

THE TRUSTEE AND THE TRUST PROTECTOR: A QUESTION OF FIDUCIARY POWER. SHOULD A TRUST PROTECTOR BE HELD TO A FIDUCIARY STANDARD?

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TABLE OF CONTENTS

I. Introduction	67
II. A Protector's Practical Purpose	69
III. Common Duties of the Trust Protector.....	73
IV. History	75
A. Trust Protector v. Trust Advisor	75
B. Practical Origins	76
C. International Statute Framework	77
D. A Domestic Migration.....	78
V. Analysis	79
A. Fiduciary Duty.....	79
B. Personal Power v. Fiduciary Power	80
C. The Uniform Trust Code	82
D. The Restatements	84
E. International Trends.....	86
F. The One Domestic Indicator? Missouri's <i>Robert T.</i> <i>McLean Irrevocable Trust U/A/D v. Patrick Davis, P.C.</i>	89
G. Fiduciary Duties in State Statutes.....	92
H. Policy Issues.....	93
VI. Conclusion	95

I. INTRODUCTION

A trustee's job can be notoriously difficult. A trustee must always act

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first and foremost in the interests of the beneficiaries, which is not always as simple as it may seem. The “best interests of the beneficiaries” does not mean act according to their every desire; it is more of a balancing act. The trustee must act in the best interests of the beneficiaries, *consistent with the terms and purposes of the trust*. This means the trustee must also try to implement what he or she believes to be the intent of the settlor. Settlers, also known as grantors or trustors, are not always able to give a trustee insight into their wishes and intentions because they often are no longer living at the time the trust is being administered. Likewise, even when living, settlers are not always able to foresee future changes and conflicts associated with the trust and related tax, law, and societal developments. Recently, a new remedy associated with these problems has emerged: the trust protector.

“[A] trust protector is an individual (or committee or entity) who is not a trustee but who is nevertheless granted powers under the trust that supersede corresponding powers of the trustee.”¹ For practical purposes, a trust protector is generally a person selected by the settlor of a trust to represent the interests of the settlor in making decisions related to the trust that the settlor is unable to make, most often because the settlor is deceased.² The idea behind the trust protector is to have a “living embodiment” of the settlor to represent the settlor’s interests, even after the settlor is gone.³ The trust protector is, at its core, an agent.⁴ No title is vested in the trust protector as title is with the trustee—the protector has instead been chosen by the settlor to have some level of power to guide the trustee’s actions.⁵ As a result, a problem emerges: If the trust protector is not a trustee, but is instead some disinterested third-party agent, does a trust protector have a fiduciary duty?

Unfortunately, the trust protector is so new to the world of domestic trusts this question has only recently begun to be addressed.⁶ Some accepted legal scholarship, such as the Uniform Trust Code (U.T.C.) and

1. ALEXANDER A. BOVE, JR. & MELISSA LANGA, PETER PROTECTOR IN TRUST NEVERLAND: THE REAL STORY OF THE TRUST PROTECTOR 1 (2003), *available at* http://www.bovelanga.com/publications/news_briefs/trusts_and_estates_forum/Real%20Story%20Trust%20Protector.pdf.

2. Stewart E. Sterk, *Trust Protectors, Agency Costs, and Fiduciary Duty*, 27 CARDOZO L. REV. 2761, 2763 (2006).

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

restatements of law, discussed below, have addressed the issue. Model acts and restatements of law are, of course, not enough to create consensus on the issue. Very little case law and only a few state statutes address trust protectors. In fact, the amount of trust protector-related legal doctrine is so slim, it was addressed directly in the Restatement (Third) of Trusts: “Unfortunately, trust law in this country shows virtually no appellate experience with [trust protector] questions[] and negligible legal development of the protector concept and principles for similar roles.”⁷ No consensus has been drawn regarding the role of the trust protector as it relates to the duties of a fiduciary.⁸

To this end, this Article will first discuss what a trust protector is and its purposes, as well as the common duties associated with a trust protector. The Article will then discuss the history and development of the trust protector in order to give a perspective on the logic of using this entity. This includes the practical origins of the trust protector, its international development, its migration to domestic American trusts, and its relation to an older domestic entity, the trust advisor. An analysis of common law fiduciary duty, the U.T.C., the Restatement (Second) of Trusts, the Restatement (Third) of Trusts, international and domestic trends, and other policy issues will all point to one necessary conclusion: A trust protector is, and should be, treated as a fiduciary and should be held to the same fiduciary standard as a trustee.

