Wyoming Law Journal

Volume 12 | Number 2 Article 12

December 2019

Legal Investments for a Wyoming Trustee

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amended Appropriations Act, General Assembly Resolutions[45] and Governors Addresses,[46] the Pupil Placement Act was unconstitutional. The court said the pattern was plain—that the legislature had adopted procedures to defeat the *Brown* decision. As regards the alleged administrative remedy the court said that before persons would be barred from federal courts as not having exhausted the administrative remedy, the administrative remedy must be adequate—that it must be indeed a remedy and not an administrative block. They then determined the administrative remedy in this case to be, in fact, a block.

By way of conclusion it can be said that so far the federal courts have been very decisive in striking down legislative and other attempts to defeat the *Brown* decision. Some states will undoubtedly continue to endeavor to postpone integration by the exercise of every means at their disposal, including the enactment of statutes. In light of the present unsympathetic attitude of the federal courts toward such legislative proposals it would seem that states by passing such laws can hope to accomplish no more than a delaying of the inevitable. Even the element of delay has been seriously curtailed by the holding in the *Adkins* case[47] requiring the administrative remedy be "adequate" before the complainant is bound to exhaust it as a prerequisite to federal court jurisdiction.

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LEGAL INVESTMENTS FOR A WYOMING TRUSTEE

The use of trusts is presently accelerating with such force that trustees currently control an estimated 85 billion dollars.[1] This is sufficient to indicate that the use of trusts is becoming so prevalent that it may be considered to be the rule rather than the exception. This article will scrutinize the laws which control the Wyoming trustee's selection of investments as he fulfills his duty of making the trust funds properly productive.

The first thing the Wyoming trustee must use as a guidepost for his selection of investments is the Wyoming Constitution. This provides as follows:

> No act of the legislature shall authorize the investment of trust funds by executors, administrators, guardians, or trustees, in the bonds or stock of any private corporation.[2]

The Supreme Court of Wyoming has interpreted this constitutional provision as prohibiting the passage of such an act by the legislature as well as being a specific declaration of policy against a trustee making such an investment without court approval. The Court said:

45. Va. Acts 1956, Senate Joint Resolution No. 3, p. 1213 (Interposition Resolution).
46. Adkins v. School Board of Newport News, 148 F.Supp. 430 (E.D. Va. 1957).
47. Ibid.

1. Report of the New York Joint Legislative Committee on Charitable and Philanthropic Agencies and Organizations 15 (1954).
2. Wyo. Const., Art. III, § 38.

> By prohibiting the enactment of such a statute, as our constitution does, it acts as a specific restraint upon him (the trustee) in making investments, and he cannot, as alreay stated, make those mentioned in the constitution unless the court authorizes that to be done.[3]

Thus in Wyoming, by constitutional provision, a trustee is restrained from investing in the bonds or stocks of any private corporation unless he first obtains court approval.

The Wyoming court has not been alone in reaching the above conclusion. The Supreme Court of Alabama construed their constitutional provision relating to trust fund investments, which is identical to that of Wyoming, and reached nearly the same result. The Alabama court said that their constitution established a policy that a fiduciary should not invest in the bonds and stocks of a private corporation. The Alabama court did not say that a trustee could invest outside the permitted investments with court approval, but the court did say that it was proper for an Alabama trustee to loan money and take the bonds or stocks of a private corporation as security for the loan.[4]

Together with the constitution and court decisions of this state, a Wyoming trustee must also look to the statutes of Wyoming for guidance in his selection of investments. A Wyoming statute positively states that nothing shall limit the authority to invest which is granted by a trust instrument to a named trustee.[5] The Wyoming trustee has the power to invest in corporate stocks if the settlor has expressly given him this power in the trust instrument.

Some other statutes which bear on this problem comprise the Wyoming "legal list" of permitted investments.[6] It can readily be seen from an examination of Wyoming's legal list that generally speaking, the only permissible investments are in bonds and mortgages. This is not completely desirable, as is indicated by the many objections to trust fund statutes which restrict investments to bonds and mortgages.[7]

The main objection raised against a legal list such as Wyoming's is that during an inflationary period an investment in bonds is not a worthwhile investment as the profits reaped by the investments are destroyed by inflation.[8] This results in a loss to the beneficiary in terms of actual purchasing power. A good illustration of this point is made by comparing the purchasing value of $75 invested in a Government Series "E" Savings Bond in 1945 against the purchasing value of the $100 which the bond would have yielded in 1955.

