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THE PROBLEM OF SELECTING AND DRAFTING AN INVESTMENT CLAUSE FOR A TRUST

I. INTRODUCTION

The benefits which the income beneficiary and remainderman ultimately derive from a trust depend primarily, notwithstanding the trustee's expertise, upon the investment powers which the trustee has been given by the settlor. In selecting these investment powers to be conferred by the trust instrument, the settlor and his lawyer must consider two familiar problems.

The first problem is to determine the type of investment power to give the trustee which will be most beneficial to both the income beneficiary and remainderman, not only for today, but for the duration of the trust. If the trustee is given uncontrolled discretion in investing the trust estate, the corpus of the trust may be jeopardized by speculative or imprudent investments.¹ On the other hand, if the trust investment power is restrictive the beneficiaries and remaindermen may be harmed by the trustee's inability to make proper investments in light of changing needs of the beneficiaries and economic fluctuations. Courts usually require that the trustee follow the investment directions contained in the trust instrument regardless of whether they are actually in the best interests of the income beneficiary and remainderman.²

The second problem is to draft the trust investment provision to grant the trustee clearly and unambiguously the investment powers intended by the settlor. If the investment provision is ambiguous, the trustee will probably interpret it conservatively, thereby depriving the beneficiaries of the maximum benefits which they may have received from the trust had the investment clause been clear.

II. TYPES OF INVESTMENT POWERS

There are three general types of investment powers which a

¹ In the Matter of Estate of Knowler, 121 Misc. 208, 200 N.Y. Supp. 777 (Surr. Ct. 1923), where the will provided that the trustee should not be confined to legal investments, that he should be at liberty to invest in such stocks, bonds, or other securities as he might deem proper, and that he should not be liable for any loss unless occasioned by his actual fraud. The estate sustained large losses on the stocks and bonds of railroad and traction companies. The court held that the trustee was not liable for the losses, saying that the evidence disclosed improvidence, lack of prudence and negligence, but not actual fraud.

² See *In re Trust of McDonough*, 252 Iowa 870, 109 N.W.2d 29 (1961).

trustee may be given:³ (1) he may be authorized to invest in securities authorized by the "legal list" statute; (2) he may be limited to certain named securities or types of securities; (3) he may be given full investment powers.

In selecting an investment power to give the trustee, the settlor must consider various factors.⁴ One of the most important, however, and the one which will be discussed in this article, is the effect of the investment powers on the income beneficiary and remainderman.

A. THE LEGAL LIST

Prior to 1902, all states imposed upon the fiduciary the basic requirements of prudence, good faith, and the exercise of sound discretion in the selection of trust investments. However, two divergent lines of authority characterized the definition of "prudence."⁵ Massachusetts and the courts adopting the "Massachusetts rule" followed the standard of "prudence" laid down by Judge Putnam in *Harvard College v. Armory*.⁶ Under this standard, "mortgages, government bonds, industrial securities, and any other investments regarded by the reasonable, prudent man as sound and without the stigma of dangerous speculation were regularly approved" investments.⁷

In the ensuing thirty-nine years, however, the development of a rich and growing country brought not only periods of great

³ See Comment, 58 YALE L.J. 288 (1949).

⁴ Some of the factors to be considered are: the purposes of the trust, the age and relationship of the life beneficiary and remainderman to the donor, the amount of income the life beneficiary receives outside of the trust, and the mode of living to which the life beneficiary is accustomed.

⁵ States followed the definition of "prudence" as set out in *Harvard College v. Armory*, 26 Mass. (9 Pick.) 446 (1830), or the definition of "prudence" as set out in *King v. Talbot*, 40 N.Y. 76 (1869). In 1902, however, New York passed its first "legal list" statute. See Torrance, *50 Years of Trust Investment*, 93 TRUSTS & ESTATES 250, 251 (1954).

⁶ 26 Mass. (9 Pick.) 446, 461 (1830). The court stated: "All that can be required of a trustee to invest, is, that he shall conduct himself faithfully and exercise a sound discretion. He is to observe how men of prudence, discretion and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital to be invested." See also Comment, 49 YALE L.J. 891, 892 (1940).

⁷ Comment, 49 YALE L.J. 891, 892 n.14 (1940); see also Comment, 14 B.U.L. REV. 88 (1934).

prosperity, but also periods of financial depression. The mixed experiences of investors during this period of unregulated enterprises and meager investment information led to decisions such as *King v. Talbot*,⁸ and suggested a need for some objective standards for trust investments.⁹ In *King*, the court applied the same flexible rule of "prudence" as used in the *Harvard College* case. However, in the *King* case, the court restricted the scope of a prudent trustee's discretion by declaring that all industrial stocks and bonds were imprudent, speculative investments for fiduciaries.¹⁰ In applying this strict definition of "prudence," courts imposed "legal lists" by judicial stare decisis, and trustees were often surcharged under circumstances varying but slightly from the cases upon which they had relied.¹¹ In view of such uncertainty, legislative action in many states became imperative,¹² and statutory "legal lists" were established to promote protection for the trust corpus,¹³ a steady income to the beneficiary,¹⁴ and certainty for the trustee.¹⁵

In 1933, the Nebraska Legislature established a list of legal in-

⁸ 40 N.Y. 76 (1869).

⁹ Torrance, *supra* note 5, at 252.

¹⁰ *King v. Talbot*, 40 N.Y. 76, 89 (1869). "If it be said, that this reasoning assumes, that it is certainly practicable so to keep the fund, that it shall be productive, and yet safe against any contingency of loss; whereas, in fact, if loaned upon bond and mortgage, or upon securities of any description, losses from insolvency and depreciation may, and often do happen, notwithstanding due and proper care and caution is observed in their selection. Not at all. It assumes and insists, that the trustee *shall not* place the fund where its safety and due return to their hands will depend upon the success of the business in which it is adventured, or the skill and honesty of other parties entrusted with its conduct; and it is in the selection of the securities for its safety and actual return, that there is scope for discretion and prudence, which, if exercised in good faith, constitute due performance of the duty of the trustee." (Emphasis added.)

¹¹ Compare Appeal of Dickinson, 152 Mass. 184, 25 N.E. 99 (1890), with *Creed v. McAleer*, 275 Mass. 353, 175 N.E. 761 (1931).

¹² By 1936, only five states other than Massachusetts had not adopted some form of "legal list" investment statute. See Comment, 15 ALA. L. REV. 79, 89 n.55 (1962). For a complete list of all trust investment statutes, see BOGERT, TRUSTS & TRUSTEES §§ 615-64 (2d ed. 1960).

¹³ See Torrance, *Legal Background, Trends and Recent Developments in the Investment of Trust Funds*, 17 LAW & CONTEMP. PROB. 128, 134 (1952); Comment, 15 ALA. L. REV. 79, 83 (1962).

¹⁴ See Fingar, *Changing Concepts of Trust Investments*, 96 TRUSTS & ESTATES 864 (1957); Note, 49 HARV. L. REV. 821, 826 (1936); Note, 1 RUTGERS L. REV. 130, 138 (1947).