II. A PROTECTOR’S PRACTICAL PURPOSE

The longer the duration of a trust, the more likely a trust protector will become a useful tool; many problems have the potential to emerge over the long life of an irrevocable trust. These problems are often not foreseen by the settlor at the time of the trust’s creation, and because the trust is irrevocable—and because the settlor is often dead—the settlor has very little input in how the trust adapts to these problems.⁹

There are a number of common problems that can emerge for a trust over time. These include: changes in the law that result in frustration of

7. RESTATEMENT (THIRD) OF TRUSTS § 64 reporter’s notes (2003).

8. *See id.* (noting the confusion associated with the personal and fiduciary duties expected from a trust protector).

9. Edward Rock & Michael Wachter, *Dangerous Liaisons: Corporate Law, Trust Law, and Interdoctrinal Legal Transplants*, 96 NW. U. L. REV. 651, 664 (2002); Sterk, *supra* note 2, at 2766.

the trust's purpose;¹⁰ an unforeseen family situation could make it desirable to change the terms of the trust;¹¹ and a beneficiary could unexpectedly die or find herself in a situation in which she is no longer in need of the trust income. Also, societal norms can change.¹² A trust could unexpectedly run out of beneficiaries and be at risk of escheating, or the trust investments may not be to the settlor's or beneficiaries' liking. Though it is always possible to bring a trust to court in an attempt to have the judiciary change the trust's terms, this is expensive and has the potential to deplete the trust's assets.¹³ There are a number of ways to avoid or resolve such problems, but many solutions have problems of their own and may in fact make the initial problems worse.

Making a trust revocable, for instance, gives the settlor the right to be flexible with the drafting of the trust and allows him to terminate it if necessary. Obviously this does not solve the problem of how to change the trust after the settlor dies.¹⁴ Also, the settlor may not wish to maintain a heightened level of interest in the trust assets because of tax or other issues.¹⁵ Likewise, a settlor could simply write into the terms of an irrevocable trust the ability for a beneficiary to make some limited modifications to the trust's terms.¹⁶ This, of course, carries with it the risk of a self-interested beneficiary modifying the terms so as to frustrate the settlor's intent, or could alternatively result in an inadvertent general power of appointment with "unfortunate tax consequences."¹⁷ Even if a settlor allows a trustee to modify the trust, trustees often oppose assumption of this power for their own liability reasons. Making a trust revocable or subject to modification by interested beneficiaries or trustees may pose more problems than it is worth to the trustee. Allowing a disinterested third party, such as a trust protector, to make these changes is a possible solution that excludes some of the drawbacks associated with these other methods.¹⁸

10. Sterk, *supra* note 2, at 2766.

11. *Id.*

12. Consider trust provisions commonly seen in older trust documents, such as my experience with a beneficiary who wished to donate an annual sum to her church, as long as the congregation remained one hundred percent white.

13. Sterk, *supra* note 2, at 2766.

14. *Id.*

15. See 26 U.S.C. § 676 (2006).

16. Sterk, *supra* note 2, at 2767.

17. *Id.* (citations omitted).

18. Indeed, the role of trust protector should be filled by a disinterested third party and not by someone close to the settlor. If the settlor and the protector are close

Unsavory trustees and self-interested parties have traditionally been dealt with through a beneficiary's built-in right to monitor the day-to-day administration of a trust. Simply stated, a trustee has a duty to inform beneficiaries of the activities of the trust—generally through statements and correspondence—and the beneficiary is therefore armed with the knowledge necessary to defend his interest in the trust.¹⁹ Because the trustee is exposed to this potential liability, the trustee will comply with the settlor's instructions found in the terms of the trust.

