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TRUST PROTECTORS: THE GOOD, THE BAD AND THE UGLY


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What is a Trustee?

A person appointed in a trust to act in the best interests of beneficiaries, consistent with the terms and purposes of the trust (the intent of the settlor).

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What is a Trust Protector?

"A Trust Protector is an individual (or committee or entity) who is not a trustee but who is nevertheless granted powers under the trust that supersede corresponding powers of the trustee."

➤ Peter Protector in Trust Neverland: The Real Story of the Trust Protector I (2003), Alexander A. Bove, Jr. & Melissa Langa, available at [http://www.bovelanga.com/publications/news_briefs/trusts_and_estates_forum/Real %20Story%20Trust%20Protector.pdf](http://www.bovelanga.com/publications/news_briefs/trusts_and_estates_forum/Real%20Story%20Trust%20Protector.pdf).

"For practical purposes, a trust protector is generally a person selected by the settlor of the trust to represent the interests of the settlor in making decisions related to the trust that the settlor is unable to make, most often because the settlor is deceased."

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What is a Trust Protector? (Cont'd)

"The idea behind the trust protector is to have a 'living embodiment' of the settlor to represent the settlor's interests, even after the settlor is gone."

"The protector is, at its core, an agent."

➤ *The Trustee and the Trust Protector: A Question of Fiduciary Power, Should a Trust Protector be Held to a Fiduciary Standard?* Philip J. Ruce, Drake Law Review, Vol. 59, page 67, February 24, 2011, citing Trust Protectors, Agency Costs, and Fiduciary Duty, 27 Cardozo L. Rev. 2761, 2763 (2006).



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What is a Trust Protector? (Cont'd)

- a. Although the TP's role can be very useful, **its role is not clearly defined.**
- b. **Statutes** among the states are diverse, inconsistent and arguably incomplete
- c. There is a dearth of **domestic case law** on the subject both
 - i) interpreting state statutes, and
 - ii) **identifying whether, and in what circumstances, the TP is a fiduciary (or not) – this is a huge problem!**



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What is a Trust Protector? (Cont'd)

iii) New York Example – NY does not have a TP statute.

1. *In re Estate of Rubin*, 143 Misc.2d 303, 540 NYS2d 944 (Sur. Ct. Nassau Co. 1989), aff'd, 172 AD 2d 841, 570 NYS2d 996 (2d Dep't 1991), **held that a directed trust was effective,**
 - **but a later case,**
2. *In re Rivas*, 30 Misc.3d 1207(A), 958 NYS2d 648 (Sur. Ct. Monroe Co. 2011), aff'd 93 AD3d 1233, 939 NYS2d 918 (4th Dep't 2012), **held that it was not.**



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What is a Trust Protector? (Cont'd)

What we can say -

- d. There is no mandate that the TP actually “protect” the trust. The name itself is misleading and could mean anything – but it has no inherent meaning.
 - Many commentators critique this point of view and believe that the name trust protector absolutely should be interpreted as imposing an obligation to protect.



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What we can say - (Cont'd)

- e. In addition to the traditional roles played by a trustee which can be assigned to a Trust Protector, such as
 - The **settlor** and **beneficiary** typically have the right to remove/replace a trustee, and
 - the power over **investment** and **distribution powers**The TP may be asked to handle more profound issues, such as **change of trust situs** or **change in beneficiaries**
 - The above roles not typically assigned to a trustee



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What we can say - (Cont'd)

Loose Definition - A Trust Protector is someone appointed by the grantor to:

- Oversee the administration of the trust
- Monitor the trustee (if required by the trust or by statute)
- Assure that the grantor's intent is carried out
- Relieve beneficiaries of the need to monitor the trustee's actions



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Where Were Trust Protectors First Used?

- a. 3rd party oversight has been a part of US trust law for many years.
- b. Before the emergence of the TP, **Trust Advisors** were and continue to be used to **bifurcate** some of a trustee's duties.



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Where Were Trust Protectors First Used? (Cont'd)

- c. Trust Protectors
Began to be used in foreign jurisdictions for **offshore asset protection planning**
 - To **provide flexibility** in handling matters specific to offshore trust administration.
 - To alleviate the concern of **US settlors who were unwilling to cede total control of their assets to an unknown professional trustee in a foreign jurisdiction.**



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Where Were Trust Protectors First Used? (Cont'd)

- d. In the 1980s and Early 1990s – US jurisdictions began enacting trust friendly provisions in their trust codes, among them provisions that addressed the use of trust protectors.
- e. Legacy Trust Planning - TPs became instrumental in legacy trust planning to provide ongoing oversight for trusts of lengthy duration and as the rule against perpetuities began to be relaxed in many jurisdictions.
 - The increased use of Trust Protectors in the US recognizes that the longer a trust is intended to last, the greater the need for modifications to account for changing times.



