

Responsible Investing in Trusts



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out your
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Settlor Investment Directive

The Settlor suggests that the Trustee invest the trust assets using the asset allocation model developed by the Settlor during her lifetime as a guide to risk tolerances and diversification, after taking into account changes in the markets and available investment vehicles since the asset allocation model was developed, and suggests investing assets in the following categories of investments (i) real property of any kind (specifically including REITs and other entities which hold real estate as their primary holdings); (ii) personal property of any kind; (iii) stocks; (iv) bonds; (v) cash; (vi) alternative investments, however it is the Settlor's strong recommendation that alternative investments not constitute more than ten percent (10%) of the total trust assets; and (viii) investment vehicles that become available in the future which are comparable in risk profile to the investments described above.



Are you comfortable having this provision in the trust?

The Settlor believes the family's legacy is tied to his successful business enterprise, and that the family's legacy will be perpetuated by maintaining and continuing to prioritize the family's business as compared with third party investments. Family Investment Company is a family heirloom. Accordingly, the Settlor expressly authorizes the trustee to retain any interests the trust owns in Family Investment Company, including but not limited to any real estate assets owned directly and/or indirectly by the trust which are used by Family Investment Company or in connection with one or more of the business operations of Family Investment Company (collectively, "Special Assets") indefinitely after the date of the Settlor's death, regardless of any resulting risk, lack of income, diversification, or marketability. . .

Family Business Investment

With respect to any act or omission by the trustee in furtherance of the Settlor's aforesaid wishes regarding the Special Assets, the Settlor (1) expressly waives any applicable prudent investor rule, (2) expressly waives the trustee's standard of care and duty to diversify, and (3) expressly requires the trustee to be indemnified and reimbursed for any liability (e.g., failure to diversify) in connection with such act or omission.

Family Business Investment



Are you comfortable having this provision in the trust?

Settlor Investment Values

The Settlor values entrepreneurship and, therefore, suggests that the Trustee authorize investments that encourage entrepreneurship by the Settlor's issue, such as an investment of trust assets in one or more business ventures or other investments in which an issue of the Settlor will be personally active, even if such investment is not of a type in which an institutional trustee would invest, provided that the issue of the Settlor presents a business plan and supporting financial projections comparable to those that would be required by an unrelated commercial funding source and provided that the Trustee determines that the investment is reasonable, notwithstanding that one or more third party investments could produce more financial return for the trust.



What about this provision? Are you comfortable with this in a trust instrument?

Religious Values

In investing the corpus of the trust, the Trustee shall avoid direct and indirect investments in businesses or securities engaged in activities prohibited (haram) under Shariah, including but not limited to:

- Conventional banking, insurance, or financial services based on riba (interest);
- Production, sale, or distribution of alcohol, pork, or non-halal food products;
- Gambling, games of chance, or other speculative activities; and
- Adult entertainment, weapons manufacturing, or enterprises inconsistent with Islamic ethical principles.



Are you comfortable with this provision in a trust?

Beneficiary Directions

At any time the beneficiary holds the rights and powers under this Paragraph with respect to a Residence in the beneficiary's trust, the beneficiary may (A) direct the Trustee to sell any Residence held in the beneficiary's trust and (B) following the sale of the Residence, direct that one or more new Residences be acquired by the Trustee, which Residence shall also be subject to the provisions of this Paragraph.

Any replacement Residence shall be of a type requested by the beneficiary, provided the Trustee determines that the request is reasonable.



What about this provision? Are you comfortable with this in a trust?

Responsible Investing Objectives: Value, Values or Both?

The adoption of any of the responsible investing approaches can have different underlying objectives:

- Increasing the financial value of the portfolio or enhancing risk adjusted returns
- A desire to generate positive impact (and mitigating harm) on the environment and wider society based on values
- A combination of both objectives

Understanding the motivation and objectives for adopting responsible investing approaches is key for trustees to perform their duties.

