

Taking the Trust Out of Trustee: The Kansas Supreme Court's Standard for Reasonable Reliance Means Investors Should Proceed Cautiously When Altering the Prudent Investor Rule [*McGinley v. Bank of Am.*, 109 P.3d 1146 (Kan. 2005)]

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I. INTRODUCTION

Trustees everywhere took notice in 2004 when Judge Edmund A. Calvaruso, presiding over *In re Chase Manhattan Bank*,¹ fined a trustee over twenty million dollars for not diversifying a trust consisting entirely of Kodak stock, even though the trust terms prohibited diversification.² For trusts governed by New York law, commentators interpreted this decision to mean that trustees must not only listen to the desires of the grantor and beneficiaries, but also to the realities of the market.³ After this ruling, instructions from the grantor could no longer justify a trustee's decision to hold a risky investment.⁴ This decision convinced some that non-diversification clauses are per se invalid.⁵ Judge Calvaruso addressed the dilemma that arises when prudent investing conflicts with the intentions of the grantor, a dilemma later confronted by the Kansas Supreme Court.

In 1990, seventy-nine-year-old Marie McGinley entered into an agreement with Bank of America (Bank) to manage investments in a revocable trust.⁶ McGinley reserved the right to make final investment

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1. No. 1956TT443, 2004 WL 1468746 (N.Y. Sur. Ct. June 25, 2004), *rev'd*, *In re Chase Manhattan Bank*, 809 N.Y.S.2d 360 (Sup. Ct. 2006).

2. See Ian Marsh & Michael Ben Jacob, *Trustees Everywhere-Be Afraid*, TR. & EST., Apr. 2005, at 70. On appeal, the New York Superior Court held the lower court's decision was impermissibly based on hindsight. *In re Chase Manhattan Bank*, 809 N.Y.S.2d at 364.

3. *Id.*

4. See *id.*

5. See *id.* at 71.

6. *McGinley v. Bank of Am.*, 109 P.3d 1146, 1148 (Kan. 2005). In a revocable trust the grantor retains administrative rights over the property, including the power to revoke the agreement. See

decisions.⁷ The trust consisted of investments in corporate stocks, including 1,541 shares of Enron.⁸ In 1991, the Bank requested McGinley's signature on a waiver that stated the Bank would not monitor the Enron investment or be liable for any losses resulting from the retention of the Enron stock.⁹ The Bank failed to explain the waiver to McGinley, leaving her unaware that the Bank would no longer provide professional advice regarding the Enron investment, despite continuing to charge management fees.¹⁰

Over the next nine years, the Enron stock significantly outperformed McGinley's other investments.¹¹ Through stock splits, the original 1,541 shares grew to 9,500 shares worth \$789,687, representing 77% of the trust's total value.¹² The Enron investment generated 83% of the Bank's trustee fees.¹³ Upon realization that the 77% allocation exceeded the Bank's policy of limiting trust investments to less than 15% in any particular stock, the Bank's investment director demanded that McGinley's advisor reduce her concentration in Enron.¹⁴ Despite this demand, McGinley's advisor failed to recommend that she diversify her investment portfolio, even when McGinley sought consultation from the Bank regarding which stocks to sell in 2000.¹⁵ Rather than explain to McGinley that in its professional opinion she was dangerously undiversified, the Bank stood idle as its eighty-nine-year-old client risked and lost nearly 77% of her life savings in a dangerous investment.¹⁶

The Kansas Supreme Court concluded that the Bank reasonably relied on McGinley's investment directions pursuant to her trust agreement, and therefore, was not liable for the resulting losses.¹⁷ The court held that because McGinley reserved the right to make final investment decisions in her trust agreement, the Bank had no duty to advise McGinley or monitor her selected investments.¹⁸ According to the court, the waiver simply reaffirmed the relationship previously created by the trust agreement—that in exchange for the right to direct investments, McGinley released the Bank from all responsibility for those di-

RESTATEMENT (SECOND) OF TRUSTS § 37 (1959).

7. *McGinley*, 109 P.3d at 1149.

8. *Id.*

9. *Id.* at 1149-50. Presumably, the Enron investment necessitated the waiver because, unlike McGinley's other investments, monitoring it required additional effort not being expended by the Bank at the time.

10. See Brief of Appellant at 14, *McGinley*, 109 P.3d 1146 (No. 04-92230-A).

11. See *McGinley*, 109 P.3d at 1150.

12. *Id.*

13. Brief of Appellant, *supra* note 10, at 18-19.

14. *Id.* at 5.

15. *Id.* at 20.

16. See *McGinley*, 109 P.3d at 1150; Brief of Appellant, *supra* note 10, at 20.

17. *McGinley*, 109 P.3d at 1154.

18. See *id.*

rected investments.¹⁹

The Kansas Supreme Court missed an opportunity seized by other jurisdictions to protect the rights of trust beneficiaries.²⁰ This comment will explore liability for failed trust investments and discuss the enforcement of waivers executed by parties to a fiduciary relationship. Finally, this comment will suggest a higher standard for reasonable reliance and examine implications for attorneys drafting trust instruments in the future.

II. CASE DESCRIPTION

In 1990, McGinley's attorney drafted the Marie McGinley Revocable Trust in which she was the beneficiary and settlor.²¹ The Bank signed the agreement as the Trustee.²² McGinley reserved the right to revoke or modify the agreement unilaterally upon written notification to the trustee.²³ The trust agreement gave the Bank the discretionary power to use its best judgment in protecting the trust estate, but also required the Bank to consult with McGinley before making a purchase or sale.²⁴ The trust agreement also authorized the Bank to retain any investments directed by McGinley, even if the type of investment was not permitted by the prudent investor rule.²⁵

Seven months later, McGinley signed a waiver directing the Bank to retain shares of Enron stock previously transferred to the trust.²⁶ The Bank drafted the waiver but did not meet with McGinley to explain the document's repercussions.²⁷ This waiver released the Bank from any liability incurred by the retention of the stock, stating:

I understand that you do not monitor these securities, and I hereby agree to exonerate, indemnify and hold the Bank harmless from any and all loss, damage and expense sustained or incurred by the Bank for continuing to retain these securities as assets of this account. I also relieve the Bank from any responsibility for analyzing or monitoring these securities in any way.²⁸

Aside from the waiver, McGinley never instructed the Bank to retain

19. *Id.* at 1155.