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Where Were Trust Protectors First Used? (Cont'd)

- f. The allocation of trustee duties among “traditional trustees” and “trust advisors” created a larger group of people engaged in the administration of the trust.
 - This also brought about the need to have someone who could oversee the various role players in any given trust arrangement.



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Terminology - Differentiating Among “Trust Advisors” and “Trust Protectors” and “Trust Directors”

- There is no consistent vocabulary used to describe the person other than a trustee who holds a power in a directed trust.
- Common terms used include “Trust Advisor,” “Trust Protector” and “Trust Director.”
- Some state statutes consider Trust Protectors and Trust Advisors as one and the same (**Tenn. Code § 35-16-108(b)**) – which states that “For purposes of this subsection, the term ‘advisor’ includes a ‘trust protector,’ and **NH Rev. Stat. Ann. § 564-B:1-103** similarly defines these two terms as being identical.



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Terminology - Differentiating Among “Trust Advisors” and “Trust Protectors” and “Trust Directors” (Cont'd)

Other research suggests as follows:

- a. Trust Advisors - are thought to have some form of control over a trustee's powers and thus holds one or more powers that a trustee would typically hold:
 - Primarily - **investment decisions/powers or distribution powers.**
 - Same **fiduciary duties and liability standard** as would apply to a trustee



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Terminology - Differentiating Among “Trust Advisors” and “Trust Protectors” and “Trust Directors” (Cont’d)

- b. Trust Protectors - by comparison, have historically been given the power to perform certain delineated **non-administrative decisions** relating to a trust, **but not powers typically held by a trustee**.
- Many TPs serve **per the trust instrument** in a **non-fiduciary capacity** and, in that case, the fiduciary or liability standard is **not** the same as a trustee – **liability in this case would be based upon a fraud standard**
 - However, if the TP is considered a fiduciary, then liability would be the same as trustee/advisor role



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Terminology - Differentiating Among “Trust Advisors” and “Trust Protectors” and “Trust Directors” (Cont’d)

- Therefore, **drafting attorneys usually provide in the trust instrument that a TP is not acting as a fiduciary**, because these powers are not typically traditional trustee powers.
- None of this means you could not have a Trust Protector that is considered to owe a duty to the beneficiaries (and not just the settlor) if the language in the appointing trust and the circumstances at hand both suggest that this was a power not just personal to the Trust Protector.
- All of this can be resolved by looking at the intention of the settlor in creating the power.



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The Implications of a Trust Director/Trust Protector or Trust Advisor Being Determined to Act as a Fiduciary or Non-Fiduciary

- a. Fiduciary Capacity - Requires a person acting in a fiduciary capacity to act in accordance with the **settlor's intent and the best interests of the beneficiaries (not just settlor's intent)**.
- Fiduciary capacity requires the TP to act in good faith and for the benefit of others with a duty of loyalty, impartiality, exercise of reasonable care, inform and report, etc.

Non-Fiduciary Capacity – the duty is owed only to the settlor, and not to the beneficiaries.



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The Implications of a Trust Director/Trust Protector or Trust Advisor Being Determined to Act as a Fiduciary or Non-fiduciary (Cont'd)

b. Liability Standard

- ✓ **Fraud (higher threshold)** is the liability standard for a Trust Protector acting in a non-fiduciary capacity, whereas
- ✓ **Gross Negligence or Willful Misconduct (lower threshold)** is the standard for a TP acting in a fiduciary capacity.

c. Conclusion - The classification of the TP as a fiduciary or nonfiduciary is critical for establishing the standard of care owed to the trust and its beneficiaries and possible exposure to liability.



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The Implications of a Trust Director/Trust Protector or Trust Advisor Being Determined to Act as a Fiduciary or Non-fiduciary (Cont'd)

d. TP Having Personal Power v. Fiduciary Power

How this impacts on trustee –

- ✓ If a TP power is personal (non-fiduciary), the only duty of the trustee is to follow the direction of the TP and ensure that the direction does not violate the terms of the trust.
 - A trustee responding to a personal power is not under a duty to consider the reasons for the exercise or non-exercise of a personal power held by the TP as long as the terms of the trust are not being violated.
- ✓ If the TP's power is held in a fiduciary capacity, the trustee's duty is to verify the direction does not violate a fiduciary duty owed by the TP to the beneficiaries.



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The Implications of a Trust Director/Trust Protector or Trust Advisor Being Determined to Act as a Fiduciary or Non-fiduciary (Cont'd)

How this impacts on the Trust Protector

- If the TP power is personal, the TP cannot be forced to exercise the power, it is not held in a fiduciary capacity, she owes no obligation to the beneficiaries, and she can determine whether to exercise her power on a mere whim, spite or malice – thus the power can be exercised solely in the discretion of the TP so long as no violation of public policy or fraud is involved.