Underlying Objectives

- Arguably, a trustee's ability to consider non-financial factors in its investment decision making is dependent on whether the objective is largely **value driven** (i.e., enhancing risk adjusted returns).
- If a non-financial factor is **material**, it is almost certainly within the trustee's **fiduciary duty** under current law to consider it in its analysis and decision making.
- What is less clear is when the underlying objective regarding consideration of non-financial factors is largely **values driven**, or how the investment impacts the environment and wider society.
- Even less clear, is whether trustees are permitted under current law to consider non-financial factors which are values driven (by beneficiaries), where those factors **could result in a reduced financial return** or additional risk.
- Without clarification in law, trustees may struggle to know **how to deal with settlors and beneficiaries' values-driven views and wishes**, given concerns of potentially adverse financial impact.



Common Law Cases

Cowan v Scargill [1985] Ch 270

- “When the purpose of the trust is to provide financial benefits for the beneficiaries, as is usually the case, the best interests of the beneficiaries are normally their best financial interests”

Common Law Cases

Harries v The Church Commissioners for England [1992] 1 WLR 1241

- “Trustees may, if they wish, accommodate the views of those who consider that on moral grounds a particular investment would be in conflict with the objects of the charity, **so long as the trustees are satisfied that course would not involve a risk of significant financial detriment.** But when they are not so satisfied trustees should not make investment decisions on the basis of preferring one view of whether on moral grounds in investment conflicts with the objects of the charity over another”

Uniform Trust Code (UTC)

Section 815 and Comments

A trustee has (1) all of the powers conferred by the trust instrument and, unless limited by the trust instrument, (2) the powers an individual would hold over property, and (3) any powers conferred under the code or appropriate to achieve “proper investment, management, and distribution of the trust property,” provided that the trustee’s exercise of its powers is subject to the trustee’s fiduciary duty.

Comments draw the distinction between a *duty* of the trustee, which imposes an obligation on the trustee, and a *power* of the trustee, which affords the trustee discretion and ability to carry out acts.

“The existence of a power, however created or granted, does not speak to the question of whether it is prudent under the circumstances to exercise the power.”

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”

Prudent Investor Rule

**Uniform Prudent Investor Act
(UPIA)
Section 2(a)**

“Among circumstances that a trustee shall consider in investing and managing trust assets are such of the following as are 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, which may include financial assets, interests in closely held enterprises, tangible and intangible personal property, and real property;
- (5) the expected total return from income and the appreciation of capital;
- (6) other resources of the beneficiaries;
- (7) needs for liquidity, regularity of income, and preservation or appreciation of capital; and
- (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.**

**Uniform Prudent
Investor Act (UPIA)
Section 2(c)**

**Prudent
Investor Rule**

Wyo. Stat. §4-10-901

(a) Except as otherwise provided in subsection (b) of this section, a trustee who invests and manages trust assets owes a duty to the beneficiaries of the trust to comply with the prudent investor rule set forth in this article.

(b) **The prudent investor rule, a default rule, may be expanded, restricted, eliminated or otherwise altered by the provisions of a trust.** A trustee is not liable to a beneficiary to the extent that the trustee acted in reasonable reliance on the provisions of the trust. (emphasis added)

Wyoming

Wyo. Stat. §4-10-902(c)

(c) Among circumstances that a trustee shall consider in investing and managing trust assets are such of the following as are relevant to the trust or its beneficiaries: . . .