20. *See, e.g., infra* note 173. The court could have based its decision on a provision in the Kansas Uniform Trust Code (KUTC). *See* KAN. STAT. ANN. § 58a-105(b)(3) (2005) (listing mandatory provisions of the KUTC as requiring that "a trust and its terms be for the benefit of the beneficiaries").

21. *McGinley*, 109 P.3d at 1148-49. The donor of property to a trust is called the settlor. *See, e.g., Hopkins v. Comm'r of Internal Revenue*, 144 F.2d 683, 690 (6th Cir. 1944).

22. *McGinley*, 109 P.3d at 1148.

23. *Id.* at 1148-49.

24. *Id.* at 1149.

25. *See id.* The prudent investor rule imposes liability on a trustee if investment decisions are not made reasonably, prudently, and with caution. RESTATEMENT (THIRD) OF TRUSTS § 227(b) (1992).

26. *See McGinley*, 109 P.3d at 1149.

27. *See id.* at 1156.

28. *Id.* at 1149-50 (quoting waiver).

the Enron stock, and no additional shares were ever purchased.²⁹ On November 30, 2000, the Bank's investment director drafted a Regulation Nine Exception (Regulation Nine) upon realizing that McGinley's 77% allocation in Enron stock exceeded the Bank's policy of limiting trust investments to less than 15% in any particular investment.³⁰ The report was intended to correct the policy violation by alerting McGinley's investment advisor to reduce McGinley's Enron allocation.³¹ Although the Bank's investment director demanded that McGinley's advisor reduce her concentration in Enron stock, no action was taken.³² The investment director instructed the advisor to sell enough shares to lower the Enron allocation to a maximum of 15% of the total value of McGinley's trust.³³ On January 31, 2001, the Bank drafted a second Regulation Nine report, which noted that the Enron allocation exceeded the Bank's written investment policy by 80%.³⁴ Meanwhile, Enron frightened investors by engaging in questionable accounting practices that ultimately led to the collapse of the company in December 2001.³⁵ By December 31, 2001, McGinley's life savings were obliterated as the remaining 8,000 shares fell in value to \$4,800, repre-

29. *See id.* at 1150.

30. Brief of Appellant, *supra* note 10, at 5. A Regulation Nine report identifies investments that violate the Bank's written policies. *Id.*

31. *See id.*

32. *Id.* at 5-6. The Bank's investment director told McGinley's advisor, "in regards to the Marie McGinley trust we have a large concentration in the Enron stock and we should diversify." *Id.* at 18.

33. *Id.* at 5.

34. *Id.*

35. In 2001, derivative-based accounting practices caused the Texas-based energy company to collapse, erasing \$70 billion of shareholder value and several billion more in defaulted loans. *The Fall of Enron: How Could it Have Happened?: Hearing Before the S. Comm. on Governmental Affairs*, 107th Cong. 104 (2002) (statement of Frank Partnoy, Professor of Law, University of San Diego School of Law). Specifically, Enron manipulated its financial statements by exchanging price swap derivatives with special purpose entities (SPEs). *Id.* at 107. An SPE is partially owned by a distinct, related company (Enron) with which it engages in agreed transactions. *Id.* at 106. Enron agreed to sell its interest in highly valued technology stock to an SPE in exchange for cash. *Id.* at 108. For the immediate cash, Enron agreed to insure the SPEs against any future loss in the market value of the technology stock, a practice known as a price swap derivative. *Id.* The SPE investors had virtually nothing to lose because Enron agreed to reimburse the investors if the technology stock crashed. *See id.* at 109. Subsequently, the market value of the technology stocks declined, obligating Enron to reimburse the SPEs several million dollars. *See id.* Enron omitted this debt obligation from its financial statements. *Id.*

Enron also entered into price swap derivatives to finance new, unprofitable projects without disclosing the resulting debt and losses. *Id.* at 109-10. It formed several SPEs in which it made minimal investments and encouraged private investors to contribute the majority of the capital. *Id.* at 110, 112. In exchange for the private investment, Enron agreed to insure the private investors' contribution with its own company stock. *Id.* at 112. The SPE business ventures ultimately failed, causing Enron to owe millions to the SPE investors. *Id.* at 109.

Enron further distorted its financial statements by selling rights to its fiber optic cable at grossly overvalued prices, subject to an agreement that Enron would guarantee the market value of the cable with its own stock. *Id.* at 115-16. Not only did Enron recognize an unreasonable gain by recording the cable sale at an inflated price, it also used the sale to justify overvaluing its remaining cable inventory. *Id.* at 116. On May 25, 2006, former Chairman, Kenneth Lay, and former Chief Executive Officer, Jeffrey Skilling, were both convicted of conspiracy and securities fraud, in part because of the testimony of former Chief Financial Officer, Andrew Fastow. *See Mary Flood, Fraud Topples Leaders*, ALBANY TIMES UNION, May 26, 2006, at A1. Fastow testified, "We stole. We all benefited financially at the expense of others." *Id.*

senting a mere 2% of the value of her trust.³⁶

III. BACKGROUND

A. Trust Law

A trust is a fiduciary relationship in which a grantor transfers legal ownership of property to a trustee, but retains an equitable interest that binds the trustee to manage the property for the benefit of specified beneficiaries.³⁷ The concept of a trust originated in fifteenth century England, where separate courts of law and equity rendered legal ownership to one party and an equitable interest to a separate party.³⁸ This practice created a relationship binding the legal owner to manage the property for the equitable owner's benefit.³⁹

A fundamental feature of any trust is that it exists for the benefit of the beneficiaries.⁴⁰ A trust creates separate ownership rights and is ideal for estate planning and business ventures.⁴¹ Trusts are governed in each state through judicial interpretations, statutes, uniform acts, the Restatement of Trusts, and the common law.⁴² Trusts are also subject to the rules of contract law.⁴³

B. The Fiduciary Relationship, the Prudent Investor Rule, and Modern Portfolio Theory

The fiduciary duty is the utmost obligation imposed by law.⁴⁴ A fiduciary relationship creates a duty upon the fiduciary to act in the other party's best interest, and to refrain from acts that would be detrimental to that other party.⁴⁵ Accordingly, a trustee has a fiduciary duty to act in the best interest of the beneficiary.⁴⁶

A trustee must produce income by investing the assets in the

36. *McGinley v. Bank of Am.*, 109 P.3d 1146, 1150 (Kan. 2005). In 2001, the Bank sold 1,500 shares on its own initiative. *Id.*

37. RESTATEMENT (SECOND) OF TRUSTS § 2 (1959).

38. 1 AUSTIN WAKEMAN SCOTT, SCOTT ON TRUSTS § 1 (4th ed. 2001).

