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EXPANDING POWERS OF TRUSTEES

*GILBERT T. STEPHENSON**

ONE of the most noteworthy trends in the field of estate planning during the past quarter century has been the expansion of the powers of trustees, especially corporate trustees. Until recently, many banks and trust companies preferred to be directed in their trust activities, avoiding discretion in the administration and disposition of trusts and estates. While this attitude seems to prevail among English trust corporations, most American institutions encourage the independence given them by broad and varied powers in wills and trust agreements under which they are to serve.

For the purpose of discussion these new powers are divided into two rough classifications, dispositive and administrative. Where the exercise of a given power primarily involves the beneficiaries as persons, it is considered as a dispositive power;[1] where it involves property under administration foremost, as an administrative power.[2] Admittedly, there is a great deal of overlapping between these two headings. But the importance of these discretionary powers is not in their classification. Their importance lies in their presence in a will or trust, so that the trustee may effect the purpose of the settlor or testator.

I. Dispositive Powers

The dispositive powers which have displayed a notable expansion are: (1) power to apply as well as pay over principal or income; (2) power to pay over or apply principal in addition to income; (3) power to terminate or continue the trust; (4) power to select the methods of payments to or for minors; and (5) powers connected with the administration of a trust "for the benefit of."

Apply as Well as Pay Over

Before the current trend became noticeable, trustees were generally granted power only to pay over the principal or income to the beneficiary. If the beneficiary became mentally incompetent to receive and expend payment, there was no other alternative for the trustee but to withhold payments until a guardian had been appointed. At the present time, however, it is common practice to give the trustee the discretionary power either to pay over directly to, or apply for, the beneficiary.

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1. See Stephenson, Drafting Wills and Trust Agreements: Dispositive Provisions (1955).
2. See Stephenson, Drafting Wills and Trust Agreements: Administrative Provisions (1952).

It would seem that this expansion of power is advisable in practically every situation. If, for example, a person created a trust for a member of his family who at that time was fully competent to receive the payments but later became totally incompetent, it should not be necessary to have a court proceeding for the appointment of a guardian. This hindrance can be easily avoided by granting the trustee power to apply as well as pay over.

Pay Over or Apply Principal as Well as Income

Until recently, trustees, even those of family trusts, were limited to the payment or application of *income* only. Principal was regarded as inviolable and had to be preserved at all hazards for the remainderman or the ultimate beneficiary.[3] Come what might, the immediate beneficiary was entitled to the income only.

In this area there has been a remarkable change in the philosophy of trusteeship. Settlors and testators are now giving their trustees power to pay over or apply principal, in addition to income, if the income alone does not provide for the needs of the beneficiary.[4]

Once his attention is called to this point, the family man almost invariably says that he intends the members of his immediate family to be his preferred beneficiaries and that, if the income alone should not be sufficient for their needs, he would want his trustee to pay over the principal.[5]

This expansion of power would seem to be highly advisable in almost every personal trust unless the beneficiary has an independent estate or for some reason is not the preferred beneficiary. Not only would this provision carry out the intent of the settlor but it would satisfy the requirements of the beneficiary. During the life of a beneficiary the purchasing power of the dollar varies from year to year and sometimes from month to month. The financial requirements of a beneficiary change with advancing years and with the vicissitudes of life. Income which was entirely adequate when the trust became operative might become hopelessly inadequate in later years.

In a given case it may be advisable to put some limit upon the trustee's power to pay over or apply principal, in addition to income. The limit could be a specified amount, a certain percentage a year, or not over a stated percentage of the trust property at the inception of the trust or

3. Merchants Nat'l Bank v. Commissioner, 320 U.S. 256 (1943); Estate of Ferral, 92 Cal. App. 2d 712, 207 P.2d 1077 (1949); Walliser v. Northern Trust Co., 338 Ill. App. 263, 87 N.E.2d 129 (1949); Matter of Clark, 280 N.Y. 155, 19 N.E.2d 1001 (1939).

4. E.g., Matter of Bisconti, 306 N.Y. 442, 119 N.E.2d 34 (1954).

5. Stephenson, The Preferred Beneficiaries of Trusts, Studies in Trust Business, 2d ser., 289 (Trust Division, American Bankers Ass'n, New York, 1944).

at the last evaluation date. But this need for a limit in some cases does not discount the soundness of the basic principle of giving the trustee power to go into principal, if need be.

It is noteworthy that the conventional terms, *invade* and *encroach upon,* applied to the consumption of principal, are disappearing from the terminology of modern draftsmen. They are repulsive terms that, in the past, may have predisposed settlors and testators not to grant the trustee any power to invade or encroach upon principal.

Terminate or Continue Trust

Another expansion of power is that of giving the trustee some discretion as to terminating or continuing the trust.[6] This usually arises in connection with trusts for sons, daughters and other young people whose future development and needs are still in a state of uncertainty.

Until recently a settlor or testator himself would fix the age or ages at which his son, daughter or other youthful beneficiary would receive the principal, discharged of trust. The age might be twenty-one, twenty-five, thirty, thirty-five, or the like. Or he might provide for the termination of the trust by installments, e.g., one third each at twenty-one, twenty-five, and thirty. There is no end to the variations in the age or ages at which such trusts definitely had to be terminated.

