

The Case Against the Trust Protector

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There can be little question about the surge in popularity of the trust protector in recent years. And rightfully so, because the inclusion of a protector in a trust can often avoid the necessity for expensive and time-consuming court proceedings, generally allow for greater flexibility to accommodate changes in beneficiary circumstances, and oversee the actions of the trustee. Unfortunately, on balance, the popularity of protectors has been more in the form of a greater number of professional discussions, lectures, and commentary on the subject than in their actual use. I believe that the reluctance of practitioners to employ the trust protector in more of their trusts may well be on account of the confusion surrounding the position, and in my opinion, the confusion, in turn, stems in large part from two sources: the handful of speculative and contradictory commentary on the subject,¹ and the inconsistent manner in which the position is regarded in the several state statutes which reference the term.² That is to say, if the handful of commentary is itself uncertain and repeatedly refers to the total absence of United States case law on the subject of trust protectors, thereby generally discouraging their use, and if the relevant state statutes themselves are largely inconsistent and contradictory, how can practitioners draw adequately solid conclusions about how and to what extent they might use a protector in their trusts?

This discussion intends to point out that, despite the confusion and disparate opinions that prevail based essentially on repeated assertions that there is no United States law on the subject, there is, in fact, a huge body of applicable precedent and treatises on which a practitioner and a court may rely, that the position/role of the protector is not a new and novel one, and that the case against the trust protector is hasty, poorly thought out, and unsupportable. If the debaters would only consider the protector's role in the light of the corresponding role of the trust advisor, much, if not the whole of the argument, could be diffused. In that

¹ See, e.g., Gregory S. Alexander, *Trust Protectors: Who Will Watch the Watchmen?*, 27 CARDOZO L. REV. 2807 (2006); Richard C. Ausness, *The Role of Trust Protectors in American Trust Law*, 45 REAL PROP. EST. & TR. J. 319 (2010); Stewart E. Sterk, *Trust Protectors, Agency Costs, and Fiduciary Duty*, 27 CARDOZO L. REV. 2761 (2006).

² Compare IDAHO CODE ANN. § 15-7-501(1)(g) (2011) with ALASKA STAT. § 13.36.370(d) (2011).

regard, and in the spirit of Aristotle, if we are to intelligently analyze the issue, “First, we must define [our] terms.”³

DEFINING THE TERMS “TRUST PROTECTOR” AND “TRUST ADVISOR”

A trust protector has been defined as the holder of one or more powers capable of affecting what the trustees are to do with the trust property.⁴ A trust *advisor* has been defined in almost the same terms: “A trust advisor is a person who has power to control a trustee in the exercise of some or all of his powers.”⁵ A direct comparison of the two definitions in light of the basic concept of trust law forces the conclusion that the two terms may be used interchangeably, and to my knowledge, no commentator has provided support which rejected or criticized this conclusion.⁶

If, in fact, these terms *can* be used interchangeably, would it not follow that the law, commentary, and treatises interpreting one would apply equally to the other? Would anyone argue that precedent relating to a trust “settlor” would not be equally applicable to a trust “donor” or “grantor”? What is it about the word, “protector,” that throws everyone so far from the mark, when a simple analysis of the *role* without reference to the name-tag reveals so much? Further, it is significant that a number of state statutes themselves *equate* the position of protector and advisor as having the same meaning or being interchangeable.⁷

Thus, if we accept this proposition, and even if we do not, but we accept (as most commentators have) that the concept behind advisor and protector makes them virtual siblings, then we will be able to satisfactorily address the central questions that have been plaguing the estate planning bar for years, including whether the protector is a fiduciary, and, if so, to whom, if anyone, does the protector owe a duty, and whether such duty can simply be drafted away.

The foregoing are probably the most hotly disputed issues within the United States estate planning bar’s conception of the trust protector.

³ ARISTOTLE, ON INTERPRETATION 1 (E.M. Edghill trans., Kessinger Publ’g Reprt. 2004) (c. 350 B.C.E.).

⁴ Donovan W. M. Waters, *The Protector: New Wine in Old Bottles?*, in 63 TRENDS IN CONTEMPORARY TRUST LAW 64 (A.J. Oakley ed., Clarendon Press 1996).

⁵ Note, *Trust Advisors*, 78 HARV. L. REV. 1230, 1230 (1965).