39. *Id.* (stating the beneficiary of a trust has an equitable interest in the use of the property); see also, e.g., *Oklahoma v. Taylor*, 4 P.3d 1242, 1249 (Okla. 2000) (holding a trustee who retains legal title of property has a fiduciary duty to safeguard the property).

40. The mandatory rules of the KUTC state that "a trust and its terms be for the benefit of its beneficiaries." KAN. STAT. ANN. § 58a-105(b)(3) (2005).

41. Scott, *supra* note 38, at § 1.

42. Nineteen jurisdictions, including Kansas, have adopted the Uniform Trust Code. UTCProject.org Homepage, <http://www.utcproject.org> (last visited Oct. 13, 2006) (listing Alabama, Arkansas, District of Columbia, Florida, Kansas, Maine, Missouri, Nebraska, New Hampshire, New Mexico, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Virginia, and Wyoming as states that adopted the UTC).

43. *In re Hauck's Estate*, 223 P.2d 707, 710 (Kan. 1950).

44. BLACK'S LAW DICTIONARY 625 (6th ed. 1990).

45. Scott, *supra* note 38, at § 2.5; see also BLACK'S *supra* note 44.

46. See RESTATEMENT (SECOND) OF TRUSTS § 2 cmt. b (1959).

trust.⁴⁷ The appropriateness of the trustee's investment decisions is governed by the prudent investor rule, which requires the trustee to invest using reasonable care.⁴⁸ The prudence of investment decisions are not analyzed in isolation, but rather in relation to the overall investment plan.⁴⁹

Modern portfolio theory indicates that several diverse investments provide the same opportunity for return as a single investment, but with less risk of loss.⁵⁰ The total risk of a portfolio consists of both market and non-market risks, also known as systematic and unsystematic risk, respectively.⁵¹ Market risk includes risks common to all equities in the market, such as inflationary changes, interest rate changes, and nationwide economic or business cycles.⁵² Non-market risk includes risks that are specific only to a single equity, including a particular entity's vulnerability to market decline resulting from the loss of a key customer or a devastating lawsuit.⁵³ In an efficient market, losses by one entity due to non-market risk usually result in a gain to a competing entity.⁵⁴ Theoretically, if an investor owned every stock in the market, the non-market loss in one equity investment would be offset by the gains absorbed by every other equity in the market.⁵⁵

Increasing the number of differing investments in a portfolio lowers an investor's exposure to non-market risk.⁵⁶ Thus, by investing in multiple stocks, non-market risk can virtually be eliminated.⁵⁷ This process of making several diverse investments to eliminate non-market risk and minimize total risk is known as diversification.⁵⁸ Diversifying non-market risk lowers the total risk without a corresponding reduction in expected profit.⁵⁹ Failing to eliminate diversifiable risk from a trust portfolio violates the prudent investor rule because it exposes the beneficiary to additional risk without a compensating expectation of increased profit.⁶⁰ In contrast, the Kansas Uniform Trust Code (KUTC)

47. RESTATEMENT (THIRD) OF TRUSTS § 181 (1992).

48. *Id.* § 227.

49. *Id.* § 227(a).

50. See HARRY M. MARKOWITZ, PORTFOLIO SELECTION: EFFICIENT DIVERSIFICATION OF INVESTMENTS, 19-22 (1959).

51. Peter Byrne & Stephen Lee, *The Impact of Market Risk on Property Portfolio Risk Reduction*, 18 J. PROP. INVESTMENT & FIN. 613, 614 (2000).

52. Boone Schwartzel, *Is the Prudent Investor Rule Good For Texas?*, 54 BAYLOR L. REV. 701, 720 (2002).

53. Byrne & Lee, *supra* note 51, at 614.

54. See Schwartzel, *supra* note 52, at 720.

55. *Id.* at 720-21.

56. See *id.* at 721.

57. *Id.*

58. *Id.*

59. John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 NW. U. L. REV. 1105, 1113 (2004) ("Modern portfolio theory instructs us that the investor who diversifies thoroughly virtually always improves the odds of doing better than a one-stock portfolio.")

60. RESTATEMENT (THIRD) OF TRUSTS § 227(b) (1992) ("In making and implementing investment decisions, the trustee has a duty to diversify the investments of the trust unless the cir-

states that a trustee who reasonably follows written directions from a grantor satisfies the prudent investor rule, even if the instructions prohibit the trustee from eliminating diversifiable risk.⁶¹

C. Kansas Trust Law

When the McGinley trust was created in 1990, the Uniform Trustee's Powers Act (UTPA) was the governing law and incorporated the prudent investor rule to govern trust investments.⁶² The language of the prudent investor rule was modified frequently from 1990 to the present, but the substance of the rule remained constant.⁶³ A trustee who invests pursuant to written directions from the grantor complies with each version of the prudent investor rule.⁶⁴ The KUTC replaced the UTPA on January 1, 2003, but did not substantially modify the UTPA version of the prudent investor rule.⁶⁵ Nevertheless, the KUTC did not govern the McGinley decision because all of the relevant acts or omissions took place before the KUTC's enactment in 2003.⁶⁶ The law from 1990 to the present provides that a trustee will not be liable for losses resulting from reasonably relying on the grantor's directions.⁶⁷

IV. COURT'S DECISION

The Shawnee District Court granted the Bank's motion for summary judgment because McGinley failed to prove the waiver was legally ineffective.⁶⁸ The district court held that the prudent investor rule can be "expanded, restricted, eliminated or otherwise altered by the provisions of a trust" and that McGinley's retention of the right to make final investment decisions eliminated the protections that the rule provides.⁶⁹ According to the district court, a trustee may act in reasonable reliance of trust terms without liability, and the waiver indicated that McGinley

cumstances, it is prudent not to do so.").

61. See KAN. STAT. ANN. § 58-24a01 (Supp. 2000).

62. KAN. STAT. ANN. §§ 58-1201 to -1210 (1983) (codifying the UTPA which incorporates the prudent investor rule from KAN. STAT. ANN. § 17-5004 (a)(1)(1988)).

