The Development, Use, And Misuse Of The Trust Protector And Its Role In Trust Law And Practice.

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Use of the trust protector has recently become unusually popular with the trust attorney, for whom it was heretofore virtually non-existent, at least under that name. For instance, the first protector statute was enacted in the Cook Islands in 1989, followed shortly thereafter by statutes in Nevis and Belize, but not until 1997 did any of the United States adopt such a statute (South Dakota and Delaware). Why all this relatively recent attention to, what I point out, is in fact a relatively old concept? This discussion will address the reasons for its popularity, review and analyze the position of protector in general, and then focus on its appearance and use in the modern trust. It will further examine the advantages and disadvantages, powers and problems, and the responsibilities, if any, of the position, with a view towards assisting the attorney in deciding whether, when, and to what extent to utilize this “modern” development for trusts.

I. Just What Is A Protector And Why Has The Concept Become So Popular?

Mention the term “protector” to any professional who deals with trusts, particularly offshore trusts, and they will almost definitely indicate an understanding of the concept, and quite a few will readily state that they employ the concept in their own trusts. This can be a bit disturbing when one considers the paucity of cases and commentary on the subject of protectors, and further, that, unlike the terms, “trustee”, “beneficiary,” “guardian,” “remainderman,” and the like, there is no universally accepted definition of protector and, as to that term, per se, very few authoritative sources for reference. For instance, the term appears nowhere in Scott or Bogert on trusts, or in the Restatement of The Law (Second) Trusts, the three monumental and leading trust references in the United States.1 It is very significant to note, however, that the recently published Restatement of The Law (Third) Trusts does contain specific and very helpful commentary on the trust protector, no doubt in recognition of its growing use.2 As for international treatises, there is only a passing reference to it in The Law of Trusts and Equitable Remedies, by David Hayton (Hayton and Marshall), although in recognition of the growing interest in the position, there is some discussion of protectors in another of Professor Hayton’s books, The Law of Trusts and Trustees, both leading references in the United Kingdom and most offshore common law jurisdictions.3

Although a formal definition of protector might be helpful, it would still leave numerous questions unanswered, as we shall see. In this regard, we can find formal definitions of protector in the laws of a number of foreign jurisdictions, the earliest being that of the Cook Islands as noted above, which was followed in both time and substance by a number of other offshore jurisdictions, such as Belize and Nevis.4 The law of Nevis, for instance, defines the protector as follows:

“‘protector’ in relation to an international trust means a person who is the holder of a power which when invoked is capable of directing a trustee in matters relating to the trust and in respect of which matters the trustee has a discretion and includes a person who is the holder of a power of appointment or dismissal of trustees;”

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As suggested, this definition of protector is helpful to orient our analysis in the sense that it broadly describes the position as it relates to the trust and the trustee. A closer look at the question, however, would suggest that perhaps the definition could have been condensed to: “A protector is a party who has power over a trust but who is not a trustee.” And that is about the essence of it, or rather, the beginning of it. That is to say, the power could be negative, such as a veto power over some proposed act, or positive, such as the power to remove and replace trustees or add beneficiaries, or to amend the trust, or even the power to terminate the trust. Furthermore, the power can be personal, or it can be fiduciary, or perhaps both. It is easy to see how generations of practitioners who, before this alternative for flexibility, have been forced to follow tradition and draft trusts with only the “accepted” forms of flexibility (viz., the removal of trustees or the inclusion of a power of appointment, and even then in limited cases) could get carried away with this new form of super flexibility. While unlimited flexibility may be attractive, it virtually reverses the original concept of a settlor thoughtfully establishing a trust for specified classes of beneficiaries with specified terms and specified trustees. Unfortunately, it is this nascent super flexibility which seems, or at least promises to allow us to deal with virtually every conceivable future circumstance (including the re-writing of oversights in drafting) that makes the position of protector so increasingly popular.

II. Is The Protector Lying About His Age?

While a number of commentators all too hastily attribute the popularity of the trust protector solely to the offshore asset protection trust, this conclusion is less a question of fact than it is a lack of thorough research and thoughtful consideration of the position.5

What may come as a surprise to many is the fact that the concept of trust protector is not new at all; at best, it is only the term that is new, as well as practitioners’ recent “discovery” of what actually is an old concept in trust law. As noted below, trust attorneys in the common law jurisdictions have been employing the concept of trust “advisors” for decades, but unlike the “protector,” it was more the role of the trust advisor rather than the name tag that was given formal recognition. It is appropriate to note at this point that in this context we are speaking of an advisor who is granted certain specific powers under the trust, as opposed to an “advisor” who is merely designated as a resource that the trustee is requested to consult (without in any way causing the trustee to be bound by the results of such consultation) before the trustee exercises certain discretionary powers under the trust.6 Thus, in earlier days it was not at all uncommon, for instance, for a settlor to name an “advisor” who had the power to direct and control all trust investments, or to remove and replace trustees. The instructions of that type of advisor were binding on the trust and the trustee.

Although the term “advisor” is still customarily used where a power over only trust investments is granted, if the power extends beyond that, today that party is more likely to be called a “protector.” So let’s consider this revised definition: “A trust protector (which by definition includes a trust “advisor”) is a party who has overriding discretionary powers with respect to the trust but who is not a trustee.” An advisor/protector may be given “positive” powers, such as the ability to modify the trust or compel the trustee to act, or “negative” powers, such as a veto power over changes in trust investments or over trust distributions. In this regard, the advisor with powers is in every respect the same as the protector we see today. In fact, at least one state has statutorily agreed with that conclusion, stating: “For purposes of this subsection [on trust advisors], the term “advisor” includes a trust protector…”7
Over the years there have been numerous cases in a number of common law jurisdictions dealing with trust advisors of one designation or another, and in the courts, at least, if not in the practice of law and trust administration, the position has not been regarded as new or unusual. Many such cases are cited in Scott in an exhaustive and illuminating discussion on the subject, examining the extent of powers that can be and have been granted to trust advisors. When one reflects on the perceived role of the protector and considers the analysis put forth by Scott, it becomes quickly apparent that the term “protector” could be substituted for the term “advisor” wherever used in Scott’s discussion, without exception.

It is difficult to determine exactly when the concept of trust advisor first appeared, but the earliest U.S. case I found was decided in 1823. Later, between the end of the nineteenth century and the first half of the twentieth century, numerous cases were heard reflecting the increasing use of the trust advisor, primarily with respect to control over trust investments, but the issues were by no means confined to that, nor were they confined to the use of a single advisor. In a 1946 case, for instance, the settlor appointed a committee of advisors (perhaps one of the first anywhere utilizing a committee), which was given the power to remove and replace trustees and to accelerate principal distributions on certain conditions.

The concept became far more common in the second half of the twentieth century, as reflected in a larger number of cases dealing with various aspects of the role. Furthermore, during that period a number of very informative law review and journal articles began to appear, but oddly, the idea never really attracted serious widespread professional notice until the last decade or so, when it took the title of protector. Despite the name tag and the date on the tag, however, there should be no question that we are dealing with the very same personage, generally governed by the very same legal principals and concepts, so let’s not permit the protector to lie about his age.

III. The Protector And The Asset Protection Trust

For better or for worse, the recent surge in popularity of the protector has been fueled to a great extent by the equally fast growing popularity of the so-called, offshore asset protection trust. While asset protection trusts, per se, like the position of protector, are not new, it is safe to say that their use has grown exponentially over the past ten to fifteen years. Since the typical asset protection trust is one where the settlor and his family are discretionary beneficiaries, and the settlor gives up control to prevent his creditors from exercising such control through a court order, the concept of the protector seems to offer the settlor the opportunity of having it both ways. That is, although the settlor would have no apparent control over the trust, he could have indirect control or influence over the selection of the protector, who in turn could control the trust. Thus, assuming the settlor is comfortable with the selection of the protector, the more powers given to the protector the more comfortable the settlor would feel in establishing and funding an irrevocable trust with a foreign trustee in a strange jurisdiction on the other side of the world. Technically - though absolutely not recommended – the protector could be a spouse or child of the settlor, or a close trusted friend, or in aggressive cases – also not ever recommended - even the settlor. Selecting the settlor, her spouse or children as protector generally indicates a lack of understanding of the role, a lack of, or disregard of any asset protection concerns (as noted below), a lack of a good advisor, or just a devil-may-care approach. In any event, not surprisingly, as practitioner and settlers have become more attracted to and intrigued by this “newly” discovered key to flexibility, the concept is now finding its way into domestic trusts and legislation, as referenced above.