⁶ *But cf.* Philip J. Ruce, *The Trustee and the Trust Protector: A Question of Fiduciary Power. Should a Protector Be Held to a Fiduciary Standard?*, 59 DRAKE L. REV. 67, 75 (2010) (making the unsupportable statement that “a trust advisor’s influence is limited to the trust’s investments and the analysis that goes into making investment decisions.”).

⁷ See, for example, TENN. CODE ANN. § 35-16-108(b) (2011) stating, “For purposes of [this subsection], the term ‘advisor’ includes a trust ‘protector’ . . .” and N.H. REV. STAT. ANN. § 564-B:1-103 (2011) which defines trust advisor and trust protector in nearly identical terms.

That is to say, the question is whether the protector is a fiduciary, and if so, whether the terms of the trust can effectively dispense with the protector's fiduciary duty, or to put it another way, whether the trust can effectively declare that the protector is not a fiduciary, meaning that the duty was not "drafted away" because there was no duty in the first place. But if there is a fiduciary duty from the protector, the question of to whom is the duty owed, as raised by a few commentators,⁸ is to some legal experts, too obvious to require comment. It would seem quite clear that, with the exception of the case where the protector's powers are personal, the protector owes a fiduciary duty *to the beneficiaries*.⁹ That is, if we agree that the protector is equivalent to a trust advisor, it is well settled that the typical trust advisor's duty is to the purposes of the trust and the interests of the beneficiaries.¹⁰ Nevertheless, some commentators have offered the confusing proposition that the protector/advisor may owe a duty to the settlor, to the trustee, to the beneficiaries, or any combination of these, based entirely on the "agency theory" of trust law.¹¹

This theory suggests casting aside the several hundred year old "trust relationship" theory on the basis that the trustee is the *agent* of the settlor, and if we accept that theory, it must follow that the protector is some sort of sub-agent, who, if he has any fiduciary duty at all, owes such duty to the settlor and/or the trustee.¹² This proposal places the protector in a subservient position to the trustee, which totally contradicts the intended role of the protector who typically oversees the actions of the trustee.¹³ And as far as the trustee being considered an agent of the settlor, though an agent's duty to the principal is acknowledged to be a fiduciary one under the principal/agent relationship, it is well-settled in trust law that the trustee is *not* an agent of the settlor and that the trustee's fiduciary duties run to the beneficiaries and no one else. If the protector is treated as owing a duty to the trustee, or to the trust itself, or to the settlor, (under the agency theory and not under accepted theory of trust law) rather than to the beneficiaries, then in cases where the beneficiaries are damaged by a protector's breach of fiduciary duty, they would have no recourse, as no duty to them was breached, if there were a duty at all. Suffice it to say that such a result would be repugnant to the very concept and premise of the trust arrangement. Fortunately, the proponents of the agency theory are liter-

⁸ See Sterk, *supra* note 1.

⁹ VA AUSTIN W. SCOTT ET AL., SCOTT AND ASCHER ON TRUSTS § 185, at 566 (5th ed. 2007) [hereinafter SCOTT].

¹⁰ See *id.*

¹¹ Ausness, *supra* note 1, at 340; Sterk, *supra* note 1, at 2762.

¹² Ausness, *supra* note 1, at 340; Sterk, *supra* note 1, at 2762.

¹³ See *id.*

ally a small handful, and none of the recognized treatises on trusts gives that theory even the slightest credit.¹⁴ Accordingly, it would appear that arguments based on a theory inconsistent with and in some essential respects at complete odds with the centuries-old, accepted precepts of trust law, must be viewed in that dim light.

FIDUCIARY DUTY

The notion that a trustee could be relieved of all fiduciary duty to the beneficiaries is, as noted, contradictory to the very concept of the trust, and as one English justice stated,

. . .there is an irreducible core of obligations owed by the trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust. If the beneficiaries have no rights enforceable against the trustees, there are no trusts.¹⁵

But perhaps that, in light of this discussion, is the easy part. Can't another party, one who has been granted one or more powers over the trust, some of which may overlap or even trump those of a trustee, hold one or more powers in a *non*-fiduciary capacity? The answer is clearly yes. For instance, while a trustee may have the power to distribute principal among the beneficiaries (a fiduciary power of appointment), so at the same time an individual may hold the same power but without any duty to consider the needs of the beneficiaries or any other external factor. This is regarded as a personal power, and the powerholder may exercise or not exercise the power on a whim, or under misinformation, or even in retaliation, so long as he exercises the power according to its terms and so long as he does not commit a fraud on the power.¹⁶ There is also the situation where the foregoing power may be granted to an individual who may benefit himself through an exercise of that power, referred to as a general power of appointment.¹⁷ In both of these examples, the powers are said to be "personal," and unless the language granting the power, or the circumstances surrounding the grant (see illustration below) provides otherwise, there is no fiduciary duty connected with its exercise.