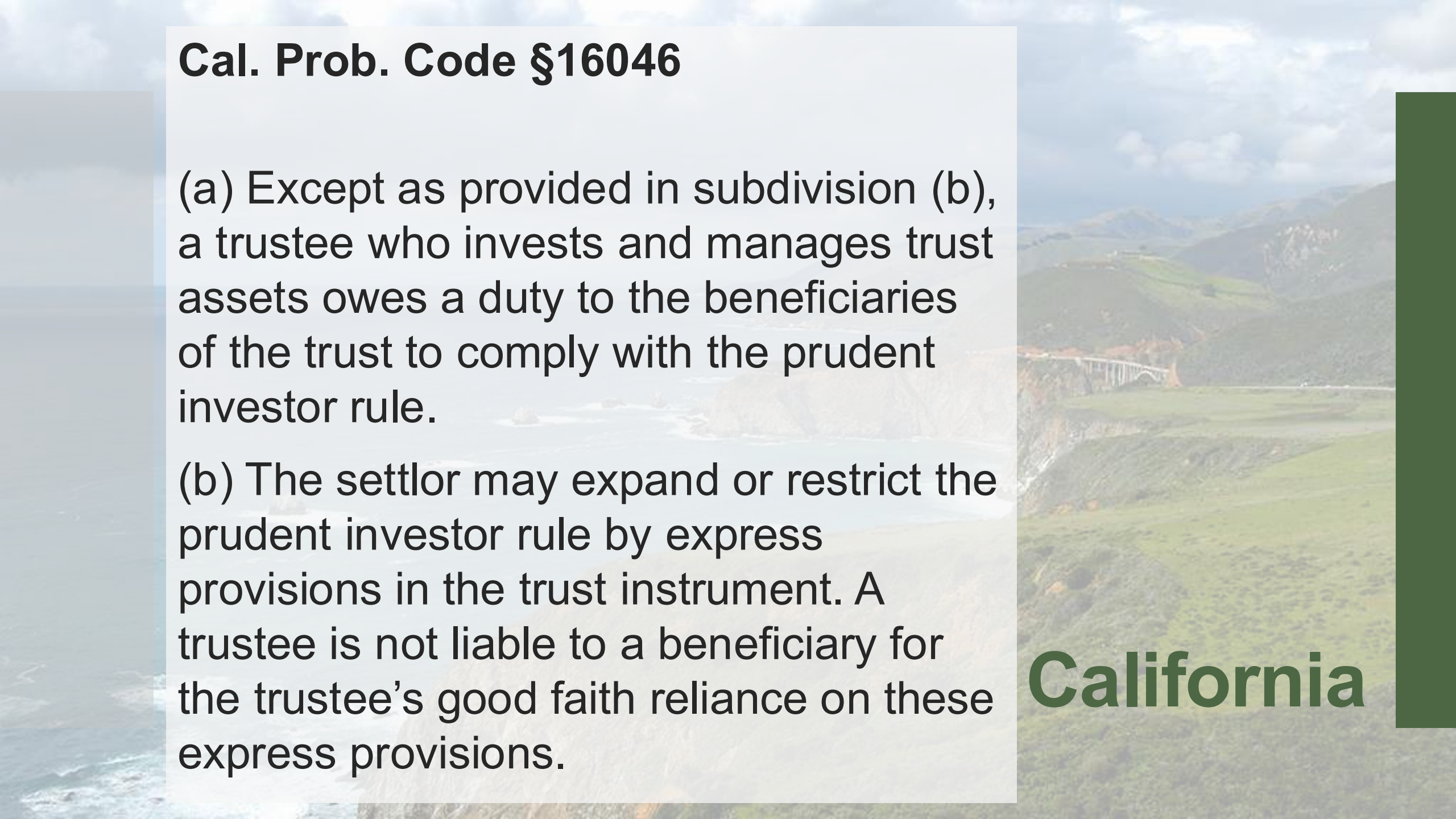
(viii) An asset's special relationship or special value, if any, to the purposes of the trust or to one (1) or more of the beneficiaries.

Wyoming

Cal. Prob. Code §16046

(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.

(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.



California

Cal. Prob. Code §16047

(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:

. . . (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.

California

Delaware

“ . . . In making investment decisions, a fiduciary may consider the general economic conditions, the anticipated tax consequences of the investment and the anticipated duration of the account and the needs of the beneficiaries; **when considering the needs of the beneficiaries, the fiduciary may take into account the financial needs of the beneficiaries as well as the beneficiaries’ personal values**, including the beneficiaries’ desire to engage in sustainable investing strategies that align with the beneficiaries’ social, environmental, governance or other values or beliefs of the beneficiaries.” (emphasis added)

12 Del. C. Ann. tit. 12, §3302(a)

(a) Notwithstanding any other provision of this Code or other law, the terms of a governing instrument may expand, restrict, eliminate, or otherwise vary any laws of general application to fiduciaries, trusts, and trust administration, including, but not limited to, any such laws pertaining to...

