"I'M NOT SAYING I'D MAKE A BETTER CEO; THAT'S UNSAID." COMPELLING THE TRUSTEE TO SELL THE FAMILY BUSINESS WHEN *SUCCESSION* GOES AWRY

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Synopsis: Trust settlors frequently establish trusts as a means of keeping a business in the family dynastically through multiple generations. These trust structures commonly immunize trustees from liability for retaining the business and waive the general duty of diversification. Frequently, beneficiaries of such trust structures do not feel any economic benefit from their status unless they are also insiders in the business earning salaries, bonuses, and perquisites. In circumstances where beneficiaries have sought relief, courts generally demur, pointing to the provisions immunizing the trustee from liability for retaining the assets. No case has addressed the question asked, and which this Article seeks to answer, whether a provision immunizing a trustee from liability should be equated with a mandate to retain them (absent catastrophic events). The Article suggests that even if the trustee would not be found liable for having made a good faith decision to retain assets, trustees nonetheless have the power to sell unless there is an actual mandate to retain the assets, which is rare. If trustees have the power to sell if they conclude it would be reasonable to do so, even if they would be immunized from liability if they did nothing, then surely the court has the power to instruct the trustee to sell in such circumstances.

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I. INTRODUCTION

As HBO's hit show *Succession* teaches us, the inter-generational transfer of the family business can (and often does) lead to internecine warfare.[1] Even the best succession planning is often tenuous at best when there is a will to fight. A global survey conducted by investment powerhouse UBS presages the battles to come:

> Over the next 20 years, the world will experience the greatest transfer of wealth in history with $84 trillion expected to pass down to younger generations in the US alone. UBS's latest Investor Watch report, which surveyed 4,500 investors in 14 markets with at least $1 million in investable assets, found that around 40% of investors globally have not formalized an inheritance plan, due to the complexity of dividing their inheritance fairly.[2]

The genesis of these disputes may, as is the case in *Succession*, emanate from a thirst for power and control or to fulfill what one perceives to be one's rightful claim to the throne at the king's demise. Frequently, however, the field of battle is between insiders and outsiders: those who profit from their employment in the family business and those forced to stand idly by and who derive little or no benefit from their supposed inheritance. While the insiders profit from salaries, bonuses, and perquisites, the outsiders gain little more than bragging rights as an "owner," meaning usually that he or she is merely a beneficiary of a trust that owns a controlling interest in the business. Without remuneration or any great financial reward, the patina of one's so-called ownership, even of a renowned business or brand, can erode or wear thin over time.

The patriarch or matriarch who devised the succession plan also frequently overestimates the fealty his or her family will have to it. These "masters of the universe" and "lions of industry" are accustomed to ruling with impunity, to commanding respect whether by fear or deed. Therefore, they are entirely unaccustomed to the notion that anyone would defy what the patriarch or matriarch is certain everyone is certain of, that is, his or her intentions. However, defiance is precisely what happens time and time again once these seemingly omnipotent captains of their trade are dead or

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[1] *See Succession* (HBO June 3, 2018).

[2] UBS Investor Watch: Investors are unprepared for the largest transfer of wealth in history, UBS Global, https://bit.ly/4gyNmDG [https://perma.cc/S7Y9-N8PD].

just senile. This defiance is what the author calls the "Marshal Tito syndrome": the dictator whose death led to the fall of Yugoslavia and the Baltic wars. Decades of pent-up jealousy, rage, humiliation and frustration often fan the flames of discontent in families and in nations.

According to UBS, 40% of investors globally have no succession plan at all.[3] The succession plan, when one exists, is most commonly set out in a trust and related instruments and typically are accompanied by provisions that may be intended to act as the proverbial castle walls: the plan may authorize, if not direct, the trustee to retain ownership of the business, waive any legal obligation to diversify assets or make prudent investment decisions, and exculpate the trustee from liability to the fullest extent of the law, usually short of bad faith, gross negligence, or reckless indifference to the interests of the beneficiaries.

For those who believe there is cause, is there any way to scale the castle walls, that is, to compel the trustee to sell, monetize the family business, or otherwise create a liquidity event? Put more succinctly, the question posed by this Article is whether a trustee who is not prohibited from selling an asset can be compelled to do so judicially regardless of whether the trustee could be found personally liable should the trustee choose not to do so. Notwithstanding the importance of the question, there is a remarkable nationwide dearth of judicial authority. Most states have no reported decisions that even remotely provide guidance. Nineteen states have one, maybe two reported judicial opinions that are of a marginal degree of value on the question presented by this Article, and none has addressed the question squarely, to wit, whether a court could, would, or should approve the sale or other disposition of an asset, or compel it, despite trust provisions that evince an intent to retain it, and even immunize the trustee from liability for inaction.[4]

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[3] *See id*.

[4] *See* Baldus v. Bank of Cal., 530 P.2d 1350 (Wash. Ct. App. 1975); Carnahan v. Johnson, 711 N.E.2d 1093 (Ohio Ct. App. 1998); Donato v. BankBoston, N.A., 110 F. Supp. 2d 42 (D.R.I. 2000); Est. of Nicholas, 223 Cal. Rptr. 410 (Cal. Ct. App. 1986); Glass v. SunTrust Bank, 523 S.W.3d 61 (Tenn. Ct. App. 2016); Hasty v. Castleberry, 749 S.E.2d 676 (Ga. 2013); Haw. Tr. Co. v. Breault, 42 Haw. 268 (Haw. 1958); Hewitt v. Beattie, 138 A. 795 (Conn. 1927); Hoffman v. First Va. Bank of Tidewater, 263 S.E.2d 402 (Va. 1980); *In re* Chase Manhattan Bank, 809 N.Y.S.2d 360 (N.Y. App. Div. 2006); *In re* McDonough's Tr., 109 N.W.2d 29 (Iowa 1961); *In re* Tr. Created by Inman, 693 N.W.2d 514 (Neb. 2005); Lichtenfels v. N.C. Nat. Bank, 151 S.E.2d 78 (N.C. 1966); *In re* Est. of Maxedon, 946 P.2d 104 (Kan. Ct. App. 1997); *In re* Trs. Created by Hormel, 504 N.W.2d 505 (Minn. Ct. App. 1993); Shriners Hosps. for Children v. First N. Bank of Wyo., 373 P.3d 392 (Wyo. 2016); Woodard v. Mordecai, 67 S.E.2d 639 (N.C. 1951); York v. Md. Tr. Co., 131 A. 829 (Md. 1926); Young v. Young, 237 N.W. 535 (Mich. 1931).

Even the precedents that circle the issue have yet to explore this more subtle, yet critically important question, the result of an unfortunate conflation of the trustee's authority to sell in appropriate circumstances, on the one hand, and an exculpation from personal liability should the trustee not sell. Understandably, decisions arise most commonly in the context of whether the trustee should be liable for breaching fiduciary duties for having failed to diversify, resulting in damages to the trust estate. However, when the question arises, should the trustee sell proactively (whether to avoid further damage from a declining asset or for some other reason)? The few decisions available suggest that circumstances must be dire, and courts rely heavily on provisions that exculpate trustees from liability for retaining assets important to the settlor. But personal liability for inaction is not the same as the power of action. This conflation is significant because, whether the trustee may have personal liability for doing nothing, if the trustee has the authority to do something, then it is appropriate for beneficiaries and courts to demand it.

While no court has squarely addressed whether a trustee who is not prohibited from selling an asset can be compelled to do so judicially regardless of whether the trustee could be found personally liable should the trustee choose not to do so, the ability to predict judicial attitudes that might impact a decision on this question requires examining the authority that might bear on it.

Part II explains the principles articulated by the Restatement (Third) of Trusts and Uniform Trust Code, which have been adopted by many states' legislatures or are followed by the courts in many states bearing on the question at hand. Part III discusses judicial opinions, binding as precedent in those states and potentially persuasive authority in others. Part IV proposes a uniform standard for state courts that will undeniably have to grapple increasingly with the question of whether and when to force a sale of the family business.

II. RESTATEMENT OF TRUSTS AND UNIFORM TRUST CODE

A. Restatement (Third) of Trusts

The Restatement (Third) of Trusts (Third Restatement) is a publication of the American Law Institute.[5] Though the Restatement has no binding effect, courts accept it as persuasive authority in the absence of specific, binding precedent, particularly in circumstances where it may fill

[5] *Publications*, THE AMERICAN LAW INST., https://www.ali.org/publications [https://perma.cc/7JDY-VWZF].

the void in a state's own statutes or may help to explain or guide courts in the interpretation or application of those statutes.[6] The Restatement is organized as a model code and provides scholarly commentary and examples based upon judicial opinions from jurisdictions throughout the country.[7] Many state statutes have been modeled after the Third Restatement.[8]

Pertinent to this discussion, section 90 of the Third Restatement provides generally that a trustee is under a duty to the beneficiaries to invest and manage funds as a prudent investor would, including that the trustee has a duty to diversify the investments, unless it is prudent under the circumstances not to do so.[9] Section 91 provides that trustees have the duty to conform to the terms of the trust, including restricting certain investment powers.[10] However, comment f to this section provides that even

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[6] *Restatement of the Law*, CORNELL LAW SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/restatement_of_the_law [https://perma.cc/ED7G-RS7L].

