

# “Trust” and Trustee Issues – What’s a Guardian To Do?

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## **EXAMPLE #1**

Only Son of an elderly woman is the Power of Attorney for both Health Care and Property. Son is the Successor Trustee of a Living Trust established by Mother. Mom is the current Trustee but is not mentally competent. Unfortunately, Son is “taking his inheritance early.” Mom is no longer involved in finances due to her mental and physical deterioration. Son “parked” mom in a non-Medicaid eligible nursing home. Bills are mounting. Nursing home bills are not being paid by Son. What to do? Son is non-responsive to requests by nursing home for disclosure of mom’s ability to stay in nursing home. Son refuses to disclose what mom’s assets and liabilities are.

## EXAMPLE #2

Mother and deceased Father create separate Grantor Living Trusts during their lives and fund each years ago. Trusts are administered by a Corporate Trustee. Father's trust provides for income to Mother during her life and access to principal in Trustee's sole discretion. Father's trust leaves assets equally to sons. Mom is subject to guardianship (Son #1 is the guardian). Son #2 is in battle with son #1. Son #1 lives with Mom in her home and is spending through Mom's assets ("**But Mom needs a convertible**"). Mom is in need of full-time care and Son #1 believes he can provide such care despite his own physical and mental limitations. Mom's trust is almost depleted and Son #1 is now seeking to get at Father's trust to maintain lifestyle. Can Son raid Father's Trust for "benefit" of Mom?

# I. What is a Trust?

- A trust is an artificial (abstract) “device” by which ordinary characteristics of ownership of property by a natural person are divided and separated. Trust document governs the administration and distribution of the trust.
- “Bundle of Rights” – Legal ownership vs. Equitable or Beneficial Ownership
- Trustee owns “Legal” title
- Beneficiaries own “Equitable” or Beneficial title

## A. Trust Basics: Concepts to Know

### ELEMENTS & IMPORTANT TERMS:

1. Agreement & Intention to Create a Trust
2. Grantor/Settlor
3. Trustee
4. Beneficiary
5. “Res” or “Corpus”
6. Description of What Estate Has Been Created
  - Vested vs. Contingent; Present vs. Future interest
  - Legal title vs. Beneficial (equitable) title
7. Express Trust or Implied
8. Living Trusts; Grantor Trusts; Testamentary Trusts; Land Trusts; Resulting Trusts; Totten Trusts
9. Rule No. 1: Trusts are generally not public

## B. Interplay between Trusts and Guardianships

### Issue:

If a person that is both the beneficiary of a trust and a ward of a guardianship, who is in control of assets?

### Depends on:

1. Who owns the asset in question?
2. What does the Trust document say as far as distribution and discretion?
3. Who is the trustee and what other roles does that representative play relative to the beneficiary/ward?
4. Who are the other “interested” parties to potential dispute?
5. Is a beneficial interest in a trust an asset of a guardianship?

## E. Access to Trust Assets & Restrictions

### 1. Terms of the Trust – Remember Rule No 1.

- Generally not a public document.

- Inquiry is: Is this person a beneficiary?

If so, then entitled to see a copy of the Trust provisions naming them as such at a minimum.

### 2. What is the Ward's Interest in a Trust?

- Income Interest vs. Remainder Interest

- Present Interest vs. Contingent Interest

- Take as an individual or as a class?

- Are the spendthrift provisions in the Trust?

## C. Whose Asset Is It?

### Is it a Trust Asset or Guardianship Estate Asset?

- Title to Assets Controls the initial review
  - Deed in Trust for Real Estate (Recorder's Office Search)
  - Bank Account or Investment Account Title (see Statements)
  - Check individual Income Tax Returns for 1099's and K-1's
  - Untitled Assets (Personal Property) (Insurance Policies)
  - Was there general assignment of assets when trust was created?
  - Implied trust relationship



## D. Mandatory Distributions vs. Discretionary Distributions

1. Focus on language of the Trust – HEMS Standard?  
“may” vs. “shall” - What does the document say?
2. “Sole” or “Absolute” Discretion?
3. A trustee risks liability for “abusing” their discretion when making or refusing to make distributions. Is decision-making “reasonable”?
4. “Sprinkle” or “spray” of income?
5. Discretion of Trustee unlikely to be overturned unless contrary to Trust Agreement or abuse of discretion (fairly high standard)

## Sample Living Trust provisions on distributions /Grantor Provision:

(a) **Payments During My Life.** During my life, the Trustee shall administer the Trust Estate for my primary benefit (the “Lifetime Trust”) as follows: As long as I am not incapacitated, the Trustee shall pay to me as much of the income and principal as I shall request from time to time. *If I become incapacitated, then while I am incapacitated, the Trustee (i) shall pay to me as much of the income and principal as the Trustee considers advisable for my health, maintenance in reasonable comfort, or best interests and (ii) may pay as much of the income and principal as the Trustee considers necessary for the health, maintenance in reasonable comfort, or education of any persons dependent on me.* Any income not so paid in each year and any income not so paid at my death shall be added to principal.