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The Implications of a Trust Director/Trust Protector or Trust Advisor Being Determined to Act as a Fiduciary or Non-fiduciary (Cont'd)

- e. **Open Questions** – if the advisor/protector/director is not acting in a fiduciary role, then what is it?

If the beneficiaries are unhappy with the administration of the trust, who is responsible or liable?

Does the directed trust approach provide sufficient recourse to the beneficiaries in the event of misconduct?



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How Do We Really Know if a Trust Protector is a Fiduciary?

- a. The statute defaults to the assumption that a TP is **NOT** a fiduciary
- Theory - Encourages people (or trust companies) to serve without fear of litigation exposure
 - Allows for competition among states for trust administration business
- b. The statute defaults to the assumption that a TP **IS** a fiduciary
- Theory - Settlor would not want to appoint someone with great power over the trust who is unaccountable to the courts and possibly to beneficiaries.



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How Do We Really Know if a Trust Protector is a Fiduciary? (Cont'd)

- c. The statute is **silent**
- Therefore, a Trust Protector may be acting
 - as a fiduciary,
 - a non-fiduciary, or
 - a “quasi” fiduciary (even more ambiguous, maybe only with respect to certain powers),
- depending on the powers granted in the trust and the statute itself to determine the correct determination of fiduciary status.



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BOTTOM LINE – BE CAREFUL

- KNOW THE STATE LAW THAT APPLIES IN YOUR CIRCUMSTANCES
- DRAFT THE TRUST AROUND THE STATUTORY FRAMEWORK IF STATUTE ALLOWS YOU TO OVERCOME STATUTORY DEFICIENCIES
- OR IF NOT, THEN CONSIDER ANOTHER JURISDICTION



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State Statutes and Uniform Acts

a. State Statutes

South Dakota was the first state to enact a trust protector statute (1997). Idaho, Alaska, Wyoming and Tennessee soon followed.

Today – only 3 states do NOT have a statute!



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State Statutes and Uniform Acts (Cont'd)

b. Uniform Trust Code § 808 (2000)

- i. Creates a **rebuttable presumption** that a 3rd party power holder is a fiduciary.

However, **the trust instrument can modify this.**

NOTE – that Trust Protectors are treated the same as Advisors in the uniform acts.



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State Statutes and Uniform Acts (Cont'd)

- ii. With the increasing use of directed trusts came numerous legal questions which were not addressed by existing state statutes and the UTC Section 808 and its many variations.
 - ✓ How is fiduciary responsibility allocated between the trust protector and the trustee?
 - ✓ How much information do the trust protector and the trustee need to share with one another?
 - ✓ Can a trust protector receive compensation for its work?



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State Statutes and Uniform Acts (Cont'd)

The Uniform Directed Trust Act was drafted to address these and other issues that had arisen throughout the country as directed trusts gained popularity.

c. Uniform Directed Trust Act (2017)

- i. Trust Director/Protector **has same fiduciary duty and liability as trustee.**

NOTE – here again, **you can draft around this presumption in the trust document.**



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State Statutes and Uniform Acts (Cont'd)

ii. Notable Provisions

- ✓ Adds definitions of “**directed trust**”, a “**directed trustee**”, and “**trust director**”
- ✓ “**power of direction**” is defined (power over investment, management, or distribution of trust property, a power to amend a trust instrument or terminate a trust, or a power over other matters of trust administration)
- ✓ **and enumerates what is specifically excluded** (powers of appointment, the power to remove or appoint a trustee or trust director, the power of a settlor over a trust while the trust is revocable, etc.).



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State Statutes and Uniform Acts (Cont'd)

- ✓ defines **"terms of a trust"** to include trust terms established by or amended by a trust director
- ✓ Limitations on trust director with powers relating to **Medicaid payback** or a charitable interest is subject to the same rules as a trustee regarding those items.
- ✓ Duties and liabilities of trust directors are the same as trustees – however, can be modified by the trust instrument



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State Statutes and Uniform Acts (Cont'd)

- ✓ Requires trust director and trustee to provide information as it relates to powers or duties of both of them
- ✓ **Neither a trustee nor a trust director has a duty to monitor, inform or advise a settlor, beneficiary, trustee or another trust director as to how the trust director might have acted differently than a trustee or another trust director**
- ✓ Jurisdiction



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State Statutes and Uniform Acts (Cont'd)

d. Trustees subject to a third-party veto

would definitely have oversight responsibilities under the UTC

"A trustee who administers a trust subject to a veto power occupies a position akin to that of a co-trustee and is responsible for taking appropriate action if the third party's refusal to consent would result in a serious breach of trust." **UTC Section 808**

The UDTA is not in agreement.

"A trustee that operates under this kind of veto or approval power has the normal duties of a trustee regarding the trustee's exercise of its own powers, but has only the duties of a directed trustee regarding the trust director's exercise of its power to veto or approve."