[7] *Id.*

[8] *Id.*

[9] RESTATEMENT (THIRD) OF TRS. § 90 (Am. Law Inst. 2023) (emphasis added) (General Standard of Prudent Investment):

> The trustee is under a duty to the beneficiaries to invest and manage the funds of the trust as a prudent investor would, in light of the purposes, terms, distribution requirements, and other circumstances of the trust.
>
> (a) This standard requires the exercise of reasonable care, skill and caution, and is to be applied to investments not in isolation but in the context of the trust portfolio and as a part of an overall investment strategy, which should incorporate risk and return objectives reasonably suitable to the trust.
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> (b) In making and implementing investment decisions, *the trustee has a duty to diversify the investments of the trust unless, under the circumstances* it is prudent not to do so.
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> (c) In addition, the trustee must:
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> (1) conform to fundamental fiduciary duties of loyalty (§ 170) and impartiality (§ 183);
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> (2) act with prudence in deciding whether and how to delegate authority and in the selection and supervision of agents (§ 171); and
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> (3) incur only costs that are reasonable in amount and appropriate to the investment responsibilities of the trusteeship (§ 188).
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> (d) The trustee's duties under this Section are subject to the rule of § 228, dealing primarily with contrary investment provisions of a trust or statute.

[10] *Id.* at § 91 (Investment Provisions of Statute of Trust):

In investing the funds of the trust, the trustee when a certain investment is permitted under the terms of the trust, including when the trust permits the trustee to retain certain property, it "does not relieve the trustee of the fundamental duty to act with prudence. The fiduciary must still exercise care, skill, and caution in making decisions to acquire or retain the investment."[11]

Section 92 of the Third Restatement imposes a duty on the trustee, within a reasonable period of time after creation of the trust, to conduct a review and make and implement decisions concerning whether to retain or dispose of investments of the trust estate in order to conform to the requirements of sections 90 and 91.[12] Comment a to section 92 provides as follows:

> *a*. *Duty to restructure trust portfolio.* The rules of §§ 90 and 91 require the trustee to manage trust investments as a prudent investor would in light of any applicable statutory restrictions and the terms, purposes, distribution requirements, and other circumstances of the trust. Because a trustee rarely receives a trust estate consisting wholly of cash, the relevant circumstances of the trust include its existing investments—so-called "inception assets." Thus, with the trust's investment objectives in mind, the trustee must review the original investments and, if and as necessary, formulate a plan for restructuring the portfolio to achieve a suitable level of risk and expected return with appropriate degrees of diversification and income productivity.[13]

Comment d to section 92 addresses the effect of an authorization in the trust to retain inception assets; it provides:

> The authorization to retain, however, ordinarily does not justify the trustee in retaining such assets if, under the circumstances, retention would be imprudent . . . . In most instances, ***a trustee should not take a settlor's authorization to retain specific invest-***

(a) has a duty to conform to any applicable statutory provisions governing investment by trustees; and

(b) has the powers expressly or impliedly granted by the terms of the trust and, except as provided in §§ 66 and 76, has a duty to conform to the terms of the trust directing or restricting investments by the trustee.

[11] *Id.* § 91 cmt. f.

[12] *See id.* § 92 (Duty With Respect to Original Investments): "The trustee has a duty, within a reasonable time after the creation of the trust, to review the contents of the trust estate and to make and implement decisions concerning the retention and disposition of original investments in order to conform to the requirements of §§ 90 and 91."

[13] *Id.* § 92 cmt. a.

> ***ments as special justification indefinitely if retention would otherwise be imprudent***, especially if an apparent purpose of the authorization becomes outdated by changed circumstances or passage of time.[14]

Comment d(1) addresses the trustee's duty when the trust instrument expands the trustee's ordinary duty of discretion or provides exculpatory language:

> Sometimes a statutory or trust provision expressly grants the trustee "absolute," "sole and uncontrolled," or similar discretion to retain assets received as a part of the trust estate, or expressly states that the trustee shall not be liable for retaining such assets. Language of this type does not wholly insulate the trustee from judicial intervention or liability for abuse of discretion. See § 87. Such language, however, confers upon the trustee greater than ordinary latitude in the exercise of judgment with respect to the retention of inception investments, although it does not allow the trustee to act in bad faith or in a state of mind not contemplated by the settlor. See § 87, Comment *d*. Nor does it allow the trustee to act recklessly or in disregard of the fiduciary duty of loyalty.[15]

Indeed, section 66 imposes upon the trustee an affirmative duty to seek judicial relief from a provision that would prohibit the trustee from disposing of an asset if changed circumstances would defeat the purpose of the trust and would authorize the court to grant such relief.[16] Illustration 1 in the comments to section 66, subsection (1) provides an example of the circumstances under which a court may order the sale of property that the trust instrument otherwise directs the trustee to retain:

> The terms of the trust being administered by T require the retention of a modest-sized apartment complex that the settlor had

[14] *Id.* § 92 cmt. d(2) (emphasis added).

[15] *Id.* § 92 cmt. d(1).

[16] *See id.* § 66 (Change in Circumstances):

> (1) The court may modify an administrative or distributive provision of a trust, or direct or permit the trustee to deviate from an administrative or distributive provision, if because of circumstances not anticipated by the settlor the modification or deviation will further the purposes of the trust.
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> (2) If a trustee knows or should know of circumstances that justify judicial action under Subsection (1) with respect to an administrative provision, and of the potential of those circumstances to cause substantial harm to the trust or its beneficiaries, the trustee has a duty to petition the court for appropriate modification of or deviation from the terms of the trust.

> owned and operated during her lifetime. It has subsequently become clear that this apartment complex cannot be administered efficiently and can be expected to continue to detract from the overall performance of the trust estate, to the disadvantage of all of the beneficiaries. The court may authorize deviation from the terms of the trust, enabling the trustee to sell the apartment complex and reinvest the proceeds.[17]

Furthermore, as expressed in illustration 7, in the circumstances of illustration 1, the trustee has an affirmative duty to seek an order authorizing the trustee to sell: "The trust and circumstances are as stated in Illustration 1. The trustee has a duty to petition the court for authority to disregard the settlor's direction to retain the apartment complex."[18]

In other words, under the Restatement, even in circumstances in which the trust requires the retention of an asset—in other words, even in circumstances beyond just a simple waiver of the duty to diversify—there may arise an affirmative duty upon the trustee to seek relief from that provision and request authority from the court to dispose of the asset, and the Restatement would authorize the court to grant that relief.[19] The circumstances giving rise to the trustee's duty are when retention would be imprudent, especially if there are changed circumstances that would make it disadvantageous for the beneficiaries to adhere to the trust's directive.[20]

B. Uniform Trust Code

The Uniform Trust Code (UTC) is a model code of the Uniform Law Commission that has been adopted in whole or with modification by many states.[21] The Uniform Law Commission provides states drafts of nonpartisan legislation to bring clarity and stability to state statutory law. ULC

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[17] *Id.* § 66 illus. 1(1).

[18] *Id.* § 66 illus. 7(1).

[19] *See id.* § 66.

[20] *See id.*

[21] *See* UNIF. TR. CODE, prefatory note (Unif. L. Comm'n 2000). The UTC has been adopted by the following states: Alabama, Arizona, Arkansas, Colorado, Connecticut, District of Columbia, Florida, Illinois, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming.

members are lawyers, judges, legislators and legislative staff, and law professors appointed by state and territory governments [22]

Under section 105 of the UTC, the terms of the trust prevail over any provision of the Code, except the duty to act in good faith and in accordance with the purpose of the trust and best interests of the beneficiaries, in which circumstances the court has power to act.[23] Section 801 of the UTC (Duty to Administer Trust) provides, "Upon acceptance of a trusteeship, the trustee shall administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with this [Code]."[24] As per the comment to section 801, "this section confirms that a primary duty of a trustee is to follow the terms and purpose of the trust and to do so in good faith."[25]

Section 804 (Prudent Administration) provides, "A trustee shall administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution."[26] The comment to section 804 provides that a settlor may modify the prudent person standard with limitations, that is, section 1008 prohibits a settlor from exculpating a trustee from liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or to the interests of the beneficiaries.[27] The comment to section 1008 explains:

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[22] *About Us*, UNIF. L.COMM'N, https://www.uniformlaws.org/aboutulc/overview [https://perma.cc/GV23-TTKK].

