Wyoming's Uniform Trustee's Powers Act: A Help to the Knowledgable Draftsman, a Trap for the Unwary

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WYOMING'S UNIFORM TRUSTEE'S POWERS ACT: A HELP TO THE KNOWLEDGABLE DRAFTSMAN, A TRAP FOR THE UNWARY

The trustee, at common law, had no powers solely by virtue of his office.[1] His only powers were those which were granted to him expressly or impliedly by the terms of the trust instrument.[2] The implied powers are those that are necessary and appropriate for the carrying out of the trust's purpose and are not expressly forbidden by the terms of the trust instrument.[3] If for some reason, a power that was necessary for the administration of the trust was omitted from the instrument, the trustee had to seek judicial approval before he could exercise such power.[4] To avoid such problems draftsmen had to have a solid background in archaic rules which made little sense in the mid-twentieth century, as well as an exceptional ability to foresee problems in the future.[5] To complicate matters further, courts have tended to narrowly construe the powers granted to the trustee.[6]

Perhaps the reason for these strict rules is that the trustee is a fiduciary of the highest character and consequently the potential for him to cause harm is very great. The fact is, that today trusts are generally created for the investment and active management of a fund. The modern trust has greatly changed in both purpose and character from that of its forebearers. In the 18th century the purpose of the trust was mainly to keep family landholdings intact, and thus, the trustee's role was passive.[7] The modern trust is often made up of securities which require constant attention by the trustee so that maximum economic benefit is achieved, both in terms of safety and yield. Also, a desire for tax benefits has resulted in the use of discretionary powers to a degree unprecedented in the previous centuries.[8]

Consequently, the settlor, or the creator of the trust, intends the trustee to have all powers needed for efficient and

1. Haskell, *Some Problems With the Uniform Trustees' Powers Act*, 32 LAW AND CONTEMPORARY PROBLEMS, 168, 169 (1967).
2. Fratcher, *Trustees' Powers Legislation*, 37 N. Y. UNIV. L. REV., 627 (1962).
3. RESTATEMENT (SECOND) OF TRUSTS, § 186 (1959).
4. Note, *Utah's Trustees' Powers Provisions*, 1977 UTAH L. REV. 265 (1977).
5. Fratcher, *supra* note 5, at 627.
6. Horowitz, *Uniform Trustees' Powers Act*, 41 WASH. L. REV. 1, 2 (1966).
7. *Id.* at 1-2.
8. Hallgring, *The Uniform Trustees' Powers Act and the Basic Principles of Fiduciary Responsibility*, 41 WASH. L. REV. 801, 823 (1966).

economical management.[9] The need for more skillful management of the trust corpus has also resulted in a change in the character of the trustee. The trusted friend acting as a fiduciary has given way, in many instances, to a corporate trustee, such as a trust department of a bank, that has the skill and manpower to properly handle the estate.

In order to accomplish the results desired in using a modern trust, revisions in the law as it had developed in the courts was needed.[10] One of the first really successful statutory modifications was the enactment of the "prudent man" rule for investments. This rule broadened the list of eligible investments the trustee could make.[11] It enabled the trustee to purchase corporate stocks and bonds, investments which had previously been forbidden in some states unless authorized by the terms of the trust.[12] A second, and somewhat more sweeping revision, is represented by the Uniform Trustees' Powers Act, enacted in Wyoming in 1965.[13]

The act liberalizes the strict rules of the common law, by giving the trustee power to perform every act a prudent man would perform in carrying out the purposes of the trust. The act further grants specific powers which had not existed at common law absent express provisions in the trust instrument.[14] The statute is a useful and needed tool in modern trust law, but it has been severely criticized for removing some basic restraints that had been placed on trustees because of the experiences of courts in dealing with them. In particular, these restraints were based on the fiduciary's duty of loyalty, of care and the duty not to delegate discretionary powers.[15] The purpose of this article is to discuss this act, first concentrating on its general provisions, and then, exposing some of its dangers.

9. Fratcher, *supra* note 2, at 658.
10. Horowitz, *supra* note 6, at 4.
11. The prudent man rule was enacted in Wyoming in 1967. *See* WYO. STAT. § 4-3-101 thru 105 (1977).
12. The New York Supreme Court in King v. Talbot, 40 N.Y. 76 (1869), held that the investments by the trustee in stocks of various corporations was improper. *See also* RESTATEMENT (SECOND) OF TRUSTS, § 227, comment *M* (1959).
13. WYO. STAT. § 4-8-101 thru 110 (1977). In the discussion I will refer to the section number used in the Uniform Trustee's Powers Act. The Wyoming act follows the same order.
14. Note, *Utah's Trustees' Powers' Provisions*, *supra* note 4, at 265.
15. Hallgring, *supra* note 8, at 802.