## Sample Beneficiary Provision:

- (c) **Income and Principal.** The income from a child's share shall be paid in convenient installments, at least quarterly, to the child until complete distribution of the share or his or her prior death, except that, while the child is under the age of twenty-one (21) years, *the Trustee shall pay to or for the benefit of the child so much or all of the income from his or her share as the Trustee deems necessary or advisable from time to time for his or her **health, maintenance in reasonable comfort, and education**, adding to principal any income not so paid. The Trustee may also pay to the child such sums from the principal of his or her share as the Trustee deems necessary or advisable from time to time for his or her health, maintenance in reasonable comfort, and education.* If any guardian of the person of a minor child of mine maintains the child in the guardian's own household, *the Trustee may pay to such guardian a reasonable allowance from the child's share to contribute to the expenses incurred by the guardian in connection with providing for the health, education, and support in reasonable comfort of the child. Any such allowance may be made without court approval and irrespective of the availability of any other funds of such child.*

## Safe Harbor for Trustees?

In general, if the trustee's authority to make distributions is discretionary, and the trustee uses its judgment and makes a *reasonable* decision, a Court will not disturb the trustee's decision to distribute or withhold trust assets unless there has been evidence of bad faith or an abuse of discretion. Where the trustee's discretion is "absolute" or "uncontrolled," a Court will grant the trustee's decision even more deference. Bogert § 811

## II. Statutory Authority

Look to:

A. Illinois Trust & Trustees Act

760 ILCS 5/1 et seq.

B. Illinois Principal and Income Act

760 ILCS 5/1 et seq.

C. Illinois Probate Act of 1975

755 ILCS 5/1 et seq.

- Article XIa - Guardians for Disabled Adults
- Article XIII - Public Administrators, Guardians
- Article XVI - Recovery of Property and Discovery of Info
- Article XXIV – Accounts and Accounting

## A. Illinois Trust & Trustees Act 760 ILCS 5/3

### Sec. 3. Applicability.

(1) A person establishing a trust may specify in the instrument the rights, powers, duties, limitations and immunities applicable to the trustee, beneficiary and others *and those provisions where not otherwise contrary to law shall control*, notwithstanding this Act. The provisions of this Act apply to the trust to the extent that they are not inconsistent with the provisions of the instrument.

# Illinois Trust & Trustees Act-con't

## 760 ILCS 5/4.20

### Distribution of Income & Principal

Sec. 4.20. To distribute income and amounts of principal in such one or more of the following ways as the trustee believes to be for the best interests of any beneficiary who at the time of distribution is under legal disability or in the opinion of the trustee is unable properly to manage his affairs because of illness, physical or mental disability or any other cause:

(a) directly to the beneficiary;

(b) to a duly appointed guardian of the beneficiary; . . . .

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(e) by expending the money or using the property directly for the benefit of the beneficiary; and the trustee is not required to see to the application of any distribution so made; and

# Illinois Trust & Trustees Act-con't

## 760 ILCS 5/11

### Sec. 11. Accounts.

(a) Every trustee at least annually **shall** furnish to the beneficiaries then entitled to receive or receiving the income from the trust estate, or if none, then those beneficiaries eligible to have the benefit of the income from the trust estate **a current account** showing the receipts, disbursements and inventory of the trust estate; A current account shall be binding on the beneficiaries receiving the account and on such beneficiaries' heirs and assigns unless an action against the trustee is instituted by the beneficiary or such beneficiary's heirs and assigns within 3 years from the date the current account is furnished.

(b) Every trustee **shall** on termination of the trust furnish to the beneficiaries then entitled to distribution of the trust estate **a final account** for the period from the date of the last current account to the date of distribution showing the inventory of the trust estate, the receipts, disbursements and distributions and shall make available to such beneficiaries copies of prior accounts not theretofore furnished. Such final accounting shall be binding on the beneficiaries receiving the same and all persons claiming by or through them, unless an action against the trustee is instituted by the beneficiary or person claiming by or through him or her within 3 years from the date the final account is furnished....