At the present time, however, it is not an uncommon practice for the settlor or testator to *direct* that, in any event, the trust must be terminated at a stated age or ages but then go on to say that even before the beneficiary's arrival at the stated age or ages, the trustee *may,* in the exercise of its discretion, pay over or apply a stated amount or percentage or even all of the principal, and thereby partially or wholly terminate the trust. The reason for such a grant of power is that it enables the trustee to meet, more adequately, the emerging needs of the beneficiary which the settlor or testator himself cannot foresee. For example, it enables the trustee to pay over principal to a son to set him up in his own business or profession, or to a daughter to buy or build a residence upon her marriage.

This power to terminate or to continue the trust until a stated time places a heavy responsibility upon the trustee; but there seems to be no other practicable way of providing for the unforeseeable needs of youthful beneficiaries.

Select Method of Payment to or for Minors

If a trustee is to do its full duty to each of its minor beneficiaries, it must have power to select the method of payment or application best

6. E.g., Bardfeld v. Bardfeld, 23 N.J. Super. 248, 92 A.2d 854 (Ch. 1952).

suited to the needs and circumstances of each. Where the minor is in his late "teens" and has manifested habits of stability and economy, the trustee should be able to make payments directly to him and accept his receipt in discharge of its obligation for the payment. Where the minor is still of tender years, has no guardian or anyone standing in the place of a parent or guardian, the trustee itself should pay the bills for support, maintenance, schooling, medical and surgical expenses, or other institutional care. Where the minor, although not having a guardian, does have some dependable person who stands in the place of a parent, such as a grandparent or older brother or sister, the trustee should have power to make payments direcly to that person. Where the minor does have a guardian, in addition to, or different from, the trustee, the payments would, as a matter of course, be made to the guardian. Furthermore, the trustee should have the power to change the method of payment or application as the minor advances in age and his needs change.

Connected with Administration of Trusts "for Benefit of"

We come now to a comparatively new provision in wills and trust agreements and one not yet widely used. The use of it may come about in this way: the trust agreement or will creates a number of trusts, e.g., for children, grandchildren, and for other descendants, subject to the applicable rule against perpetuities. The terms of the trusts for children and grandchildren in being at the time the trust agreement or will is made are spelled out in detail, because the creator of the trust knows their circumstances and has them specifically in mind. But he does not know how to provide for grandchildren and great-grandchildren yet unborn.

Instead of trying vainly to spell out in detail the terms of trusts for such future, contingent beneficiaries, some draftsmen are now providing that each trust shall be administered "for the benefit of" a given beneficiary and then, by an omnibus provision elsewhere in the instrument, stating the powers that are connected with such trusts. Here, for example, is such a provision:

> Wherever under this will a trust is created "for the benefit of" a person, without further specification, unless the terms of the trust expressly provide otherwise or unless the context clearly shows a different intent on my part (as to which the judgment of the trustee shall be conclusive), I intend that the trustee shall have power to pay over, to apply, or to accumulate income for later distribution and, in addition, to pay over or apply income not only to or for the beneficiary himself or herself but also to or for any person who is legally or actually, in the judgment of the trustee, dependent upon such beneficiary for support and maintenance—such, for illustration but not limitation, as a dependent wife or husband, child, or parent.

As a matter of course, dangers lurk in all such expansions of the trustee's dispositive powers. This is particularly true with respect to payments or applications of principal as well as income and with respect to the termination or continuation of trusts. There will be instances in which a beneficiary will take advantage of and abuse the confidence of the trustee in order to reach the principal of his trust. There will be cases in which the trustee will be persuaded by an insistent, importunate, plausible but undependable beneficiary into making premature distributions of principal. But these are calculated risks that must be taken by creators and trustees alike in trust administration. The principle of the greatest good for the greatest number of beneficiaries must govern. The creator of the trust should go as far as possible in defining the terms of his trust. After he has reached his limit, there is nothing else for him to do, if the emerging needs of his beneficiaries actually are to be met, but to give his trustee some broad dispositive powers such as those mentioned above.

II. Administrative Powers

Numerically, there has been more expansion of administrative than of dispositive powers of trustees. In many a recently drawn trust agreement or will the administrative provisions constitute fully half the instrument. Draftsmen spell out in the instrument not only the power that they think the trustee *will* need but also those that they think it *may* need in the administration of the trust. They even include present statutory powers on the assumption that the statute may be changed or that it may not apply in some jurisdiction in which the trustee may, in the course of time, hold trust property. They include implied and resulting powers on the theory that it is safer to have an express power than to have to rely upon interpretation or, possibly, court action.

However, administrative powers, much more than dispositive powers, can be, more or less, standardized. Many draftsmen have their own list of standard administrative powers of trustees. Furthermore, many trust institutions, drawing upon their experience in trust administration, have had their general counsel and trust officers prepare and distribute among lawyers a list of administrative powers which they would like to have incorporated in wills and trust agreements under which they will be appointed to serve as trustee.

The following is a list of the headings of administrative powers incorporated in one recently drawn will: (1) to postpone distribution; (2) to retain original investments; (3) to make new investments; (4) to carry on businesses; (5) to carry on farms; (6) to manage real property; (7) to receive additional property; (8) to sell and exchange property; (9) to deal with other trusts; (10) to borrow money; (11) to register property in name of a nominee; (12) to vote shares of stock; (13) to exercise options, rights, and privileges; (14) to participate in reorganizations; (15) to reduce interest rates; (16) to modify or release guarantees; (17) to renew and extend mortgages; (18) to foreclose and bid on mortgaged property; (19) to retain property bid in or taken over; (20) to insure property; (21) to collect all kinds of income; (22) to compromise claims; (23) to employ and compensate agents and other representatives; (24) to hold property of two or more trusts undivided; (25) to establish and maintain reserves; (26) to distribute in cash or kind; (27) to apportion or allocate receipts and expenses; and (28) to rely upon evidence.