¹⁵ See Torrance, *supra* note 5, at 252; Comment, 15 ALA. L. REV. 79, 83-84 (1962); Note, 49 HARV. L. REV. 821 (1936).

vestments.¹⁶ Under this act, trustees were authorized to invest in United States Government bonds, bonds of any city or political subdivision in Nebraska, and bonds of cities of over 200,000 population in the United States. Since 1933, the Nebraska "legal list" has been amended nine times.¹⁷

On first reading, the Nebraska "legal list" seems to present an imposing array of authorized securities which gives a beneficiary a high yield of income, protects the corpus of the trust, and grants to a trustee sufficient investment latitude. It is submitted, however, that the Nebraska "legal list" may be detrimental to the income beneficiary and remainderman for the reasons discussed below.

(1) *The Legal List Tends to Freeze the Assets of the Trust Estate in Their Original Investments.*

The Nebraska "legal list" authorizes trustees to invest up to forty per cent of the market value of the trust estate in common stocks at the time of the original investment.¹⁸ The statute also permits the trustee to reinvest proceeds from the sale of common stocks back into commons, even though the market value of the common stocks in the portfolio is above the forty per cent limit at the time of the reinvestment.¹⁹ However, if the market value of the common stocks is above the forty per cent limit, the trustee may not invest proceeds of a sale of another type of legal security in common stocks.²⁰ On the other hand, the trustee may be reluctant to sell a common stock and invest the proceeds in an interest-bearing security because, if the market value of the common stock is above forty per cent, the trustee may be unable to reinvest the funds taken from common stocks back into commons at a later date. Thus, the forty per cent provision tends to freeze the assets of the trust estate in their original form.

¹⁶ Neb. Laws c. 64, § 1 (1933).

¹⁷ Neb. Laws c. 68, § 1 (1935); Neb. Laws c. 60, § 1 (1937); Neb. Laws c. 66, § 1 (1943); Neb. Laws c. 56, § 1 (1945); Neb. Laws c. 79, § 1 (1947); Neb. Laws c. 67, § 2 (1953); Neb. Laws c. 82, § 1 (1955); Neb. Laws c. 263, § 9 (1959); and Neb. Laws c. 134, § 1 (1963).

¹⁸ Neb. Laws c. 134, § 1, at 509 (1963): "... *Provided*, that no such fiduciary shall be permitted to invest in excess of forty per cent of the total approximate value of the account, at the time that such investment is made."

¹⁹ Neb. Laws c. 134, § 1 (1963).

²⁰ For example, assume the market value of the common stocks in the portfolio is 50%. A trustee could not sell a government bond and reinvest the proceeds into commons.

Also, because one of the purposes of the "legal list" is to provide a list of prudent investments for the trustee,²¹ the courts' attention to the trust investments is focused primarily on the question of their formal compliance with the statute.²² Investments within the "legal list" are *prima facie* evidence of prudence.²³ Courts require only that a trustee, who invests within the Nebraska "legal list," use that amount of discretion which a reasonable man would employ in choosing investments from within the "legal list."²⁴ Questions of intrinsic soundness of the particular investment in the light of economic conditions, its relation to the other investments in the portfolio and the financial situation of the beneficiaries are relegated to a position of secondary importance in the determination of the prudence of an investment.²⁵ Thus, a trustee could use the required reasonable judgment in originally investing, and then refuse to make alterations in the investments even though subsequent

²¹ See Comment, 49 YALE L.J. 891 (1940): "Although the distinction between prudence and improvidence in the investment market is often obscure, the trustee is obliged at his peril to discover that distinction, and courts, often less qualified as investment experts, constantly assume to do so. In recognition of the problems thus confronting the trustee, and to provide some security from the ever-present danger of surcharge, courts and legislatures early attempted a more definitive classification of permissible trust investments in what were generally known as 'legal lists.' "

²² See Whyte, *Should the Prudent Man Rule for Trust Investments Be Adopted in Wisconsin?*, 1945 WIS. L. REV. 499.

²³ See Note, 46 YALE L.J. 1085, 1086 (1937): "Although investments of trust funds in securities included in such a list [legal lists] does not absolve the trustee from his duty of using reasonable care, it is *prima facie* evidence of prudence, and only in exceptional cases of this sort are trustees surcharged for losses." See also BOGERT, *op. cit. supra* note 12, § 614.

²⁴ *Scully v. Scully*, 162 Neb. 368, 375, 76 N.W.2d 239, 245 (1956). In defining the discretionary duty of care required by a trustee, the court stated: "If discretion is conferred upon the trustee in the exercise of a power, the court will not interfere unless the trustee in exercising or failing to exercise the power acts dishonestly, or with an improper even though not a dishonest motive, or fails to use his judgment, or acts beyond the bounds of a *reasonable judgment*." (Emphasis added.) The court further stated: "The mere fact that, if the discretion had been conferred upon the court, the court would have exercised the power differently is not ordinarily a sufficient reason for interfering with the exercise of power by the trustee." *Ibid.* See also *Reed v. Ringsby*, 156 Neb. 33, 54 N.W.2d 318 (1952); *In re Will of Sullivan*, 144 Neb. 36, 12 N.W.2d 148 (1943); *In re Estate of Lynch*, 136 Neb. 705, 287 N.W. 88 (1939); *In re Estate of Vohland*, 135 Neb. 77, 280 N.W. 241 (1938); *Burnham v. Bennison*, 121 Neb. 291, 236 N.W. 745 (1931).

²⁵ See Note, 1 RUTGERS L. REV. 130, 134 (1947).

fluctuations in the investment market may indicate that a change would be advisable.

(2) *The Legal List Imposes Diversification According to Formula.*

Although the argument for increased diversification has been competently handled in many articles expounding the pros and cons of the "legal list,"²⁶ diversification warrants some mention here because under normal conditions it is classified as a prime element of consideration in any prudent investment policy.²⁷

The purpose of diversification is to spread the inherent risk of loss of investments over a number of different kinds of investments.²⁸ Diversification, however, does not imply investing relative proportions of the trust estate in fixed-income securities and common stocks²⁹—such as the Nebraska "legal list" requires.³⁰ To achieve diversification it is necessary to evaluate investment policies in the light of the circumstances of each trust estate. Further, it is necessary to consider the economic, political, and international trends, together with new discoveries in manufacturing processes, peace-war changes in demand, and economic recessions and infla-

²⁶ See Buek, "Qualified" Trustee Performance Calls for Full Investment Freedom, 99 TRUSTS & ESTATES 194 (1960); Chapman, Fallacies in Trust Investment Policy, 95 TRUSTS & ESTATES 813 (1956); Goodenough, Liberalize Trust Investment Powers, 90 TRUSTS & ESTATES 453 (1951); Jennett, Changing Concepts of Trust Investments, 94 TRUSTS & ESTATES 843 (1955); Torrance, *supra* note 13; Note, 1 RUTGERS L. REV. 130 (1947); Comment, 36 IOWA L. REV. 341 (1951); Comment 52 NW. U.L. REV. 788 (1958); Comment, 18 U. CHI. L. REV. 92 (1951); Comment, 58 YALE L.J. 288 (1949).