[23] *See* UNIF. TR. CODE § 105 (Default and Mandatory Rules) (emphasis added):

> (a) Except as otherwise provided in the terms of trust, this [Code] governs the duties and powers of a trustee, relations amount trustees, and the rights and interests of a beneficiary.
>
> (b) The terms of a trust prevail over any provision of this [Code] except:
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> . . .
>
> (2) [subject to [Uniform Directed Trust Act Sections 9, 11, and 12],] the duty of a trustee to act in good faith *and in accordance with the terms and purposes of the trust and the interests of the beneficiaries*;
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> . . .
>
> (13) the power of the court to take such action and exercise such jurisdiction as may be necessary in the interests of justice.

[24] *Id.* § 801.

[25] *Id.* § 801 cmt.

[26] *Id.* § 804.

[27] *See id.* §§ 804, 1008. UTC section 1008 provides, in pertinent part, as follows:

> (a) A term of a trust relieving a trustee of liability for breach of trust is unenforceable to the extent that it:

> Even if the terms of the trust attempt to completely exculpate a trustee for the trustee's acts, the trustee must always comply with a certain minimum standard. As provided in subsection (a), ***a trustee must always act in good faith with regard to the purposes of the trust and the interests of the beneficiaries***. Subsection (a) is consistent with the standards expressed in Sections 105 and 814(a), which, similar to this section, place limits on the power of a settlor to negate trustee duties. This section is also similar to Section 222 of the Restatement (Second) of Trusts (1959), except that this Code, unlike the Restatement, allows a settlor to exculpate a trustee for a profit that the trustee made from the trust.[28]

Even when a settlor seeks to alter the prudent investment standards or to exculpate the trustee from liability to the fullest extent possible, the trustee's discretion is never absolute, and the trustee must always act in good faith.[29]

III. PERTINENT JUDICIAL AUTHORITY

In contrast to the frequency with which succession battles arise, there is little in the way of judicial precedent to guide in the resolution of such conflicts. Surprisingly, virtually no judicial guidance exists on the question presented by this Article, that is, whether or in what circumstances a court can or should compel the sale of the family business notwithstanding trust provisions that immunize a trustee for failure to do so. If anything can be gleaned from decisions that have not squarely addressed this question, it is that courts tend to conflate the immunity from liability for inaction with the trustee's authority and thus, the court's authority to compel action. As aforementioned, regardless of provisions immunizing a trustee for inaction, a trustee has authority for action, that is, to decide to sell if the trustee deems reasonable to do so.[30] Given the trustee's authority, the court then has the power on the petition by the trustee or a beneficiary to instruct or compel the trustee to exercise that authority if

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> (1) relieves the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries; . . . .

[28] *Id.* § 1008 cmt. (emphasis added).

[29] *See id.* § 814(a). That subsection provides as follows:

> Notwithstanding the breadth of discretion granted to a trustee in the terms of the trust, including the use of such terms as "absolute", "sole", or "uncontrolled", the trustee shall exercise a discretionary power in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.

[30] *See id.* § 816.

circumstances warrant, even if the trustee would be shielded from liability for breach of duty if she were to decline to take action.[31]

A. Trustee Inaction

Courts will weigh the conduct through the prism of exculpatory language in the trust instrument when called upon to adjudicate trustee liability for inaction with respect to a concentrated position in a declining asset. For example, in *Perling v. Citizens and Southern National Bank*,[32] the Georgia Supreme Court considered a trust that was almost entirely funded with one stock. The trust authorized the trustees to retain assets or property received from the settlor, and further provided that any investment retained by the trustees in good faith was proper notwithstanding principles of diversification.[33] When the stock dropped in value, the beneficiary sought to hold the trustee liable for having taken no action to diversify.[34] The court held in favor of the trustees, finding that the trust authorized them to retain the concentrated position and it was not bad faith, therefore, to fail to take action to sell it.[35]

Similarly, in *In re Chase Manhattan Bank*,[36] the New York Supreme Court found that there was no compelling reason for the trustee to sell stock with a declining value that composed the majority of a trust. In that case, the income and remainder beneficiaries of a testamentary trust objected to an account filed by the trustee on the grounds that the trustee failed to invest the assets of the trust in a prudent manner, failed to exercise reasonable diligence in care, and failed to adequately consider the interests of the remainder beneficiaries. The trust was established by Charles G. Dumont for the lifetime benefit of his daughter.[37] Upon the daughter's death, the income was to be paid to the settlor's granddaughter.[38] Upon her death, the principal was to be paid to the granddaughter's issue.[39] The trust was funded with a concentration of Kodak stock, and the settlor provided in his will that it was his

> desire and hope that said stock will be held by my said Executors and by my said Trustee to be distributed to the ultimate benefici-

[31] *See id.* § 1001(b).
[32] 300 S.E.2d 649 (Ga.1983).
[33] *See id*. at 651.
[34] *See id*. at 650.
[35] *See id*. at 653.
[36] 809 N.Y.S.2d 360 (App. Div. 2006).
[37] *See id*. at 362.
[38] *See id*.
[39] *See id*.

> aries under this Will, and neither my Executors nor my said Trustee shall dispose of such stock for the purpose of diversification of investment and neither they [n]or it shall be held liable for any diminution in the value of such stock.[40]

The will further provided that "[t]he foregoing . . . shall not prevent my said Executors or my said Trustee from disposing of all or part of the stock of [Kodak] in case there shall be some compelling reason other than diversification of investment for doing so."[41] The court found that the trustee did not act imprudently for failing to sell the stock.[42] The objecting beneficiaries argued that there was a compelling reason to sell 95% of the stock because the income yield was "miniscule."[43] The lower court found in favor of the beneficiaries.[44] The New York Supreme Court found that there was no compelling reason to sell the Kodak stock, which remained well-rated, despite a drop in value, and continued to generate income.[45] Further, the trust's income beneficiary's recent receipt of an inheritance valued at $12,000,000 meant that she had no need for funds.[46] Notably, the appellate court did not disagree with the surrogate's position that a waiver of the duty to diversify does not waive the duty to manage prudently.[47] However, the court seemingly viewed the testator's direction that the executor or trustee could sell if there were compelling reasons to do so as a type of mandate to retain the stock absent compelling reasons.[48]

One might even conclude that there is a judicial tendency toward deference to trustees in cases of inaction even in the absence of exculpatory language if the Kansas Court of Appeals decision in *In re Estate of Maxedon*[49] is any indicator. In that case, the decedent's will had no provisions waiving the prudent investor rule or exculpating the trustee.[50] The will devised his farm to a trust for the lifetime benefit of his brother and sister.[51] The trustee continued to hold the farm, which constituted 90% of

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[40] *Id*.
[41] *Id*.
[42] *See id*. at 363.
[43] *See id*. at 362-63.
[44] *See id*. at 362.
[45] *See id*. at 364-65.
[46] *See id*. at 365.
[47] *See id*. at 363.
[48] *See id*. at 365.
[49] 946 P.2d 104 (Kan. Ct. App. 1997).
[50] *See id*.
[51] *See id*. at 106.

the trust's assets, for almost forty years.[52] During that period, the farm produced an average income of 4.85%, and the farmland substantially increased in value.[53] After the trustee petitioned the court for approval of its accounting, the remaindermen objected, arguing the trustee breached its duty to diversify under the prudent person rule.[54] The court agreed that the prudent investor rule required diversification but reasoned:

> While the trust document did not expressly prohibit the trustee from selling the land, the trustee could properly have considered the fact that the subject land was placed into the trust by the settlor and comprised a majority of the corpus of the trust, thus indicating the settlor's intent that the land remain the primary asset of the trust.[55]

On these facts, and given that the farmland was generating income and appreciating in value, the court of appeals found that the trustee did not breach its duty by declining to sell the farm.[56]

Courts will not, however, protect trustees who turn a blind eye to a settlor's "obsession." *In re Estate of Saxton*[57] is instructive on this point. In *Saxton*, beneficiaries objected to an accounting on the basis of a trustee's failure to diversify the trust's high concentration of the stock of a single corporation, IBM.[58] The trust's provisions gave lifetime income and necessary principal to the settlor's spouse.[59] The remainder was to go to his daughters.[60] The trust document "directed the trustee to continue to hold the stock rather than following the normal banking procedure of diversification and additionally held the bank harmless from decreases in value of the investment."[61] The trust instrument limited the trustee's liability for continuing to hold the stock and forgoing diversification.[62] Over the thirty-year life of the trust, the trustee did not diversify the trust's investments.[63] The value of IBM stock fell by $4,000,000 in 1987 alone.[64]

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[52] *See id*. at 106, 111.
[53] *See id*.
[54] *See id*. at 106.
[55] *Id*. at 109.
[56] *See id*. at 112.
[57] 686 N.Y.S.2d 573 (App. Div. 1998).
[58] *See id*. at 575.
[59] *See id*.
[60] *See id*.
[61] *Id*. at 576.
[62] *See id*.
[63] *See id*.
[64] *See id*. at 577.

