whom he or she represents, or is named by the settlor in the instrument.

Under the ITC, a designated representative is a fiduciary role. He, she or it must, at a minimum, act in good faith on behalf of the beneficiaries represented.

Conclusion

For trustees and beneficiaries, these new provisions of the ITC may provide some flexibility as to whom a trustee must deliver

accounts and notices for an irrevocable trust, and who are the necessary parties for a NJSA or court proceeding.

For trustmakers and their advisers, careful thought should be given to as whether a beneficiary should have a power of appointment and if so, whether that beneficiary should represent other beneficiaries. Trustmakers can narrow the scope of representation of a holder of a power of appointment. Similarly, a trustmaker may consider appointing (or having a mechanism to appoint) a designated representative. Although there are some limits on a designated representative, it may be a useful tool for a problematic family member who will be a beneficiary of a trust.

For More Information

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