THE BASIC PROVISIONS OF THE ACT

This section gives a brief discussion of the various sections of the act, noting particularly those areas in which there has been a change from the common law. The first section of the act[16] defines various terms as they are used in the act. Subsection 1 limits the act to only those trusts in which the trustee administers the assets for the benefit of income or principal beneficiaries. Then follows a careful listing of the types of trusts which are not included, such as resulting or constructive trusts, investment trusts and voting trusts to name a few. In essence then, the act applies only to inter vivos and testamentary private trusts and charitable trusts. Subsection (b) of the act's second section,[17] however, allows the act to be incorporated by reference into instruments which are not trusts. Testators and their lawyers may find this a useful tool in granting powers to the administrators of their estates.[18]

In subsection 2(a)[19] the act makes clear that it has changed the common law rule which held that absent express and implied powers granted in the trust instrument the trustee has no powers at all.[20] Instead, now the trustee has powers simply by virtue of his office, whether the trust instrument grants him any or not. Thus, the act requires that the settlor negate certain broad powers if he does not intend them to exist.[21] This power to limit certain provisions of the act is itself restricted by the idea that certain powers and rights cannot be negated without destroying parts essential to the operation of the statute.[22]

Section (3)a[23] of the act, is a broad grant of general powers to the trustee to do anything that a prudent man would. The section specifically provides that the powers granted are

16. WYO. STAT. § 4-8-101 (1977).
17. WYO. STAT. § 4-8-102(b) (1977).
18. Horowitz, *supra* note 6, at 1.
19. WYO. STAT. § 4-8-102(a) (1977).
20. Fratcher, *supra* note 2, at 627; RESTATEMENT (SECOND) OF TRUSTS § 186 (1959).
21. Haskell, *supra* note 1, at 169; UTPA § 2(a) provides that "(t)he trustee has all the powers conferred upon him by the provisions of this act unless limited in the trust instrument."
22. In particular Charles Horowitz, chairman of the committee drafting the act, stated that "a provision excluding the operation of § 7 would be inoperative as violative of the basic purposes of the Act." Horowitz, *supra* note 6, at 13.
23. WYO. STAT. § 4-8-103(a) (1977).

in addition to those enumerated elsewhere in the act.[24] The act defines a prudent man as a trustee who exercises trust powers in a reasonable and prudent manner based on how men of ordinary prudence, diligence and judgment act in managing their own affairs.[25] This definition of "prudent man" is taken from the prudent man rule of investment law,[26] a standard first set out by the Massachusetts Supreme Court in *Harvard College v. Amory.*[27] It has also been used to govern the trustee's general duty of care and skill in managing the trust estate.[28] The rule changes the common law by giving the trustee the power to perform any act necessary to accomplish the purposes of the trust even though the power was not expressly conferred. However, it is not a blank check, since he can only use such powers as are necessary to perform his fudiciary duties.[29] The trustee does not have the power to do things his duty of care prohibits him from doing.[30]

Section 3(b)[31] limits the powers granted by the act so that any available tax exemptions will not be lost. The purpose is to preclude acts which would cause trusts such as charitable trusts, grantor trusts and marital deduction trusts, to lose their tax exempt status. It is not meant to restrict action merely because the trust might be taxed in some way. Thus the trustee may acquire an asset that might create a tax liability for the trust as long as other existing tax exemptions of the trust are not lost.[32] The line between the two may be difficult to draw.[33]

The specific grants of power to the trustees are listed in section 3(c).[34] Subsection 3(c)1 generally follows the common

24. Horowitz, *supra* note 6, at 13.
25. WYO. STAT. § 4-8-101(3) (1977).
26. Horowitz, *supra* note 6, at 10.
27. 26 Mass. (9 Pick.) 461 (1830).
"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."
28. 2 SCOTT, THE LAW OF TRUSTS, § 174 (2nd Ed. 1967). *See also*, Dallas Dome Wyoming Oil Fields Co. v. Broder, 55 Wyo. 109, 97 P.2d 311 (19) where the Wyoming Supreme Court held that the standard of care and diligence required of a trustee was that of a man of ordinary prudence and skill in the management of his own estate.
29. Horowitz, *supra* note 6, at 11.
30. Haskell, *supra* note 1, at 172.
31. WYO. STAT. § 4-8-103(b) (1977).
32. Horowitz, *supra* note 6, at 15.
33. Haskell, *supra* note 1, at 181.
34. WYO. STAT. § 4-8-103(c) (1977).