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3. U.S. Fidelity and Guaranty Co. v. Durrin, 61 Wyo. 1, 154 P.2d 348 (1944).
4. Sims v. Russel, 236 Ala. 562, 183 So. 862 (1938).
5. Wyo. Comp. Stat. § 8-302 (1945).
6. Wyo. Comp. Stat. §§ 8-301, 8-304 and 35-1102 (1945).
7. Whyte, Should the Prudent Man Rule for Trust Investment be Adopted in Wisconsin?, 1945 Wis. L. Rev. 499; Note, 36 Iowa L. Rev. 341 (1951).
8. Central Hanover Bank and Trust Co. v. Brown, 177 Misc. 136, 30 N.Y.S.2d 85 (1941).

The permitted investments in Wyoming provide nothing as a defense against the ravages of inflation. Since 1941, the United States has been in a period of general inflation. As the purpose of any trust is to see that the beneficiary is adequately provided for, the Wyoming trustee is confronted with the problem of trying to maintain the beneficiary's standard of living by not limiting the beneficiary to a fixed income, as such an income will slowly be reduced in value by inflation.

The Wyoming Supreme Court has recognized that under such conditions as the United States has experienced during the last sixteen years, an investment may be more prudent if it is in corporate stocks rather than in the investments permitted by Wyoming's legal list.[9] It is also well recognized that corporate stocks are a worthwhile investment from the standpoint of dividends. Scores of common stocks are listed on the New York Stock Exchange which have paid regular dividends for periods of time ranging from 50 to 90 consecutive years.[10] The view that corporate stocks were inherently a proper form of investment under modern conditions has been taken by a divided court under a will which relieved the trustee from the restrictions of the legal list.[11]

A trustee could fulfill his obligation to both the beneficiary and the settlor if he were permitted to invest a certain percentage of the trust funds in corporate stocks and securities of a sound nature. The reason for this is that shares of stock are more likely to increase in value where there is a currency or credit inflation and the dividends are also likely to increase so the return will more nearly represent the same purchasing power the settlor originally intended for the beneficiary.[12] If a part of the trust funds have been invested in corporate stocks, the chances are less likely that the beneficiary's income will remain stationary.

Another objection to the Wyoming investment law results from the requirement imposed upon a trustee to diversify the investments. A reasonably prudent trustee will diversify the investment and spread the trust assets over a number of types of securities.[13] This acts as a hedge against many things, but primarily against fluctuation in general business conditions. The only practical diversification permitted by Wyoming law is that part of the trust funds may be invested in bonds of one city or state and another part in the bonds of the federal government. This defeats the goal for which a skilled investor should aim. A skilled investor will have a certain percentage in various bonds and stocks and a percentage in banks and savings and loan associations. This protects the funds and still yields a realistic income. This line of investment is unfortunately unavailable to a Wyoming trustee.

9. Supra note 3.
10. Dividends Over the Years, Published by Members of the New York Stock Exchange (1957).
11. In re Carwithen's Estate, 28 Pa.D.&C. 66, reversed on other grounds, 327 Pa. 480, 194 Atl. 743 (1937).
12. Supra note 7.
13. City of Boston v. Curley, 276 Mass. 549, 177 N.E. 557 (1931).

Another objection which may be interposed to the Wyoming investment law results from the fact that court approval is required before a trustee may safely invest outside the legal list.[14] This decision assumes a great deal of the courts in Wyoming. By substituting judicial judgment for the judgment of a trustee, the assumption is that a court will know more about what is or what is not a sound investment than a trustee who has been appointed to the trusteeship because of his long and successful experience in the field of managing either his own or someone else's investments. It is possible that as the courts in Wyoming have been relegated to the position of investment counselors, they will be swamped by petitions asking for permission to invest outside the permitted securities. The probable result of this would be that courts would not be likely to entertain such actions and would make this fact known by denying permission to those seeking such relief.