63. See McGinley v. Bank of Am., 109 P.3d 1146, 1152-54 (Kan. 2005). Trust agreements existing prior to the statutory revisions are governed by the new statutes. KAN. STAT. ANN. § 17-5004(a)(5) (Supp. 1993). Acts or omissions occurring before the effective date are governed by the law existing at the time of the act or omission. *Id.*

64. See KAN. STAT. ANN. § 17-5004(d) (Supp. 1993) (stating that a trustee acting pursuant to written directions is in compliance with the prudent investor rule); *McGinley*, 109 P.3d at 1153; see also KAN. STAT. ANN. § 58-24a01(b) (Supp. 2000) ("The prudent investor rule, a default rule, may be expanded, restricted, eliminated or otherwise altered by the provisions of a trust. A fiduciary is not liable to a beneficiary to the extent that the fiduciary acted in reasonable reliance on the provisions of the trust.").

65. See *McGinley*, 109 P.3d at 1153.

66. See *id.*

67. *Id.*

68. *Id.*

69. *Id.* at 1154 (quoting KAN. STAT. ANN. § 58-24a01(b) (Supp. 2000)).

was aware of the risks associated with the investment.⁷⁰ The court did not address McGinley's assertion that even if the waiver was effective, the Bank's failure to recommend diversification was "reckless and indifferent to McGinley's best interest."⁷¹ McGinley's appeal to the Kansas Court of Appeals was transferred directly to the Kansas Supreme Court for hearing by a three-judge-panel.⁷²

On appeal, McGinley contended that the Bank's behavior and failure to explain the consequences of the waiver violated the fiduciary relationship.⁷³ McGinley claimed that the Bank received as much as \$6,000 annually to serve as her fiduciary and that failing to share the Enron sell recommendation with her was reckless and indifferent.⁷⁴ McGinley highlighted the contradiction that 93% of the trustee's commission came from an asset for which it rendered no professional advice.⁷⁵ Through this contradiction, McGinley stressed the unfairness of allowing the Bank to profit while providing little service and no accountability.⁷⁶ According to McGinley, when she sought advice on which stocks to sell, the Bank withheld its opinion that the Enron shares should be sold.⁷⁷ McGinley argued that despite the waiver, the dramatic increase in the percentage of the trust's total value invested in Enron obligated the Bank to inform McGinley that diversification was in her best interest.⁷⁸ An internal memo from the investment manager to McGinley's advisor supported her claim, stating, "in regards to the Marie McGinley trust we have a large concentration in the Enron stock and we should diversify."⁷⁹

The Bank countered that it only owed McGinley the duty to retain her Enron stock as directed and that the trust agreement limited the scope of its fiduciary duty.⁸⁰ According to the Bank, imposing a duty on the trustee to manage investments beyond the scope of the trust instrument would be unworkable, and "breach of such an expanded duty would be nearly impossible to avoid."⁸¹ In the Bank's view, the Kansas Legislature did not intend for a trustee to "have the duty of protecting the grantor from herself."⁸²

The Bank claimed that the waiver was simply an exercise of

70. *Id.*

71. *Id.* at 1157.

72. *Id.* at 1148 (acting pursuant to KAN. STAT. ANN. § 20-3018(c) (1995)).

73. *See id.* at 1156.

74. Brief of Appellant, *supra* note 10, at 19.

75. *Id.* at 20.

76. *See id.*

77. *See McGinley*, 109 P.3d at 1157.

78. *See id.*

79. Brief of Appellant, *supra* note 10, at 18.

80. *See McGinley*, 109 P.3d at 1157.

81. Brief of Appellee at 19, *McGinley*, 109 P.3d 1146 (No. 04-92230-A).

82. *Id.*

McGinley's right to direct her own investments as specifically reserved in her trust agreement, and it owed McGinley no duty beyond retaining her Enron stock as directed.⁸³ In addition, the Bank argued that the prudent investor rule could be eliminated by the terms of the trust instrument, and a fiduciary is not liable for reasonably relying on the terms that modify the rule.⁸⁴ According to the Bank, the trustee has "a right to rely upon the express terms of the [t]rust without subjecting itself to liability for McGinley's bad investment decisions."⁸⁵ The Bank also claimed that McGinley's attempt to rely on internal bank documents to modify the terms of the trust agreement was barred by the parol evidence rule.⁸⁶ The Bank argued that parol evidence is prohibited when, as in this case, trust language is not ambiguous.⁸⁷

The Kansas Supreme Court agreed with the Bank's assertion that the waiver was not an amendment, but rather an exercise of McGinley's reserved power to direct investments as drafted by her counsel in the terms of the trust.⁸⁸ The court held that the waiver reaffirmed the provisions of the trust agreement, and was too consistent with the terms of the trust to operate as an amendment.⁸⁹ Further, because the language of the letter was clear and unambiguous, the court would not allow the use of contradictory parol evidence.⁹⁰ The court also agreed with the Bank that the trust instrument language contractually eliminated the default prudent investor rule.⁹¹ The court held that through the subsequent waiver, McGinley, "not only specifically relieved the Bank from any responsibility to *monitor* the stock, but also from any responsibility to *analyze* it."⁹² The court acknowledged the importance of informed consent but held that McGinley lacked sufficient authority to prove that the Bank's failure to explain the waiver violated its fiduciary duty.⁹³ In response to McGinley's assertion that changed circumstances imposed a duty on the Bank to override the agreement, the court held, "the trustee

83. *Id.* at 20.

84. *Id.* at 10.

85. *Id.* at 16.

86. *Id.*

87. *Id.*

88. *See McGinley*, 109 P.3d at 1155.

89. *See id.*

90. *See id.*

91. *Id.* at 1154 (holding that the trust language obligated the Bank to follow McGinley's directions and, in doing so, removed the Bank's liability as provided by the statutory prudent investor rule).

92. *Id.*

93. *Id.* at 1156. The court noted:

Clearly the better practice for the Bank would have been to have communicated to McGinley the letter's contents and effect before she signed it, and to have notified her of evolving circumstances, *e.g.*, steady decreases in Enron's value which reduced the investment portfolio's overall worth, or steady increases, though desirable, which unbalanced the portfolio. However, McGinley fails to direct this court to any relevant authority showing the Bank had a legal obligation to do so under the facts of this case.

