Legal Studies Research Paper Series
Working Paper No. 2016-08
March 2016

Trust Protectors: Why They Have Become "The Next Big Thing"

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First published in 50 Real Property, Trust and Estate Law Journal 267 (2015).
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TRUST PROTECTORS: WHY THEY HAVE BECOME "THE NEXT BIG THING"

Lawrence A. Frolik*

Editor's Synopsis: Settlors are increasingly naming trust protectors, particularly for trusts that may endure for many years, because of the possible need to amend the trust in light of changing laws and changing circumstances. Trust protectors have also become popular for trusts with beneficiaries who have an intellectual disability that may prevent them from enforcing their beneficial interest in the trust. The selection of a protector, the powers to be granted the protector and the standard of care required of the protector require thoughtful consideration. This Article also discusses the origin of trust protectors, their current statutory basis, and the few existing cases that analyze the legal status and role of a trust protector.

I. INTRODUCTION

The traditional world of trusts had three players: the settlor, the trustee, and the beneficiary. Today, increasingly that trio has been joined

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by a fourth entity—the trust protector, who is appointed by the settlor with a specified list of powers.[1] While a trustee is responsible for the day-to-day operation of the trust, the protector has a more distant relation, with duties and obligations that may arise infrequently, if at all. But the protector has one big power—the protector's powers supersede those of the trustee.

Although the majority of trusts created in the past few years probably do not have a protector, the use of trust protectors is growing. This is interesting because only a few state laws define and sanction the use of protectors.[2] Undoubtedly, the increase in the use of protectors is due in part to the Uniform Trust Code that ratifies the use of protectors.[3] Still, unlike much of trust law, which has detailed statutory rules and countless cases interpreting the statutory and common law of trusts, the "law" of protectors is not well defined.[4]

With the lack of statutory imperatives and an almost complete absence of case law opining on the duties and responsibilities of a protector, settlors are free to imagine a protector as they see fit. The result, if not quite the "wild west" of trust law, is a landscape of confusion as to what is a protector, why would a settlor want to appoint a protector, what are the duties of the protector, who is the protector answerable to, and what is a protector's standard of duty.

II. A SHORT HISTORY OF TRUST PROTECTORS

Protectors are best conceived as a means for a settlor to attempt to ensure that the intent behind the establishment of the trust remains fulfilled in the future. Settlors appoint a protector to create an alter-ego who can supervise the trust and act to ensure that the purpose of the trust, as envisioned by the settlor, is carried out even if the trustee must be replaced or the terms of the trust must be modified. The settlor, by

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[1] *See* Stewart E. Sterk, *Trust Protectors, Agency Costs, and Fiduciary Duty*, 27 CARDOZO L. REV. 2761, 2764 (2006).

[2] For a comprehensive discussion and list of state protector statutes, see Kathleen R. Sherby & Justin T. Flach, *"Directed Trust" or "Enhanced Trust Flexibility"? Is There a Difference? The Nature and Effective Use of "Trust Advisor" and "Trust Protectors" as Third Party Decision Makers* (TSWB20 ALI-CLE Mar. 24, 2015).

[3] *See* UNIF. TRUST CODE § 808(b)-(d) cmt. ("Subsections (b)-(d) ratify the use of trust protectors and advisers.").

[4] *See, e.g.*, ARIZ. REV. STAT. ANN. § 14-10818(B) (showing even some statutes that authorize the use of a protector permit the settlor to define the powers of a protector) (All statutory citations in this Article refer to the current statute unless otherwise indicated.).

appointing a protector, overcomes the judicial reluctance to modify trusts that can be traced to the 1889 Massachusetts case, *Claflin v. Claflin*,[5] where a court refused to accelerate a vested right to the principal of a trust.[6] In *Claflin*, the twenty-four year old sole beneficiary of a trust requested that the court approve the termination of the trust and the distribution to him of the funds in the trust.[7] The court refused.[8] The trust provided for the accumulation of a fund for the beneficiary to be paid in installments as he reached the ages of twenty-one, twenty-five, and thirty years.[9] The court held the trust restrictions to be valid because "a testator has a right to dispose of his own property with such restrictions and limitations, not repugnant to law, as he sees fit, and that his intentions ought to be carried out, unless they contravene some positive rule of law, or are against public policy."[10] *Claflin* underscored judicial acquiescence in letting the dead hand of the past trump the realities of the present, without asking whether unanticipated circumstances might justify a change in how the trust operated.

Although modern trust law is more receptive to the modification of a trust,[11] some settlors desire even more flexibility so that the trust will carry out the settlor's intent despite a change in circumstances or the law. To do so, a settlor can appoint a trust protector with such powers as the settlor deems necessary.

But before there was a protector, there was a trust adviser.[12] As originally understood, a trust adviser had the "power to control a trustee in the exercise of some or all of his powers."[13] Advisors could have the power to order a trustee to perform some action, such as ordering the

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[5] 20 N.E. 454 (Mass. 1889).

[6] *See id.* at 456 (holding that modification or termination of a trust is prohibited if such change contravenes the clear intent of the settlor).

[7] *See id.* at 455.

[8] *See id.* at 456.

[9] *See id.* at 455.

[10] *Id.* at 456. The court's decision to enforce the timed distributions from the trust seems reasonable. However, the problem was with the broad language, which endorsed enforcement of the trust provisions without regard to extrinsic evidence of the intent of the settlor or of the reasonableness of the provision in light of present realities.

[11] *See* John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 NW. U. L. REV. 1105, 1108 (2003-2004); *see also* RESTATEMENT (THIRD) OF TRUSTS § 66(1) (AM. LAW INST. 2003) (showing a court can modify a trust as a result of changed circumstances).

[12] *See generally* Note, *Trust Advisers*, 78 HARV. L. REV. 1230 (1965).

[13] *Id.*

trustee to cease investing trust assets in real estate, or they could have the more limited power of consent, so that the trustee could only undertake specified acts with the consent of the advisor, such as requiring the consent of the advisor to sell a particular asset that is owned by the trust.[14] Whatever the power, the advisor was thought to be a fiduciary and bound to the fiduciary standard, whether directing the trustee to act or consenting, or not consenting, to a trustee's proposed act.[15]

By the 1990s, trust advisers had morphed into trust protectors, who were conceived of as a means of securing the settlor's control over an off-shore asset protection trust.[16] The off-shore trust was a way to legally shield the settlor's assets from tort liability.[17] But because the trust was under the jurisdiction of a foreign entity and subject to the law of that jurisdiction, the settlor appointed a protector to ensure that the trustee, who might not act in a manner desired by the settlor, nevertheless carried out the wishes of the settlor or faced removal by the protector.[18] The appointment of a protector permitted the settlor to maintain indirect control over the trustee without the assets of the trust being subject to creditor claims.[19]

More recently, trust protectors have become popular for all trusts, not just the off-shore variety. When Alaska enacted the first domestic asset protection trust,[20] the off-shore trust came "on-shore." And along

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[14] *See id.* at 1232–33.

[15] *See id*. at 1231–32.

[16] *See* James T. Lorenzetti, *The Offshore Trust: A Contemporary Asset Protection Scheme*, 102 COM. L.J. 138, 149 (1997). The term "protector" appears to have been first employed in the 1989 Cook Island International Trusts Amendment Act. *See* Richard Lewis, *The Foreign Irrevocable Life Insurance Trust as Asset Protection for Abuse and Suggestions for Reform*, 9 CONN. INS. L.J. 613, 618 (2003).

[17] *See* Lorenzetti, *supra* note 16, at 140.

[18] *See id.* at 149–50.

[19] *See id.*; *see also* Richard C. Ausness, *When Is a Trust Protector a Fiduciary?*, 27 QUINNIPIAC PROB. L.J. 277, 279 (2014). Today, of course, several states have granted self-settled trusts protection from creditors. *See* David M. English, *The Impact of Uniform Laws on the Teaching of Trusts and Estates*, 58 ST. LOUIS U. L.J. 689, 693 (2014). Settlors of these "on-shore" trusts, however, may still want the control offered through the appointment of a trust protector.

[20] *See* ALASKA STAT. § 13.36.370(a) (originally enacted in 1997). As of April 2014, sixteen states have enacted similar domestic trust protection statutes. *See* David G. Shaftel, *ACTEC Comparison of the Domestic Asset Protection Trust Statutes*, ACTEC.ORG (2014), http://www.actec.org/public/Documents/Studies/Shaftel-Comparison-of-the-Domestic-Asset-Protection-Trust-Statutes-Updated-through-April-2014.pdf; English, *supra* note 19, at 693.

with those trusts came the protector. Following Alaska's lead, several other states adopted similar statutes, and some of these statutes specifically recognized the right of the settlor to appoint a protector.[21] Even the Uniform Trust Code (UTC), although it does not use the term "protector," authorizes the settlor to "confer upon a person [the power] to direct certain actions of the trustee," which permits the appointment of a protector.[22]

The use of protectors soon spread beyond domestic asset protection trusts. Settlors increasingly began to appoint trust protectors for non-asset protection trusts. Part of the appeal of trust protectors can be traced to the greater powers and discretion that modern trust law confers upon trustees.[23] The UTC, for example, lists twenty-six trustee powers as well as providing liberal standards for judicial modification of the trust.[24] As the powers of the trustee grew, a settlor might naturally worry whether those expanded powers or judicially sanctioned trust modifications would always be used to carry out the intent of the settlor.[25] Moreover, while in the past an irrevocable trust was also unamendable, today the opposite is true. An irrevocable, unamendable trust hardly exists as state statutes and courts permit the modification of an "unamendable" trust.[26] Trust law has retreated from the concept that trust provisions are inviolable, which has contributed to the appeal of granting settlor-like powers in a trust protector.

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[21] *See, e.g.*, DEL. CODE ANN. tit. 12, § 3313; S.D. CODIFIED LAWS § 55-1B-1(2).

[22] UNIF. TRUST CODE § 808(b)-(d) cmt. (amended 2010), 7C U.L.A. 604 (2006) ("Subsections (b)-(d) ratify the use of trust protectors and advisers.").

[23] *See* Richard C. Ausness, *The Role of Trust Protectors in American Law*, 45 REAL PROP. TR. & EST. L.J. 319, 320 (2010).

[24] *See* UNIF. TRUST CODE arts. 8, 4 (amended 2010), 7C U.L.A. 477, 587 (2006). The Uniform Trust Code will be cited as an example of trust law. Of course, individual state law may not reflect the provisions of the Code, but as of February 2014, twenty-eight states and the District of Columbia had adopted some version of the Code. *See* Uniform Law Highlights – February 2014, ABA, http://www.americanbar.org/content/dam/aba/publishing/rpte_ereport/2014/1_february/uniform_laws.authcheckdam.pdf.

[25] The touchstone for judicial interpretation and enforcement of a trust is "the intent of the settlor." Unfortunately for trust settlors, intent is in the eye of the beholder. *See* Peter B. Tiernan, *Understanding the Limits of and Exceptions to Intent*, 88 FLA. BAR J. 39 (2014).

[26] *See* Richard C. Ausness, *Sherlock Holmes and the Problem of the Dead Hand: The Modification and Termination of "Irrevocable" Trusts*, 28 QUINNIPIAC PROB. L.J. 237 (2015); Julia C. Walker, *Get Your Dead Hands Off Me: Beneficiaries' Right to Terminate or Modify a Trust Under the Uniform Trust Code*, 67 MO. L. REV. 443, 455 (2002).