²⁷ See BOGERT, *op. cit. supra* note 12, § 612; RESTATEMENT (SECOND), TRUSTS § 228 (1959); 3 SCOTT, TRUSTS § 228 (2d ed. 1956); Dicus, *The Trustee's Dilemma—Retention or Diversification of Investments*, 95 TRUSTS & ESTATES 1130 (1956).

²⁸ See Scully, *Changing Concepts of Trust Investments*, 97 TRUSTS & ESTATES 912 (1958).

²⁹ *Id.* at 918: "Diversification does not mean a precise division at the half-way mark between stocks and bonds or a precise distribution of the various types of securities for each and every trust. The merits of the particular security for the particular objective must be weighed. There is no single yardstick for measuring diversification. In each case a comprehensive analysis of securities suitable for the particular account is required, after which a studied choice may be made of the most favorable investment opportunities in each area best serving the purposes of the account. Expert management is essential in both initial selection and continuing supervision of securities to test their present and future suitability for the trust portfolio."

³⁰ See Neb. Laws c. 134, § 1 (1963).

tions. The trust investment selection requires immediate professional skill, and not the mechanical application of an arbitrary formula drafted by the Nebraska Legislature approximately twenty years ago.

Courts in other jurisdictions have taken judicial notice of a need for diversity in trust investment. States following the Massachusetts prudent man rule have generally held that a trustee is under a duty to diversify investments *per se*,³¹ although the courts have not adopted any arbitrary rule of percentages of the whole fund that may be safely held in one form of security. Courts in jurisdictions which have adopted a *modified prudent man rule* by statute, such as New York,³² have generally held that a trustee has no duty to diversify investments *per se*.³³ However, these jurisdictions have held that if a trustee invests a substantial portion of the trust estate in one security, or type of security, the trustee may be surcharged for failure to exercise the required care, skill, and caution of an ordinarily prudent man.³⁴

³¹ See *First Nat'l Bank v. Hyde*, 363 S.W.2d 647, 654 (Mo. 1963): "Except as otherwise provided by the terms of the trust, the trustee is under a duty to the beneficiary to distribute the risk of loss by a reasonable diversification of investments, unless under the circumstances it is prudent not to do so." See also *Mandel v. Cemetery Bd.*, 185 Cal. App. 2d 583, 8 Cal. Rptr. 342 (Dist. Ct. App. 1960); *Day v. First Trust & Sav. Bank*, 47 Cal. App. 2d 470, 118 P.2d 51 (Dist. Ct. App. 1941); *BOGERT, op. cit. supra* note 12, § 612; *RESTATEMENT (SECOND), TRUSTS* § 228 (1959); 3 *SCOTT, op. cit. supra* note 27, § 228; *Annot.*, 131 A.L.R. 1158 (1941); *Scully, supra* note 28, at nn.9-12.

³² N.Y. PERS. PROP. LAW § 21. A modified prudent man statute is a "legal list" which imposes the additional duty on the trustee to invest within the "legal list" with the care of a prudent man, who, through discretion and intelligence in such matters, is seeking a reasonable income and the preservation of his capital.

³³ See *Matter of Kellogg*, 35 Misc. 2d 541, 230 N.Y.S.2d 836 (Sup. Ct. 1962). In the *Matter of Will of Kilmer*, 18 Misc. 2d 60, 186 N.Y.S.2d 120 (Surr. Ct. 1959), held that the trustee was not under a duty to diversify *per se*, even though over two-thirds of the corpus consisted of nontaxable bonds. See also *In re Nuese's Estate*, 25 N.J. Super. 406, 96 A.2d 298 (Essex County Ct. P. Div. 1953); *In re City Bank Farmers Trust Co.*, 189 Misc. 942, 68 N.Y.S.2d 43 (Sup. Ct. 1947); *In re Beebe's Estate*, 52 N.Y.S.2d 736 (Surr. Ct. 1943); *In the Matter of Estate of Gottschalk*, 167 Misc. 397, 4 N.Y.S.2d 13 (Surr. Ct. 1938). *But cf. President & Directors of Manhattan Co. v. Erlandsen*, 36 N.Y.S.2d 136 (Sup. Ct. 1942). See generally *Annot.*, 131 A.L.R. 1158 (1941).

³⁴ See *In re Ward*, 121 N.J. Eq. 555, 192 Atl. 68 (Prerog. Ct. 1936), where four-fifths of the trust estate was invested in bank securities within a certain locality. The court held the trustee liable for the loss to the trust. The court stated: "[O]ne of the first principles of safe investment is diversity in the type of investment and in the localities upon

No court in Nebraska has decided the issue of diversification. It is submitted, however, that an income beneficiary and remainderman may be protected from lack of diversification of investments if the trustee has full investment powers; whereas, they may not be protected if he is limited to "legals." If the trustee is limited to "legals" all he need do is use reasonable judgment in selecting securities³⁵ which the Nebraska Legislature has already designated as prudent.³⁶ On the other hand, a trustee who is given full investment powers must exercise that degree of care that a prudent man would exercise.³⁷ The securities in which he invests are not prudent per se, as under the "legal list," but rather, they are only prudent if an ordinary prudent man would make such an investment.³⁸ As stated above, courts have held that an ordinary prudent man would not invest a substantial portion of the trust estate in one security or type of security. Thus, it would seem that the income beneficiary and remainderman may have more protection where the trustee has full investment powers than where his investment power is limited to the "legal list."

(3) *The Legal List Fails to Protect the Purchasing Power of the Trust Estate.*

In times of recurring inflation and rising taxes, advocates of equity investments argue that the limitations imposed by the "legal list" on the amount of common stocks in a trust portfolio make it impossible for a trustee to preserve the purchasing power of a trust estate.³⁹ Although courts have been cognizant of this argument, they have failed to take judicial action to preserve the purchasing power of the trust estate.⁴⁰ Legislatures, on the other hand, have

which the securities depend." *Id.* at 562, 192 Atl. at 72. See also *Commercial Trust Co. v. Barnard*, 27 N.J. 332, 142 A.2d 865 (1958); *Cobb v. Gramatan Nat'l Bank & Trust Co.*, 261 App. Div. 1086, 26 N.Y.S.2d 917 (1941); *BOGERT, op. cit. supra* note 12, § 612; *RESTATEMENT (SECOND), TRUSTS* § 228 (1959); 3 *SCOTT, op. cit. supra* note 27, § 228.

³⁵ See cases cited note 24 *supra*.

³⁶ See cases cited notes 21, 22, 23, 25 *supra*.

³⁷ See *First Trust Co. v. Exchange Bank*, 126 Neb. 856, 254 N.W. 569 (1934). See also text accompanying notes 60-69 *infra*.

³⁸ *Ibid.* See also *RESTATEMENT (SECOND), TRUSTS* § 227 (1959); 3 *SCOTT, op. cit. supra* note 27, § 227.