The New York Supreme Court ruled that this retention clause did not protect the trustee for failing to diversify, noting that the trustee had an "obsession" with retaining the IBM stock and that the beneficiaries pled with the trustee to diversify.[65] It pointed out that the trustee also ignored tax consequences from a change in capital gains taxes and never made a comprehensive evaluation of the IBM stock.[66] As such, the trustee breached its fiduciary duty.[67]

In *Mest v. Dugan*,[68] the Oregon Court of Appeals likewise held the trustees breached their fiduciary duty by acting in bad faith. In that case, a beneficiary sued a trustee alleging self-dealing and mismanagement of the trust's only assets: two pieces of real property that were operated pursuant to lease agreements as automobile dealerships. Specifically, the trustees executed leases on these properties whereby the trustees effectively leased the properties to themselves.[69] In doing so, the trustees failed to determine the fair market rental value of the property in the current market and leased themselves the property for below market value.[70] The trust instrument contained the following exculpatory clause: "The Trustees shall not be liable for any action taken, or for failure to take any action, on the advice of legal counsel or otherwise, save and except where such act or failure to act is due to fraud or bad faith."[71] The court rejected the plaintiff's argument that the exculpatory clause did not apply to self-dealing:

> On *de novo* review, we agree with the trial court's conclusion that the trust instrument permitted self-dealing by the trustees and that the exculpatory clause exonerates them, in the absence of bad faith. Exculpatory clauses do not reduce or enlarge the standard of care owed by a trustee, but a clause may relieve a trustee of personal liability and be valid in the absence of an attempt to eliminate liability completely. *See* Bogert, Trusts and Trustees, § 542 (2nd ed 1978). The trustees here were given broad discretion in the management of the trust. The instrument does not require them to use the properties for the highest and best use, absolves them of liability for any investment loss and permits them to treat the property as if they were the owners. The quoted

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[65] *See id*.
[66] *See id*. at 578.
[67] *See id*.
[68] 790 P.2d 38, 39 (Or. Ct. App. 1990).
[69] *See id*. at 41.
[70] *See id*.
[71] *Id*. at 40.

> exculpatory language comports with the instrument as a whole, which shields the trustees' decisions from scrutiny, in the absence of bad faith.[72]

The court also rejected defendants' argument that the trial court improperly concluded that plaintiff pled a claim upon which relief could be granted, on the theory that because the exculpation clause permitted self-dealing, leasing the properties to themselves could not be bad faith.[73] The court explained:

> Although "good faith" and "bad faith" suggest a subjective element in the actor's state of mind, . . . we conclude that, in a self-dealing situation, a conscious or intentional element is not required to prove bad faith. A ***trustee's act that completely ignores the interests of beneficiaries, intentional or not, constitutes bad faith. To hold otherwise would negate a primary purpose of the trust—administration of the assets for the benefit of the beneficiaries***. . . . As the Supreme Court stated in addressing the standard of care owed by an insurer in a conflict of interest situation . . . . No less a standard can apply to a trustee. Even if the trust instrument allows a trustee to consider his own interests, he cannot do so without consideration of the interests of the beneficiaries. If he does, he acts in bad faith.[74]

The court found that the fault was not that the trustees leased to themselves the auto dealerships, but that they failed to analyze the terms of the leases to determine whether they were reasonable to the beneficiaries.[75]

Evidence that trustees took reasonable steps to consider diversification, and had reasons not to, will certainly lead to a different result. In *In re Hyde*,[76] the daughters of the founder of Finch Pruyn, a large manufacturer in the city of Glens Falls, New York, established three trusts and funded them with stock in this closely held company.[77] The company's capital structure had two classes of stock.[78] Class A had voting rights but had minimum liquidation rights.[79] Class B shares had no voting rights but

[72] *Id*.
[73] *See id*.
[74] *Id*. (emphasis added) (citation omitted).
[75] *See id*. at 41.
[76] *In re* Hyde, NY Slip. Op. 7960, 845 N.Y.S.2d 833 (App. Div. 2007).
[77] *See id*. at 1.
[78] *See id*. at 3.
[79] *See id*.

did have premium liquidation rights.[80] The trusts were funded with Class B shares.[81] The beneficiaries asserted that the trustees should be surcharged for their failure to diversify during the 20-year tenure of the trusts.[82] The trusts did not waive diversification nor make any reference to the stock.[83] However, according to the court, there was some indication that "the settlors of the trust wanted the ownership of Finch Pruyn to remain in the family and the trusts were used as vehicles to achieve such a result."[84] The trustees considered liquidating the stock several times and met with financial advisors, including investment bankers and brokerage houses.[85] It was determined that a fair price could only be obtained by selling the entire company.[86] There was also no market for the stock, and the company had little interest in purchasing the shares except at book value.[87] In addition, the stock had a special relationship to a trust purpose.[88] Because of this special relationship and the lack of a market for the shares, the New York Supreme Court held in favor of the trustees.[89]

The author has no disagreement with the way in which courts seek to defer to the intent of the settlor; that is as it should be. The author agrees that settlor intention can often be gleaned from provisions that seek to waive the prudent investor rule, including the duty to diversify assets, and provisions seeking to exculpate trustees from liability. It is not surprising, therefore, that courts fall into what the author believes is a conflation trap, grafting the concept of liability exculpation for inaction onto the trustee's authority for action.

However, the result of this conflation is too limiting. If a possible theme might be gleaned from the relatively few cases arising from petitions to instruct a trustee to sell assets, it is this: if the trust purpose would be frustrated or made impossible, courts appear open to petitions to compel the sale of assets, despite a settlor's evinced intent to retain them.

[80] *See id*.
[81] *See id*.
[82] *See id*. at 1.
[83] *See id*. at 2.
[84] *Id*. at 4.
[85] *See id*.
[86] *See id*.
[87] *See id*.
[88] *See id.*
[89] *See id*. at 5.

B. Express Direction To Retain Certain Assets

When the settlor directs the trustee to retain certain assets, courts will typically honor that direction. For example, in *In re Trusts Created by Hormel*,[90] the Minnesota Court of Appeals held a trustee did not breach its fiduciary duty by failing to diversify the trust's assets when the trust included primarily stock of a company of which the settlor intended to retain a controlling interest. In that case, a trustee petitioned the court for approval of its accounting, and the beneficiaries cross-petitioned for an order instructing the trustee to diversify the trusts' investments. The subject trusts were established by George A. Hormel, founder of the Hormel Food Corporation (the Company,) and the trusts were funded primarily with stock in the Company.[91] The trustee of the trusts was the Hormel Foundation (the Foundation).[92] Under the terms of the trusts, the settlor's grandchildren were to receive income for their lifetime.[93] Upon the grandchildren's deaths, the residue of the trusts was to be distributed to the Foundation.[94]

In 1954, when the Foundation became the trustee, the trusts held more than 50% of the Company's outstanding stock, continuing to do so until 1978.[95] In 1980, the Foundation petitioned the court for an order allowing it to sell some of the trusts' shares of Company stock.[96] While the court authorized the sale, the court also found it was the settlors' intent that the trusts maintain a controlling interest in the Company.[97] In 1991 and 1992, the beneficiaries requested the Foundation diversify the trusts' assets.[98] The Foundation rejected these requests and petitioned the court for approval of its accounting and decision to retain Company stock.[99]

The beneficiaries objected, alleging the Foundation had breached its fiduciary duty by failing to diversify.[100] The lower court approved the Foundation's accounting but found the Foundation had a prospective duty to diversify partially the trusts' investments.[101] The appellate court

[90] *In re* Trs. Created by Hormel, 504 N.W.2d 505 (Minn. Ct. App. 1993).
[91] *See id*. at 507.
[92] *See id*.
[93] *See id*.
[94] *See id*.
[95] *Id*.
[96] *See id*. at 508.
[97] *See id*. at 507-509.
[98] *See id*. at 508.
[99] *See id*.
[100] *See id*.
[101] *See id*.

affirmed the lower court's ruling that the Foundation did not breach its fiduciary duty by failing to diversify given it was the settlor's intent to retain a controlling interest in the Company, the stock had appreciated in value, and the beneficiaries' income from the trusts had doubled during the subject accounting period.[102] However, the appellate court also found there was no support for the lower court's conclusion that the Foundation had a prospective duty to diversify the trusts' investments given the performance of the stock and intent.[103]