Id.

is only protected when following written instructions from the grantor . . . not when directly contradicting them.”⁹⁴ The court’s decision can be summarized by its interpretation of the legal effect of the waiver, which it took to mean: “Do not sell my Enron stock until I say otherwise in writing, or die or become disabled. There is no need to bother me with asking my permission to sell it and therefore no need to monitor or analyze it. I will let *you* know.”⁹⁵

V. COMMENTARY

In *McGinley*, the Bank’s right to modify the prudent investor rule clashed with McGinley’s right to have her best interests served.⁹⁶ The court reconciled the conflicting rights with the concept of reasonable reliance. In the court’s words, “[a] trustee which reasonably and in good faith relies upon . . . a trust instrument . . . is not liable . . . to the extent the breach resulted from the reliance.”⁹⁷ Stated differently, a trustee can still act in the beneficiary’s best interest while relying on trust instructions to “alter the prudent investor rule,” provided the reliance is reasonable.⁹⁸

In approving the Bank’s conduct, the court set a low standard for reasonable reliance.⁹⁹ The court should have held that the Bank’s conduct was unreasonable because it significantly undermined McGinley’s best interest in several ways. For example, the Bank unreasonably used the waiver to remove her right to be protected from changed circumstance risk.¹⁰⁰ The Bank also acted unreasonably by imposing the waiver to lower the standard of care owed to McGinley without an explanation.¹⁰¹

The court should have set a higher standard for reasonable reliance by concluding that reliance on trust instructions becomes unreasonable when it contradicts the beneficiary’s best interests.¹⁰² The common law indicates that the beneficiary’s best interests are thwarted by the use of unexplained waivers, attempts to ignore risks posed by changed circumstances, and bad faith.¹⁰³

94. *Id.* at 1157.

95. *Id.* at 1155.

96. *See id.* at 1153-54.

97. *Id.* at 1153.

98. *Id.*

99. *See id.* at 1154 (concluding that “because Defendant reasonably relied on Plaintiff’s decision to retain the stock, Defendant cannot be held liable”).

100. Brief of Appellant, *supra* note 10, at 7.

101. *See id.* at 4, 18.

102. *See* Langbein, *supra* note 59, at 1112 (“The requirement that there be benefit to the beneficiaries sets outer limits on the settlor’s power to abridge the default law.”). This is supported by the mandatory rule of the KUTC that a trust must be administered for the benefit of the beneficiary. KAN. STAT. ANN. § 58a-105(b)(3) (2005).

103. *See* Carr v. CIGNA Secs. Inc., 95 F.3d 544, 547 (7th Cir. 1996) (“A fiduciary relationship . . . excuses the principal from having to take the same degree of care that is expected of a participant in

A. *Equitable Explanation of the Effect of a Waiver*

Because enhanced communication is rarely a bad thing, as part of the duty to act in the beneficiary's best interest, a trustee should explain the effect of a waiver.¹⁰⁴ A New York court affirmed this proposition in *In re Saxton*.¹⁰⁵ The court in *Saxton* held that an unexplained waiver will not release a trustee from liability for failing to diversify a trust investment.¹⁰⁶ It ruled that a waiver subsequent to the creation of the trust required an explanation of its effect to be legally valid.¹⁰⁷

In 1958, the decedent in *Saxton* left his beneficiaries a trust consisting entirely of IBM stock.¹⁰⁸ Two years later, the bank trustee drafted a waiver and imposed it upon the beneficiaries without explaining that it released the bank from liability for not diversifying the large concentration of IBM stock.¹⁰⁹ Like *McGinley*, the beneficiaries in *Saxton* "never requested the [waiver], had no input in its preparation nor had any communication with [the trustee] as to the benefits of diversification or the risks associated with such concentration."¹¹⁰ When the beneficiaries signed the letter in January of 1962, the trust consisted of 1,575 IBM shares worth \$569,853.¹¹¹ By 1986, the portfolio had grown to over \$7,000,000.¹¹² Similar to Bank of America, the bank in *Saxton* had a policy to hold no more than 10% of a trust in one stock.¹¹³ Despite this policy, the bank held the entire trust in IBM stock.¹¹⁴ In October 1987, the value of the IBM stock declined, causing the trust to lose \$4,000,000.¹¹⁵ The beneficiaries filed a suit alleging that the bank's failure to diversify the trust was a breach of its fiduciary duty.¹¹⁶ The bank claimed the waiver justified its failure to diversify.¹¹⁷ The court held that principles of equity trump normal contract rules when a beneficiary consents to imprudent fiduciary management.¹¹⁸ The court further stated:

[N]ot a scintilla of evidence indicates that petitioner fully apprized Saxton or respondents of the effects that their execution of the [waiver] would

an arm's length contractual relationship."); RESTATEMENT (SECOND) OF TRUSTS § 167 cmt. g, illus. 24 (1959) (explaining the duty of a trustee to monitor risks posed by a change in circumstances); see also KAN. STAT. ANN. § 58a-814 (2005) (incorporating good faith requirement into KUTC).

104. See *Carr*, 95 F.3d at 547.

105. 712 N.Y.S.2d 225, 231 (App. Div. 2000).

106. *Id.*

107. See *id.*

108. *Id.* at 227.

109. See *id.*

110. *Id.*

111. *Id.*

112. *Id.* at 228.

113. *Id.* at 229.

114. *Id.*

115. *Id.*

116. *Id.* at 230.

117. *Id.*

118. *Id.* at 231.

have on their legal rights or how their direction to hold the entirety of the trust's corpus in IBM stock would fall far short of what would have been required of a prudent corporate trustee.¹¹⁹

The court concluded that, "although the beneficiaries appeared to consent to the stock's retention, such consent must be informed."¹²⁰

The Missouri Court of Appeals also imposed the requirement of informed consent upon a trustee.¹²¹ Boatmen's First National Bank (First National) served as co-trustee for ninety-two-year-old Imogene Ramsey, along with Ramsey's son, S. Hoit Campbell.¹²² Ramsey reserved the right to approve all final investment decisions and consented to imprudent investments in limited real estate partnerships after Campbell and First National failed to explain the risks associated with the investments.¹²³ Ramsey asserted a negligence claim against First National for losses incurred by the unsafe investments.¹²⁴ First National claimed it could not be liable because Ramsey directed and consented to the transactions.¹²⁵ The court voided Ramsey's consent and ruled that transactions involving a trustee must involve informed consent.¹²⁶ Similar to Bank of America's diversification policy, First National had a policy prohibiting unsafe investments in certain limited real estate partnerships.¹²⁷ The court held that the policy "should have been directly communicated to Ms. Ramsey by [First National]."¹²⁸ Ultimately, the fiduciary duty prohibited First National from administering the trust in a passive role.¹²⁹ The bank's failure to share with Ramsey "its expert opinion of the nature of the proposed investments and their potential ramifications" violated her best interests.¹³⁰

*Gochnauer v. A.G. Edwards & Sons, Inc.*¹³¹ also supports the idea that consent between parties to a fiduciary relationship must be informed.¹³² In this case, husband and wife investors were encouraged by their investment advisor to move their savings from conservative municipal bond investments to highly speculative option trading.¹³³ The couple signed an agreement stating that they understood the risks in-

119. *Id.*

120. *Id.*

121. *Ramsey v. Boatmen's First Nat'l Bank*, 914 S.W.2d 384, 388 (Mo. Ct. App. 1996).

