Illinois Trust Code
What you need to know as trustee

The Illinois Trust Code applies to the operation of Trusts in Illinois after January 1, 2020.

This law imposes certain duties on trustees (see chart below). Language in your trust can modify some of these provisions, but not others. Some of these can be modified.

This document contains a highly detailed analysis of the rules, what you can change, what you cannot change, and what to do when you become a trustee.

Important terms to know:

- Current Beneficiary: a beneficiary who, on the date you make a determination about his or her benefits under the trust, is entitled to trust income or principal.
- Designated Representative: a person nominated in the trust instrument to represent and bind a qualified beneficiary (generally before age 18, but no later than age 30).
- Presumptive Remainder Beneficiary: a beneficiary who, on the date you make a determination about his or her benefits under the trust, would be eligible to receive a distribution if the trust terminated that date or would be eligible to receive a distribution if the interest of all beneficiaries ended on that date without causing the trust to terminate. In other words, the successor trust beneficiaries if the main beneficiaries died.
- Qualified Beneficiary: a beneficiary who, on the date you make a determination about benefits under the trust, is someone who could receive a distribution from the trust or is likely to receive trust property when the current beneficiaries die or the trust terminates.

The Illinois Trust Code sets out many "default" rules. A trust document may change some of these rules and not others. The following rules are defaults that a trust document cannot modify:

New Rules that CANNOT Change	**Explanation**
The trustee must act in good faith	
The trust must have lawful purpose	
Designated representative cannot represent and bind a beneficiary who is age 30 or older.	If a trust beneficiary is a "bad boy" and it would cause problems if the "bad boy" became aware of his interest in the trust, the trust could designate someone to receive trust accountings until, a the latest, the "bad boy" turns 30. NOTE: Designated representatives are fiduciaries and owe a duty of good faith and must act in best interests of the represented beneficiary.

	NOTE: Trust must expressly designate or nominate representative or state the authority of someone other than trustee to designate individuals.

A trust may be created for a noncharitable purpose without a definite or definitely ascertainable beneficiary but the trust cannot be enforced for more than 21 years.	NEW! Now a trust can be created without an ascertainable beneficiary (think cemetery plot). But a trust is not enforceable for more than 21 years after creation.
A court's ability to modify or terminate trust.	Any beneficiary can ask a court to approve a modification or terminate a trust.
A spendthrift provision prevents a beneficiary's creditors from attaching to beneficiary's interest in the trust. (A) A beneficiary's creditor cannot attach to a beneficiary's interest in a discretionary trust created by a third party. (B) All property of a revocable trust is subject to claims of settlor's (the person who creates the trust) creditors to extent it would be if the settlor owned the property outright. (C) A creditor may reach a mandatory distribution (a distribution that the language in the trust requires the trustee to make) that is not made within a reasonable time. (D) Trusts for beneficiaries with disabilities are not liable to reimburse Illinois/ public agency for financial aid or services except if the trust was created by the individual or trust property was distributed directly to the individual or is under the individual's control.	NOTE: a trust must contain specific "spendthrift" language to have this protection. NOTE: a trust created by someone else for the benefit of a disabled individual is not liable to pay or reimburse Illinois or agency for aid or services (Special Needs Trusts). For example mandatory income distributions under a trust document would be subject to the beneficiary's creditors. A trust is not subject to Medicaid state recovery or a trust will not affect current benefit eligibility unless the beneficiary used his or her money to create it or if the individual can control distributions of trust property. If a trust is a "special needs trust," some exemptions apply to this rule.
A Power of Attorney for Property must explicitly state that the agent has the power to create and modify trusts.	NOTE: This is not a new rule. It is our firm policy in most situations to include appropriate enabling language in our powers of attorney.
A court can adjust the trustee's compensation if unreasonably low or high.	The court can raise or lower the trustee compensation rate if a beneficiary asks a court to review the trustee's compensation. NOTE: The trustee is entitled to compensation even if the trust doesn't specifically state that compensation is allowed.