Further to the selection of a protector, where asset protection issues of settlers are concerned, one of the more serious risks that is taken by practitioners is to allow the settlor to name a “domestic” protector (one
who resides in the settlor’s home jurisdiction), or worse, where the practitioner allows the settlor himself to serve as protector. Where the protector has extensive powers this could be fatal for asset protection purposes. A real life illustration of this is the so-called “Anderson” case, where the U.S. settlors established and funded an offshore asset protection trust, naming themselves (incredibly) as co-trustees and (equally incredibly) as co-protectors of that trust, and retaining considerable powers in each capacity. Charges were brought against them by the United States Federal Trade Commission in connection with an alleged “Ponzi” scheme, and a U.S. District court judge issued a temporary restraining order on the Andersons. When ordered by the judge to repatriate the offshore trust funds, which, as trustees, the Andersons had the power to do, the Andersons immediately sent notice to the offshore trustee requesting the funds pursuant to the court order. Such a notice typically triggers the “anti-duress” clause commonly found in asset protection trusts, and this notice not only did that, but also caused the Andersons to be automatically removed as trustees. Thus, when the court asked again that the funds be repatriated, the Andersons responded that they were unable to do so, since they had been removed as trustees. Subsequently, the court discovered they were also co-protectors of the trust (thereby having the power to comply with the court’s order), and when the Andersons failed to comply with the re-iterated court order, they were jailed for contempt of court.

Thus, if asset protection is an objective of the trust, it is generally a bad idea to name a domestic protector and a worse idea to allow the settlor to be the protector, since both are subject to court orders and possible contempt charges for failing to comply with such orders. An exception to this may lie where the protector (preferably someone other than the settlor) is given only negative (i.e., veto) powers. In that event there could be no positive acts of the protector, the performance of which may be ordered by the court. At the same time, however, restricting the protector to negative powers would seriously limit the value of having the protector at all, so it is not a good alternative.

IV. Using a Protector In Domestic Trusts

As observed throughout this discussion, it is to some extent inappropriate to credit offshore trusts with the idea of the trust protector, considering the fact that the protector is nothing more than a trust advisor with a different name, though admittedly, often given greater powers than the traditional trust advisor. Perhaps it is the latter feature that is the cause of the credit, and justifiably so. The traditional trust advisor would typically be given powers over trust investments and nothing more, while the trust protector is often given powers over almost everything except trust investments. Although I do not advocate unlimited powers for the protector, I believe this extension of powers is just what can make the protector invaluable in trusts other than asset protection trusts and for domestic trusts in particular. By this I mean such trusts as life insurance trusts, special needs trusts, purpose trusts, trusts which are to hold family business interests, dynasty trusts, voting trusts, and any other type of trust where there may be special administrative concerns, likely changes in circumstances, or near total uncertainty of both, such as with a dynasty trust. In these cases, asset protection of the settlor is generally not the prime issue, so the selection of a protector who is outside the jurisdiction of the settlor’s local courts is not an issue. Asset protection may still be provided for trust assets under the normal spendthrift rules.

This is not necessarily to say that a protector should be used in every trust, since the circumstances of many are reasonably predictable. For instance, in the “typical” family with a typical estate plan, a protector may not be needed. Where assets are held for a surviving spouse, then distributed outright to children or even grandchildren on the spouse’s death, a protector is usually not provided for in the trust, and in most instances, a protector may not be necessary. But in any of the other trusts noted above, the
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very objectives, terms, and duration of the trust make it advisable to consider a protector, or at least a
springing protector as discussed in Part XIV below. This provides the settlor and the trustee with a
mechanism to deal with changes in circumstances, changes in the law, or trust disputes without repeated
petitions to the courts.

Where a protector is used in a domestic trust, particular attention should be given to the local tax
implications. That is to say, in these cases, it is highly likely that a domestic protector will be chosen, and
advisors must be mindful of the potential income, gift, and estate tax ramifications depending on the
choice of protector. (See Part XII for a brief discussion of the tax implications.)

V. Who May Serve As Protector, And, Once And For All, Is The Protector A Fiduciary?

The reason these questions are posed together is that in some cases the answer to one may suggest the
answer to the other. For example, say that the protector is given the power to add or delete beneficiaries
without restriction, and in the first instance, the settlor names his daughter as protector. Pursuant to the
power, the daughter proceeds to delete her siblings and their issue from the pool of beneficiaries and adds
her spouse and children as beneficiaries. Under these circumstances it is likely that the settlor would have
contemplated that the daughter could and in fact might well exercise the power in such a way, and so the
power may be considered a personal power and the daughter’s exercise may be appropriate. On the other
hand, say that the settlor’s attorney was named protector and given the same power. Would it be
appropriate for the attorney to delete the settlor’s children and grandchildren as beneficiaries and
substitute his own? In the latter case, of course, unless expressly stated otherwise, the power would not
be construed as a personal one, and the attorney would clearly have a duty to consider the intentions of
the settlor and the purpose of the trust in a fiduciary capacity. Any exercise of the power that benefited
the attorney in such a case, directly or indirectly, would be invalid as a breach of fiduciary duty as well as
a fraud on the power.16 On the other hand, in cases where the settlor is the protector,17 it would have to be
concluded that the power is a personal one, since it would be little different, depending on the extent of
the power reserved by the settlor, from a power reserved by the settlor to amend or revoke the trust
without restriction.18

Then there may be cases where the power is personal but with fiduciary aspects, such as the power in a
beneficiary of a discretionary trust to remove and appoint trustees. In such a case, absent a specific
prohibition in the trust, would it be appropriate for the beneficiary to appoint himself as a trustee?
Similarly, could a beneficiary with the power to appoint a protector appoint himself to that position?
Clearly, the intent of the settlor is the first issue to consider, but absent any specific motive or express
language, it would seem that a settlor would merely want the beneficiary to use his best judgment in
filling the trustee or protector position. An excellent illustration of this is the Circle Trust case.19 There
the settlor gave the beneficiaries of his trust the power to appoint a protector of the trust by majority vote,
and the protector had the power to remove and appoint trustees. There was a dispute among the
beneficiaries and a majority voted to appoint a protector, who in turn appointed one of the beneficiaries as
trustee. Of course, the disputing beneficiaries (who were in the minority) sought relief from the court on
the basis that although the power to appoint may have been personal, there was nevertheless a fiduciary
duty to appoint a proper person to fill the position. The court agreed with the petitioners, holding that
both the beneficiaries’ power to appoint a protector and the protector’s power to appoint a trustee were
fiduciary powers, and that either appointment would be invalid if it was “tainted by irrationality, bad
faith, or impropriety of purpose.” Accordingly, it would follow that the protector’s appointment of trustee
could be rescinded on those grounds.
It should be clear, then, that as to the question of whether the protector should be viewed as a fiduciary, some considerable inference can be drawn from the settlor’s choice of protector (as well as successor protectors), in addition to the particular powers granted. As a general rule, if the appointed protector is a beneficiary or a person who would likely be an object of the settlor’s bounty and there is no language or facts to dictate otherwise, then to the extent the exercise of a particular power could benefit the protector, there is likely to be a presumption that it is a personal power, but, depending on the power itself, it’s exercise may nevertheless be subject to a fiduciary standard, as discussed above. If the protector is someone in an advisory capacity to the settlor, or is an otherwise disinterested party, or is someone the settlor would be unlikely, under normal circumstances, to name as a beneficiary, the power will likely be a fiduciary one. If the power is deemed to be a fiduciary power, then it imposes a duty on the person accepting the power to consider whether or not to exercise it, and such consideration and the resulting decision must be impartial and motivated by what the fiduciary, in this case, the protector, believes to be in the best interests of the beneficiaries; not the settlor, not the trustee, and most certainly not the protector himself. Of course, an obvious way to avoid the question would be to include appropriate language in the trust, simply providing that the protector’s powers must be exercised in a fiduciary capacity.

Unfortunately, just the opposite appears to be the common approach. That is, many drafters have come to believe that the inclusion of a statement to the effect that the protector shall not be deemed to be a fiduciary will conclusively settle the question. This is a little like saying, “regardless of what type of animal walks through these gates, it will be deemed to be a horse”. While such a statement is bound to be correct at some point if enough different animals pass through the gates, why would we not want to correctly identify each animal, or in this case, each protector, and each power? And as a general rule, most attorneys would have to admit that despite language denying fiduciary status, the huge majority of protectors are in fact intended and expected to exercise their powers for the furtherance of the trust and not for themselves. In fact, the Uniform Trust Code states the point quite clearly: “A person, other than a beneficiary, who holds a power to direct is presumptively a fiduciary who, as such, is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries.”