(4) The manner in which a fiduciary should invest assets, including whether to engage in 1 or more sustainable or socially responsible investment strategies, in addition to, or in place of, other investment strategies, with or without regard to investment performance...

provided, however, that nothing contained in this section shall be construed to permit the exculpation or indemnification of a fiduciary for the fiduciary's own wilful misconduct...

12 Del. C. Ann. tit. 12, §3303(a)(4)

(3) A trustee shall consider all relevant circumstances in investing and managing trust assets, including any of the following that are relevant to the trust or the beneficiaries of the trust:

(i) The intent, desire and **personal values of the settlor**, including the settlor's desire to engage in sustainable or socially responsible investment strategies that align with the settlor's social, environmental, governance or other values or beliefs to the extent known by the trustee; and

(j) **The needs of the beneficiaries, including but not limited to the beneficiaries' personal values** and desire that the trustee engage in sustainable or socially responsible investing strategies that align with the beneficiaries' social, environmental, governance or other values or beliefs, as well as the financial needs of the beneficiaries. (emphasis added)

Or. Rev. Stat. §130.755(3)(i)-(j)

“In investing and managing trust assets, the trustee may consider **the personal values of the beneficiaries**, including but not limited to a desire to engage in investing strategies that align with social, political, religious, philosophical, environmental, governance, or other values or beliefs of the beneficiaries.”
(emphasis added)

More broadly includes social, political, religious, philosophical, etc.

GA. Code §53-12-340(d)

The circumstances that a trustee may consider in making investment decisions include, without limitation:

- (1) the general economic conditions...
- (7) environmental and social considerations;
- (8) governance policies of the entities in which the trustee may invest;

760 Ill. Comp. Stat 3/902(c)(7)-(8)

“Among circumstances that a trustee shall consider in investing and managing trust assets are such of the following as are relevant to the trust or its beneficiaries...

(10) Unless contrary to settlor intent or otherwise prohibited...the expressed wishes of the interested persons of the trust... to have the trustee, trust advisor or trust protector engage in investing strategies that **align with the interested persons’ social, environmental, or governance objectives or other values or beliefs of the interested persons, regardless of investment performance.**” (emphasis added)

N.H. Rev. Stat. Ann. §564-B:9-902 (c)(10)

Summary

Delaware

- Permissive - “Fiduciaries may take into account”
- Beneficiaries’ values
- “sustainable investing strategies”
- “social, environmental, governance”
- Terms of instrument may expand powers, “with or without regard to investment performance”

Oregon

- Permissive but obliged to consider whether relevant
 - “A trustee shall consider... any of the following that are relevant”
- Settlers’ or beneficiaries’ values or beliefs
- “sustainable or socially responsible investment strategies”
- “social, environmental, governance”

Georgia

- Permissive – “the trustee may consider”
- Beneficiaries' personal values
- “social, political, religious, philosophical, environmental, governance, or other values or beliefs”

Illinois

- Permissive – “circumstances that a trustee may consider include”
- “environmental and social considerations”
- “governance policies of the entities in which the trustee may invest”
- No reference to settlors'/beneficiaries values

New Hampshire

- Permissive but obliged to consider whether relevant - “Among circumstances that a trustee shall consider... are such of the following as are relevant”
- Interested persons' values or beliefs
- “social, environmental, or governance”
- “regardless of investment performance.”

Bermuda

. . . “other circumstances of the trust” includes the wishes of beneficiaries and settlors, including in respect of investment strategies that align with their views regarding—

- (a) the impact of investments on the environment, wider society in Bermuda or overseas, and otherwise whether in Bermuda or overseas; and
- (b) appropriate governance related to investments, insofar as such wishes or views may be known to the trustee from time to time

“This change empowers trustees to factor environmental, social, and governance criteria into their investment decisions without fear of violating their fiduciary duty.”