122. *Id.* at 386.

123. *Id.*

124. *Id.*

125. *Id.*

126. *See id.* at 388; *see also* RESTATEMENT (SECOND) OF TRUSTS § 216(2)(b) (stating that a beneficiary's consent may be set aside if given without knowledge of material facts which "the trustee knew or should have known and which the trustee did not reasonably believe that the beneficiary knew").

127. *See Ramsey*, 914 S.W.2d at 388.

128. *Id.*

129. *Id.*

130. *See id.* at 389.

131. 810 F.2d 1042 (11th Cir. 1987).

132. *Id.* at 1050.

133. *See id.* at 1044.

herent in trading options, yet later, the risky investment cost them several thousand dollars in losses.¹³⁴ The United States Court of Appeals for the Eleventh Circuit held that the advisor violated the fiduciary duty by failing to discuss the risks with his clients.¹³⁵ The Kansas Supreme Court should have followed the persuasive authority of the Eleventh Circuit and held that the Bank's failure to disclose the risk of investing without diversification violated the fiduciary duty owed to McGinley.

The Georgia case of *Youngblood v. Mock*¹³⁶ provides additional persuasive authority for the proposition that informed consent is a critical aspect of the fiduciary duty.¹³⁷ In that case, an elderly widow entered into a fiduciary relationship with an agent to sell her trucks and tools.¹³⁸ The widow did not review the terms of the agreement and later learned that one of her trucks was sold to the agent rather than another buyer.¹³⁹ The court held that, where there is a fiduciary relationship, the normal duty to read governing contracts is inapplicable.¹⁴⁰

The KUTC was not enacted in time to govern *McGinley*,¹⁴¹ but it too indicates that the fiduciary duty mandates informed consent.¹⁴² The KUTC demands informed disclosure when a trustee drafts and implements an exculpatory waiver.¹⁴³ The court recognized this persuasive authority but distinguished the Bank's circumstances from those that require an explanation of the exculpatory waiver under the KUTC.¹⁴⁴ Instead, the court stated that informed disclosure is unnecessary if the exculpatory waiver merely reaffirms the trust agreement terms.¹⁴⁵ The court then categorized the waiver as simply reaffirming the terms of the trust agreement.¹⁴⁶

This categorization is problematic because the Bank's waiver low-

134. *Id.* at 1044-45.

135. *Id.* at 1050.

136. 238 S.E.2d 250 (Ga. Ct. App. 1977).

137. *See id.* at 252.

138. *Id.* at 251.

139. *Id.* at 251-52.

140. *Id.* at 252. *See* RESTATEMENT (SECOND) OF TRUSTS § 2 cmt. b (1959) (stating that a "transaction can be set aside" if the fiduciary "fails to make a full disclosure of all circumstances . . . affecting the transaction"); *see also* Carr v. CIGNA Secs. Inc., 95 F.3d 544, 547-48 (7th Cir. 1996) ("A fiduciary relationship . . . excuses the principal from having to take the same degree of care that is expected of a participant in an arm's length contractual relationship.").

141. *McGinley v. Bank of Am.*, 109 P.3d 1146, 1153 (Kan. 2005) (stating the KUTC "does not apply to the trustee Bank's acts in this case").

142. KAN. STAT. ANN. § 58a-1008(b) (2005) ("An exculpatory term drafted or caused to be drafted by the trustee is invalid as an abuse of a fiduciary or confidential relationship unless the trustee proves that the exculpatory term is fair under the circumstances and that its existence and contents were adequately communicated to the settlor.").

143. *Id.*

144. *McGinley*, 109 P.3d at 1156 (holding that KAN. STAT. ANN. § 58a-1008 "[did] not concern letters issued in accordance with trust provisions that had been drafted by a grantor's own legal counsel.").

145. *See id.* at 1154.

146. *Id.* at 1155 ("[T]he letter simply evidences the exercise of her retained right . . . to control trust asset sales by directing the Bank to hold the Enron stock.").

ered the standard of care owed to McGinley beyond the terms of the trust agreement.¹⁴⁷ The trust agreement eliminated the Bank's duty to prudently diversify by stating that the trustee must abide by the grantor's decisions.¹⁴⁸ Even though the trust provisions released the Bank from the prudent investor rule, they did not authorize the Bank to ignore risks that developed as the Enron stock allocation grew over time.¹⁴⁹ Consequently, the waiver was different from the trust terms because it released all responsibility, even the duty to monitor changes in circumstances.¹⁵⁰ Because the waiver lowered the standard of care, the Bank had a duty to ensure that McGinley understood the waiver when she signed it.¹⁵¹

Persuasive authority from the KUTC and other jurisdictions indicates an effort to promote informed consent.¹⁵² In contrast, the *McGinley* decision condones uninformed consent by permitting a trustee to undermine a beneficiary's rights through an uninformed waiver.¹⁵³ This holding strips the trustee of any incentive to insist on informed disclosure.¹⁵⁴ After the *McGinley* decision, a trustee gains more liability protection by soliciting waivers than by offering sound investment advice.¹⁵⁵ While other jurisdictions have sought to promote informed consent, the *McGinley* decision has likely discouraged it.

147. The trust agreement provided the Bank with discretionary authority to manage the trust with,

its best judgment . . . and to hold . . . property . . . in the same form of investment as that in which it is received by it, although it may not be of the character of investments otherwise permitted by law It shall also have . . . authority to insure against loss . . . any part of such property . . . it deems advisable [P]rovided, however, that during the lifetime of Grantor, [s]he shall be consulted by the Trustee as to any purchase or sale, and the Trustee shall abide by the Grantor's decision

Id. at 1149 (second alteration in original) (emphasis omitted) (quoting Trust Agreement). The court held that this language in the trust agreement was consistent with the subsequent waiver drafted by the Bank which, in reference to the Enron investment, stated:

I understand that you do not monitor these securities, and I hereby agree to exonerate, indemnify and hold the Bank harmless from any and all loss, damage and expense sustained or incurred by the Bank for continuing to retain these securities as assets of this account. I also relieve the Bank from any responsibility for analyzing or monitoring these securities in any way.