The attempt of some practitioners to have it both ways is undoubtedly to prevent potential protectors from being “scared off” by the assumption of possible liability, which is the same reason for the language exculpating a trustee for submitting to the powers of the protector. Other than that concern, however, and where the power is not a personal one, it is truly a challenge to understand why a settlor would grant extensive powers to an unrelated individual (or committee) for any purpose other than to see to the objective and thoughtful carrying out of his wishes in establishing the trust. What would be the sense of it? If, for instance, a protector is given the power to change the situs and governing law of the trust, would anyone conclude that the power was given so that the protector could arbitrarily and for no apparent reason shift the situs from one jurisdiction to another just for the fun of it? Or would it rather be that while the settlor felt the original jurisdiction seemed a good choice at the inception of the trust, being unable to foresee the future he wanted to allow for a change of jurisdiction if it appeared to be in the best interests of the beneficiaries and the trust?

Of course, the protector is deemed to be a fiduciary, he is exposed to the liability that goes along with the position. For instance, say that a protector, who is admittedly a fiduciary and who has the power to remove and replace the trustee, stood by and did nothing while the trustee breached its fiduciary duty to the serious damage of the trust and the beneficiaries. Clearly the trustee is liable for breach of duty but what about the protector who did not commit the damaging behavior? Didn’t he have a duty to remove the trustee when he saw the trust being damaged so as to stop the damaging behavior? These are the basic
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facts of the first and only “protector” case to date in the United States. While the case has yet to be tried (as of the printing of this discussion), the court, in response to a motion by the protector for summary judgment, agreed that the questions of liability and to whom the protector owes a duty are triable. Unfortunately, in lamenting over the lack of a formal definition of “protector” and over the total absence of law on the subject, the court did not, at least in the preliminary pleadings, recognize that the protector and the trust advisor are interchangeable terms.

And what about the power to remove and replace trustees? Couldn’t that be some sort of neutral power that is neither fiduciary nor personal in nature, as many attorneys seem to think? This very issue was raised in a 1994 Bermuda case. In Von Kriemer v. Bermuda Trust Co., Ltd. a protector was given the power to remove and replace the trustee, the Bermuda Trust Company (BTC). BTC as trustee was asked to vote shares it held in favor of keeping the settlor on the board of directors of the subject company. Before complying, BTC understandably wanted additional information as well as time to consider the request, but the impatient protector decided not to risk receiving a negative response from the trustee and exercised his power to remove BTC as trustee, appointing a successor corporate trustee. BTC, concerned over the possibility of facing a breach of fiduciary duty claim by the beneficiaries, questioned the protector’s actions and petitioned the court for instructions before it would turn over the shares. (Note that at the same time, the protector petitioned the court asking that BTC be ordered to transfer the shares to the successor trustee.)

In its consideration of the case, the court centered on the key questions of whether the protector was a fiduciary, or at least whether the power to remove and replace the trustee must be exercised in a fiduciary capacity. In addressing these issues, the court first noted that it would depend on the facts of the particular case and in some respects on the nature of the power. In this case the court pointed out that the power to remove and replace trustees was viewed to be essential to the integrity of the trust and the interests of the beneficiaries (when would it not be?), quoting (in part) from an English case, stating, “The power of appointing trustees…imposes on the person who has the power…the duty of selecting honest and good persons who can be trusted with the difficult…duties which the trustees have to perform. He is bound to select to the best of his ability the best people he can find for that purpose.” Finding, therefore, that the position was a fiduciary one, as was the duty to select a suitable successor trustee, the court concluded that the protector’s selection was reasonable and approved the protector’s exercise of the power. It is also significant to note that the court in the Circle Trust case, discussed above, cited the Von Kriemer case in its opinion.

Another situation arguing convincingly in favor of fiduciary status is where the position of protector is established as an office, as it is with the trustee, rather than as the appointment of an individual, per se. That is, where the trust provides for the office of protector, including the appointment, removal, and resignation of a protector, the appointment of one or more successor protectors, the powers and compensation of the protector, etc., it would be extremely difficult, at best, to refute the argument that the powers attach to the “office” rather than to the individual holding the office. Such a structure would unquestionably require the office-holder to act reasonably and not for personal motives, having in mind the obvious purpose behind the creation of the office: to protect the integrity and carry out the purposes of the trust. When one considers the extent of the powers often given the protector over the trust, the trustees, and the beneficiaries, evidence that the powers are personal rather than fiduciary would have to be overwhelming and nearly incontestable before a court would refuse to interfere, especially where the effect of the protector’s acts or refusal to act could clearly conflict with the purpose of the trust or the purpose of the protector’s appointment in the first place.
In the Canadian case of *In Re Rogers*, for instance, the relevant instrument provided that the trustee was prohibited from acting on a certain investment (shares of stock in a particular company) without the consent of a named individual (effectively, a protector). No successor “protector” (called an “advisor” in the instrument) was provided for, and the settlor gave the power to him “exclusively”. Further, the provision granting the power expressly released the trustees “from all liability for any action that may be taken” at the advisor’s request. After the settlor’s death, the advisor acquired, for his own account, shares of the same company held by the trust and entered into negotiations with other parties that conflicted with the interests of the trust in that investment. In effect, the advisor wanted to be able to sell his shares but withhold his consent to a sale of the trust shares by the trustee if it affected his (the advisor’s) sale. The trustee petitioned the court to intercede, since it desired to sell the shares held in the trust and distribute the proceeds to the trust beneficiaries (the children of the settlor), but pursuant to the power given to the advisor, the trustee was prohibited from negotiating on its own without the advisor’s consent. If the power were truly a personal power, the advisor, who was otherwise unconnected to the trust, would have been free to withhold consent, as he did, even though such withholding of consent would have been detrimental to the beneficiaries. In fact, the advisor asserted to the court that his power to give or withhold consent was “conclusive” (i.e., personal), and therefore, the court had no authority to override it. The court flatly disagreed, and in directing that the trustee could act without the advisor’s required consent, the court stated, “to contend that the so-called control over the management of the estate given him [the advisor] can hamper or limit the power of the Court to advise the trustees and to give directions for the due administration of the estate is to place Beaton [the advisor] in the extraordinary and quite unknown position of a sort of super-trustee who is neither responsible to the trustees or the beneficiaries nor subject to the control or direction of the Court” 

Lastly, we should consider the case where instead of naming one person as protector, we name a corporate protector, or a law firm, or a committee of several individuals, as discussed below. What then? Would anyone argue, for instance, that a corporate protector has no fiduciary duty in exercising or not exercising its powers?

In sum, and at the risk of oversimplification, if the protector is in fact appointed to “protect”, then he has to be regarded as a fiduciary as to the powers falling into that category and he cannot be released from his obligations merely by language stating the contrary. If he accepts the position knowing the powers granted him, he must consider whether or not to exercise those powers, and he must act reasonably, having in mind the interests of the trust and the beneficiaries – it is not like deciding whether to read a newspaper or go to the movies.

**VI. What Powers Should Be Given To The Protector?**

As observed above, there is a difficult-to-resist temptation to give the protector as many powers as possible to provide for the ability to contend with any future changes in circumstances, the law, or the beneficiaries. It is this perceived benefit, however, that can cause us to casually include powers that do little more than produce conflicts between the protector and the trustee which would result in costly legal disputes, unnecessary tax exposure, the possible deletion of beneficiaries that may have been important to the settlor, and even a distortion of, or worse, a diversion from the original trust purposes. Such an approach, therefore, can be dangerous, if not reckless, and just the opposite approach is often better.

That is, having in mind the purposes of the trust, and using history as a guide, the settlor and the professional should attempt to reasonably anticipate the powers that would likely assist in carrying out the
trust purposes which would be better held in the hands of someone other than the trustee or the beneficiaries. For instance, a very common power given to protectors is the power to remove and replace trustees. To give this power to one or more beneficiaries is not usually conducive to an objective evaluation of whether a trustee should or should not be removed, since many beneficiaries would hasten to remove a trustee who didn’t accommodate their every wish, or at least accede to what the protector/beneficiaries decided were “reasonable” requests. Further, there could be tax ramifications where a beneficiary has such a power. Similarly, the power to add or delete beneficiaries would obviously be best if held by a party outside the trust, as would the power to amend the dispositive provisions of a trust (with the caveats observed in the tax discussion below). On the other hand, the power to amend the trust’s administrative provisions could be held by either the trustee or a protector.