One of the vital elements governing the question of whether a power is a fiduciary or a personal power is the intention of the settlor/

¹⁴ See GEORGE GLEASON BOGERT, GEORGE TAYLOR BOGERT, & AMY MORRIS HESS, *THE LAW OF TRUSTS & TRUSTEES* § 15 (3d ed. 2000 & Supp. 2010); SCOTT, *supra* note 9, § 8, at 94-95.

¹⁵ *Armitage v. Nurse* (1998) Ch. 241 (C.A.).

¹⁶ See Alexander A. Bove, Jr., *Using the Power of Appointment to Protect Assets, More Power Than You Ever Imagined*, 36 ACTEC J. 333, 340 (2010).

¹⁷ *Id.*

donor of the power—in our case, the settlor. If it is clear by the facts and circumstances that a settlor intended that the power is to be held in a fiduciary capacity, then it would be so held, even though such intention may not be expressly stated in the trust instrument.¹⁸ For instance, say that upon establishing a trust, the settlor gives his attorney the power to add or delete beneficiaries without restriction, the settlor believing that the attorney would then have the power to “adjust” the trust benefits in accordance with major changes in the settlor’s extended family, according to the attorney’s best judgment and her understanding of the settlor’s intentions. There is no mention in the trust of any duty on the part of the settlor’s attorney to consider any factor or adhere to any standard in exercising her power. Since there are no written restrictions or guidelines on the exercise of the power, would it be appropriate for the attorney to add her children as beneficiaries of the trust? Would the answer be different if the settlor gave his brother the same power and the brother deleted the settlor’s children and added his own? And would the conclusion be different in either or both cases, if, instead of not mentioning any duty on the part of the powerholder, the trust expressly stated, “The (powerholder) shall not be deemed a fiduciary hereunder?”

It may be noted here that, as a general rule, if the powerholder is also a beneficiary or a person who would likely be an object of the settlor’s estate, and there is no language or facts to dictate otherwise, then to the extent the power may be exercised to benefit the powerholder, there is likely to be a presumption (though rebuttable) that the power is a personal power.¹⁹ Further to this point, SCOTT ON TRUSTS, in discussing the question of whether the powerholder is a fiduciary, states, “In determining this question the relationship of the holder of the power to the trust, as well as the nature of the power, is an important consideration.”²⁰

THE PROTECTOR: A FIDUCIARY? A NON-FIDUCIARY? OR BOTH?

So how does all this relate to the protector? The protector is invariably granted one or more powers under a trust, and the pivotal questions are the following: first, whether the protector is a fiduciary with respect to the exercise of any or all of these powers, because if he is not, then the power(s) would have to be personal; and second, if the protec-

¹⁸ See SCOTT, *supra* note 9, § 185, at 565.

¹⁹ *Id.*; see also *Rawson Trust Co. Ltd. v. Perlman*, No. 194-1989 (Bah. Sup. Ct., Apr. 25, 1990) (holding that protectors of a trust were given the power to protect their own interests due to the fact that they were simultaneously functioning as protectors and beneficiaries and they owed no explicit duties as fiduciaries).

²⁰ SCOTT, *supra* note 9, § 185, at 563-64.

tor is a fiduciary, whether he can be relieved of all fiduciary duty simply by so stating in the trust.

In considering whether the protector is a fiduciary, this question may be best answered by asking another question: what was the settlor's intent and purpose in naming the protector and granting the specific powers? If the answer is to give the protector the enforceable power to carry out certain objectives consistent with and in furtherance of the settlor's intent and the purposes of the trust, then one must conclude that the settlor expected that person to use his best judgment and exercise the powers in "good faith with regard to the purposes of the trust and the interests of the beneficiaries."²¹ On the other hand, if the answer is clearly no, that the settlor intended the power(s) to be exercised at the sole personal discretion of the protector without regard to the settlor's intent, the interests of the beneficiaries, or the purposes of the trust, then the power will be a personal one.