It will be seen at once that many of the foregoing powers are well established common-law or statutory powers. To collect, receive, and receipt for rents, profits, and income of all kinds is a common-law power.[7] In quite a number of states to register property in the name of a nominee is a statutory power.[8] Draftsmen who include these statutory and common-law powers in their instruments reason that the expression of a given power, although already a statutory or common-law power, may prevent any question being raised about it, may prevent litigation, and thus may expedite administration.

With respect to each of these powers only such comment is offered as will tend to make clear what the draftsman had in mind in including it in the instrument.

Postpone Distribution

This is primarily an executor's power. Yet for a trustee it may be a physical or legal impossibility to distribute the trust property the very day of the termination of the trust. Since activities in the trust may continue to and even during the day of its termination, the trustee must have additional time within which to make the final accounting and to make the necessary transfers of the property to the principal beneficiaries.

Retain Original Investments

In some, but not all states, the prudent-man rule is made expressly applicable to original as well as new investments.[9] In the absence of a statute on retention, the trustee may need power under the instrument to retain property that, but for the power expressed in the instrument, might be an unauthorized investment. The trustee may need power for

7. Purdy v. Johnson, 174 Cal. 521, 163 Pac. 893 (1917); Matter of Smith, 123 Misc. 69, 204 N.Y. Supp. 475 (Surr. Ct. 1924).

8. See 2 Scott, Trusts § 179.5, nn. 11-12 (2d ed. 1956).

9. E.g., Estate of Kent, 6 Cal. 2d 154, 57 P.2d 901 (1936); Creed v. McAleer, 275 Mass. 353, 175 N.E. 761 (1931); Liberty Title & Trust Co. v. Plews, 6 N.J. 28, 77 A.2d 219 (1950); Matter of Lawrence, 202 Misc. 1044, 116 N.Y.S.2d 237 (Surr. Ct. 952). Also the following states: Indiana, Maryland, Minnesota, Ohio, Pennsylvania, Wisconsin.

a time to disregard the doctrine of diversification,[10] to retain cash uninvested for a considerable period, and to retain national bank stock. As to the last item, if the trustee should be a national bank and the settlor or testator a stockholder in that bank, it would be necessary, if the stock is to be retained, for the trustee to have express power to retain it.[11]

Make New Investments

In most states the prudent-man rule for investment has been adopted by statute or judicial decision, and this would seem to cover the requirements as to new investments.[12] This, however, is not so. With respect to new investments there may be need for the trustee to go beyond the limits of the rule. For example, if the trustee is a national bank and the settlor or testator is one of its stockholders, it may be advisable to grant the trustee power to exercise stock rights in the acquisition of additional bank stock. If the trustee is near a state line, it may be advisable to grant it power to invest trust funds in mortgages on property outside the state. In some states life insurance and annuity contracts are authorized trust investments.[13] In the states that do not have such a statute, it may be advisable to grant the trustee power to invest in insurance on the life not only of the beneficiary, but also of anyone in whose life the beneficiary has an insurable interest, and to purchase with trust funds annuity contracts of its own selection. Whether or not the trustee has a common trust fund at the time, it may have one later, and, therefore, it may be advisable to grant the trustee power to invest any common trust fund it should establish later. Circumstances may arise in which it may be advisable for the trustee to invest in property temporarily unproductive.

Carry on Businesses

In recent years there has been a remarkable change in the attitude of both property owners and trust institutions towards the retention and carrying on of businesses for an extended period of time. Until then, corporate trustees, as a rule, were disposed to get rid of small, family-owned or controlled businesses as soon as they reasonably could do so. Businessmen were not disposed to leave their businesses to be carried on by a trustee. At the present time, on the contrary, many owners of small, closely held businesses want them carried on for an indefinite period of

10. First Nat'l Bank v. Truesdale Hospital, 288 Mass. 35, 192 N.E. 150 (1934); Warmack v. Crawford, 239 Mo. App. 709, 195 S.W.2d 919 (1946).

11. 12 U.S.C.A. § 61 (1945).

12. E.g., Creed v. McAleer, 275 Mass. 353, 175 N.E. 761 (1931); In re Buhl's Estate, 211 Mich. 124, 178 N.W. 651 (1920). Ala. Code tit. 58, §§ 47-48 (1941); Ill. Ann. Stat. c. 148, § 32 (1954).

13. See 3 Scott, op. cit. supra note 8, § 227.8 nn. 8-9.

time, certainly until a son, now a minor, is old enough to take over and carry on the family business. Trust institutions, on their part, are much more hospitable than they used to be to taking over and carrying on businesses in trust.

Where there is a probability that the testator may have a going business at his death and may want it carried on beyond the reasonable period for liquidation, sale or distribution, the trustee should insist upon having at least these powers with respect to the business: to incorporate it so as to limit liability, to decide about putting additional capital into the business, and, in every case, to close out, liquidate, or sell the business if, in the judgment of the trustee, it would be unwise, imprudent or vain to carry it on any longer. A going business never should be allowed to become and remain a millstone around the neck either of the trustee or of the beneficiary for whom the testator wanted it retained.

Carry on Farms

Likewise, there has been a noticeable change of attitude towards trustees carrying on farms. The reasoning is similar to that with respect to going businesses. In many agricultural areas, modern mechanized farming has become profitable in recent years. A farmer, with a fertile and productive farm, and with a family of growing children, may want his farm retained and operated by his trustee at least until his sons are old enough to take over and carry on. In response to this desire, trust institutions in agricultural areas are establishing farm-management divisions in their trust departments.