If a trust becomes irrevocable after January 1, 2020, the trustee has a duty to notify each qualified beneficiary of (A) The trust's existence (B) The beneficiary's right to request a complete copy of the trust, and (C) Whether the beneficiary has a right to receive or request accountings. The trustee must notify beneficiaries of this information within 90 days of: (1) the trust becoming irrevocable or acceptance of trusteeship if no trustee acting before; (2) the trustee learning that a qualified beneficiary now has a representative; (3) the trustee learning that a qualified beneficiary no longer has a representative; and (4) the trustee learning of a new qualified beneficiary.	A trust becomes irrevocable if it is created that way (for certain life insurance and asset protection trusts) or when the person who has the power to amend the trust dies. In most circumstances, a typical estate planning revocable trust becomes irrevocable when the person who created the trust dies. NEW! Trustee must notify beneficiaries within 90 days of the trust's existence, the beneficiary's right to receive a complete copy of the trust, and whether the beneficiary has a right to receive an accounting.
If a trust becomes irrevocable after January 1, 2020, the trustee must provide accountings at least annually to all current beneficiaries.	NOTE: This requirement is different than the modifiable duty to provide accountings to presumptive remainder beneficiaries (see below). NOTE: A qualified beneficiary can waive their right to receive information, such as an accounting, by an instrument in writing delivered to the trustee. However, the beneficiary can withdraw their waiver at any time.
The trustee must provide a final accounting at trust termination to all beneficiaries entitled to receive distributions of what is left in the trust.	
A trust term eliminating trustee liability for breach of trust is unenforceable if it relieves liability for breach committed in bad faith or with reckless indifference to the purpose of trust of beneficiaries' interest, or it was included due to fiduciary relationship abuse.	Believe it or not, there are trusts out there that do this. Now these provisions no longer apply.

The trustee is not personally liable for a contract entered into in the trustee's fiduciary capacity, but the trustee is personally liable for torts the trustee committed in course of administering the trust. The trustee who holds interest as general partner in general or limited partnership is not personally liable on a contract the partnership entered after the trustee's acquisition of interest if the trustee disclosed their fiduciary capacity in the contract; trustee is not personally liable for torts of the partnership or obligations arising from ownership or control of interest unless trustee is personally at fault, unless the interest in partnership is held by trustee in another capacity, trustee's spouse, descendants, siblings, parents, or spouse of any. A person other than a beneficiary or representative who, in good faith, assisted or deals with a trustee without knowledge that the trustee exceeded the trustee's powers under the trust is protected from liability as if the trustee properly exercised the power.	A trustee is not personally responsible for contracts entered into as trustee, but a trustee is responsible for wrongful acts he or she commits in administering the trusts. If a trustee has an interest in a partnership, the trustee is not personally responsible for the contract the partnership entered after accepting trusteeship if the fiduciary relationship was disclosed. A trustee is not personally responsible for wrongful acts the partnership commits unless the trustee is personally at fault. If someone acts in good faith to assist the trustee, but the trustee did not have the power to do what he or she did, then the person who assisted the trustee is not responsible.

For the following rules, the trust document determines if they are modified or eliminated:

Rules that <u>CAN</u> be changed	**Explanation if Needed**
The trustee has a duty to notify qualified beneficiaries of a proposed transfer of the trust's principal place of administration at least 60 days prior to initiating the transfer.	Transfer is terminated if qualified beneficiary objects. SAFE HARBOR: trustee does not need to tell beneficiaries or interested parties about this section, and they do not need to review the trust to determine what actions should be taken to change the place of administration.
Ability in trust document to designate who is entitled to receive an accounting of trust prior to distribution and who can see what parts of trust document after death.	However, anyone who receives a money from the estate is entitled to receive an accounting, and that cannot change. The trust document can change who else is eligible to receive an accounting.

The trustee is subject to the jurisdiction of Illinois by accepting trusteeship of trust with principal place of administration in Illinois.	If a beneficiary receives distributions in Illinois, that is enough for the Illinois court to hear matters related to beneficiary's interest in trust administered in Illinois.