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State Statutes and Uniform Acts (Cont'd)

e. Bottom Line

- States vary as to the presumption of fiduciary v. non-fiduciary capacity of Trust Protector.
- See State Listing of Trust Protector statutes/Directed Trust statutes in material.

- f. **Problem** – in states where a Trust Director/Trust Protector can serve as a non-fiduciary, the question becomes who's the party from whom a beneficiary can seek redress if the directed trustee is absolved from liability for following the trust director's instructions, and the trust director is not a fiduciary?



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The Uniform Trust Code Approach

a. Section 808 – Directed Trusts

- If the terms of a trust confer a power to direct certain trustee actions, **the trustee must accept such direction.**
- The power to direct a trustee is clearly set forth as a **fiduciary power** in the UTC. **This is a rebuttable presumption.**
- Commentary notes that the use of the term Trust Protector (as opposed to "Trust Advisor") connotes the grant of greater powers, sometimes including the power to amend or terminate the trust.
- Commentary also clearly provides that the provisions of §808 can be modified in the trust document.



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The Uniform Trust Code Approach (Cont'd)

b. State Approaches to Adoption of Section 808 (about 30+ states have adopted some form of Section 808)

- §808 is adopted by the state and is the sole guidance on the subject
- §808 is adopted by the state but statute provides further guidance for trust protectors

Example - Arizona provides specifically for the appointment of a trust protector and creates a default treatment of the TP as a nonfiduciary, or some states even create a default of fiduciary with exceptions for certain enumerated powers.



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The Uniform Trust Code Approach (Cont'd)

3. States that have not adopted the UTC, but incorporate some provisions of §808 into their trust codes.
4. States that have not adopted the UTC and have no directed trust or trust protector statutes.



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Directed Trustee Protections

We have spoken about the protection of Trust Directors/Protectors/Advisors from owing a fiduciary duty and limiting liability, but what about the directed trustee?

- a. Uniform Trust Code – does not expressly exonerate a directed trustee.
- b. Nevada and other states – provide that a directed trustee is not liable for loss in complying with a directed act.
- c. Delaware – has a low liability statute which provides that a directed trustee is not liable as long as s/he does not act with willful misconduct.



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Directed Trustee Protections (Cont'd)

- d. Uniform Directed Trust Act – uses the willful misconduct type language not quite the same as Delaware. It provides that a directed trustee will not be liable for reasonably complying with the directed act but must not carry out the directed act if doing so would be an act of willful misconduct.

Confusion – this standard is criticized for uncertainty injected into determining whether complying with a directed act is itself willful misconduct. The criticism is that by making the directed trustee responsible for determining whether the director's instructions would constitute an act of willful misconduct, the trustee must evaluate the merits of the directed act.



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State Statute Variations

- a. **All statutes give deference to the trust instrument itself** – so start looking at the trust document first, and then the statute
- b. **Notable Differences Among State Statutes**
 - Some states use the term “Directed Trust Statute,” but include a “Trust Protector” term in the definitions section of the statute, or maybe “Trust Advisor.”
 - Some state statutes have a “non-inclusive” list of powers (some very short and some longer).
 - Some states do not offer a list of powers and authority – rather, these jurisdictions rely on the trust instrument itself



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Why Use a Trust Protector Today?

- a. **Adds flexibility to the administration of a trust – avoid court involvement – oversee actions of trustee**
 - Avoids costs and time-consuming process of court modification of trusts.
 - No longer limited to offshore asset protection trusts
 - Now typically used in more traditional estate planning strategies, including various irrevocable trusts that cannot be amended by grantor, Life Insurance Trusts, Irrevocable Gifting Trusts, and even Revocable Trusts



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Why Use a Trust Protector Today? (Cont'd)

- b. TP can address **family dynamics/conflicts without court intervention**
 - Example - TP can address **disputes between the trustee and family members/beneficiaries**
- c. Can address/support a family member serving as trustee **who lacks higher level of sophistication** than the appointed Trust Protector
- d. Can address a **corporate trustee that requires greater familiarity with family members to best administer the trust**



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Why Use a Trust Protector Today? (Cont'd)

- e. Can address **changes needed to be made to the trust instrument without court intervention.**
 - Nonjudicial modification to the trust instrument provides maximum flexibility.
- f. Can assure the **trust instrument stands the test of time.**
 - Particularly useful for so-called "dynasty trusts" which are intended to extend well into the future



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Why Use a Trust Protector Today? (Cont'd)

- Can you imagine a trust from the 1960s being able to address **Assisted Reproductive Technology** or **Gender issues** today?
- What about **cryptocurrency** or **legalization of marijuana**?
- g. TP can **interpret the provisions of the trust for trustee and/or beneficiaries**



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Drafting Considerations

- a. **Should you allow the Grantor or a Beneficiary to have authority to remove a Trust Protector?**

No. This power to remove and replace the Trust Protector may cause estate tax inclusion for the Grantor or Beneficiary. Instead, the trust document should provide that any Beneficiary will have the right to petition the court to remove or replace the Trust Protector.



