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# Trustee's Power to Delegate: A Comparative View

Elizabeth E. Baringhaus

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## NOTES

### TRUSTEE'S POWER TO DELEGATE: A COMPARATIVE VIEW

#### I. Introduction

The traditional view of the courts in both England and America was that a trustee could not rid himself of his obligation as trustee by delegating his authority to another.<sup>1</sup> This hostility to the delegation of power by trustees was based on the assumption that a settlor chose a trustee because of his confidence in the personal judgment of the trustee.<sup>2</sup>

Individual and corporate trustees are still chosen for the abilities they possess. However, it is doubtful whether any party to a trust is significantly benefited by a strict rule requiring personal performance of all duties necessary to the administration of the trust.

As early as 1925, the need to broaden trustees' power to delegate was recognized in the United Kingdom when the Trustee Act of 1925<sup>3</sup> was enacted. This statutory codification expanded trustees' powers far beyond the confines of the common law and permitted more flexibility in the administration of trusts.

In contrast, most American jurisdictions determine trustees' power to delegate in reference to the applicable common law principles. Only a few states have legislation dealing with the power of a trustee to delegate his authority or employ agents.<sup>4</sup> Thus, the trustee is bound by the common law rule requiring personal performance of trust duties unless the settlor expressly or impliedly expands his powers of delegation.<sup>5</sup>

The model American statute, the Uniform Trustees' Powers Act<sup>6</sup> (UTPA) follows the English law on this subject and confers broad powers upon trustees. The UTPA would give a trustee power

. . . to employ persons, including attorneys, investment advisors, or agents, even if they are associated with the trustee, to *advise* or *assist* the trustee in the performance of his administrative duties; to act without independent investigation upon their recommendations; and instead of acting personally, to employ one or more agents to perform *any* act of administration, whether or not discretionary (emphasis added).<sup>7</sup>

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1 This rule was expressed in the maxim "delegatus non potest delegare," meaning that a delegate cannot delegate; an agent cannot delegate his function to a subagent without the knowledge or consent of the principal. BLACK'S LAW DICTIONARY 513 (4th ed. 1968).

2 H. BROOM, A SELECTION OF LEGAL MAXIMS, CLASSIFIED AND ILLUSTRATED 570 (10th ed. 1939).

3 Trustee Act of 1925, 15 & 16 Geo. V, c.19; [hereinafter cited as Trustee Act].

4 On power to delegate, see PA. PROBATE, ESTATES AND FIDUCIARIES CODE, tit. 20, § 3319 (Supp. 1972) (permits one fiduciary to delegate to another the right to exercise stock subscription rights) and § 7133. Most states also have statutes dealing with power of fiduciaries in war service to delegate. Concerning power to employ agents, see IOWA PROBATE CODE, ch. 633, §§ 84-86 (1964) (permits employment of specialists).

5 RESTATEMENT (SECOND) OF TRUSTS § 186 (1959).

6 UNIFORM TRUSTEES' POWERS ACT, in THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, 1964 HANDBOOK, 267 [hereinafter cited as U.T.P.A.].

7 U.T.P.A. § 3(c)(24).

This note will compare current English and American law with the provisions of the UTPA. Particular attention will be given to five specific areas: (1) delegation of the entire trust administration, (2) delegation to a cotrustee, (3) power to cooperate with others, (4) use of expert advice, and (5) delegation by a corporate trustee.

## II. English Law

The old English rule of equity severely restricted the right of trustees to delegate their powers or employ agents. The trustee was liable to the beneficiary for the default of any agent he employed, regardless of the circumstances involved. Thus, as Lord Langdale wrote in *Turner v. Corney*:<sup>8</sup>

. . . trustees who take on themselves the management of trust property for the benefit of others have no right to shift their duty on other persons; and if they employ an agent, they remain subject to the responsibility toward the *cestuis que trust*, for whom they have undertaken the duty.<sup>9</sup>

At an early date, it was recognized that severe restriction of trustees' power to delegate hindered effective trust administration. Consequently, the English courts began permitting delegation where there was a legal necessity or where the delegation accorded with the common usage of mankind, a circumstance referred to as "moral necessity." Thus in *Ex parte Belchier*,<sup>10</sup> a trustee in bankruptcy employed a broker to sell the bankrupt's tobacco. Before presenting the proceeds to the trustee, the broker went bankrupt. The court held that the trustee was not liable for the default of the broker, stating that "where trustees act by other hands, either from necessity, or conformable to the common usage of mankind, they are not answerable for their losses."<sup>11</sup>

The necessity rule of *Belchier* was followed for many years by the English courts of equity and was confirmed by the House of Lords in the leading case of *Speight v. Gaunt*.<sup>12</sup> However, in upholding this rule, the court used language which inadvertently became the basis for a new standard in the area of delegation.