law except that it allows the trustee to retain an asset in which he is personally interested. Previous law had held that the trustee could never allow himself to be placed in a position where it would be for his own benefit to violate his duty to the beneficiary.[35] Thus, it was held that a trustee was under a duty to dispose of its own shares if retention was not authorized by the terms of the trust.[36] One of the results of this change is that a corporate trustee is free to retain stock in itself as a trust asset, subject only to the rules of prudence.

Section 3(c)3 also represents a break with the law. Without such a section a trustee could not carry on an active business unless the term of the trust so provided or a court authorized such activity.[37] As with all the enumerated powers, the trustee can conduct the business only if it is prudent with respect to both the preservation of principal and the production of income.

Section 3(c)6 changes the rule that a bank, acting as trustee, cannot deposit trust funds in its own banking department. The reason for the rule was that the deposit amounted to self-dealing by the trustee.[38] The drafters of the act have expressed the opinion that "(a) savings and loan association is not necessarily a branch within the meaning of this rule."[39]

The next section involves a radical departure from the common law. The rules changed are the power to sell, either for cash or on credit, to improve, to partition, to exchange, to change the character of the trust estate and to encumber mortgage or pledge, and to do so beyond the terms of the trust if such is desired. Prior to the enactment of this act, power to sell depended on the terms of the trust or on the fact that the sale was necessary and appropriate to carry out

35. 2 A. SCOTT, *supra* note 28, § 170.
36. *Id.* at § 170.15.
37. RESTATEMENT (SECOND) OF TRUSTS, § 230, comment *M* (1959).
38. *Id.* at § 170 comment M. WYO. STAT. § 13-5-109 (1977) appears to conflict with § 3(c)6 of the UTPA in that the former says such funds may only be deposited in the bank's commercial department if proper security is pledged for the deposit. To the extent that the funds are insured by the federal government no such security is required. The Uniform Act provided for the possibility that a state might not want certain statutes affected by this Act. The Wyoming act failed to utilize this and thus, there is the ambiguity. It would seem that a "prudent" corporate trustee would follow the stricter rule to avoid any problems.
39. Horowitz, *supra* note 6, at 19.

the purpose of the trust.[40] Even if the power of sale was found to exist, either expressly or impliedly, it was not construed, generally, to include power to sell on credit, to exchange or to partition.[41] In addition, implied power to mortgage was rarely found except where such was necessary to carry out the purposes of the trust.[42] The same reasoning applied to the incurring of expenses for purposes of improvements to the trust estate.[43] The trustee has always been authorized to make repairs, as permitted in Section 3(c)8, although the act expands the power somewhat by allowing such expenses even for extraordinary repairs.[44]

Subsection 3(c)10 deals with the power of the trustee to give or enter into leases. Even without the act, the trustee is normally held to have the power to lease trust land because such power is necessary to fulfill his duty to make the trust estate productive.[45] The length of time for which a lease was made had to be reasonable under the circumstances, but rarely was the trustee justified in making a lease for a period longer than the period of the trust.[46] The section clearly changes that rule. It also changes the rule that the trustee is not empowered to grant an option, even though he may have the power to lease.[47] Similarly, Section 3(c)12 allows the trustee to grant an option to purchase even without the lease. It also, further allows the trustee to take an option for the acquiring of an asset.

Power to enter into leases for exploring or removing minerals or other natural resources is granted by subsection 3(c)11. Prior to this, the general rule was that the trustee's power depended on whether oil and gas wells or mines had been opened on the land.[48] This rule, however, was not generally followed where both the life estate and the remainder interests were held in trust.[49] This subsection clears up any doubts the trustee might have, although power to enter into a lease had probably already existed statutorily in Wyo-