The growth in popularity of perpetual or dynasty trusts has been even more compelling.[27] More and more states have greatly liberalized or even abolished the application of the Rule Against Perpetuities.[28] Touted as the best way to take advantage of the estate tax avoidance permitted by generation skipping trusts,[29] long lasting trusts have become quite popular.[30] Settlors who create a trust that they anticipate will last for many years, however, perceive the advantage and need for a protector who can modify the trust in light of changing law, unexpected behavior of the beneficiaries, and questionable actions of the trustee.[31]

The result has been a rapid growth in the appointment of trust protectors who have been granted the authority to modify the terms of the trust,[32] decant the trust, change the trust situs, monitor the trustee, remove and replace the trustee, and possibly control the actions of the trustee.[33] Not every protector has all of these powers, but almost all protectors will have at least some.[34] Other protectors, *inter alia*, have the

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[27] *See generally* Daniel J. Amato, *The Good, the Bad, and the Ugly: The Political Economy and Unintended Consequences of Perpetual Trust*, 86 S. CAL. L. REV. 637 (2013); Max M. Schanzenbach & Robert H. Sitkoff, *Perpetuities or Taxes? Explaining the Rise of the Perpetual Trust*, 27 CARDOZO L. REV. 2465 (2006).

[28] *See* Grayson M.P. McCouch, *Who Killed the Rule Against Perpetuities?*, 40 PEPP. L. REV. 1291 (2013).

[29] *See generally* Mary Louise Fellows, *Why the Generation-Skipping Transfer Tax Sparked Perpetual Trusts*, 27 CARDOZO L. REV. 2511 (2006). The elimination of the Rule Against Perpetuities by a state may also be "part of an aggressive campaign to attract trust and banking positions to the State." Stewart E. Sterk, *Jurisdictional Competition to Abolish the Rule Against Perpetuities: R.I.P. for the R.A.P.*, 24 CARDOZO L. REV. 2097, 2101–02 (2003).

[30] *See* McCouch, *supra* note 28, at 1292. A generation-skipping trust ensures that the entire trust, including unlimited future appreciation, will remain exempt from the estate tax throughout the trust term. A settlor who leaves an estate that is large enough to potentially be subject to the federal estate tax can shield some of that estate from the estate tax for several generations by funding a perpetual trust up to the limit permitted by the federal estate tax provisions found in the generation skipping transfer provisions. *See* I.R.C. § 2631.

[31] *See* ALEXANDER A. BOVE JR., TRUST PROTECTORS 8 (2014).

[32] Some who write about trusts refer to the "trust instrument," meaning the document that created the trust. Because the addition of the term "instrument" adds nothing but excess verbiage, in this Article the term "trust" is used.

[33] *See* Gregory T. Densen, *Trust Protectors: Powers, Capacity, and Selection*, COLO. LAW., Sept. 2012, at 63, 64, 70.

[34] *See id.* at 64.

power to add beneficiaries, modify the trust distribution requirements, or have a limited power of appointment.[35]

The ability of a settlor to impact the trust long after death is a bit of a reversal; in other respects trust law has been moving toward reining in a settlor's post-mortem powers.[36] For example, settlor attempts to dictate what constitutes appropriate investments have been held unenforceable.[37] And, the UTC permits a court to "modify the administrative or dispositive terms of a trust or terminate the trust" if doing so would "further the purposes of the trust."[38] Yet these attempts to loosen the grip of the dead hand of the past have been undercut by the ongoing disappearance of the Rule Against Perpetuities and the emergence of the perpetual trust.[39] Allowing protectors can be seen as part of the rebirth of the power of settlors to retain some manner of control over otherwise irrevocable, unamendable trusts.

Two recent court decisions reinforce the view that even without authorization by a state statute, a settlor can control a trust from beyond the grave by appointing a protector. A Louisiana appeals court stated, "By designating a trust protector, the settlor's interest in managing the assets for the benefit of the beneficiaries is better protected" because the protector represents the interests of the settlor.[40] A Kansas appeals court noted that the powers of the protector depend upon the terms of the trust and the intent of the settlor.[41] Based on the powers granted to the protector, the court overturned an appointment of a trust by a beneficiary who failed to first consult with the protector and obtain his approval of the proposed exercise of her power of appointment as required by the trust.[42]

III. PROTECTOR POWERS

The powers granted to a protector may arise either from the specific language of the trust or from a state statute that authorizes the

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[35] *See id.*

[36] *See* Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 14–18 (1992).

[37] *See* Langbein, *supra* note 11, at 1111–12.

[38] UNIF. TRUST CODE § 412(a) (amended 2010) 7C U.L.A. 507 (2006).

[39] *See* Reid Kress Weisbord, *Trust Term Extension*, 67 FLA. L. REV. 73, 74 (2015).

[40] *In re* Eleanor Pierce (Marshall) Stevens Living Tr., 159 So. 3d 1101, 1111 (La. Ct. App. 2015).

[41] *See* Midwest Tr. Co. v. Brinton, No. 110670, 2014 WL 4082219, at *1 (Kan. Ct. App. July 22, 2015).

[42] *See id.*

appointment of a protector. If a state lacks a "protector" statute, the settlor is presumably free to empower a protector as the settlor sees fit, which may include granting the protector "a discretionary power to amend the trust."[43] Even if the state has a statute that defines and authorizes a trust protector, the statute, like the Arizona protector statute, may "not limit what powers, delegations and functions may be granted to the trust protector."[44] Despite Arizona's grant of unlimited settlor power to delegate authority to a protector, the Arizona statute does list the powers that may be granted to the trust protector.[45] What is clear from the language of the statute is that the protector has only those powers listed in the trust.[46] The statute does not appear to confer any powers on a protector.[47] The Missouri statute is similar; it too lists powers that may be granted, but the settlor is not limited to granting those powers, and the protector has only those powers granted by the trust.[48]

The powers of a protector can be divided into those that relate to the trustee and all other powers. The powers concerning the trustee can be thought of as the settlor's attempt to protect the beneficiary and the assets of the trust from a trustee who is less than the best.[49] The essential power granted to a protector is the right to remove a trustee and to fill a trustee vacancy.[50] All other powers related to the trustee are merely more specific grants of authority that could be accomplished if the protector threatened to use the power to remove the trustee. Examples include the power to make, direct, or veto investment decisions;[51] force or veto the

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[43] Minassian v. Rachins, 152 So. 3d 719, 722 (Fla. Dist. Ct. App. 2014).

[44] ARIZ. REV. STAT. ANN. § 14-10818(B).

[45] *See id.*

[46] *See id.*

[47] *See id.*

[48] *See* MO. REV. STAT. § 456-008.808(B). In contrast, trustee powers are laid out with particularity. *See, e.g.*, UNIF. TRUST CODE § 816 (amended 2010), 7C U.L.A. 627–30 (2006).

[49] *See generally* UNIF. TRUST CODE § 105(b) (amended 2010), 7C U.L.A. 428 (2006).

[50] *See generally* UNIF. TRUST CODE § 706(a) (amended 2010), 7C U.L.A. 575 (2006); *see also* Ausness, *supra* note 23, at 330.

[51] The protector might be given merely the power to oversee and advise the trustee as to investments. While this might affect the behavior of a financially inexperienced trustee, in reality the power merely to advise, if not coupled with the power to remove the trustee, has almost no impact because, absent acting in bad faith or in some other way violating fiduciary duties, the trustee is free to ignore the protector's advice. *See* Ausness, *supra* note 23, at 329–30.

sale of trust assets; and allocate sale proceeds between income and principal.[52]

The "all other powers" that can be granted to a protector can be divided into those that concern the trust administration and those powers that concern the beneficial enjoyment of the trust. The former powers include the right to change the situs of the trust, change the governing power of the trust, decant the trust, terminate the trust under defined conditions,[53] and, most importantly, amend the trust for any valid purpose other than to modify the beneficial interests.[54] Valid purposes to amend the trust might include the need to respond to changes in other state or federal law or the need to respond to changes in the Internal Revenue Code or state income tax law.[55] Any such amendment, however, would have to be consistent with the settlor's intent, though given the nature of these powers, it is hard to see when compliance with the settlor's intent would be an issue.

The other kind of "all other powers" is that which grants the protector the right to affect the beneficial enjoyment of the trust. Such powers include the power to veto otherwise mandatory distributions, for example, "all income to Fran," or discretionary distributions, for example, "such principal to Fran as the trustee in its sole discretion . . ."; the power to delay beneficiary withdrawal rights, for example, "one-third of trust principal to Fran at age thirty"; a limited power of appointment among predesignated beneficiaries; or the power to add or remove beneficiaries.[56]

Although a settlor could grant the protector a power to modify beneficial interests, it is difficult to imagine why a settlor would do so.

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[52] *See* Ausness, *supra* note 23, at 329.

[53] Such conditions might arise if the settlor's purpose for the trust has been realized, the cost of administering the trust is too great in light of the value of the trust assets, or the assets of the trust are insufficient to carry out the intent of the settlor.

[54] *See* RESTATEMENT (THIRD) OF TRUSTS § 64, note on comments b through d (AM. LAW INST. 2003).

[55] *See id.*

[56] *See* Daniel R. Griffith & Emily S. Pan, *A New Take on Taking or Leaving Trust Protectors* (SX 002 ALI-CLE 431, July 16–17, 2015). Power affecting distributions from the trust, if granted to the protector, may affect federal income tax or estate and gift taxes. For example, granting the trust protector the power to change the beneficiaries who are eligible to receive discretionary distributions makes the trust a grantor trust under I.R.C. section 674(a), with the result that the grantor is required to include the trust items of income, deduction, and credit on the grantor's federal income tax return. *See* I.R.C. §§ 671, 674(a). Other possible effects on income or estate and gift taxes are beyond the scope of this Article.

Granting a protector the right to affect the benefits flowing from the trust is the equivalent of granting the protector the power to override the distribution decisions made by the settlor. Why would a settlor permit a third party to essentially rewrite the most significant aspect of a trust—the enjoyment of the beneficial interest? If the settlor is fearful of changing circumstances that make the initial distribution decisions unwise, the settlor has the right to provide for change in trust distributions and enjoyment in the event of the occurrence of specified events.[57] By drafting for possible, designated events, rather than granting expansive powers to the protector, the settlor can ensure that his or her values will control the beneficial enjoyment of the trust, rather than the protector's.

Permitting the protector a limited power of appointment to add or delete beneficiaries seems even less defensible because it too creates the possibility that the protector will act in a manner inconsistent with the intent of the settlor. A power to remove a beneficiary that is not subject to an objective standard, such as "remove Fran as a beneficiary if she does 'x,'" may lead to results that please the protector but would never have been approved by the settlor. For example, suppose Fran converts to a new religion, one disfavored by the protector, but as to which the settlor had no opinion. If the protector has the discretion to remove Fran as a beneficiary, the protector can do so even though the settlor might not have cared about Fran's conversion.

While it may be difficult to imagine why a settlor would grant a protector the right to modify the beneficial interest of the trust, some state laws permit a settlor to do so. South Dakota law states that a trust protector may be given the power to "[i]ncrease or decrease the interests of any beneficiaries to the trust."[58] Even the UTC states that "[t]he terms of a trust may confer upon a trustee or other person a power to direct the modification or termination of the trust."[59] Query whether the right to modify the trust necessarily includes the right to modify beneficial interests.

IV. WHY A PROTECTOR?

From a settlor's perspective the question is less about what powers a protector can have, than why a protector is needed. Only after the reason

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[57] *See* Ausness, *supra* note 23, at 327.

[58] S.D. CODIFIED LAWS § 55-1B-6(2).

[59] UNIF. TRUST CODE § 808(c) (amended 2010), 7C U.L.A. 604 (2006).

for needing a protector is identified can the settlor select appropriate powers. One compelling reason for using a protector is to circumvent the federal income grantor trust rules, which result in a settlor being taxed on the trust income of an irrevocable, inter vivos trust if the settlor retains certain enumerated powers.[60] Rather than retaining a power over the trust that would result in the grantor trust status, the settlor can appoint a protector with powers to amend the trust or direct the trustee.[61] For example, the settlor might appoint a protector with the power to add charitable beneficiaries to a trust, which if the settlor had retained would have created a grantor trust.[62] Instead, the settlor can appoint a protector with full discretion to add a charity, but who is expected by the settlor to add a charity only at the request of the settlor.

