What Wealth Management Professionals, Trust Officers and Estate Planners Need to Know About Trust Protectors

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I. Introduction.

Financial planners and others who provide professional investment advice work closely with their clients, but they may also come into contact with host of others, such as lawyers, accountants, tax consultants, who are concerned with managing, conserving and, hopefully, increasing wealth. Now, another person, the trust protector, has begun to appear on the scene. Although financial planners may not yet encounter trust protectors in person very often, it may be helpful to know something about them.

I was first exposed to the concept of trust protectors while working on an article about offshore asset protection trusts. **FN1.** Several years later, I returned to the subject of trust protectors and wrote about their increasing use in domestic trusts. This research was published recently in the Real Property, Trust and Probate Law Journal. **FN2.** What follows is an abridged and updated version of this article.

Simply put, a trust protector is a person the settler appoints to ensure that the trustee carries out the settlor's wishes as set forth in the trust instrument. Unlike traditional trustees, trust protectors are not involved in the day-to-day administration of the trust. However, a trust protector can play a useful role in trust administration by monitoring the actions of the trustee and by making critical decisions about the operation of the trust or the distribution of trust assets. On the other hand, there can be some disadvantages as well. First of all, vesting a third party with oversight authority over the trustee arguably diffuses managerial responsibility and increases the cost of trust administration. In other words, the game may not be worth the candle for some trusts, particularly smaller ones.

Second, in many states the legal status of trust protectors, as well as the scope of their fiduciary duties, is uncertain. More than half of the states provide no statutory recognition for trust protectors and many of those that have enacted statutes have not identified the powers that a trust protector may exercise or defined the nature of a trust protector's duties and responsibilities. Nevertheless, attorneys and estate planners should be aware of the potential role of a trust protector when they discuss trusts and other estate planning tools with their clients.

This article will begin by examining the use of trust protectors in connection with offshore asset protection trusts. Next, we shall consider the legal status of trust protectors in the United States. This will involve a survey of both statutory law and court decisions. The article will then identify some of the powers that a settler may give to a trust protector in the trust instrument. The next topic for discussion is whether trust protectors should be treated as fiduciaries and, if so, what the nature of their fiduciary obligations might be. The article will also consider the advantages and disadvantages of appointing a trust protector as opposed to relying on co-trustees, special trustees, independent trustees and others to carry out important functions. Finally, we will suggest some

precautions that settlers and their lawyers should take when they provide for trust protectors in their trust instruments.

II. Origins of the Trust Protector.

Trust protectors were first popularized in the 1990s in connection with offshore asset protection trusts. An asset protection trust is a self-settled spendthrift trust that is created for the purpose of protecting the settlor against the claims of creditors. A spendthrift provision in a trust is a disabling restraint on alienation; that is, it prohibits a beneficiary from voluntarily or involuntarily transferring his interest in the trust to someone else. In the absence of a spendthrift provision, the creditor of a beneficiary could garnishee the beneficiary's interest in the trust or compel the trustee to disburse trust funds directly to him instead of to the beneficiary. Although settlors could establish spendthrift trusts for the benefit of third parties, until recently they could not create them for their own benefit. Instead, most courts concluded that spendthrift provisions in "self-settled" trusts were invalid and contrary to public policy.

This led some American citizens to establish self-settled spendthrift or asset protection trusts in foreign countries where they were legal. Although some of these settlers were swindlers and deadbeats, others were physicians or other professionals who were concerned that a large malpractice award might wipe them out. Over the years, a large number of countries, mostly former British colonies ranging from Anguilla to the Turks and Caicos Islands, enacted laws to protect assets transferred to local banks and trust companies from claims by American judgment creditors.

Notwithstanding the advantages of offshore asset protection trusts, Americans who created these types of trusts in foreign countries were reluctant to turn over all control of their hard-earned money to a foreign trustee. One solution was to vest a trusted family member or business associate with the power to remove the foreign trustee or to direct him to make certain distributions of trust property. Thus, the settlor of an offshore asset protection trust could exercise de facto control over the trust through the use of a trust protector while, at the same time, resisting the claims of American creditors by claiming to have divested himself of any power over the trust.