³⁹ This argument is made in *Scully, supra* note 28, at 912. See also *Comment*, 52 *Nw. U.L. Rev.* 788 (1958).

⁴⁰ Courts have given two arguments for rejecting the purchasing power argument. The first argument is centered around the idea that the purposes of the trusts are almost always the production of a moderate income temporarily and the conservation of capital until a future date.

recognized the purchasing power argument and allow trustees to offset inflationary trends by making increased investments in common stocks.⁴¹

Even with legislative action, however, the problem of preserving the purchasing power of the trust estate has not been completely solved.⁴² Bascom H. Torrance⁴³ points out that there is no consistent relationship between commodity prices and stock prices in general.

Instead of any consistent relationship there are some rather notable periods of divergence. The most striking was during the period from 1915 to 1930, which included the rampant bull market of the late 1920's, when stocks rose sharply against a generally stationary trend for commodity prices. It is also interesting to note that stocks failed to follow the sharp rise in wholesale prices which began in 1945 and continued through 1948.⁴⁴

Thus, legislative action which permits the trustee to invest a greater percentage of the trust estate in common stock does not necessarily alleviate the problems of depreciating purchasing power. These problems are products of a moving economy and the only manner in which a trustee can adequately deal with them is by having increased range and flexibility of investment powers.⁴⁵

Investments may rarely, if ever, be made from a speculative point of view. The trustee must keep in mind the selection of a security which will to a satisfactory extent accomplish the main objects of the trust, which usually are the furnishing of a continuous flow of at least moderate income and the guarantee of safety of the principal. The trustee should not invest to increase the capital fund. See BOGERT, *op. cit. supra* note 12, § 612; 3 SCOTT, *op. cit. supra* note 27, § 227. The second reason courts have been reluctant to impose the duty of preserving the purchasing power upon the trustee is that this would burden the court with the duty of determining whether the purchasing power of estate assets at the end of an accounting period were at least equivalent to the purchasing power of such assets at the time they were received. See also Scully, *supra* note 28, at 915.

⁴¹ See BOGERT, *op. cit. supra* note 12, §§ 615-64. See also Neb. Laws c. 66, § 1 (1943); Neb. Laws c. 79, § 1 (1947); Neb. Laws c. 82, § 1 (1955); Neb. Laws c. 134, § 1 (1963).

⁴² The following argument was taken from Torrance, *supra* note 13.

⁴³ Bascom H. Torrance is vice president of the City Bank Farmers Trust Company and the National City Bank of New York. He acts as senior investment officer over trusts and estates. In 1954 he was a member of the executive committee of the Trust Division, New York State Bankers Association.

⁴⁴ See Torrance, *supra* note 13, at 147-48.

⁴⁵ *Id.* at 147.

(4) *Summary—Legal List*

The "legal list" statutes evolved from the New York court's definition of prudent investments for trustees, and at that time, it may be argued that there was a need to restrict the investments of trustees to certain fixed income securities. Today, however, the economic conditions which characterized the latter half of the nineteenth century and the first thirty years of the twentieth century no longer exist.

Today . . . we have abundant evidence that these statutory restrictions can be a hindrance rather than a help. For a time, however, they served a purpose; they were "period pieces," and like other things that outlive their usefulness, they are passing from the scene, after the fashion of the horse car, the hoop skirt, and the bustle.⁴⁶

The "legal list" tends to freeze the assets of the trust in their original investment form, imposes diversification by formula, and fails to preserve the purchasing power of the trust estate. The "legal list" often breeds complacency and provides only a "safe" zone in which the trustee may invest the trust funds regardless of the destructive long term effects on the trust assets.⁴⁷

B. SPECIFIC AUTHORIZATION IN THE TRUST INSTRUMENT TO INVEST IN CERTAIN SECURITIES OR TYPES OF SECURITIES

A settlor may limit the investment powers of the trustee to certain specified securities. For example, a trustee may be directed to limit his investments to United States Government bonds, real estate mortgages, and preferred stocks.

The above type of investment power contains most of the limitations present in the "legal list," without any corresponding advantages.⁴⁸ Most important, however, this type of investment power may, at some future date, be detrimental to the income beneficiary and remainderman, unless the settlor performs the formidable task of foreseeing and anticipating future fluctuations in the investment market.⁴⁹

⁴⁶ Torrance, *supra* note 5, at 252.

⁴⁷ See Comment, 15 ALA. L. REV. 79, 101 (1962).

⁴⁸ Diversification is lacking in both "legal list" and investment in certain securities. However, the "legal list" is usually broader in the scope of its authorized securities than the special investment powers are. Also, the legislature can at some time change the types of authorized securities in the "legal list," whereas courts are very reluctant to permit deviation from the terms of the trust by the trustee.

⁴⁹ *In re Trust of McDonough*, 252 Iowa 870, 109 N.W.2d 29 (1961), where the beneficiary of a testamentary charitable trust brought suit to force the trustee to convert the corpus from farm land to interest-bearing securities in order to receive more income. The application was denied

Courts are generally guided by the terms of the trust instrument⁵⁰ and will allow deviation only where the performance of the terms of the trust is impossible,⁵¹ illegal,⁵² contrary to public policy,⁵³ or where such unanticipated circumstances are present that compliance with the terms of the trust would defeat or substantially impair the accomplishment of its purposes.⁵⁴ This power of the courts to allow deviation, however, is recognized as an extraordinary power which is invoked cautiously and sparingly.⁵⁵ Deviation is not permitted solely to increase the beneficiary's income,⁵⁶ aid one beneficiary at the expense of another,⁵⁷ or merely because

by the trial court on the ground that the wording of the bequest indicated that the lands were to be retained.