While there is no “standard” set of powers to be given to the protector, depending upon the wishes of the settlor and the aggressiveness of the attorney, the following is a list of powers commonly seen in whole or in part in trusts which utilize a protector (note that not infrequently only a few such powers may be included, most commonly the power to remove and replace trustees, the power to veto distributions, and to direct or advise on investments):  

- remove, add, and replace trustees
- veto or direct trust distributions
- add or delete beneficiaries
- change the situs and governing law of the trust
- veto or direct investment decisions
- consent to the exercise of a power of appointment
- determine whether an event of duress has occurred
- amend the trust as to administrative provisions
- amend the trust as to dispositive provisions
- approve trustee accounts
- terminate the trust.

While it is apparent that the protector cannot be given a power to further an illegal purpose, it may not always be so apparent when public policy questions arise. For instance, could the protector be given the power to prevent anyone, including a beneficiary, from seeing a copy of the trust? Or to exculpate a trustee for failure to account? Or the power to deny a beneficiary the right to an accounting? Clearly such powers offend the very premise of a trust and would likely be struck down.

As observed, although it is a great temptation to include extensive protector powers in order to be able to deal with future problems and unforeseeable circumstances, it may become a question of whether what we are really looking for is a “substituted settlor”, giving the protector the collective power to completely redraft the trust at any time and from time to time. Such a result challenges the very concept of the role of the settlor, if not the trust and the trustee as well. One respected author stated, for instance, “The assent of the protector has the effect of making the trustees not responsible for their actions. This turns the figure of the trustee upside down and makes him in substance an agent.”

Thus, when deciding on the powers to be given the protector, the most serious consideration should be given to the realistic purposes of the trust and a reasonable selection of classes of beneficiaries, and these should be reflected in the language specifying the protector’s powers, with restrictions or stated wishes, if
necessary, designed to keep the exercise of the powers within the desired goals of the settlor. Otherwise, the settlor could run the risk that her assets could effectively end up in “someone else’s” (i.e., the protector’s) trust.

VII. What Is The Relationship Between The Protector And The Trustee?

To a great extent the answer to this question (the protector vis a vis the trustee) depends upon whether the protector is deemed to be a fiduciary, a critical issue, as explained above. This is because if and to the extent the protector is not a fiduciary, or to put it more precisely, if the power in question held by the protector is a personal power rather than a fiduciary power, then the trustee’s position vis a vis the protector will be virtually reversed. That is, an individual holding a personal power cannot be forced to exercise it and in fact need not even consider whether to exercise it. And if he does exercise such a power, he may do so on a whim, or even for a spiteful or malicious reason, so long as he does not commit a fraud on the power. Therefore, a trustee who must in some way consider or react to a personal power is under no duty to look behind the protector’s exercise (or non-exercise), or to review the motives for or reasonableness of its exercise, so long as the terms governing the exercise have been satisfied.

On the other hand, if the protector’s powers are fiduciary in whole or in part, which is far more likely the case, then the trustee is in a more delicate and responsible position, and the delicacy of the position will be increased where the applicable trust provision contains an exculpatory clause (as it often does), such as words to the effect that: “The trustee shall not be held liable for acting or for not acting in following the directions of the protector pursuant to the powers given the protector hereunder.” Even a brief reflection on the import of such a provision quickly reveals how troublesome and misleading such language can be in a fiduciary setting.

Would one assume from this statement, for instance, that a trustee can freely follow a protector’s direction which appears patently improper with respect to the trust purposes though technically within the protector’s powers? And is a trustee exculpated if such trustee proposes an improper act which is only carried out because the act was given the required consent of the protector? In a case illustrating the point (that one fiduciary may be responsible for the actions or inactions of another), an individual co-trustee had veto power over investments, and the corporate co-trustee was held liable for not seeking court instructions where the individual co-trustee repeatedly refused to consent to a sale of securities as proposed by the corporate trustee, resulting in a loss of nearly all the trust corpus. But compare this with: 1) a Georgia statute providing that where a trust gives an advisor the authority over trust investments, the trustee shall be exonerated from responsibility for any losses resulting from following the advisor’s instructions, and 2) a British Virgin Islands statute providing that a trust may contain provisions requiring the trustee to obtain the consent of a person, “and if so provided in the instrument the trustees shall not be liable for any loss caused by their actions if the previous consent was given”. Clearly, the purpose of such legislation is to give recognition to the settlor’s choice of advisor and relieve the trustee of having to second guess every investment or other decision made by the advisor. Whether statutes of this sort would exculpate a trustee who carries out a clearly improper investment, distribution, or other act, however, remains to be seen. The Georgia statute, for instance, makes an exception if the trustee acts with “reckless indifference” to the interests of the beneficiaries.

The concept of a trust “advisor” to direct trust investments has become so widespread and accepted that a considerable number of states have adopted a statute similar to that of Georgia exculpating a trustee for following the directions of a trust investment advisor. Interestingly, these statutes generally relate quite
specifically to investments, but is there any reason that the same standard of care should not be extended to any power of direction given to an advisor? Would it be reasonable to assume, for example, that an advisor’s power to remove and replace trustees or to add and delete beneficiaries, would provide the same exculpatory relief for a trustee who simply acceded to these acts even though highly questionable? If so, the trustee could simply stand by while the advisor (or protector) exercised bad judgment, and neither would have any liability if local statutes exculpated both, as observed below.

In fact, it is not at all so clear that a trustee’s duties to the trust may be so easily eliminated. An absolute exculpation, as suggested in some statutory language relating to trustees’ liability in following the direction of a protector or advisor, regardless of the circumstances, would be repugnant to the very concept of a trust and would undoubtedly be against public policy. One commentary appropriately stated: “Exculpatory clauses should be held against public policy if they allow the liability to fall somewhere between the trustee and the holder of the power [i.e., the advisor or protector], and leave the beneficiary without any remedy for mismanagement of the estate.” Thus, there has to be some fundamental duty of the trustee to see that the advisor or protector is exercising his authority in a reasonable manner that is in the best interests of the beneficiaries and the purposes of the trust.

In view of this, it would appear that regardless of the extent of the powers of the protector and the extent of exculpatory language relieving the trustee of duty or responsibility for the protector’s actions or inactions, the trustee must nevertheless recognize and honor his fiduciary obligations and question the protector when called for. If we were to hold otherwise, the very premise of the trust would fail, and to paraphrase Professor Lupoi, the trustee would not be a trustee at all but rather an agent for the protector, with no responsibility to the beneficiaries.

It is also quite significant to note that the United States Uniform Trust Code completely agrees with this position. Section 808(b) provides that, “If the terms of a trust confer upon a person [other than the settlor of a revocable trust] power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of the power unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust.” (Emphasis added). Thus, unless the protector’s powers are personal (and not fiduciary), a trustee who blindly complies with a protector’s direction cannot be completely exculpated, even though the trust language expressly attempts to do so, if the protector’s directions clearly conflict with the purpose of the trust, the role of the trustee, or the interests of the beneficiaries.

VIII. Professional Protectors

With the advent of the position of protector and in apparent recognition of the numerous issues associated with it, a number of “professional” protectors have surfaced. It is becoming fairly common for corporate trustees, attorneys, and law firms in the various offshore jurisdictions to make themselves available to act as trust protector for an annual fee. The fee is usually a nominal one for “stand-by” services, with the understanding that it is to cover correspondingly nominal involvement. Where the protector is required to become actively involved, the fees will increase in proportion to the services rendered. In the customary case, the trustee will recommend one or two professional protectors with whom they are familiar. In addition, we are now seeing some formally structured organizations which hold themselves out as professional protectors. Typically, these are organizations which are also qualified to act as trustee, but where a trustee is already named, they offer protector services. Of course, it is not necessary that the
protector and the trustee be in the same jurisdiction. Such organizations can offer independent and experienced protector services anywhere in the world. Some advantages of naming a professional protector organization, as opposed to an individual, include continuity of services (they are not vulnerable to deaths, moves, retirement, or disability, as an individual protector would be), and collective knowledge and experience of the individuals who make up the entities. A committee, on the other hand, although attractive to some advisors, offers neither the cohesiveness of a professional organization nor the flexibility of an individual. In addition, the use of a committee necessitates numerous additional provisions, adding complexity to the trust.