But what if the powers are clearly intended by the settlor to be fiduciary, but the drafting attorney completely on his own includes language in the trust expressly stating, "The protector shall not be deemed to be a fiduciary hereunder." Can the duties and responsibilities of a fiduciary be so simply drafted away? Or legislated away? According to many commentators and a number of state statutes, the answer seems to be yes,²² despite the acknowledgment in both the Restatement Third of Trusts²³ and the Uniform Trust Code²⁴ that one with such powers who is not a beneficiary *will be presumed to be a fiduciary*, despite the damaging effect this could have on the administration of the trust. That is to say, while fiduciary powers are enforceable by the beneficiaries, by a court, or even by the trustee, personal powers are not, regardless of the powerholder's basis for exercising it or for refusing to exercise it, so long as there is no fraud on the power.²⁵

With that in mind, if we as advisors follow the unfortunate trend to exculpate protectors from liability, aren't we arbitrarily assuming that a settlor who names a protector to see to the smooth administration of the trust and the flexibility to adjust its terms to changing situations, wants to take away the beneficiary's right to seek damages or other recourse for a breach of the protector's fiduciary duty? Is that reasonable? Don't we have an ethical responsibility to explain to the settlor that

²¹ UNIF. TRUST CODE § 808(d) (2005).

²² See, e.g., IDAHO CODE ANN. § 15-7-501(4) (2011); S.D. CODIFIED LAWS § 55-1B-4 (2011); ESTATE PLANNING STRATEGIES AFTER ESTATE TAX REFORM 135-136, ¶ 10080.05, § E (Charles D. Fox IV & Thomas W. Abendroth eds., 2001) [hereinafter FOX & ABENDROTH].

²³ RESTATEMENT (THIRD) OF TRUSTS, § 75 (2003).

²⁴ See SCOTT, *supra* note 9, § 185, at 565.

²⁵ See Bove, *supra* note 16, at 340.

where the protector is expressly exculpated from liability, the beneficiaries are at the mercy of the protector regardless of how negatively the protector's decision to exercise or not to exercise such powers, or even the protector's decision not to decide, impacts on them? What settlor would agree to that, and why would an attorney or other advisor to a settlor even recommend such an arrangement? To make matters worse, several of the state statutes tacitly encourage the abolishment of any liability by applying the presumption that a protector shall not have personal liability "unless otherwise provided" in the trust instrument.²⁶

In other words, the default position of these statutes is that a protector has no fiduciary duty. Then a few other state statutes provide just the opposite—that a protector *is* a fiduciary "unless the governing instrument provides otherwise."²⁷ Still others provide that the trust protector is a fiduciary and must act in the best interests of the beneficiaries.²⁸ One has to be puzzled by the dramatic and sometimes opposing positions in the law of these so-called "domestic asset protection trust" (DAPT) states and their readiness to disregard the huge body of fiduciary law we have in the United States, which is based on fiduciary relationships. Despite this, almost all of the DAPT states allow a protector's fiduciary duty and liability to be drafted away simply by having the trust state that he has none, and unfortunately, many drafting attorneys seemed inclined to accept that offer. Is it their duty to protect the protector or the beneficiaries? In my opinion, there is little question that if the "drafted-away" duty is breached by a disinterested protector who is deemed to be a fiduciary and a claim is made, the particular state law exculpating the protector would have to be struck down by a court. It is little, if at all, different from providing that the trustee's fiduciary duty can be drafted away. How did we get to this point of creating a dutiless fiduciary?

It may help us understand how we have been led down this dangerous path if we recall the reason for this wholesale exculpation of protectors. As noted earlier in this discussion, most commentators and at least one court attribute the origin of protectors to the offshore trust.²⁹ This is in part correct. As demonstrated at the outset, however, such attribution is not at all correct in terms of the concept of the position and the role it plays, but rather only in the nametag. The term "protector" was

²⁶ See, e.g., ALASKA STAT. § 13.36.370(d) (2011); ARIZ. REV. STAT. ANN. § 14-10818 (2011).

²⁷ See, e.g., IDAHO CODE ANN. § 15-7-501(4) (2011); S.D. CODIFIED LAWS § 55-1B-4 (2011).

²⁸ See, e.g., MICH. COMP. LAWS § 700.7809(1)(b) (2011); N.H. REV. STAT. ANN. § 564-B:12-1202 (2011).