40. RESTATEMENT (SECOND) OF TRUSTS, § 190 (1959).
41. Fratcher, *supra* note 2, at 632.
42. RESTATEMENT (SECOND) OF TRUSTS, § 191 comment b (1959).
43. Fratcher, *supra* note 2, at 630.
44. Horowitz, *supra* note 6, at 19; 3 A. SCOTT, *supra* note 13, at § 188.2.
45. 3 SCOTT, *supra* note 28, at § 189.
46. *Id.* at § 189.2.
47. RESTATEMENT (SECOND) OF TRUSTS, § 190 comment k (1959).
48. 3 SCOTT, *supra* note 28, at § 189.7.
49. 2 WILLIAMS & MYERS, OIL & GAS LAW, § 514 (1977).

ming.[50] Problems with creation of reserves for remainder men are dealt with by subsection 3(c)21 and the Wyoming Uniform Income and Principal Act which provides a formula for the division of the proceeds.[51] The power to lease, however, should rarely be construed to justify a trustee in taking the risks of exploring for minerals even though section 3(c)3 allows him to conduct a business.[52]

Subsection 3(c)16 allows title to trust property to be taken in the name of third persons or in any other manner, including the trustee's name, without earmarking the property as a trust investment. Earmarking was strictly required at common law.[53] The use of nominees was also forbidden, even if the trust property was earmarked.[54] The reason for the rule was the possibility that without earmarking the trustee at a subsequent time, would be able to contend that the investments which had proved profitable were his own, while those which had resulted in a loss were the trusts.[55] A second purpose was to put third party purchaser's on notice that they were dealing with trust property and therefore they were obligated to inquire into whether the trustee had power to sell the assets. This made sales of securities, in particular, quite difficult, and thus, statutes have been enacted which provide that securities of a trust may be held by nominees.[56] Generally, these statutes applied only to corporate trustees and therefore this section extends the law by granting all trustees this power.

According to the Restatement (Second) of Trusts Section 191 (2) the trustee could not borrow on the credit of the trust estate unless the terms of the trust granted him such power.[57] Subsection 3(c)18 changes this rule so that the trustee now can borrow on the trust's credit. It further assumes that the trustee can advance money to the trust and that he has a lien on the assets of the trust for such ad-

50. WYO. STAT. § 4-5-103 (1977). The section requires court approval and it does not appear to apply at all to inter vivos trusts. It may not apply to testamentary trusts either once the probate proceedings have ended.
51. WYO. STAT. § 4-8-109 (1977).
52. Note, *Utah's Trustee's Powers Provisions, supra* note 4, at 285.
53. RESTATEMENT (SECOND) OF TRUSTS, § 179, comment d (1959).
54. 2 SCOTT, *supra* note 28, at § 179.5.
55. *Id.* at § 179.3.
56. WYO. STAT. § 13-5-109(c) (1977) provides that trust companies may register trust securities in the name of a nominee.
57. RESTATEMENT (SECOND) OF TRUSTS, § 191(2) (1959).

vancements. This part of the section comports with the common law rule.[58]

Subsection 3(c)20 basically tracks prior law. It deviates in one respect, however, by allowing the trustee to set his own compensation. At common law the trustee was entitled to reasonable compensation.[59] Two methods were used to set the amount; either a statutory scheme was enacted, or a court exercised its discretion in fixing the amount.[60] He was not permitted to set the amount himself unless a court found it was reasonable.[61] Although the section speaks only in terms of paying the compensation, it is generally felt that it also authorized the fixing of the amount since simple payment is a mechanical act which requires no authorization once the amount is ascertained.[62] It appears that the framers of the act agree with this view.[63]

Subsection 3(c)24 is another provision which represents a broad break with the common law. It expands powers with respect to the employment of others, power to delegate discretion to agents and power to act upon an agent's recommendation without independent investigation.[64] At common law the trustee could employ agents, if to do so was reasonably necessary for the administration of the trust. He could not employ agents, however, to do things he personally should have performed.[65] In particular, the trustee could not delegate acts requiring substantial discretion.[66] The subsection clearly allows the delegation of discretionary acts. The word "associated" as used in the section seems to indicate that the trustee employees can be members of his law firm, other employees of the corporate trustee or brokers in the trustee's real estate firm. To the extent this involves self-dealing it is also a break with prior law.[67] The power to delegate is limited by section 4[68] which prohibits the trustee from

58. *Id.* at § 244 comment c which provides that "(t)o the extent to which the trustee is entitled to indemnity he has a security interest in the trust property.
59. Horowitz, *supra* note 6, at 23.
60. 3 SCOTT, *supra* note 28, at § 242.
61. *Id.* at § 242.2.
62. Hallgring, *supra* note 8, at 817.
63. *See* Horowitz, *supra* note 6, at 23 where he says that "at common law . . . [compensation] could not be fixed by the trustee himself. This subsection changes that rule subject to fiduciary accountability.
64. *Id.* at 24.
65. RESTATEMENT (SECOND) OF TRUSTS, § 188 comment c (1959).
66. 2 SCOTT, *supra* note 28, at § 171.2.
67. Haskell, *supra* note 1, at 177.
68. WYO. STAT. § 4-8-104 (1977).

transferring his office or the entire administration of the trust to another.