In *Speight*, a trustee had employed a broker to purchase securities authorized by the trust; a loss of funds resulted. While the court warned that a trustee could not delegate his duties at "mere will and pleasure,"<sup>13</sup> it held that the trustee was not liable for the loss since employment of a stockbroker was a delegation which would be made by an ordinary man of business in conducting his own affairs. In time, the "ordinary man of business" became the "prudent man" of the new test.

It was initially unclear, however, whether the standard of *Speight* was simply a restatement of the old tests of legal necessity and common usage or a

8 49 Eng. Rep. 677 (1841).

9 *Id.* at 678.

10 27 Eng. Rep. 144 (1754).

11 *Id.* at 145.

12 [1884] 9 App. Cas. 1.

13 *Id.* at 5.

liberalization of those tests. The Lord Chancellor expressed the view that the "necessity" requirement was still applicable.<sup>14</sup> Lord Fitzgerald, however, stated that the trustee was entitled to employ a broker even if he could have obtained the securities without a broker.<sup>15</sup> Generally, the Lord Chancellor's restrictive construction of the standard prevailed.

Thus, an agent could not be employed to undertake duties which a trustee could easily perform himself.<sup>16</sup> Agents must be employed to perform services within their area of specialization<sup>17</sup> and they must be closely supervised by the trustee.<sup>18</sup> A prudent man would personally hire any agents he employed.<sup>19</sup> Certainly, he would not allow an agent to keep trust funds for an unnecessarily long period of time.<sup>20</sup>

The trustee was forbidden to delegate his power under any circumstances when a judgment to be made involved a purely personal decision. Thus, the appointment of a beneficiary under a discretionary trust remained nondelegable.<sup>21</sup>

Nevertheless, while the "ordinary man of business" was generally defined in terms of the old necessity rule, a subtle shift in emphasis was occurring. Decisions written after the 1884 *Speight* opinion premise their holdings on prudent conduct of the trustee rather than the strict necessity of his action. These decisions laid the foundation for a clear break with the old tests of legal necessity and common usage, which had lingered on with diminished importance.

The English Trustee Act of 1925 dealt the deathblow to the "necessity" rule and revolutionized the position of the English trustee.<sup>22</sup> Section 23(1) of the Act reads as follows:

Trustees or personal representatives may, instead of acting personally, employ and pay an agent, whether a solicitor, banker, stockbroker, or other person, to transact *any* business or *any* act required to be transacted or done in the execution of the trust (emphasis added).<sup>23</sup>

Thus, the Trustee Act codified a greatly liberalized "ordinary man of business" standard called the "prudent man."

Under this liberalized rule, the Trustee Act provides that the trustee shall not be responsible for the default of an agent employed in good faith.<sup>24</sup> The first case to apply this section of the act was *In re Vickery*.<sup>25</sup> In that case, the

14 *Id.* at 11.

15 *Id.* at 29.

16 *Re Brier*, [1884] 26 Ch. D. 238.

17 *Fry v. Tapson*, [1885] 28 Ch. D. 268 (employing a lawyer as a rental agent).

18 *Rowland v. Witherden*, 42 Eng. Rep. 379 (1851); *Bostock v. Floyer*, 55 Eng. Rep. 1030 (1865).

19 *In re Weall*, [1889] 42 Ch. D. 674.

20 *Wyman v. Paterson*, [1900] App. Cas. 271, 280 (H.L.).

21 *In re Boulton's Settlement Trusts*, [1928] Ch. 703. *See also* *Attorney-General v. Scott*, 27 Eng. Rep. 1113 (1750).

22 *See In re Vickery*, [1931] 1 Ch. 572. "He [trustee] is no longer required to do any actual work himself, but he may employ a solicitor or other agent to do it, whether there is any real necessity for the employment or not." *Id.* at 581.

23 Trustee Act § 23(1).

24 *Id.*

25 [1931] 1 Ch. 572.

trustee employed a solicitor who had, unknown to the trustee, been suspended from practice at one time. The beneficiaries of the trust finally told the trustee of the solicitor's past improprieties and urged him to employ a different solicitor. The solicitor, however, repeatedly assured the trustee that the matter would be quickly completed. The trustee reasonably relied on such assurances and the solicitor succeeded in stealing a substantial portion of the trust corpus.