²⁹ See Sterk, *supra* note 1, at 2764.

virtually unknown in the field of U.S. trusts prior to its introduction from offshore. But instead of recognizing it as nothing more than a trust advisor (we could easily give it still another name, like trust enforcer, trust guardian, trust overseer, etc.), it seemed that the entire U.S. legal community regarded it as something new and unique, and that we should accept it as offered, such as it was—and we have. Perhaps one reason the legal community so readily accepted it was the broader array of powers given a protector compared to those typically given a trust advisor. In any event the position has been mistakenly viewed by most as a new role in trust administration.

In that regard, and surprising as it may be, we also readily accepted the concept of total exculpation from liability for a position that, given broad powers, could cause a total rewriting of a trust or a total restructuring of its dispositive provisions by a disinterested third party, and as noted above, many states actually enacted this reckless position into law. (It is interesting to note that none of the state statutes that allow a protector's fiduciary duty to be drafted away conditions that option on the extent of the protector's powers.)³⁰

The reason behind this obsession with exculpation from liability was and is the product of the drafters and promoters of the offshore trusts (i.e., the offshore trustees in virtually every case) and the same parties' influence on legislation, with the primary objective being the attraction of offshore funds (read, from the United States) to the foreign jurisdiction. Since the corporate trustees of such trusts would be unlikely to do something as drastic as to add or delete a beneficiary, or to change the trust situs, or to decant the trust to a totally new trust, for fear of exposure to liability, the idea of a "protector" who could do all of this while exculpating the trustee was quite acceptable if not preferable to the trustee. At the same time, the arrangement gave the typical settlor a certain degree of comfort when viewed in the light of offering an "escape hatch" to a purely discretionary irrevocable trust managed by a trustee thousands of miles away. But who would be the protector?

In the case of offshore protection trusts, the protector would typically be an attorney or other professional outside the jurisdiction of United States courts. To induce such advisors to act, the trust language and local statutes would provide that the protector would not be deemed a fiduciary (most offshore statutes allowed the trust language to override this, but in fact most such trusts did not do so), and therefore, there would be no liability for the protector for acting or refusing to act, and no liability on the part of the trustee for complying with the protector's instructions. Take, for instance, the Cook Islands statute: "Subject

³⁰ See, e.g., IDAHO CODE ANN. § 15-7-501(4) (2011); S.D. CODIFIED LAWS § 55-1B-4 (2011).

to the trust instrument, a protector of a trust shall not be held liable as a fiduciary in relation to any act or omission by the protector in performing his obligations under the trust instrument.”³¹ Thus originated the powerful position of protector with no exposure to liability, which we quickly imported as-is and began to employ, assuming, with no basis in fiduciary law, that if it worked in the offshore trusts and statutes, it would work for us. That is exactly how we got to this point.

In fact, however, as the offshore cases began to be heard on various issues turning on whether the protector is a fiduciary, the question became clearer,³² and in every reported case where there was a third party protector, such position was held without exception to be a fiduciary one with the attendant duties and responsibilities.³³ Unfortunately, not a single one of these cases was a United States case, but only because up to now, no such case has happened to arise. Finally, in 2009 a Missouri court was presented with a case against a trust protector,³⁴ who was designated a fiduciary and who had the power to remove and replace the trustee, but who nevertheless allegedly stood by and watched the trustee totally dissipate the trust funds over a period of less than 24 months, which funds were intended to provide for the beneficiary during his anticipated life expectancy of over 25 years. The successor trustee sued the protector for breach of duty for failing to remove the trustee and for the resulting damages. The protector argued that he had no duty to monitor the trustee, and thus, no liability for damages. The question of the duty to monitor was set aside, as evidence was offered that the protector had actual knowledge of the trustee’s expenditures. The problems for the plaintiff trustee, nevertheless, were numerous. First, it was repeatedly noted by both the district court and the court of appeals that there is no Missouri law or reported cases establishing any law on trust protectors, so it was unclear as to the extent of the role or just what duties were owed, and to whom. Next, it was noted that no evidence was offered to show specific damages resulting proximately from the protector’s failure to remove the trustee. As result, the district court directed a verdict for the protector. The case is on appeal.