Section 5(a) is intended to continue the rule that a court of equity can empower a trustee to do an act expressly prohibited by the terms of the trust, if because of circumstances not known to the settlor when the trust was created and not anticipated by him, failure to do so would defeat or substantially impair the accomplishment of the purposes of the trust.[69] Even though the section was an attempt to continue the existing rules of law on augmentation, the drafters of the act felt that the principles of liberality written into it would encourage courts to remove trust restrictions when the rule of prudence required.[70] Subsection 5(b) limits the power of trustees to act where there is a conflict of interest by requiring court approval.[71] Certain sections which expressly allow for self-dealing are excluded from the operations of this provision.

Section 6(a) changes the common law rule that two or more trustees can exercise power only by unanimous action.[72] The rule was relaxed in cases of emergencies and with charitable trusts where a majority would exercise the powers of the trustee. This section extends the principal of allowing the majority to exercise the trust powers to all trusts covered by the act.

One of the more important changes effected by the act is in section 7, dealing with the duty of inquiry of third parties. The problems in dealing with third parties arise because the trustee holds legal title to the trust property and thus, he can transfer it with the same effect on legal title as if he were the beneficial owner of the property.[73] Thus, the trustee would pass legal title to a third party even though the terms of the trust did not authorize him to do such. Of course, he would be liable for breach of trust. If the third party had no notice that the trustee was exceeding the scope of his powers, and gave value, equitable title would pass as well.[74] The

69. RESTATEMENT (SECOND) OF TRUSTS, § 167(1) (1959); Horowitz, *supra* note 6, at 25.
70. Horowitz, *supra* note 6, at 26.
71. *Id.*
72. Fratcher, *supra* note 2, at 637.
73. *Id.* at 645.
74. RESTATEMENT (SECOND) OF TRUSTS, § 284 (1959).

requirement of lack of notice was difficult to fulfill since anyone who had actual or imputed notice that he was dealing with a trustee was required to make diligent inquiry into the trustee's powers, and he is charged with knowledge of what he would have found.[75] This rule of inquiry was bolstered by the requirement that trustees segregate trust property and earmark it.[76]

The Trustees Power Act eliminates the imputed notice and the duty to inquire into the powers of the trustee. Instead, the third party can assume that the trustee has the power to act and that he is properly exercising each power unless the third party has actual notice that such is not the case. As long as there is no actual notice, the third party is fully protected. This elimination of the duty of inquiry creates a problem inside the act itself. It involves subsection 2(a) and the question of whether the settlor can limit the operation of this section in the trust instrument so as to restore the duty of inquiry. This would mean that a third person dealing with a trustee would always have to examine the trust instrument to see if section 7 had been excluded. Since this would totally defeat the purpose of the section, it was felt by the drafters of the act that such an exclusion would be ineffective.[77]

THE PITFALLS OF THE ACT

The Uniform Trustees Powers Act, like any provision which effected so many changes in the law, has been subject to criticism. While some of it may be unjustified, much of it has merit and therefore this section will examine some of the more objectionable provisions. It is important to remember that if these or any other provisions of the Act disturb the drafter of a trust instrument, section 2(a) allows him to limit the effectiveness of that provision.

In certain respects, however, the act provides greater freedom of action to a trustee than is really necessary for sound management.[78] One commentator has suggested that

75. Fratcher, *supra* note 2, at 645; RESTATEMENT (SECOND) OF TRUSTS, § 297 comments f-i (1959).
76. Fratcher, *supra* note 2, at 645.
77. Horowitz, *supra* note 6, at 29.
78. T. SHAFFER, THE PLANNING AND DRAFTING OF WILLS AND TRUSTS 233 (1979).