- ⁵⁰ Valley Nat'l Bank v. Hartford Acc. & Indem. Co., 60 Ariz. 286, 136 P.2d 458 (1943); Floyd v. Rankin, 86 Cal. 159, 24 Pac. 936 (1890); Stanton v. Wells Fargo Bank & Union Trust Co., 150 Cal. App. 2d 763, 310 P.2d 1010 (Dist. Ct. App. 1957); *In re Huntington's Will*, 210 N.Y.S.2d 441 (Surr. Ct. 1960). See generally 4 POMEROY, *EQUITY JURISPRUDENCE* § 1062 (5th ed. 1941); Scott, *Deviation From the Terms of a Trust*, 44 HARV. L. REV. 1025 (1931); Comment, 47 IOWA L. REV. 803 (1962); Comment, 20 NEB. L. REV. 133 (1941); Comment, 15 WASH. & LEE L. REV. 108 (1958).
- ⁵¹ See St. Louis Union Trust Co. v. Ghio, 240 Mo. App. 1033, 222 S.W.2d 556 (1949); *In the Matter of Estate of Simons*, 16 Misc. 2d 352, 182 N.Y.S.2d 1005 (Surr. Ct. 1958); RESTATEMENT (SECOND), TRUSTS §§ 165, 381 (1959).
- ⁵² See Stout v. Stout, 192 Ky. 504, 233 S.W. 1057 (1921); RESTATEMENT (SECOND), TRUSTS §§ 166, 381 (1959).
- ⁵³ See Colonial Trust Co. v. Brown, 105 Conn. 261, 135 Atl. 555 (1926). See also Scott, *supra* note 50, at 1031-33.
- ⁵⁴ See John A. Creighton Home v. Waltman, 140 Neb. 3, 299 N.W. 261 (1941), where the Nebraska Supreme Court allowed deviation from the terms of the trust because compliance with the terms of the trust in making investments would thwart the purposes of the trust. See also 3 SCOTT, *op. cit. supra* note 27, § 167.
- ⁵⁵ See Russell v. Russell, 109 Conn. 187, 198, 145 Atl. 648, 652 (1929), where the court stated: "[T]he very nature of the authority given trustees under this principle necessarily requires, that it should be most carefully and sparingly used, and it is to be borne in mind that it is the necessity of the situation which brings it into operation, not the mere fact that thereby the estate may be administered in a way which will be more advantageous to its beneficiaries." See also 4 POMEROY, *op. cit. supra* note 50, § 1062(b).
- ⁵⁶ Stanton v. Wells Fargo Bank & Union Trust Co., 150 Cal. App. 2d 763, 310 P.2d 1010 (Dist. Ct. App. 1957); *In re Trust Under Will of Jones*, 221 Minn. 524, 22 N.W.2d 633 (1946); Thomson v. Union Nat'l Bank, 291 S.W.2d 178 (Mo. 1956). See also 2 SCOTT, TRUSTS § 167 (2d ed. 1956).
- ⁵⁷ See *In re Trust Under Will of Cosgrave*, 225 Minn. 443, 31 N.W.2d 20 (1948). See also 2 SCOTT, *op. cit. supra* note 56, § 167; Comment, 20 NEB. L. REV. 133, 134 (1941).

it would be beneficial to the trust.⁵⁸

C. GRANT OF FULL INVESTMENT POWERS

A grant of "full discretion" to the trustee in investing the trust estate is, in most cases, the most beneficial to the income beneficiary and remainderman. It gives the income beneficiary and remainderman a chance to derive benefit from investment according to sound principles of finance, rather than according to a rigid formula. The trustee can select investments according to:⁵⁹ (1) the nature, purpose, and objectives of the trust; (2) the age and relationship of the life beneficiaries to the donor, settlor, or testator; (3) the age and relationship of the remainderman to the donor, settlor, or testator; (4) the degree of dependency of the life beneficiary upon sources of income outside the trust; and (5) the mode of living to which he has been accustomed.

In Nebraska, the duty of care which a trustee must exercise *when given full investment powers* is similar to the duty of care which a trustee must employ under the Massachusetts prudent man rule.⁶⁰ It seems that the only difference in the application of the Nebraska prudent man rule and the Massachusetts prudent man rule is that the trustee in Nebraska has a primary duty of preserving the trust corpus and a secondary duty of providing in-

⁵⁸ See *In re Trust Under Will of Jones*, 221 Minn. 524, 22 N.W.2d 633 (1946); *Thompson v. Union Nat'l Bank*, 291 S.W.2d 178 (Mo. 1956).

⁵⁹ The following elements to be considered in trust investments were taken from *Bardt, Selection of Securities*, 91 TRUSTS & ESTATES 742, 743 (1952).

⁶⁰ Only where the trustee is granted full investment powers has the Nebraska Supreme Court adopted the "prudent man rule." In *First Trust Co. v. Exchange Bank*, 126 Neb. 856, 867-68, 254 N.W. 569, 574 (1934), the court stated: "As a general rule, the measure of care and diligence required of a trustee is such as would be pursued by a man of ordinary prudence and skill in the management of his own estate. . . . He must act honestly and faithfully, in what he believes to be the best interests of the *cestui que trust*. He must exercise sound discretion. He is bound to proceed with diligence in investigating the nature of the proposed investment, and to use such care in deciding as, in general, prudent men of intelligence and integrity in such matters would employ in their own affairs when making a permanent investment in which the primary object is the preservation of the fund, and the secondary one that of obtaining an income therefrom." See also *State ex rel. Ebke v. Board of Educ. Lands & Funds*, 154 Neb. 244, 47 N.W.2d 520 (1951); *In re Estate of Lynch*, 136 Neb. 705, 287 N.W. 88 (1939); *Whaley v. Matthews*, 134 Neb. 875, 280 N.W. 159 (1938); *First Trust Co. v. Carlsen*, 129 Neb. 118, 261 N.W. 333 (1935). Compare the Massachusetts "prudent man rule" as expounded by Judge Putnam in *Harvard College v. Armory*, 26 Mass. (9 Pick.) 446, 461 (1830).

come to the income beneficiary; whereas, under the Massachusetts prudent man rule the trustee has an equal obligation of preserving the corpus and providing income.⁶¹

The specific application of the prudent man rule by the courts has been compiled in excellent annotations and treatises.⁶² Hence, only a broad outline of the duty required of the trustee under the prudent man rule will be attempted here.⁶³

Generally, the duty of exercising that degree of care in investing that an ordinary prudent man would exercise, requires the trustee to: (1) exercise a reasonable degree of *care* in selecting investments;⁶⁴ (2) exercise a reasonable degree of *skill* in making the selection;⁶⁵ and (3) exercise the *caution* which a prudent man

⁶¹ The Nebraska courts, in adopting the "prudent man rule," have expressly declared that the trustee must invest with the primary duty of preserving the corpus, and the secondary duty of providing income. See *John A. Creighton Home v. Waltman*, 140 Neb. 3, 299 N.W. 261 (1941); *First Trust Co. v. Exchange Bank*, 126 Neb. 856, 254 N.W. 569 (1934). On the other hand, trustees investing under the Massachusetts prudent man rule have an equal duty of preserving the corpus and providing income. See *Harvard College v. Armory*, 26 Mass. (9 Pick.) 446, 461 (1830).

⁶² See BOGERT, *TRUSTS & TRUSTEES* § 612 (2d ed. 1960); 3 SCOTT, *TRUSTS* § 227 (2d ed. 1956); SHATTUCK & FARR, *ESTATE PLANNER'S HANDBOOK* 518-45 (2d ed. 1953); Goodenough, *Liberalize Trust Investment Powers*, 90 *TRUSTS & ESTATES* 453 (1951); Lewis, *The Prudent Man Investment Rule*, 35 *ILL. B.J.* 65 (1946); Torrance, *Legal Background, Trends, and Recent Developments in the Investment of Trust Funds*, 17 *LAW & CONTEMP. PROB.* 128 (1952); Torrance, *50 Years of Trust Investment*, 93 *TRUSTS & ESTATES* 250 (1954); Torrance, *New Trust Investment Law—New York Gets Partial Prudent Man Rule*, 89 *TRUSTS & ESTATES* 300 (1950); Comment, 15 *ALA. L. REV.* 79 (1962); Note, 23 *WASH. L. REV.* 78 (1948).

⁶³ The following generalities were taken from BOGERT, *op. cit. supra* note 62, § 612; 3 SCOTT, *op. cit. supra* note 62, § 227.