The trustee's investment duties are minimized or eliminated when it comes to technical detail of selection and retention of life insurance policies.	
If the trust property has a value of less than $100,000, the trustee may terminate the trust if continuing the trust will substantially impair the ability of trust to accomplish its purpose.	The trustee can end the trust if the trust assets are valued at less than $100,000 and continuing to administer the trust will be against the trust's purpose or if corporate trustee's fees consume a large portion of trust assets or income. Many trusts may contain this provision.
The trustee has 120 days (from the date the trust becomes irrevocable) to accept or decline trusteeship. A trustee accepts by substantially complying with trust language describing how to accept the trust. If the trust does not contain a method, the trustee accepts by accepting delivery of trust property, exercising trustee powers, performing trustee duties, or indicating acceptance.	NOTE: If the trustee does not respond, then after 120 days it is as if the trustee declined. Examples: taking steps to investigate or inspect trust property, accepting the trust property, or taking steps to show that you are active in administering the trust property.
A court may remove a trustee if: 1) The trustee committed a serious breach of trust; 2) There is a lack of cooperation among co-trustees that impairs with the trust administration; 3) There is a lack of fitness, lack of willingness. or persistent failure of a trustee to administer the trust effectively; 4) There has been a substantial change in circumstances; and 5) All qualified beneficiaries request it, on the finding of serving the best interests of those beneficiaries, if a suitable co-trustee or successor trustee is available.	A trustee can be removed for serious breach of trust, lack of cooperation among co-trustees, lack of fitness/willingness/persistent failure to administer the trust effectively, a substantial change in circumstances, when the all beneficiaries request it to serve beneficiaries' interests.

Trustee can delegate duties and powers, but shall exercise reasonable care, skill, and caution in 1) selecting agent, 2) establishing the scope and terms of delegation, and 3) periodically reviewing the agent's actions	The trustee can delegate discretionary powers in certain circumstances. By exercising reasonable care, the trustee is not liable for the actions of the agents. NOTE: This broadens delegation powers from previous laws.
Duty to provide accounting to presumptive remainder beneficiaries.	NOTE: This is a modifiable duty to account to presumptive remainder beneficiaries, NOT the duty to current beneficiaries. This section provides that a trustee must provide accountings to the successor beneficiaries if the main beneficiaries die.
Illinois Prudent Investor Rule: a trustee has a duty to invest and manage trust assets to comply with the prudent investor rule. If modified, a trustee is not liable to beneficiary for the trustee's reasonable and good faith reliance on express provisions.	NEW! The trustee can consider the environmental, social, and governance considerations when making investment decisions. NOTE: This rule can be expanded, restricted, eliminated, or otherwise altered by the trust document.

General powers that a trustee has under the Illinois Trust Code:

1) The trustee can collect, accept, or reject trust property.

2) The trustee can buy or sell trust property for cash or credit, at private or public sales.

3) The trustee can change the type of trust property.

4) The trustee can deposit money into a regulated financial-service institution.

5) The trustee can borrow money and mortgage or pledge trust property for time period beyond the lifetime of the trust.

6) The trustee can continue an interest in a proprietorship, partnership, limited liability company, business trust, corporation, or other form of business and take any action allowable by shareholders, members, or property owners, which can include merging, dissolving, pledging trust assets, guaranteeing debts obligations of the business, or perform other changes.

7) With stock and securities, the trustee can exercise powers of an absolute owner and vote, give proxies to vote, enter into/continue a voting trust agreement, hold a security in the name of a nominee without disclosing the trust so title can pass by delivery, pay assessments and other charges against the securities, sell stock, deposit securities, and participate in mergers, consolidations, foreclosures, reorganizations, and liquidations.

8) With real property, the trustee can make repairs, alterations, or improvements, demolish structures, enter into contracts relating to real estate, develop land, dedicate interest in real estate, dedicate land for public use, make or vacate plats, and adjust boundaries.

9) The trustee can enter into a lease, as lessor or lessee, for time lasting beyond the trust.

10) The trustee can grant option involving a sale, lease, or disposition of trust property or acquire an option, for acquisition for property, including options exercisable beyond the trust duration.