Monitoring by a beneficiary can be impractical, however. The beneficiary often lacks the knowledge necessary to detect a trustee's breach of duty.²⁰ The beneficiary may also, on some level, be dependent on the trustee, or the beneficiary may have a personal relationship with the trustee if the trustee is an individual.²¹ Because a trustee has discretionary disbursement powers, a beneficiary may think angering the trustee with complaints or legal threats will do more harm than good;²² a beneficiary may therefore be unlikely to take a trustee to court, which diminishes the trustee's threat of liability.

A trust protector, on the other hand, may be better able to relieve the beneficiary of this need to monitor the trustee's actions.²³ A trust protector could be a family friend who is familiar with the settlor's wishes, an

(within any meaning of the term), it could be argued the protector is a "dummy protector" or an alter ego of the settlor designated to protect the settlor's interests, even to the detriment of the trust, particularly if the trust is irrevocable and the settlor is still alive. JAN DASH & HERMAN W. LIBURD, *THE ROLE OF PROTECTORS IN OFFSHORE TRUSTS* 10 (2003), <http://www.liburddash.com/pubs/offshore.pdf>. A court could determine the trust is in fact controlled by the settlor through the protector and is therefore not irrevocable at all. *Id.* This could have severe tax and estate planning consequences. *Id.*

19. See UNIF. TRUST CODE § 813(a) (amended 2005) ("A trustee shall keep the *qualified beneficiaries* of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests." (emphasis added)); see also RESTATEMENT (THIRD) OF TRUSTS § 82(1)(c) (2003) (stating a trustee has a duty "to keep . . . beneficiaries reasonably informed of . . . significant developments concerning the trust and its administration, particularly material information needed by beneficiaries for the protection of their interests").

20. Sterk, *supra* note 2, at 2768.

21. *Id.*

22. *Id.* at 2772.

23. *Id.* at 2768. A trust protector may even be able to completely avoid litigation costs if the document requires the trustee to obtain permission from the protector before taking certain actions or if the protector can remove the trustee without assistance of the court. *Id.*

attorney, accountant, or another trust professional who knows what to look for and understands the tax and other consequences associated with certain administrative trust decisions.

Another solution a settlor may employ is to appoint a co-trustee. A co-trustee could be someone the settlor knows personally, or it could be a third party trust professional who can monitor the trust and assist with administrative decisions. A co-trustee has the added advantage of being subject to trustee legal doctrine; trustee law is well-established and does not carry with it some of the ambiguities associated with the still-developing doctrine of the trust protector.²⁴

Of course, there are problems with the co-trustee approach. For offshore trusts, appointing a domestic co-trustee would likely bring the trust under the jurisdiction of domestic courts.²⁵ This is not an issue for domestic trusts, which are already under such jurisdictions. That co-trustees are generally required to reach decisions by consensus may be a reason to appoint a co-trustee for a domestic trust.²⁶ A settlor may instead, however, prefer that decision making be made primarily by one entity—the sole trustee.²⁷ The trust protector's duties might therefore involve only intermittent review of the trustee's actions, a duty not entirely fitting of a co-trustee.²⁸ The protector would operate more as a check on trustee behavior than an altogether separate trustee.²⁹

A trust protector is not only a possible solution to limitations in trust law, but a practical one as well. One very practical role of the trust protector is that of a mediator; if the dialog between a trustee and beneficiary breaks down, the protector can act as a liaison, communicating the needs of the beneficiary to the trustee and communicating to the beneficiary the rationale behind a trustee's decisions.³⁰

With these issues in mind, a trust protector can certainly be a useful alternative. The trust protector is someone who can represent the concerns and wishes of the trust's settlor. Should a trust need to change its situs for tax reasons, to settle disagreements over investments, or to change beneficiaries or some other aspect of the trust to better suit the settlor's

24. *Id.* at 2775.

25. *Id.*

26. *Id.* (footnotes omitted).

27. *Id.* at 2776.

28. *Id.*

29. *Id.*

30. DASH & LIBURD, *supra* note 18, at 5.

original intentions, the trust protector can be a useful and practical tool.