⁶⁴ Under the requirement of reasonable care, the trustee must make a reasonable investigation as to the safety of the investment and as to the amount of income which will probably be received. The past history of the security must be examined. In making his decision as to the propriety of the investment, a trustee may seek the advice of other prudent men experienced in investing. However, the trustee is not justified in relying wholly upon the advice of others. See 3 SCOTT, *op. cit. supra* note 62, § 227.1.

⁶⁵ The requirement of exercising a reasonable degree of skill employs an external standard—that of a reasonably prudent man. It is no defense to the trustee that he does not possess the necessary degree of skill. Also, if a trustee possesses a higher degree of skill than a reasonably prudent man possesses, then the trustee is judged by this higher degree of skill. See 3 SCOTT, *op. cit. supra* note 62, § 227.2.

would exercise where a primary consideration is the preservation of the fund invested.⁶⁶

The duty to use the care of an ordinary prudent man is absolute, and even though the trustee was honest and well-intentioned, such honesty will not excuse him from exercising the required amount of diligence and prudence.⁶⁷ Generally, the duty of prudence requires the trustee to diversify his investments.⁶⁸ The trustee must take active charge of the estate, which includes making the corpus productive and disposing of unproductive securities.⁶⁹

III. DRAFTING THE INVESTMENT CLAUSE

The problems of drafting an investment clause which will give the trustee the investment powers intended by the settlor are just

⁶⁶ A trustee must be cautious. Scott suggests that the requirement of caution imposes a duty on the trustee to take such care in investing the trust estate as an ordinary prudent man would take "if he were minded to make an investment for the benefit of other people for whom he felt morally bound to provide." 3 SCOTT, *op. cit. supra* note 62, § 227.3. See also BOGERT, *op. cit. supra* note 62, at 413; 3 SCOTT, *op. cit. supra* note 62, § 227.6.

⁶⁷ See *In re Estate of Linch*, 136 Neb. 705, 713, 287 N.W. 88, 93 (1939): "It is well settled that every violation by a trustee of a duty which equity lays upon him, whether wilful and fraudulent, or done through negligence, or arising through mere oversight or forgetfulness, is a breach of trust. The term therefore includes every omission or commission which violates in any manner either of the three great obligations . . . of carrying out the trust according to its terms, of care and diligence in protecting and investing the trust property, and of using perfect good faith." See also *Johnson v. Richards*, 155 Neb. 552, 52 N.W.2d 737 (1952); *Rettinger v. Pierpont*, 145 Neb. 161, 15 N.W.2d 393 (1944); *Whaley v. Matthews*, 134 Neb. 875, 280 N.W. 159 (1938); *First Trust Co. v. Carlsen*, 129 Neb. 118, 261 N.W. 333 (1935).

⁶⁸ See RESTATEMENT (SECOND), TRUSTS § 228 (1959); 3 SCOTT, *op. cit. supra* note 62, § 228. See also Bliss, *Prudence in Investing—1933 and Now*, 101 TRUSTS & ESTATES 482 (1962). Bliss points out that in a recent survey by the American Bankers Association they found that corporate trustees carried approximately sixty-five per cent of the trust estate in common stocks. For more information about the trends of diversification in trust investment, see Clark, *Equities to Debts and Back Again*, 96 TRUSTS & ESTATES 1110 (1957); Driscoll, *Equities on Intrinsic Value*, 89 TRUSTS & ESTATES 318 (1950); Jennett, *Changing Concepts of Trust Investment*, 94 TRUSTS & ESTATES 843 (1955); Miller, *Common Stocks, Taxes and Prices—Protecting Economic Place of Beneficiaries*, 97 TRUSTS & ESTATES 234 (1958); Strong, *The Big Challenge—Equities Permanent Part of Investment Fabric*, 96 TRUSTS & ESTATES 996 (1957).

⁶⁹ See BOGERT, *op. cit. supra* note 62, § 612; 3 SCOTT, *op. cit. supra* note 62, § 227; SHATTUCK & FARR, *op. cit. supra* note 62, at 518-45.

as important as the initial determination of the type of investment powers to be given. Although these problems are present in all jurisdictions, the interpretations and effects of investment clauses differ from state to state because of variations in investment statutes.⁷⁰ Therefore, only the problems of drafting investment clauses which are peculiar to Nebraska will be considered.

A. THE LEGAL LIST

In Nebraska, the donor who wishes to limit investments to the "legal list" need but remain silent. The purpose clause of the Nebraska Trust Investment Statute provides that trustees, guardians, executors, and administrators, having funds for investment, shall invest them in the "legal list" unless otherwise provided by the trust instrument.⁷¹ Thus, if the trust instrument is silent concerning the investment powers of the trustee, the trustee is automatically limited to investments authorized by the "legal list."

B. SPECIAL INVESTMENT POWERS

Drafting an investment clause which gives trustees the power to invest in certain securities is one of the most difficult problems in draftsmanship. If, however, the donor wishes to give the trustee special powers of investment, the easiest method is to add or subtract from the "legal list."⁷² For instance, the donor may direct a trustee to "invest in corporate revenue bonds and such securities as may be legal for trustees."⁷³

A major problem inherent in granting a trustee special investment powers is whether the testator's authorization to invest in certain securities is permissive or mandatory.⁷⁴ If permissive,

⁷⁰ See 3 SCOTT, *op. cit. supra* note 62, § 227.14, at 1701: "It is in each case a question of interpretation whether or not the terms of the trust enlarge the scope of permissible investments and if so to what extent. This depends upon how broad the scope of proper trust investments is in the particular state in the absence of a provision in the trust instrument and upon the breadth of the language used in the instrument."

⁷¹ See Neb. Laws c. 134, § 1 (1963).

⁷² Comment, 58 YALE L.J. 288, 294 (1949).

⁷³ This investment provision is purely hypothetical for purposes of illustration.

⁷⁴ *In re Shafer's Will*, 69 N.Y.S.2d 446 (Surr. Ct. 1947), held that an investment power which "authorized" a trustee to invest in certain securities was permissive. *But cf.* *President & Directors of Manhattan Co. v. Erlandsen*, 36 N.Y.S.2d 136 (Sup. Ct. 1942), where it was held that an investment provision which "authorized" investments in certain securities or in legal securities was mandatory and the trustee was able only to invest in the specifically named securities.

the trustee is not limited to the investments specifically mentioned.⁷⁵ If, however, the investment provision is mandatory, the trustee is limited to those securities enumerated.⁷⁶ Generally, courts have held the investment provision mandatory where it announces, "I *direct* my executors and trustees to convert all my property into first class interest bearing real estate mortgage securities and keep the same so invested."⁷⁷ Also, where a will states that a trustee *shall* invest in certain securities courts would probably hold the investment provision mandatory.⁷⁸ However, where a will announces that a trustee *may* invest, or a trustee is *authorized* to invest, the courts will probably hold these provisions permissive.⁷⁹

Trust provisions which purport to list certain securities as authorized investments may run into difficulty with the rule of *ejusdem generis*, i.e., where certain things are enumerated, and a more general description is coupled with the enumeration, the general expression covers only things which are *ejusdem generis*, that is, of the like kind with those enumerated.⁸⁰ This rule, however, is merely a rule of construction raising a presumption that the investments authorized by the general clause were intended by the settlor to be of the like kind and quality as the securities specifically authorized.⁸¹ Where the more general clause is devoid of meaning if restricted by the rule of *ejusdem generis*, and is given a meaning and purpose if allowed its normal interpretation, the courts will usually not apply the rule.⁸²

⁷⁵ See *In re Shafer's Will*, 69 N.Y.S.2d 446 (Surr. Ct. 1947).