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Drafting Considerations (Cont'd)

- b. How do you limit the Trust Protector's Duty to Monitor or Keep Informed and Liability?

Example 1

The Trust Protector shall have no duty to monitor any trust created hereunder in order to determine whether any of the powers and discretions conferred under this Agreement should be exercised. Further, the Trust Protector shall have no duty to keep informed as to the acts or omissions of others or to take any action to prevent or minimize loss. Any exercise or nonexercise of the powers and discretions granted to the Trust protector shall be in the sole and absolute discretion of the Trust Protector, and shall be binding and conclusive on all persons. The Trust Protector is not required to exercise any power or discretion granted under this Agreement. **Absent bad faith on the part of the Trust Protector, the Trust Protector is exonerated from any and all liability hereunder arising from any exercise or nonexercise of the powers and discretions conferred under this instrument.**



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Drafting Considerations (Cont'd)

Example 2 – Limit Liability and No Duty to Monitor

Section X. Provisions for Trust Protector

The function of the Trust Protector is to direct my Trustee in matters concerning the trust and to assist, if needed, in achieving my objectives as manifested by the other provisions of my estate plan.

(a) Good Faith Standard Imposed

The authority of my Trust Protector is conferred in a nonfiduciary capacity, and my Trust Protector is not liable for any action taken in good faith. **My Trust Protector is not liable for any act, omission, or forbearance.** [Emphasis added]



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Drafting Considerations (Cont'd)

(b) No Duty to Monitor

My Trust Protector has no duty to monitor any trust created under this instrument in order to determine whether any of the powers and discretions conferred by this instrument on my Trust Protector should be exercised. Further, my Trust Protector has no duty to be informed as to the acts or omissions of others, or to take any action to prevent or minimize loss. Any exercise or non-exercise of the powers and discretions granted to my Trust Protector is in his or her sole and absolute discretion and will be binding and conclusive on all persons. **My Trust Protector is not required to exercise any power of discretion granted under this instrument.** [Emphasis added]



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Drafting Considerations (Cont'd)

- c. How do you state grantor's intention that the Trust Protector must take some affirmative action in protecting beneficiaries?

It is grantor's intention that in exercising this power the Trust Protector shall consider and review on a periodic basis all relevant circumstances, including the trustee's performance in light of the purposes of the trust and the needs of beneficiaries, and shall use his best judgment in maintaining a qualified, suitable person or entity to serve as trustee hereof. The Trust Protector serving hereunder shall not be liable for any action or inaction except where there is found to be fraud, reckless or willful misconduct.



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Drafting Considerations (Cont'd)

But if you are going to give the Trust Protector fiduciary duties, then the drafting attorney should consider providing language in the trust instrument substantially protecting the Trust Protector:

- The Trust Protector can be given an immediate and absolute right to require that the Trust defend the Trust Protector from any litigation (which substantially deters most frivolous lawsuits since the defense moneys are immediately paid from the Trust), and
- The Trust can be required to pay for Errors & Omissions insurance for the benefit of the Trust Protector.

The worst thing that a drafter can do is to give the Trust Protector the bad half of the loaf, i.e., make the Trust Protector a fiduciary, but not protect the Trust Protector as a fiduciary.



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Drafting Considerations (Cont'd)

If a drafting attorney is going to make the Trust Protector a fiduciary, then those fiduciary duties need to be clearly and specifically set out -- otherwise, the Trust Protector has the potential to be sued if anything goes wrong with the Trust even if the Trust Protector did not know about it.



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Drafting Considerations (Cont'd)

d. Trust Protector Designator

You can appoint a TP Designator which could be any of the following:

- The trustee
- The law firm/an attorney or other professional
- An Independent Person

This assures there is an acting TP only when the need arises, but also requires drafting attorney to address issues of monitoring, compensation, when to appoint, etc.



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Drafting Considerations (Cont'd)

e. Appointing a Co-Trustee as an Alternative to Appointment of a Trust Protector

- Appoint a co-trustee, which has the advantage of eliminating any ambiguity around whether the individual appointed owes a fiduciary duty to the beneficiaries.
- Similarly, however, there may be circumstances where the grantor or drafting attorney may not wish to appoint a co-trustee.



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Drafting Considerations (Cont'd)

f. Power to Revoke Medicaid Asset Protection Trust?

"Hello Howie,
I hope you and the family are well. Can you please give me some guidance. I drafted an IRT with trust protector provisions. Under the agreement, the TP can revoke any trusts created under the agreement. Since signing the trust, my client has had a falling out with her beneficiaries (grandchildren) and is now adamant that she wants to revoke the entire trust. I know this typically requires the consent of all beneficiaries, but if the TP has the power to revoke, can the revocation be done without the consent of the beneficiaries?
Thank you for any assistance you can provide."