Likewise, in *Lichtenfels v. North Carolina National Bank*,[104] the North Carolina Supreme Court held the trustee did not breach a fiduciary duty when the terms of a will provided: "My trustees are hereby expressly authorized to retain as a proper investment of trust funds, any stock or other securities owned by me, or which may be purchased by them after my death, and I leave it solely to them to allow such investments to remain intact . . . ."[105] The trust held substantial stock in the Cone corporation and the trustor of the trust was a member of the Cone family, with her brothers named as executors and trustees.[106] The terms of her will expressly authorized the trustee to retain the Cone stock as a proper investment of trust funds and stated that the trustor left "it solely to them to allow such investment to remain intact."[107] After the trustees sold some shares of the Cone corporation, the trust beneficiaries sued, alleging that the trustee should have sold more shares of stock.[108] The court held as follows:

> [. . .]By the terms of her will she authorized her trustee to continue the risk solely in its discretion. The excellent income, amounting to almost one million dollars, to the life tenant was an added inducement to hold Cone stock.
>
> The depreciation in the value of textile stocks, according to one witness, resulted from two-price cotton and synthetics. By looking backward, one may find in financial records times at which Cone stock could have been sold and times and prices at which other stock could have been bought with great benefit to the trust. But

[102] *See id*. at 512.
[103] *See id*.
[104] 151 S.E.2d 78 (N.C. 1966).
[105] *Id*. at 78.
[106] *See id*. at 84.
[107] *Id*. at 78.
[108] *See id*.

> wisdom resulting solely from a backward look is not a fair test. . . .
>
> . . . .
>
> **The rule of law which fits this case is stated in 47 A.L.R.2d 187, at 266: 'But where a decedent leaves an estate which is not diversified in a prudent manner, as where the principal asset of the estate is stock in a family corporation, and he authorizes the retention of investments, the trustee is not obliged to sell part of the assets merely to obtain diversification.' Citing authorities, including the leading diversification State-Massachusetts**.
>
> . . . .
>
> The evidence shows, and the court found, the defendant gave due attention to the composition of the Long trust.[109]

Similarly, in *Shriners Hospitals for Children v. First Northern Bank of Wyoming*,[110] the Wyoming Supreme Court held the trustee did not breach a fiduciary duty in failing to sell the trust's principal asset. The trust's principal asset was a 1,620-acre ranch. The instrument provided that the ranch was to be held in trust until 2100, at which time trust would terminate, and the ranch would be distributed to the charitable beneficiaries, Shriners Hospital and the Kalif Children's Travel Fund.[111] Shriners petitioned the court seeking a termination of the trust and immediate distribution of trust assets, arguing the trustee breached its fiduciary duties by failing to diversify the trust's investments, and, that while the ranch was generating income, the rate of return the trust was earning on the ranch was far less than the trust would receive if the ranch were sold or distributed to Shriners outright.[112] The Wyoming Supreme Court confirmed that the settlor intended that "the ranch be retained by the Trust until the year 2100 unless its sale was required for the limited reasons set forth in the Trust."[113] It also held that the duty to diversify is not held in a vacuum and, thus, the trustee did not err in failing to sell the ranch:

[109] *Id*. at 85-86 (emphasis added).
[110] 373 P.3d 392 (Wyo. 2016).
[111] *See id*. at 397.
[112] *See id*. at 402.
[113] *Id*. at 410.

> if it had been the Settlors' intention to benefit the charities over any other purpose, they could have included a provision, which outright donated the Ranch, restriction free, to Shriners and Kalif upon their deaths. However, they did not do so. They crafted provisions aligned with their desire to keep the ranch open, with any net income earned after the expenses to maintain the ranch had been paid, going to Shriners and Kalif.[114]

Therefore, the court did not force a sale of the ranch and found the trustee did not breach its fiduciary duties.[115]

The result is different when the evidence demonstrates that adherence to the settlor's direction would frustrate the purpose of the trust.[116] In *Hewitt v. Beattie*,[117] a will establishing a testamentary trust directed that a stone quarry previously owned and operated by the settlor shall not be sold for a period of three years and must instead be held in trust. After the settlor's death, the demand for stone produced by the quarry dropped, such that the quarry could no longer be operated except at a loss.[118] There was no prospect for a resumption of demand.[119] The administrator of the settlor's estate filed a petition seeking instructions from the court as to sale of the quarry.[120] The Connecticut Supreme Court found that, notwithstanding the settlor's desire to continue to operate the quarry, his intent in establishing the trust was to provide for the beneficiaries, and that intent would be impossible to carry out if the quarry was not sold.[121] Thus, the court authorized the administrator to deviate from the directive in the will and sell the quarry.[122] The court had a relatively easy decision to make given that the trust purpose could not be effectuated given unanticipated changed circumstances, and that the settlor intended for the quarry to be sold in three years anyway.

Hawaiian Trust Co. v. Breault reached a similar conclusion.[123] In that case, the court considered whether a trustee could sell certain property the trust instrument directed the trustee to retain.[124] The asset in question—

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[114] *Id.* at 411.
[115] *See id*.
[116] *See* Hewitt v. Beattie, 138 A. 795 (Conn. 1927).
[117] *Id*.
[118] *See id*. at 798.
[119] *See id*.
[120] *See id*.
[121] *See id*. at 802.
[122] *See id*. at 804.
[123] 42 Haw. 268 (1958).
[124] *See id*. at 269-70.

real property that formed practically the sole remaining corpus of the trust estate—was in substantial need of repair and required the construction of a wall to protect it from flooding.[125] However, there were no funds in the trust to make the necessary repairs or construct the wall.[126] The trustee filed a petition for instructions to sell the property.[127] While the trust directed that the trustee "shall not" dispose of the residence, it also directed the trustee to provide support to the settlor's mother and maid for their lives.[128] The Supreme Court of Hawaii ruled that the purpose of the trust was to provide support for the beneficiaries and that, notwithstanding the terms of the trust, the sale of the property was permissible to carry out this purpose.[129]

Likewise, in *In re Pulitzer's Estate*,[130] a New York court considered when a sale was appropriate given trust directives. A trust was settled with stock in two publishing corporations.[131] The trustee was to: (1) hold the stock and pay the dividends to his children; (2) continue during the lives of his two youngest sons; and (3) upon their death, divide the stock.[132]The will expressly prohibited the sale of the stock.[133] His children applied to the court for an order authorizing the trustees to sell the stock in one of said publishing corporations.[134] The corporation had been performing poorly and continued to perform poorly.[135] The court framed the issues for its decision (pertinent to this discussion) as follows: (1) "If a prohibition is contained in the will, has the Surrogate's Court, under its equitable jurisdiction, the power to modify the terms of the trust and authorize the sale of such assets by the trustees?" and (2) "Do the proofs submitted to the surrogate justify the exercise of that power in the emergency?"[136]

The court ultimately held that it had the power to authorize the sale of the stock and ordered the trustees to make the sale of the stock:

> The extreme circumstances in the pending case surely justify the alternative of disregarding the directions of the testator, if

[125] *See id*.
[126] *See id*. at 270.
[127] *See id* at 269.
[128] *See id*. at 269-70.
[129] *See id*. at 271, 275-77.
[130] 249 N.Y.S. 87 (Surr. Ct. 1931), *aff'd* 260 N.Y.S. 975 (App. Div. 1932).
[131] *See id*. at 91.
[132] *See id*.
[133] *See id*. at 92.
[134] *See id*. at 90.
[135] *See id*.
[136] *Id*.

mandatory, and reading into the will a power of sale. Briefly summarized, the proofs submitted to me show that the losses in the business operations of the three newspapers owned by the Press Publishing Company for the five years from 1926 to 1930 averaged $811,822.10 per year. In 1929, the loss was $1,062,749.80. In 1930, the loss was $1,975,604.77. In 1930, the loss grew, despite economies effected that year, aggregating $1,250,000. The advertising lineage of the three newspapers has greatly declined in recent years. The total circulation of the three newspapers has likewise declined in the last three years. The reserves of the corporation have diminished to the extent of $3,025,000 in the past five years. The present reserves, it is stated, would not permit continued publication of the newspapers for more than three months. The testimony showed that the decline in revenue was not due to the business depression caused by the panic of 1929, but antedated it by at least two years. The trustees have attempted to correct the deterioration which has occurred by employing specialists and experts in the advertising and circulation fields. The loss for the year 1931, it is estimated, will be $2,500,000. The Press Publishing Company has certain other income (aside from newspaper operation) from syndicate participation and investment activities. Despite the profits and income derived from these sources, the loss of the Press Publishing Company from all its operations has averaged, during the past five years, $427,000 per year. The loss for 1930 was $1,677,625.80.