Beginning in 1997, a number of states have passed laws to allow the creation of asset protection trusts in their territory. These states modeled their asset protection statutes after the laws of offshore venues and, consequently, imported the concept of the trust protector. Furthermore, principally due to the enactment of the Uniform Trust Code in many states, the use of trust protectors has expanded from domestic asset protection trusts to other kinds of trusts as well.

III. Legal Status of Trust Protectors in the United States.

The legal status of trust protectors, as well as their powers and duties, can be defined by statute or by judicial decisions. Although there are a variety of state statutes on the subject, appellate court decisions are surprisingly scarce.

A. Statutes.

About half the states have enacted statutes that appear to recognize the legal status of trust protectors. These statutes fall into two categories. The first category is comprised of statutes that authorize the creation of domestic asset protection trusts. This includes Alaska, Delaware, Missouri,

Nevada, New Hampshire, Oklahoma, Rhode Island, South Dakota, Utah and Wyoming. The statutes enacted in Alaska, Delaware, Rhode Island, South Dakota, Utah and Wyoming expressly allow settlers to appoint and remove trust advisors and trust protectors. The second category consists of states that have enacted legislation that allows the appointment of trust protectors in private trusts generally. These states include Arizona, Idaho, and Michigan. In addition, 23 jurisdictions have adopted some form of the Uniform Trust Code. These include Alabama, Arizona, Arkansas, the District of Columbia, Florida, Kansas, Maine, Michigan, Missouri, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Virginia and Wyoming. Although the text of the Uniform Trust Code does not mention trust protectors by name, a comment to § 808 of the Code declares that it ratifies the use of trust protectors and trust advisors. Even though this comment has not been enacted into law, we would expect most courts to rely on the code and its comments for guidance if the legal status of trust protectors were ever litigated. Therefore, if we add up all of the statutes that recognize trust protectors (and eliminate any overlap), at least 27 jurisdictions have recognized, at least tacitly) trust protectors by statute.

B. Judicial Decisions.

Although a number of courts have mentioned trust protectors in passing, only Robert T. McLean Revocable Trust v. Davis **FN3** decided by a Missouri intermediate appellate court in 2009, has discussed the legal status of trust protectors in any depth. The principal issue in the McLean case was whether a successor trustee had standing to sue a trust protector for failing to prevent a former trustee from improperly depleting the trust of its assets. Robert McLean was left a quadriplegic as the result of an automobile accident in 1996. In 1999, money from the resulting settlement was used to establish a special needs trust to supplement the benefits he received from various government assistance programs. The defendant, Ponder, who had represented McLean in his lawsuit against the negligent driver, was appointed as trust protector. When the original trustees resigned, Ponder, acting in his capacity as trust protector, appointed Davis and others as successor trustees. In 2000, McLean informed Ponder that the trustees were spending trust funds improperly. Eventually, both Ponder and Davis resigned and McLean's mother was appointed trustee. In 2005, she brought suit on behalf of the trust against Ponder, Davis and the other former trustees. Ms. McLean alleged that Ponder had failed to monitor and report trust expenditures and failed to prevent the former trustees from improperly removing $500,000 from the trust.

The trial court concluded that Ponder had no legal duty to supervise the trustees and dismissed the case against him. On appeal, the Missouri appellate court determined that Ponder did owe a fiduciary duty to McLean and possibly the trust and therefore reversed the trial court's decision and remanded the case back to the lower court for further fact-finding. The fiduciary duty will be discussed in greater detail below. It is interesting that the majority in McLean did not feel the need to discuss the legal status of trust protectors in Missouri, but merely assumed that settlers could legally appoint them and hold them liable in tort if they failed to carry out their duties properly. However, one of the judges in a concurring opinion expressed concern that the term "trust protector" had not yet been accepted or defined by statute or court opinion. He also cautioned that trusts were "dangerous devices when they undertake to break new ground insofar as designating obligations or rights of a nature not theretofore established by statute or prior judicial determination." **FN4.**

