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Trust Administration in Georgia and the Prudent Investor Rule: May Trustees Delegate Their Investment Powers?

Stephen M. Dickson

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TRUST ADMINISTRATION IN GEORGIA AND THE PRUDENT INVESTOR RULE: MAY TRUSTEES DELEGATE THEIR INVESTMENT POWERS?

INTRODUCTION

Consider the following hypothetical: a wealthy woman establishes an inter vivos trust in favor of various members of her family and appoints her son as trustee. The trust corpus consists entirely of financial instruments. The son, who has no investment training or education, interviews and researches several investment advisors and, with due care, selects an advisor to assist him in managing the trust. In concert with the investment advisor and with the purposes of the trust in mind, the trustee decides on an overall investment strategy. Because he does not have as much information and expertise as his advisor, the trustee instructs the advisor to make the day-to-day trades and to manage the trust portfolio in accordance with the investment strategy. The trustee continuously monitors the advisor and regularly reviews his performance. The question under current Georgia trust investment law is this: if one of the beneficiaries becomes dissatisfied with the performance of the trust investments, may he recover from the trustee for a breach of trust due to improper delegation of fiduciary duties? In Georgia, or any other state that has not adopted the complete Prudent Investor Rule of the Restatement (Third) of Trusts, the answer might well be “yes.” In the absence of guidance from the

1. The five basic elements of a trust are as follows: (1) the trust property, sometimes referred to as the trust res or corpus; (2) the settlor, the person who had the intent to create the trust and transferred legal title to the trustee; (3) the trustee, the individual or entity holding legal title to the trust property for the benefit of the beneficiaries; (4) one or more beneficiaries, the person or persons holding the beneficial equitable interest in the property; and (5) fiduciary duties imposed on the trustee. See George G. Bogert & George T. Bogert, The Law of Trusts and Trustees § 1 (2d ed. 1984). Georgia requires the same elements by statute and imposes the additional requirement that an express trust must be in writing. See O.C.G.A. § 53-12-20(a) (1997). An express trust is a trust in which the settlor's intent to create a trust is expressly stated, rather than implied from the circumstances. See id. § 53-12-2(2).


3. Restatement (Third) of Trusts: Prudent Investor Rule (1992); see infra notes 24-26 and accompanying text.

4. See O.C.G.A. § 53-12-190 cmt. (1997); Restatement (Second) of Trusts § 171
legislature, a court might apply the traditional common law rule, whereby the trustee would be liable for any losses resulting from the delegation of his investment power, whether the delegation itself was prudent or not.  

Trustees occupy a unique position in the investment marketplace and must consider several factors relating to their status as trustee when managing a trust. These factors include the purpose of the trust and the specific language of the trust instrument, any default rules provided by state law on issues in which the trust instrument is silent, the administrative responsibilities of the trust, the relationship with the beneficiaries, and the investment considerations. Most importantly, trustees are bound by fiduciary duties to the trust beneficiaries that do not encumber other investors. One of the most important fiduciary obligations is the duty to invest trust funds prudently.

A settlor may have many reasons for selecting a certain person or entity as trustee, but often central to this decision is the notion that a particular trustee can improve the economic position or security of the trust beneficiaries better than other potential trustees. Thus, the traditional (and still majority) rule is that, in the absence of specific language in the trust instrument to the contrary, the trustee cannot delegate the investment function to others, even if it is prudent to do so.

(1959).

5. See O.C.G.A. § 53-12-191 (1997); Restatement (Second) of Trusts § 171 cmt. h (1959).
8. See Martin, supra note 6, at 42.
10. See Martin, supra note 6, at 42.
11. See 2A Austin W. Scott & William F. Fratcher, The Law of Trusts § 171.2, at 446-47 & n.8 (4th ed. 1987). The traditional rule on delegation is that a trustee cannot delegate to others duties that the trustee can reasonably perform himself. See id. at 446-47; Restatement (Second) of Trust § 171 (1959). Thus, the nondelegation rule is not just an investment rule and the only established exception to the rule under the Restatement (Second) pertains to acts that require no discretion on the part of the trustee. See Scott & Fratcher, supra, § 171.2, at 446-47 & n.8. The rule allows the trustee to delegate only in very limited circumstances and is still a wise rule in other contexts that require the trustee to exercise careful discretion, such as discretionary distributions from the trust. See id.
However, several factors other than investment expertise may influence the settlor's selection of a trustee. A settlor may choose a family member because he trusts the family member more than a third party to act in the best interests of the beneficiaries. A family member or close friend might also be more familiar with the trust assets and the beneficiaries' circumstances, and choosing a family member may be a less expensive alternative than a third party. On the other hand, a settlor who chooses an institutional trustee may want to take advantage of that trustee's expertise on tax and investment matters as well as the independent judgment the trustee might offer. Some settlers may not have the luxury of choosing an institutional trustee if the trust is too small for efficient administration by a corporate fiduciary.

Over the last several decades, four major changes in the circumstances surrounding management of trusts have made the nondelegation rule impractical as it relates to trust investment law. First, assets in most private trusts no longer consist primarily of ancestral lands, management of which requires relatively little expertise by the trustee. Today, trusts are typically composed of financial assets, which "require active fiduciary administration." Second, today's investment markets are much more complex and specialized than those of a few years ago, and many new investment devices are available. Third, inflation has become a fact of life, and the historical concern with preservation of a corpus does not contemplate the loss in real value that may result from over-conservative investment practices. Finally, many new investment techniques and

13. See id. at 34.
14. See id.
15. See id. at 34-35.
16. See id. at 34.
17. See Samuel D. Cheris, Making Responsible Investment Decisions in Light of the Evolving Prudent Person Rule, 14 EST. PLAN. 338, 339 (1987) (noting threat of inflation as it relates to preservation of trust principal and availability of modern portfolio theories and techniques that can be used effectively to manage trust assets); John H. Langbein, Reversing the Nondelegation Rule of Trust-Investment Law, 59 Mo. L. Rev. 105, 110 (1994) (discussing historical changes in character of typical assets in trust from land holdings to complex financial assets).
18. See Langbein, supra note 17, at 110.
19. Id.
20. See id.; Cheris, supra note 17, at 339.
21. See Robert T. Willis, Jr., Prudent Investor Rule Gives Trustees New Guidelines,
services are available for even the small private investor, and these techniques have the potential to increase investment performance without unduly increasing risk.22 In short, in today's environment the benefits of delegating the trust investment function often outweigh the associated risks.23

In response to these developments, the American Law Institute (ALI) adopted a partial Restatement (Third) of Trusts, entitled the Prudent Investor Rule.24 The new Restatement modifies traditional rules governing trust investment to allow the trustee to take advantage of new investment theories; it also abrogates the nondelegation rule,25 effectively allowing trustees to delegate investment duties to others so long as the decision to delegate is prudently made.26