The Chancery Division found the trustee was not liable and held that § 23(1) authorized the defendant to allow the solicitor to collect and retain the trust funds involved. The court concluded that a trustee would be liable under the Trustee Act only for a loss occurring through the trustee's own "wilful default."<sup>26</sup> The latter term was defined as "consciousness of negligence or breach of duty or a recklessness in the performance of a duty."<sup>27</sup> An error in judgment, such as that of the trustee in *Vickery*, was not considered a wilful default.

The court's definition of "wilful default" has provoked substantial criticism.<sup>28</sup> Most commentators argue that "want of reasonable care" should be included in the definition.<sup>29</sup> Thus, a trustee should not, by the honest appointment of an agent, be free to ignore with complacency the activities of his agent.<sup>30</sup>

The later case of *In re Lucking's Will Trusts*<sup>31</sup> substantiates this view. In that case, trustees were charged with the loss resulting from negligence in supervising a manager whom they had employed. Citing *Vickery*, the defendants argued that they were liable for the loss only if their negligence amounted to "wilful default." The court, however, distinguished *Vickery*<sup>32</sup> and held that a trustee must exercise the care of a reasonable man in overseeing the administration of the trust even where he has appointed a competent agent.

### III. American Law

Early American cases state that trustees could delegate their authority only when required by strict necessity.<sup>33</sup> A distinction was made, however, between the discretionary duties which the trustee had been selected to perform and duties

26 *Id.* at 582. Section 30 states: "A trustee shall be chargeable only for money and securities actually received by him notwithstanding his signing any receipt for the sake of conformity, and shall be answerable and accountable only for his own acts, receipts, neglects or defaults, and not for those of any other trustee, nor for any banker, broker, or other person with whom any trust money or securities may be deposited, nor for any other loss, unless same happens through his own wilful default." The incorporation of this clause in the predecessors of the Trustee Act of 1925 only had the effect of changing the burden of proof. *See* R. MAUDSLEY, HANBURY'S MODERN EQUITY 351 (9th ed. 1969) and *Re Brier*, [1884] 26 Ch. D. 238.

27 *Id.* at 584.

28 G. KEETON, LAW OF TRUSTS 257 (7th ed. 1957) (opinion that the reasoning of the court is erroneous); LEWIN ON TRUSTS 135 (15th ed. R. Cozen, H. Horne 1950) (accepted view cautiously); R. MAUDSLEY, HANBURY'S MODERN EQUITY 228-9 (9th ed. 1969) (accepts the case subject to an important limitation).

29 See excellent article, Jones, *Delegation by Trustees: A Reappraisal*, 22 MOD. L. REV. 381 (1959).

30 *Id.* at 389. To accept this view would be to depart dramatically from the standard of the "reasonable man" and to protect the trustee if he is, in Holdsworth's phrase, an "honest fool."

31 [1968] 1 W.L.R. 866.

32 *Id.* at 874 (securities were not involved in this case).

33 *Keim v. Lindley*, 31 A. 1063, 1074 (N.J. 1895); *McMurtrie v. Pennsylvania Co.*, 9 Phila. 529 (Pa. 1872).

which were merely ministerial or necessary to execute the trustees' discretion. A similar distinction also appeared in early English law but it was relegated to a minor status when the standard of reasonableness subtly replaced the narrow tests based upon necessity. American courts, in contrast, stressed the distinction between discretionary and ministerial.

Generally, American courts first determine whether a duty involves discretion, or as the Restatement of Trusts (2nd) expresses it, whether it is an act "which the trustees can reasonably be required personally to perform."<sup>34</sup> Such a determination is made by considering, *inter alia*, the five factors listed by the Restatement: (1) the amount of discretion involved; (2) the value and character of property involved, (3) whether the property is principal or income, (4) the proximity or remoteness of the subject matter of the trust, and (5) the character of the act as one involving professional skill or facilities possessed or not possessed by the trustee himself.<sup>35</sup>

The most important factor unquestionably is the first, the amount of discretion involved.<sup>36</sup> However, strong reliance on this factor alone is fraught with difficulty. Almost every act involves a certain amount of discretion and this does not necessarily make delegation of the act improper.<sup>37</sup> Nevertheless, if the court finds that the delegated duty is not discretionary, the trustee cannot be liable for improper delegation.<sup>38</sup> If, however, the court determines that the duty involved discretion, the trustee may be liable for any default of the agent, even if he has acted prudently.<sup>39</sup> It is clear that under English law, a trustee would not be liable for improper delegation in the latter circumstance. The delegation of discretion alone is not a breach of trust.