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Who Should Serve as the Trust Protector

Someone who can be **objective** in evaluating the circumstances and **apply the grantor's intent** to the **family dynamics/issues presented** throughout the course of the trust administration

a. Use this appointment to fill a void in expertise

- 1) Such as **special needs planning** if the appointment of a family member requires the addition of specialized knowledge of government benefits rules
- 2) **Grantor's Attorney** – can sometimes serve if willing to do so. For Example - appointment of attorney as Trust Protector in MAPT



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Who Should Serve as the Trust Protector (Cont'd)

- b. Generally – **stay away from grantors, beneficiaries, contingent beneficiaries or creditors from serving as TP**
- c. **Best to select an independent third party who can act without influence by beneficiaries**



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Powers and Authorities Given to Trust Protectors

- a. **Power to remove and replace Trustees and Trust Advisors**
 - Trustee may no longer be a good fit, needs of trust administration have changed, bad actor, etc.
- b. **Power to select Trust Advisors not originally anticipated to be needed**
- c. **Power to Review and Approve accountings**



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Powers and Authorities Given to Trust Protectors (Cont'd)

- d. **Power to determine and/or negotiate Trustee (and other fiduciary) fees**
 - and settling issues with respect thereto
- e. **Power to Amend the Trust**
 - Typos – ambiguities – changes in the law
 - MAPT – HRA experience re: Use and Occupancy of Homestead Property
 - SNT – changes in POMS requires language changes in trust



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Powers and Authorities Given to Trust Protectors (Cont'd)

- f. **Power to Decant**
- g. **Power to Terminate Trust**
- h. **Power to Add/Remove Beneficiaries**
- i. **Power to Grant a Power of Appointment (or modify or revoke a beneficiary POA)**
- j. **Power to Change Situs**
 - Especially where a corporate trustee is less likely to do so (loss of trusteeship is a conflict for corp. trustee to change situs)



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Powers and Authorities Given to Trust Protectors (Cont'd)

- k. **Power to Address Changes in the Law**
- l. **Power to Address Income and Estate tax changes**
- n. **Power to Address Social Security Rule Changes**
- n. **Power to Address Medicaid rule Changes**



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Case Law Review

Robert T. McLean Irrevocable Trust v. Ponder, 418 SW 3d 482 (Mo. Ct. App., October 24, 2013)

- 1) **Holding** - Missouri Court of Appeals holds that Trust Protector does not have any responsibility – actual or implied – to **monitor** or **supervise** the activities of a trustee in determining whether to remove a trustee.
- 2) TP was designated a fiduciary and had the power to remove and replace the trustee, but he nevertheless allegedly stood by and watched the trustee totally dissipate the trust funds over a period of less than 24 months, which funds were intended to provide for the beneficiary during his anticipated life expectancy of over 25 years.
- 3) The successor trustee sued the trust protector for breach of duty for failing to remove the trustee and for the resulting damages. The protector argued that he had no duty to supervise or monitor the trustee, and thus, no liability for damages.



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Case Law Review (*McLean Cont'd*)

- 4) **This case had a SNT established for the beneficiary, Robert McLean. The Trust protector's authority was conferred in a fiduciary capacity under terms of the trust, but "TP shall not be liable for any action taken in good faith."**
- 5) Court stated – "While the Trust Protector has the right to fire such an errant Trustee, it should probably not be the job of the Trust Protector to constantly monitor the Trustee's activities or be responsible for losses. Instead, either the Beneficiaries should be charged with monitoring the Trustee's activities (for their own protection, if nothing else), or an independent Co-Trustee should be appointed for that specific purpose. These other parties can then complain to the Trust Protector, who can then investigate and fire the errant Trustee if warranted."



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Case Law Review

Minassian v. Rachins, 4th District Court of Appeal, Florida, December 3, 2014

- **FACTS** - Children of trust settlor brought action against trustee, who was settlor's wife, claiming breach of fiduciary duty. After, trustee appointed a Trust Protector to amend the trust, children filed supplemental complaint challenging the validity of amendments made by the TP, and the trustee and children each moved for summary judgment as to the validity of the amendments.
- The amendment adopted by the Trust Protector provided: "Upon the death of [the wife] and the termination of the [family] trust as provided in [art. 10, §7] if there is any property remaining, it shall be disbursed to a new trust to be created upon the death of [the wife] with a separate share for each of the children."



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Case Law Review *(Minassian Cont'd)*

- Trust was ambiguous as to whether a common pot trust approach or a split-trust approach would be created for the benefit of the surviving spouse at the time of the husband's death, or if the Marital Trust would be funded first, and then the Family Trust for the children would upon the death of the surviving spouse be established for the children and be funded with whatever was left in the Marital Trust.
- If both would be funded simultaneously, this would allow the children to be considered contingent remainder beneficiaries of the spousal trust and impact on the amount of trust funds that could be used to maintain the wife's lifestyle.



