

# 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 V

This Alert is the fifth installment in a six-part series on the new Illinois Trust Code (“ITC”), 760 ILCS et seq., a version of the Uniform Trust Code (“UTC”), which became effective 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 decanting.

### Decanting Generally

The UTC does not contain any decanting provisions; however, the provisions of the ITC are based off another uniform law, the Uniform Trust Decanting Act (“UTDA”).

Effectively, the power to decant is a power to change the terms which govern the trust property. A trustee who possesses discretionary powers to distribute the principal or corpus of a trust to distribute that principal to a second trust and manage the principal pursuant to the terms of that second trust.

Since 2013, Illinois has recognized a trustee’s power to decant, that is, to distribute property that is part of one trust to a second trust. The ITC does make a few changes to the original statute (codified at 760 ILCS 5/16.4, “Distribution of trust principal in further trust, the *“prior statute”*”).

As under the prior statute, under the ITC, the power to decant and the extent by which the terms of the second trust can vary from the original trust depended on the scope of the Trustee’s discretionary authority (i.e., whether that discretionary authority was absolute or was limited). Both the prior statute and the ITC still restrict how a decanting can affect a beneficiary’s interest in a trust’s property and disallows modifications that increase a trustee’s compensation or the indemnification and/or protections against liability a trustee can receive under the trust agreement.

The ITC expands the scope of the decanting power and provides a stronger framework by defining specific terms and setting more concrete parameters.

### Broadening of Scope and Changing the Standard of Conduct

The ITC expands the power to decant beyond just the trustees of a trust. Under the ITC any “authorized fiduciary” is permitted to decant. The term includes the trustee and any fiduciary, other than a settlor, that has discretion to distribute or direct a

distribution of part, or all, of the trust’s principal (such as a distribution director, trust protector or court appointed fiduciary). In addition to expanding the who may decant, the ITC now specifies the trusts to which the ITC’s decanting statute apply. The ITC can be applied to any trust that has Illinois as its principal place of administration or any trust that provides that Illinois law governs its administration or the constructions of its terms.

While the ITC has increased the scope of who may decant and defined the trusts to which the statute is, it applies a stricter standard under which an authorized fiduciary must act when undertaking a decanting. Under the prior statute a trustee was held only to a reasonableness standard. Under the ITC an authorized fiduciary is held to a fiduciary standard. Moreover, the ITC explicitly provides that a decanting can only be done if it furthers the settlor’s purpose. As discussed later in this Client Alert, if the authorized fiduciary is unsure whether a proposed decanting furthers the settlor’s purpose, court approval can be sought.

### Expanded Authority to Decant

Under the prior statute, the ability and extent of a decanting party’s authority to modify the first trust was dependent on whether the trustee had absolute discretion over the distribution of the principal of the trust or limited discretion. The ITC maintains this distinction but expands some of the categories used under the prior statute and provides some clarity as to the extent of the modification that can be undertaken. Two new terms are added under the ITC, “expanded distributive discretion” and “reasonably definite standard.” Expanded distributive discretion is an expansion of the term “absolute discretion,” which was used in the prior statute, and now includes discretionary authority exercised in the best interests, welfare, or happiness of a beneficiary (we will refer to this as the “Broad Standard”). In contrast, in a “reasonably definite standard,” the discretion has been limited to a more restrictive ascertainable standard or a reasonably definite standard, such as the health, support or education of a beneficiary (we will refer to this as the “Stricter Standard”).

The fiduciary who has a Broad Standard for making distribution is given very broad authority to modify the terms of the original trust. The fiduciary who has a Stricter Standard will be restricted as to the provisions of the original trust that can be modified by the decanting.

The ITC maintains the special exception for trusts that have a beneficiary with a disability. Specific rules apply, but even a fiduciary who has a Stricter Standard may proceed with a decanting if it is in the best interests of the beneficiary to setup a special needs trust in order to qualify the disabled beneficiary for governmental benefits.

## Notice Requirements and Safe Harbor

Like under the prior statute, notice must be provided prior to the decanting. Sixty (60) days prior to decanting an authorized fiduciary must provide proper notice (as laid out in the ITC) to any required party. The ITC requires that the following be notified (unless notice has been waived by such party): any living settlor, the qualified beneficiaries, all other fiduciaries and parties given the authority to remove the authorized fiduciary, any fiduciaries named in the second trust and, if the trust contains a charitable interest, the Illinois Attorney General (“AG”). Note, not all charitable interests will require notice to be delivered to the AG. If the charitable interest is remote or contingent interest, notice may not be required; however, if the charitable interest is current and/or ascertainable, notice should be provided to the AG.

The foregoing list notwithstanding, notice is not required for a qualified beneficiary that is an unrepresented minor or a qualified beneficiary that cannot be reasonably located. Additionally, an authorized fiduciary is protected from failing to provide proper notice to one of the aforementioned required parties if he or she acted with reasonable care when undertaking the notification process. With the exception of the AG, unlike under prior law a required party can’t prevent the decanting from going forward by simply filing an objection with the authorized fiduciary. Only the AG has the power to prevent a decanting by responding to the notice with an objection.

## Court Involvement

As stated previously, a required party, other than the AG, cannot prevent a decanting simply by filing an objection with

the authorized fiduciary. However, a required party can initiate court proceedings in order to prevent a decanting. Additionally, if an authorized fiduciary disagrees with the AG’s objection to a decanting, the authorized fiduciary can seek court approval to proceed.

In addition to ruling on objections, a court can rule on the validity of a proposed decanting. This can protect the authorized party from later challenges as to the terms of the second trust or whether the decanting was contrary to a settlor’s intent. A court can also appoint a special fiduciary to act as an authorized fiduciary in the decanting process. If a decanting has already occurred court proceedings can be initiated in order to approve the decanting, determine if the decanting was effective or remedy any flaws in the decanting.

## For More Information

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