#### IV. Uniform Trustees' Powers Act

The Uniform Trustees' Powers Act<sup>40</sup> is similar to the English Trustee Act of 1925 in conferring broad powers of delegation upon trustees. The UTPA places greater reliance upon the trustees' self-regulation and codifies the "prudent man" standard.<sup>41</sup> It does not relieve the trustee of his duty to use judgment in administering the trust.<sup>42</sup> Clearly, agents employed by the trustee can only "assist and advise." In addition, the UTPA specifically states that the entire administration of the trust cannot be delegated.<sup>43</sup>

In one significant area, however, the UTPA does relieve the trustee of his

34 RESTATEMENT (SECOND) OF TRUSTS § 171 (1959).

35 *Id.* comment d at 374.

36 2 A. SCOTT, THE LAW OF TRUSTS § 171.2 (3rd ed. 1967) [hereinafter cited as SCOTT].

37 *Id.*

38 There is some confusion over the proper terminology to be used in such a situation. Some courts state that a ministerial duty may be delegated. *See* McLean v. Peyser, 169 Md. 1, 179 A. 58 (1935). Other courts say that allowing others to perform ministerial duties is not a true delegation at all. *See* Beacon Mutual Indemnity Co. v. Stadler, 95 Ohio App. 441, 120 N.E.2d 743 (1954). It seems that the former view is the correct one.

39 RESTATEMENT (SECOND) OF TRUSTS § 225(2) (1959).

40 UNIFORM TRUSTEES' POWERS ACT (1964).

41 THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, 1964 HANDBOOK, 265.

42 U.T.P.A. § 4.

43 *Id.*

duty to use judgment. Section 24(c)(15) provides that the trustee may act on the agent's recommendations without independent investigation.<sup>44</sup> It is extremely doubtful whether English law would deem such conduct to be prudent, where information obtained from the agent merited further inquiry by the trustee.<sup>45</sup>

The English law governing delegation of a trustee's powers distinguishes the overall judgment which a trustee is bound to use in administering a trust from the discretion necessary to carry out specific tasks of trust administration. The trustee may delegate the exercise of the judgment required to perform certain tasks but may never delegate his personal responsibility to oversee the administration of the trust. The exercise of discretion by the trustee in making prudent delegations allows him to be more flexible and, perhaps pragmatic, in furthering the goals of the trust than under a more restrictive view.

American law, in contrast, limits the range of opportunity for delegation which has been granted by the English law. The modern American view condones a personal exercise of the trustee's judgment in all matters of trust administration involving any amount of discretion. While clinging to the basic assumption of the common law that a trustee is chosen because of the settlor's confidence in his judgment,<sup>46</sup> the American rule fails to recognize that in many cases, good judgment demands prudent delegation.

The strict rule against delegation assumes that an agent will err when the trustee would not. Yet, in this age of complex trusts, the contrary is more likely to be true. The rule, by forcing a trustee to limit his own judgment in regard to delegation, may lead him to act in a way that a reasonable man, pursuing his own interest, would not. While a few American cases have judged the legality of delegation by the "prudent man" standard,<sup>47</sup> most American courts continue to follow the Restatement view.<sup>48</sup>

## V. Specific Problems

### A. Complete Delegation of Trust Administration

The delegation of the entire administration is clearly forbidden by American common law<sup>49</sup> and the UTPA.<sup>50</sup> It is also forbidden under English law,<sup>51</sup> subject to two specific exceptions, both of which are based upon the difficulties of administering a trust from a distance.

The first exception allows the trustee to appoint any person to exercise a discretion or power vested in the trustee in relation to any property in trust outside

44 *Id.* at § 3(c)(24).

45 *Whiteley v. Learoyd* [1886] 33 Ch. D. 347.

46 Thus, "a trust or discretion in the agent for the exercise of which he is selected . . . cannot be delegated to another," H. BROOM, A SELECTION OF LEGAL MAXIMS, CLASSIFIED AND ILLUSTRATED 570 (10th ed. 1939) and agency as "a personal trust and confidence which cannot be delegated." 2 J. KENT, COMMENTARIES ON AMERICAN LAW 825 (8th ed. 1854).

47 *See* note 39, *supra*.

48 RESTATEMENT (SECOND) OF TRUSTS § 171, comment g (1959).

49 RESTATEMENT (SECOND) OF TRUSTS § 171, comment c (1959).

50 *See* note 42, *supra*.

51 *Green v. Whitehead* [1930] 1 Ch. 38, 45.

the United Kingdom.<sup>52</sup> In so providing, § 23(2) of the Trustee Act is merely a codification of the common law rule.<sup>53</sup> While the trustee acting under § 23(2) is not liable only by virtue of having made such an appointment, he is liable if he does not delegate his responsibility reasonably and prudently.