III. COMMON DUTIES OF THE TRUST PROTECTOR

As one can imagine, the duties that may be imposed on a trust protector are as varied as a scrivener's imagination. Broadly stated, a trust protector's duties involve the power to act, direct action, consent, and refrain from action.³¹ It is not generally thought that the trust protector will take over the duties of the trustee; contrarily, the trust protector's job is to monitor the trustee's actions, or lack thereof.³²

The powers of the trust protector have been codified by parts of Alaska,³³ South Dakota,³⁴ Idaho,³⁵ Tennessee,³⁶ and Wyoming³⁷ statutes. In these statutes, trust protectors are given the power to:

- Appoint a successor trust protector;³⁸
- Consent to, direct, or veto income or principal distributions;³⁹
- Appoint, add, or remove a trustee;⁴⁰
- Remove and replace a trust advisor;⁴¹

31. ELIZABETH CARROTT MINNIGH, *UTILIZING TRUST PROTECTORS IN DOMESTIC ESTATE PLANNING* 3 (2006).

32. Sterk, *supra* note 2, at 2784–87.

33. ALASKA STAT. § 13.36.370 (2008).

34. S.D. CODIFIED LAWS § 55-1B-6 (2004 & Supp. 2010).

35. IDAHO CODE ANN. § 15-7-501 (2009).

36. TENN. CODE ANN. § 35-15-808 (2007).

37. WYO. STAT. ANN. § 4-10-710 (2009).

38. *See, e.g.*, S.D. CODIFIED LAWS § 55-1B-6(8) (Supp. 2010) (“Appoint a successor trust protector.”); WYO. STAT. ANN. § 4-10-710(a)(iii) (“[t]o appoint a successor trust protector”).

39. *See, e.g.*, S.D. CODIFIED LAWS § 55-1B-6(6) (Supp. 2010) (“Veto or direct trust distributions.”); WYO. STAT. ANN. § 4-10-710(a)(x) (“To direct, consent or disapprove a trustee’s or cotrustee’s action or inaction in making distributions to beneficiaries.”).

40. *See, e.g.*, ALASKA STAT. § 13.36.370(b)(1) (2008) (“[R]emove and appoint a trustee.”); S.D. CODIFIED LAWS § 55-1B-6(4) (Supp. 2010) (“Remove and appoint a trustee, trust adviser, investment committee member, or distribution committee member.”); WYO. STAT. ANN. § 4-10-710(a)(vii) (“To remove a trustee, cotrustee or successor trustee, for the reasons stated in the trust instrument, and appoint a replacement.”).

41. *See, e.g.*, WYO. STAT. ANN. § 4-10-710(a)(vi) (“To remove and replace any trust adviser for the reasons stated in the trust instrument.”).

- Change the governing law of a trust or change the trust situs;⁴²
- Alter the interests of beneficiaries;⁴³
- Interpret the terms of the trust document;⁴⁴
- Advise the trustee regarding the beneficiaries;⁴⁵
- Approve trustee accounts;⁴⁶ and
- Terminate the trust.⁴⁷

The duties of a trust protector can be varied and far-reaching. Given the broad reach of a trust protector and the trust protector's influence over some of the trustee's duties, it is worth considering the level of liability the trust protector actually has. If a trust protector can veto a trustee's decision—that is, the decision of someone who is held to a fiduciary responsibility—should the trust protector not also be held to that same level of duty?

The basic duties of the trustee are not affected by the appointment of a trust protector. The trustee must continue following the terms of the trust document and is still held to the same fiduciary duty. The trust protector, ostensibly, is simply there to *protect* the trust. Indeed, the colloquial definition of protector is “a person or thing that protects.”⁴⁸ This simplified and common sense definition should not be discounted; indeed, an argument can certainly be made that this simple definition—the very

42. See, e.g., S.D. CODIFIED LAWS § 55-1B-6(7) (Supp. 2010) (“Change situs or governing law of the trust, or both.”); WYO. STAT. ANN. § 4-10-710(a)(v) (“To change the governing law or principal place of administration of the trust.”).