Illinois Trust & Trustees Act-con't  
760 ILCS 5/15

Sec. 15. Minor or person with a disability - Authority of Representative.

*The representative of the estate of a beneficiary under legal disability or a spouse, parent, adult child, or guardian of the person of a beneficiary for whose estate no representative has been appointed, may act for the beneficiary in receiving and approving any account of the trustee appointing a successor trustee and executing any receipt and receiving any notice from the trustee.*

## B. Illinois Principal and Income Act 760 ILCS 15/1 et seq

Generally speaking, this Act deals primarily with rules for fiduciary accounting for assets in the control of trustees/ fiduciaries and how income interests and principal interest of beneficiaries are to be handled. It helps determine what the respective beneficiaries are to receive and how such distributions are likely to be taxed.

End Result: Don't be intimidated by trustees or fiduciaries throwing out references to this Act. These rules generally don't address beneficiaries rights to receive, rather it goes to characterizations of such interests. The rules act as defaults if the provisions of the trust are not well spelled out. The key is to get the trust document.

## Probate Act/Guardian powers vs. Trustee

- The Probate Act seems to be at odds with itself. Subsection 5/11a-18(a-5) generally seems to allow a Guardian of the Estate to do things the ward could have done had he not been disabled.
- Under 5/11a-18(d), the Probate Act attempted to coordinate guardianship powers with powers of a trustee of a revocable trust which were created by the now disabled person.
- The attempt was to prevent guardians from totally revoking or terminating such revocable. Under this subsection (d), the Guardian can bring action to sue the Trustee for abuse of discretion or to demand an accounting of the Trustee's management of the trust.
- Absent reliance on 755 ILCS 5/11a-18(a-5), the guardian is limited to (1) receiving distributions as required or made pursuant to the Trustee's discretionary powers, (2) receiving accountings and enforcing rights that go with accountings, or (3) suing for the failure to exercise discretion or abuse of discretion.

## C. ILLINOIS PROBATE ACT 755 ILCS 5/1 et seq.

- Sec. 5/11a-18. Duties of the estate guardian.

(a) To the extent specified in the order establishing the guardianship, the guardian *of the estate* shall have the care, management and investment *of the estate*, shall manage the estate frugally and shall apply the income and principal of the estate so far as necessary for the comfort and suitable support and education of the ward, his minor and adult dependent children, and persons related by blood or marriage who are dependent upon or entitled to support from him, or for any other purpose which the court deems to be for the best interests of the ward

- The guardian may make disbursement of *his ward's funds and estate* directly to the ward or other distributee or in such other manner and in such amounts as the court directs.

ILLINOIS PROBATE ACT  
755 ILCS 5/1 et seq. –con't

Sec. 11a-18(a-5) The probate court, upon petition of a guardian, other than the guardian of a minor, and after notice to all other persons interested as the court directs, *may authorize the guardian to exercise any or all powers over the estate and business affairs of the ward that the ward could exercise if present and not under disability.*

## ILLINOIS PROBATE ACT

### 755 ILCS 5/1 et seq. –con't

Sec. 5/11a-18(d) *Adjudication of disability shall not revoke or otherwise terminate a trust which is revocable by the ward. A guardian of the estate shall have no authority to revoke a trust that is revocable by the ward, except that the court may authorize a guardian to revoke a Totten trust or similar deposit or withdrawable capital account in trust to the extent necessary to provide funds for the purposes specified in paragraph (a) of this Section. **If the trustee of any trust for the benefit of the ward has discretionary power to apply income or principal for the ward's benefit, the trustee shall not be required to distribute any of the income or principal to the guardian of the ward's estate, but the guardian may bring an action on behalf of the ward to compel the trustee to exercise the trustee's discretion or to seek relief from an abuse of discretion.** This paragraph shall not limit the right of a guardian of the estate to receive accountings from the trustee on behalf of the ward.*

## III. Financial Exploitation

Criminal Statute Governing Financial Exploitation  
720 ILCS 5/17-56

Sec. 17-56. Financial exploitation of an elderly person or a person with a disability.

(a) A person commits financial exploitation of an elderly person or a person with a disability when he or she stands in a position of trust or confidence with the elderly person or a person with a disability and he or she knowingly and by deception or intimidation obtains control over the property of an elderly person or a person with a disability or illegally uses the assets or resources of an elderly person or a person with a disability.