The second exception to the restriction against delegation of the entire administration is found in § 25(1) of the Trustee Act. This section allows a trustee to delegate to another (donee) the entire administration of the trust during his (trustee-donor) absence abroad for a period not exceeding twelve months.<sup>54</sup> A specific procedure to effectuate the delegation is provided by statute.<sup>55</sup> Under § 25(1), the individual or trust corporation to whom the power of administration is delegated has all the powers of the donor except the power to delegate.<sup>56</sup> Despite a valid delegation under § 25(1), the trustee-donor remains liable for the acts or defaults of the agent as if they were his own acts or defaults.<sup>57</sup> Thus, although both § 25(1) and § 23(2) of the Trustee Act make exceptions to the usual policy by allowing a complete delegation, the exception given in § 25(1) is relatively restricted. Under the latter provision, the delegation is limited to one year. In addition, the trustee is not protected by his own initial exercise of prudence.

This distinction between delegation of the authority to manage a trust when the res is abroad and the delegation of authority to manage a trust while the trustee is abroad is reasonable and reflects the probable difference in the settlor's expectations. When distant property forms part of the trust corpus, the settlor, arguably, must have known of the practical difficulties inherent in appointing a local trustee. Consent to such a delegation may be implied from the settlor's knowledge at the time of the appointment. Thus, a broad power to delegate comports with the common law philosophy of compliance with the settlor's intent.

A restricted power of delegation when a trustee goes abroad is also consistent with the earlier common law view. It is unlikely that a settlor appoints a trustee with the expectation that he will leave the country and delegate the adminis-

52 Trustee Act § 23(2) "Trustees or personal representatives may appoint any person to act as their agent or attorney for the purpose of selling, converting, collecting, getting in and executing and perfecting insurances of, or managing or cultivating, or otherwise administering any property, real or personal, moveable or immovable, subject to the trust or forming part of the testator's or intestate's estate, in any place outside the United Kingdom or executing or exercising any discretion or trust or power vested in them in relation to any such property such ancillary powers, and with and subject to such provisions and restrictions as they may think fit, including a power to appoint substitutes, and shall not, by reason only of their having made such appointment, be responsible for any loss arising thereby."

53 *Stuart v. Norton*, 15 Eng. Rep. 212 (1860) (trustees allowed to appoint an attorney to represent trustee in all rights and actions in colony of British Guinea and management of a plantation).

54 Trustee Act § 25(1) "Notwithstanding any rule of law or equity to the contrary, a trustee may, by power of attorney, delegate for a period not exceeding twelve months the execution or exercise of all or any of the trusts, powers and discretions vested in him as trustee either alone or jointly with any other person or persons." (The original formulation of this provision allowed the trustee to delegate trust administration if he was going to be absent from the United Kingdom for a period of more than one month.) Under this power, a trustee may not delegate to his only other cotrustee, unless such cotrustee is a trust corporation. Trustee Act § 25(2).

55 Trustee Act § 25(3) and § 25(4). See also Practice Dir. [1960] 1 W.L.R. 355.

56 Trustee Act § 25(6).

57 Trustee Act § 25(5).

tration of the trust to someone else. Since this eventuality is further from the settlor's intent than is the action contemplated under § 23(2), it is not surprising that it is more severely circumscribed.

Under prevailing American law, it would be a breach of trust for an American trustee to delegate his power in those exceptional circumstances in the Trustee Act.<sup>58</sup> Giving the trustee power to delegate his discretion, even for a short period, would be contrary to the common law view. No matter how exigent the circumstances, a complete delegation would be a delegation of discretion and hence impermissible.

Whether the UTPA would allow such a delegation is, as yet, unlitigated. Under the general provisions of the UTPA, the trustee would probably be able to delegate his discretion in these situations. However, such delegations may be construed as conflicting with § 4 of the UTPA which forbids in express terms the delegation of the entire administration of the trust.<sup>59</sup>

### B. Delegation to a Cotrustee

Under any statement of the law, a trustee may not commit the administration of the entire trust to his cotrustee.<sup>60</sup> Each cotrustee has a duty to participate in the administration of the trust.<sup>61</sup> Nevertheless, a trustee may delegate the doing of particular acts to a cotrustee on the same bases as he would delegate to an agent.