The settlor is the one person who can make sure that the trustee will not be bound within the narrow confines of permissible investment as defined by Wyoming law. The trustee will have the power to invest in corporate stocks if the settlor expressly gives him this power in the trust instrument.[15] The law is definite that the settlor of a trust may legally designate the kind and character of investments which are to be made by the trustee. If this method of conferring investment powers upon the trustees is to be used, the draftsman of the trust instrument should take note that the intention of the settlor to confer upon the trustee this power must be spelled out with the utmost clarity in the instrument. If there is any doubt of this intention, courts will favor the construction that the settlor did not mean to confer such powers.[16] If the settlor does not confer broad powers, he may set up his own "legal list." If this is done, the trustee is bound to follow this list just as he would the state's list. It is not likely that this list may be changed in any respect. The Wyoming Supreme Court has said that where a will expressly limits the investment of funds to certain securities, it is not within the power of the court to change the terms of the trust in that particular by approving unauthorized investments.[17] The settlor's express commands may even exclude the legal list as a guide to proper investments if the instrument is so drafted.

As previously mentioned, a Wyoming trustee may invest in corporate stock if he first petitions the court to allow outside investments.[18] Before the court will permit this, the trustee will have to show the necessity of the desired outside investment.[19] The Wyoming Supreme Court also indicated that the court should be extremely careful in permitting outside investments and when such an investment is permitted, it should only be in shares of a company which has long been proven to be sound.[20]

14. Supra note 3.
15. Supra note 5.
16. Annot., 99 A.L.R. 910 (1935).
17. International Trust Co. v. Preston, 24 Wyo. 163, 156 Pac. 1128 (1916).
18. U.S. Fidelity and Guaranty Co. v. Durrin, 61 Wyo. 1, 154 P.2d 348 (1944).
19. Ibid.
20. Ibid.

A problem which is related to the propriety of certain investments exists because courts have indicated that there is a real question whether the rules governing investments by trustees are applicable to charitable corporations.[21] This question has not been settled in Wyoming.

A good argument may be made to support the contention that a charitable corporation shall not be bound by the investment laws which are applicable to a regular trust. It may be argued that a charitable corporation is not within the policy declaration of the Wyoming Constitution as a charitable corporation is not an "executor, administrator, guardian, or trustee"[22] and this is evidenced by the fact that the Wyoming statutes give a charitable corporation the power to raise money in any manner which is specified by its articles of association or its by-laws.[23] Furthermore, as a settlor has the express power to name what is a permitted investment in the trust instrument,[24] he has the power to incorporate by reference the articles or by-laws of the charitable corporation as a part of the trust instrument.[25] Thus, the settlor may give the corporation the power to invest as the charitable corporation's articles or by-laws specify. This would be the same as if the power was expressly given by the trust instrument itself.

On the other hand, a good argument may be made to support the contention that a charitable corporation will be bound by the investment laws of Wyoming which are applicable to a regular trustee. It may be argued that a charitable corporation is technically within the policy declaration expressed by the Wyoming Constitution as this provision applies to "executors, administrators, guardians, and trustees."[26] Support for this proposition comes from many courts which hold a charitable corporation to be a trustee, since such a corporation holds property for the general benefit of others.[27] The Wyoming Supreme Court has equated a charitable corporation with a trustee in a case which involved the conveyance of real property by a charitable corporation.[28] The legal list statute of Wyoming apparently includes a charitable corporation in the definition of who is bound to follow the requirements of this statute. This statute is applicable to "every individual, bank or trust company."[29] Courts have, in nearly all cases, held that the word "individual" as used in most statutes does encompass a corporation.[30] There appears to be no valid argument against this construction unless it would be that the word "corporation" does not include a charitable corporation.

21. Town of Cody v. Buffalo Bill Memorial Ass'n., 64 Wyo. 648, 196 P.2d 369 (1948).
22. Wyo. Const., Art. III, § 38.
23. Wyo. Comp. Stat. § 44-1005 (1945).
24. Wyo. Comp. Stat. § 8-302 (1945).
25. Wyo. Comp. Stat. § 6-2902 (1945).
26. Supra note 21.
27. E.g., Wellessly College v. Attorney General, 313 Mass. 722, 725, 49 N.E.2d 220, 222 (1943).
28. Town of Cody v. Buffalo Bill Memorial Ass'n., 64 Wyo. 648, 196 P.2d 369 (1948).
29. Wyo. Comp. Stat. § 8-301 (1945).
30. In re United Button Co., 137 Fed. 668, (D.Del. 1904); Georgetown College v. Webb, 313 Ky. 25, 230 S.W.2d 84 (1950).