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Case Law Review *(Minassian Cont'd)*

- **HOLDING**
 - ✓ Florida Trust Code provides "The terms of a trust may confer on a trustee or other person a power to direct the modification or termination of the trust." FS §736.0808(3). This is identical language to UTC §808(c).
 - ✓ Court holds that a trust code section allowing trust to confer power to modify its terms permitted trust provision authorizing appointment of trust protector to modify terms of trust, and
 - ✓ Trust agreement was ambiguous, so as to empower trust protector to exercise her authority to correct the ambiguity by modifying the terms of the trust.



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Case Law Review

In re Eleanor Pierce (Marshall) Stevens Living Trust and Eleanor Pierce Stevens Revocable Gift Trust, 159 So.3d 1101 (La.App. 3 Cir. February 18, 2015)

Holding – Enforcement of trust providing for appointment of a "trust protector" permitting the removal of a co-trustee did not violate public policy, even if trust gave trust protector authority to remove trustee; designation of trust protector allowed for better protection of settlor's interest in managing assets for benefit of beneficiaries, as beneficiaries were no longer saddled with responsibility of monitoring trustee for a breach of fiduciary duty.



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Case Law Review

Midwest Trust Company v. Brinton, 331 P.3d 834 (August 15, 2014), 2014 WL 4082219 (Kan. Ct. App., July 22, 2015)

Grantor established a trust under which his daughter had a special power of appointment to devise the trust assets to whomever she chose, but she was first required to consult with the designated trust protector and get his approval for the exercise of her appointment power.

In this case, daughter consulted Trust Protector # 2 (successor to TP # 1), and in so doing the court determined that she was required under the terms of the trust to consult with TP #1 according to the clear and unambiguous language of the trust – not # 2. Thus, her power of appointment failed.



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Actual Applications – The Trust Protector Saves the Day

a. Special Needs Trust - Change in POMS (Actual Case)

- 1) Mom died in 2010 leaving assets to her disabled daughter on SSI.
- 2) Court order dated July 1, 2010 directs (pre-dates SNT Fairness Act enacted in 2016) creation of D4A trust on behalf of the daughter rather than going to her outright.
- 3) July 20, 2010 – self-settled d4A trust fbo daughter is created and I am named as Trust Protector. Trust is immediately sent to both SSA and Medicaid for review.



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Actual Applications – The Trust Protector Saves the Day (Cont'd)

- 4) May 2012 – SSA changes POMS (SI 01120.201F.3.c) re: reimbursement of family members for travel expenses incurred in visiting a beneficiary of a 1st party special needs trust. SSA concluded that payment for such travel violates the sole benefit rule.
- 5) Thus, immediate family members who were authorized to receive reasonable out of pocket travel and lodging expenses for visits to the beneficiary at his home would no longer be permitted. So, while beneficiary expenses to visit relatives is permitted, this does not extend to paying for the family to visit or travel.



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Actual Applications – The Trust Protector Saves the Day (Cont'd)

- 6) May 2013 – SSA added two new examples where travel expenses would be allowed:
- The trust could reimburse family members when travel expenses were necessary for the “trust beneficiary to obtain medical treatment.”
 - The second exception applied where the trust beneficiary lived in an institution, nursing home, or other long-term care facility or supported living arrangement” and travel by family members was necessary “for ensuring the safety and/or medical well-being of the individual.”



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Actual Applications – The Trust Protector Saves the Day (Cont'd)

- 7) July 17, 2013 – client calls my office and states she received a letter that her SSI benefits are being suspended by July 31, 2013 due to the defective trust that I drafted!

My heart sank upon learning this news and I began to wonder how? How did I draft a defective trust? What did I fail to do?

- 8) The answer is – I didn't do anything to create a defective trust at the time it was established – rather, a change in the POMS caused the 2010 trust language to be ineffective and it took SSA 3 years to review my trust!
- 9) Thus, all that was needed was a modification to the trust. But how can I get that done by July 31, 2013, when benefits would be suspended?



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Actual Applications – The Trust Protector Saves the Day (Cont'd)

10) Options

- Go to court and seek emergency relief to modify the trust
 - ✓ Unlikely to obtain court approval for necessary replacement language by the end of the month (preparation of petition requires time, many judges on vacation during summer, court calendar, etc.; or
- Exercise of Trust Protector to bring travel reimbursement language in line with new POMS.

Time Needed – about 10 minutes!



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Actual Applications – Maybe Not Such a Good Idea After All?

- b. Phone call from Grantor of MAPT - “I No Longer Want One of My Co-Trustees to Serve – What Can I Do?”
- 1) Medicaid Asset Protection Trust established on April 6, 2011.
 - 2) Co-Trustees are grantor’s son and stepdaughter, with joint authority to act.
 - 3) Section 2.11 of MAPT provides for appointment of drafting attorney as Trust Protector.
 - 4) No communication with client after establishment of MAPT (about 13 years passes by).