C. What Is the Status of Trust Protectors in States Which Do Not Have Statutes or Judicial Decisions?

More than 20 states have not adopted the Uniform Trust Code or enacted statutes of their own to clarify the legal status of trust protectors. Obviously, those who draft trust instruments in those states will be acting at their peril when they provide for the appointment of trust protectors. In such cases, the risk is not so much that a court would refuse to give legal recognition to trust protectors. Rather, the risk is that courts would be reluctant to define the powers and responsibilities of trust protectors very expansively in the absence of statutory guidance. However, one strategy that courts are likely to adopt, as did the Missouri court in McLean, is to rely on the trust instrument for guidance. This suggests that those who draft trust instruments should specifically enumerate all the powers and duties of the trust protector and not expect a court to fill in the blanks.

IV. Powers Exercisable by Trust Protectors.

In theory, settlers can authorize trust protectors to exercise almost any powers or functions. A South Dakota statute lists the following twelve powers that a trust protector may exercise if authorized by the trust instrument:

(1) Modify 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) Increase or decrease the interests of any beneficiaries to the trust;

(3) Modify the terms of any power of appointment granted by the trust. However, 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) Remove and appoint a trustee, trust advisor, investment committee member, or distribution committee member;

(5) Terminate the trust;

(6) Veto or direct trust distributions;

(7) Change the situs or governing law of the trust, or both;

(8) Appoint a successor trust protector;

(9) Interpret terms of the trust instrument at the request of the trustee;

(10) Advise the trustee on matters concerning a beneficiary;

(11) Amend or modify the trust instrument to take advantage of law governing restraints on alienation, distribution of trust property, or the administration of the trust; and

(12) Provide direction regarding notification of qualified beneficiaries pursuant to § 55-2-13. **FN5.**

A Wyoming statute enables settlers to grant many of these same powers to trust protectors and adds some additional powers as well:

(iv) To review and approve the accountings of a trustee;

(xi) ... to grant a power of appointment to one (1) or more trust beneficiaries or to terminate or amend any power of appointment granted by the trust; however, a modification, amendment or grant of a power of appointment may not grant a beneficial interest to a person or class of persons not specifically provided for under the trust instrument or to the trust protector, the trust protector's estate or for the benefit of the creditors of the trust protector; and

(xii) To elect for the trust to become a qualified spendthrift trust under W.S. 4-10-516. **FN6.**

We shall discuss the following powers in more detail: (1) advise trustees; (2) supervise the actions of trustees; (3) direct or veto distributions from the trust to trust beneficiaries; (4) arbitrate or mediate disputes among beneficiaries or between beneficiaries and trustees; and (5) modify the terms of the trust in response to changes in tax laws , family circumstances or other conditions.

A. Advising Trustees.

In the past, settlers have sometimes appointed trust advisors to provide financial advice to trustees. However, settlers may now prefer to appoint trust protectors instead. Appointing a financial advisor makes little sense if the trustee is a bank or an institutional trustee with access to in-house financial expertise, but if the trustee is not financially sophisticated, the settlor might wish to appoint a financially experienced trust protector to advise the trustee. In some cases, a trust protector might also be utilized to provide professional advice to a non-institutional trustee concerning such matters as real estate investments, business planning, legal issues, accounting and taxation.

A trust protector may also advise the trustee about discretionary distributions from the trust. Those who administer trust accounts for banks and trust companies may not have known the settlor personally or know any of the trust beneficiaries, particularly if the account has passed through several hands over the years. In such cases, a friend of the settlor or family member (who is not a beneficiary) can serve as a trust protector and in that capacity advise a corporate trustee about the settlor's probable intent regarding the distribution of trust assets.

Trust protectors may also be appointed to assist trustees in connection with the administration of educational, support and special needs trusts where trustees' discretion is more limited. A friend or family member acting as a trust protector is not only likely to be familiar with the settlor's intent, but may be better able to make tough choices about family issues than institutional trustees.