There have been no decisions in Wyoming or any other state which would resolve the question presented by the foregoing arguments. Both Bogert and Scott in their respective works in the field of trusts feel that a charitable corporation should not be bound by the investment laws which are applicable to regular trusts.[31]

A trustee in Wyoming, without the power to invest outside the legal list of permitted securities, is not in an enviable position. Should he find himself in this situation, the only safe course for him to follow is to invest prudently in the permitted securities. This may result in the beneficiary's purchasing power slowly declining while the economy of this country is slowly ascending.

Setting aside the private trust, the problem is most acute as to existing charitable institutions which have received and will continue to receive gifts. Quite frequently the gifts are in a will and in the form of outright gifts with no express trust terms stated. Although it is in the form of an outright gift, courts may apply trust restrictions because of a policy decision that charitable corporations should be treated as trusts, as heretofore indicated, or the court may consider it as a gift in trust with the institution being the trustee subject to adherance to the legal list. The hardship on these institutions is that whereas a charitable institution may be currently receiving two per cent on its investments, it could double the amount of money available for the furtherance of its charitable purposes, without endangering the safety of the corpus, if the Wyoming investment laws would permit investments which would yield a more realistic rate. Because of this and the many problems previously mentioned, a change in the investment laws of Wyoming would seem to be indicated.

Remedial legislation is not the answer in Wyoming as this would be prohibited by the Wyoming Constitution. The answer is to be found in the Constitution itself.

A constitutional provision such as Wyoming's is relatively rare. The constitutions of five states, including Pennsylvania and Wyoming, did have such a provision.[32] Pennsylvania revised this section of its constitution in 1933. Its constitution no longer limits the investment of trust funds in any manner. Wyoming should follow the lead of Pennsylvania in modernizing its investment laws by modernizing its constitution. The Wyoming legislature would then be free to adopt modern legislation. A majority of states has adopted the prudent-investor rule which gives the trustee the

31. 4 Scott on Trusts, § 389 (2d ed. 1956); Bogert, Trusts and Trustees, § 399 (1951).
32. Const. of Ala., Art. IV, § 74.
Const. of Colo., Art. V, § 36.
Const. of Mont., Art. V, § 37.
Const. of Pa., Art. III, § 22, amended Nov. 7, 1933, to read as follows:
The General Assembly may, from time to time, by law, prescribe the nature and kind of investment for trust funds to be made by executors, administrators, trustees, guardians, and other fiduciaries.
Const. of Wyo., Art III, § 38.

right to make any investments; he will only be liable for the losses which were occasioned by investments which would not, at the time of the investment, have been made by a prudent investor, not in regard to speculation, but in regard to the permanent disposition of the funds, considering the probable income, as well as the probable safety of the capital.[33]

The fallacy of the present investment laws in Wyoming may best be summarized by the following statement. There is no man or group of men presently alive who can be certain, at any point in human history, which investment is likely to be sound and which unsound; or which investment will continue to produce reasonable income and which not; therefore, any attempt to freeze an authorized list of investments is doomed to disappointment.

WADE BRORBY

THE CONCEPT OF GOOD FAITH BARGAINING UNDER THE LABOR-MANAGEMENT RELATIONS ACT OF 1947

The National Labor Relations Act of 1947, more commonly referred to as the Taft-Hartley Act, describes unfair labor practices of both employers and labor organizations in Section 8. After setting out activities that constitute such practices the following provision outlines the statutory duty to bargain collectively:

> . . . to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . .[1]

The primary objective of our national labor policy is to promote industrial peace by encouraging the practice of collective bargaining. This objective was first developed under the original National Labor Relations Act of 1935 and it continues in the 1947 amendment to the Act. To best describe this theory of successful labor-management negotiation, it is appropriate that we examine the legal requirements of bargaining collectively. A more thorough examination can be achieved by first giving content to the phrase, "to . . . confer in good faith."

HISTORY OF THE DUTY TO COLLECTIVELY BARGAIN IN GOOD FAITH

If collective bargaining were to aid in resolving industrial strife and eliminating costly strikes, some requirement of good faith was necessary.

33. Harvard College v. Armory, 9 Pick, 446 (Mass. 1830).

1. Act of June 23, 1947, c. 120, § 8 (d), 61 Stat. 142, 29 U.S.C. § 158 (1952 ed.).