However, in most instances the use of protectors arises from the settlor's desire to have someone empowered to act after the death of the settlor, often many years after the death of the settlor. As their names suggest, generation skipping trusts, dynasty trusts, and perpetual trusts may last for many years.[63] Naturally, a settlor may fear that changes in society, the law, and the lives of beneficiaries (some not yet born) may interfere with the trust carrying out the settlor's intent. Granting a protector the power to modify the administrative provisions of the trust seems like a sensible solution. Some settlors may even be comfortable permitting the protector to alter beneficial interests in light of changing circumstances in the lives of the beneficiaries.

A protector might also be desirable if the trust owns assets, such as stock in a closely held corporation, that the trustee, whether an individual or corporate trustee, lacks the ability to manage effectively. Holdings in a foreign corporation or an extensive real estate ownership also might cause a settlor to appoint a protector with special skill or knowledge, who, though unwilling to act as trustee, would be willing to accept the less onerous duties of a protector and provide advice or make the final decisions as to the disposition and retention of identified trust assets.

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[60] Grantor trust status arises from I.R.C. sections 671-679.

[61] Trust powers held by a party who is not a "related or subordinate party," as defined in section 672(c), do not result in the settlor being taxed on the trust income. I.R.C. § 674(b)(4).

[62] *See* I.R.C. § 674(b)(4).

[63] For a discussion as to the possible tax consequences of modifying the terms of an irrevocable trust, *see generally* Diana S.C. Zeydel, *Developing Law on Changing Irrevocable Trusts: Staying Out of the Danger Zone*, 47 REAL PROP. TR. & EST. L.J. 1 (2012).

Note that most of the powers that can be granted to a protector that concern trust administration, including the power to modify the trust instrument in light of changes in the law, changing circumstances, or in order to carry out the intent of the settlor, can be done by a court.[64] The title of Section 412 of the UTC explains the court's powers quite plainly: "Modification or Termination Because of Unanticipated Circumstances or Inability to Administer Trust Effectively."[65] Granting a similar power to a protector is essentially duplicative. Still, some settlors prefer to permit a protector to take action in the belief that it will be less expensive, quicker, and not subject to public scrutiny.[66] Or the settlor may simply have more confidence that a protector, rather than an unknown judge, will do what is right.

The most important power not affecting beneficial interests is the power to remove and replace the trustee. Unlike the power to amend the trust, which might be granted to a trustee or exercised by the court, and unlike the power to modify beneficial interests, a power that a settlor might reasonably be wary of granting, the power to remove and replace the trustee is precisely the power that a settlor, who is concerned about the future, might want to grant to a protector.[67]

The right to remove and replace the trustee is a response to the ever-lengthening lives of trusts. In the past, a trust's duration was limited by the Rule Against Perpetuities. Today, however, a settlor can avoid that limitation by establishing the trust situs in a state that no longer recognizes the Rule Against Perpetuities and permits so-called dynasty trusts.[68] Any trust expected to continue for many years must have clauses that ensure that the trust will have beneficiaries and a trustee; otherwise it will fail as a trust. Assuring a very high probability of future beneficiaries can be accomplished by the use of class gifts—"all my grandchildren"—and by gifts that flow to future generations—"my

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[64] *See* UNIF. TRUST CODE § 412 (amended 2010), 7C U.L.A. 507 (2006).

[65] *Id.*

[66] *See* Philip J. Ruce, *The Trustee and the Trust Protector: A Question of Fiduciary Power. Should a Trust Protector Be Held to a Fiduciary Standard?*, 59 DRAKE L. REV. 67, 70, 76 (2010).

[67] *See* Densen, *supra* note 33, at 64, 67. The power to remove and replace the trustee is one of the powers cited as an "ideal" power to grant to a protector. *See id.* The other powers are the ability to amend the trust and the right to decant or change the interests of the beneficiaries. *See id.* Of course, if the settlor wants to preserve the power to decant the trust, that power can be granted to the trustee. *See id.* No protector is needed. *See id.*

[68] *See* Reid Kress Weisbord, *Trust Term Extension*, 67 FLA. L. REV. 73, 108 (2015).

descendants per stirpes." The lack of a trustee is not a problem because a court can appoint a trustee if necessary.[69]

Rather than relying on a judge to appoint a trustee, however, settlors often permit the trustee to name its successor if the trust does not. This does not assure a trustee, however, because a trustee might die, become mentally incapacitated, or, if the trustee is an entity, cease to exist before having appointed a successor trustee. The longer the trust lasts, the more likely that the lack of a trustee will require the protector to name a successor trustee.

Most settlors probably do not merely empower the protector to name a successor trustee. Instead, they also grant the protector the power to remove the trustee even though a court can remove a trustee if requested to do so by the trust beneficiary, or, on its own initiative.[70] Given that a beneficiary can request the removal of the trustee and a court can remove a trustee, why would a settlor also grant the power to the protector?[71]

The authority of a court to remove a trustee depends upon the applicable state law. The UTC, however, is instructive. Under Section 706, a court may remove a trustee for listed reasons, including when "the trustee has committed a serious breach of trust" or "the trustee's unfitness, unwillingness, or persistent failure . . . to administer the trust effectively [causes the court to determine] that removal of the trustee best serves the interests of the beneficiaries."[72] While the grounds for judicial removal are broad, they nevertheless require proof that the trustee is not performing properly.[73] A settlor might want to avoid having that improper performance revealed to a court for several reasons: the cost of bringing a court action, the public nature of such a request and the resulting publicity, and the need to articulate and offer proof of why the trustee should be removed. A settlor might reasonably prefer to leave the removal of a trustee up to the discretion of the protector, not only to

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[69] *See* UNIF. TRUST CODE § 704 (amended 2010), 7C U.L.A. 570 (2006).

[70] *See* UNIF. TRUST CODE § 706 (amended 2010), 7C U.L.A. 575 (2006). Courts may rely on a beneficiary to request the removal of a trustee. "Hence the beneficiaries have an incentive to monitor the trustee's performance . . . ." Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621, 663 (2003).

[71] Part of the answer is the difficulty for beneficiaries to remove a trustee. *See* Ronald Chester & Sarah Reid Ziomek, *Removal of Corporate Trustees Under the Uniform Trust Code and Other Current Law: Does a Contractual Lense Help Clarify the Rights of Beneficiaries?*, 67 MO. L. REV. 241, 249 (2002).

[72] UNIF. TRUST CODE § 706(b) (amended 2010), 7C U.L.A. 575 (2006).

[73] *See id.*

facilitate the removal of the trustee, but also as a means of encouraging the trustee to perform in a manner acceptable to the protector. To paraphrase Samuel Johnson, nothing concentrates the mind of a trustee as does the possibility of removal,[74] particularly if the protector has unlimited discretion to do so and no need to seek court approval. A protector with such removal authority has a good deal of control over the trustee, including a corporate trustee who is likely to be amenable to the protector's "suggestions" for fear of being dismissed as trustee and losing the compensation paid to the trustee.[75]

Under the UTC, trust beneficiaries have the right to petition a court to remove a trustee. In addition to incompetence or a serious breach of trust, the UTC permits a court to remove a trustee when

> there has been a substantial change of circumstances or removal is requested by all of the qualified beneficiaries, the court finds that removal of the trustee best serves the interests of all of the beneficiaries and is not inconsistent with a material purpose of the trust, and a suitable co-trustee or successor trustee is available.[76]

Here again, the authority of a court to remove a trustee is subject to a standard that might not be met despite how much the beneficiary desires that the trustee be replaced. A protector, however, might be willing to accede to a beneficiary's request to remove a trustee without any showing that doing so would not be "inconsistent with a material purpose of the trust."[77] And a disagreement between the trustee and the beneficiary as to what is "inconsistent" might be the motivation for the beneficiary's desire that the protector remove and replace the trustee.

Rather than giving the power to a protector, the settlor could just give the beneficiary an absolute and unconditional right to remove the

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[74] Johnson's actual words were, "Depend upon it, sir, when a man knows he is to be hanged in a fortnight, it concentrates his mind wonderfully." James Boswell, *Life of Johnson*, Sept. 19, 1777, *in* BARTLETT'S FAMILIAR QUOTATIONS 328 (17th ed. 2002).

[75] A trustee is entitled to reasonable compensation. *See* UNIF. TRUST CODE § 708 (amended 2010), 7C U.L.A. 580 (2006).

[76] UNIF. TRUST CODE § 706(b)(4) (amended 2010), 7C U.L.A. 575 (2006). The application of that language can lead to litigation. *See In re* McKinney, 67 A.3d 824 (Pa. Super. Ct. 2013) (discussing whether the beneficiaries moving to a different state and the original trustee, a corporate entity, having gone through six corporate mergers leading to entirely different individuals administering the trust, represented a change of circumstances substantial enough to justify the removal and replacement of the trustee).

[77] UNIF. TRUST CODE § 704(b)(4) (amended 2010), 7C U.L.A. 575 (2006).

trustee.[78] But the settlor might not choose to grant this power to a beneficiary if the settlor has doubts as to whether the beneficiary might use the power to thwart the settlor's intent. The beneficiary obviously has a financial interest in the trust that might lead to replacing a trustee, even if the removal power contains the limitation that the beneficiary must appoint a corporate entity as successor trustee.[79]

A settlor who grants a protector the power to remove a trustee assumes (or at least hopes) that the protector's action in that regard will be met with the settlor's approval. Although the power to remove can be purely within the discretion of the protector, thereby ensuring that the removed trustee will have no grounds to resist, the settlor can still let his or her wishes be known as to what conditions warrant the protector's removing the trustee. For example, the settlor could attach a non-binding letter that details the purposes of the trust and the settlor's wishes in regard to the operation of the trust.[80] In doing so, the settlor should state that this information is provided to the protector (and presumably also to the trustee) merely as precatory language that in no way compels or directs the protector to act.

Precatory language, however, will not ensure that a protector will act in a manner consistent with the settlor's intent. Of course, the settlor will make the initial selection of the protector and so should feel comfortable that the protector will act in accord with the intent of the settlor—why else select that person or entity to act as protector? Yet, because a protector will typically be employed when the trust may last for a long time,[81] at some point the original protector will be replaced by a

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[78] *See* Mucci v. Stobbs, 666 N.E.2d 50, 57 (Ill. App. Ct. 1996). Even if a majority of the beneficiaries can remove the trustee, they may not exercise that power in a way that is contrary to the interests of the other beneficiaries. *See* Florida Nat'l Bldg. Corp. v. Miami Beach First Nat'l Bank, 9 So. 2d 563, 564 (Fla. 1942).

[79] Permitting the beneficiary only to replace a trustee, individual or corporate, with a corporate trustee can be an attempt to prevent the beneficiary from appointing an individual as trustee who might be very compliant and merely act as a conduit to carry out the wishes of the beneficiary. Hopefully, a corporate trustee, who has a professional reputation to preserve, will insist upon acting as an independent fiduciary who is not beholden to the beneficiary. In reality, a corporate trustee may prove amenable to the beneficiary's desires so long as those desires do not undermine or diminish the rights of other, future beneficiaries or the takers of the remainder.

[80] For a discussion of letters of wishes directed at a trustee, see Alexander A. Bove Jr., *The Letter of Wishes: Can We Influence Discretion in Discretionary Trusts?*, 35 ACTEC J. Summer 2009, at 38.

[81] The exception may be a trust created for beneficiaries who, because of mental illness, intellectual disability, or dementia, are unable to act to protect their own interest.

successor protector. Therefore, the selection of the successor protector or the method used to name the successor is crucial.