It is interesting to note that a somewhat similar situation existed in the sale of the New York Times in 1893. George Jones was one of the largest stock owners in the enterprise—The New York Times Association. He left the stock in trust, His will provided: "Whereas I am the owner of forty-six shares of the capital stock of the association 'The New York Times,' I direct that my executors shall not sell, or otherwise dispose of the same, or any of them, during the said trust. I give to my executors full power to sell any and all other property, real or personal, constituting the said trust estate, and direct them to invest the proceeds as they shall consider safe and proper." There, as here, the newspaper was conducted by the trustees. The newspaper became financially unproductive. An equity receivership resulted. Involved in the action there came in question the sale of the assets of the association and the right of the executors of George Jones to sell the

> stock in contravention of the terms of the trust. Despite the command of the testator, the executors were authorized by the court of equity to liquidate the shares held by the estate. The decree approving that direction and authorizing the sale of the New York Times was made by Justice, afterwards Presiding Justice, MORGAN J. O'BRIEN, upon August 8, 1893, and the newspaper was sold pursuant to its direction.
>
> The trustees here find themselves in a crisis where there is no self-help available to them. A judicial declaration is necessary, not only as to their general authority, but as to the effect of the words of Mr. Pulitzer contained in his will. The widest equity powers exist in the Surrogate's Court of this Statute by the grant of legislative authority contained in section 40 of the Surrogate's Court Act. (Matter of Raymond v. Davis Estate, 248 N.Y. 67, 71).
>
> I accordingly hold, in this phase of the decision, that the terms of the will and codicils do not prohibit the trustees from disposing of any assets of the Press Publishing Company; that the trustees have general power and authority to act in the conveyance of the assets proposed to be sold, and that this court, in the exercise of its equitable jurisdiction, should authorize them by an appropriate direction in the decree to exercise such general authority.[137]

The theme continues in *Young v. Young*,[138] in which a testamentary trust directed the trustees not to sell or mortgage real property held in the trust. However, after the property was destroyed in a fire, it appeared that proceeds from insurance would be insufficient to rebuild the property and that taxes and other annual charges were far in excess of the trust's income.[139] Eventually, this would result in the beneficiaries receiving a diminished amount of what had originally been devised to them.[140] The Michigan Supreme Court held that, notwithstanding the provision in the will directing the trustees to retain the property, the court had the inherent power to order the sale of the property given the exigent circumstances unforeseen by the settlor, as the sale was necessary to preserve the trust's remaining assets and protect the rights of the beneficiaries.[141]

[137] *Id*. at 95-98.
[138] 237 N.W. 535 (Mich. 1931).
[139] *See id*.
[140] *See id*.
[141] *See id*. at 537.

In re Trusteeship of Mayo[142] is thematically consistent, in which the Minnesota Supreme Court approved deviation from a trust's prohibition against equity investments. Specifically, the irrevocable trust permitted the trustees to "invest and re-vest the same in Real estate mortgages, municipal bonds or any other form of income bearing property (but not real estate nor corporate stock) . . . ."[143] In 1940, the trust had a value of $957,711.60.[144] Eighteen years later the trust had only appreciated to a value of $968,893.08.[145] Accounting for inflation, this meant that the buying power of the trust had been reduced by almost half.[146] The beneficiary of the trust sought deviation from the restrictive investment language, arguing the primary purpose of the trust was to preserve the value of the trust corpus and that this purpose was being circumvented because of the restrictive investment language.[147] She argued that since the grantor's death, inflation had become a substantial factor.[148] The trustees asserted that inflation had in fact been present during the grantor's lifetime and that he restricted the investments due to the stock market crash of 1929.[149] The Minnesota Supreme Court began by noting that its highest duty was to give effect to the donor's intent.[150] The court noted that in exceptional circumstances, a court will permit a deviation from the terms of a trust, but only if "it is reasonably certain that the purposes of the trust would otherwise be defeated or impaired in carrying out the donor's dominant intention."[151] The court felt compelled to allow a deviation from the terms of the trust to give effect to the dominant intention of the grantor to benefit the beneficiaries.[152]

Seeking an instruction to deviate from trust instructions may simply be more palatable than ordering the sale of the family business or an asset the settlor wanted retained. *St. Louis Union Trust Co. v. Ghio*[153] illustrates when a trustee may deviate from investment instructions contained in a trust in circumstances where the directions are prospective rather than in

[142] 105 N.W.2d 900 (Minn. 1960).
[143] *Id*. at 902.
[144] *See id*.
[145] *See id*.
[146] *See id*.
[147] *See id*. at 902.
[148] *See id*.
[149] *See id*. at 903.
[150] *See id*.
[151] *Id*. at 904.
[152] *See id*. at 906.
[153] 222 S.W.2d 556 (Mo. Ct. App. 1949).

retaining existing assets. In *St. Louis Union Trust Co.*,[154] the Missouri Court of Appeals considered a trust instrument that directed the trustee to invest in real estate mortgages or good bonds bearing interest at not less than 4%. The trustee petitioned the court for instructions to invest in stocks and other safe investments that could bring in 4% interest on the grounds that economic conditions had changed such that the investments identified in the trust instrument now only brought interest of between 2.6% to 3.5%.[155] The court held that the trustee should be authorized to deviate from the investment directive in the trust because the primary intent of the settlor was to produce a reasonable income as near to 4% as possible, and not necessarily to buy mortgages and bonds.[156]

C. Less Than an Express Direction

When a settlor expresses a "wish" that certain assets be retained, rather than an express direction, courts still tend to require more than a showing that the assets are underperforming or unproductive. For example, in *York v. Maryland Trust Co.*,[157] a will listed certain oil company stocks ("Standard Oil stocks") the testator "wish[ed]" would be retained by the trustee of a testamentary trust to be formed under the will. The trust was to pay income to two lifetime beneficiaries and then, upon their death, be distributed to the testator's surviving children.[158] Two years after the death of the testator, one of the lifetime beneficiaries filed suit requesting that the court direct the trustee "as to the proper and safe investment of the trust estate," asserting that the trustee should sell one of the Standard Oil stocks, 330 shares in Atlantic Refining Company ("Atlantic").[159] The beneficiary sought relief on the grounds that 97.5% of the trust corpus was comprised of Standard Oil stocks, and because Atlantic did not declare dividends in the prior year, the total yield on the Standard Oil stocks was only 3.5%.[160]

The lower court denied the beneficiary's petition.[161] The appellate court affirmed, reasoning that a temporary lack of productivity in an asset the trustee was directed to retain does not justify the sale of that asset, especially given the stock was apparently sound and was increasing in value, the corporation had declared dividends in the nine preceding years,

[154] *Id*.
[155] *See id*. at 557-58.
[156] *See id*. at 561.
[157] 131 A. 829 (Md. 1926).
[158] *See id*. at 830.
[159] *Id*.
[160] *See id*. at 831.
[161] *See id*.

the Atlantic stock represented only 1/15 of the trust corpus, and the testator expressly stated his wish that the trustee retain the Standard Oil stocks.[162] The court added it did not hold that the trustee would be justified in retaining the Atlantic stock for "an unreasonable period" if it continued to be unproductive.[163] It also appears the court was influenced not only by the testator's "wish" that the trustee retain specific stocks, but by certain other strong language in the will, that is, giving the trustee "absolute control of said trust estate," and directing the trustee to "handle, manage, control, lease, bargain, sell, transfer, convey, mortgage, encumber, allot, invest and reinvest the same, or any part thereof, upon such terms, under such conditions and in such securities as it in its discretion shall deem best."[164]

When the petitioner does not contend that a fundamental trust purpose is frustrated, we have little guidance as to what might persuade courts to compel a sale, even absent an explicit expression of intent to retain specific assets. For example, in the Iowa Supreme Court case of *In re McDonough's Trust*,[165] the trust owned income-producing farm land, and while there was no express direction to retain the farms, the trust instrument directed the trustee to pay income from the farms to the settlor's sister and other income to the American Red Cross. After his sister's death, all of the income was to be distributed to the Red Cross.[166] The Red Cross sued to convert the farms to securities, but the trial court denied the petition.[167] The appellate court affirmed the lower court's decision on the grounds that "the pervading and dominant purpose of testator was to contribute the net income from his real estate and personal property, after certain bequests, to a charitable cause."[168] The court further reasoned that "it is equally clear he desired it done by the use of the net income from the real estate set out and from any revenue derived from the rest of his property, real or personal."[169] Thus, the court concluded the charity made "absolutely no showing that this land was better suited for another purpose or that the donor would have agreed to or consented to such a sale or conversion."[170]

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[162] *See id*. at 833.
[163] *See id*.
[164] *Id.* at 830.
[165] 109 N.W.2d 29 (Iowa 1961).
[166] *See id*. at 30.
[167] *See id*.
[168] *Id*.
[169] *Id*. at 35.
[170] *Id*.