If the trustee is to carry on farms, it must have and exercise all the powers requisite to good farm practices. However, there can be nothing as a standard or even near standard provision for carrying on farms. Provisions that would be appropriate for carrying on farms in New England, or upper New York State, would not be appropriate in all respects for any other section of the country. It would seem, therefore, that it would be advisable for draftsmen in each agricultural area, with the aid of practical farmers or farm-managers, to work out a standard provision for carrying on farms in that area.[14]

Manage Real Property

Where the testator already owns or is likely to acquire real property, business or residential, the trustee should have broad powers of management. It should have the power to deal with such property as a prudent outright owner of similar property would.

14. For a suggested provision for carrying on farms in the northeastern section of North Carolina, where the principal crops are cotton, peanuts, tobacco, and dairy products, see Stephenson, op. cit. supra note 2.

One of the powers that, by all means, should be included in a will or trust agreement is the power to lease beyond the duration of the trust. If, for example, the trust is to terminate when the beneficiary is twenty-one, but the lease of the tenant of trust property expires when the beneficiary is nineteen, the trustee, in the absence of an empowering provision to lease for a period beyond the duration of the trust, generally has no other alternative but to say that it can re-lease the property for only two years, that is, until the beneficiary is twenty-one.[15] Where the tenant says that if it does not get a long term lease, it must look for another location, the building is likely to be left unoccupied for the remainder of the trust and turned over to the beneficiary untenanted and unproductive.

Receive Additional Property

There seems to be little doubt that a settlor himself can add property to his own trust provided it is agreeable with the trustee.[16] But there is a great deal of doubt about anyone else doing so or about the power of the trustee to receive it.[17] Yet there are cases in which a wife, let us say, wants to add her own property to a trust created for her by her husband. The trustee should have power to receive property from her. There are other cases in which the settlor or testator might not be willing for anyone else—not even his wife or other member of his immediate family—to add property to his trust lest it upset his own estate plan. Therefore, the will or trust agreement should leave no doubt as to the power of the trustee to receive additional property and from whom it may or may not be received.

Along with the reserved right to add property, there should be some power of the trustee to refuse to receive it. In most additional-property provisions, it is stated that the trustee shall not be required to receive additional property against its will nor unless satisfactory arrangement is made for its administration of the additional property. But for these

15. Hunt v. Lawton, 76 Cal. App. 655, 245 Pac. 803 (1926); Bergengren v. Aldrich, 139 Mass. 259, 29 N.E. 667 (1885); St. Louis Union Trust Co. v. Van Raalte, 214 Mo. App. 172, 259 S.W. 1067 (1924); Cox v. Kingston Carolina R. & Lumber Co., 175 N.C. 299, 95 S.E. 623 (1918); In re Will of Caswell, 197 Wis. 327, 222 N.W. 235 (1928). Contra: Butler v. Topkis, 63 Atl. 646 (Del. Ch. 1906); Sweeny v. Hagerstown Trust Co., 144 Md. 612, 125 Atl. 522 (1924); North v. Augusta Real Estate Ass'n, 130 Me. 254, 155 Atl. 36 (1931). By statute other states permit a court to authorize a lease for a term longer than the probable duration of the trust: N.Y. Real Prop. Law §§ 106-07(n); Pa. Stat. Ann. tit. 20, § 717 (1950); Minn. Stat. § 501.24 (1953).

16. Cf. Wells Fargo Bank & Union Trust Co. v. Superior Ct., 32 Cal. 2d 1, 193 P.2d 721 (1948); Hackensack Trust Co. v. Ackerman, 138 N.J. Eq. 244, 47 A.2d 832 (Ch. 1946); Matter of Rausch, 258 N.Y. 327, 179 N.E. 755 (1932).

17. Cf. Boston v. Curley, 276 Mass. 549, 177 N.E. 557 (1931); In re Barlow's Estate, 144 Misc. 210, 258 N.Y. Supp. 451 (Surr. Ct. 1932).

two safeguards, the trustee might be required to receive property that it would not accept in a new trust or to continue to administer the trust so augmented for an inadequate compensation.

The provision about additional property is more important for an irrevocable trust agreement or will than for a revocable agreement. If the trust is revocable, the settlor and trustee can make an amendment to the agreement or work out some satisfactory arrangement about additional property.

Sell and Exchange Property

In most states a trustee has common-law power to sell personal property for cash to pay debts, taxes, and administration expenses or to improve the investment status of the trust.[18] But in most states, in the absence of an express power, a trustee cannot sell real property except under a court order.[19] In either case there may be doubt as to the trustee's power to sell on time or to exchange instead of sell. In everyday practical administration it is very advantageous for the trustee to have the express power to sell all kinds of property, real as well as personal, for cash or on time, with or without an order of a court. Along with the power of sale, there should go the power of exchange.

Deal with Other Trusts

It is now common practice for an estate plan to call for the creation of several trusts by members of the same family—husband and wife, for instance—each to create one or more trusts. The property owner may create one or more living trusts, including life insurance, and one or more trusts under his will. He may want to provide that the trustee under the agreement shall have power to make purchases from the executor of the will and for the executor to make sales to or obtain loans from the trustee under the agreement.