⁷⁶ See *President & Directors of Manhattan Co. v. Erlandsen*, 36 N.Y.S.2d 136 (Sup. Ct. 1942).

⁷⁷ See *In re Nola's Estate*, 333 Pa. 106, 3 A.2d 326 (1939), which held that "I order and direct" was mandatory. See also *In re Shaw's Estate*, 122 N.J. Eq. 536, 195 Atl. 525 (Prerog. Ct. 1937); *In the Matter of Estate of Irwin*, 59 Misc. 143, 112 N.Y. Supp. 205 (Surr. Ct. 1908); *In re Mendel's Will*, 164 Wis. 136, 159 N.W. 806 (1916).

⁷⁸ See cases cited note 77 *supra*.

⁷⁹ *Falls v. Carruthers*, 20 Tenn. App. 681, 103 S.W.2d 605 (1936), held that an investment clause which gave the trustee power to invest as he *may* see fit was permissive. See also *In the Matter of Estate of Hamersley*, 152 Misc. 903, 274 N.Y. Supp. 303 (Surr. Ct. 1934). *But cf. In re Bruen's Estate*, 83 N.Y.S.2d 197 (Sup. Ct. 1948).

⁸⁰ For example, see *In re Sanders' Estate*, 304 Ill. App. 57, 25 N.E.2d 923 (1940). See also Annot., 78 A.L.R.2d 12, 21 (1961).

⁸¹ See Annot., 78 A.L.R.2d 12, 21 (1961).

⁸² See *City Bank Farmers Trust Co. v. Lewis*, 122 Conn. 384, 189 Atl. 178 (1937); *In the Matter of Trust of Friberg*, 199 Misc. 593, 100 N.Y.S.2d 343 (Sup. Ct. 1950); *Irving Trust Co. v. Natica*, 157 Misc. 32, 284 N.Y. Supp. 343 (Sup. Ct. 1935).

C. FULL POWERS

In drafting a trust instrument in which the donor wishes to give the trustee full powers of investment, the donor should be aware of the fact that the Nebraska Trust Investment Statute will limit the trustee to "legals" unless otherwise provided in the trust instrument.⁸³ Also, a clause in a will or trust instrument which is relied upon as authorizing a trustee to make nonlegal investments, will be strictly construed by the courts against the existence of such a power.⁸⁴ Consequently, any intention of the testator or settlor to authorize a trustee to go beyond the ordinary limits imposed by law upon fiduciaries must be expressed clearly and unambiguously.⁸⁵

A good illustration of an investment clause which gives the trustee full investment powers is: The trustee is hereby expressly authorized and empowered to change, invest and reinvest in such stocks (of any classification), bonds, common stock funds, other securities, and other property, whether or not of the same kind, without regard to the proportion such property or property of a similar character so held may bear to the entire amount held, as in their discretion may determine, *and whether or not the same be authorized by law for the investment of trust funds.*⁸⁶

The problems of construction of "full power" clauses arise where the trust instrument does not clearly state that the trustee may invest in nonlegals. Courts in other jurisdictions have generally found that where a trustee is authorized to invest "in his discretion," the trustee is not limited to "legals."⁸⁷ Phrases such as

⁸³ See the Purpose Clause in Neb. Laws c. 134, § 1 (1963).

⁸⁴ See *In re New Rochelle Trust Co.*, 50 N.Y.S.2d 602 (Sup. Ct. 1944); *Hale Estate*, 347 Pa. 177, 180, 32 A.2d 20, 21 (1943): "The presumption is against the existence of such power [the power to invest in nonlegals], and all doubts are resolved against the party asserting it." See also *Title Guar. & Trust Co. v. Bedford*, 125 Conn. 349, 5 A.2d 852 (1939); *Equitable Trust Co. v. Snader*, 20 Del. Ch. 278, 174 Atl. 132 (Ch. Ct. 1934); *Clark v. Clark*, 167 Ga. 1, 144 S.E. 787 (1928); *Taylor's Estate*, 277 Pa. 518, 121 Atl. 310 (1923); *Welch v. Welch*, 235 Wis. 282, 290 N.W. 758 (1940).

⁸⁵ See *In the Matter of Estate of Whitmore*, 172 Misc. 277, 15 N.Y.S.2d 379 (Surr. Ct. 1939).

⁸⁶ The substance of this investment provision was taken from 12 AM. JUR. *Legal Forms* § 1543 (1955).

⁸⁷ See, e.g., *Merchants' Loan & Trust Co. v. Northern Trust Co.*, 250 Ill. 86, 95 N.E. 59 (1911); *In the Matter of Estate of Libman*, 26 Misc. 2d 854, 203 N.Y.S.2d 559 (Surr. Ct. 1960); *In the Matter of Wind*, 1 Misc. 2d 260, 145 N.Y.S.2d 188 (Surr. Ct. 1955); *In the Matter of Estate of Maloney*, 120 Misc. 456, 198 N.Y. Supp. 788 (Surr. Ct. 1923);

"to invest as he may think best,"⁸⁸ "as may be advised,"⁸⁹ or "for the best interests of my estate,"⁹⁰ have generally been held to be synonymous with a general grant of discretion; such phrases indicating a "freedom of choice" rather than a limitation to "legals."⁹¹

Carr Estate, 355 Pa. 438, 50 A.2d 330 (1947). *But cf.* Clark v. Clark, 167 Ga. 1, 144 S.E. 787 (1928), where "in their discretion" did not authorize investments in nonlegals.