V. SELECTION OF THE PROTECTOR

The settlor appoints the initial protector.[82] Absent a state statute placing limits on who can be appointed,[83] the settlor is free to appoint whomever he or she prefers. The settlor's choice, however, is limited to those who are qualified to undertake the responsibilities of the position, and within that group, those who are willing to serve. Who is qualified depends to a great extent on the powers delegated to the protectors. Who is willing to serve also depends on the effort expected of the protector, which is largely a function of the powers and responsibilities of the protector. However, even if the effort expected of the protector does not discourage some people from accepting appointment as a protector, possible liability may cause them to refuse the appointment. Specifically, many will not serve as protector if they are a fiduciary.

A. Who is Qualified to Act as Protector?

The powers granted to the protector essentially define the protector's necessary qualifications. Protector powers that relate to the administration of the trust require, *inter alia*, that the protector understand what a trust is, how it functions, the law of trusts and trustees, federal and state taxation of trusts, and the relative advantage of one state's trust law over another's. This list strongly suggests that a protector should be an attorney who is knowledgeable about trust law, an accountant familiar with trusts, or an entity that regularly handles trust affairs.

For such beneficiaries, a protector is needed to oversee the trustee because the beneficiary is unable to do so. *See* discussion *infra* note 90.

[82] There are other ways to appoint a protector, but it is difficult to imagine why the settlor would not make the original appointment. The other ways are appointment by the beneficiary, by the trustee (as was the case in *Minassian v. Rachins*, 152 So. 3d 719, 720 (Fla. Dist. Ct. App. 2014)), or by petitioning a court to appoint the protector. For a more supportive view for the use of a non-settlor appointment of a protector, see Densen, *supra* note 33, at 63, 67.

[83] For example, under Idaho law, if the protector is a fiduciary, either because of having certain powers such as investment powers or because the trust states that the protector is a fiduciary, only designated entities or individuals can serve as protector. *See* IDAHO CODE § 26-3204(1). They include a chartered bank or trust institution or a disinterested attorney or accountant who has a preexisting professional relationship with the settlor. *See id.*

Appointing a professional as protector, however, risks creating a conflict of interest if the protector has business or professional dealings with the trustee or any of the beneficiaries. A Washington state appeals court upheld a trial court's removal of a protector who, in his role as attorney, filed motions and petitions against one of the trust beneficiaries.[84]

Possible conflicts of interest for an attorney who is appointed protector should give a settlor pause. Similarly, before appointing an accountant, the settlor should consider whether that accountant is likely to be employed by the trustee or any beneficiary or be involved in a financial transaction, such as the assessment of the value of an enterprise, that involves the trustee or any beneficiary. For further protection, the trust should require the protector to resign if a conflict of interest should arise.

In addition to having the necessary knowledge and expertise, and not having a potential or actual conflict of interest, the protector has to have longevity. As noted,[85] the abolition of the Rule Against Perpetuities and the popularity of generation skipping trusts have led to trusts expected to last for many years and several generations.[86] Settlors of these dynasty or perpetual trusts are likely to appoint a protector to protect against changes in circumstances, protect against changes in the law, and provide oversight over a future trustee that the settlor may not have selected because the original trustee and all successors named in the trust no longer serve as trustee.[87]

The number of years that a protector might be required to serve suggests that at some future date a corporate entity will have to be appointed as the protector. If the settlor initially appoints an individual, that individual is unlikely to live long enough (or be capable of serving

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[84] *See* Estate of Wimberley, No. 31757-9-III, 2015 WL 410340, at *11–*23 (Wash. Ct. App. Jan. 29, 2015).

[85] *See* McCouch, *supra* note 28 and accompanying text.

[86] *See* McCouch, *supra* note 28, at 1292. Not all settlors create dynasty trusts merely to create generation skipping trusts. Some are motivated by other reasons, including a desire to protect future beneficiaries from their own improvidence, to protect the family wealth from creditors, to protect against claims in divorce, or to perpetuate the settlor's name and values. *See* Joshua C. Tate, *Perpetual Trusts and the Settlor's Intent*, 53 U. KAN. L. REV. 595, 614–17 (2005).

[87] If they are individuals, they may have died, resigned, or become unable to perform as a trustee—such as becoming mentally incapacitated because of dementia. If a corporate trustee, the entity may no longer be willing to act as a trustee for the trust or the entity may have been merged or have been taken over by another entity, possibly one that the settlor would not have selected to serve as trustee.

effectively) as protector. The settlor can name another, presumably younger, individual as successor protector, but in time the successor will also die. Almost certainly at some point someone other than the settlor will appoint a successor protector. The question is, who? One alternative is to permit each individual protector to name his or her successor, which might be a person or an entity. However, it is difficult to see the circumstances where a settlor would be willing to have an unknown, and possibly unborn, individual named as protector. The solution is for the settlor to name a corporate entity as the initial successor protector.[88]

B. The Choice of a Lay or Professional Protector Depends on the Powers Granted to the Protector

Who should be appointed as protector depends to a great extent on what the settlor wants the protector to do. For most settlors, the overarching concern is that the trust carry out their intent. More specifically, most settlors want the trust to benefit the beneficiary as they have envisioned. Beyond these fundamental concerns, a settlor might want a protector for three different reasons:[89] to monitor the trust for changes in the law; to monitor the trustee; and to modify the interests of the beneficiaries.

If the settlor only wants the protector to monitor the trust for changes in the law, surely a professional protector is preferable. The protector could be an individual such as an attorney, or it could be a corporate entity such as a trust company. The alternative is to appoint a lay person

[88] Imagine a settlor, at age seventy, names his niece, age forty, protector of a trust that benefits his three children and then his descendants. At the settlor's death at age eighty, the niece will be fifty. She dies at age ninety. At that time, the trust has seven living beneficiaries, all grandchildren of the settlor. It is unlikely that the settlor would name another individual as protector, such as the son of the niece, who was only fifteen when the settlor created the trust. The settlor would either name a corporate entity as successor or let the niece name her successor protector. Would the settlor be comfortable with the niece's choice? He might be if he trusts her enough to name her as the protector. Assume the niece has the power to name a successor and names her son who is age sixty-five when his mother dies at age ninety. He in turn develops dementia and resigns as protector at age seventy-five. At that point, the settlor would likely have insisted that the successor protector be a corporate entity. He has no reason to trust the judgment of the successor individual protector.

[89] This list is not intended to be exhaustive; rather, it provides only a way of analyzing whether a lay person should be named to serve as a protector. Of course, as stated, the appointment of a corporate entity does not guarantee that the entity will exist or be willing to act as a protector when needed, but the odds are much better with a corporate entity than an individual.

as protector with the expectation that he or she will seek professional guidance. But if the lay protector is unqualified to carry out the responsibilities absent professional assistance, then in reality the functions of the protector have been delegated to the professional advisors. While even a professional advisor will often seek advice from other professionals, such as an attorney consulting with an accountant regarding the taxation of a trust, a professional, unlike a lay person, presumably has special knowledge and enough expertise to determine whether it is wise to follow the proffered advice. In most cases, therefore, the appointment of a lay person as protector seems unwise.[90] The settlor would be ill advised to appoint a lay person who lacks the knowledge and ability to monitor the law and appreciate what changes should be made.

Most settlors will want the protector to monitor the trustee and will likely grant the protector the discretionary power to replace the trustee without the need for court approval. A lay person might be acceptable to perform this function if that person is sophisticated enough to judge the wisdom of the trustee's acts. However, because most lay protectors would likely seek professional assistance when evaluating a trustee, the appointment of a lay person only delays the ultimate reliance on a professional. If for some reason the settlor insists upon having a lay person oversee the trustee, the settlor can also grant the beneficiary (a lay person) the right to remove the trustee either with or without good cause.[91]

If the protector is granted the power to modify beneficial interests, such as the power to delay a distribution, name new beneficiaries, or decant the trust,[92] the settlor might reasonably prefer a lay person, likely a relative who the settlor has confidence in, to change beneficiary interests in a manner consistent with the intent and values of the settlor or in a way that best serves the beneficiaries. Even so, a professional acting as protector might be a better choice. Professional protectors, such

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[90] If the trust is a special needs trust for a beneficiary with mental disabilities, the protector's main obligation may be to oversee the trustee and ensure that the trust is being used in a way that best promotes the beneficiary's quality of life. In such a case, the settlor might appoint as protector an individual who has expertise in the needs of a person with the beneficiary's disability, or the settlor might prefer to appoint an individual whose strongest attribute is concern for the well-being of the beneficiary.

[91] This assumes the beneficiary has the mental capability to oversee the trustee.

[92] *See* Morse v. Kraft, 992 N.E.2d 1021, 1024 (Mass. 2013) (discussing a trustee who requested authority to decant a trust into a new trust under which the beneficiaries of the original trust could serve as trustees with the power to determine trust distributions for themselves).

as an attorney, should have the advantage of not having a personal interest in how the trust operates or how its distributions affect the lives of the beneficiaries. Or a professional protector, seeing that a trustee was not distributing all the trust income and so incurring the high federal income tax rates, might intervene to force distribution of all the income to beneficiaries because they have lower marginal income rates. A lay person might not be aware of the income tax consequences of the trust accumulating income.

C. Willingness to Serve as Protector

The settlor can select a protector, but ultimately the decision to serve as protector rests with the person selected. Whether an individual or corporate entity is willing to serve as a protector will depend on a number of factors, but three stand out: relation to the settlor, duties to be performed, and level of exposure to liability.[93]

If the protector is an individual, his or her relation to the settlor may determine whether to accept the appointment as protector. Similarly, the relation of the protector to the trust beneficiaries will also play a role. An individual who has a close, personal relationship to the settlor is more likely to accept the appointment out of a sense of friendship, a feeling of obligation, or a desire not to disappoint the settlor. Even a close friend of the settlor, however, might decline to be a protector if the duties seem too onerous. Personal liability arising from acts or inaction as a protector can also cause an individual to refuse to act as a protector. Some individuals may initially accept appointment as protector but later resign when they become aware of the obligations and risks associated with the position.

Corporate entities and professional individuals are less likely to accept the appointment if they do not have a preexisting relationship with the settlor, even though under certain circumstances they might believe that if they accept the appointment, other, more desirable business opportunities may present themselves. Mainly, however, corporate entities will decide whether to act as protector after balancing the cost of being a protector, both in effort and possible liability, against the compensation paid for being a protector.[94] Possible liability arises from

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[93] Other factors include the value of the trust assets (some corporate entities insist on a minimum value), the situs of the trust, the level of discretion of the trustee, the identity of the trustee, the probable duration of the trust, and the amount of likely compensation.

[94] Compensation may also include other business opportunities that may develop indirectly because of the entity's efforts as a protector.

the kinds of authority granted to the protector and the standard of care to which the protector is held. The critical question is whether the protector is considered to be a fiduciary.[95]

D. Who is Capable of Acting as a Successful Protector?

Who is capable of successfully performing as protector depends, to a great degree, on what the settlor envisions and what powers have been delegated to the protector to fulfill that vision. If the settlor is most concerned with how the trust meets the needs of the beneficiary, an individual protector, who knows both the settlor and the beneficiary, may be the best choice. The appointment of an individual also suggests that the settlor wanted the protector to be literally the "protector" of the beneficiary. If the trust continues for a considerable time after the initial beneficiaries die, however, the settlor may prefer an entity, rather than an individual, serve as the successor protector.

Some professional individuals, such as attorneys, are named as protectors because of the knowledge and skills that they bring to the position. The settlor, though wanting a skilled protector, may be more comfortable with a professional individual than a corporate entity, such as a bank, at least during the initial years of the trust. Yet, sometime during the trust's existence, the preferred choice appears to be an entity because an entity is likely to have the requisite knowledge to be an effective protector and is likely to be in existence throughout the life of the trust. In most trusts, the duties of the protector will require a sophisticated understanding of trust law and when it would be appropriate to act, which is consistent with the appointment of an entity as the initial protector and certainly as the successor protector; the exception being the appointment of an individual who is a professional as the initial protector with an entity as the named successor.