As noted earlier, fiduciary duties are enforceable by the beneficiaries, or in some cases (e.g., where there is an advisor or protector who

³¹ International Trusts Amendment 1995-96, No. 25, Part IV, § 20(5) (1996) (Cook Islands). There is also language indicating that a trust protector shall not be accountable or regarded as a trustee. *Id.* § 20(4).

³² *See, e.g.,* Von Knieriem v. Berm. Trust Co., [1994] Bda. L.R. 50 (Berm. Sup. Ct. 1994); *In re* The Z Trust, 1997 CILR 248 (Cayman Is. Grand Ct. 1997); Rawcliffe v. Steele, Manx L. Rep. 1993-95 102 426 (High Ct., Isle of Man 1995).

³³ *Rawcliffe*, Manx L. Rep. 1993-95 102 426.

³⁴ Robert T. McLean Irrevocable Trust v. Patrick Davis, P.C., 283 S.W.3d 786, 788 (Mo. Ct. App. 2009).

is a fiduciary) by the trustee as well, if the beneficiaries do not act.³⁵ Personal (non-general) powers, on the other hand, are *not* enforceable.³⁶ What it appears we could have, however, is a *fiduciary* power that is directed by the terms of the trust to be non-fiduciary and therefore, personal. Although commentators have explored, if not proposed, that a disinterested protector could hold personal (non-fiduciary) powers, unfortunately, none has considered the consequences of such a situation from the beneficiaries' standpoint. This astonishing oversight could not be more serious.

For instance, say that a settlor establishes an irrevocable, totally discretionary trust in his home state of Illinois, naming a close friend as protector of the trust and giving the protector the power to remove and replace trustees, change the trust situs and governing law, add or delete beneficiaries, and consent to each beneficiary's exercise of a power of appointment. The trust provides that upon reaching the age of 30, each beneficiary has the power to appoint his share to his issue (ignore GST implications), and assume the trust is funded with substantial assets. There is no power to remove the protector but the protector can resign and appoint his successor. The trust contains language expressly stating (1) that the protector is not a fiduciary, (2) that the protector shall not be liable in any way for acting or failing to act except for bad faith and willful misconduct, and (3) that the trustee shall be held harmless for following any direction given it by the protector. It is very important to note here that there is nothing unusual in the foregoing scenario. In fact, the protector is often given even further powers, such as the power to amend the trust, change the dispositive provisions, and terminate the trust.³⁷

Sometime after the trust had been operative for a few years, the protector became dissatisfied with the corporate trustee, whom the protector had also used for his own trust. The dissatisfaction was the result of the protector's personal viewpoint and not related to poor performance or breach of duty by the existing trustee. Nevertheless, the protector removed the existing trustee on both trusts (his own and the settlor's), and appointed another corporate trustee with whom he had a better relationship. In addition, it so happened that the protector's brother was on the board of the new corporate trustee. The settlor was quite upset, as he was very satisfied with the original trustee. Further-

³⁵ See SCOTT, *supra* note 9, § 185, at 565.

³⁶ RESTATEMENT (SECOND) OF PROPERTY § 13.6(1) (1986); David Hayton, *English Fiduciary Standards*, 32 VAND. J. TRANSNAT'L L. 555, 581 (1999). *But cf.* RESTATEMENT (SECOND) OF PROPERTY § 13.6(2) (1986) (Personal powers that are general powers, however, may in certain cases, be enforceable by creditors of the powerholder).

³⁷ See, e.g., FOX & ABENDROTH, *supra* note 22, at 136, ¶ 10080.06, § C.

more, there were some, but reasonable, expenses associated with the change of trustees.

The following year, the protector took an early retirement and moved from Illinois to Delaware. Deciding that it would be far more convenient for him to have the trust and trustee nearby, he again removed the trustee, and for successor trustee, he appointed a Delaware attorney, with whom he had become friendly. At the same time he exercised his power to change the trust situs and governing law to Delaware, while the settlor and his family (the beneficiaries) remained in Illinois.

Obviously, the settlor and his family were disturbed by all this, but before they could determine whether or not they had the right to take any action, the settlor passed away. After about 18 months, the settlor's estate was settled, and more assets poured over into the trust from the settlor's Will. One of the children, now well past 30, on the advice of counsel, decided to exercise her power of appointment to appoint one half of her share in favor of her daughter. It was acknowledged that the exercise of power would save thousands in taxes. Unfortunately, the protector never was fond of the daughter and refused to consent the exercise of the power. When the daughter's attorney objected to the protector's unreasonable behavior, the protector responded that he was not a fiduciary and therefore had no duty to the daughter.