Id. at 1150, 1155.

148. *See id.* at 1149.

149. *See id.*

150. *See id.* at 1150.

151. *See In re Saxton*, 712 N.Y.S.2d 225, 231 (App. Div. 2000) (requiring trustee to explain a waiver that lowered the standard of care).

152. KAN. STAT. ANN. § 58a-1008(b) (2005); *Gochnauer v. A.G. Edwards & Sons, Inc.*, 810 F.2d 1042, 1049-50 (11th Cir. 1987); *Youngblood v. Mock*, 238 S.E.2d 250, 252 (Ga. Ct. App. 1977); *Ramsey v. Boatmen's First Nat'l Bank*, 914 S.W.2d 384, 388 (Mo. Ct. App. 1996); *Saxton*, 712 N.Y.S.2d at 231.

153. *See McGinley*, 109 P.3d at 1156 ("McGinley fails to direct this court to any relevant authority showing the Bank had a legal obligation to [explain the waiver] under the facts of this case.")

154. *Id.* at 1154 (concluding that the waiver relieved the Bank of all management duties related to the Enron stock).

155. *See id.*

B. The Duty to Monitor Risks Posed by Changed Circumstances

The unusually explosive growth of McGinley's Enron stock represented a change in circumstances.¹⁵⁶ McGinley's initial investment in Enron was reasonable because it represented only a small portion of the value of her trust.¹⁵⁷ Over the next nine years, however, McGinley's Enron investment significantly outperformed her other stocks, and the percentage of her trust's value invested in Enron grew dramatically.¹⁵⁸ McGinley's Enron investment became unsafe and unreasonable when it increased from less than 15% to a peak of 77% of the trust's total value.¹⁵⁹ The court should not have allowed the Bank to recklessly ignore this unsafe change in circumstances.¹⁶⁰

Both the KUTC and the common law impose the duty to monitor risks posed by changed circumstances.¹⁶¹ Other jurisdictions have prevented this injustice by imposing a duty on the trustee to periodically examine whether changed circumstances have rendered the trust's directed investments contrary to the best interest of the beneficiary.¹⁶² For example, in *Union Commerce Bank v. Kusse*,¹⁶³ the grantor required the trustee to retain all of the trust's securities and waived all trustee liability for losses.¹⁶⁴ The Ohio court held that when a change in circumstances renders the investment unsafe, the trustee has a duty to petition the court for permission to sell the unsafe investment.¹⁶⁵

The duty to respond to changed circumstances is also recognized by *In re First Trust & Deposit Co.*,¹⁶⁶ which involved a provision prohibiting the trustee from selling a specific investment.¹⁶⁷ The trustee honored the provision even as the investment's performance suffered.¹⁶⁸ The New York court stated that the trustee had an affirmative duty to

156. See, e.g., *Union Commerce Bank v. Kusse*, 251 N.E.2d 884, 889 (Ohio Prob. Ct. 1969) ("Even though a fiduciary is without power of sale, . . . [i]f the circumstances are such that it becomes imprudent to retain a certain security or other item of property, the fiduciary must apply to the court for permission to sell it."); see also RESTATEMENT (SECOND) OF TRUSTS § 167 cmt. g, illus. 24 (1959) (explaining the duty of a trustee to monitor risks posed by a change in circumstances).

157. *McGinley*, 109 P.3d at 1149.

158. *Id.* at 1150.

159. RESTATEMENT (THIRD) OF TRUSTS § 227(b) (1992) (stressing the importance of diversification in prudent investing).

160. See *McGinley*, 109 P.3d at 1155.

161. KAN. STAT. ANN. § 58a-106 (2005) (incorporating the common law into the KUTC); see also RESTATEMENT (SECOND) OF TRUSTS § 167 cmt. g, illus. 24 (1959) (explaining the duty of a trustee to monitor risks posed by a change in circumstances).

162. *Clark v. Clark*, 144 S.E. 787, 792-93 (Ga. 1928) (holding that despite being directed to retain an investment, the trustee has a duty to monitor the investment and sell it if a change in circumstances renders the investment in danger of loss); see also *Steiner v. Hawaiian Trust Co.*, 393 P.2d 96, 108 (Haw. 1964) (holding that despite a retention clause, the trustee had a duty to diversify an improperly allocated portfolio after a change in circumstances).

163. 251 N.E.2d 884 (Ohio Prob. Ct. 1969).

164. See *id.* at 887.

165. *Id.* at 889.

166. 251 N.Y.S. 347 (App. Div. 1931).

167. *Id.* at 348.

168. See *id.*

seek a court order striking the retention clause when the investment becomes imprudent.¹⁶⁹ This duty arises when “there is a changed condition of affairs where the best interests of the beneficiaries will be promoted by . . . reinvestment of the proceeds in some safe and conservative security.”¹⁷⁰ In *Clark v. Clark*,¹⁷¹ a Georgia court stated that a retention clause “does not relieve the trustee from the ordinary duty of watching such investment and of calling it in when there is imminent danger of its loss by change of circumstances.”¹⁷²

These cases offer persuasive authority for enforcing the duty to monitor changed circumstances. Each case implicitly recognizes that apathetic risk management does not serve the beneficiary’s best interest.¹⁷³ The duty to act in the beneficiary’s best interest should prohibit imprudent retention clauses, especially when a retention clause results in an undiversified investment portfolio, because “[t]he advantages of diversifying an investment portfolio broadly are so great that it is usually folly not to do it, and folly is not how to benefit the beneficiaries.”¹⁷⁴

McGinley failed to set a precedent deterring deficient investment management.¹⁷⁵ Rather, the holding enabled professional investment advisors to shift the responsibility for unsafe investments to novice consumers.¹⁷⁶ This is bad policy because consumers often need assistance when investing.¹⁷⁷ Investment advisors, however, have specialized training in business, finance, and accounting that enables them to make wise investment choices.¹⁷⁸ Further, potential liability would likely motivate banks to develop procedures that could prevent more customers from losing their investments.