The Restatement (Third) was followed in 1994 by the Uniform Prudent Investor Act (UPIA),27 which sixteen states have now adopted.28 The UPIA implements the new Restatement's Prudent Investor Rule and provides guidelines for a trustee to delegate his investment powers.29 These guidelines outline when a trustee's delegation of investment responsibilities is effective and prudent; they impose additional duties on a trustee to monitor the performance of the investment advisor; and they protect trust beneficiaries from imprudent decisions to delegate.30

Georgia has adopted some of the concepts of prudent investment, including abrogation of the "no-offset rule," which was another historical restriction on trust investment;31

19 EST. PLAN. 338, 339-340 (1992); Cheris, supra note 17, at 339.
23. See Langbein, supra note 17, at 110.
24. See RESTATEMENT (THIRD) OF TRUSTS, PRUDENT INVESTOR RULE (1992); Langbein, supra note 17, at 105.
25. See RESTATEMENT (THIRD) OF TRUSTS § 171 (1992); Langbein, supra note 17, at 105.
28. The states that have adopted the UPIA include: Arizona, California, Colorado, Florida, Illinois, Maine, Minnesota, New Mexico, New York, Oklahoma, Oregon, Rhode Island, Utah, Virginia, Washington, and West Virginia. BOGERT & BOGERT, supra note 1, § 613 (Supp. 1997).
30. See id.
31. See O.C.G.A. § 53-12-287 (1997). This Code section outlines the prudent investor standard for trustees in Georgia. See id. It allows trustees to acquire and
however, Georgia has not addressed the delegation question.\textsuperscript{32} This leaves trustees in Georgia potentially liable for any delegation of investment duties to investment advisors, unless the trust instrument specifically authorizes such delegation.\textsuperscript{33} Moreover, the nondelegation rule does not allow trustees to take advantage of the full range of today's investment options.\textsuperscript{34}

This Note will first review and discuss the development of the Prudent Investor Rule of the Restatement (Third) and its impact on other trustee duties, particularly nondelegation. Part II will investigate the development of the prudent investor standard in Georgia and the state's current position on delegation. Part III will provide drafting tips for practitioners or settlors who wish to override the statute in order to give the trustee broad delegation power. Finally, Part IV will urge that Georgia adopt some form of the Uniform Prudent Investor Act to allow Georgia trustees to take advantage of modern investment services and techniques and to provide beneficiaries with appropriate safeguards against imprudent behavior.

I. DEVELOPMENT OF THE PRUDENT INVESTOR RULE AND ITS IMPACT ON THE TRUSTEE'S ABILITY TO DELEGATE INVESTMENT DECISIONS

A. The South Sea Bubble and the English "Court-Lists"

In the eighteenth century, the British Parliament first allowed trustees to invest in the securities of a private enterprise, the South Sea Company.\textsuperscript{35} The following year, the "South Sea Bubble" burst, attended by a ninety percent drop in the share

\textsuperscript{32} See W.R. Dickson, Trust Administration in Georgia and the Prudent Investor Rule: Ma.

\textsuperscript{33} See W.R. Dickson, Trust Administration in Georgia and the Prudent Investor Rule: Ma.

\textsuperscript{34} See W.R. Dickson, Trust Administration in Georgia and the Prudent Investor Rule: Ma.

\textsuperscript{35} See W.R. Dickson, Trust Administration in Georgia and the Prudent Investor Rule: Ma.
price.36 This situation had three major effects on the prudence standard of trust investment law.37 First, the Court of Chancery decided to develop a statutory list, or “court-list,” of investments that were presumed to be proper and would free the trustee from liability if he invested in them.38 Second, because investments not on the list were deemed improper, all trust investment in private companies was forbidden or greatly restricted.39 Third, trust investment law became most concerned with preservation of the corpus.40 The law strictly forbade speculative investments and considered safety most important in administering the trust.41

B. The Prudent Man Rule

Trust investment law in the United States became more flexible after Harvard College v. Amory,42 an 1830 Massachusetts decision.43 The Amory court held that trustees are “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.”44 This more flexible standard did not restrict investments to a statutory list; it did, however, expressly forbid speculation.45

C. Legal Lists

Although the Amory court gave no hard and fast rule concerning which investments were prohibited, many states adopted statutes that prescribed permissible investments (these came to be called a “legal list” of investments, and were similar to the English court-lists, although statutory in nature).46

36. Id.
37. See id. at 3-4.
38. Id. at 3. Typical items on the court-lists were government bonds, secured first mortgages on realty, railway debentures, and preferred stock. See id. at 3-4.
39. See id. at 4.
40. See id.
41. See id.
42. 26 Mass. (9 Pick.) 446 (1830).
43. See id.
44. Id. at 461.
45. See Martin, supra note 6, at 42.
46. See id.; SCOTT & FRATCHER, supra note 11, § 227.13. As of 1995 Alabama,
some states, the list was a “safe harbor” of permissible investments, and a trustee could not be held liable for his decision to invest in an item on the list. In other states, the legal list comprised the only legal investments for trustees, unless the trust instrument specifically authorized other choices or gave the trustee discretion to choose non-legal investments. Legal list investments were generally “safe and conservative” and were not a great hindrance to most trustees because investment markets were relatively underdeveloped and inflation was low. However, the development of new investment options and the increasing risk of inflation made a rigid list impractical. Whether defined as rigid or safe harbor, the legal lists tended to restrict the scope of investments and did not encourage trustees to maximize the benefits for beneficiaries because the trustee could not easily adapt to changes in the investment climate. Despite these disadvantages, a few states currently maintain some form of a legal list for trust investments.

Because trust law is largely private in nature, settlors can vary the investment standards for their individual trusts. This is one reason why the legal lists survived for so long. Had the standards been mandatory, it is unlikely that most states would have kept them on the books. The result is that knowledgeable settlors have engaged the services of lawyers, bank trust departments, and other corporate fiduciaries to draft sophisticated trust instruments with permissive investment powers. The law has generally imposed the more restrictive statutory standards on the unwary beneficiaries of those settlors who did not have the advice of counsel.

