

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 II

This Alert is the second 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 expanded powers, and trustmakers (the creators or settlors of a trust) and their advisors should also be aware of these changes and consider how they may impact how trust property is managed.

This Alert covers the newly created powers granted to a trustee under the ITC, as well as the previously existing, but now codified, powers. The ITC includes a provision, new to Illinois, that identifies the general scope of a trustee’s authority. The ITC also expands the list of statutory powers given to a trustee, including expanding its borrowing and lending powers and permitting it to refuse certain assets. Additionally, the ITC expressly permits a trustee to release any powers granted to it under the law or the trust instrument.

General Powers of Trustee

While prior Illinois law (e.g., the Illinois Trusts and Trustees Act) contained a list of specific powers granted to a trustee, it did not provide guidance as to the general scope of a trustee’s powers. Trustees relied on court decisions, common law principles and treatises in navigating their general authority to manage a trust’s property.

The ITC adds a specific section to outline a trustee’s general powers over a trust’s property. The ITC keeps the scope of a trustee’s authority broad and codifies the fiduciary standard for the trustee’s exercise of general authority. Subject to any limitations in the trust instrument, the ITC grants a trustee “all powers over the trust property that an unmarried owner with legal capacity has over individually owned property” as well as powers appropriate to achieve “the proper investment, management, and distribution of the trust property....” The statute confirms the broad scope of authority a trustee has with respect to trust assets. It also confirms that the *exercise* of a power is still subject to the fiduciary duties that are set out in the ITC.

Specific Powers of Trustee

The ITC expands the list of specific powers granted to a trustee. Some of the new powers granted to a trustee include (a) the authority to make elections regarding the distribution of retirement plans, annuities and life insurance as well as the authority to exercise collection and indemnification rights

typically given to individuals; (b) the ability to decline to accept property that may incur liability because of potential violations of environmental law; (c) the ability to make loans to a beneficiary and place liens on future distributions to such beneficiary for repayment of any such loans; (d) the ability to guarantee loans made by third parties to a beneficiary of a trust and to pledge trust assets in furtherance of such guarantees; (e) the authority to resolve disputes over the interpretation or construction of the trust instrument through arbitration, mediation or other procedure (such as through a nonjudicial settlement agreement); and (f) the ability to release, surrender or refuse to accept, by written renunciation, any power granted to the trustee by the trust instrument or applicable law.

Limitations Set by Trust Instrument

While the ITC codifies a general standard and the specific powers of a trustee, these powers remain limited by the terms of the trust instrument. Therefore, prior to utilizing any of the new powers granted under the ITC a trustee should conduct a thorough review of the trust instrument to determine how the provisions of the trust instrument may be altered by the expanded powers granted under the ITC.

In addition to a review of any general powers section of the trust instrument, a trustee should take special care to ensure that the trustee’s exercise of any of the new powers granted under the ITC is undertaken in accordance with any applicable standards provided for in the trust instrument (e.g., health and

education), spendthrift provisions that may otherwise restrict a beneficiary's ability to alienate his or her interest in the trust's property and/or a creditor's ability to make a claim against the beneficiary's interest in the property, as well as any statements regarding the trustmaker's intent that may be included by the trustmaker to guide, but not bind, the trustee (the latter may not be binding on the trustee, but should be considered prior to taking a specific action).

Trustmakers should review their current documents to determine if any changes may be necessary in order to clarify, expand or restrict a trustee's powers under a trust instrument. Moreover, this review should include any powers given to a trustee that may later be released or surrendered pursuant to the new authority granted to a trustee under the ITC.

Exercise of Powers; Fiduciary Duties

While fiduciary duties are not covered in this Alert, a trustee should take care not to violate such duties when exercising any general or specific power granted under the ITC. The trustee should consider the impact on the interests of the trust's current beneficiaries as well as future beneficiaries.

Moreover, a trustee may consider whether it is appropriate to release certain powers granted to it in instances where a conflict has arisen or may arise between the trustee's interests and those of the beneficiaries where any such conflict may not have been properly waived by the settlor or applicable law.

Conclusion

The ITC codifies a new general standard and expands upon the specific powers previously granted to trustees under Illinois law. While the ITC expands a trustee's powers, the powers remain subject to the terms of the trust instrument and must be exercised in combination with a trustee's fiduciary duties.

Corporate and individual trustees may want to consider implementing processes and procedures to ensure that any

actions taken that rely on the new specific powers granted under the ITC do not violate the existing language of the trust instrument or the trustee's fiduciary duties.

Trustmakers and their advisors should take care in preparing new or revising existing trust agreements, where needed, to ensure that the provisions of the ITC are properly considered to guarantee that the trustmaker's intentions are correctly realized.

For More Information

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