The English courts permit the delegation of authority to a cotrustee subject to the same qualifications which would be applicable in delegating to any other agent. Thus, in *Carruthers v. Carruthers*,<sup>62</sup> the court stated that the trustees could have made the appointment of one of their number as factor even if the trust instrument had not given them this power.<sup>63</sup>

In the United States, trustees may not delegate to their cotrustees duties involving the exercise of discretion and judgment.<sup>64</sup> The characterization of the act as ministerial or discretionary is critical. Ministerial acts are delegable since the practicalities of trust administration demand that trustees should not have to "parade out together to act on details."<sup>65</sup> If, however, one trustee does alone exercise the discretion of the trusteeship, his cotrustees may be estopped by their own conduct from repudiating the action taken.<sup>66</sup> Such a transaction may be upheld on principles of equity.<sup>67</sup>

58 See Bohlen's Estate, 75 Pa. 304 (1874); Scott § 171.1.

59 U.T.P.A. § 4.

60 RESTATEMENT (SECOND) OF TRUSTS § 171, comment c (1959); U.T.P.A. § 4; Crewe v. Dicken, 31 Eng. Rep. 50 (1798).

61 RESTATEMENT (SECOND) OF TRUSTS § 184, comment a (1959).

62 [1896] A.G. 659.

63 *Id.* at 663.

64 Allison & VerValen Co., Inc. v. McNee, 170 Misc. 144, 9 N.Y.S.2d 708 (Sup. Ct. 1939); *In re Campbell's Estate*, 171 Misc. 750, 13 N.Y.S.2d 773 (Sur. Ct. 1939); Herr v. U.S. Casualty Co., 347 Pa. 148, 31 A.2d 533 (1943).

65 Landow v. Keane, 10 N.Y.S.2d 267 (Sup. Ct. 1939). See also, *In re Kohler's Estate*, 348 Pa. 55, 33 A.2d 920 (1943).

66 Blum v. William Goldman Theatres, 164 F.2d 192, 198 (3d Cir. 1946); Deviney v. Lynch, 372 Pa. 570, 94 A.2d 578 (1953).

67 Deviney v. Lynch, 372 Pa. 570, 94 A.2d 578 (1953).

The UTPA approximates the English rule. A trustee is permitted to delegate authority to his cotrustee if a prudent man would so delegate. However, here again, the trustee would be empowered to act on his cotrustee's advice without independent assessment of its validity.

### C. Power to Cooperate with Others

The English Trustee Act specifically provides for a power to cooperate with others.<sup>68</sup> Under this section, persons owning stock in a certain corporation, including a trustee, could join together to pursue, for example, a stockholder's derivative suit. While the trustee is delegating his discretion in this instance, he is allowed to do so because of the overriding benefit accruing to the trust by taking such an action.

In similar fashion, the American common law generally gives trustees the power to cooperate with others in ventures beneficial to the trust estate.<sup>69</sup> One of the early cases upholding this power to cooperate was *In re Rees' Estate*.<sup>70</sup> In that case, some trustees had invested in a mutual fund. This action was challenged as being an improper delegation by the trustees because the management of the mutual fund could independently make important investment decisions.

Although the trustees in this instance had obviously delegated their discretion, the court upheld the investment. In doing so, the court did not dwell upon the distinction between discretionary and ministerial duties. Rather, it focused upon what it found to be the intention of modern trust law, placing upon the trustee the responsibility of prudent behavior. The investment in a reputable management enterprise was not an abandonment of trustees' duties in any real sense but rather a discharge of them.<sup>71</sup>

The UTPA does not mention a general power to cooperate with others, as does the English statute. However, there is an implied power to cooperate. Section 3(c)(15) of the UTPA gives the trustee power

. . . to sell or exercise stock subscriptions or conversion rights; to consent directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise.<sup>72</sup>

This section specifically approves most of the actions which would be taken

68 Trustee Act § 24. "Where an undivided share in the proceeds of the sale of land directed to be sold, or in any other property, is subject to a trust, or forms part of the estate of a testator or intestate, the trustees or personal representatives may (without prejudice to the trust for sale affecting the entirety of the land and the power of the trustees for sale in reference thereto) execute or exercise any trust or power vested in them in relation to such share in conjunction with the persons entitled to or having power in that behalf over the other share or shares, and notwithstanding that any one or more of the trustees or personal representatives may be entitled to or interested in any such other share, either in his or their own right or in a fiduciary capacity." See also Trustee Act § 10(3) involving corporate securities; Law of Property Act, 1925, 15 & 16 Geo. V, c. 20 §§ 23-29.

69 RESTATEMENT (SECOND) OF TRUSTS § 171, comment i (1959). See also SCOTT § 171.3.

70 41 Ohio Op. 61, 87 N.E.2d 397 (1947), *aff'd*, 53 Ohio L. Abs. 385, 85 N.E.2d 563 (1949). But see *In re Palmer's Will*, 132 N.Y.S.2d 311 (Sur. Ct. 1954).