In the absence of correlative power in both the trust agreement and the will, it is doubtful that the estate and the trust, or the two trusts, can deal with each other in making such purchases, sales, or loans.[20] However, the need for such intertrust dealings does exist, particularly during a period of economic depression when there is only a depressed market for property in the estate, e.g., the executor is in dire need of cash for debts and taxes, and at the same time the trustee has an abundance of cash, perhaps the proceeds of insurance, awaiting investment and would

18. Citizen's Nat'l Bank v. Jefferson, 88 Ky. 651, 11 S.W. 767 (1889); Jones v. Atchison, T. & S.F.R.R., 150 Mass. 304, 23 N.E. 43 (1889).

19. E.g., Quick's Ex'rs v. Fisher, 9 N.J. Eq. 802 (Ct. Err. & App. 1852); Matter of Frech, 220 App. Div. 126, 220 N.Y. Supp. 645 (1st Dep't), aff'd, 246 N.Y. 552, 159 N.E. 648 (1927).

20. Federal Reserve Board, Regulation F, § 11(c) (1949).

like to invest in the securities—perhaps stock in the family corporation—which the executor wants to sell.

All such intertrust dealings, especially where the same bank or trust company is both executor and trustee, or is trustee under both trusts, are scrutinized with great care, and properly so, to see that there is no suggestion of divided loyalty as between the distributees of the estate and the beneficiaries of the trust, particularly so if they are different persons, or between the beneficiaries of the two trusts. Moreover, in those states which have adopted the Uniform Trusts Act[21] the draftsman must observe the limitations imposed by the act upon the terms of the trust instrument as regards intertrust dealings.[22]

Borrow Money

In most states a trustee has power to borrow money for the trust and to secure the loan by the transfer of stocks, bonds, mortgages, and other personal property.[23] But, in the absence of express authority in the instrument, it does not have power, except under an order of a court, to obtain loans for the trust by mortgaging real property.[24] Yet there may be cases in which it would be easier and better to borrow by mortgaging than to borrow on securities. It would seem advisable, therefore, for the trustee to have power to borrow on property, real or personal, upon such terms as to rates, maturities, and renewals as will, in its judgment, be for the best interests of the beneficiaries of the trust.

Where the trustee is both a bank *and* trust company, with both a banking and trust department—and nearly all trust institutions are also banks—it usually is to the advantage of the trust for the trustee to borrow from its own banking department, provided, of course, it can obtain the loan on as good terms as it could from any other source. However, there is, unavoidably, an element of self-dealing when a bank or trust company, as trustee, borrows for its trust funds from its own banking department and secures the loan by mortgage or hypothecation of trust property. Self-dealing in any way, shape, or form is subject to the closest scrutiny, as it should be, by both the courts and the supervisory offices.

Since the trustee's act of borrowing from its own banking department is so often to the advantage of the trust, and since such loans are the

21. Louisiana, Nevada, North Carolina, Oklahoma, South Dakota, Texas.

22. 2 P-H Wills, Estates and Trusts ¶ 3850 (1950).

23. Purdy v. Bank of America Nat'l Trust & Sav. Ass'n, 2 Cal. 2d 298, 40 P.2d 481 (1935); Warren v. Pazolt, 203 Mass. 328, 89 N.E. 381 (1909).

24. Hoyt v. Jaques, 129 Mass. 286 (1880); Byron Reed Co. v. Klabunde, 76 Neb. 801, 108 N.W. 133 (1907); Griswold v. Caldwell, 65 App. Div. 371, 73 N.Y. Supp. 2 (1st Dep't 1901); Beakey v. Knutson, 90 Ore. 574, 174 Pac. 1149 (1918).

subject of close scrutiny, it would seem that the settlor or testator can, with safety to the trust and the beneficiaries, grant the trustee power to obtain and secure loans from its own banking department. However, again this word of warning should be heeded: in the states that have adopted the Uniform Trusts Act, the draftsman must be careful not to include powers the exercise of which would violate the Act.[25]

Register Property in Name of Nominee

In a bare majority of the states trustees are authorized by statute to carry securities in the name of a nominee.[26] The Uniform Trusts Act authorizes the carrying of *stock* in the name of a nominee, provided the trustee complies with certain specific requirements.[27] But under the act this privilege is limited to stocks; whereas there are occasions when it is fully as advantageous to the trust to carry registered bonds, deeds and mortgages in the name of a nominee.

Using a nominee to facilitate transfers is approved present-day practice among corporate trustees. So, even in states that do have a nominee-registration statute, it is advisable to incorporate in the will or trust agreement a nominee-registration provision and, in some cases, go beyond the limits of the statute.

Vote Shares of Stock

Generally a trustee can properly vote by proxy.[28] But this power is subject to the limitation that it is a breach of trust to delegate duties. A trustee may delegate a ministerial duty,[29] but not a discretionary power.[30] Thus, when the voting of corporate stock requires the exercise of discretion or judgment in the interests of the trust estate, it seems that the trustee can delegate to his proxy only the ministerial act of recording the vote in the manner previously determined by the trustee.[31] To avoid possible liability many banks and trust companies were advised by their counsel not to vote shares at all unless they could vote them in person, through their responsible officers and directors. Yet, looked at in another way, it may be fully as much a breach of duty for the trustee *not* to vote the shares at all as to vote them by proxy.

25. See note 21 supra.

26. See note 8 supra.

27. Uniform Trusts Act § 9.

28. Edson v. Norristown-Pa. Trust Co., 359 Pa. 386, 59 A.2d 82 (1948). Many states allow this practice by statute. See 2 Scott, op. cit. supra note 8, § 193.3 n. 3.

29. McClure v. Middletown Trust Co., 95 Conn. 148, 110 Atl. 838 (1920); Donaldson v. Allen, 182 Mo. 626, 81 S.W. 1151 (1904).