In *In Trust Created by Inman*,[171] the Nebraska Supreme Court held a sale of farmland violated the trustee's duty of loyalty to the beneficiaries, even though the trustee had duty to diversify trust assets, but the trust purpose would not be served by the sale. In that case, the trust held farmland that had been in the settlor's family for years and had sentimental value to the beneficiaries and the settlor alike. The trustee sought to sell part of the farmland to himself in order to diversify the trust's investments, which consisted almost exclusively of farmland.[172] The trust's beneficiaries objected to the sale.[173] The lower court ruled that the proposed sale violated the trustee's duty of loyalty to the beneficiaries notwithstanding the trustee's duty to diversify.[174] The Nebraska Supreme Court affirmed, noting that while the trustee could diversify the trust's holdings, he had "no specific plan for investment of the proceeds from the proposed sale, and thus, any potential benefit to the beneficiaries in the nature of increased income without a corresponding increase in risk to the principal is speculative."[175] Moreover, the court noted "[no] additional income is needed to carry out any specific purpose of the trust, and the beneficiaries have articulated a legitimate interest in maintaining the geographic integrity of the farm that has been in their family for many years."[176] Therefore, because no trust purpose would be served by the sale, and diversification was not strictly needed, the sale was not approved.[177]

On the other hand, in *Carnahan v. Johnson*,[178] the Ohio Court of Appeals allowed the sale of trust property when circumstances had changed, making it impossible to effectuate the decedent's intent. In that case, the testator's will provided that the trustee was to "encourage" and "assist" the beneficiaries of the trust to develop a 142-acre tract next to a cemetery into cemetery lots. The beneficiaries and the trustees noted that they had to sell the stock in the cemetery company to pay for estate taxes and thus no longer could control the corporation that was to develop the lots.[179] The beneficiaries argued circumstances had changed resulting in the will provision being impossible to perform.[180] The appellate court

[171] 639 N.W.2d 514 (Neb. 2005).
[172] *See id*. at 516.
[173] *See id*.
[174] *See id*. at 518.
[175] *Id*. at 521.
[176] *Id*. at 521-22.
[177] *See id*. at 522.
[178] 711 N.E.2d 1093 (Ohio. Ct. App. 1998).
[179] *See id*. at 1095.
[180] *See id*. at 1097.

agreed with the beneficiaries and trustees and permitted the sale.[181] The court noted that the terms "encourage" and "assist" were words of recommendations and not mandates.[182] The court found that the material purpose of the trust was to provide for the primary beneficiaries.[183] The court noted that even if a primary purpose of the trust was to develop the lots, circumstances changed since the decedent's death making it impossible to perform what the decedent intended.[184]

In California, one decision of the court of appeal suggested the possibility that a trustee could compel the sale of a family business, despite a trust provision expressing an intent that it be retained, while at the same time, finding insufficient evidence in that case to grant the petition.[185] In *Estate of Nicholas*,[186] the trustee petitioned for instructions to sell livestock that constituted the business of operating a family ranch. A beneficiary objected, stating that the herd was unique and irreplaceable.[187] The trial court granted the petition.[188]

The court of appeal reversed.[189] The court specifically singled out clauses in the trust that spoke to the continued operation of the ranch, the beneficiary's anticipated role as the manager, and a retention clause that stated it was the settlor's wish to retain and operate the property.[190] However, the court also noted that the trustee was authorized to "sell any part or the whole thereof, at any time the trustee may deem it for the best interest of the beneficiaries."[191] Therefore, the court reasoned that the trustee had the discretion to sell the livestock, but the discretion must be exercised reasonably.[192] However, the court found that the trustee failed to present any evidence establishing that the proposed sale of the livestock was reasonable.[193] Thus, the court of appeal reversed the order granting authority to sell the cattle.[194] What the courts might deem "reasonable" is left unexplained.

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[181] *See id*. at 1098.
[182] *See id*. at 1097.
[183] *See id*.
[184] *See id*. at 1098.
[185] *See* Estate of Nicholas, 223 Cal. Rptr. 410, 412 (Ct. App. 1986).
[186] *Id.* at 412.
[187] *See id*. at 413.
[188] *See id*.
[189] *See id*.
[190] *See id* at 417.
[191] *Id*.
[192] *See id*. at 418.
[193] *See id*. at 420.
[194] *See id*. at 421.

IV. THE PROBLEM AND A PROPOSED STANDARD

As explored in Part III, the case law would teach us that when a trust directs a trustee to retain a specific asset, the court will uphold that direction absent a showing that it would be impossible or would frustrate the very purpose of the trust. When there is something less than a direction to retain the asset, but rather a wish or implied intention to retain the asset, there is very little guidance as to the circumstances that would make it "reasonable" for a court to exercise its authority to instruct the trustee to sell. Courts too often seem to hold a too narrow view of their authority often by conflating the existence of exculpation provisions for inaction with the trustee's power to act and, therefore, the court's authority to instruct the trustee to act. Of course, when there is no exculpatory language and no direction to retain an asset, there should be significant runway for a court to consider whether circumstances warrant an instruction to sell.

Unless the trust expressly directs the retention of a specific asset, an expression of an intent to retain it, even supported by an exculpation from liability for failure to diversify, should not be treated the same as a mandate to retain the asset. A distinction should and must be made between a power to act and a protection against liability for inaction. If trustees have the power to sell, that is, they are not mandated to retain the asset, then the court has the authority to compel them to sell. The exculpation provision may evince an intent that the settlor wishes for the trustee to retain the asset, but exculpation from liability is not the same as the power, or the discretion, that the settlor conferred upon the trustee to sell.

The conclusion that liability for inaction cannot be equated with authority for action is supported by rules that do not permit settlors to absolve trustees from liability and impose affirmative obligations upon them.[195] Consider, as case in point, the California statutory scheme. In drafting the UTC's provisions concerning trust administration, discussed above,[196] the Uniform Law Commission relied upon California Probate Code sections 15000 *et seq.* as the initial model.[197] Article 8 of the UTC (Duties and Powers of Trustee), section 804 (Prudent Administration) provides that "[a] trustee shall administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall

[195] *See* UNIF. TR. CODE § 804 (Unif. L. Comm'n 2000).

[196] *See id.*

[197] *See* UNIF. TR. CODE Prefatory Note, Models for Drafting, at 1 (Nat'l Conf. of Comm'rs. on Unif. State Laws 2010).

exercise reasonable care, skill, and caution."[198] This language essentially mirrors California's Uniform Prudent Investor Act, Section 16047, which provides that "[a] trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution."[199]

A California trustee's primary duty is to administer the trust according to the terms of the trust instrument and, secondarily, according to the provisions of the California Probate Code, unless as provided otherwise by the trust.[200] Of course, the trustee has a duty of loyalty to administer the trust solely in the interest of the beneficiaries.[201] The trustee has a duty to invest and manage assets in accordance with the prudent investor rule, except to the extent provided otherwise in the instrument, in which case a trustee acting in good faith consistent with the directives of the trust may not be found liable for breach of duty.[202] Trusts nearly invariably contain provisions broadly empowering trustees to manage the assets, including by selling or otherwise disposing of them.

The settlor may exculpate the trustee from liability in the instrument, except that the settlor may not exculpate a trustee from liability for gross negligence, bad faith, or reckless indifference to the interest of the beneficiaries.[203] A trust provision altering the prudent investor rule by itself suggests that certain types of investments, or the allocation of investment

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[198] UNIF. TR. CODE § 804.

[199] CAL. PROB. CODE § 16047(a) (West 1995). All state statutory citations in this Article refer to the current statute unless otherwise indicated.

[200] *See id.* § 16000 (Duty to Administer Trusts) (West 1990) ("On acceptance of the trust, the trustee has a duty to administer the trust according to the trust instrument and, except to the extent the trust instrument provides otherwise, according to this division.").

[201] *See id.* § 16002(a).

[202] *See id.* § 16046 (Compliance; Duty of Trustee; Exception; Liability). That section provides:

> (a) Except as provided in subdivision (b), a trustee who invests and manages trust assets owes a duty to the beneficiaries of the trust to comply with the prudent investor rule.
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> (b) The settlor may expand or restrict the prudent investor rule by express provisions in the trust instrument. A trustee is not liable to a beneficiary for the trustee's good faith reliance on these express provisions.

[203] *See id.* § 16461 (Exculpation of Trustee; Trust Provisions; Objections). That section provides:

> (a) Except as provided in subdivision (b), (c), or (d), the trustee can be relieved of liability for breach of trust by provisions in the trust instrument.

types or classes, may be permitted that might otherwise be frowned upon, but would not excuse the trustee from ordinary diligence in investing or managing assets.[204]

Upon acceptance of the trust, the trustee has a duty to review the trust assets and make determinations about whether to retain or dispose of particular assets.[205] Because a trustee cannot be exculpated for turning a blind eye, it would seem the trustee is always bound to make this initial review and determination.[206] Although the instrument may direct the trustee to retain assets and even exculpate the trustee from liability should the trustee follow that directive, some level of review, analysis, and contemplation over whether to do so is rational, if not reasonable, must be assumed.[207] The California Probate Code establishes certain standards a trustee must follow and sets out a number of factors the trustee should consider to comply with the prudent investor rule.[208] In light of the fact that a trustee never

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> (b) A provision in the trust instrument is not effective to relieve the trustee of liability (1) for breach of trust committed intentionally, with gross negligence, in bad faith, or with reckless indifference to the interest of the beneficiary, or (2) for any profit that the trustee derives from a breach of trust.