Granted, perhaps some or all of these situations may be unlikely to occur, but they are far from impossible, and worse, under the terms of the trust, it is not clear that any or all are subject to recourse.³⁸ Furthermore, one could conceive an almost unlimited number of similar conundrums, many much worse than the examples above, that would do little more than incur expenses, anger the beneficiaries, and be unproductive to the purposes of the trust. This, of course, certainly does not mean that any or all protectors would act in such a way. It merely illustrates the danger of total exculpation and the fact that few, if any, of the proponents of the non-fiduciary, fully exculpated protector seem to have considered the possible consequences. In any event, the real question is what recourse the settlor or the family beneficiaries have in any of these situations. Actually, the settlor, as settlor, probably has none, because once the trust is formed and becomes irrevocable, the settlor becomes a non-party. (If the settlor were also a beneficiary, he would have standing.) In any case, if we agree that because of the exculpatory language

³⁸ Of course, the trust might have been drafted so that the settlor or the beneficiaries would have the power to remove and replace the protector, but such a provision could be quite inadvisable for tax purposes if the protector has broad powers. Thus, the price for the power to remove and replace might have to be a drastic curtailment of the protector's powers, which in turn sacrifices the desired flexibility provided by the trust protector.

used by the settlor “himself,” declaring that the protector is not a fiduciary, that all of the protector’s powers are purely personal, and that he shall not be liable for any action taken or not taken, what recourse could there be?

Certainly, in the above example none of the protector’s actions could be considered a fraud on a power as each was clearly within the authority granted to him by the settlor, and the protector did not personally profit by any of them. The fact that all of the actions were dictated by his personal feelings and not for the benefit of the trust has absolutely no bearing in his liability—after all, that is the very reason some advisors use and commentators consider the exculpatory language in question. And as for the needless expenses associated with some of the protector’s acts, no doubt it would be presumed that since the settlor gave the protector these powers, the settlor must have anticipated there would be reasonable expenses associated with their exercise. Well then, could we blame the drafting attorney for including language the settlor did not intend or understand? Or could we argue that despite the specific language, we really intended that there be some fiduciary duty under basic trust law? Are we now embarrassing ourselves with such speculative, inconsistent arguments?

But what about the case where the settlor wants to give certain powers to her protector but deliberately wishes to provide that the protector shall *not* be liable “as a fiduciary” for his actions or inactions? Doesn’t the settlor have a right to do this? First we must remember that the particular power must be either personal or fiduciary. If it is personal, the settlor would not have to exculpate the protector at all, as no liability attaches to a personal power except where there is a fraud on the power. If it is fiduciary, then it certainly may be possible to *reduce* the liability of the protector, such as limiting liability to cases of recklessness, fraud, and willful misconduct, but not to totally eliminate it. Such a provision would generally be stricken as being against public policy.³⁹

Another telling view to consider in the question of personal versus fiduciary power is what the effect would be if the trust stated the settlor’s purpose or intent in granting the power. For instance, say the protector is granted the typical power to remove and replace the trustee, but the power is to be non-fiduciary (assuming that is possible). Would you feel comfortable stating the following in the relevant trust provision?

³⁹ See N.Y. EST. POWERS & TRUSTS LAW § 11-1.7 (McKinney 2011); see also SCOTT, *supra* note 9, § 222.3, at 391.

It is the settlor's intention that in exercising this power the protector shall not be deemed a fiduciary, shall not be required to monitor the trustee's performance, and shall not be bound by or required to consider any particular standards of trustee performance. He shall not be required to act upon notice that a trustee is in breach of its fiduciary duty, and in the event of appointment of a successor trustee, the protector shall not be required to consider whether any such successor trustee has any experience in or knowledge of trust administration, or is a suitable person or entity to act as trustee. The protector may exercise or refrain from exercising such power in a capricious or whimsical manner at his total personal discretion, without liability therefor.

Note that the forgoing provision is quite consistent with the legal basis of personal powers.