11) The trustee can get liability insurance for themselves, agents, and beneficiaries.

12) The trustee can abandon or decline property if it has no value or the value is insufficient to justify collection or continued administration.

13) With environmental law, the trustee can investigate property held by the trustee or property owned or operated by organization where trustee holds interest to determine application of environmental law, take action to prevent, abate, or remedy actual or potential violations of environmental law for said property, decline to accept property into trust or disclaim any power with respect to said property that may have environmental law violations, compromise claims against the trust that are asserted in environmental law violations, and pay expenses of inspections, review, abatement, or remedial actions in order to comply with environmental law.

14) The trustee can pay, contest, prosecute, or abandon claims, settle a claim or charge for or against the trust, and release a claim belonging to the trust.

15) The trustee can pay taxes, assessments, and the compensation of agents of the trust incurred during trust administration.

16) The trustee can made Federal, State, and local tax elections.

17) The trustee can select a mode of payment under an employee benefit or retirement plan, annuity, or life insurance payable to the trust, and exercise right related to employee benefit or retirement plan, annuity, or life insurance, including the right to indemnification for expenses and against liabilities and take appropriate action to collect proceeds from these plans.

18) The trustee can loan out trust property to beneficiary on terms and conditions that are fair and reasonable under the circumstances, and there is a lien on future distributions for repayment of the loans.

19) Pledge trust property to guarantee loans by others to beneficiaries.

20) The trustee can appoint a trustee to act in another jurisdiction (as trustee or co-trustee) for all or part of the trust property, and can give the appointed trustee all of the rights, powers, and duties, require that the appointed trustee provide security, and remove the appointment.

21) The trustee can distribute trust income and principal to beneficiaries either directly to the beneficiary, to the beneficiary's guardian of the estate or person, to a custodian for the beneficiary if the beneficiary is a minor, to an adult relative of the beneficiary on the beneficiary's behalf, to a trust created for the benefit of the beneficiary, and by managing it in a separate fund on the beneficiary's behalf, subject to the beneficiary's right to withdraw the distribution.

22) Upon termination of the trust, the trustee can make distributions of property, allocate assets in proportionate or disproportionate shares, value the property, and adjust for the differences in values.

23) The trustee can resolve disputes of trust interpretation through courts, alternative dispute resolution, or non-judicial settlement agreements, or other alternative dispute resolutions.

24) The trustee can prosecute or defend an action, claim, or judicial proceeding in any jurisdiction to protect trust property and in performance of trustee duties.

25) The trustee can execute contracts and other legal instruments to help the trustee exercise trustee powers.

26) The trustee can wind up administration after the trust terminates, including distributing trust property.

27) The trustee can enter into bank agreements or other open other bank accounts for trust property and can pay reasonable compensation for services.

28) The trustee can hire attorneys, financial advisors, and other agents and provide reasonable compensation.

29) The trustee can invest or hold interests in trust property.

30) The trustee can deal with the executor, trustee, or representative of another trust or estate where a beneficiary has an interest.

31) The trustee can make distributions in cash or in kind and may value property or distribute property.

32) The trustee can rely on affidavits, certificates, letters, or other evidence to make payments or distributions in good faith without liability.

33) Unless directed by the court, a trustee can have all the rights, powers, and duties under the law and terms of the trust between termination of the trust and during any period in which litigation is pending that may void or invalidate the trust in whole or in part or affect the rights, powers, duties, or discretions of the trustee.

34) If there is farm property: The trustee can perform acts that are appropriate and commonly used by farm owners in the community where the farm property is located. The trustee can plant and harvest crops; breed, raise, purchase, and sell livestock; lease land, equipment, or livestock for cash or on shares, purchase and sell, exchange or otherwise acquire or dispose of farm equipment and farm produce of all kinds; make improvements, construct, repair, or demolish and remove any buildings, structures, or fences, engage agents, managers, and employees and delegate powers to them; engage in drainage and conservation programs; terrace, clear, ditch, and drain lands and install irrigation systems; replace improvements and equipment; fertilize and improve the soil; engage in the growing, improvement, and sale of trees and other forest crops; participate or decline to participate in governmental agricultural or land programs.