For instance, the maximum and minimum number of participants required to serve on the committee should be clearly specified, along with the number (e.g., a majority or by unanimous consent) required to carry a vote, as well as provisions to break a deadlock. There should also be provisions as to notice for meetings, whether in person or by other means, and rules on whether and to what extent expenses for attending such meetings may be reimbursed by the trust. And, of course, there should be clear provisions for removal of a committee member and filling vacancies on the committee, as well as rules for carrying a vote while any vacancies remain unfilled. Typically, neither the settlor nor any other interested party should serve on the committee.

In short, and in my opinion, having a committee of protectors can be far more expensive and cumbersome than an individual protector or an organization, due to fees, expenses, time involved in arranging meetings, not to mention potential disputes and lengthy discussions before arriving at a vote.

In any event, it ought to be clear that the engagement of a professional protector can only serve to buttress the position that the protector owes fiduciary duties to the trust and its beneficiaries. It would be difficult if not preposterous to argue that the professional protector was being paid a fee for “protecting,” i.e., carrying out duties such as removal and replacement of trustees, amendment of the trust, distributions to beneficiaries, change of situs, and the like, but had no fiduciary duty to anyone.

In regard to attorneys or accountants as logical choices for protectors, this may be acceptable from the settlor’s standpoint, but in view of the suggested exposure to fiduciary liability, is it a good idea for the attorneys and accountants? As to attorneys, many are surprised to discover (hopefully not too late) that their malpractice policy may not cover them for fiduciary positions such as protector, and in fact, most insurance companies are probably unfamiliar with the position of protector. Accordingly, attorneys or accountants who are interested in acting as protectors would be wise to obtain confirmation that such activities are covered by their professional liability policy (and they should also be sure to insist on inclusion of provisions in the trust instrument for reimbursement and indemnification of the protector by the trust, as discussed later), as it would not be at all unusual or unexpected for a disgruntled beneficiary to sue the protector along with the trustee.

For instance, in one of the rare United States cases specifically involving a trust protector, *Thornbrook International vs. Rivercross Foundation, et.al.*, brought in the Illinois district court, the settlor/beneficiary of a revocable trust transferred several millions of dollars to the trustee, with special provisions relating to the investments. The trust also provided for a protector, who entered into a written contract, agreeing, among other things, to ensure the trustee’s compliance with the trust provisions. The settlor/beneficiary subsequently notified the trustee of its decision to revoke the trust and requested
distribution of funds. The trustee failed to make full payment and the settlor/beneficiary sued both the trustee and the protector, among others. The case settled.

**IX. Can The Protector’s Fiduciary Duty Be Legislated Away? Or Drafted Away? Or Both?**

As we have noted more than once, many drafters attempt to simply draft away the protector’s fiduciary responsibility by stating in the document that the protector is not a fiduciary. As we have also noted, unless the power is a personal power, just wishing (and drafting) won’t make it so. It would be little different from providing that the trustee shall have no fiduciary duty in administering the trust. But what if the governing jurisdiction itself passes legislation that expressly exculpates a protector and states, as a matter of law, that unless otherwise provided in the document, the protector is not a fiduciary? Will that make it so?

We observed earlier that the relevant law of the Cook Islands, one of the first of its kind, states:

“(4) Subject to the trust instrument, a protector of a trust shall not be liable or accountable as a trustee or other person having a fiduciary duty to any person in relation to any act or omission in performing the function of a protector under the trust instrument.”

In other words, according to the letter of the Cook Islands law, if we say nothing in the trust about the protector being a fiduciary, then he is simply not a fiduciary in respect “to any act or omission” in serving as a protector. And if, in addition, we have language in the trust that states the protector shall not be deemed a fiduciary, then it would appear we would have a double denial of liability and therefore apparent absolute protection of the protector from any liability for a breach of what are unquestionably fiduciary duties. Could it be that simple? Does the statute really mean any act or omission? Surely, it would undermine the very foundation of trust law to so conclude, when by every common law account and analysis the basic fiduciary duty of a trustee, or of one who is deemed to be akin to a trustee by virtue of his relation to the trust and the beneficiaries (such as a protector), is an inseparable part of the fundamental concept of a trust. As one English justice aptly put it, “there is an irreducible core of obligations owed by the trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust. If the beneficiaries have no rights enforceable against the trustees, there are no trusts.”

Nevertheless, here is the picture we are expected to blindly accept: we have a protector whose only basis for not being treated as a fiduciary is that the trust language says he is not, and we also have governing law that says he is not; and say there is also governing law that says the trustee is completely exculpated for following the protector’s directions (discussed earlier). Clearly, there has to be something wrong with this picture, for if we do accept it, what, then, do we have? Certainly not a trust, as the judge stated in *Armitage v. Nurse* quoted above, since there would be no liability of any of the fiduciaries to the beneficiaries. And would any experienced trust counsel in the United States (or any other common law jurisdiction) believe that a court would not reach the same conclusion as the English judge in *Armitage v. Nurse*, despite governing law and trust provisions that attempted to provide to the contrary?

To make matters worse, it appears that the same fundamentally bankrupt approach is being followed in the United States by several states. Take, for instance, the relevant South Dakota and Idaho statutes (in
this part referred to as “the U.S. statutes”). The two U.S. statutes define a trust protector as a “disinterested third party.” This in itself is quite interesting, since it immediately suggests a party who has nothing to gain by exercising the powers of a protector, which in turn suggests that such powers are unlikely to be “personal” powers. Furthermore, the definition of “fiduciary” under these U.S. statutes specifically includes a trust protector or advisor “who is acting in a fiduciary capacity.” Another section of the respective statutes provides that the powers and discretions of the trust protector “may in the best interests of the trust be exercised or not exercised…” (emphasis added). Still further, in the definition section, the U.S. statutes define a trust “advisor” as “the grantor or other fiduciaries” who are given exclusive powers (emphasis added). Thus, the clear inference, if not clear provisions, in the U.S. statutes strongly suggests that the position of protector or advisor by its very nature is a fiduciary position. Unfortunately, and as a sad testimony to the drafters’ ignorance of the underlying law, the whole issue is then left to chance and abandonment by a subsequent provision which states that an advisor (which by statutory definition includes a protector) will be considered to be a fiduciary, “unless the governing instrument provides otherwise” (emphasis added).

The U.S. statutes also contain a new, made-up (and disturbing) designation referred to as the “excluded fiduciary.” An excluded fiduciary is “any fiduciary excluded from exercising certain powers under the instrument which powers may be exercised by a trust advisor or a trust protector.” The excluded fiduciary is then expressly exculpated under the statutes from any liability for loss that results from any act or failure to act (by the excluded fiduciary) that is in compliance with the direction of the protector or advisor holding such powers. Typically, the excluded fiduciary would be the trustee of the trust!

Accordingly, under the U.S. statutes it appears that with a few poorly chosen words exculpating both the protector and the trustee, combined with an array of powers granted to a “disinterested” protector, an uninformed though perhaps well-meaning drafter can totally eliminate all fiduciary duty associated with a trust. Are they serious?!

If this were truly possible, we would all be in deep trouble. While it has been observed that the form and content of the offshore protector statutes were largely motivated by concerns of local practitioners and the economic interests of local trustees, this should certainly not be the case for any U.S. statute addressing the subject. As suggested above, I strongly believe that the legally unsound approach taken by the U.S. statutes is uninformed if not embarrassing, and they simply would not be upheld under the foregoing circumstances if and when challenged in court.

A few statutes, on the other hand, specifically provide that the protector or advisor is a fiduciary, and in that regard at least one does not state “unless the trust provides otherwise.” In fact, the particular statute goes on to provide, “a trust advisor or trust protector shall act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.” Clearly a breath of fresh air on the issue. Under this statute, it is possible to designate the protector as an excluded fiduciary, but only with respect to powers granted exclusively to other fiduciaries, which means that no fiduciary can be fully exculpated with respect to powers they hold.