Contrast this with the case, again, where the settlor wants to limit the protector's liability, but in this case does not want to place the trust and the beneficiaries at unreasonable and unnecessary risk. In such a situation, we (and the settlor) might feel more comfortable with something like this:

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

I readily acknowledge that the proposed language in the first illustration may appear extreme, but isn't that what we intend when we make the power personal and attempt to totally exculpate the protector from liability? Unfortunately, we simply can't have it both ways, so that a protector who removes or replaces a trustee, for instance, with a totally unsuitable successor who proceeds to waste trust assets, has no liability for the loss.

It should be noted once again that it is possible to have a protector with personal powers, as illustrated in one case in the Bahamas, where the settlor gave the protector, among other things, the power to consent to distributions to his four children and one of these children ended up as sole protector. In a dispute over whether the power was a fiduciary one, the court held that under the circumstances, the settlor clearly understood the consequences and intended for that child to have the

power as a personal one and one not subject to any fiduciary duty.⁴⁰ Therefore, the child's exercise of the power for her personal benefit carried no liability, because personal powers may be exercised or not, for any reason or for no reason (excepting fraud) with no liability to the powerholder.⁴¹

It is also possible to have mixed powers—some personal and some fiduciary, again depending on the circumstances. For instance, where a protector/beneficiary has the power to direct distributions and also the power to remove and replace the trustee, unless otherwise stated in the trust, the former power would likely be a personal one, and the latter power would be a fiduciary one. Thus, the protector/beneficiary would be held to a fiduciary standard in removing and replacing the trustee,⁴² but probably not as to the direction of distributions.⁴³

But what if the trust specifically states that both of the above powers are personal and that the protector shall not be a fiduciary? Can the power to remove and replace the trustee be a personal power? Would it be reasonable to assume the settlor wished to give someone the totally arbitrary and unrestricted power to decide who would manage the trust, even to the extent of appointing someone who was completely unsuited for the position? Would our response to this suggestion differ if instead of trust “protector,” we gave the power to a trust “advisor”? Perhaps it would, because of the regard we have as well as the extensive case law relating to that position, consistently holding that the advisor's role is presumably a fiduciary one and liability will result if a breach occurs.⁴⁴ The conflict we face is that, as proposed at the onset of this discussion, by all reasonable definition and analysis the positions happen to be interchangeable – it is only the extent of the powers that tends to vary.

So, the underlying question to all of this is, why would a settlor grant to a third party (i.e., a protector) extensive power over her trust, perhaps so extensive as to allow material changes to the dispositive and administrative provisions, without providing any recourse to herself (if a beneficiary), or to any other trust beneficiaries in the event of damages resulting from the protector's actions or inactions⁴⁵ or behavior inconsistent with the purposes of the trust or the interests of the beneficiaries?

⁴⁰ *Rawson Trust Co. Ltd. v. Perlman*, No. 194-1989 (Bah. Sup. Ct., Apr. 25, 1990).

⁴¹ See generally IDAHO CODE ANN. § 15-7-501(4) (2011); S.D. CODIFIED LAWS § 55-1B-4 (2011); FOX & ABENDROTH, *supra* note 22, at 135-136 (noting that duties and responsibilities of a fiduciary can be simply drafted or legislated away).

⁴² *Von Knieriem v. Berm. Trust Co.*, [1994] Bda. L.R. 50 (Berm. Sup. Ct. 1994).

⁴³ *Rawson Trust Co.*, No. 194-1989, at 25.

⁴⁴ See Ruce, *supra* note 6, at 79-80.

⁴⁵ See *Robert T. McLean Irrevocable Trust v. Patrick Davis, P.C.*, 283 S.W.3d 786 (Mo. Ct. App. 2009).

The obvious answer is she would not, nor should the law allow it. As attorneys, jurists, legislators, and other advisors, we must reconsider our hastily formed and unduly influenced positions and recognize once and for all that a third party protector is presumed to be and generally should be a fiduciary, bearing all the duties and liabilities associated with the position, unless and to the extent the *facts and circumstances*, and not solely the trust instrument, dictate a different conclusion. Proceeding to treat the protector as a fiduciary and finally recognizing that the trust protector is the equivalent of a trust advisor⁴⁶ will answer most, if not all the persistent questions (and speculations) that constantly seem to puzzle us, such as whether the protector is entitled to consideration, to hire agents, or to initiate actions on behalf of the trust and beneficiaries, as well as that needlessly elusive question of to whom the protector owes a duty.

⁴⁶ See *supra* notes 4, 5, and 7, supporting the virtually identical definition of the two terms.