Kentucky, and West Virginia had “legal list” statutes in effect. See BOGERT & BOGERT, supra note 1, § 613.
47. See Martin, supra note 6, at 42; SCOTT & FRATCHER, supra note 11, § 227.13.
49. Martin, supra note 6, at 42.
51. See Sages, supra note 22, at 22.
52. See id.
53. See supra note 46 (listing states).
55. See id.
56. See id.
57. See id.
58. See id.
D. The Restatement (Second) Approach

The Restatement (Second) of Trusts, promulgated by the ALI in 1959, did not forbid any particular investment and returned to the flexible standard of Amory.69 However, the Restatement (Second) did not permit delegation, except with respect to "ministerial duties."610 Section 171 of the Restatement (Second) required the trustee personally to perform any duty that required the exercise of discretion, such as making investment decisions.61 As time passed and the investment environment became more sophisticated and specialized, the ALI realized that the Restatement (Second) formulation was inadequate and only gave trustees some of the tools they needed to do their jobs efficiently.62 Also, the reality was that, for all practical purposes, many trustees were delegating their investment duties.63 The existing law allowed trustees to employ and consult with investment advisors so long as the trustee made the final investment selection himself.64 In many cases, the agent made the investment selections, and the trustee merely "rubber-stamped" the agent's decisions.65

E. The Restatement (Third) Prudent Investor Rule

The Prudent Investor Rule is contained in sections 227 through 229 of the Restatement (Third) of Trusts.66 In 1992, the ALI adopted this new partial Restatement, which fills a 300 page volume.67 The Prudent Investor Rule takes advantage of modern investment concepts, many of which are lumped together under the heading of Modern Portfolio Theory (MPT).68 One of the

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60. See RESTATEMENT (SECOND) OF TRUSTS § 171 (1959); accord Langbein, supra note 17, at 108-109; BOGERT & BOGERT, supra note 1, § 555, at 114-15. Ministerial duties are those duties that do not require the trustee to exercise discretion in making decisions, such as keeping records of trust fund expenditures. See BOGERT & BOGERT, supra note 1, § 555, at 114-15.
61. See RESTATEMENT (SECOND) OF TRUSTS § 171 cmt. d (1959); Langbein, supra note 17, at 108-09.
63. See Langbein, supra note 17, at 118-19.
64. See id.
65. See id. at 110.
66. See Halbach, supra note 9, at 1155-56; BOGERT & BOGERT, supra note 1, § 612, at 4 n.22.5 (Supp. 1997).
67. See Martin, supra note 6, at 43-44.
68. See Langbein, supra note 17, at 115-16. Modern Portfolio Theory states the
central ideas of MPT is that investments should not be analyzed in isolation; rather, courts should judge the success of an investment portfolio in the context of the overall portfolio, not by the performance of individual investments. This modifies the traditional no-offset rule, which held the trustee liable for losses on individual investments even if there were gains in other individual investments to offset the losses.

The Prudent Investor Rule has a substantial impact on several other trustee duties. These include the duty of impartiality toward beneficiaries, the duty with respect to co-trustees, the duty to make trust property productive, and the duty to minimize costs. Thus, the Restatement (Third) affects more sections of the Restatement (Second) than just sections 227 through 229.

Another central idea of the Prudent Investor Rule is the complete reversal of the nondelegation doctrine for selection of investments. Under this approach, trustees can take full advantage of the services of investment advisors, however, the decision to delegate the investment function must be prudent, and the trustee must monitor the advisor. Although the advisor may make individual investment decisions and trades, the trustee must still personally define or approve the trust's investment strategy and objectives. In some extreme cases, it may be imprudent not to delegate investment power, especially if the trustee lacks the expertise to manage the trust himself.

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proposition that an investor should attempt to minimize risk and maximize return over his entire portfolio of investments and that one of the risks inherent in long-term investments is inflation. See id. Thus, one cannot determine the wisdom of a particular investment decision by examining the performance of an investment in isolation. See id. Some investments may offset the poor performance of others and may contribute to an overall increase in return for the portfolio at less risk. See id.

69. See id.
70. See supra note 31 (discussing no-offset rule).
71. See Halbach, supra note 9, at 1151.
73. See id. § 184.
74. See id. § 181.
75. See id. § 227(c)(3).
76. See Halbach, supra note 9, at 1151 n.4.
77. See Langbein, supra note 17, at 105.
79. See id.
80. See id. at cmt. a.
81. See id.
other words, under certain circumstances, delegation may not only be desirable but also mandatory. By allowing “amateur” trustees to delegate investment decisions to professionals, the Prudent Investor Rule puts professional and amateur trustees on equal footing and gives beneficiaries a chance to realize better returns on trust assets. The new rule also reflects what had already been the practice in many jurisdictions.

As noted above, although a trustee operating under the Prudent Investor Rule may delegate his investment responsibilities, he still has a duty to control costs. If the trustee’s fee includes compensation for investment services, the trust should not pay double for outside investment management. Thus, a trustee who delegates must ensure that the agent’s costs are reasonable and that the trustee does not receive additional compensation for making investment decisions.

In sum, the traditional “prudent person” trustee is primarily concerned with preserving the absolute dollars in the trust and obtaining income for the beneficiaries. This type of trustee manages trust funds more conservatively than his own income and avoids speculation. Largely because he cannot offset gains against losses, he considers each investment decision in isolation “for prudence and impartiality and does not dare seek professional help.” In contrast, the modern “prudent investor” trustee considers the total portfolio return, balances income with the growth expected in light of inflation, weighs the tax consequences of investments and makes the appropriate trade-offs necessary to improve the after-tax performance of the portfolio, diversifies investments to limit risk, and hires professional help when necessary. This trustee even delegates investment responsibilities when it is prudent to do so.

82. See id.
83. See Langbein, supra note 17, at 106.
84. See id. at 108-10.
86. See Langbein, supra note 17, at 108.
87. See id.
89. See id.
90. Id.
91. See id.
92. See id.
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F. The Uniform Prudent Investor Act

The Uniform Prudent Investor Act (UPIA) implements the Restatement (Third) principles and makes five major alterations in the requirements for prudent investing. These five major changes are as follows: (1) focusing on the overall performance of the total portfolio, rather than on each individual investment, in establishing the standard of prudence for each fiduciary investor; (2) providing that the fiduciary’s central consideration is the tradeoff between risk and return; (3) permitting the fiduciary to select any investment that meets the risk/return objectives of the trust; (4) specifying that diversification of investments is not only desirable, but is integral to prudent investing; and (5) reversing the nondelegation rule with regard to management and investment functions, but incorporating safeguards to protect beneficiaries. As of 1996, eleven states had adopted the UPIA in one form or another.

II. GEORGIA’S PRUDENT INVESTOR STANDARD AND ITS DEFAULT RULE ON DELEGATION OF INVESTMENT DECISIONS

A. Georgia’s Legal Lists and Return to the Prudent Man Standard

Prior to 1972, the Georgia Code established “legal lists for fiduciary investments.” Unless the trust instrument provided otherwise, trustees could invest only in the items that were on the “legal list.” A trustee was strictly liable for any losses from investments that were not listed in the Code.