E. Identifying the Successor Protector

If a protector is named primarily because the settlor desires someone to monitor the trust for many years after the death of the settlor, the need for a successor protector is apparent. If the initial protector is an individual, the need for a successor is obvious, but even if the initial protector is an entity, the trust must provide for a manner of appointing a successor in the event that the entity resigns as trustee or ceases to exist.

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[95] Another issue is whether the professional's liability insurance covers liability for acting as a protector.

The settlor has three options for providing for successor trustees: the settlor can name the successor, the settlor can delegate to the protector the right to appoint a successor, or the trustee or beneficiary can be empowered to name a successor. The longer the trust is expected to last, the better it is to permit the protector to name the successor, with the expectation that the protector is likely to be an entity that will have the capability of naming a successor should that become necessary. All else failing, the settlor can provide that a court name a successor protector.[96]

VI. IS THE PROTECTOR A FIDUCIARY?

The question of whether the protector is a fiduciary is not only critical to determining the possible liability of the protector, but also as to who is likely to accept the responsibility of being a protector. If the protector is a fiduciary, the likelihood that a professional is willing to serve as protector is greatly lessened because many corporate entities and professionals, such as attorneys and accountants, do not want to subject themselves to potential fiduciary liability. They simply do not want to take on what they perceive as the overly risky possibility of being found to have violated some fiduciary obligation.[97]

Many professionals may fear groundless lawsuits or allegations of misconduct that rest upon an expansive reading of what a fiduciary's duties are. Specifically, they may fear that if they are fiduciaries they will have an affirmative duty to seek out information relevant to their powers and possibly an affirmative duty to act. For example, if the protector can amend the trust in light of changing law, must the protector monitor the law of the state that governs the trust in order to know if the trust should be amended? If the state trust law that governs the trust or federal tax law has changed, what is the standard that determines whether the protector was correct in amending or not amending the trust? Would a showing of acting in good faith insulate the protector from liability?

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[96] The court likely has the power to name a successor protector even absent so providing in the trust, but including that right in the trust removes any uncertainty in that regard.

[97] Protectors may not want to be held to the same standards as a trustee because "[t]he most fundamental duty of a trustee is the duty of loyalty" and "[a] trustee is in a fiduciary relationship with the trust beneficiaries and must, therefore, administer the trust in the beneficiaries' best interest." AUSTIN WAKEMAN SCOTT, WILLIAM FRANKLIN FRATCHER & MARK L. ASCHER, SCOTT AND ASCHER ON TRUSTS § 17.2 (5th ed. 2007).

A few state laws mandate that a protector is a fiduciary.[98] In the absence of state law, the trust can declare its protector to be a fiduciary. Holding the protector to a fiduciary standard can be justified on the grounds that most of the powers held by a protector[99] are the same as those that would be subject to a fiduciary standard if held by a trustee.[100] For example, administrative powers, such as amending a trust, changing its situs, and the like, are often cited as justifying the appointment of a protector. It can be argued that the grant of such powers would make a protector a fiduciary because a trustee granted the power to amend the trust is subject to a fiduciary standard of care, and the manner in which the trust is amended is subject to judicial review as a fiduciary act.[101]

Some commentators, however, assert that a protector is a fiduciary, at least regarding some of the powers that can be delegated to the protector.[102] Indeed, Section 808(d) of the UTC declares that a person who

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[98] *See* N.C. GEN. STAT. § 36C-8A-3(a); VT. STAT. ANN. tit. 14A, §§ 808(d), 1102(a); VA. CODE ANN. § 64.2-770(D); WYO. STAT. ANN. §§ 4-10-711, -808(d).

[99] For example, the South Dakota statute that authorizes protectors lists the following twelve powers that a trust may delegate to a protector:

> (1) [m]odify or amend the trust instrument to achieve favorable tax status or respond to changes in the Internal Revenue Code, state law, or the rulings and regulations thereunder; (2) [i]ncrease or decrease the interests of any beneficiaries to the trust; (3) [m]odify the terms of any power of appointment granted by the trust [with the qualification that] a modification or amendment may not grant a beneficial interest to any individual or class of individuals not specifically provided for under the trust instrument; (4) [r]emove and appoint a trustee, a fiduciary provided for in the governing trust instrument, trust advisor, investment committee member, or distribution committee member; (5) [t]erminate the trust; (6) [v]eto or direct trust distributions; (7) [c]hange situs or governing law of the trust, or both; (8) [a]ppoint a successor trust protector; (9) [i]nterpret terms of the trust instrument at the request of the trustee; (10) [a]dvise the trustee on matters concerning a beneficiary; (11) [a]mend or modify the trust instrument to take advantage of laws governing restraints on alienation, distribution of trust property, or the administration of the trust; and (12) [p]rovide direction regarding notification of qualified beneficiaries pursuant to § 55-2-13.

S.D. CODIFIED LAWS § 55-1B-6.

[100] *See* Ausness, *When is a Trust Protector a Fiduciary?*, *supra* note 19, at 301.

[101] *See, e.g.*, Rubinson v. Rubinson, 620 N.E.2d 1271 (Ill. App. 1993).

[102] *See* BOVE, *supra* note 31, at 21; Ausness, *When is a Trust Protector a Fiduciary?*, *supra* note 19, at 302.

holds a power to direct a trustee is inherently a fiduciary.[103] Several state statutes that provide for a protector declare the protector to be a fiduciary, and some do not provide that the settlor can waive that requirement.[104] But in other states that authorize protectors and presume that the protector is a fiduciary, the settlor can overcome that presumption in the trust and limit under what conditions, if any, the protector is a fiduciary.[105] In states that do not statutorily provide that a protector is a fiduciary or do not statutorily provide for the appointment of a protector, the settlor presumably has the option of whether to impose fiduciary duties on a protector.[106]

At least one commentator argues that a protector is always a fiduciary and that neither a state statute nor a settlor can eliminate that.[107] Another commentator is less absolute and argues that a protector should be considered a fiduciary as to some acts but not others.[108] Whatever commentators may prefer, the reality is that a settlor, in all but a handful of states, can define a protector as not being a fiduciary.[109] There are limits, however. The minimum requirements that a settlor must require of

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[103] *See* UNIF. TRUST CODE § 808(d) (amended 2010), 7C U.L.A. 604 (2006).

[104] *See, e.g.*, MISS. CODE ANN. §§ 91-8-808, -1201; MO. REV. STAT. § 456.8.808.6; N.C. GEN. STAT. § 36C-8A-3; S.C. CODE ANN. §§ 62-7-808, -818; TENN. CODE ANN. §§ 35-15-808, -1201-1206; VT. STAT. ANN. tit. 14A, §§ 808, 1101-1105; VA. CODE ANN. § 64.2-770; WYO. STAT. ANN. §§ 4-10-808, -818.

[105] *See* ALASKA STAT. § 13.36.370-375; ARIZ. REV. STAT. ANN. §§ 14-10808, 10818; DEL. CODE ANN. tit. 12, § 3313; IDAHO CODE ANN. § 15-7-501; 760 ILL. COMP. STAT. § 5/16.3; IND. CODE ANN. § 30-4-3-9; MICH. COMP. LAWS § 700.7809; N.H. REV. STAT. ANN. §§ 564-B:8-808, 12-1201; OHIO REV. CODE ANN. § 5808.8; OR. REV. STAT. §§ 130.685, 130.735; WASH. REV. CODE § 11.100.130.

[106] *See, e.g.*, 20 PA. CONS. STAT. § 7768(a). If the protector is compensated, the settlor might want to impose fiduciary duties to ensure that the protector performs well enough to justify the expense. Protector compensation would be paid by the trust, just as is trustee compensation. Whether paid out of principal or income depends upon what the settlor provided in the trust. *See id.*

[107] *See* BOVE, *supra* note 31, at 34–39. Bove cites no case law to support the proposition that state law cannot shield a protector from being a fiduciary. Rather, he claims that to permit states to do so would "have the effect of arbitrarily usurping the centuries-old, established right of the courts to determine whether there is, in fact, a fiduciary duty." *Id.* at 39. This argument suggests that courts can create law that contradicts what the legislature has enacted.

[108] *See* Ausness, *Sherlock Holmes*, *supra* note 26, at 292–93.

[109] A settlor of a state that mandates fiduciary status for a protector has the option of creating the trust in a state that does not mandate fiduciary status. *See generally* Ausness, *When is a Trust Protector a Fiduciary?*, *supra* note 19, at 292–94. As a result, whether a protector is a fiduciary is always a choice made by the settlor. *See generally id.*

a trustee or a protector depend on state law. The UTC states that the terms of a trust prevail over the provisions of the state statute, except, *inter alia*, for "the duty of a trustee to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries."[110] This seems to permit a settlor to lower the liability bar for a trustee, but not below the standard of good faith. And if the settlor can exculpate the trustee from fiduciary status, it would seem to follow that the same degree of exculpation can be provided to a protector.

If the protector is not subject to fiduciary obligations, the protector is nevertheless subject to judicial review and is still held to some judicially reviewable standard of behavior. Looking to the law governing trustees and the need to protect the interest of the beneficiary, the bedrock standard for a protector must be to act in good faith.[111] The UTC requires the trustee to "administer the trust in good faith";[112] a protector should be held to a similar standard. The good faith standard of care demanded of trustees is so fundamental to trust law that exoneration clauses designed to insulate a trustee from liability do not relieve the trustee for acting in bad faith.[113] The UTC permits the trust provisions to prevail over the Code, except for a list of powers that includes the "duty of a trustee to act in good faith."[114] A protector who, like a trustee, has powers that can affect the beneficial enjoyment of the trust, should be required to act in good faith.

Even if the trust is silent and says nothing about the protector's standard of care, the protector must act in good faith because the absence of good faith is bad faith. There is nothing in between: either the protector is acting in good faith or the protector is acting in bad faith. And

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[110] UNIF. TRUST CODE § 105(b)(2) (amended 2010), 7C U.L.A. 428 (2006).

[111] In interpreting an exoneration clause in a trust and demonstrating the fundamental nature of the requirement of good faith, the Pennsylvania Supreme Court stated that the trust exoneration clause would govern, but it "becomes inapplicable if it would allow a fiduciary who acted in bad faith or with reckless indifference to the beneficiary's interests to escape liability." *In re* Estate of Niessen, 413 A.2d 1050, 1053 (Pa. 1980) (citing Gouley v. Land Title Bank & Trust. Co., 198 A. 7, 9 (Pa. 1938)). One treatise's model language for the powers of a protector states that the protector is a fiduciary, but qualifies that requirement by having the settlor exonerate the protector from all acts or omissions absent bad faith. *See* WILLIAM W. BROWN, TRUSTS § 30.25 (2013).

[112] UNIF. TRUST CODE § 801, 7C U.L.A. 587 (2006).

[113] *See* Robert Whitman, *Exoneration Clauses in Wills and Trust Instruments*, 4 HOFSTRA PROP. L.J. 123, 125 (1992).

[114] UNIF. TRUST CODE § 105(b)(2), 7C U.L.A. 428; *see* UNIF. TRUST CODE § 1008, 7C U.L.A. 654 (2006).

no court is going to permit a protector to act in bad faith because to do so would compromise the beneficial interest of the beneficiary.

Good faith is variously described. A Wyoming court, in need of a definition of good faith for a case involving a trustee, looked to the Restatement (Second) of Contracts section 205, comment a (1981), which stated good faith was "faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving 'bad faith' because they violate community standards of decency, fairness or reasonableness."[115]

In a will contest, a Texas jury was instructed that "good faith" meant "an action which is prompted by honesty of intention or a reasonable belief that the action was probably correct."[116] This is an objective test; merely believing you are doing the right thing is not enough; the belief must be reasonable. If this were not so, acting negligently, that is, failing to act reasonably, would violate the good faith standard.[117]

Those who do not want a protector to be treated as a fiduciary, however, may also want to ensure that mere negligence will not create liability.[118] The settlor is free to define what is meant by "good faith" and should be able to provide that an act of ordinary negligence does not violate good faith. However, the settlor cannot exculpate a trustee, or presumably a protector, from liability for acts made in bad faith or with reckless indifference (gross negligence).[119]

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[115] Wells Fargo Bank Wyo., N.A. v. Hodder, 144 P.3d 401, 413 (Wyo. 2006).