B. Overseeing the Actions of Trustees.

Traditionally, beneficiaries were expected to monitor the actions of trustees to ensure that they carried out the terms of the trust faithfully and competently. However, beneficiaries do not always have either the time or the expertise to perform this task effectively. For this reason, the settlor may prefer to shift some of this responsibility to a trust protector instead. For example, if the trustee is not experienced in financial management, the settlor may wish to appoint a trust protector who is a professional financial manager and give the trust protector the power to approve or veto the trustee's investment decisions. The settlor may also want to appoint a trust protector to oversee the trustee's management of the trust assets if he feels that the trustee may eventually be unable to make good

decisions at a later time because of poor health or advancing age. In addition, the settlor could give the trust protector the power to review and approve the trustee's accounts.

Obviously, a trust protector's powers need not be limited to financial oversight. Instead, the settlor may wish to give a trust protector the power to approve or veto discretionary distributions of trust assets to beneficiaries. In fact, the trust protector can be authorized to approve or veto any exercise of discretion by the trustee. To be sure, vesting a trust protector with supervisory power over the trustee carries a risk of friction between them. Therefore, the settlor should be careful to appoint someone who is likely to have a collaborative relationship with the trustee and not a confrontational one. To avoid a conflict of interest, a settlor should avoid appointing a beneficiary as trust protector if at all possible.

One of the most important powers that a settlor can give a trust protector is the power to remove a trustee and to appoint a replacement. This power enables a trust protector to remove a trustee without court approval who is incompetent or who is violating the terms of the trust. This power of removal and replacement may also be exercised to change the situs of the trust (as well as the trustee) in order to take advantage of lower fees or a more favorable legal environment.

C. Overseeing Distributions to Trust Beneficiaries.

A trust protector may be empowered to direct, approve or disapprove a trustee's action or failure to fact regarding discretionary distributions to trust beneficiaries. Normally, this is the trustee's responsibility. However, if the trustee is a bank or a trust company, and is primarily concerned with managing the trust's assets, a non-beneficiary family member might be in a better position to make decisions about discretionary distributions from the trust.

D. Changing the Terms of the Trust.

In the past, it was difficult, if not impossible, to change the terms of a testamentary trust or an irrevocable inter vivos trust. Court approval was required and courts were extremely reluctant to approve changes, particularly changes in the trust's distributive scheme. However, some statutes now permit a trust protector to make such changes without obtaining court approval, if authorized by the trust instrument. This power may be useful in responding to contingencies, such as health problems, disability or economic conditions, that were not foreseen at the time of the trust's creation.

E. Mediating Disputes.

A trust protector who is a family member, family friend, doctor or lawyer, may be in a good position to mediate disputes about the trust between the trustee and a beneficiary or among the beneficiaries themselves. As one who is familiar with the settlor's wishes, a trust protector may be able to interpret ambiguous provisions in the trust instrument or take other steps to resolve conflicts. This is a cheaper and more expeditious alternative to resolving these disputes in court.

V. Are Trust Protectors Fiduciaries?

One of the most controversial questions in this area is the fiduciary status of trust protectors.**FN7.** A fiduciary is one who agrees to act on behalf of another and who owes this person the duties of good faith, trust, confidence and candor. **FN8.** A fiduciary is expected to be loyal to the

person to whom he owes a fiduciary duty and to always act in that person's interest. **FN9.**Attorney-client, guardian-ward, doctor-patient and trustee-beneficiary are examples of fiduciary relationships.

Any discussion of the possible fiduciary status of trust protectors requires us to consider a number of subsidiary questions: First, are trust protectors ever fiduciaries, or are they more like non-trustee holders of a power of appointment? Second, do trust protectors act in a fiduciary capacity when they exercise some powers, but not when they exercise others? Third, what standard of conduct will trust protectors be held to when they act as fiduciaries? Is the standard good faith, reasonableness or some other standard? Fourth, when trust protectors act as fiduciaries, to whom do they owe a fiduciary duty (and who has standing to sue them for an alleged breach of fiduciary duty)? Finally, what remedies should be available to injured parties when trust protectors breach their fiduciary duties? Unfortunately, there is very little in the way of statutory law or case law to go on.