“This bill will establish Bermuda as an early adopter of statutory flexibility and protection for trustees to consider certain non-financial factors when investing trust assets.”

Law Reform Scotland

Trusts and Succession (Scotland) Act 2024, s20

- (1) For the purposes of section 19(1) and (2), where two or more proposed investments are suitable for the trust, the trustees may (except in so far as the trust deed, expressly or by implication provides otherwise) take into account appropriate non-financial considerations in determining which investment to make.
- (2) An appropriate non-financial consideration may be (either or both) —
 - (a) a consideration that one investment is more consistent with the purposes of the trust than the other investment,
 - (b) an ethical, social or environmental consideration.
- (3) This section —
 - (a) does not apply as respects a trust created before the section comes into force, and
 - (b) is without prejudice to any other power of trustees to take into account non-financial considerations in relation to determining investments.

**Manitoba, The Trustee Act, C.C.S.M c. T160,
s. 79.1**

Use of non-financial criteria

Subject to any express provision in the instrument creating the trust, a trustee who uses a non-financial criterion to formulate an investment policy or to make an investment decision does not thereby commit a breach of trust if, in relation to the investment policy or investment decision, the trustee exercises the judgment and care that a person of prudence, discretion and intelligence would exercise in administering the property of others.

Frequent Tension Areas

- Charged terminology.
- “Benefits” beyond the beneficiary.
- Does a framework built within prudent investor rule, or waiving it, create a presumption values driven investment approaches might not otherwise meet the standard of care?
- Whose values should the trustee consider, and what about values in conflict?

Common Law Cases

In the Matter of the May Trust [2021] JRC 137

- The court determined that much of the old case law was too focused on ‘financial’ benefit, and that society has moved on.
- “Benefit”:
 - goes wider than financial benefit,
 - may include the application of trust monies to provide social or educational benefits for the beneficiary in question, and
 - may include the application of trust monies in discharge of what a beneficiary believes to be his or her moral obligation.

Common Law Cases

In the Matter of Butler-Sloss & ors v Charity Commission & anr [2022] WTLR 865

- The trustees of two charitable trusts sought the court's blessing for an investment policy that would exclude investments that did not align to the ESG goals of the 2016 Paris Agreement.
- The trustees were concerned that such an investment policy might not be lawful and consistent with their duties, as it was accepted that it could diminish their financial return.
- Using the Public Trustee v Cooper doctrine, the court gave approval to the charities' policies.

Wyoming

Wyo. Stat. §4-10-1006

Reliance on trust instrument.

A fiduciary who acts in reasonable reliance on the terms of the trust as expressed in the trust instrument is not liable to a beneficiary for a breach of trust to the extent the breach resulted from the reliance

STEP

Responsible Stewardship Toolkit

“The trust is intended to provide financial and non-financial benefits (which may include, but is not limited to, educational, social, moral or psychological benefits) to the beneficiaries. In fulfilling its fiduciary duty to act in the best interests of the beneficiaries when exercising its dispositive powers, or its powers of investment whether statutory or provided for in this instrument, the trustee shall consider not only the beneficiaries’ financial best interests, but also their non-financial best interests. . . .

Consider The Following Trust Provision . . .

When exercising its powers under clause [general power of investment], the trustee need not have regard only to the financial return of an investment, but may also have regard to:

- the intent, desire and personal views and wishes of the settlor, including the settlor's desire for the trustee to invest with regard to the impact of investments on the environment and wider society or other matters that reflect the settlor's views or wishes; and
- the needs, views and wishes of the beneficiaries (or any one or more of them to the exclusion of the other or others) including the beneficiary's or beneficiaries' desire that the trustees invest with regard to the impact of investments on the environment and wider society or other matters that reflect the views or wishes of the beneficiary or beneficiaries."

STEP Responsible Stewardship Toolkit



Thank you!

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