March 9, 2016

Re: *Trust Protectors: Why They Have Become "The Next Big Thing*, by Prof. Lawrence Frolik, Univ of Pittsburgh School of Law

50 *Real Property Trust and Estate Law Journal* 267 Fall 2015

Following is a brief memo addressing some of the major concerns I have with the subject Law Review Article, specifically Part VI, *Is The Protector A Fiduciary?*, and Part IX, *Ensuring That The Protector Acts Effectively*.

Part VI. The anti-fiduciary belief expressed here is quite popular with attorneys that have done little or no research on the subject, demonstrated by their belief, or at least their desire to believe that if they declare a duck is not a duck, it won't be a duck. They do this for the very reason stated in your article, which is that they do not want to risk exposure to liability as a fiduciary, naively believing that saying they are not a fiduciary is conclusive of the question, regardless of the facts. Interestingly, neither your article nor any other responsible commentary has offered a supportable argument (with citations) to the effect that a party who holds fiduciary powers will not be held to a fiduciary standard as to those powers simply because he is declared in the trust not be a fiduciary (state statutes not withstanding). More specifically, your article makes repeated references to the protector's duty to carry out the "intent of the settlor" and the "purposes of the trust," ignoring the fact that the same are clearly fiduciary duties. In addition, although it emphasizes those state laws where fiduciary duty may be drafted away in the trust, the article contains no discussion of those states which mandate fiduciary status of the protector, and it erroneously states that my own position is that a protector is always a fiduciary. A quick reference to my book on protectors would reveal that to be a misstatement. Lastly, the article conveniently omits any mention of the recent draft of the Uniform Law on Divided Trusteeship, which provides that a trust protector is a fiduciary. As you know, the draft represents the considered opinion of many of the country's leading attorneys as to the establishment and clarification of the law on divided trusteeship and specifically trust protectors.

One of the most important points, however, and one quite conspicuous, not to mention surprising by its absence, is the question of whether the powers given to the protector are personal or fiduciary in nature. Nothing could be more central to or determinative of the

fiduciary question than this. Despite that, the article instead focuses on the good faith/bad faith issue, stating that "the bedrock standard for a protector must be to act in good faith," but offering no cites to support that important statement. In this regard, the article proceeds to say, "The protector must act in good faith because the absence of good faith is bad faith. There is nothing in between." And it continues to say, "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." Again, not one of the foregoing statements is supported by relevant cites, but interestingly, all of the forgoing statements would be true and supportable if the protector's powers were fiduciary powers, while none of such statements would be true if the powers were personal. Thus, the absence of any discussion of the nature of the powers undermines that entire argument.

It is well-settled law that a power is either personal or fiduciary. Where, under special circumstances, it has aspects of both, the court will decide, but the foregoing situation would only occur where the protector is also a beneficiary—not relevant here. Thus, it is not a good faith/bad faith question at all, but a question of the nature of the power. The only question of good faith where a personal power is involved is the good faith duty not to commit a fraud on the power. In fact, instead of good faith, a party with a personal power (and when we admit to a fiduciary duty, that includes a trust protector) can disregard the power entirely or exercise it in retaliation against a beneficiary, so long as the exercise is within the terms of the power. Is that good faith? Interestingly, aside from some irrelevant moral judgement or a fraud on the power, it is not bad faith either, and would not be reviewable by the court. Maybe this is the "in between" that the article claims does not exist?

Part IX. This is the second major part that concerns me, and which constitutes an attempt to make an end-run around the fiduciary question by suggesting that the protector enter into a contract with the trustee for his services as a protector to the trust. Aside from the critical (and completely unaddressed) issue of whether a trustee would even have the authority to grant trust powers to another under a contract, from a practical standpoint the idea is almost humorous. A new contract would be necessary with every protector. And how would the protector's discretionary powers (which are generally not assignable under trust law) be described and exercised? Could the contract give the protector the power to remove the trustee, effectively deleting one of the parties to the contract? Does the article suggest that a protector would be less

liable under the contract approach? That a paper contract would successfully camouflage the underlying fiduciary duty?

One last point: The article states early on that there is "an almost complete absence of case law" on protectors. In fact, there are dozens of important cases from several common law jurisdictions with valuable analytical and articulate views on the duties and responsibilities of trust protectors, many cited as landmark cases on the topic. If the reason for their total omission from the article is that they are not U.S. cases, surely you are aware that in the early years of our court system, courts, especially the United State Supreme Court, regularly used and cited decisions from other common law courts to consider the issues at hand. Omitting any mention of such cases and noting "an almost complete absence of case law" is misleading at best.

In conclusion, I would like to express my belief that it is a disservice to practioners to perpetuate what I call the fear of fiduciary duty. We readily serve to act as estate fiduciaries and trustees without such fears—why not protectors? Furthermore, it is common knowledge that exposure to liability can be reduced to a minimum, which would place more risk on the trustee and beneficiaries than on the protector. If we look at the definition of "willful misconduct" under Delaware law, for example, we would be hard pressed to justify any realistic concerns over liability. Perhaps if we stop trying to teach professionals how to fit a round peg into a square hole and instead show them how to assist clients without the fear of fiduciary duty, we would be rendering a better service to everyone.

As noted, these are brief comments. Of course, there is much more that could be said, and there are a number of other points in the article that deserve comment. For example, it states that there is "an almost complete absence of case law opining on the duties and responsibilities of a protector." In fact, there are at least 50 reported cases in common law jurisdictions doing just that.

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