This is not at all to say that either a trustee or a protector or both could not be exculpated so long as they act in good faith and are not motivated by an improper purpose or act with reckless indifference to the interests of the beneficiaries. In fact, we have seen that a trustee can be exculpated within certain guidelines, and there is no basis for concluding that a protector who is acting in a fiduciary capacity could not be exculpated to the same extent. Under widely accepted and tested public policy rules, however,
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And Its Role In Trust Law And Practice.

neither can be exculpated absolutely, whether by the document or by statute, if we are still to have a trust.\textsuperscript{55} In this regard, courts have repeatedly recognized the principal that the law “determines a point beyond which the parties cannot agree to relieve a trustee from liability for breach of a trust duty. For instance, a trustee cannot contract for immunity from liability for acts of gross negligence or for acts done in bad faith. Such contracts are invalid because repugnant to law.”\textsuperscript{56}

X. Is The Protector Subject To Court Supervision?

If the protector is a fiduciary, and in most cases it is clear that he will be, then it must necessarily follow that he would be subject to the supervision of the appropriate court.\textsuperscript{57} Such supervision would presumably include the power of the court to surcharge a protector and even to remove or appoint a protector to fill a vacancy under appropriate circumstances. In a milestone 1995 Isle of Man case, that very issue was presented to the court. In that case, \textit{Steele v. Paz, Ltd},\textsuperscript{58} a trust provided that the protector of the trust was to consent to the selection of beneficiaries, and was to consent to all distributions to beneficiaries. The problem was that no protector was named, nor was there a provision in the trust to name one. Thus, the very function and purpose of the trust was effectively frustrated by the absence of a protector or a mechanism to appoint one. And so, a petition was filed by the trustee asking the court to declare the trust invalid. Of course, if the question before the court had been whether the trust would be allowed to continue without a trustee, it is common knowledge that the court would simply appoint a trustee under the well-settled legal maxim. But what about the case of a trust, the purpose of which is dependant not on the appointment of a trustee but of a protector, which fails to name one or provide for the appointment of one? That was exactly what occurred here, and the court decided that the protector’s powers in this case were fiduciary powers; the protector was therefore a fiduciary, and it was clearly within the court’s power to appoint a fiduciary rather than abandon the trust. Accordingly, the court appointed a protector to carry out the purpose of the trust.

It is quite interesting to note the widespread international attention and extensive commentary that followed the decision in \textit{Steele v. Paz}, which was undoubtedly because a court formally acknowledged the critical role of the protector and viewed the protector as a fiduciary. What may be, or in this case should be even more interesting, at least to U.S. practitioners, is that we had our own \textit{Steele v. Paz} case right here in the U.S. fifty-seven years before \textit{Steele v. Paz}!

In \textit{Gathright’s Trustee v. Gaut},\textsuperscript{59} Emma Gathright provided in her will that her executor/trustee could not sell any property or make future investments without the consent of two individuals (i.e., advisors or protectors). If either failed to act, he was to be succeeded by a judge of the local court. One of the named advisors died, and of course, none of the local judges wished to be placed in the position of an advisor to a personal estate. On appeal to the Kentucky Court of Appeals the court first formally acknowledged that all of the judges of the local court declined to act and that the advisors in this case were clearly to serve in a fiduciary capacity, observing that “equity will not permit the trustee or advisory duties specified in the will to fail for want of [an] advisory ‘trustee’ to exercise [the advisory duties]” (emphasis added). Accordingly, the court ordered the appointment of a successor advisor so that the 1938 trust could be carried out, just as the Manx court did in the 1995 “landmark” case of \textit{Steele v. Paz, Ltd}.

The Freiburg Trust case (\textit{Mourant & Co. Trustees Limited v. Magnus and Others}) is a further indication of the courts’ inherent jurisdiction over a protector who is deemed a fiduciary. In that case the provisions of the trust appointed a protector and provided for his removal but only in limited situations. The named protector was convicted of stealing from the trust funds and, after serving a prison sentence, he
disappeared. Unfortunately, the terms of the trust did not dictate that a vacancy would occur in such a case, so technically, the thief remained as the named protector and, under the terms of the trust, could not be removed. The trustee therefore applied to the court for an order removing the protector. The primary question before the court was whether the court had jurisdiction over the protector and therefore, over the office of protector (and perforce, the related trust provisions).

In its opinion containing an affirmative answer to the foregoing the court stated,

“A protector is in the position of a fiduciary and the court must have power to police the activities of any fiduciary in relation to a trust whether he be called a protector or indeed by any other name. Such a jurisdiction is a necessary incident of the duties to protect the interests of the beneficiaries…….., and to ensure that the wishes of the settlor are respected.” (Emphasis added).

And further,

“It would be quite unconscionable and unthinkable that this court should have no jurisdiction to remove a protector who was thwarting the execution of a trust or who was otherwise unfit to exercise the functions entrusted to him by the trust instrument.” (Emphasis added.)

As to the right to surcharge a protector who is regarded as a fiduciary, this would certainly follow if it is agreed that the courts have supervision over protectors as fiduciaries. In the United States the question has actually been answered through the courts’ treatment of trust “advisors”, a position used fairly often in this country, and although not normally thought of as a “protector”, it clearly amounts to exactly that, as presented earlier. Further, the position of trust advisor has almost invariably been held to be a fiduciary position, demanding a duty of “loyalty and impartiality”. And as one Harvard Law Review commentary observed in addressing the responsibilities of a trust advisor who is not a trustee, “No less care will be expected of an advisor with such [investment] powers than of the trustee himself, and the advisor should be surchargeable for failure to direct investment prudently.”

In an illustrative case, a Florida testator named a bank in Minnesota (his previous home) as “managing advisor” of his estate, requiring that the Florida executor (also a bank) could act only as directed by the Minnesota bank. This arrangement apparently allowed the Minnesota bank to participate in the estate settlement process as an “advisor”, even though it was not authorized to act as executor under Florida law. As it happened, the beneficiaries of the estate felt that certain losses incurred by the estate were the result of the failure of the Minnesota bank to act on a timely basis, and they sued the advisor bank for the losses. The federal district court held (and the circuit court of appeals affirmed in principal) that the advisor could be liable for losses resulting from negligent acts committed by the advisor within the applicable period of limitations.

In some respects, it should be reassuring to the settlor and to the beneficiaries that the protector who is a fiduciary will be subject to the review and supervision of the court, despite those situations which purport to dispense with any fiduciary liability. The Rogers case, discussed earlier, is a good example of the value of court supervision, as in that case the protector refused to give the trustee his consent to act in a situation where it was in the protector’s (but not the beneficiaries’) best interests to do so. Despite the trust provision giving “exclusive” powers to the protector, the court overrode the provision by dispensing with the required consent of the protector. And although in Steele v. Paz the issue was whether the court had the authority to appoint a protector, there should be no question that if there was a protector and he
refused to act, the court would have taken it upon itself to remove the protector and appoint another, because in that case no trust distributions could be made to beneficiaries without the protector’s consent. Thus, if the court took no action in such a case, the result would have been the same as if there was no protector (or no trustee), and the trust would fail, since its terms could not be carried out. It was quite appropriate, therefore, that the court refused to allow the trust to fail for want of a fiduciary.

XI. What Are The Rights Of The Protector?

An interesting and important question that necessarily follows the fiduciary issue is whether the protector, if deemed to be a fiduciary, has the rights of a fiduciary, and if the protector is not a fiduciary, whether he has any rights at all. If the protector’s powers are personal, then even though his duties and responsibilities to the trust or to the beneficiaries are practically non-existent, he nevertheless would have the right to information necessary to knowledgeably exercise the power, as well as the right to enforce a properly exercised power. For instance, a protector who is given the personal power to appoint income or principal would certainly have the right to obtain a trust accounting showing the income and corpus of the trust that is subject to the power. Similarly, if the protector had the (personal) power to add or delete beneficiaries, he would have the right to see the trust instrument to determine the nature and extent of all beneficial interests. On the other hand, a protector whose powers are personal clearly should not have the right, for example, to petition the court for fees or expenses, or to employ advisors at the expense of the trust, or to question a trustee’s performance or selection of investments, or a beneficiary’s right to distributions, because the power is a personal one and not for the furtherance of the trust.