71 *In re Rees' Estate*, 41 Ohio Op. 61, 87 N.E.2d 397 (1947).

72 U.T.P.A. § 3(c)(15).

under a general power to cooperate with others. Actions not specifically mentioned which would involve trustee's surrender of his discretion in cooperating with others, could be implied. The specific powers enumerated in the UTPA are meant to be illustrative, not exhaustive.<sup>73</sup>

#### D. Use of Expert Advice

The general rule in both England and the United States is that the trustee may consult an expert. He is still required, however, to use independent judgment in evaluating and using advice tendered by the expert.<sup>74</sup>

The UTPA provides that when experts are employed to advise or assist a trustee, the trustee is empowered "to act without independent investigation upon their recommendations."<sup>75</sup> This section of the UTPA departs radically from both English and American law. Consequently, it has been severely criticized as an unjustified extension of trustee's power to delegate his judgment and discretion.<sup>76</sup>

#### E. Delegation by a Corporate Trustee

The rules governing delegation of trustees' powers will have their greatest impact in their application to corporate trustees.<sup>77</sup>

English law has generally held the paid trustee to the standard of a prudent man with special skills. In *National Trustees of Australasia, Ltd. v. General Finance Co. of Australasia*,<sup>78</sup> the Appeals Court found it material that the trustee was in the business of trusteeship and that he was paid for the exercise of special skill.<sup>79</sup> In a later case, the court held that a "bank which advertises itself largely in the public Press as taking charge of administration is under a special duty."<sup>80</sup> Finally, in *Re Rosenthal*,<sup>81</sup> a corporate trustee was held liable for a breach of trust whereas an individual trustee was exonerated. The court based its decision on the fact that "although the [corporate] trustee had acted honestly, as a professional trustee he had not . . . acted reasonably."<sup>82</sup>

In the United States, at least one court has stated that the rule against

73 *Id.* at § 3(a).

74 Attorney-General v. Olsen, 346 Mass. 190, 190 N.E.2d 132, 136 (1963); *Whiteley v. Learoyd*, (1886) 33 Ch. D. 347.

75 U.T.P.A. § 3(c)(24).

76 See Hallgring, *The Uniform Trustees' Powers Act and the Basic Principles of Fiduciary Responsibility*, 41 WASH. L. REV. 801, 831-35 (1966) [hereinafter cited as Hallgring]; Haskell, *Some Problems with the Uniform Trustees' Powers Act*, 32 LAW AND CONTEMP. PROB. 168, 175-78 (1967) [hereinafter cited as Haskell]. While it is clear that the trustee must evaluate the expert's advice to the best of his ability, he must necessarily depend to a large extent on the expert's greater knowledge in making his decision. The "prudent man" rule taken together with the concept of reasonable inquiry allows the trustee to exercise his discretion while profiting from the expertise of his agent. This view furthers not only efficient trust administration but is clearly in line with the reasonable expectations of the settlor.

77 Hallgring, at 824, note 76 *supra*.

78 [1905] A.C. 373.

79 *Id.* at 381.

80 *Re Waterman's Will Trusts* [1952] 2 All E.R. 1054, 1055.

81 [1972] 1 W.L.R. 1273. (The trustees in this case were attempting to invoke the power of the court under § 61 of the Trustee Act to relieve them from liability for breach of trust. The power may only be exercised when the trustee has acted both honestly and reasonably.)

82 *Id.* at 1278.

delegation is not applicable to corporate trustees.<sup>83</sup> The element of reliance on the personal judgment and discretion of the trustee is absent in such a case. Additionally, a corporate trustee can only act through its officers and directors and these may change from time to time.<sup>84</sup>

The general principles of agency support this position, as far as the performance of trust administration through the employees and officers of the corporate entity is concerned.<sup>85</sup> Hence, there is no question of improper delegation where a corporate trustee acts through its proper officers and employees.<sup>86</sup> However, necessary discretion should be exercised by the board of directors or a responsible committee or officer.<sup>87</sup> It would clearly be a breach of trust to allow an employee with no visible authority to speak for the corporate entity in such a matter.<sup>88</sup>

Aside from the question of intracorporate delegation, however, the rules concerning delegation and employment of agents are applied in the same manner to corporate trustees as they are to individual trustees. If the trustee delegates his authority to another outside the corporate entity, he may be liable for breach of trust.<sup>89</sup>

In practical terms, it is questionable whether the power of the corporate trustee to employ agents is as great as that of an individual trustee. It is apparent that a corporate trustee, in possession of greater knowledge and expertise than most individual trustees, could reasonably be expected to perform on a higher level than that of the reasonable man. This view has been adopted by some American courts<sup>90</sup> as well as the Restatement (Second) of Trusts.<sup>91</sup>

