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Trust Administration: The Basics in 10 Steps



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Trust Administration

- Role of the Fiduciary/Trustee's Duties
- Beneficiaries' Rights
- Common pitfalls
- Trends

- Questions at the end

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10 Steps of Trust Administration

For purposes of our discussion, we will limit the scope to the post-death administration of a typical grantor/living/inter vivos trust.

Grantor/Living Trust: instrument created by the grantor during his or her lifetime that sets forth the terms for distribution/administration of trust assets on the death of the grantor. Can be amended during lifetime of grantor. Becomes irrevocable on death of grantor.

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Step 1: Read the Trust

Even if you drafted it!

- What are the Trust terms?
- Has the Trust been amended/restated?
- Do you have all the amendments/most recent restatement?



Pitfall: Be sure you have the most recent version of the trust!

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Step 1: Read the Trust

Even if you drafted it!

- Who is the Trustee?
- Who are the beneficiaries?
- What are the trustee's powers?

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Step 1: Read the Trust

- Are there restrictions on the Trustee?
- Are there specific bequests (money or property)?
- Who gets the residue?

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Step 1: Read the Trust

- Are there timing issues? (Options, dates that trigger distribution etc.) – docket the dates!

Pitfall: Make sure you are aware of all the trust terms. Watch for options or other restrictions on disposition of property.

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Illinois Trust and Trustees Act 760 ILCS 5/1 *et seq.*

Read the Trust and Trustees Act

Illinois Trust and Trustees Act governs all trusts and their administration (*unless the trust states other law governs*).

Whenever you're not sure what to do, read the trust and the statute.

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Illinois Trust and Trustees Act 760 ILCS 5/1 *et seq.*

What if there is an inconsistency between the trust terms and the Trust and Trustees Act?

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Illinois Trust and Trustees Act 760 ILCS 5/1 *et seq.*

What if there is an inconsistency between the trust terms and the Trust and Trustees Act?

THE TRUST INSTRUMENT GOVERNS
760 ILCS 5/3(1)

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Step 2: The Trustee

- Meet the Trustee or Trustee(s)
- Can you represent all the trustees?

Pitfall: Trustees that do not or cannot get along and trustees with competing interests. In your engagement letter, cover what you will do if conflicts arise. Or, have trustees obtain separate counsel.

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Step 2: The Trustee

- The Trustee is your client but you also have a duty to all beneficiaries
- If an individual trustee, explain the duties of the trustee to the individual or individuals

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Step 2: The Trustee Trustees' Duties

- Fiduciary Duty
- Compliance with Trust Terms & Distributions
- Prudent Investor Rule
- Accountings
- Taxes

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Step 2: The Trustee

- Review the trustee's powers in the instrument
- Review the trustee's powers as delineated in the Trust and Trustees Act 760 ILCS 5/4.1 – 4.26

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Step 2: The Trustee

- Fee Agreement
- Under the Trust and Trustees Act, trustees may appoint attorneys, auditors, financial advisors and other agents and pay reasonable compensation to such appointees. 760 ILCS 5/4.09

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Step 2: The Trustee

- Get the Will from the Trustee and file it with the appropriate Court



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Step 2: The Trustee

- Trustee has a duty not to delegate any acts that involve the exercise of *judgment and discretion* EXCEPT investment functions (then must comply with statute) 760 ILCS 5/5.1

Trend: Directed trusts. 760 ILCS 5/16.3

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Step 2: The Trustee 760 ILCS 5/5.7 Compensation

Trustee is entitled to reasonable compensation for services rendered and reimbursement for proper expenses

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Step 2: The Trustee Co-Trustees 760 ILCS 5/5.7

- Majority rules if 3 or more trustees
- Review trust terms in case different

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Step 2: The Trustee

- Set forth what you as the attorney will be taking care of and what the Trustee will be responsible for handling

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Step 2: The Trustee

- Setting follow up appointments with the Trustee avoids many problems and allows the attorney to stay on top of any issues as they occur