If and to the extent the protector is considered to be a fiduciary, however, it should necessarily follow that he has at least some of the rights of a trustee, but due to the paucity of cases on the subject, the extent of such rights is not entirely clear. Despite this, some rights would have to be implied, and there are a few cases which are helpful and seem to recognize such implied rights. For instance, in the Von Knieriem case, the court considered an action brought by the protector to force the removed trustee to transfer the trust assets to the new trustee appointed by the protector. In a United States case, a trust protector was approved by the court as a plaintiff in an action against a trustee for breach of trust. In neither of these two cases did the court suggest that the protector, since he was not a trustee, had no standing to exercise the right of a fiduciary to petition the court or prosecute a case. Instead, it appeared that both courts readily accepted the fact that the protector, as a fiduciary, had standing to bring the action, even though he was not a named trustee. And if that is the case, then it must follow that the protector, as a fiduciary on behalf of the trust, would clearly have the authority to engage legal counsel at the expense of the trust, and also could receive a reasonable fee for his own (fiduciary) services.

But how far would the protector’s rights extend? For instance, shouldn’t the protector (who is a fiduciary) be entitled to seek an order: for compensation? or for indemnification by the trust? for expenses incurred in the performance of his duties? to employ agents? to redress a trustee? Once again, to paraphrase the Von Knieriem court, it will depend upon the circumstances of the case, the nature of the powers, and the language governing the protector. And in one U.S. decision, the court clearly acknowledged the protector’s right to remove a trustee and seek an accounting and a possible surcharge of the previous trustee.

There may be some actions that might be beyond the implied powers of a protector in carrying out his function (such as the right, without express authorization, to employ agents), but other rights should be apparent. For instance, if a protector is acting on behalf of the trust pursuant to the powers given him,
there should be little or no question that he is entitled to reasonable compensation and reimbursement for his reasonable expenses as would any fiduciary, and although one leading commentator seems to take some issue with this, courts at least in the United States and offshore have unequivocally upheld the right of a non-trustee who was deemed to be a fiduciary to receive compensation for services and expenses reasonably incurred in carrying out his duties. In the National Bank of Portland case, for instance, a decedent established a testamentary trust for the benefit of his spouse and child, naming a corporate trustee. In addition, the trust named another bank, not as trustee but as a consultant or advisor (or protector) to approve “all changes in investments or new investments” proposed by the named trustee. One of the main issues of the litigation was whether the consultant bank was entitled to fees and expenses, particularly the expenses of the litigation.

In addressing this issue the court first examined the nature and extent of the duties of the consultant bank. It observed that although the bank was not technically a trustee, the bank’s role was expressly “for the protection of the beneficiaries,” and therefore the bank was a fiduciary, “having responsibilities analogous to those of a trustee and subject to control of a court of equity” (emphasis added). Accordingly, even though the consultant bank was not a trustee, the court affirmed the consultant bank’s entitlement to fees and expenses in the performance of its duties as a fiduciary.

It is important to note here that the law regarding a fiduciary’s right to reasonable compensation for services rendered on behalf of a trust differs substantially between the U.S. and the UK (and therefore, the jurisdictions which follow UK law). As explained above, a fiduciary in the U.S. always has the right to reasonable compensation, while in the UK, the fiduciary (e.g., trustee) has no right to compensation (with certain exceptions) unless such is specifically provided for in the instrument. Thus, as discussed below in greater detail, appointment of a protector, particularly in the UK or sympathetic jurisdictions, should always be accompanied by inclusion of all related provisions in the trust, especially including those allowing for compensation and reimbursement of expenses.

Following the above reasoning, and with the possible exception where UK law is strictly applied, unless the protector’s powers are purely personal, it would be difficult to argue that an authorized person, especially one characterized by the trust or by the court as a fiduciary, should not be compensated for services and reimbursed for reasonable expenses for acting in furtherance of the trust. Furthermore, as with any fiduciary, whether in an express or implied position, and even under UK law, the court has inherent jurisdiction to award costs and compensation where appropriate. In fact, where the protector is deemed a fiduciary and fees are allowable, it should follow that he would have a lien on the trust assets for his reasonable fees and expenses.

**XII. What Are The General Tax Implications Of The Role Of Protector?**

The tax results, including gifts taxes, income taxes, and estate (inheritance) taxes, obviously will vary according to the settlor’s and sometimes the trust’s jurisdiction. Thus, a thorough discussion of the same is far beyond the scope of this paper. Nevertheless, a couple of basic tax concepts are worth noting for the advisor to keep in mind. First, where the settlor makes an irrevocable transfer, many jurisdictions will impose a gift tax on the amount transferred. At least one jurisdiction, the United Kingdom, imposes a tax even where a revocable transfer occurs. Second, where the settlor or the protector remains a beneficiary or retains significant control, an estate or other death tax may apply on the settlor’s or protector’s death. Lastly, where the settlor remains a beneficiary, income tax will generally be imposed on the settlor on the
trust income. In any event, it must be noted that the foregoing are the briefest and most general observations and the tax results in each relevant jurisdiction must be examined by the advisor.\(^70\)

XIII. What Special Drafting Issues Are Brought Into Play Along With A Protector?

One commentator has stated, “the strongest criticism of trust protectors is that their involvement complicates the trust administration and makes it more expensive”.\(^71\) And materials given to settlors and their attorneys by a Gibraltar trust company include the statement, “Arguably a protector can give greater security but this also creates a greater administrative burden for the trustees, and consequentially increases costs. Use of a protector can also result in some delay in the trustees exercising their powers and discretions whilst the consent of the protector is sought.”

Both comments may be correct, but the administrative issue is only one factor in considering a protector in the first place, and any such complication and expense can definitely be lessened by the inclusion of well thought-out and carefully drafted trust provisions which make clear the protector’s rights and responsibilities in dealing with the trustee and the beneficiaries, the rights and responsibilities of the trustee in dealing with the protector, and the rights of the beneficiaries in dealing with both. That is to say, if as typically intended, the role of the protector results in avoiding the need for the trustee to repeatedly petition the court for instructions, and avoiding expensive litigation between the beneficiaries and trustees, and in expediting important functions of the trust among other things, then the modest added expense would be well worth it.

Therefore, when the decision is made to include a protector in a trust, that decision should be accompanied by an orderly and focused review of the essential issues surrounding the position. For instance, unless the protector’s powers (or any of them) are intended to be purely personal, why complicate matters and generate needless expense by declaring that the protector shall not be a fiduciary? And why leave open the question as to whether a protector (who is a fiduciary) is entitled to reasonable fees and expenses? Or whether he can employ agents to help carry out his responsibilities? Or whether he can seek indemnification from the trust before acting? Or engage tax counsel to determine the consequences of his acts? Or whether he is entitled access to all trust records, documents, and accounts? Even in cases where the protector’s powers are limited, it would seem that consideration of every one of the foregoing issues would eliminate otherwise unavoidable questions and therefore expense. Thus, they should each be addressed in drafting provisions relating to the protector.

In addition, the more apparent questions must be thoughtfully covered, including appointment of a successor protector in the event the current protector ceases to serve for any reason, as well as removal of a protector, if desired. The appointor (or remover) could be the former protector, the settlor and/or his spouse (having in mind the tax and asset protection ramifications), the trustee, the beneficiaries, or an independent outside party (sort of a protector higher level), or even a committee, or a professional protector, as discussed earlier. The appointed protector or successor who accepts the position should either sign the trust or so indicate in writing. A practitioner must always be mindful that some of these choices may have tax and/or fiduciary ramifications. Other drafting issues include what constitutes the protector’s consent when such is required, and in the case of a veto power, when may the trustee act if the protector does not respond? Typically, veto provisions allow the trustee to act if a protector does not overtly veto a distribution or transaction, or if the protector does not respond within a specified time (e.g., thirty days) after notice to the protector of the proposed distribution or transaction. And should every transaction by the trustee be subject to the protector’s veto or consent? Consideration should be given to
allowing the trustee to administer the trust without such disruption and only require approval in larger or significant transactions (e.g., over a specified dollar amount, or on the sale of certain property or closely held business interests).

With regard to the veto power, one approach that is commonly taken with which I strongly disagree, is where the trust gives the protector (who has veto or consent power) the authority to give the trustee a blanket consent to all actions taken by the trustee unless and until such carte blanche is withdrawn by the protector. If the power in the protector is a fiduciary power (which it is very likely to be and which would then require the protector to consider whether to veto or give consent in each case), why would not such a blanket consent be a prima facie breach of fiduciary duty by the protector? And what would be the trustee’s exposure for accepting and acting on a blanket consent? This blanket consent arrangement does little more than render the protector impotent, contradicting and defeating the very purpose of the appointment of a protector by the settlor, and yet it does not seem to stop drafters from including such a provision.