[116] *In re* Estate of Longron, 211 S.W.3d 434, 439 (Tex. App. 2006).

[117] In non-trust law, acting negligently is not always a violation of acting in good faith. Although the opposite of acting in good faith is acting in bad faith, mere negligence is not necessarily the same as acting in bad faith. A federal court considered a case involving whether a surety acted in good faith when it wrongly made payments under a bond even though the principal was not liable. *See* U.S. Fidelity & Guaranty Co. v. Ferris, 15 F. Supp. 2d 579, 585–86 (M.D. Pa. 1998). The court permitted the surety to seek reimbursement from the principal even though the surety had acted negligently because the surety was due reimbursement unless it had acted in bad faith. *See id.* Because its negligence was not bad faith, it had a right to be reimbursed. *See id.*

[118] To avoid acting negligently, the protector would have to act as a "reasonable protector," and if the protector had any special skill, the protector would be held to a standard of care commensurate with a protector endowed with the special skills of the protector in question. *See* UNIF. TRUST CODE § 806, 7C U.L.A. 602 (2006). The settlor, however, can reverse that presumption and provide that the protector is not held to a higher standard despite any special skill.

[119] *See* RESTATEMENT (THIRD) OF TRUSTS § 96(1)(a) (AM. LAW INST. 2003).

The UTC states that a third party who has the power to direct a trustee 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."[120] Just what is meant by "direct a trustee" is not certain. Perhaps this would not apply to protector powers that do not allow the protector to "direct a trustee," such as a power to amend the trust. Still, a court should require the protector to exercise that power in good faith and give due consideration to the "interests of the beneficiaries."[121]

The good faith and best interest of the beneficiary standard apparently is the base line for the duty of care for a trustee or a protector. The UTC states that a trust term that relieves the trustee of liability is unenforceable to the extent it "relieves the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries."[122] Even an otherwise permissible exculpatory clause can be invalid. According to the UTC: "[A]n exculpatory term drafted or caused to be drafted by the trustee is invalid as an abuse of a fiduciary or confidential relationship unless the trustee proves that the term is fair under the circumstances and that its existence and contents were adequately communicated to the settlor."[123]

It seems fair to assume that a court would hold exculpatory language regarding a protector to a similar standard in order to protect the interests of the beneficiaries. And because the interests of the beneficiaries are defined by the language of the trust and the intent of the settlor, the protector's actions must be consistent with the settlor's intent.[124]

VII. DOES A PROTECTOR HAVE AFFIRMATIVE DUTIES?

Even a protector who is held only to a good faith standard must act consistent with the language and purposes of the trust, the intent of the

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[120] UNIF. TRUST CODE § 808(d) (amended 2010), 7C U.L.A. 428 (2006). Similar language is found in RESTATEMENT (THIRD) OF TRUSTS § 75 (AM. LAW INST. 2007).

[121] UNIF. TRUST CODE § 808(d), 7C U.L.A. 428 (2006).

[122] UNIF. TRUST CODE § 1008(a)(1) (amended 2010), 7C U.L.A. 654 (2006).

[123] *Id.* § 1008(b). Failure to adequately communicate the nature and effect of an exculpatory clause to trust beneficiaries invalidated the clause. *See* Rafert v. Meyer, 859 N.W.2d 332, 340 (Neb. 2015).

[124] Settlor's intent is the "polestar" that guides the administration of the trust. *See In re* Sherman Trust, 179 N.W. 109, 112 (Iowa 1920). The importance of the settlor's intent is discussed in Jeffrey A. Cooper, *Empty Promises; Settlor's Intent, The Uniform Trust Code, and the Future of Trust Investment Law*, 88 B.U. L. REV. 1165 (2008). *But see* Langbein, *supra* note 11, at 1124 (settlor's intent is difficult to ascertain).

settlor, and the interests of the beneficiaries.[125] Does that include a duty to make inquiry about issues relevant to the protector's powers? It would seem so—how else could a protector fulfill the obligation to act in good faith? For example, if the protector has the power to amend the trust in the event the federal tax laws change, surely the protector has a duty to monitor changes in those tax laws. The appointment of the protector would have little meaning if the protector can ignore changes in the federal tax law with impunity. If the protector has the power to alter distributions to beneficiaries, the protector must know what distributions are being made to the beneficiaries and whether changes in beneficiary circumstances justify the protector taking appropriate action. Thus, if a protector is to serve a useful function and carry out the intent of the settlor, monitoring and gathering information are essential protector duties. Therefore, the good faith standard should include the requirement that the protector has an affirmative duty to monitor the trust, the trust law, and the trustee and, additionally, to act when circumstances so demand.

The trustee in turn has a duty to respond to the inquiries from the protector about how the trust is being managed. It is possible that the trustee has an affirmative duty to inform the protector about the trust's management, even in the absence of a protector inquiry, on the theory that the appointment of a protector means that the settlor intended the trustee to provide the protector with information relevant to the powers granted to the protector. The better alternative is for the trust to specifically provide that the trustee is required to provide information to the protector, either when requested by the protector, or, more preferably, the trust should require the trustee to provide regular reports to the protector. The information to be conveyed should be listed in detail in the trust.

Once the protector has knowledge of changing circumstances that interfere with carrying out the intent of the settlor or efficiently and effectively promoting the interests of the beneficiary, a protector, to be acting in good faith, must act. A protector, despite knowing of the need to act or the advantage of acting, who does not act, would not fulfill the duty to "act in good faith." For example, if the protector has the power to change the trust situs, but fails to do so even if the protector is aware that by so doing the trust could avoid state income taxes, the protector's

[125] The Uniform Trust Code does not define "good faith," but surely it would be bad faith to act in a manner inconsistent with the purposes of the trust, the intent of the settlor, or contrary to the interests of the beneficiaries.

inaction would exhibit bad faith because bad faith is the "neglect or refusal to fulfill some duty or . . . contractual obligation."[126]

Assuming the protector has a duty to act, the next question is how extensive is that duty. For example, if the protector has the power to replace the trustee (with or without cause), the protector has a duty to stay informed as to the actions of the trustee by seeking out appropriate and sufficient information and acting accordingly.

Terms such as "appropriate" and "sufficient," of course, are open to interpretation. To date, the extent of a protector's duties has been considered in only one case.[127] A Missouri appeals court was asked to determine the responsibilities of a special needs trust protector who had been granted the power to remove the trustees and name a successor.[128] The appellant contended that the protector had a fiduciary duty to monitor the trustees to ensure that their actions were in the best interest of the beneficiary.[129] The appellant claimed the protector had failed in his duties because he had not taken any action when the trustees inappropriately spent trust funds.[130] The trial court granted the respondent's motion to dismiss.[131] The appeals court reversed and sent the case back for factual determinations.[132] The appeals court noted that because Missouri had no governing statutory or case law, the duties and responsibilities of the protector had to be determined by what the settlor intended.[133] The case was sent back for a trial to determine whether the settlor intended to impose upon the protector a duty to monitor the trustees to make sure they were acting in the best interests of the beneficiary.[134]

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[126] *Bad Faith*, BLACK'S LAW DICTIONARY 139 (6th ed. 1990); "[B]ad faith may be overt or may consist of inaction. . . ." Keller v. Beckenstien, 979 A.2d 1055, 1064 (Conn. App. Ct. 2009) (quoting Landry v. Spitz, 925 A.2d 334 (Conn. App. 2007)).

[127] *See* McLean Irrevocable Tr. v. Davis, 283 S.W.3d 786 (Mo. Ct. App. 2009). *See also* McLean Irrevocable Tr. v. Ponder, 418 S.W.3d 482 (Mo. Ct. App. 2014) (finding no admissible claim that the protector breached his fiduciary duty because there was no evidence of any damage to the trust as a result of the protector's alleged breach).

[128] *See Davis*, 283 S.W.3d at 789.

[129] *See id.* at 790–91.

[130] *See id.* at 790.

[131] *See id.* at 788.

[132] *See id.*

[133] *See id.* at 794.

[134] *See id.* at 795.

The trust stated that the protector's authority was "conferred in a fiduciary capacity," but the protector "shall not be liable for any action taken in good faith."[135] At the second trial, following the reversal of the initial trial court's dismissal, the trial court stated in dicta that the "[p]rotector had no obligation to monitor the activities of the [t]rustee."[136] The trial court dismissed the case because the petitioner failed to prove that the protector's failure to act caused financial harm to the trust.[137] Specifically, the petitioner failed to prove that once the protector was aware of alleged misspending of trust assets, the protector's failure to remove the trustee resulted in further wrongful depletion of the trust assets.[138] The appeals court upheld the trial court's dismissal and concurred that, because the petitioner claimed that the protector's duty to remove the trustee did not arise until December of 1999, the misuse of trust funds prior to that time could not be determined to be harm caused by the protector.[139] Apparently the petitioner did not raise the issue of whether the protector should have monitored the trust expenditures before December of 1999, when the misuse of the trust assets was supposed to have occurred.[140]

The Missouri decisions are disappointing because the facts did not require the courts to determine the nature of a protector's obligations.[141] The first decision held that the "duties and responsibilities" of the protector depend on the intent of the settlor as expressed in the trust,[142] and that intent, in turn, is a factual determination.[143] The trust in question gave the protector "the right to remove any [t]rustee [under the] Agreement," the right to appoint a successor trustee, and the right to resign as protector and appoint a successor protector.[144] The trust said nothing as

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[135] McLean Irrevocable Tr. v. Ponder, 418 S.W.3d 482, 484 (Mo. Ct. App. 2014).

[136] *Id.* at 487.

[137] *See id.* at 488.

[138] *See id.* at 490, 494.

[139] *See id.* at 496.

[140] *See id.* at 494.

[141] *See generally id.*; McLean Irrevocable Tr. v. Davis, 283 S.W.3d 786 (Mo. Ct. App. 2009).

[142] *Davis*, 283 S.W.3d at 795.

[143] *See id.*

[144] *Id.* at 790.

to when removal of the trustee was permitted and nothing about whether the protector had any duty to monitor the trustee.[145]

According to the Missouri court,[146] the starting point for considering the obligations of a protector is analogous to the rule that "the extent of a trustee's duties and powers has depended primarily on the terms of the trust."[147] The Missouri court applied this standard that applies to a trustee when considering the duties and powers of the protector.[148] (Ultimately, that question was not determinative because of the lack of a showing of any financial harm to the beneficiaries as a result of the protector's failure to act.)[149] The court, however, had to ascertain the intent of a settlor whose intent could only be inferred by the grant of authority to the protector in the trust document.[150]

The protector's power to remove the trustee was discretionary; it could be invoked without the protector's having cause to remove the trustee.[151] A discretionary power to remove the trustee makes sense if the settlor wants the protector to be able to remove the trustee without fear of litigation.[152] The protector need not justify the removal, because it was a

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[145] *See id.*

[146] *See id.* at 795.

[147] SCOTT ET AL., *supra* note 97, at 1022.

[148] *See Davis*, 283 S.W.3d at 795.

[149] *See* McLean Irrevocable Tr. v. Ponder, 418 S.W.3d 482, 489 (Mo. Ct. App. 2014).

[150] *See Davis*, 283 S.W.3d at 794.