Rather than discouraging imprudent asset management, *McGinley* rewards it. *McGinley* allows trustees to be unjustly enriched by generating commissions from assets for which they have no liability for managing.¹⁷⁹ In *McGinley*, the Bank’s trustee fees were calculated as a per-

169. *Id.*

170. *Id.*

171. 144 S.E. 787 (Ga. 1928).

172. *Id.* at 792-93.

173. See *Clark*, 144 S.E. at 792-93 (requiring trustee to monitor safety of investments subject to a retention clause); *In re First Trust & Deposit Co.*, 251 N.Y.S. at 348 (imposing duty on trustee to petition the court to remove a retention clause that conflicts with the beneficiary’s best interest); *Union Commerce Bank v. Kusse*, 251 N.E.2d 884, 889 (Ohio Prob. Ct. 1969) (requiring a trustee to petition the court to amend a retention clause if the investment becomes unreasonably dangerous).

174. Langbein, *supra* note 59, at 1114.

175. See *McGinley v. Bank of Am.*, 109 P.3d 1146, 1154 (Kan. 2005).

176. See *id.* at 1155.

177. See Lauren Young & Greg Hafkin, *Taking Stock of Your Adviser*, BUS. WK., Sept. 11, 2006, at 114 (reporting that “92% of 1,052 investors polled say they don’t know how to assess advisers”).

178. United States Department of Labor, Bureau of Labor Statistics, Financial Analysts and Personal Financial Advisors Occupational Handbook, <http://stats.bls.gov/oco/ocos259.htm#training> (last visited Oct. 14, 2006) (listing by Department of Labor of typical qualifications for personal financial advisors).

179. See Brief of Appellant, *supra* note 10, at 19.

centage of the value of the trust investments.¹⁸⁰ McGinley noted the unfairness of the Bank collecting 93% of its trustee fees from an asset for which it rendered no professional advice.¹⁸¹ Permitting a trustee to generate fees from investments for which it disclaims all professional services is likely contrary to the good faith requirement of the KUTC.¹⁸²

C. Implications for Practicing Attorneys

McGinley will alter the way attorneys practice in Kansas. Because the decision permits trustees to lower the standard of care, drafters of trust instruments should start with documented advice to the client about allocation of liability for bad investments and which parties are responsible for monitoring investments.¹⁸³ During this conference, the trustee should be notified of the beneficiary's motivation behind any retention clauses, and each party's interpretation of terms within the trust instrument should be discussed and clearly defined.¹⁸⁴

In *Allison v. Bank One-Denver*,¹⁸⁵ the United States Court of Appeals for the Tenth Circuit provided an example of how competent drafting can protect beneficiaries from the lessened accountability of trustees.¹⁸⁶ The court insulated Employee Retirement Income Security Act (ERISA) participants from their investment losses because the bank trustee failed to follow the trust agreement's written terms.¹⁸⁷ The terms required a written letter and thorough explanation of the risks involved before the bank could release itself from liability by altering the plan to allow employees to direct their own investments.¹⁸⁸ Thoughtful drafting afforded the beneficiaries protection from a trustee seeking to lower the standard of care.¹⁸⁹

VI. CONCLUSION

The Kansas Supreme Court held that McGinley's power to direct investments justified the Bank's failure to monitor the safety of her Enron investment.¹⁹⁰ The decision is problematic because reliance on trust instructions becomes unreasonable when a professional trustee fails to

180. *Id.*

181. *Id.* at 18.

182. See KAN. STAT. ANN. § 58a-814 (2005).

183. See Maureen S. Bateman & Ellen S. Berkowitz, *Can We Talk?*, TR. & EST., Mar. 2005, at 45.

184. See generally *id.* at 44-49 (highlighting the importance of initiating client communication).

185. 289 F.3d 1223 (10th Cir. 2002).

186. *Id.* A choice of law clause can be used to subject a trust agreement to laws of a state, such as New York, with more precedent for protecting beneficiaries. KAN. STAT. ANN. § 58a-107(1).

187. See *Allison*, 289 F.3d at 1238-39.

188. See *id.*

189. See *id.*

190. See *McGinley v. Bank of Am.*, 109 P.3d 1146, 1157 (Kan. 2005).

explain the effect of a waiver.¹⁹¹ Additionally, it is unfair to rely on trust instructions as justification for ignoring the safety of directed trust investments in light of changed circumstances.¹⁹² Instead, a trustee should have a duty to monitor risks posed by changes in circumstances over time.¹⁹³ The court should have imposed a duty on the Bank to evaluate and respond to the new risk of loss that developed when the Enron allocation exceeded 15%. The increase in McGinley's Enron concentration represented an unsafe change in circumstances, which the Bank had a duty to monitor and address.¹⁹⁴

Instead, the court opted not to enforce the principle of informed consent nor the duty to monitor changed circumstances.¹⁹⁵ Even more shocking, the court enabled the Bank to collect fees on an asset for which it had no responsibility to manage prudently.¹⁹⁶ Consequently, the court lowered the standard for reasonable reliance and eroded the protection afforded by the duty to serve the beneficiary's best interest. In doing so, the court also squandered the chance to stress the importance of diversification and the advantages of modern portfolio theory. While other jurisdictions have an enviable history of cases upholding the best interest of beneficiaries, the disappointing truth is that the Kansas Supreme Court missed the opportunity to do the same.

191. See *In re Saxton*, 712 N.Y.S.2d 225, 231 (App. Div. 2000) (holding an exculpatory waiver does not justify failing to diversify a trust unless the waiver is accompanied by an equitable explanation); see also KAN. STAT. ANN. § 58a-1008 (stating exculpatory terms are invalid unless adequately explained to the beneficiary).

192. See *Clark v. Clark*, 144 S.E. 787, 792-93 (Ga. 1928) (imposing a duty to monitor risks arising from a change in circumstances); see also RESTATEMENT (SECOND) OF TRUSTS § 167 cmt. g, illus. 24 (1959) (explaining the duty of a trustee to monitor risks posed by a change in circumstances).

193. RESTATEMENT (SECOND) OF TRUSTS § 167 cmt. g, illus. 24 (1959).

194. See *id.*

195. *McGinley*, 109 P.3d at 1155 (holding that McGinley's reservation of the right to direct some investments in her trust agreement effectively told the Bank, "[t]here is no need to bother me with asking my permission to sell [my Enron stock] and therefore no need to monitor or analyze it").

196. See Brief of Appellant, *supra* note 10, at 19.