some of the liberalizing provisions of the statute seem designed to exculpate the fiduciary or put him at an advantage.[79] In fact, it is often the corporate fiduciary that has pushed for the enactment of legislation such as the Uniform Trustees' Powers Act.[80] Without doubt, certain basic restraints felt necessary in the past to protect the beneficiaries have been weakened. In particular these restraints are the duty of loyalty, the duty of care or skill, and the duty not to delegate discretionary powers.[81] Although the act deals with powers, the trustee's duties are relevant since he cannot have the power to do something which his fiduciary duties would forbid.[82]

The Duty of Care and Skill

The prudent man rule of sections 1(3) and 3(a) establishes the duty of care and skill that is required of the trustee. The standard established is the same one used with investment powers. Nevertheless, it fails to provide sufficient protection to the beneficiaries and the trust estate because it requires that the trustee uses only the caution and expertise he would use in managing his own property.[83] This comports with the standard used by the Restatement (Second) of Trusts,[84] but some states including Utah, have taken a different approach. Utah adopted the majority of the provisions of the Uniform Trustees Powers Act, but it changed the prudent man rule. It holds a trustee to the standard of care observed by prudent men dealing with the property of another.[85] It is possible there is little or no difference in the two standards,[86] but some courts have distinguished them, because the latter standard recognizes that a trustee is not empowered to take the same risks with trust property that he would take with his own even if the ventures he would invest in himself are good business risks.[87]

79. Haskell, *supra* note 1, at 168.
80. *Id.* The author expresses the view that this is especially true with bank fiduciaries.
81. Hallgring, *supra* note 8, at 802.
82. Haskell, *supra* note 1, at 172.
83. *Id.*
84. RESTATEMENT (SECOND) OF TRUSTS, § 174 (1959).
85. Note, *Utah's Trustees' Powers Provisions*, *supra* note 4, at 271-2. UTAH CODE ANN. § 75-7-302 (1978) provides that "the trustee shall observe the standards in dealing with trust assets that would be observed by a prudent man dealing with the property of another.
86. 2 SCOTT, *supra* note 28, at § 174.
87. King v. Talbot, *supra* note 12, at 86. The New York Court held, "It, therefore, does not follow, that because prudent men may and often do, conduct their own affairs

A second, and even more serious, failing of the act's prudent man rule is that it fails to hold trustees who have or represent themselves to have greater skills than the average fiduciary to a higher standard. Usually it is the corporate trustee who falls into this category of fiduciary. The standard used by the Act results in the protection of the bank fiduciary at the expense of sound trust management.[88] This is a marked liberalization of prior law which recognized that a trustee who had, or represented himself as having, higher skills was obligated to exercise those skills.[89] Even agents are required to use their actual skills when they are superior.[90] The Utah prudent man provision adopts the rule of prior law to an extent. It distinguishes between the professional trustee and the ordinary trustee by requiring those trustees with special expertise to make use of it.[91]

The Duty of Loyalty

The duty of loyalty has been called the "most fundamental duty owed by the trustee to the beneficiaries of the trust.[92] It is the obligation of a trustee to always act in the interest of the beneficiary and never in his own interest.[93] Dealings between the trustee, acting for himself, and the trust are not permitted even though they were conducted in good faith.[94] Section 5(b) of the act requires that the court authorize any self-dealing between the trust and the trustee. However, self-dealing authorized by some subsections of the act are excluded from this provision. Of these subsections, two, 3(c)1, and 3(c)24, have troubled commentators the most. In addition, subsection 3(c)20 contains elements of self-dealing which may give problems.

Section 3(c)1 allows retention of assets in which the trustee is personally interested. This means that a bank act-

with the hope of growing rich, and therein take the hazard of adventures which they deem hopeful, trustees do the same; the preservation of the fund, and the procurement of a just income therefrom are primary objects of the creation of the trust itself, and are to be primarily regarded."

88. Haskell, *supra* note 1, at 172.
89. RESTATEMENT (SECOND) OF TRUSTS, § 174 (1959).
90. Hallgring, *supra* note 8, at 829.
91. UTAH CODE ANN. § 75-7-302 (1978). The act says in part that "if the trustee has special skills or is named trustee on the basis of representations of special skills or expertise, he is under a duty to use those skills."
92. 2 SCOTT, *supra* note 28, at § 170.
93. Hallgring, *supra* note 8, at 803.
94. 2 SCOTT, *supra* note 28, at § 170.1.