[151] *See id.* at 790. Though a protector is not a trustee, a protector with an unfettered right to remove a trustee has the ability to dictate what a trustee does because if the trustee ignores the protector's wishes, the protector can discharge the trustee. *See* Gregory S. Alexander, *Trust Protectors: Who Will Watch the Watchmen?*, 27 CARDOZO L. REV. 2807, 2810 (2006). A trustee who fears removal may, in effect, become the agent of the protector to avoid being removed. *See id.* Of course, a protector with complete discretion to remove a trustee needs no justification for the removal, but in reality the protector will remove a trustee for acts considered unacceptable, which the protector can explain to the trustee so that the trustee's behavior will comport with wants of the protector. That degree of power over the trustee by the protector is presumably intended by the settlor as intent is assumed to be consistent with the power granted. A settlor considering granting a protector the right to remove a trustee without cause should consider whether that degree of protector control is desirable. One commentator believes that amount of power in the hands of the protector is usually not what a settlor intends. *See id.*

[152] *See* Sterk, *supra* note 1, at 2768. Litigation can still arise because even unfettered, discretionary power, at least if held by a trustee, is subject to court oversight and acts taken "in bad faith, dishonestly, or with an improper motive" can be overturned. Tomazic v. Rapoport, 977 N.E.2d 1068 (Ohio Ct. App. 2012).

matter of pure discretion.[153] If the protector failed to remove a trustee whose actions injured the beneficiary, the Missouri court implied that the protector might be held liable for acting in bad faith, even though the trust language left it up to the sole discretion of the protector whether to remove a trustee.[154] The trust stated that the protector was a fiduciary and also would not be liable for acts taken in good faith.[155] Based on that language, the court concluded that the protector could be liable for "actions taken in *bad* faith."[156]

In so holding, the Missouri court was looking to the traditional law of trusts that holds that even an unlimited discretionary power granted to a trustee is not beyond judicial review. As stated in the UTC, even "absolute" or "uncontrolled" discretionary powers must be exercised "in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries."[157] Under California statutory law, a trustee with "absolute," "sole," or "uncontrolled" discretion nevertheless "shall not act in bad faith or in disregard of the purposes of the trust."[158] According to the Eleventh Circuit Court of Appeals, no matter how broad the discretion conferred upon the trustee, "he will never be permitted to act dishonestly or in bad faith."[159] A Minnesota court noted that a trustee will not be permitted to act in a manner that is an abuse of discretion, and the motives of the trustee in exercising or not exercising a discretionary power is one factor used to determine whether an abuse has occurred.[160]

Therefore, it would seem to follow that a protector with unfettered discretion to remove a trustee must use that power in good faith. If the protector removes the trustee as an act of bad faith, the protector's action could be reversed and the trustee could be restored, and the protector would be liable for any financial harm suffered by the trust or the beneficiary.[161] As to whether the protector could be liable for failure to

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[153] *See Davis*, 283 S.W.3d at 794.

[154] *See id.*

[155] *See id.*

[156] *Id.* (emphasis in original).

[157] UNIF. TRUST CODE § 814(a) (amended 2010), 7C U.L.A. 620 (2006).

[158] CAL. PROB. CODE § 16081(a).

[159] Ledbetter v. First State Bank & Tr. Co., 85 F.3d 1537, 1544 (11th Cir. 1996).

[160] *See In re* Trusts A & B of Divine, 672 N.W.2d 912, 919–20 (Minn. App. 2001).

[161] The Missouri court distinguished between a duty to the trust and a duty to the beneficiary. *See Davis*, 283 S.W.3d at 794–96. It is not clear what the court saw as the difference because all the benefits of the trust flow to the current and future beneficiaries.

act if the trustee behaved in a manner "against the purpose of the trust,"[162] the Missouri court noted the trust language was not clear as to the duties and responsibilities of the protector. In fact, the language was clear, but incomplete. The protector's authority to remove the trustee was explicit.[163] The trust was silent, however, as to whether the protector had a duty to remove the trustee based on actual knowledge of trustee misfeasance, and whether the protector had a duty to supervise the trustee in order that he might know whether he should remove the trustee.[164]

Although the Missouri court refused to answer the question of whether the protector had a duty to act and a duty to supervise, the answer seems clear: the protector had a duty to act, and therefore a duty to supervise, and a duty to perform those duties in good faith.[165] As stated by a Michigan appeals court, bad faith is the "arbitrary, reckless, indifferent, or intentional disregard of the interests of the person owed a duty."[166] The protector owes a duty of acting in good faith to the settlor and to the beneficiary.[167] The protector owes this duty to the settlor because the settlor appointed the protector to "represent the settlor's interests in making specified trust decisions that the settlor will be unable to make."[168] The protector owes this duty to the beneficiary because the protector presumably was appointed to ensure that the trustee would act in ways that promote the interests of the beneficiaries.[169] Therefore, a

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If the trust is protected from injury, the benefits of that protection ultimately benefit the present or future beneficiaries.

[162] *Id.* at 794.

[163] *See id.* at 794–95.

[164] *See id.* at 795.

[165] *See id.*

[166] *In re* Green Charitable Tr., 431 N.W.2d 492, 499 (Mich. 1988) (quoting Commercial Union Ins. Co. v. Liberty Mutual Ins. Co., 393 N.W.2d 161, 164 (Mich. 1986) for the definition of bad faith as defined in the context of insurance litigation).

[167] The joint loyalty to the settlor and the beneficiary is analogous to the joint loyalty owed by the trustee. *See generally* Sitkoff, *supra* note 70, at 662–63. That the settlor has interests separate from those of the beneficiary, which are judicially enforceable, was established in *Claflin v. Claflin*, 20 N.E. 454, 455 (Mass. 1889).

[168] Sterk, *supra* note 1, at 2763. The right of a settlor to have his or her interests protected years long after death may not represent a wise use of scarce resources, particularly of the assets owned by the trust. *See* Jeffery Evans Stake, *A Brief Comment on Trust Protectors*, 27 CARDOZO L. REV. 2813, 2817 (2006).

[169] *See In re* Eleanor Pierce (Marshall) Stevens Living Trust, 2015 WL 672549, at *14 (Feb. 18, 2015). The court explained that a settlor appoints a protector in part to relieve the beneficiaries of the need to monitor the trustee. *See id.*

protector with actual knowledge of a trustee's acting in a manner inconsistent with the intent of the settlor or the interests of the beneficiaries must act.[170] To do nothing would be an expression of bad faith.[171]

If the settlor appointed a protector who has the power to remove the trustee but no duty to monitor the trustee, the settlor would be counting on the goodwill and personal loyalty of the protector. While that might be conceivable if the settlor appointed a personal friend or trusted relative, no settlor would rationally depend on the "kindness of the protector"[172] of a successor protector or professional protector. A rational settlor would never permit a protector to avoid using his or her powers by willfully avoiding having actual knowledge. Hence, the intent of the settlor must be that the protector take appropriate action to ascertain how the trustee is performing.

Beyond information supplied by the settlor, how active or inquisitive must a protector be in acquiring information relevant to his or her duties? Absent any case law on the point or any statutory guidance, the duties of the trustee must be looked to for guidance; particularly if a protector has the power to remove and replace the trustee. The protector's ability to replace the trustee, and therefore influence the trustee's actions, should subject the protector to the same standard as the trustee—the duty to "exercise such care and skill as a man of ordinary prudence."[173] That level of care, the prudent person, like the "reasonable person" of tort law, is fact specific. The answer as to what is prudent is "it depends." If a beneficiary complains that she suspects that the trustee has a conflict of interest that is causing the trustee to behave adversely to her interests, a prudent protector would investigate. If the protector learns that the corporate trustee has been charged with securities violations, the prudent protector might replace the trustee. But if the trustee's trust stock investments decline in value, but not much more than the general stock market, a prudent protector might do nothing. The facts determine what is

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[170] *See id.* at *15.

[171] *See id.*

[172] *See* TENNESSEE WILLIAMS, A STREETCAR NAMED DESIRE 142 (1947) (paraphrasing "I have always relied on the kindness of strangers.").

[173] RESTATEMENT (SECOND) OF TRUSTS § 174 (AM. LAW INST. 1959); *see also* UNIF. TRUST CODE § 804 (amended 2010), 7C U.L.A. 601 (2006) ("A trustee shall administer the trust as a prudent person would . . . ."). The settlor has the right to define the duty of the protector and so could either impose a higher or lower duty than that of a prudent person. *See* N.Y. Est. Powers & Trust Law § 11-2.3(b)(6) (stating banks and professional investment advisors are held to a standard of a prudent investor with special investment skills).

prudent. But what is not fact dependent is that the protector has a duty to monitor the situation, so that the protector can make a prudent decision as to whether to invoke his or her powers.[174] A protector with special skills or a professional protector with more resources, however, like a trustee, would be required to use them.[175]

VIII. PROTECTORS OF TRUSTS WITH BENEFICIARIES WITH MENTAL DISABILITIES

In addition to settlors desiring to empower a protector with the discretionary power to act in light of possible changing circumstances, another reason has developed for the use of a protector. It is fundamental trust law that the beneficiary of a trust has standing to compel the trustee to faithfully carry out the duties required of a trustee.[176] The right of a beneficiary to enforce the terms of the trust flows from the split of ownership in a trust.[177] The trustee owns the legal interests, and the beneficiary owns the beneficial interests.[178] Because the manner in which the trustee employs its powers over the legal interests may affect the beneficial interests, the beneficiary has the right to sue the trustee and ask the court to preserve and protect the beneficiary's interest by requiring the trustee to use its authority according to the provisions of the trust and in a manner consistent with the best interest of the beneficiaries.[179] Some beneficiaries, however, are not capable of enforcing their rights under a trust due to diminished mental capacity. They may have a mental illness, dementia, an intellectual or developmental disability, or a traumatic brain injury.[180] Whatever the cause, the result is that they are incapable of understanding or enforcing their rights as beneficiaries. If they have a guardian, the guardian has the power to enforce the beneficial trust rights of the incapacitated person, although how vigorously the guardian

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[174] *See generally* LAWRENCE A. FROLIK & MELISSA C. BROWN, ADVISING THE ELDERLY OR DISABLED CLIENT 17-62 to -63 (2d ed. 2014).

[175] Trustees with special skill are held to a higher standard than a person of ordinary prudence. *See* SCOTT ET AL., *supra* note 97, at 1210 (stating trustees with special skills are held to a higher standard than a person of ordinary prudence).

[176] *See* RESTATEMENT (THIRD) OF TRUSTS § 94 (AM. LAW INST. 2011).

[177] *See* RESTATEMENT (THIRD) OF TRUSTS § 94 cmt. b (AM. LAW INST. 2011).

[178] *See* SCOTT ET AL., *supra* note 97, at 38.

[179] *See* RESTATEMENT (THIRD) OF TRUSTS § 94, § 94 cmt. b (2011).

[180] Many trusts for beneficiaries with reduced mental capacity exist for younger beneficiaries who suffer from mental illness, intellectual disabilities, or reduced mental capacity due to traumatic brain injury.

pursues those rights depends on the guardian.[181] If the beneficiary has no guardian—perhaps because the person's mental incapacity does not rise to the level sufficient to warrant the appointment of a guardian—the beneficiary's interest in the trust may go unprotected.

If a trust has a beneficiary with diminished mental capacity, many settlors appoint a protector, who has several duties.[182] First, the protector is expected to monitor the actions of the trustee to see whether those actions are consistent with the trust.[183] Second, the protector is expected to monitor the trust investments.[184] Third, if the trustee has discretion as to trust distributions, the protector is expected to monitor whether that discretion is being deployed in a manner that is best for the beneficiary.[185] Finally, the protector has the duty to monitor the law and the circumstances of the beneficiary, and, if necessary, amend the trust or advise the trustee as to the best course of action in light of changing circumstances.[186]

The duty of the protector to monitor distributions to the beneficiary is often the most important obligation because many trusts that have a beneficiary with impaired mental capacity grant the trustee discretion as to how much to distribute to the beneficiary.[187] The settlor could, of course, have mandated distributions, such as "distribute all the income," but where a beneficiary has impaired mental capacity, mandatory distributions are usually considered unwise.[188] Either the distributions will cause too much or not enough money to come into the hands of the beneficiary.[189] A trust with considerable assets may produce income that exceeds the needs of the beneficiary. Or the current income may not be enough in a year when the beneficiary has greater needs for income, possibly arising out of the medical condition that causes the beneficiary to have reduced capacity.