A. Statutes.

As we have seen, a number of state statutes recognize the legal status of trust protectors, but only a few of them expressly indicate whether trust protectors may be treated as fiduciaries. Statutes enacted in Alaska and Arizona specify that a trust protector shall not be held liable as a fiduciary unless provided for in the trust instrument. This approach enables the settlor to determine what powers, if any, that a trust protector will exercise in a fiduciary capacity. In contrast, a Michigan statute states that a trust protector "is a fiduciary to the extent of the powers, duties, and discretions granted to him under the terms of the trust." **FN10.** In addition, the Michigan statute declares that "[i]n exercising or refraining from exercising any power, duty, or discretion, the trust protector shall act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiary." At the same time, the statute provides that the trust instrument may allow the trust protector to exercise certain administrative powers in a nonfiduciary capacity. However, even then, the statute still requires the trust protector to act in good faith.

The Uniform Trust Code, which has been adopted by a large number of states, provides that any person, other than a beneficiary, who holds a power to direct certain actions of the trustee is presumptively a fiduciary. **FN11.** A comment to § 808 goes on to say that the holder of a power (such as a trust protector) who acts on behalf of others is presumptively acting in a fiduciary capacity with respect to these powers and may be held liable for any action or inaction that constitutes a breach of trust. This comment also states that the settlor can provide that that the holder of the power to direct is not to be held to the standards of a fiduciary.

Finally, at least one state statute declares that trust protectors can be held liable for any financial losses that a trust incurs because of their negligence or breach of their fiduciary duties. The Michigan statute discussed above also provides that "[t]he trust protector is liable for any loss that results from the breach of his or her fiduciary duties." The statute also limits the effect of exculpatory clauses in trust instruments in Michigan by declaring that "[a] term of a trust that relieves a trust protector from liability for breach of his or her fiduciary duties is unenforceable "to the extent that it "relieves the trust protector of liability for acts committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the trust beneficiaries."

B. Judicial Opinions.

Robert T. McLean Irrevocable Trust v. Davis, **FN12** decided by a Missouri intermediate appellate

court in 2009, is the first and only judicial decision to discuss the fiduciary duties of trust protectors. As mentioned earlier, the defendant, Michael Ponder, served as trust protector for Robert McLean's special needs trust. After Ponder resigned as trust protector, McLean's mother, who had been appointed trustee, brought suit against Ponder, claiming that when he was the trust protector, Ponder had failed to properly monitor the activities of the former trustees, thereby enabling them to improperly remove $500,000 from the trust account. Finding that Ponder had no legal duty to oversee the trustees, the trial court dismissed the case.

On appeal, the court began its analysis by identifying the various elements of a claim for breach of fiduciary duty. These elements included: (1) the existence of a fiduciary relationship between the plaintiff and the defendant; (2) breach of a fiduciary duty that arises out of that relationship; (3) causation; and (4) resulting harm. The defendant contended that neither state law nor the trust instrument required him to monitor the trustees. In addition, the defendant raised lack of causation as an issue, arguing that the beneficiary could have petitioned the court to remove the trustees once he discovered their wrongdoing.

Addressing the duty issue, the court observed that a fiduciary duty could be imposed by statute, arise out of a prior relationship or set of circumstances or be assumed by express contract or agreement. In this case, the court determined that no statute imposed a fiduciary duty on trust protectors. Turning to the trust agreement, the court acknowledged that it did not specify how the trust protector was supposed to exercise his powers. Nevertheless, the court concluded that the trust agreement indicated that the settlor expected the trust protector to exercise these powers in a fiduciary capacity.

As far as the causation issue was concerned, the court conceded that the beneficiary did not have to rely on the trust protector, but could have petitioned the court directly for an order removing the trustees. However, the court held that the fact that the trust instrument authorized the trust protector to remove a trustee indicated that the settlor intended that the trust protector, not the beneficiary, should be primarily responsible for monitoring the behavior of the trustees and remove them if necessary.

Having concluded that the trust protector must exercise his powers in a fiduciary capacity, the court next considered what standard of conduct should be applicable to the defendant's actions (or inactions). The court seemed to think that the choice was between a negligence standard and a good faith standard. At a minimum, the court declared, the trust protector owed a duty of trust, confidence, candor and good faith. Furthermore, the argument for this lesser standard of conduct was reinforced by an exculpatory clause in the trust instrument which declared that the trust protector would "not be liable for any action taken in good faith." This indicated to the court that the trust protector was subject to nothing more than a good faith standard. Having settled on a good faith standard, the court remanded the case back to the trial court to determine whether the trust protector's failure to remove the trustees amounted to bad faith.