Pitfall: Rouge trustees

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Step 2: The Trustee Resignation of Trustee 760 ILCS 5/12

Resign at any time by written notice to co-trustee, if any, and income beneficiaries

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Step 2: The Trustee Vacancy 760 ILCS 5/13

- Remaining trustee shall continue to act
- If no remaining trustee, then successor trustee can be appointed by a majority of the income beneficiaries
- Check the trust instrument, likely it specifies terms for vacancy

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Step 3: Discover & Marshall the Assets

- Ask the trustee
- Review tax returns & supporting documentation
- Review account statements
- Schedules on trust instrument

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Step 3: Discover & Marshall the Assets

- Real estate tax records
- Title searches
- Have mail forwarded
- Check email
- State unclaimed property
<https://icash.illinoistreasurer.gov/>

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Step 3: Discover & Marshall the Assets

- Appraise real estate
- Date of death values for all assets
- Get Taxpayer Identification Number for Trust. Use IRS Form SS-4. Apply online at IRS.gov
- Get title commitments on ALL real estate

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Step 3: Discover & Marshall the Assets

- Get title commitments on ALL real estate

Pitfall: Sometimes clients will have done intervening deeds or changed ownership. **ALWAYS** get a title commitment!

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Step 3: Discover & Marshall the Assets

- Establish a bank account for the Trust
- Make sure the trustee understands that they must keep an accurate accounting and keep the trust assets separate from their own
- Trustee should provide account statements to the attorney

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Step 3: Discover & Marshall the Assets

- Review trust for restrictions on the sale of assets of the trust
- Make sure the Trustee is collecting any rents or payments due to the trust
- Review any contracts, leases, or other obligations

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Step 3: Discover & Marshall the Assets

- Investments of the trust are governed by 760 ILCS 5/5 Prudent Investor Rule as well as by the terms of the trust
- Review trust assets. Are the appropriate?

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Step 3: Discover & Marshall the Assets

- Trustee has a duty to diversify assets
- Look to terms of trust for investment terms and duties. Some trusts appoint Investment Trust Advisor 760 ILCS 5/16.3 (Directed trusts)

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Step 4: Liabilities

- Determine the debts of the decedent
- Set forth a plan for payment of debts
- Grantor trusts are subject to the claims of the decedent's creditors
- Forward decedent's mail
- Check email accounts for bills

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Step 5: Is a Probate Estate Necessary?

- Unfunded trusts
- Assets outside the trust
- Creditor issues
- High liability professions: attorneys, doctors, etc.
- Personal business exposure

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Step 5: Is a Probate Estate Necessary?

- Use Small Estate Affidavits to transfer assets to the trust
- Examples: vehicles, accounts, life insurance payable to Estate
- Use Small Estate Affidavit up to \$100,000 (gross value outside trust)
755 ILCS 5/25-1

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Step 6: Tax Issues Estate Tax

- Federal Estate Tax Exemption \$5.49 million in 2017 (adjust for inflation annually)
- Illinois Estate Tax Exemption \$4 million (not adjusted for inflation)
- Had the decedent filed gift tax returns (IRS Form 709)

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Step 6: Tax Issues Estate Tax

- Will it be necessary for file a Federal Estate Tax Return (IRS Form 709)?
- Should we claim the Deceased Spouse Unused Exclusion (DSUE)?
- Do we need to file an Illinois Estate Tax Return?

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Step 6: Tax Issues Estate Tax

- Estate Tax Returns are due 9 months after Date of Death
- Consult with competent professionals

The image shows a thumbnail of a 706 United States Estate (and Generation-Skipping Transfer) Tax Return form. The form is titled "706 United States Estate (and Generation-Skipping Transfer) Tax Return" and includes instructions for filers. It is a complex document with various sections for reporting assets, liabilities, and tax calculations.