30. In re Sulima's Estate, 193 Misc. 159, 82 N.Y.S.2d 751 (Surr. Ct. 1948); Meck v. Behrens, 141 Wash. 676, 252 Pac. 91 (1927).

31. Gow v. Consolidated Coppermines Corp., 19 Del. Ch. 172, 165 Atl. 136 (Ch. 1933).

Within recent years there has been a definite trend towards the application of the prudent-man rule to voting shares. The Uniform Trusts Act, in authorizing a trustee to vote by proxy, provides that it ". . . shall be liable for any loss resulting to the beneficiaries from a failure to use *reasonable care* in deciding how to vote the stock and in voting it."[32]

Despite such enabling statutes the corporate trustee rests easier where the draftsman of a trust instrument grants the trustee power to vote shares in person or by a general, special or limited proxy, as to the trustee shall seem best, but *without* power of substitution. Allowing one proxy to substitute another person for himself is still regarded as an unwarranted delegation of duty.[33] The Trust Division of the American Bankers Association has worked out, approved and recommended to banks and trust companies a statement of policies as to voting shares in estates and trusts.[34]

If the shares to be voted are those in a national bank which is also trustee, the provision about voting should go on to specify who is to instruct the trustee as to voting the shares for directors of the bank. This is required by the National Bank Act.[35] However, except for the election of directors of the national bank, the corporate trustee, granted the power in the instrument, can vote these the same as it can vote other shares.

Exercise Options, Rights, and Privileges

Stockholders, bondholders, mortgagees, and other security holders frequently have from the beginning, or later acquire, options, rights, and privileges with respect to their holdings. The outright owner of such holdings, as a prudent man, would exercise or not exercise a given option, right, or privilege as his judgment dictated. He does what he thinks will be best for his investment.

It would seem altogether logical that a trustee should have as much power as the prudent outright owner has to exercise all such options, rights, and privileges. To resolve any doubt as to its power, the modern trust instrument contains a provision to that effect.

In exercising a given option, right, or privilege, the trustee may come into ownership of a security or of other property that under the law or under the instrument is not an authorized trust investment for that trust. To cover such an eventuality the trustee is granted power to retain such unauthorized investments so acquired as long as it deems advisable.

32. Uniform Trusts Act § 8. (Emphasis added.)

33. Cf. Earle v. Earle, 93 N.Y. 104 (1883).

34. A Statement of Policies for Voting Shares of Stock Held in Trust Accounts, Trust Bull., Oct. 1954, p. 16.

35. 12 U.S.C.A. § 61 (1945).

Thus it is granted the power to apply the prudent-man rule to an otherwise unauthorized trust investment. This is logical, for it would be futile to authorize the trustee to receive such unauthorized securities or other property and then require it forthwith to get rid of the property so acquired.

Participate in Reorganizations

Trustees hold in trust the stocks, bonds, and notes of corporations that go through all sorts of organic changes, e.g., mergers, consolidations, reincorporations, foreclosures, sales, leases, and re-leases. It stands to reason that for the protection of its trust property the trustee should have as much power as any other investor does to participate actively in any and all such changes. It should not have to sit on the sidelines while others do the work and perhaps make decisions of which the trustee disapproves. For example, a representative of the trustee should have the power to sit on protective committees of stockholders or bondholders of the corporation going through any such organic change.

Moreover, if out of the change there should come new stocks, bonds or notes, differing from the ones it had been holding in trust, it should have the express power to retain or to dispose of such new holdings as it believes best.

Since expenses are incurred in serving on protective committees or taking any other form of protective action, the trustee should have the express power to incur such necessary expenses and pay out of the trust its proportionate share of the expenses. In giving the trustee power to participate in reorganizations, modern draftsmen cover all such points.

Reduce Interest Rates

During the past quarter century or more we have been in a period of easy money. Property owners have been able to borrow on mortgages at an ever-decreasing interest rate, from six to five, to four, even to three percent. Borrowers at six per cent have been going to trustees and saying that unless the interest rate is reduced, they will pay off their mortgages by refinancing elsewhere. Trustees know as well as borrowers that if a loan is paid off, they will not be able to reinvest the funds at a rate that the borrower is willing to pay. Any prudent business man or investor would reduce the rate rather than lose the mortgage. Clearly, under such circumstances, trustees should have power to do as much.

Yet, unless the power is expressed in the instrument, some thoughtless or unreasonable beneficiary, upon learning that the rate has been reduced, may claim that the trustee, by reducing the rate has given away income which but for the reduction would have gone to the beneficiary. The power to reduce interest rates puts the trustee into a more reasonable and logical, as well as a more comfortable, position.

Modify or Release Guarantees

There was a period, just before the "Great Depression" of 1929, when special sanctity and safety seemed to attach to guaranteed mortgages as trust investments. If the note or bond was guaranteed as well as secured by mortgage, it was taken for granted that it was a safe investment. But when the depression came, holders of guaranteed mortgages had a rude awakening. They learned that the safety of their investment depended upon the market value of the underlying property and the solvency of the guarantor. They learned that it was better to have an unsecured and unguaranteed obligation of a solvent obligor than the secured, guaranteed obligation of an insolvent obligor and guarantor.

So, there followed a period after the depression during which trustees, as well as other investors in guaranteed mortgages, were willing and, in fact, eager to substitute unguaranteed for guaranteed mortgages. Draftsmen of instruments in communities in which guaranteed mortgages had turned out to be so unsatisfactory began to grant trustees power to modify or even to release guarantees if by so doing they might better the investment.