[204] *See* Estate of Collins, 139 Cal. Rptr. 644, 650 (Ct. App. 1977). The court noted:

> More fundamentally we do not agree with defendants' premise. While the declaration of trust may possibly enlarge the prudent-investor standard as far as the type of investment is concerned, it cannot be construed as permitting deviations from that standard in investigating the soundness of a specific investment. This distinction is well established. Comment v. to section 227 of the Restatement reads, in part, as follows: "v. An authorization by the terms of the trust to invest in a particular type of security does not mean that any investment in securities of that type is proper. The trustee must use care and skill and caution in making the selection. Thus, if the trustee is authorized by the terms of the trust to invest in railroad bonds, he is guilty of a breach of trust if he invests in bonds of a railroad company in which a prudent man would not invest because of the financial condition of the company."

[205] *See* CAL. PROB. CODE § 16049 (Review of Assets; Time for Compliance). That section states:

> Within a reasonable time after accepting a trusteeship or receiving trust assets, a trustee shall review the trust assets and make and implement decisions concerning the retention and disposition of assets, in order to bring the trust portfolio into compliance with the purposes, terms, distribution requirements, and other circumstances of the trust, and with the requirements of this chapter.

[206] *See Estate of Collins*, 139 Cal. Rptr. at 650.

[207] *See id*. ("We leave aside that even a trustee with 'absolute discretion' may not 'neglect its trust or abdicate its judgment,' . . . or show a 'reckless indifference' to the interests of the beneficiary. . . . Second, the 'absolute discretion' is 'specifically limited' by the requirement that the trustee is 'subject always to the discharge of its fiduciary obligations . . . .'").

[208] *See* CAL. PROB. CODE § 16047.

has absolute discretion nor is the trustee ever fully immunized from liability, section 16047 seems instructive at least as to the considerations to be given even when the instrument seeks to expand the trustee's power and limit the trustee's liability.[209]

The California statutory scheme is not unique; it largely mirrors the statutes of the other states, particularly those that have likewise adopted the UTC in one form or another. Even when a trustee is exculpated for inaction the trustee still has affirmative obligations of care. The trustee still has the power of action. Since the trustee has the power of action, the court can instruct the trustee to use it. If the court can instruct the trustee to use it, a beneficiary can petition the court to so instruct the trustee.

Even when family members pay careful attention to a succession plan for a family-owned or controlled business, moving from generation to generation, especially when the legal or beneficial interests in the enterprise pass from the founder to the heirs, gets complicated and can lead to battles like those that have delighted HBO audiences over several seasons of *Succession*. No doubt, founders of iconic businesses want their legacies carried on after their deaths and want their heirs to benefit. Culturally, we endorse their desire, and, legally, we approve dynastic trust structures and certain favorable tax mechanisms that empower wealth creators to make

[209] *See id*. That section states:

> (a) A trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution. (b) A trustee's investment and management decisions respecting individual assets and courses of action must be evaluated not in isolation, but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust. (c) Among circumstances that are appropriate to consider in investing and managing trust assets are the following, to the extent relevant to the trust or its beneficiaries: (1) General economic conditions. (2) The possible effect of inflation or deflation. (3) The expected tax consequences of investment decisions or strategies. (4) The role that each investment or course of action plays within the overall trust portfolio. (5) The expected total return from income and the appreciation of capital. (6) Other resources of the beneficiaries known to the trustee as determined from information provided by the beneficiaries. (7) Needs for liquidity, regularity of income, and preservation or appreciation of capital. (8) An asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries. (d) A trustee shall make a reasonable effort to ascertain facts relevant to the investment and management of trust assets. (e) A trustee may invest in any kind of property or type of investment or engage in any course of action or investment strategy consistent with the standards of this chapter.

sure of their legacy. However, those plans do not always go as planned; sometimes the plan is unworkable given family dynamics.[210]

Sometimes a maverick in business who has had stunning success also simply lacks insight into the attributes of the maverick's children. Years ago, the author came upon a quotation, that he has never been able to locate again, from Abraham Lincoln, and whether Lincoln said it or not, the author's experience in representing clients in these cases has made him a believer that "sometimes in nature a lion bears an ass." Time and again, the author has seen how children of these extraordinary entrepreneurs, eager and determined to demonstrate their rightful place in the line of succession, bear little resemblance to their parents. Also, in the author's experience, these "lions of industry" often lack insight into their relationships with their family members and their family members' relationships with each other. A well-meaning and thoughtful succession plan may look wonderful on paper, but people are people. Being in the shadow of an icon cannot be easy. Often, decades of jealousy, frustration, resentment, and even humiliation, simmer under the surface, though they dare not boil over while the patriarch or matriarch is in firm control. Once that control slips away because of death or mental infirmity, the eruption can be violent.

One answer to the *Succession* problem is a recognition, if not by the founder, then by trustees or some or all the heirs, is that it may be time to sell. When there is no consensus, the court has a role when a business is owned by a family trust (or trusts). Courts too often place greater weight on the settlor's intent in retaining a family business than the settlor's intent to benefit her heirs. Is not one important purpose of a trust generally to provide a financial inheritance for the heirs? What if certain beneficiaries receive little or nothing from the trust's ownership of the stock in the business? What if certain beneficiaries are favored by reaping economic benefits as employees of the business while other beneficiaries are on the outside? What if the illiquid nature of the trust causes the trustee to incur debt to discharge taxes, debts, or other trust obligations? What if the heirs cannot govern together without turmoil that impairs the financial stability of the business to the potential detriment of grandchildren or other current

[210] The consequences can be unfortunate, even tragic. The author represented a branch of a family that received no financial benefit from their beneficial interest in a company founded by an ancestor two generations earlier. After creating headlines based upon the author's deposition of the company's then-CEO and chairman, his son, the company's president, persuaded the board to approve a repurchase of the outsider family members at a premium to the trading price of the then public stock, arguing that the company's prospects without the distraction of lawsuits, were rosy. When the stock price crashed, instead, the president shot and killed himself.

or future beneficiaries? Uncertainty about the future direction or performance of a business is perilous. Is resolving or averting the destructive force that family conflict over *Succession* a purpose worthy of the equation?[211]

As this great migration of wealth proceeds, succession disputes will be on the rise no matter how attentive skillful lawyers and advisors may be in hoping to avoid them. Will courts rise to the challenge and face these disputes with a more subtle appreciation that a trustee's exposure to personal liability is not the same as the trustee's—or the court's—power to do more than point to provisions that seek to insulate the trustee's risk to liability for maintaining the status quo? The family depends upon it. What is in their best interests is not always within the capacity of either the settlor or even the beneficiaries themselves to ascertain. This is where the court should more robustly fill the void; it has the authority and should use it as appropriate.

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[211] *See, e.g.*, Michael McMahon, *Why Is Uncertainty So Damaging for the Economy?*, ECONOMICS OBSERVATORY (May 29, 2020), https://bit.ly/4dh8P17 [https://perma.cc/4BX3-SLPU].

> Many economic decisions are made on the basis of expected outcomes. For example, firms make investments on the basis of expected demand for what they sell; individuals make the decision to move house on the basis of expected wellbeing; students invest in their education at least partly in the expectation of earning a higher wage when they get a job; and investors direct funds to research into new products on the basis of the expected gains from innovation.
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> In order to make these decisions, people have to form a view about what the future might look like. As the saying goes, 'Prediction is very difficult, especially about the future'. (The source of this quote is uncertain: it has been variously attributed to US baseball legend Yogi Berra, Danish physicist and Nobel laureate Danish Niels Bohr, and film producer Samuel Goldwyn).
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> There is always uncertainty about the future—but large increases in uncertainty of the kind that we are now experiencing are thought to confound the ability to form a confident view about the future. This means that it is harder to make these forward-looking decisions.
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> The main channel through which economists think that increased uncertainty affects the economy is often summarized as 'the option value of waiting' (Dixit and Pindyck, 1994). In other words, faced with an increasingly uncertain future, it makes sense to wait until you have more certainty to make an important decision.
>
> This means that firms wait to make an investment, delay research projects or defer hiring until the economy's likely future path is clearer. It might also slow down the reallocation of resources to more productive uses for similar reasons.