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Step 6: Tax Issues Income Taxes – Individual Form 1040

- Ensure decedent's final income tax returns are filed
- Business returns of decedent

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Step 6: Tax Issues Income Taxes – Fiduciary Form 1041

- Determine tax year (Generally calendar year, but may want to treat trust as an estate – Section 645 Election)
- Ensure return is filed timely

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Step 6: Tax Issues Income Taxes – Fiduciary Form 1041

- Get W-9's from residuary beneficiaries
- Maximize tax advantage
- Consult with competent professionals

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Step 6: Tax Issues Qualified Accounts & Tax Deferred Accounts

- Watch out! Look for IRA's, 401(k)'s, annuities, and other tax deferred accounts

Pitfall: Time limits and tax bombs are hiding

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Step 6: Tax Issues Qualified Accounts & Tax Deferred Accounts

- Watch out if Trust is beneficiary
- Be aware of Required Minimum Distributions (RMD's) for decedent's IRA's and 401(k)'s.
- Seek advise of other professionals

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Step 7: Communicate with Beneficiaries

- The sooner the better!
- Identify the beneficiaries
 - Are any deceased?
 - 760 ILCS 5/5.5 Gifts to a deceased beneficiary
 - Check the terms of the trust

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Step 7: Communicate with Residuary Beneficiaries

Residuary beneficiaries are beneficiaries who receive the remainder of assets after payment of expenses and specific bequests

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Step 7: Communicate with Beneficiaries

- Letter to residuary beneficiaries
 - Timeline for distribution/funding of the trust
 - Inventory of trust assets
 - IRS Form W-9 and tax information
 - Copy of Trust Instrument
 - Who to call with questions

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Step 7: Communicate with Beneficiaries Specific Bequests

A gift of a sum of money or an item of property that is to be distributed to a named person or entity (like a charity)

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Step 7: Communicate with Beneficiaries Specific Bequests

- Timeline for when they will receive money or property
- Copy of relevant portions of trust instrument
- Who to call with questions

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Step 8: Administer Trust Assets

- Review Trust for terms
- If the assets will need to be liquidated, work with the Trustee to put together a plan for liquidation
- Consult with professionals about unusual assets
- Always appraise real estate and collectible assets

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Step 8: Administer Trust Assets

- Depending on the nature of the trust assets, you and the Trustee may want to give the beneficiaries options
- Ensure all tax returns are timely filed and taxes paid

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Step 9: Accountings 755 ILCS 5/11 Accounts

- Income beneficiaries are entitled to an accounting at least annually
- When ready to terminate the trust, send out a Final Accounting to all the residuary beneficiaries
- Get approval of accounting, fees, and release of trustee BEFORE distribution

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Step 9: Accountings 755 ILCS 5/11 Accounts

Pitfall: If you do not get approval,
beneficiaries have 3 years to object to the
accounting

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Step 9: Accountings 755 ILCS 5/11 Accounts

- Advise beneficiaries that they will be getting tax information and for what tax year
- What if beneficiaries object or refuse to approve the accounting?

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Step 9: Accountings 755 ILCS 5/11 Accounts Options Upon Objection

- Negotiate
- If agreement cannot be reached, Court involvement
- If any unusual treatment of assets, get beneficiary approval before doing it.

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Step 10: Trust Termination After Approval of All Beneficiaries

- Send out Specific Bequests and get receipts from those beneficiaries
- Fund any trusts that continue
- Distribute remaining trust assets to residuary beneficiaries and get Final Receipts

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Step 10: Trust Termination After Approval of All Beneficiaries

- Send out tax information to residuary beneficiaries
- Make sure you get paid

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Trends in Trust Administration

- Litigation, more and more, litigation
- After the fact, complaints resulting in litigation
- More trust terms that attempt to control behavior of beneficiaries

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Trends in Trust Administration

- Directed trusts 755 ILCS 5/16.3
- Virtual representation to solve problem trusts 755 ILCS 5/16.1
- Distribution of trust principal in further trust 755 ILCS 5/16.4

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Biggest Trend in Trust Administration

Nothing is forever, nothing is irrevocable. Everything is subject to change through litigation, virtual representation, court order, decanting, or a combination of the above.

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