Although in recent years guaranteed mortgages have not been a common form of trust investment, and although, if they were, there would have been little occasion to invoke the protection of the guaranty, none the less it is not amiss to incorporate a provision even now in the trust instrument.

Renew or Extend Mortgages

At the present time the mortgage to be amortized on a ten, fifteen, or twenty year basis is much more common and popular than one payable in a lump sum on a specified date. Yet there still are occasions when the trustee prefers to accept in trust a mortgage due in full one year from the date so that, if there should be need to do so, the mortgage might be called at maturity. If, however, the trustee and the mortgagor desired to continue the mortgage in whole or in part after maturity, the trustee should have power to renew or extend the mortgage.

There is another point that should be covered in this provision. Suppose that at the time the mortgage was accepted by the trustee the debt was only fifty, sixty or, at most, seventy-five per cent of the appraised value of the property. Then suppose that, because of general economic conditions or of some major change for the worse in real property values in the community in which the property is located, the re-appraised value of the property became ninety or one hundred per cent of the amount of the mortgage. The trustee, of course, could not make a new loan on any such basis. But under the circumstances can it renew or extend the existing loan? If it forecloses, it may have to take a substantial loss or buy the property itself. A prudent investor probably would renew or extend the loan and try to work it out with the help of the mortgagor. The trustee should have similar power. Modern draftsmen are giving trustees power to renew or extend mortgages even where the security has been impaired and presently is inadequate for a new loan.

Foreclose and Bid on Mortgaged Property

Under the terms of the mortgage or deed of trust the trustee has the power, and it may be under a duty, to foreclose a mortgage in default. But does it have the power to bid on the property at the foreclosure sale? If it does not, the property may go at a nominal price and the trust take a big loss. If it does bid in the property, the trustee may be able to work out the debt and eventually save the trust any loss. Or, the mortgagor in desperation may say to the trustee, "You take the property for the debt." Although a provision may give the trustee power to take over the property for the debt and thus save the time and expense of foreclosure, it is a power that the trustee should not exercise unless it first has the approval of its legal counsel. Courts look very closely at transactions in which the mortgagor surrenders his equity of redemption to the mortgagee. If the facts surrounding the conveyance display oppression or undue influence, equity will set aside the conveyance.[36]

Retain Property Bid in or Taken Over

Suppose the property bid in by the trustee or taken over for the debt would not be an authorized investment for that trust. It would be futile to bid in or take over the property and then have to dispose of it immediately and account to the mortgagor for any surplus. So, coupled with the power to bid in or take over, there should be the power to retain the property even though it is not an otherwise authorized investment for that trust.

The five immediately preceding grants of power, namely, to reduce interest rates, to modify or release guaranties, to renew or extend mortgages, to foreclose and bid in or take over, crept into wills and trust agreements as a direct result of the "Great Depression." During the past quarter century there has been little occasion to exercise any of them except the one about reducing interest rates. Yet, since trusts may run a long time through all the different segments of a long economic cycle, it may be well to continue these grants of power. Having them may be a present help to a trustee in a time of trouble; not having them at such a time may be a terrible handicap.

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36. Peugh v. Davis, 96 U.S. 332 (1878); Cassem v. Heustis, 201 Ill. 208, 66 N.E. 283 (1903); Reich v. Cochran, 213 N.Y. 416, 107 N.E. 1029 (1915).

Insure Property

In the United States the prudent-man rule applies to insurance on trust property. A trustee is under a duty to carry the kinds and amounts of insurance coverage that a prudent man would carry on similar property under similar circumstances.[37] In England and Wales, on the contrary, under the Trustee Act of 1925,[38] the trustee *may* insure against loss by fire up to three fourths of the value of the property.

Since the prudent-man rule does apply to insurance, it would seem unnecessary to have an insurance provision, and it probably would but for two considerations. First, public liability insurance really is for the protection of the trustee. Why should the trust pay premiums on that kind of insurance? Because, if it did not, the trustee would, properly, add the cost of the insurance to its compensation so that in the long run the result would be the same. Second, in a mutual insurance company, the members of the company insure one another's property. Why should a trustee insure other people's property in return for their insuring its property? Because many of the mutual companies have as low or lower assessments as the stock companies and equally good records of service. Prudent men insure their property in mutual companies, as well as stock companies. Trustees should have the same power.

Collect All Kinds of Income

One of the inherent powers of a trustee is to collect, from all the trust property, not only principal, but all kinds of income as well, including rents, interest, dividends, and profits.[39] Why lengthen the already long list of administrative powers by giving the trustee express power to collect? Only to put to rest any question that ever may be raised by anyone—and, given time, someone will raise it—about the power of the trustee to receive and give a receipt for a given kind of property.

Compromise Claims

The common law gives a trustee power, within reason, to compromise, adjust, arbitrate, sue on or defend, and even to abandon claims.[40] But prudent men, dealing with difficult debtors and creditors, try not to throw

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37. Willis v. Hendry, 127 Conn. 653, 20 A.2d 375 (1940); Murray v. Wiley, 180 Ore. 257, 176 P.2d 243 (1947).

38. 15 Geo. 5, c. 19, § 19(1) (1925).

39. Cf. Dyer v. Riley, 51 N.J. Eq. 124, 26 Atl. 327 (Ch. 1893); Herr v. United States Cas. Co., 347 Pa. 148, 31 A.2d 533 (1943).