The trust should also contain provisions allowing the trustee to act during any period where there is no protector serving, as could happen where a protector dies or becomes incompetent and a successor is not quickly appointed. Further, the trust should provide (which few trusts do) that a protector may resign the office, and how this is accomplished.

This is neither a required list nor an exhaustive review of all drafting issues involved, since the particular circumstances surrounding the trust in question and the reason for having a protector may generate fewer or additional considerations in each instance. Nevertheless, it should be clear that neither the position of protector nor the drafting issues relating to the position should be treated casually, nor should “sample” language proposed by other attorneys or manuals be blindly accepted, particularly that old familiar (and misleading) language which declares that the protector is not a fiduciary and that neither the protector nor the trustee is liable so long as the trustee follows the protector’s direction.

XIV. The “Springing” Protector

It is interesting to note that in many trusts where a protector is appointed, the protector simply “stands by,” waiting to be called to action. Despite the stand-by position, however, the protector still charges a fee (for standing by), and his very presence invites the question of whether, as a fiduciary, he has the responsibility to take some action, such as to periodically monitor the performance of the trustee and the activities of the trust.

For those drafters who wish to avoid exposure to this expense and potential complication and who, therefore, do not wish to have a protector presently, but who understand that the need for one may arise in the future, there is a solution. The trust could be drafted omitting the appointment of a protector for now but allowing for the appointment of one in the future. My firm successfully uses and recommends a provision be included in the original version of the trust allowing for a “springing” protector. And if the subject trust is an “offshore” asset protection trust, the appointment would be restricted to one who is not a person or entity subject to the settlor’s home court jurisdiction.

Such a provision would give the trustee (or some other person) the power to appoint a protector for the trust where none existed previously, thus establishing and filling the position only when needed. The provision could allow for the appointment of a protector for a specified period of time, or permanently, or
in certain cases, give the trustee the power to remove and replace protectors, or revoke the appointment.
Such a provision should include all the necessary terms and conditions for protector powers,
compensation, length of appointment, removal and/or replacement, etc. Attention to all of these issues
will enhance the flexibility, integrity, and asset protection qualities of the trust, without the need to fill the
position before it is necessary.

**XV. Conclusion**

When one considers the reported case law on the subject, the knowledgeable commentary, the history of
fiduciary law, and the very purpose of having a protector, the question of the true role of the protector
should hardly be a question at all. At the outset, the very choice of the term “protector”, is suggestive.
As one justice put it, “It seems to me that it would be wrong to entirely neglect the terminology involved.
The word ‘protector’ seems to me to connote a role for the person holding that position even before one
considers the detailed provisions relating to it. A ‘protector’ is, presumably, one who ‘protects’. But
what is he to protect?” And the court stated, in answer to its own question, “It is, therefore, the
settlement that he is obliged to protect” (emphasis added).

As such, then, the protector can serve a critical function “outside” the trust while acting in conjunction
with the trustee to enhance the carrying out of the settlor’s wishes, but not without responsibility to
interested parties if the protector breaches his duty. In such a role he can introduce flexibility to the trust
and respond to future needs and changes that a trustee could not do or would certainly be reluctant to do
without first obtaining court permission. In this context, then, the position can be uniquely useful and
should definitely be considered in any trust where such flexibility and outside consultation is indicated,
especially where the trust is anticipated to extend considerably into the future, including, for instance,
dynasty trusts, special needs trusts, purpose trusts (especially where protectors or “enforcers” are required
by statute) or business succession trusts.

At the same time, however, as legal advisors and drafters we must not be vague about the role of protector
or ignorant of the ramifications of the position, as that is often what has proved to be the real source of the
problems. Perhaps, then, we should take a lesson from the character Humpty Dumpty when he said to
Alice, “When I use a word, it means just what I choose it to mean – neither more nor less.”, so that
when we decide to utilize the position of a protector in a trust, let us present it in a thoughtful way to
insure that the position is deemed to be just what we choose it to be – neither more nor less.

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1 George Bogert, *The Law of Trusts and Trustees* (2d ed. West Pub. Co. 1951); Austin Scott & William Fratcher,
ed. 1987). Note, however, that the 2001 draft of the Uniform Trust Code does contain a reference to the term,
protector, in the comment to §808 (Powers to Direct).

2 Restatement of The Law (Third) Trusts, §75, comments b through f (2007).

3 David Hayton (Hayton & Marshall), *The Law of Trusts and Equitable Remedies*, (11th ed. Street & Maxwell 2001);

4 Cook Islands, International Trusts Amendment Act 1989, Part IV, §20; Nevis International Exempt Trust
Ordinance 1994 §9(1); Belize Trusts Act 1992 §16(1).

5 See e.g., Gregory Alexander, *Trust Protectors: Who Will Watch the Watchman?* 27 Cardozo L. Rev. 2807 (April
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6 An example of such a non-binding advisor arrangement is reflected in Alaska Stat. §13.36.375 (2006).
8 Scott, supra note 2 at §185.
9 Howard v. Ducane, 1 Turn. & R. 81 (1823).
11 Scott, supra note 2 at §185.
16 Restatement of The Law (Second) Property §20.2 (1986).
17 Federal Trade Commission v. Affordable Media, LLC., 179 F.3d 1228 (9th Cir. 1999).
19 In the Matter of The Circle Trust, 2006 CILR 323 (Grand Court of The Cayman Islands).
20 Rawson Trust v. Perlman, Bahamas Supreme Court, 25 April 1990.
21 Uniform Trust Code §808(d) (2001). As of July, 2008, 21 states have adopted a version of the Uniform Trust Code and four have introduced bills to adopt a version of the Code.
22 Id.
23 Robert T. MacLean Irrevocable Trust v. Patrick Davis, PC. 283 S.W. 3d 786 (Mo. CT. App. 2009)
24 Von Knieriem v. Bermuda Trust Co. Ltd., 1 BOCM 116 (Bermuda High Court 1994).
25 In re Skeats Settlement, 42 ChD 522, 526 (1889).
26 See e.g., James Wadham, Willoughby’s Misplaced Trust, at 150 (2d. ed. Gostick Hall Publications 2002); and Andrew Penney, Rights and Powers of Trust Protectors: Rahman Revisited, Jnl. of Int’l. Corp. & Trust Planning, Vol. 4 No. 1 (April 1995). It is interesting to note that the protector in the Von Knieriem case was, in fact, acting more for the settlor than he was for the beneficiaries, since the underlying issue was the upcoming corporate vote to allow the settlor to remain on the board of the company whose shares were held by the trust, and some trust analysts have taken issue with this.
27 In re Rogers, 63 O.L.R. 180 (Ontario 1928).
28 For an extensive list of possible powers, some of them admittedly undesirable, see Antony Duckworth, Protector – Fish or Fowl?, Journal of International Trust and Corporate Planning, Vol. 4 No. 3, (December 1995) (hereinafter “Duckworth”).
29 For example, see U.S. Treas. Reg. §20.2041-1 and discussion infra.
30 This is by no means a recommended schedule of powers. In fact, an uninformed use of some of these powers can lead to undesirable legal and tax ramifications as discussed infra.
31 Duckworth, supra note 17, at 137.
34 Restatement of The Law (Second) Property §18.2 (1986).
35 In re Cross, 172 A. 212 (N.J. 1934), (reversed on other grounds) 176 A. 101 (N.J. 1935). See also, Scott, supra note 2, §185, at 574.
39 Scott, supra note 2, §185, fn. 20.
40 See e.g., S.D. Codified Laws Ch 55, §55-1B-2 (1997, 2006).
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42 See e.g., Directory Trusts and the Exculpatory Clause, 65 Columbia Law Rev. 138 (1965); Liability of a Trustee Where Control Over His Acts or the Trust Property is Vested in Another, 28 Cornell Law Quarterly 239 (1943); G. Cronin, Effectiveness of Exculpatory Clauses in Directory Trusts, Trusts & Estates, November 1959.
43 Lupoi, supra note 21.
44 Uniform Trust Code §808(b) (2001).
47 Supra note 5.
48 Supra note 2 §222.3.
50 In re Rogers, 63 O.L.R. 180 (Ontario 1928).
53 Scott, supra note 2, at §242.3.
55 Duckworth Part II, supra note 32 at 67.
56 Steele v. Paz, Ltd., Manx LR 102 426 at 119-120 (High Court, Isle of Man 1993-95).
57 Id.
58 Lewis Carroll, Through the Looking Glass, Chapter VI (Macmillan 1871).