ing as trustee can hold onto stock in itself. This opens the possibility of abuse in several ways. The management of the bank may prefer to retain the stock rather than have it fall into the hands of hostile parties.[95] Also the trustee may desire to retain the stock because he wants the votes that go with it, since subsection 3(c)13 gives him the power to vote the trust's stock. Retention of the stock is, in any case, permissible only where a prudent man would do so, but the act certainly enables the trustee to rationalize more easily his retention of the stock. It is true in some cases, such as where the bank is small, where the settlor makes his business partner a trustee or where the shares are a sizeable block of the company's total shares, retention would be justified for economic reasons.[96] It has been suggested that this subsection should be rewritten to allow retention only in situations similar to those just mentioned.[97]

Subsection 3(c)20 represents the most blatant of all self-dealing provisions because it allows the trustee to determine the amount he should be paid. As mentioned earlier, this section is concerned with more than just the simple payment of compensation. The provision is flagrantly unjustifiable because it places the burden on the beneficiary to challenge the reasonableness of the trustee's compensation.[98] The trustee, of course, is limited by the prudent man rule, but the section nonetheless accords his judgment a prima facie validity.[99] A possible solution to this problem would be to subject the setting of compensation to either the provisions of section 5(b) or to a statutory scheme of some sort.

Another example of possible self-dealing allowed by the act is in subsection 3(c)24. This provision empowers the trustee to hire people associated with him to assist him in his duties. It is not certain what "associate" means, but it is likely to include officers, directors and employees of corporate trustees.[100] The problem is, when a settlor entrusts his estate to a corporate trustee he expects to get, as a matter of

95. Hallgring, *supra* note 8, at 813.
96. Haskell, *supra* note 1, at 174.
97. *Id.*
98. *Id.* at 175. The author notes that it is possible that under section 5(b) court authorization would be needed to set the salary, but he says that such a view is inconsistent with the inclusion of this power specifically in the subsection.
99. Hallgring, *supra* note 8, at 818.
100. *Id.* at 821.

course, all the services which the trustee is known to perform regularly.[101] Under prior law it was possible for a trustee to receive additional compensations for the performance of professional or other services not usually rendered by trustees.[102] This may provide a basis for allowing the corporate fiduciary to charge an additional fee for the use of specialists it has in its employ. But, why should the trust be charged for the services of an in-house investment specialist, when the major reason why a corporate trustee was appointed was because the modern trust needs special investment skill and flexibility?[103] Although the hiring of an "associate" is limited by the rule of prudence, again this provision puts the bank in the driver's seat on close calls. Also, under subsection 3(c)20 it is permissible for the trustee to determine how much his employees or "associates" should be paid for the extraordinary services.[104]

Duty Not to Delegate

Under the prior law the trustee could not delegate to others acts which he could reasonably be required to perform.[105] The duty is based on the concept that a settlor usually selects the trustee, whether individual or corporate, because of the confidence he has in the trustee, or because of the fiduciary's reputation.[106] When a fiduciary delegates acts to an agent, he is only liable if he directed the agent to perform the act, or if he was negligent in selecting the agent.[107] Thus, the trustee substitutes the liability of a stranger for his own when he delegates, thereby defeating the settlor's purpose in appointing him. For this reason, the duty not to delegate was a very important aspect of trust law. Subsection 3(c)24 relaxes the delegation rule by allowing the trustee to delegate any act of administration and then allowing him to act on the advise of the agent without any independent investigation. This provision seems to give unwarranted freedom to a trustee to employ others and then escape liability if the agent's advice on actions were wrong, thus ignoring

101. *Id.* at 820.
102. RESTATEMENT (SECOND) OF TRUSTS, § 242 comment d (1959).
103. Haskell, *supra* note 1, at 176.
104. Hallgring, *supra* note 8, at 822.
105. RESTATEMENT (SECOND) OF TRUSTS, § 171 (1959).
106. Hallgring, *supra* note 8, at 832.
107. RESTATEMENT (SECOND) OF TRUSTS, § 225 (1959).

the special trust and confidence with which the settlor chose him.

Once again it is the corporate trustee who profits by these provisions. The bank can either collect a fee from the trust for delegating certain acts to its own investment advisors, or it can avoid the expense of hiring such advisors by simply retaining them with trust funds.[108] The abuse possible with this section could be largely avoided if the standard of prudence took into account the special skill possessed or represented to be possessed by the fiduciary bank. In the business of trust administrations a selling point of almost any corporate fiduciary is that they have the means to assure that the trust assets will be properly invested. With a standard of prudence based on special skills, it would seem that the trustee could not delegate or recover additional compensation for the furnishing of services related to their skills.