# Civil Liability in the Criminal Statute

## 720 ILCS 5/17-56

(effective 1-1-16)

(g) Civil Liability. A civil cause of action exists for financial exploitation of an elderly person or a person with a disability as described in subsection (a) of this Section. **A person against whom a civil judgment has been entered for financial exploitation of an elderly person or person with a disability shall be liable to the victim or to the estate of the victim in damages of treble the amount of the value of the property obtained, plus reasonable attorney fees and court costs.** In a civil action under this subsection, the burden of proof that the defendant committed financial exploitation of an elderly person or a person with a disability as described in subsection (a) of this Section shall be by a **preponderance of the evidence**. *This subsection shall be operative whether or not the defendant has been charged or convicted of the criminal offense as described in subsection (a) of this Section.* This subsection (g) shall not limit or affect the right of any person to bring any cause of action or seek any remedy available under the common law, or other applicable law, arising out of the financial exploitation of an elderly person or a person with a disability.



Criminal Statute/Con't  
720 ILCS 5/17-56

(h) If a person is charged with financial exploitation of an elderly person or a person with a disability that involves the taking or loss of property valued at more than \$5,000, a prosecuting attorney **may file a petition** with the circuit court of the county in which the defendant has been charged **to freeze the assets of the defendant** in an amount equal to but not greater than the alleged value of lost or stolen property in the defendant's pending criminal proceeding for purposes of restitution to the victim. The burden of proof required to freeze the defendant's assets shall be by a preponderance of the evidence.

## A. Pre-Litigation and Litigation Steps

### Steps to be taken to lessen Conflict –

1. Remember Rule No. 1 - Ask nicely for information. You *might* get it.  
-if no cooperation, roll out the big guns
2. Reliance on Statutes
3. Adult Protective Services involvement
4. Contact State's Atty

## B. Discovery from Trustees

1. Copies of Trust Agreement
2. Annual Accountings
3. Pleadings from other cases/Info from other beneficiaries or family members
4. Account information from other non trust sources
5. Recorded documents as a source
6. Citation Proceedings – Powerful tool

## C. Trustee's Duties to Account

1. Statutory – Trust and Trustee's Act
2. Petition for Accounting –Where filed?
3. How often must there be an accounting?
4. Is the Accounting “Proper”?
5. Failure to Account Grounds for Trustee removal?  
For Cause?

## D. Citation to Discover/Recover Assets 755 ILCS 5/16-1 et seq.

1. Citation process is Court directed/ordered to identify assets of the Estate, and then to recover assets of the Estate.
2. There are no statutes of limitation in terms of requesting a citation relative to estate property.
3. This process consists of two parts: identification and recovery of estate assets.

## Citations to Discover/Recover

Sec. 16-1. Citation on behalf of estate.

(a) Upon the filing of a petition therefor by the representative *or by any other person interested in the estate or, in the case of an estate of a ward by any other person*, the court shall order a citation to issue for the appearance before it of any person *whom the petitioner believes* (1) to have *concealed, converted or embezzled or to have in his possession or control* any personal property, books of account, papers or evidences of debt or title to lands which belonged to a person whose estate is being administered in that court or which belongs to his estate or to his representative or (2) *to have information or knowledge* withheld by the respondent from the representative and needed by the representative for the recovery of any property by suit or otherwise. The petition shall contain a request for the relief sought.

## Citations, Cont'd

(d) *The court may examine* the respondent on oath whether or not the petitioner has proved the matters alleged in the petition, may hear the evidence offered by any party, may determine all questions of title, claims of adverse title and the right of property *and may enter such orders and judgment as the case requires.* If the respondent refuses to answer proper questions put to him or refuses to obey the court's order to deliver any personal property or, if converted, its proceeds or value, or books of account, papers or evidences of debt or title to lands, the court may *commit him to jail* until he complies with the order of the court or is discharged by due course of law and the court may enforce its order against the respondent's real and personal property in the manner in which judgments for the payment of money are enforced. *The court may tax the costs of the proceeding against the respondent and enter judgment therefor against him.*

## E. Where Will Litigation Be Heard?

1. Chancery Division? Most Trust litigation takes place here.
2. Probate Division? Home Court for Guardians.
3. Consolidation of cases? Where would you rather be?
4. Check Local Rules for filing requirements



## Who Pays for This?

- Recovery of Attorneys' Fees and Costs?
- Recovery of Guardians' Fees? GAL Fees?
- Surcharge a possibility? Depends on the bad acts of the legal representative.

**QUESTIONS ?**

# References

Estate of Howell v. Howell, 2015 IL App (1st) 133247 (good recent case worth reading through)