Another issue the court discussed was whether the trust protector owed a fiduciary duty to the beneficiary or to the trust as a separate entity. The plaintiff trustee alleged that the trust protector owed a fiduciary duty to her son, the sole beneficiary of the trust. However, the court pointed out that the trust instrument itself stated that settlor intended it to "constitute a plan for the financial management of the trust estate" (emphasis added). According to the court, this language suggested that trust protector might owe a fiduciary duty to the trust itself rather than to the

beneficiary. However, the court did not attempt to this question but left instead for the trial court to deal with on remand.

Finally, in reversing the trial court's dismissal of the plaintiff's tort claim against the trust protector, the court in McLean reasoned that he should be required to reimburse the trust for any losses caused by his failure to prevent the trustees from improperly transferring funds from the trust.

VI. Are Trust Protectors Really Necessary?

Given that the appointment of trust protectors imposes additional costs on trust administration and may also cause friction with the trustee or interfere with efficient management of the trust, should settlors consider other alternatives? In particular, can other parties, such as trust advisors, co-trustees, special trustees, independent trustees or trust beneficiaries provide the same advantages as trust protectors or is there a role that only trust protectors can play?

A. Trust Advisors.

It is important to distinguish between trust protectors and trust advisors. In theory, a trust advisor can offer advice to the trustee about the administration of the trust or the investment of trust assets, but normally the advisor cannot to direct or veto a trustee's proposed action. In contrast, a trust protector can override or control the actions of a trustee. Unfortunately, statutes and court decisions do not always distinguish between trust advisors and trust protectors.

There are several options available to a settlor who merely wants to ensure that someone with financial expertise has a role in making investment decisions. The most obvious choice is to appoint a bank or trust company as trustee or co-trustee. If the settlor prefers to appoint a family member or other individual as trustee, then it might be prudent to appoint a trust advisor as well to assist the trustee. In such cases, it would not be necessary to also provide for the appointment of a trust protector. On the other hand, even if a trust advisor is given the power to direct or veto investment decisions, the settlor might prefer to have someone else oversee other aspects of trust administration. In such cases, if the trust is large enough, the settlor can appoint both a trust advisor and a trust protector, while making sure that their functions do not overlap.

B. Co-Trustees.

Another option is to appoint more than one trustee. Normally, co-trustees hold legal title to the trust property as joint tenants and they must concur in their decisions and act jointly. However, nowadays, statutes and court decisions in many states allow the settlor to assign different powers and duties to co-trustees. **FN13.** A co-trustee may delegate some responsibilities to another trustee. For example, a corporate co-trustee may take custody of and manage the trust property while an individual trustee makes decisions about discretionary distributions to beneficiaries. There are several advantages to using a co-trustee instead of a trust protector. First, there is no doubt about the legal status and powers of a co-trustee. The status of co-trustees has been recognized for centuries. Also, it is clear that co-trustees are fiduciaries. Furthermore, in most states, the duties of trustees and co-trustees are set forth in detail by statutes and court decisions. On the other hand, there are some powers, such as the power to remove a trustee or the power to change the situs of the trust, that a settlor may not want to entrust to a co-trustee. In addition, a co-trustee may not be able to act independently if state law requires co-trustees to act unanimously.

C. Special Trustees and Independent Trustees.

A special trustee is someone who is empowered to act under certain circumstances as a co-trustee in order to make a joint decision with the original trustee about a particular issue. In all other cases, the original trustee continues to act as sole trustee and will exercise all of the normal powers of a trustee. In contrast, an independent trustee is authorized to make certain decisions without any participation by the original trustee. Like a special trustee, an independent trustee is not involved in the day-to-day administration of the trust.