Duty to Earmark

As mentioned earlier, the duty to earmark was strictly enforced at common law,[109] partly to put third party purchasers on notice that they were dealing with trust property. Subsection 3(c)16 eliminates the need for earmarking. The rationale for this provision and others like it was to facilitate the transfer of trust property, particularly securities.[110] Section 7 allows the third party purchaser to assume the trustee is acting properly in selling trust assets to him unless he has actual notice that the trustee is acting beyond his authority. Also, section 8-304 and 8-403 of the Uniform Commercial Code[111] similarly protect a third party who is a good faith purchaser of trust securities.

What these provisions mean is that there is no longer any duty of inquiry on the third party just because he knows of the trust character of the property he is purchasing. Consequently, earmarking would not affect sales of trust property, including securities and therefore, some commentators

108. Haskell, *supra* note 1, at 177.
109. *See*, note 50, *supra*.
110. Horowitz, *supra* note 6, at 21.
111. WYO. STAT. § 34-21-843(b), 872 (1977).

have suggested that the act should have retained the duty of earmarking.[112]

USING THE UNIFORM TRUSTEES POWER ACT

The most important point to remember when using the act is that the trustee automatically has the powers enumerated in it. It becomes part of every trust. Thus, it is imperative that the drafter of the trust instrument have a thorough understanding of the act and its strengths and weaknesses. In each case the drafter should examine the powers to determine whether they are adequate to serve the purposes of the settlor, or whether they are excessive.[113] Two options face the drafter. First, he can say nothing and simply rely on the act to grant the necessary powers, or second, he can rely on the act partially, negating some provisions and adding others to cover shortcomings.[114]

Some of the changes that might be made have already been mentioned and include raising the standard of prudence required of extraordinarily skilled trustees, requiring earmarking and limiting the trustee's power to set his own compensation. Others, suggested by commentators include granting powers which would make it easier for trustees to run sole-proprietorships.[115] Another point, mentioned before, but worth restating, is that the provisions of the act can be incorporated by reference into instruments which are not covered by the act.[116] Besides wills, such instruments could include business agreements and escrow arrangements. In these cases the act can especially be of use because the drafter can simply incorporate those phrases which are necessary to give the desired result without any worry of excluding a provision which is felt to be nonexcludible in trust instruments, such as section 7.

CONCLUSION

The UTPA is a very effective instrument in modern trust law. Its changes provide the means for the flexible

112. Haskell, *supra* note 1, at 180.
113. SCHAFFER, *supra* note 78, at 237.
114. Note, *Utah's Trustees' Powers Provisions, supra* note 4, at 288-9.
115. SCHAFFER, *supra* note 78, at 237.
116. WYO. STAT. § 4-8-102(b) (1977).

management of a twentieth century trust. Several changes in particular are most helpful. They include the broad grant of the power of sale, the grant of the power to give and take options, the grant of the power to lease beyond the terms of the trust and the grant of the power to continue or participate in the operation of a business.

It is the element of flexibility, however, which has generated the greatest criticism. Because the standard of prudence is too low for corporate fiduciaries, because self-dealing is allowed and because delegation is treated too easily some have recommended the act not be passed.[117] It seems, however, that such criticisms may go too far.

These problems just mentioned can be corrected by the settlor or his counsel in the drafting of the instrument. The act itself recognizes that it is not a cure-all for every trust by allowing for variations. Also, the commentators seem to fail to realize that corporate fiduciaries, while not totally above reproach, are well regulated by federal and state government; a factor which, to a certain extent, will limit abusive practices possible under the act.

A final statement in favor of the act is that it solves some of the problems which occurred because a needed power was omitted. Since, under the common law, all powers had to be expressly or impliedly granted, if one was missed the trustee was forced to get court approval to act. He may even have wanted the approval of the court when he acted under the implied powers for fear that such powers might later be found not to exist. The act solves this problem by making a wide range of powers part of every trust. Not only does this help the trustee, but it also reduces the strain on courts and additionally helps the beneficiary by seeing that the administration of the trust runs smoothly.

This is not to say the act is perfect. Adoption of a prudent man rule similar to that of Utah's is strongly recommended. But, although the act has been adopted by some ten states and in force for as long as 15 years, the litigation has been minimal. This would seem to speak favorably for it.

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117. Haskell, *supra* note 1, at 183.