⁸⁸ See, e.g., Arnette v. Watson, 203 Iowa 552, 213 N.W. 270 (1927); In the Matter of Life's Fresh Air Fund, 9 Misc. 2d 1026, 171 N.Y.S.2d 370, 371 (Sup. Ct. 1958) ("as to them seem best" authorized trustee to invest in nonlegal securities); Guaranty Trust Co. v. Leach, 168 Misc. 526, 5 N.Y.S.2d 628 (Sup. Ct. 1938); In the Matter of Estate of Das, 24 Misc. 2d 40, 202 N.Y.S.2d 605 (Surr. Ct. 1960); In the Matter of Will of Jeffress, 198 Misc. 249, 97 N.Y.S.2d 132 (Surr. Ct. 1950); *In re Ball's Will*, 24 N.Y.S.2d 432, 435 (Surr. Ct. 1940) (trustee not limited to "legals" when authorized "to invest the proceeds of all such sales and exchanges in any property it thinks best"); In the Matter of Estate of Wilkes, 172 Misc. 623, 15 N.Y.S.2d 908 (Surr. Ct. 1939); In the Matter of Estate of Clark, 165 Misc. 801, 1 N.Y.S.2d 629 (Surr. Ct. 1938); In the Matter of Estate of Boulware, 144 Misc. 235, 258 N.Y. Supp. 522 (Surr. Ct. 1932); In the Matter of Estate of Storts, 142 Misc. 54, 253 N.Y. Supp. 834 (Surr. Ct. 1931); Willis v. Braucher, 79 Ohio St. 290, 87 N.E. 185 (1909); Detre's Estate, 273 Pa. 341, 117 Atl. 54 (1922); Hart's Estate, 203 Pa. 480, 53 Atl. 364 (1902); Falls v. Caruthers, 20 Tenn. App. 681, 103 S.W.2d 605 (1936). *But cf.* United States Trust Co. v. Oxnard, 66 N.Y.S.2d 716 (Sup. Ct. 1946). See generally Annot., 78 A.L.R.2d 7, 25 (1961).

⁸⁹ See, e.g., In the Matter of Free, 4 Misc. 2d 463, 148 N.Y.S.2d 884 (Surr. Ct. 1956); *In re Doughty's Will*, 125 N.Y.S.2d 317 (Surr. Ct. 1953). See also Annot., 78 A.L.R.2d 7, 27 (1961).

⁹⁰ See, e.g., In the Matter of Estate of Voeth, 11 Misc. 2d 641, 173 N.Y.S.2d 113 (Surr. Ct. 1958) ("for the best interests of my estate" authorized investments in nonlegals); *In re Sullivan's Will*, 123 N.Y.S.2d 159 (Surr. Ct. 1953); *In re Brittain's Estate*, 48 N.Y.S.2d 931 (Surr. Ct. 1944) (investments in nonlegals authorized by "in such manner as to them shall appear advantageous"); In the Matter of Estate of Wilmerding, 135 Misc. 674, 238 N.Y. Supp. 375 (Surr. Ct. 1929); In the Matter of Will of Leavitt, 135 Misc. 387, 238 N.Y. Supp. 109 (Surr. Ct. 1929); In the Matter of McDowell, 102 Misc. 275, 169 N.Y. Supp. 853 (Surr. Ct. 1918). *But cf.* Mobley v. Phinizz, 42 Ga. App. 33, 155 S.E. 73 (1930). See also Annot., 78 A.L.R.2d 7, 28 (1961).

⁹¹ See In the Matter of Jeffress, 198 Misc. 249, 97 N.Y.S.2d 132 (Surr. Ct. 1950), where the court said that such words as "seem best" or words of like import connote a "freedom of choice" rather than restriction of investments to "legals." See also In the Matter of Life's Fresh Air Fund, 9 Misc. 2d 1026, 171 N.Y.S.2d 370 (Sup. Ct. 1958); In the Matter of Voeth, 11 Misc. 2d 641, 173 N.Y.S.2d 113 (Surr. Ct. 1958); In the Matter of Free, 4 Misc. 2d 463, 148 N.Y.S.2d 884 (Surr. Ct. 1956); *In re Sullivan's Will*, 123 N.Y.S.2d 159 (Surr. Ct. 1953); In the Matter of McDowell, 102 Misc. 275, 169 N.Y. Supp. 853 (Surr. Ct. 1918); Willis v. Braucher, 79 Ohio St. 290, 87 N.E. 185 (1909).

However, investment clauses giving a trustee the power to invest, "as if the trust fund was the trustee's own property,"⁹² or "to exercise the like absolute authority and discretion in making and changing any investment as the grantor personally could exercise,"⁹³ or "to invest,"⁹⁴ have been held by the majority of the courts not to authorize the investment in nonlegals by a trustee.

It must be remembered, however, that even though the words of an investment clause indicate a "freedom of choice" rather than a limitation to "legals," courts, in interpreting these investment clauses, will look beyond the words of the clause and determine the intention of the settlor.⁹⁵ Thus, if a trustee is confronted with an ambiguous investment clause, he must look to the intention of the settlor as found by employing established canons of construction,⁹⁶ rather than rely entirely on the words of the investment clause.⁹⁷ If the trustee is unable to find a *clear expression* of the donor's intention, then it is recommended that the trustee either adopt a very conservative investment policy which is clearly authorized by the trust instrument, or ask a court for a judicial construction of the investment provision.

IV. CONCLUSION

In drafting a trust instrument, it must be remembered that the benefits derived from the trust by the income beneficiary and remainderman will depend upon the type of investment power which the trustee receives. If the trustee is limited to the "legal list" or by special investment powers, the income beneficiary and

⁹² See, e.g., *In re Staudinger's Will*, 112 N.Y.S.2d 100 (Surr. Ct. 1952).

⁹³ See, e.g., *In the Matter of Will of Flagg*, 192 Misc. 397, 81 N.Y.S.2d 514 (Surr. Ct. 1948); *In the Matter of Estate of Toel*, 180 Misc. 447, 39 N.Y.S.2d 898 (Surr. Ct. 1943).

⁹⁴ See *Clark v. Beers*, 61 Conn. 87, 23 Atl. 717 (1891); *Equitable Trust Co. v. Snader*, 20 Del. Ch. 278, 174 Atl. 132 (Ch. Ct. 1934).

⁹⁵ See 2 SCOTT, TRUSTS § 164.1 (2d ed. 1956).

⁹⁶ See *County of Holt v. Gallagher*, 156 Neb. 457, 459, 56 N.W.2d 621, 623 (1953): "General rules of construction of written instruments apply to the construction of trust instruments, whether they are contracts, deeds, or wills. The cardinal rule of construction is, of course, to determine the intention of the settlor"

⁹⁷ See *Hoffman v. McGinnes*, 277 F.2d 598, 602 (3d Cir. 1960); *Hoge v. Hoge*, 17 Ill. 2d 209, 161 N.E.2d 117 (1959); *Weishaar v. Burton*, 132 Ind. App. 597, 179 N.E.2d 211 (1962); *In the Matter of Estate of Spross*, 37 Misc. 2d 581, 236 N.Y.S.2d 666 (Surr. Ct. 1963); *Lloyd v. Campbell*, 23 Ohio Op. 2d 329, 189 N.E.2d 660 (P. Ct. 1963); *Clark v. Clark*, 411 Pa. 251, 191 A.2d 417 (1963).

remainderman will fail to realize the benefits they may have received had the trustee been given full investment powers. The trustee who is limited to "legals" must exercise only reasonable care in making investments. Theoretically, he could invest the trust estate in legal securities which have been declared prudent by the legislature, and thereafter remain indifferent to the changing needs of the beneficiaries and economic fluctuations. However, the trustee who has full investment powers must exercise that degree of care which a prudent man of intelligence and integrity would exercise. He has a continuing duty to the trust to take active charge of the estate, making corpus productive and disposing of unproductive securities. Given such full investment power, he is able to more readily effectuate the purposes of the trust.

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