40. Redmond v. Commerce Trust Co., 144 F.2d 140 (8th Cir. 1944); Kinion v. Riley, 310 Mass. 338, 37 N.E.2d 984 (1941); Suffolk County Nat'l Bank v. Licht, 256 App. Div. 1080, 11 N.Y.S.2d 124 (2d Dep't 1939); Nunner v. Erickson, 151 Ore. 575, 51 P.2d 839 (1935).

good money after bad through litigation. Trustees should have the power to do what prudent men do under similar circumstances. Often it gives a trustee a trading advantage to be able to point out in the instrument its express power to do these things. It puts to rest any question about the existence of the power.

Employ and Compensate Agents and Other Representatives

A trustee has the common-law power to employ and compensate agents and other representatives to do for it what it is not able, nor reasonably can be expected, to do itself. Yet, when an item of expense for the employment of an agent or other representative, including lawyers, to do these things appears in the account, some beneficiary is likely to ask why the trustee did not do those things itself and save the trust that expense. Then it is that the trustee can point to the provision in the instrument and remind the person raising the question that the settlor or testator himself realized that there might be need for such employment in the course of the administration of the trust. Among the agents and other representatives usually specified are: accountants, brokers, attorneys at law, attorneys in fact, realtors, rental agents, and tax specialists.

Hold Property of Two or More Trusts Undivided

Sometimes, instead of creating a single family trust for his wife and children, a man will create a separate trust for each. If the estate is of modest size or consists of undivided interests in real property, it may be overly expensive and troublesome to keep each of the trusts separate, administratively, from the others. No additional risk will be taken by giving the trustee power to carry the trusts undivided and to show the respective shares on the books.

If the trust is to continue throughout two generations or more, the provision should state that the holding of the property undivided shall not postpone the vesting of the respective interests. Otherwise, there might be a violation of the rule against perpetuities.[41]

Establish and Maintain Reserves

A trustee has the common-law power to establish and maintain reserves for the equalization of payments to beneficiaries and perhaps for some other purposes.[42] But where nothing is said in the instrument about reserves, an importunate beneficiary may hound the trustee into paying out all the income as it is received and run the risk of having subsequent

41. E.g., N.Y. Real Prop. Law §§ 42-43; N.Y. Pers. Prop. Law § 11.

42. Cf. Stempel v. Middletown Trust Co., 127 Conn. 206, 15 A.2d 305 (1940); Shirk v. Walker, 298 Mass. 251, 10 N.E.2d 192 (1937).

income payments drastically reduced, or even halted for a time in order to pay the necessary expenses chargeable to income.

It promotes good trust administration to grant the trustee power to establish and maintain reserves not only for equalization of payments but also for the payment of taxes, assessments, insurance premiums, repairs, incidental improvements, depreciation, obsolescence, and the maintenance of buildings and other tangible property.

Distribute in Cash or Kind

A trust usually consists of many kinds of property, such as stocks, bonds, notes, mortgages, real property, and the like. One of the cardinal principles of trusteeship is that the trustee must be absolutely impartial as between or among beneficiaries.[43] When the time comes for the termination of the trust and distribution of the property, some of the beneficiaries may want certain property in the trust, and two or more of them may want the same property, while still others may want their share in cash. It may be at a time in the economy when to sell trust property and convert it into cash for distribution would be a tragic loss to the beneficiaries. Then it is that the express power to distribute in cash or kind and the power to determine values enables the trustee to treat the beneficiaries with impartiality and yet, in a measure, to respect their preferences in the distribution.

Apportion or Allocate Receipts and Expenses

One of the most vexatious problems of trust administration is whether to allocate a given receipt to income or principal, or to apportion it between the two. The National Conference of Commissioners on Uniform State Laws tackled this problem and in 1931 came forth with the Uniform Principal and Income Act. This act, which has been adopted with some variations in twenty states and parts of which have been adopted in four other states,[44] has served an admirable purpose. But, in the nature of things, no uniform act can take into account all the variations with respect to allocation or apportionment nor are the wishes of settlors or testators uniform with respect to the matter. So the Uniform Act, useful as it is, has not done away with the need for a provision in the instrument giving the trustee discretion in allocation or apportionment.

Rely upon Evidence

In the transaction of its business a trustee must employ and rely upon the same media of communication as any person does in the transaction

43. White v. MacQueen, 360 Ill. 236, 195 N.E. 832 (1935); In re Hart's Estate, 203 Pa. 480, 53 Atl. 364 (1902).

44. 2 P-H Wills, Estates and Trusts ¶ 3945 (1950).

of his business, that is, letters, telegrams, and telephone conversations as well as affidavits and certificates. If it had to insist upon, and wait for, the "best evidence" in every case, the wheels of trust administration could come to a stop. Therefore, in the interest of practical, commonsense administration, a trustee should have power to rely and act upon any medium of communication reasonably regarded by it as genuine and, in the absence of any negligence on its part, to be protected in so doing.

Furthermore, where a trust is to terminate or change upon the happening of a specified event—as the remarriage of a beneficiary in a distant state—the trustee, in the complete absence of negligence on its part, should not be liable for continuing the trust and the payments thereunder until it receives notice of the event terminating or changing the trust.

Conclusion

The significance of all this remarkable expansion of the powers of trustees in our generation is that property owners and their advisers, both legal and business, realizing the utter impossibility of foreseeing and providing for the changing needs of beneficiaries and the requirements of good property management perhaps a generation hence, after using extreme care in the selection of their trustees are giving them the powers of the prudent man under similar circumstances to meet those needs and requirements. What else, in reason, can they do?