35) If there are interests in minerals: The trustee can use methods that are commonly employed by owners with similar interests in the community where the interests are located. The trustee can drill, mine, and otherwise operate for the development of oil, gas, and other minerals; enter into contracts relating to the installation and operation of absorption and repressuring plants; enter into unitization or pooling agreements for any purpose including primary, secondary, or tertiary recovery; place and maintain pipe lines; execute oil, gas, and mineral leases, division and transfer orders, grants, deeds, releases and assignments, and other instruments; participate in a cooperative coal marketing association or similar entity.

36) The trustee can continue an unincorporated business and participate in management with appropriate compensation from the business and can incorporate the business.

37) The trustee can continue a partnership business and participate in management of the partnership by having the trustee or an agent act as partner, limited partner, or employee with appropriate compensation from the business, as well as enter new partnership agreements. The trustee is not personally liable to third persons unless the trustee or agent fails to identify the trust estate and disclose that the trustee or agent is acting in a representative capacity. This power is not meant to impair the liability of the trust estate with the activities listed to the extent of the assets of the trust estate.

38) The trustee can release any power granted to the trustee by applicable law or the trust. The release can be permanent or applicable for a specific period of time and can apply only to the trustee executing the release or it can apply to all future trustees, successor trustees and co-trustees acting at any time.

39) The trustee can obtain approval of the accountings and have beneficiaries sign a refunding agreement at termination of the trust.

So you've been offered trusteeship of a trust. What do you do now?

Before or On Acceptance of Trusteeship:

1. Accept or decline the trusteeship
2. Identify the trust elements (that there is a set beneficiary, whether it is a charitable trust, and your duties under the trust)
3. Identify the dates the trust became irrevocable and trustee was appointed
4. Identify current beneficiaries of the trust
5. Identify presumptive remainder beneficiaries of the trust
6. Identify qualified beneficiaries
7. Identify if there are any representatives of beneficiaries
8. Identify anyone who holds powers of appointment (authority to direct where trust share goes) and nature of the power
9. Identify the trust's purpose
10. Identify trust provisions that modify the Illinois Trust Code's provisions
11. Confirm safe harbors or protection the trust provides (e.g. the safe harbor of choosing a place for administration)
12. Confirm that the place of administration of the trust is appropriate with the trust's purpose and beneficiaries' interests (i.e. it's not administered in one state when every party and trust asset is in another state)
13. Identify if there is a spendthrift provision in the trust for any beneficiary
14. Determine if the trust was revocable at settlor's death (this affects which rules apply to the trust)
15. Inventory trust assets and abandon or decline property as needed
16. Review trust/trustee liability insurance with qualified insurance representatives
17. Provide notices to qualified beneficiaries, if any (within 90 days)
18. Implement investment strategy for trust assets and execute required changes within 90 days
19. Document procedures for delivering information to each beneficiary

Annually

1. Prepare and send accounting to each beneficiary entitled to receive accounting
2. Re-confirm investment strategy for assets is appropriate for the trust's purpose
3. Re-confirm: place of administration is appropriate for trust's purpose and beneficiaries' interests
4. Review actions of any agents

At Termination

1. Prepare and send accounting to beneficiaries entitled to trust residue

Other Tasks to Keep in Mind:

1. Notify qualified beneficiaries for changes in rate of trustee compensation
2. Notify qualified beneficiaries of trustee resignation, incapacity, or removal
3. If value approaches $100,000: determine if continued administration will impair trust purpose
4. If trust asset decreases in value, determine if it is appropriate to not exercise your right to sell the property and use the money to pay creditors
5. If change in circumstances (i.e. asset value): re-set investment strategy for trust assets
6. If change in circumstances (i.e. location of parties): re-confirm place of administering the trust is appropriate for trust's purpose and beneficiaries' interests

7. If change in circumstances (i.e. death of beneficiary): re-identify current and qualified beneficiaries
8. Consider obtaining beneficiary consent or release for key decisions
9. Disclose trustee's fiduciary capacity in each contract that the trust makes with other parties