Like trust protectors, special trustees and independent trustees can be employed to make decisions that the settlor does not want the trustee to make wholly on its own. The advantage of employing special trustees or independent trustees to carry out this function is that their legal status is fully recognized under state law and they will act as fiduciaries when exercising their powers. However, if the settlor wants someone other than the trustee to make decisions on a wide range of issues or to monitor the actions of the trustee on a continuing basis, the better approach would probably be to appoint a trust protector instead.

D. Trustees and Beneficiaries.

In some cases, it may be more efficient to dispense with the services of a trust protector and rely instead on either the trustee or the beneficiaries to make certain decisions about the administration of the trust. For example, the settlor may authorize the trustee to modify the terms of the trust (within certain limits), change the situs of the trust, or even terminate the trust. Likewise, it is possible to empower a trust beneficiary to affect the trust by exercising a power of appointment or removing and replacing the trustee. While a trust protector could perform these functions as well, it might be cheaper and more efficient to keep these aspects of trust administration "in house" rather than bringing an additional party into the process. However, if the settlor wants to avoid conflicts of interest, it might be prudent to empower a disinterested third party, such as a trust protector, to make these decisions.

VII. Precautions.

Although there are many uses for trust protectors, estate planners should exercise caution when providing for them in trust instruments. First of all, the legal status of trust protectors may be in doubt in states which have not adopted the Uniform Trust Code or some other legislation that recognizes their legitimacy. In such cases, it may be prudent to appoint a special trustee or an independent trustee or even assign certain decision-making functions to the trustee or a trust beneficiary.
In most states, the powers of a trust protector are not enumerated by statute and even when they are, the statutes do not automatically vest trust protectors with these powers. Instead, they merely authorize the settlor to include some or all of them in the trust instrument. Therefore, the drafter of the trust instrument should determine exactly what the settlor wants the trust protector to do, identify the powers that are necessary to carry out the settlor's wishes, and then describe their nature and purpose as in as much detail as possible in the trust instrument.

Most state statutes either do not indicate whether trust protectors are fiduciaries, or if they do, they merely provide a default rule and allow the trust instrument to override the statutory standard. Therefore, it is essential that the trust instrument indicate under what circumstances, if any,

the trust protector will be acting in a fiduciary capacity. In addition, the trust instrument should specific whether the required standard of conduct is good faith, reasonableness or some other standard. For most functions, good faith is probably the most appropriate standard, although a higher standard may be specified for decisions, such as asset management, that involve the exercise of professional judgment or expertise.
Finally, the trust instrument should provide a mechanism for the appointment of a successor trust protector if the original appointee dies before the trust terminates (assuming that the settlor wants a successor trust protector to be appointed at all).

VIII. Conclusion.

The use of trust protectors can introduce an additional level of oversight and flexibility in trust administration, particularly trusts of long duration are involved. Trust protectors may also be used in special needs trusts and honorary trusts. However, regardless of the type of trust involved, it is important that the powers and duties of trust protectors be spelled out in detail in the trust instrument.

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1. See Richard C. Ausness, The Offshore Asset Protection Trust: A Prudent Financial Planning Device or the Last Refuge of a Scoundrel?, 45 Duquesne Law Review 147 (2007).

2. See Richard C. Ausness, The Role of Trust Protectors in American Trust Law, 45 Real Property, Trust & Estate Law 319 (2010).

3. 283 S.W.3d 786 (Mo. Ct. App. 2009).

4. Id. at 795.

5. South Dakota Codified Laws § 55-1B-6 (2009).

6. Wyoming Statutes Annotated § 4-10-710 (2009).

7. See Philip J. Bruce, The Trustee and the Trust Protector: A Question of Fiduciary Power. Should a Trust Protector Be Held to a Fiduciary Standard?, 59 Drake Law Review 67 (2010).

8. See Black's Law Dictionary 658 (8th ed. 2004).

9. See Uniform Trust Code § 802 (amended 2005).

10. Michigan Compiled Laws Annotated § 700.7809 (2010).

11. See Uniform Trust Code § 808(b) (amended 2005).

12. 283 S.W.3d 786 (Mo. Ct. App. 2009).

13. See George T. Bogert, Trusts § 91 (6th ed. 1987).