An alternate theory of liability is that if the corporate trustee represents to the public that it has and possesses a higher degree of skill and ability than that of the individual, such a trustee will be held to that degree of skill, whether or not it actually possesses it.<sup>92</sup> If this principle were applied in the area of delegation, a corporate trustee could not delegate to others those functions in which it claimed expertise.<sup>93</sup>

This latter view stresses the representations of the corporate trustee to the settlor. A corporate trustee would not be allowed to escape liability by acting as a "prudent man" when it failed to exercise the competence it promised to the settlor. The Restatement (Second) of Trusts has endorsed this theory of liability.<sup>94</sup>

The UTPA does not apply the higher standards of skill to corporate trustees

83 *Chicago Title and Trust Co. v. Zinser*, 264 Ill. 31, 105 N.E. 718 (1914).

84 *Id.* at 719.

85 W. SEAVEY, *HANDBOOK OF LAW OF AGENCY* § 13(d) (1964).

86 *RESTATEMENT (SECOND) OF TRUSTS* § 171, comment e (1959).

87 *New England Trust Co. v. Paine*, 317 Mass. 542, 59 N.E.2d 263 (1945).

88 *SCOTT* § 171.4.

89 *Id.*

90 *Security Trust Co. v. Appleton*, 303 Ky. 328, 197 S.W.2d 70 (1946); *SCOTT* § 174.1 and Note, *Standard of Care for Corporate and Professional Trustees*, 42 VA. L. REV. 665, 670 (1956).

91 *RESTATEMENT (SECOND) OF TRUSTS* § 174, comment a; § 227, comments c, d (1959).

92 *Finley v. Exchange Trust Co.*, 187 Okla. 167, 172, 80 P.2d 296, 303 (1938); *Liberty Title and Trust Co. v. Plews*, 142 N.J. Eq. 493, 60 A.2d 630 (1948).

93 *Id.*

94 *RESTATEMENT (SECOND) OF TRUSTS* § 227, comment a; § 174, comment a (1959).

as have some of the American courts and all of the English courts. Its terms indiscriminately apply the standard of the man of "ordinary prudence, diligence, discretion and judgment" to all trustees.<sup>95</sup> Consequently, critics have voiced fears that if the trustee's power to delegate is increased while skill is not used in determining prudence, corporate trustees will be able to delude their potential settlers as to the services they will receive.<sup>96</sup>

These fears would seem to be generally unfounded since principles developing in the common law, such as skill and liability based on representation of ability, militate against such a result. However, from a jurisprudential view, it would seem more beneficial to codify the relationship between skill and the trustees' power to delegate and employ agents.

## VI. Conclusion

The American view of trustees' power to delegate and employ agents is inappropriate in view of the necessities of modern trust administration. The emphasis on an imaginary line which divides ministerial duties from those involving discretion detracts from what should be the central focus: the risk involved weighed against the potential benefit to the trust.

The English approach is more sophisticated and more responsive to modern needs. It emphasizes the substance of a trustee's function rather than its form. Jurisprudentially, English law is more consistent and predictable in its application of a readily identifiable standard: the "prudent man." In addition, English law gives the trustee significantly more power "ex officio" than does American law, with the result that resort to the judicial system in trust administration is less frequent. It also provides rules to accommodate exceptional types of situations rather than trying to subsume all aspects of trust administration under one rule.

The Uniform Trustees' Powers Act, in attempting to emulate the values expressed in the English Trustee Act of 1925, has disregarded some of the protective features of the English act without a substantial benefit to effective trust administration, to protection of the beneficiary's interests, or to fulfillment of the settlor's purposes. This is especially true in those provisions allowing the trustee to act on his agent's advice without independent investigation.

The UTPA could be improved immeasurably by adding to the definition of the "prudent man" the following caveat: "If such trustee either has or has represented himself to possess special skill, knowledge, or ability, he will be required to use such ability in the administration of the trust." In addition, the UTPA could be amended to circumvent the problem encountered under the English Trustee Act in the case of *In re Vickery*. It should include "want of reasonable care" in the definition of those acts or omissions which render the trustee liable for breach of trust.

*Elizabeth E. Baringhaus*

95 U.T.P.A. § 1(3) defines a "prudent man" as follows: "a trustee whose exercise of trust powers is reasonable and equitable in view of the interests of income or principal beneficiaries, or both, and in view of the manner in which men of ordinary prudence, diligence, discretion and judgment would act in the management of their own affairs."

96 See note 76, *supra*, Haskell at 171 and Hallgring at 801.