B. The Current Prudent Investor Standard in Georgia

The General Assembly eliminated the legal lists in 1972 and returned to a more flexible, Amory-like prudent man standard.

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93. See Langbein, supra note 17, at 117.
95. See BOGET & BOGET, supra note 1, § 613, at 12-13 (Supp. 1995). The states that have adopted the UPIA are California, Colorado, Florida, Illinois, New Mexico, New York, Oklahoma, Oregon, Utah, Virginia, and Washington. See id.
97. Id.
98. See id.
99. See id. at 364-65.
In making trust investments under the current law, Georgia trustees are subject to a prudent investor standard that is very close to the Restatement (Third).\textsuperscript{100} Trustees must "exercise the judgment and care, under the circumstances then prevailing, that a prudent person acting in a like capacity and familiar with such matters would use to attain the purposes of the account."\textsuperscript{101} Courts judge investment decisions "by what the trustee knew or should have known at the time of the decision"\textsuperscript{102} and should "consider not only the performance of a particular investment but also the performance of the individual's portfolio as a whole."\textsuperscript{103} The Restatement (Third) uses similar language to indicate that the prudence standard of conduct relates to the skill of the trustee and that the test is one of conduct, not evaluation of investment performance with the benefit of hindsight.\textsuperscript{104} Georgia trustees are "authorized to acquire and retain every kind of property including real, personal, or mixed and every kind of investments, specifically including, but not by way of limitation, bonds, debentures, and other corporate obligations, and stocks, preferred or common . . . ."\textsuperscript{105} The current Georgia Code section also allows trustees to invest in mutual funds.\textsuperscript{106}

C. Georgia's Rule on Nondelegation of Investment Decisions

Although the Georgia Trust Code embraces the concept of Modern Portfolio Theory and expands the range of permissible investments to match the new Restatement, it does not address the delegation issue.\textsuperscript{107} The General Assembly adopted the current version of the Georgia prudent investor standard in 1988, before the adoption of the Restatement (Third) and its new rule favoring delegation.\textsuperscript{108} The following three factors support the premise that Georgia does not permit delegation of investment decisions by trustees: (1) the language of the statute does not

\textsuperscript{101} O.C.G.A. § 53-12-287(b) (1997).
\textsuperscript{102} Id. § 53-12-287(c).
\textsuperscript{103} Id.
\textsuperscript{104} \textit{See Restatement (Third) of Trusts} § 227 (1992).
\textsuperscript{105} O.C.G.A. § 53-12-287(c) (1997).
\textsuperscript{106} \textit{See id}.
\textsuperscript{107} \textit{See id.} §§ 53-12-232, 287
\textsuperscript{108} \textit{See Bogert & Bogert, supra} note 1, § 626, at 28 (Supp. 1997).
provide for delegation,\textsuperscript{109} (2) the statute and its comments defer to common law trustee duties, as stated in the Restatement (Second),\textsuperscript{110} and (3) the statute provides no guidelines for delegation or for protection of beneficiaries in the event of imprudent delegation.\textsuperscript{111}

1. The Language of the Statute

The plain text of the Georgia Code does not support a trustee’s authority to delegate nonministerial functions.\textsuperscript{112} As discussed above, Code section 53-12-287, which took effect on January 1, 1998, allows for investments in any type of property.\textsuperscript{113} However, this Code section does not address delegation.\textsuperscript{114} The provision refers to factors that a trustee should consider when “making investment decisions.”\textsuperscript{115} The trustee must consider “the attributes of the portfolio, the general economy, and the needs and objectives of the beneficiaries of the account as they existed at the time of the decision.”\textsuperscript{116} Because the Code section imposes such specific obligations on the trustee for each individual investment decision, it seems to preclude any delegation of investment authority to a third party.

Although the common law imposes certain inherent duties on trustees, a trustee generally has no inherent powers.\textsuperscript{117} The trust instrument gives the trustee his powers.\textsuperscript{118} This is not to say that the trust instrument must specifically enumerate each power.\textsuperscript{119} In Georgia, settlors may incorporate trustee powers by reference to Code section 53-12-232, which provides thirty-two trustee powers.\textsuperscript{120} However, this Code section does not include the power to delegate.\textsuperscript{121} Code section 53-12-232(24) gives trustees the power to “employ . . . persons . . . in the . . .

\textsuperscript{110} See id. § 53-12-190 cmt.
\textsuperscript{111} See id. § 53-12-232.
\textsuperscript{112} See id. § 53-12-287.
\textsuperscript{113} See id. §§ 53-12-287(c).
\textsuperscript{114} See id.
\textsuperscript{115} Id. § 53-12-287(b).
\textsuperscript{116} Id. § 53-12-287(c).
\textsuperscript{117} See SCOTT & FRATCHE, supra note 11, § 164; O.C.G.A. § 53-12-190 cmt. (1997).
\textsuperscript{118} See SCOTT & FRATCHE, supra note 11, § 164.
\textsuperscript{119} See id.
\textsuperscript{120} See O.C.G.A. § 53-12-232 (1997).
\textsuperscript{121} See id.
administration of any trust, including . . . agents, . . . investment brokers . . . and tax specialists; and to do so without liability for any neglect, omission, misconduct, or default of the agent or representative, provided he was selected and retained with due care on the part of the fiduciary."122 Although this Code section permits employment of persons to assist in trust administration, it does not contain language authorizing the trustee to delegate individual investment decisions.123

Georgia trustee powers are similar, but not identical, to those found in the Uniform Trustees' Powers Act (UTPA).124 In language that almost parallels the Georgia provision, section 3(c)(24) of the UTPA permits a trustee “to employ . . . investment advisors, or agents . . . 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.”125 This provision effectively reverses the nondelegation rule.126 The UTPA language was adopted in 1964, so it was available to the Georgia drafters when the Georgia provision was adopted in 1991.127 Georgia’s unwillingness to go as far as the UTPA language is another indication of its anti-delegation attitude.

At the time the Georgia powers were enacted, two other statutory settings contained pro-delegation language. First, the Uniform Management of Institutional Funds Act (UMIFA) authorized charitable institutions to delegate investment decisions to either a committee of the institution’s governing board or to outside investment organizations.128 Second, the Employee Retirement Income Security Act (ERISA), which regulates the fiduciary management of employee pension plans, specifically provided for delegation of investment authority to

122. Id. § 53-12-232(24).
123. See id.
125. Id. § 3(c)(24) (emphasis added).
investment managers. ERISA is significant for a second reason: it extends fiduciary liability to the investment advisor and applies a prudent fiduciary standard to the trustee's delegation decisions.

