

Examples – cases where courts upheld a trust document’s waiver of the duty to diversify:

Americans for the Arts v. Ruth Lilly Charitable Remainder Annuity Trust, 855 N.E.2d 592 (Ind. Ct. App. 2006). Two charitable remainder annuity trusts were funded solely with shares in Eli Lilly & Co. Both trusts granted the trustee the power to “retain indefinitely any property received by the trustee... and any investment made or retained by the trustee in good faith shall be proper despite any resulting risk or lack of diversification or marketability and although not of a kind considered by law suitable for trust investments.” The court held that the general retention clause, the language explicitly eliminating the duty to diversify, and the exoneration of the trustee for failure to do so combined to waive the duty to diversify.

Brackett v. Tremaine, 693 N.W.2d 514 (Neb. 2005). The trust’s sole asset was farmland in Nebraska. The trust document authorized the trustee to retain inception assets “without regard to the proportion of such property or property of a similar character so held may bear to the entire amount of the trust, whether or not such property is of the class in which trustees generally are authorized to invest by law or rule of court.” The court held this language waived the duty to diversify for those assets originally placed in trust.

Holder v. First Tennessee Bank N.A. Memphis, No. W1998-00890-COA-R3-CV, 2000 WL 349727 (Tenn. Ct. App. March 31, 2000) (unpublished opinion). The trust held a concentration of Coca-Cola stock. The trust instrument provided: “The Grantor intends for the Trustee to act primarily in a custodial capacity with regard to the stocks in this trust, and he expressly relieves the Trustee of responsibility for any unfavorable results that may arise from lack of diversification, or from these restrictions on its normal investment freedom.” The court held this language waived the duty to diversify, although ultimately the trustee was able to sell the stock for diversification.

Nelson v. First National Bank & Trust Co. of Williston, 543 F.3d 432 (8th Cir. 2008). The trust document granted the trustee the power to retain any property received by the trustee and provided “any investment made or retained by the trustee in good faith shall be proper despite any resulting lack of diversification or marketability and although not of a kind considered by law suitable for trust investments.” The court held this language waived the duty to diversify. The trustee acted in reasonable reliance on the provisions of the trust and did not breach any fiduciary duties under the state’s version of the UPIA.

In re Wege Trust, Docket Nos. 271244, 274217, 274256, 274850, 281244, 2008 WL 2439904 (Mich. Ct. App. June 17, 2008) (unpublished opinion). A will granted the trustees the authority to hold and retain any of the testator’s properties in trust “if in their discretion they shall deem it prudent and for the best interest of my estate to do so, notwithstanding the fact that the retention of such investments might, except for this express direction, be in violation of the laws of this State governing trust investments.” The court held this language created a “safe harbor” exempting the trustees from compliance with the prudent investor rule.

Atwood v. Atwood, 25 P.3d 936 (Okla. Ct. App. 2001). The trust permitted the trustee to invest “without being limited in the selection of investments by any statutes, rules of law, custom, or usage.” The court found this language waived the duty to diversify, despite the fact that the duty to diversify was not specifically mentioned in the trust document.

Evans v. Bank One Trust Co. (In re John F. Ervin Testamentary Trust), No. 270498, 2008 WL 540332 (Mich. Ct. App. Feb. 28, 2008) (unpublished opinion). The trust empowered the trustee to “invest and reinvest... in income-producing assets in accordance with [its] judgment, not being limited by any present or future investment laws.” The court held this language was sufficient to make the state’s prudent investor law inapplicable.

W.A.K. ex rel. Karo v. Wachovia Bank, 712 F. Supp. 2d 476 (E.D. Va. 2010). The trust authorized the trustee to retain the corporate trustee’s stock and empowered the trustee to invest trust property “without being confined to investments lawful through statute or otherwise for fiduciaries in the State of Virginia.” The court held the duty to diversify was waived as to the trust property at the trust’s creation and any investments later transferred to the trust.

Carter v. Carter, 965 N.E.2d 1146 (Ill. App. Ct. 2012). The trustee was authorized by the terms of the trust to invest “regardless of diversification and regardless of whether the property would be considered a proper trust investment.” The court found the trustee did not breach the prudent investor rule when she invested solely in tax-free municipal bonds, because her investment strategy was not arbitrary or unreasonable and because she was given authority to invest without regard to diversification.

Donato v. BankBoston, 110 F. Supp. 2d 42 (D.R.I. 2000). The trust authorized its trustees to “hold and retain any property delivered to them by me or subsequently acquired by them pursuant to my written instructions, notwithstanding any lack of diversification in the investment of such property or any disproportionate investment thereof in common stock or other equities and the trustee shall not be liable for any loss or depreciation occasioned by such retention.” The court held this language waived the duty to diversify trust assets.

Exceptions – cases where courts did not uphold a trust document’s waiver of the duty to diversify:

Wood v. U.S. Bank, 828 N.E.2d 1072 (Ohio Ct. App. 2005): The trust held stock of the corporate trustee. The trust document authorized the trustee to retain its own stock, but it was silent as to the trustee’s duty to diversify. The court held that even if the trust document empowers a trustee to “retain” particular assets, “the trustee’s duty to diversify remains, unless there are special circumstances.” To alter the duty to diversify, a trust must “clearly indicat[e] an intention to abrogate the common-law, now statutory, duty to diversify.”

Fifth Third Bank v. Firststar Bank, No. C-050518 2006 WL 2520329 (Ohio Ct. App. Sept. 1, 2006) (unpublished opinion): The court held a general waiver of the duty to diversify was insufficient to waive the duty. The trust granted the trustee the power “to retain, without liability for loss or depreciation resulting from such retention, original property, real or personal, received from the Grantor or from any other source, although it may represent a disproportionate part of the trust.” The court held this language “did not clearly indicate the intention to abrogate the duty to diversify” and was therefore insufficient to waive the duty.