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[181] The proper nomenclature for a person under a guardianship varies based upon the applicable state law. In this Article, the term "incapacitated person" will be used. If an individual lacks some degree of mental capacity, but is not under a guardian, the term "person with a mental incapacity" will be used.

[182] *See* FROLIK & BROWN, *supra* note 174, at 17-62 to 17-63.

[183] *See id.*

[184] *See id.*

[185] *See id.*

[186] *See id.*

[187] *See id.* at 17-44 to 17-45.

[188] *See id.*

[189] *See id.*

To avoid either "over funding" or "under funding," settlors commonly grant the trustee discretionary distribution powers over both income and principal. The discretion can be unlimited or limited by a standard (typically the support needs of the beneficiary).[190] Whether unlimited or limited, the settlor may be concerned that the trustee might be too parsimonious or too generous in making these discretionary distributions, although this is less likely. Because the beneficiary with reduced capacity may not be capable of protesting the trustee's actions, the settlor appoints a protector with the authority to monitor trust distributions and, if necessary, advise or even sue the trustee as to the appropriateness of the distributions.

Even if a trust does not have a beneficiary with diminished mental capacity at the time of the creation of the trust, the appointment of a protector is still desirable. A settlor who creates a dynasty trust must watch out for the interests of future beneficiaries who may become unable to effectively advocate on their own behalf. Settlors must plan for possible future, unborn beneficiaries of the trust who have reduced mental capacity from birth or experience it at some point in their lives. Even more likely is the possibility that beneficiaries of the trust, who had the mental capability necessary to protect their interests at the inception of the trust, may become demented and lose mental capacity as they age or otherwise experience mental incapacity at some point in their lives. Because trusts last longer and serve beneficiaries over their lifetimes, the likelihood increases that, in the future, unborn beneficiaries will live long enough to become demented. Other very old beneficiaries may not suffer from dementia, but due to chronic illness, reduced hearing and vision, or extreme frailty may not be physically capable of guarding their interests by monitoring the trustee's acts.

Some settlors, who fund an inter vivos, revocable trust and name themselves as trustee as a means of establishing continuity in the management of their assets in the event that they lose mental capacity, usually due to dementia, may also want a protector to oversee the successor trustee who will replace the incapacitated settlor. The protector might be a relative, who the settlor does not want to burden with the duties of being a trustee, but who the settlor believes is capable of monitoring a trustee's choice of investments and distributions to ensure that they best serve the interest of the settlor.

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[190] *See id.* at 17-46.

The growth in the use of the special needs trust (SNT)[191] has also contributed to the increasing appointment of trust protectors.[192] Many beneficiaries with reduced mental capacity are unable to work, have few assets and greatly benefit by receiving public benefits such as Medicaid, Supplemental Nutrition Assistance Program (SNAP – food stamps) and Section 8 housing. However, these programs are need-based. A beneficiary who has too much income or too many assets is ineligible for these public benefits and must spend down the excess income and assets.[193] If the beneficiary has few enough assets and a low enough income to qualify for public benefits, then in most cases it would be unwise for the trust to make too many distributions to the beneficiary and thus make him or her ineligible for public benefits.[194] To avoid this, a settlor will not mandate trust distributions that might cause the beneficiary to become ineligible for public benefits. Instead, the settlor will create a SNT for the beneficiary, which is an unlimited discretionary trust.[195] The trustee is expected to make distributions to the beneficiary in

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[191] The term "special needs trust" is used to describe a trust that leaves distributions to the beneficiary up to the discretion of the trustee. This "unlimited" discretion is designed to ensure that the beneficiary has no way to compel distributions for his or her benefit. If so, the trust assets and income are not available to the beneficiary and so are not considered when the beneficiary applies for public benefits. Such trusts have also been referred to as "supplemental needs trusts." For a discussion of how trust law supports the use of discretionary trusts for beneficiaries with disabilities, see Lawrence A. Frolik, *Discretionary Trusts for a Disabled Beneficiary: A Solution or a Trap for the Unwary*, 46 U. PITT. L. REV. 335 (1985); Lawrence A. Frolik, *Estate Planning for Parents of Mentally Disabled Children*, 40 U. PITT. L. REV. 305 (1979).

[192] For an overview of the why and how of special needs trust, see Katherine B. McCoy, Note, *The Growing Need for Third-Party Special Needs Trusts*, 65 CASE W. RES. L. REV. 461 (2014). Federal law specifically authorizes the use of special needs trusts as a means of preserving eligibility for Medicaid. *See* 42 U.S.C. § 1396p(d)(4).

[193] *See* FROLIK & BROWN, *supra* note 174, at 17-39 to 17-40.

[194] *See id.* at 17-57.

[195] The Restatement defines a discretionary trust as one that "the beneficiary cannot compel the trustee to pay any part of the income or principal." RESTATEMENT (SECOND) OF TRUSTS § 155(1) (AM. LAW INST. 1957). Even a trustee operating under trust language that grants the trustee absolute discretion as to distributions of income and principal is still subject to judicial review. *See, e.g.*, *In re* Estate of Ternansky, 141 N.E.2d 189, 192 (Ohio Ct. App. 1957) ("Where a trustee is given uncontrolled discretion, as here, he acts much as a judicial officer and is duty bound to exercise sound discretion under the circumstances."). For a discussion of the status of discretionary trusts under the UTC, see Alan Newman, *Spendthrift and Discretionary Trusts: Alive and Well Under the Uniform Trust Code*, 40 REAL PROP. PROB. & TR. J. 567 (2005).

such a manner and in such amounts that would supplement rather than supplant available government benefits.[196]

Note that making distributions from a SNT can be tricky; the trustee can make distributions in a manner that will not cause the beneficiary to become ineligible for government benefits.[197] To do so requires the trustee to understand the eligibility standards for a variety of governmental benefits, which vary over time and according to what state the beneficiary lives in. Beyond merely not causing ineligibility, however, the settlor wants the trustee to make distributions in a manner calculated to enrich the beneficiary's quality of life; the settlor expects the trustee to make distributions that are keyed to the particular needs of the beneficiary.[198]

Finally, the settlor desires that the trustee maximize trust distributions consistent with eligibility for government benefits and the financial condition of the trust. The settlor almost certainly has a greater concern for the well-being of the living beneficiary than for the well-being of succeeding beneficiaries, and the settlor does not want the trustee restricting distributions to the beneficiary with the disability in order to preserve trust assets for successor beneficiaries.

Given the expectations of the settlor, selecting the right trustee is no easy task. Family members typically lack the necessary expertise in government benefit eligibility, investment of trust funds, and making distributions that maximize the beneficiary's quality of life.[199] Instead of choosing an individual as trustee, in many cases it would be better to

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[196] *See* Webber Barton Wascher, *Providing for Adult Children with Disabilities in a Traditional Estate Plan: Looking Beyond the Special Needs Trust*, PROB. & PROP., Nov.-Dec. 2013, at 36, 37.

[197] If the beneficiary receives Supplemental Security Income and Medicaid, the trustee could make payments from the trust on behalf of the beneficiary that could include such things as medical care paid directly to a provider for dental or psychiatric services—as these are not covered by Medicaid, the services of a social worker, help with personal hygiene and meal preparation, entertainment such as trips to movies or sporting events, plane tickets to visit family members, and a cable television bill. For an example of the need for proper drafting of a trust to ensure qualification for benefits, see Hobbs v. Zenderman, 579 F.3d 1171, 1186 (9th Cir. 2009).

[198] For a detailed list of what kind of distributions that the settlor might want, see Ruthann P. Lacey & Heather D. Nadler, *Special Needs Trusts*, 46 FAM. L.Q. 247, 260–61 (2012).

[199] *See* Frolik, *Estate Planning for Parents of Mentally Disabled Children*, *supra* note 191, at 345.

choose a professional trustee, such as a bank or trust company.[200] The quality of a professional corporate trustee, however, can vary over time. Today's competent, financially sophisticated corporate trustee may be tomorrow's ineffective, inattentive, or financially imprudent trustee. The solution is the appointment of a protector with the right to remove and replace the trustee with another corporate trustee.

IX. ENSURING THAT THE PROTECTOR ACTS EFFECTIVELY

Appointing a protector is only the first step. The selection of a protector who is likely to faithfully carryout his or her duties, such as monitoring the acts of the trustee, is necessary but not sufficient. Both because the settlor should not depend upon the goodwill of the protector, but also because, given the probable long life of the trust, someday the original protector will very likely have resigned or died. Even if the settlor had named a successor protector, that person or entity may too have resigned or died before the termination of the trust. Providing for effective successor protectors is thus imperative.

In doing so, the settlor has several choices. As discussed, making the protector a fiduciary would make the protector more careful to fulfill his responsibilities, but holding the protector to fiduciary standards will make it difficult to find any individual or entity to serve as protector.[201] A preferable option is to have the trust periodically compensate the protector[202] in order to create a contractual obligation with the protector. The compensation would require a contract with the protector that would spell out the protector's obligations (and limits of obligations) and so avoid having a court determine what constitutes "good faith" and what functions are required by that standard.[203] A protector who has collected

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[200] *But see* Frederick R. Keydel, *Trustee Selection, Succession, and Removal: Ways to Blend Expertise with Family Control*, 23 U. MIAMI HECKERLING INST. ON EST. PLAN. ch. 4, ¶ 413 (1989).

[201] *See* discussion at note 97.

[202] The compensation could be a fixed amount paid by regular intervals in recognition that the protector has ongoing obligations or could be a fixed amount that would be increased each time the protector had to take action. Only paying the protector when he or she acts, would not seem to be advisable as it would encourage the protector to act as a means of getting paid. Moreover, the compensation would have to be at an hourly rate, again encouraging the protector to spend more time that might be justified and so might result in disputes about the amount being paid. Whatever the manner of payment, given the long life of the trusts, the trust should have a formula that raises the compensation to reflect inflation.

[203] This assumes that the trust or state law states that the protector is not a fiduciary.

compensation, also might have a deeper sense of moral obligation to perform. Certainly, a court should be more willing to rule against a protector who accepted compensation but failed to perform as required by a contract. Ideally the contract should detail the remedy for a breach by the protector, such as removal, specific performance, repayment of the compensation, and payment to the beneficiary for any damages caused by the protector's malfeasance.[204]

The settlor must also provide a means to remove and replace the protector. The trust should identify the conditions and standards that would signal when the protector should be removed. The settlor may be satisfied in merely permitting the appropriate court to remove the protector, or the settlor could grant a third party or entity the right to remove the protector—although that raises all the issues of who to appoint, when they can act, and whether they have a duty to act. The more practical solution is to leave protector removal to the courts with the expectation that the beneficiary, or the beneficiary's representative, will alert the court for the need to remove the protector. However, the duties of the protector, and the metrics that measure whether he or she fulfilled them, must be spelled out and apparent to the beneficiary or a court. Even if the protector has discretion to act according to the circumstances at hand, the trust should provide some standard for judging whether the discretion was properly employed. In the end, even a protector needs an overseer because, as the law knows, everyone must be answerable to someone.

X. CONCLUSION

The current uncertainty of the role and responsibilities of a protector is neither desirable nor sustainable. States need to enact statutes that authorize a trust protector, describe the powers that a settlor can empower the protector with, and delineate the legal duties of the protector, both to whom the duties are owed and the standard of care. Protectors are here to stay. It is time for the law to catch up with reality; better late than never.

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[204] At least one commentator contends that the relationship between the settlor and the trustee is based on contract law rather than being a fiduciary relationship. If so, it does not require a formal contract to invoke traditional contract remedies. *See* John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 627 (1995) ("Trusts are contracts.").