In the absence of specific language in the trust instrument, Georgia does not provide trustees the power to delegate investment decisions. Not only is the Georgia statute silent on the delegation issue, it imposes specific responsibilities on the trustee with regard to each investment decision, and does not follow the statutory trend favoring delegation indicated by the UTPA, UMIFA, and ERISA.

2. References to the Common Law and Restatement (Second) Duties

The Georgia Trust Code not only denies trustees the power to delegate investment duties by its silence, it also imposes an affirmative duty not to delegate. The duties of Georgia trustees are outlined in Code section 53-12-190, which also incorporates the common law duties of the trustee. One of the common law duties has historically been a duty not to delegate investment decisions. Although the Georgia Supreme Court has stated that "there is a paucity of law in Georgia on the liability of trustees for investment losses," there are ample precedents from other states that support a nondelegation rule. Because the Georgia courts have not had occasion to rule on the delegation question, it is impossible to say whether the courts would approve a common law rule favoring delegation. However, in view of the fact that the Restatement (Third) is the

130. See Langbein, supra note 17, at 113.
133. See Langbein, supra note 17, at 106-09.
135. See Shriner's Hosp. for Crippled Children v. Gardiner, 733 P.2d 1110 (Ariz. 1987); Baker Boyer Nat'l Bank v. Garver, 719 P.2d 583 (Wash. Ct. App. 1986); see also Estate of Baldwin, 442 A.2d 529, 532 (Me. 1982) (holding that bank as executor is under general duty not to delegate administration of estate to others); Bumbaugh v. Burns, 635 S.W.2d 518, 521 (Tenn. Ct. App. 1982) (holding that trustee may not delegate investment discretion to joint or co-trustee).
minority position and the majority rule favors nondelegation, it would appear that the Georgia courts would be hesitant to approve delegation.

In addition, the comment to Georgia Code section 53-12-190 specifically references the Restatement (Second) duties of the trustee, and defines these as the common law duties. Section 171 of the Restatement (Second) outlines the duty not to delegate, which states that "[t]he trustee is under a duty to the beneficiary not to delegate to others the doing of acts which the trustee can reasonably be required personally to perform." Courts have widely interpreted this to mean that the trustee is precluded from delegating any act that requires the exercise of discretion, including the selection of investments. Indeed, the comments to Restatement (Second) section 171 state that trustees "cannot properly delegate to another power to select investments."

Thus, Georgia arguably maintains a hostile attitude toward trustee delegation of investment authority because the majority rule imposes a duty not to delegate and the statutory comments in the Georgia Code define the common law duties in terms of the Restatement (Second). Of course, the Georgia courts could choose to allow the common law to evolve from the Restatement (Second) to the Restatement (Third) position favoring delegation. In the absence of new legislation, however, Georgia trustees would be well-advised to take the more traditional and conservative nondelegation approach in the interest of self-preservation.

3. Lack of Guidelines for Prudent Delegation or Protection for Beneficiaries

Finally, Georgia remains a nondelegation jurisdiction because, even if a court could read Code section 53-12-232 to allow delegation, the Code section gives no specific guidelines indicating when a trustee has effectively delegated, and it

136. See Sages, supra note 22, at 22.
137. See O.C.G.A. § 53-12-190 cmt. (1997) ("[A] trustee is subject to the duties the common law imposes on trustees . . . . The common law duties referred to are set forth in detail in the Restatement, Trusts, Second, §§ 169-185.").
139. See, e.g., Shriners Hosp., 733 P.2d at 1111-12.
140. RESTATEMENT (SECOND) OF TRUSTS § 171 cmt. h (1959).
provides no protection for beneficiaries from imprudent delegation. In contrast, the UPIA's comments explain that limitations on delegation are critical in order to strike a balance "between granting trustees broad powers that facilitate flexible and efficient trust administration, on the one hand, and protecting trust beneficiaries from the misuse of such powers on the other hand." When the trustee delegates, he becomes subject to duties of prudence in selection of the agent and in establishing the scope and terms of delegation, and he maintains a continuing duty to monitor the agent's performance. Fiduciary responsibility extends to the agent, and a trustee who complies with the UPIA requirements is not liable for the agent's investment decisions. Some states that have adopted the UPIA establish even stricter criteria for effective delegation.

III. DRAFTING AROUND THE DELEGATION ISSUE

A. Preliminary Considerations

Trust law consists mainly of default rules. As long as the five basic elements of a trust are present, the language of the trust instrument will generally override any statutory or common law rules. Thus, even though Georgia's statute does not allow delegation, settlors may draft trusts to allow the trustee broad power to delegate investment functions. Generally, Georgia courts will strictly construe trust instruments against the

143. See id. § 9(a)(1) to (2).
144. See id. § 9(a)(3).
145. See id. § 9(b).
146. See id. § 9(c).
147. Two examples are Florida and Illinois. Both states have more specific criteria for delegation, including a notice requirement for the trustee to inform the beneficiaries of the intent to delegate the investment function. See FLa. STAT. ch. 518.112 (1993); 760 ILL. COMP. STAT. 5/5-1 (West. 1991).
148. See Langbein, supra note 17, at 109-10.
149. See supra note 1 and accompanying text.
150. See Langbein, supra note 17, at 109-10.
151. See id.
preparer of the document." Thus, it is important for a settlor to seek the services of an experienced drafter.

The drafter should first consider the inherent tension between providing flexibility to the trustee and protecting the beneficiaries. If the trustee’s delegation is efficient, the beneficiaries have the benefit of the agent’s expertise and the potential for improved investment performance. However, if the trustee delegates to an inept or unscrupulous advisor, the beneficiaries will be harmed. It is not enough to rely on the trustee’s general duties of loyalty and prudence; in order to prevent misuse of the authority to delegate investment functions in the absence of a UPIA-like statute, the trust instrument must incorporate specific procedural safeguards.