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Actual Applications – Maybe Not Such a Good Idea After All? (Cont’d)

- 5) Son calls me and asks if I can help remove his stepsister as Trustee. I decline to render any advice because that would put me between 2 Co-Trustees. I also decline to represent the son to avoid any allegations from stepdaughter/stepsister since I was the drafting attorney.
- 6) I determine my obligation flows to the grantor, the mother in this case.
- 7) Mother (grantor) contacts me and affirms she wishes to remove her stepdaughter as a Co-Trustee of the MAPT. What can she do to make that happen?
- 8) Section 2.11(e) --- Authority to Remove and Appoint Trustees

“The Trust Protector may remove any Trustee of a trust created under this agreement, other than any of my descendants.”



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Actual Applications – Maybe Not Such a Good Idea After All? (Cont’d)

- 8) Last I checked, a stepdaughter is not a descendant, so now I know I can remove stepdaughter as currently acting Trust Protector.
- 9) What Did/Should I Do?
 - a. Under Section 2.02 of the MAPT, it states that “[i]f any of my Initial Trustees fails to serve, the remaining Initial Trustees will continue to serve, without the necessity of a successor trustee.”
 - b. So now I know that if I, as TP, remove stepdaughter, then grantor’s son would continue to serve as Trustee alone.



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Actual Applications – Maybe Not Such a Good Idea After All? (Cont'd)

- c. A long time ago I learned the following:
"Just Because You Can, Doesn't Mean You Should."
- d. I didn't want to get involved in a potentially conflicted trust administration matter in case stepdaughter would refuse to bow out willingly.



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Actual Applications – Maybe Not Such a Good Idea After All? (Cont'd)

- e. So now I ask the question, was it a good idea to allow myself to be appointed as Trust Protector? I'm in a pickle, aren't I?
- f. Section 2.11(a) Saves the Day!
2.11(a) states "[t]he serving Trust Protector may appoint a successor Trust Protector in writing, which appointment will take effect upon the resignation, incapacity, or death of the appointing Trust Protector."
- g. I called the mother and told her to find a replacement Trust Protector, I will resign and appoint the person of her choice, and the new Trust Protector will handle the trustee removal.

PROBLEM SOLVED!

BINGO!



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Resources

- *The Case Against the Trust Protector*, Alexander Bove, Jr., ACTEC Law Journal, Vol. 37:77, Summer 2011 (arguing against Trust Protectors being permitted to act in a non-fiduciary capacity)
- *Springing Protectors – Now You See 'em, Now You Don't*, Alexander Bove, Jr., Probate & Property, September/October 2024
- *The Uniform Directed Trust Act: Contents, Content and Critique*, Charles E. Rounds, Jr., Trusts & Estates Magazine, December 2017, page 24
- *Beyond UTC Section 808 and the Uniform Directed Trust Act*, Wayne E. Reames, ACTEC Law Journal, Volume 45, Number 1, Article 12, September 1, 2019



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Resources (Cont'd)

- *Peter Protector in Trust Neverland: The Real Story of the Trust Protector 1* (2003), Alexander A. Bove, Jr. & Melissa Langa, available at http://bovelanga.com/publications/news_briefs/trusts_and_estates_forum/Real%20Story%20Trust%20Protector.pdf
- *The Trustee and the Trust Protector: A Question of Fiduciary Power, Should a Trust Protector be Held to a Fiduciary Standard?* Philip J. Ruce, Drake Law Review, Vol.59, page 67, February 24, 2011 (arguing that Trust Protectors should be held to fiduciary standard).
- *Trust Protectors Under Current Florida Law: A Passing Trend or Valuable Planning Tool?* Jeffrey S. Goethe, Florida Bar Journal, Real Property, Probate and Trust Law Column, June 2017, 91-JUN Fla. B.J. 34
- *Trust Protectors: Why They Have Become "The Next Big Thing,"* 50 Real Property, Trust and Estate J. 267



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Resources (Cont'd)

- *Trust Advisors*, 78 Harv. L. Rev. 1230 (1965)
- *When is a Trust Protector a Fiduciary?*, 27 Quinn. Prob. Law J., 277 (2014)
- *Trust Protectors for Special Needs Trusts*, Gregory Wilcox, The Voice, Special Needs Alliance, August 2017 – Vol. 11, Issue 5
- *Protectors and Directors and Advisers: Oh My! The New Florida Uniform Directed Trust Act*, Charles D. Rubin and Jenna G. Rubin, Florida Bar Journal, Vol 96, No. 2, March/April 2022, page 9
- *Trust Protectors: The Role Continues to Evolve*, Andrew T. Huber, Probate and Property Magazine, January/February 2017, Volume 31 No. 1, Section of Real Property, Trust and Estate Law, American bar Association



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Thank You!

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