The need for delegation is greatly affected by a threshold matter—the nature of the trustee. Although there are many variations, the basic decision for the settlor often comes down to a choice between an individual or a corporate trustee (or sometimes a combination of the two). Settlors should consider the choice of trustee carefully because it is a long-term and sometimes personal relationship. The trust relationship will evolve over time. Administration of a trust can also be very time-consuming. As discussed above, many settlors believe that the best choice for trustee is a close relative or family member rather than a corporate trustee. But choosing an individual trustee may raise more problems with regard to delegation, because an individual trustee may not have the expertise, sophistication, experience, or resources to manage the

154. See id.
155. See id.
156. See id. § 9, at 28-29.
157. See generally Silk & Imbalzano, supra note 12, at 34 (contrasting capabilities and characteristics of individual and corporate trustees).
158. See id.
159. See id.; Street, supra note 7, at 268-69.
160. See Street, supra note 7, at 268.
161. See id.
162. See Silk & Imbalzano, supra note 12, at 34-35.
trust efficiently without delegation.\textsuperscript{163} In contrast, several factors may actually make the corporate trustee more efficient, both in terms of cost and performance.\textsuperscript{164} First, corporate trustees have the resources to handle all different types of investments.\textsuperscript{165} Second, they have a pre-existing organization that routinely deals with tax and probate deadlines and audits by internal, state, and federal regulators.\textsuperscript{166} Third, the fact that trust administration is a full-time job makes it better suited for a corporate fiduciary.\textsuperscript{167} Finally, selection of a corporate trustee may alleviate trustee succession problems.\textsuperscript{168} Institutions have an unlimited life, while an individual trustee may move out of state, become disabled, or die.\textsuperscript{169} 

Finally, a compromise position exists if the settlor insists upon retaining an individual trustee in a joint trusteeship with a corporate fiduciary.\textsuperscript{170} In many cases, this will give the settlor the best of both worlds and may eliminate or reduce the need for a broad delegation power.\textsuperscript{171} The settlor will have peace of mind knowing that a trusted individual is acting as trustee, and that the individual will be able to draw upon the expertise and resources of a corporate trust department.\textsuperscript{172} The settlor may even give the individual co-trustee power to remove the institutional co-trustee and substitute another\textsuperscript{173} if the following language is used:

\textit{Power to Substitute Corporate Fiduciary.} The co-trustee is authorized with absolute discretion to appoint, at any time or from time to time, a successor corporate trustee to act in the place and stead of any corporate trustee then acting, by delivering to the said corporate trustee, then acting, an appropriate instrument in writing duly acknowledged by him/her, naming the successor corporate trustee and by delivering a duplicate of such instrument to the successor corporate trustee. The successor trustee shall thereupon

\textsuperscript{163} See id.
\textsuperscript{164} See id. at 35.
\textsuperscript{165} See id.
\textsuperscript{166} See id.
\textsuperscript{167} See id.
\textsuperscript{168} See id.
\textsuperscript{169} See id.
\textsuperscript{170} See id. at 38.
\textsuperscript{171} See id.
\textsuperscript{172} See id.
\textsuperscript{173} See id.
become corporate trustee, and the superseded corporate trustee shall at the cost and expense of the trust (or expense of the estate) execute and deliver to such successor corporate trustee all necessary deeds, assignments, or other instruments or do or cause to be done any and all acts and things as may be necessary effectually to vest in the successor corporate trustee all the right, title and interest of the superseded trustee hereunder, and effectively to confirm to such successor corporate trustee the authority to act as such. 174

With the assumption that the nature of the trustee supports a broad delegation power, the drafter will next turn his attention to establishing the “private law” of the trust on the delegation issue. 175 The wise drafter might contemplate emulating the UPIA and would thus consider the same factors that guided the adoption of the UPIA delegation regime; 176 however, the language of the statute should be tailored to the individual trust. First, delegation procedures should be clear and specific, with emphasis on the trustee’s duty of prudence in selecting and monitoring the agent, so that the scope of the delegation is clear to both trustee and agent and the delegation is consistent with the trust terms. 177 Second, the instrument must provide protection for the beneficiaries against imprudent delegation. 178 Finally, the settlor needs to determine whether a court should hold the trustee liable for the investment decisions of the agent. 179

B. Clear Delegation Procedures

Because Georgia statutes do not permit delegation, the instrument itself must make it clear that the duty of prudence applies to the selection of an agent. 180 This should encompass a

174. Id. at 38 (Exhibit D).
175. See generally Langbein, supra note 17, at 109-10 (discussing importance of well-drafted trust to defeat nondelegation rule).
177. See id. § 9(a).
178. See id. § 9(b). Also refer to the associated comment on protection of beneficiaries. See id. § 9(b), at 29-30. This section imposes a duty on the investment agent to protect the beneficiary. See id.
179. See id. § 9(c). This section limits the trustee’s liability as long as the trustee has complied with the delegation requirements. See id.
180. See generally Langbein, supra note 17, at 109-10 (asserting that statutory rules can be overcome by the trust instrument).
duty to investigate the background of the investment advisor, including his qualifications, experience, and financial stability.  

Because Georgia already allows trustees to employ investment advisors, this aspect does not need to be addressed unless the settlor wishes to modify the statutory rule. One example, the settlor may wish to restrict the types of advisors that are appropriate for delegation. The language of the instrument should also require the trustee to consider the scope and terms of delegation and ensure that they are consistent with the terms of the trust.

In addition, the instrument should specify the allowable procedures for the trustee to monitor the agent and indicate that continued monitoring is subject to the duty of prudence. One way to do this is to establish periodic reporting requirements for the agent, analogous to the trustee's duty to account to the beneficiaries. The trust instrument may specify this requirement; however, Georgia already has a statutory default rule on accounting. Another method is to mandate regular meetings between the trustee and agent.

C. Protection of Beneficiaries

To some extent, Georgia already protects beneficiaries against imprudent delegation because delegation is not authorized by statute, and if the trust instrument is unclear or silent on delegation, any attempt to delegate nonministerial duties constitutes a breach of trust. Even if the delegation authority is otherwise clear, only exculpatory language in the instrument can absolve the trustee from liability for the imprudent investment decisions of the agent. Beneficiaries do not have

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181. See 760 ILL. COMP. STAT. 5/5-1(b)(2) (West 1991). Illinois goes beyond the Uniform Prudent Investor Act § 9(a)(1) by imposing a specific duty on the trustee to inquire into the qualifications of the investment advisor. See id.


184. See id. § 9(a)(3).


186. See id.

187. See generally Street, supra note 7, at 273-74 (discussing importance of ongoing communication in trust relationship).


189. O.C.G.A. §§ 53-12-190 to -191 (1997). Together, these Code sections impose
any direct recourse against the agent unless the instrument includes language that requires the agent to assume some responsibility to the beneficiaries, such as in an investment contract that imposes fiduciary liability on the agent.\textsuperscript{190} Also, beneficiaries may rely upon the trustee to sue the agent for breach of an investment contract on behalf of the trust.\textsuperscript{191}

One of the best ways to avoid problems in trust administration is effective communication between the trustee and beneficiaries.\textsuperscript{192} Thus, the instrument should require that the trustee provide notice to the beneficiaries of an intent to delegate the investment function.\textsuperscript{193} A notice requirement has three positive effects. First, the trustee can explain the delegation decision to the beneficiaries, and the beneficiaries will have an opportunity to confer with the trustee to state any concerns or objections they might have.\textsuperscript{194} Second, notice should reduce the potential for problems in the future because all parties may air their concerns and resolve problems before delegation begins.\textsuperscript{195} Finally, notice will start the statute of limitations running on any trustee liability resulting from the delegation decision.\textsuperscript{196}

D. Trustee Liability for Acts of the Investment Advisor

The settlor must also determine whether he wants to hold the trustee liable for the investment decisions of an agent.\textsuperscript{197} Jurisdictions differ on their statutory approaches to this issue. Some jurisdictions that allow delegation absolve the trustee from liability for the agent's investment decisions as long as the delegation was prudent and complied with certain

\textsuperscript{191} See id.
\textsuperscript{192} See Street, supra note 7, at 273-74.
\textsuperscript{193} See 760 ILL. COMP. STAT. 5/5-1(b)(6) (West 1991).
\textsuperscript{194} See Street, supra note 7, at 273-74.
\textsuperscript{195} See id.
\textsuperscript{196} See O.C.G.A. § 53-12-191 (1997). In Georgia, the statute of limitations for a claim by a beneficiary against the trustee for a breach of trust is six years after the beneficiary discovered, or reasonably should have discovered, the breach. See id.
\textsuperscript{197} See Bennett, supra note 190, at 482-87.
procedures.\textsuperscript{198} Other jurisdictions continue to hold the trustee liable along with the agent.\textsuperscript{199} At first blush, section 53-12-232(24) of the Georgia Code appears to exculpate the trustee if the section is incorporated by reference into the trust instrument.\textsuperscript{200} However, that section deals with employment and compensation of agents, not delegation of trustee powers.\textsuperscript{201} Thus, the exculpation does not likely extend to the delegation of investment authority when done outside the statute.

If the trust language and the delegation agreement put the agent in a fiduciary position relative to the trust, then the beneficiaries can rely on the trustee’s duty to enforce the delegation terms against the agent, should this become necessary.\textsuperscript{202} With the trustee exonerated from personal responsibility for the agent’s conduct, the trustee will be encouraged to exercise his authority to delegate when it is prudent to do so.\textsuperscript{203} The trustee will still be liable for any failure to exercise prudence in selection and monitoring.\textsuperscript{204} On the other hand, maintaining liability against the trustee may make him more diligent in monitoring the agent, but may defeat the purpose of delegation and may be a deterrent to a delegation decision.\textsuperscript{205}

\textbf{E. Drafting Examples}

Settlors and drafters should craft trust instruments with care because they are often effective for many years and must be capable of adapting to changes in the law, the investment environment, and the parties.\textsuperscript{206} Although no “cookbook” solution will be appropriate in all cases, drafting examples in the Appendix to this Note are offered as a starting point. Drafting Example 1 grants a trustee broad authority to delegate investment power to an agent. This example attempts to strike the appropriate balance between flexibility on the part of the

\textsuperscript{198} Illinois and Florida are two examples. See Ill. STAT. ch. 518.112(3) (1993); 760 ILL. COMP. STAT. 5/5-1(c) (West 1991).
\textsuperscript{199} See, e.g., N.Y. EST. POWERS & TRUSTS LAW § 11-2.3 (McKinney Supp. 1997).
\textsuperscript{201} See id.
\textsuperscript{202} See Bennett, supra note 190, at 485-86.
\textsuperscript{203} See Langbein, supra note 17, at 117-18.
\textsuperscript{204} See id.
\textsuperscript{205} See id.
\textsuperscript{206} See Street, supra note 7, at 269-71.
trustee and protection for the trust beneficiaries. Example 2 is a more general authority, which allows a trustee to employ, compensate, and delegate duties and powers to agents. Here, protection of the beneficiaries falls more directly on the trustee because delegation procedures are not spelled out in as much detail as Example 1. Thus, delegation is in the sole discretion of the trustee. Example 3 gives an individual co-trustee the authority to delegate investment powers to a corporate trustee. Example 4 provides exculpatory language to insulate the trustee from liability for the agent’s actions concerning individual investment decisions. These examples draw from specific statutory language used in states that have adopted a pro-delegation stance and from provisions in current formbooks.

IV. SHOULD GEORGIA ADOPT THE UPIA?

As noted above, the Georgia Supreme Court stated that there has been little litigation over trust investment issues in Georgia. This does not mean, however, that the state of Georgia trust investment law is not confused. There is a recent example of a large corporate trustee in Georgia that was uncertain about which prudence standard should govern its investment decisions. In addition, the private express trust is no longer an estate planning device used only by the wealthy. Georgia needs to adopt some form of the UPIA to continue the modernization process of its trust investment law. Adopting the pro-delegation stance of the Restatement (Third) and the UPIA would go a long way toward meeting these concerns.

208. See generally Monica Langley, Fifty-Year Delay—White Publisher’s Will Left Legacy to Blacks, Yet It Lies Unspent, WALL ST. J., Sept. 27, 1996, at A1. The story relates NationsBank’s dispute with the heirs of W.T. Anderson over a charitable testamentary trust established in Anderson’s will. See id. The heirs contend that NationsBank and its predecessors mismanaged the trust by not investing prudently. See id. at A1, A8. The bank maintains that the reason the trust grew slowly was that the will limited the investments to legal investments, and that it was bound by Georgia’s legal list. See id. at A8. The heirs contend that Georgia abrogated the legal list for trustee investments in 1972. See id.
209. See id. at A1, A8.
210. See Langbein, supra note 17, at 110.
211. See generally, Halbach, supra note 9, at 1153-54 (explaining need for modernization of trust investment law by statute).
212. See Langbein, supra note 17, at 110-19.
A pro-delegation default rule better reflects the realities of current practice. Informed settlors probably tend to draft around the nondelegation rule anyway, making the rule a trap for the unwise. In the words of an esteemed scholar on trust investment law, "[d]elegation on demand has been the actual law during the time that nondelegation has been the nominal law." The current Georgia statute embraces modern investment concepts of portfolio management, but does not give individual trustees the delegation authority often necessary for taking advantage of these concepts. With statutory delegation authority, trustees could take full advantage of the services of trained professionals and would be better able to serve the interests of the beneficiaries. A settlor who does not want delegation can still draft around a pro-delegation default rule. Finally, a well-drafted statute will protect against imprudent delegation by putting appropriate safeguards in place.

As noted above, some of the state delegation regimes, such as those used in Illinois and New York, are more rigorous than the UPIA.

A. The Illinois Model

The Illinois prudent investor statute was actually one of the models for the UPIA. Illinois maintains a nondelegation rule for "any acts involving the exercise of judgment and discretion, except acts constituting investment functions that a prudent investor of comparable skills might delegate under the circumstances." The delegation of investment functions is subject to the following six specific requirements: (1) the trustee must exercise reasonable care in selecting the agent, in

213. See id. at 118-19.
214. See id.
215. Id. at 119.
216. See Halbach, supra note 9, at 1174.
217. See id.
218. See Langbein, supra note 17, at 109.
220. See Silk & Imbalzano, supra note 12, at 34-35; 760 ILL. COMP. STAT. 5/5-1(b) (West 1991); N.Y. EST. POWERS & TRUSTS LAW § 11-2.3 (McKinney Supp. 1997).
222. 760 ILL. COMP. STAT. 5/5-1(a) (West 1991).
establishing the scope and specific terms of the delegation, and in periodically monitoring the overall performance of the agent; (2) the trustee must conduct an inquiry into the experience, general qualifications, and financial stability of the agent; (3) the investment agent is subject to state law; (4) the agent is subject to the same standards as the trustee; (5) fiduciary duties and liability to the beneficiaries and to the trustee attach to the agent; and (6) the trustee must provide written notice of intent to delegate investment functions to the beneficiaries at least thirty days prior to the delegation taking effect.\textsuperscript{223} If the trustee complies with all six requirements, the delegation is authorized, and the trustee is not responsible for the individual investment decisions or actions of the investment agent.\textsuperscript{224}

B. The New York Model

Unlike the UPIA, New York applies its prudent investor statute not only to trustees, but to other fiduciaries, such as guardians, conservators, and personal representatives of an estate.\textsuperscript{225} (In contrast, the new Georgia Trust Code applies different prudence standards to trustees on the one hand and personal representatives and other types of fiduciaries on the other.\textsuperscript{226}) New York permits delegation, but unlike the UPIA and the Illinois statute, New York does not relieve trustees who properly delegate investment functions from liability for the actions or investment decisions of the agent.\textsuperscript{227}

CONCLUSION

The nondelegation rule of trust investment law acted as an appropriate safeguard against abuses of discretion on the part of the trustee when the nature of trust property required relatively passive management. However, the typical trust today requires much more active and professional fiduciary management because it is usually composed of financial instruments. Trustees (particularly individual or amateur trustees) who are trying to do

\textsuperscript{223} See id. at 5/5-1(b).
\textsuperscript{224} See id. at 5/5-1(c).
\textsuperscript{226} Compare O.C.G.A. § 53-12-287 (1997) (standard for trustees) with id. § 53-8-1 (standard for personal representatives of an estate).
\textsuperscript{227} See Borrok, supra note 225, at 293.
their jobs will inevitably seek the counsel of outside investment professionals. Without the ability to delegate individual investment decisions, the increased responsibilities placed on trustees by the Prudent Investor Rule (such as diversifying investments in a portfolio; protecting against inflation; and planning for income, estate, and gift taxes) threaten the viability and continued existence of the individual trustee. Reversing the nondelegation rule allows the trustee to focus on the overall performance of the trust in relation to its purpose rather than on the everyday decisions concerning which investment vehicles are appropriate.

Although Georgia has moved beyond the legal lists and presently allows trustees to invest in any type of property, the failure to address the delegation issue restricts the ability of trustees to rely upon the advice of outside investment experts and does not provide safeguards to protect beneficiaries from imprudent delegation. A strong, controlled delegation regime, such as the Illinois model, would allow trustees to better serve their beneficiaries while providing clear standards to protect beneficiaries against imprudent delegation. Returning to the opening hypothetical, a pro-delegation statute would allow a hypothetical amateur trustee to carry out his fiduciary responsibilities in an efficient manner by delegating his investment duties to a qualified professional, without fear of being held liable for an otherwise prudent decision to delegate those responsibilities.

Stephen M. Dickson
APPENDIX

DRAFTING EXAMPLE 1

GRANT OF BROAD AUTHORITY TO TRUSTEE TO
DELEGATE TRUST INVESTMENT POWER TO INVESTMENT ADVISOR

(1) The trustee is authorized to delegate any or all investment functions to an investment agent that a prudent investor of comparable skills might delegate under the circumstances. Such delegation must comply with all of the requirements in section (2). The trustee shall retain the right to revoke this delegation or renew it as he or she desires.

(2) For the delegation to be effective under section (1), all the following requirements apply: (a) the trustee must use reasonable judgment, care and caution in selecting the investment agent, in establishing the scope and specific terms of delegation, and in periodically reviewing the agent’s actions in order to monitor overall performance and compliance with the scope and specific terms of the delegation; (b) the trustee must conduct an investigation into the experience, performance history, professional licensing or registration and financial stability of the agent; (c) the agent shall be subject to the same fiduciary standards that are applicable to the trustee; (d) the agent shall be liable to the beneficiaries of the trust and to the designated trustee to the same extent as if the investment agent were a designated trustee in relation to the exercise or non-exercise of the investment function; (e) the trustee shall send written notice of its intent to begin delegating investment functions to the beneficiaries eligible to receive income from the trust at least thirty days prior to the date of initial delegation. This notice shall thereafter, until or unless the beneficiaries eligible to receive income from the trust at the time are notified to the contrary, authorize the trustee to delegate investment functions pursuant to this section. In the case of a minor beneficiary, notice may be sent to a parent or legal guardian of the minor. In the case of an otherwise incapacitated person, notice may be given to the guardian of such person or to such person’s donee under a durable power of attorney that is sufficient to grant such authority.

Sources: FLa. STAT. ch. 518.112 (1993); 760 ILL. COMP. STAT. 5/5-1 (West 1991).
DRAFTING EXAMPLE 2

AUTHORITY TO EMPLOY, COMPENSATE, AND DELEGATE DUTIES TO AGENTS

The trustee is authorized to employ brokers, bank custodians, investment counsel, attorneys, and other agents or servants; to delegate to them such duties, rights, and powers of the trustee for such period as the trustee shall think fit; and to pay such persons reasonable compensation out of the trust estate, all regardless of whether any such person or entity is a beneficiary or trustee hereunder.


DRAFTING EXAMPLE 3

AUTHORITY OF INDIVIDUAL CO-TRUSTEE TO DELEGATE INVESTMENT FUNCTIONS TO CORPORATE CO-TRUSTEE

The individual trustee or any successor to the individual trustee may delegate any or all investment functions to the corporate trustee. The individual trustee shall retain the right to revoke this delegation or renew it as he or she desires.


DRAFTING EXAMPLE 4

LIMITATION OF TRUSTEE LIABILITY FOR ACTIONS OF INVESTMENT AGENT

If all the requirements of section 2 regarding delegation of investment functions are satisfied, the trustee shall not otherwise be responsible for the investment decisions or actions of the investment agent to which the investment functions are delegated.

Sources: FLA. STAT. ch. 518.112 (1993); 760 ILL. COMP. STAT. 5/5-1 (West 1991).