43. See, e.g., ALASKA STAT. § 13.36.370(b)(3) (“[I]ncrease or decrease the interests of any beneficiary to the trust.”); IDAHO CODE ANN. § 15-7-501(6)(b) (2009) (“To increase or decrease the interests of any beneficiaries to the trust.”); S.D. CODIFIED LAWS § 55-1B-6(2) (2004 & Supp. 2010) (“To increase or decrease the interests of any beneficiaries to the trust.”); WYO. STAT. ANN. § 4-10-710(a)(xi) (“To increase or decrease any interest of the beneficiaries to the trust . . .”).

44. See, e.g., S.D. CODIFIED LAWS § 55-1B-6(9) (Supp. 2010) (“Interpret terms of the trust instrument at the request of the trustee.”); WYO. STAT. ANN. § 4-10-710(a)(viii) (“To interpret terms of the trust instrument at the request of the trustee.”).

45. See, e.g., S.D. CODIFIED LAWS § 55-1B-6(10) (Supp. 2010) (“Advise the trustee on matters concerning a beneficiary.”); WYO. STAT. ANN. § 4-10-710(a)(ix) (“To advise the trustee or cotrustee on matters concerning any beneficiary.”).

46. WYO. STAT. ANN. § 4-10-710(a)(iv) (“To review and approve the accountings of a trustee.”).

47. S.D. CODIFIED LAWS § 55-1B-6(5) (Supp. 2010) (“Terminate the trust.”).

48. WEBSTER'S UNABRIDGED DICTIONARY 1554 (2d ed. 2001).

title “protector”—dictates a trust protector’s duty and, therefore, his liabilities. Many other aspects, however, should be considered.

IV. HISTORY

A. *Trust Protector v. Trust Advisor*

A trust protector is not to be confused with a trust advisor, though the terms have sometimes been used interchangeably.⁴⁹ Their similar sounding titles can cause confusion. “A trust adviser is a person who has power to control a trustee in the exercise of some or all of his powers.”⁵⁰ Courts and scholars wrestled with many of the same issues with trust advisors that are discussed in this paper—the entity’s rights and liabilities. It would seem the level of liability of a trust protector could be inferred from that which applies to the trust advisor.

The key difference between a trust advisor and a trust protector is that a trust advisor’s influence is limited to the trust’s investments and the analysis that goes into making investment decisions. A trust advisor will work primarily with the trust’s asset managers, reviewing their decisions and the logic associated with those decisions. In fact, a trust advisor is very likely a type of trust protector; a trust protector, however, is not always a trust advisor.⁵¹

A 1965 *Harvard Law Review* note’s opening paragraph pondered the then-recent development of the trust advisor when it stated, “Widespread use of the adviser is so recent that few courts have had occasion to consider the problems arising out the adviser-trustee relationship.”⁵² Similar to the issues once contemplated for the trust advisor, a trust protector is a newer creation, and its duties and liabilities have yet to be firmly established. Some duties, however, have emerged as duties most likely to be dealt with by the protector.

49. There are even some published articles that admit a protector may operate under the name “advisor”: “The role is sometimes called: Advisor, Appointor, Management Committee and Beneficiary Representative; however, the term ‘Protector’ is the most popular.” DASH & LIBURD, *supra* note 18, at 2 (citation omitted). The author of the present Article encourages “Protector” to be the standardized title to avoid confusion with other roles inherent in trust administration.

50. Note, *Trust Advisers*, 78 HARV. L. REV. 1230, 1230 (1965).

51. See Alexander A. Bove, Jr., *The Trust Protector: Trust(y) Watchdog or Expensive Exotic Pet?*, 30 EST. PLAN. 390, 394 (2003). Although a trust advisor is not thought of as a trust “protector,” it amounts to exactly that.” *Id.*

52. Note, *supra* note 50, at 1230.

B. *Practical Origins*

Trust protectors originated when asset managers sought to lure American dollars to offshore business investments under the promise of asset protection.⁵³ Before the existence of trust protectors, an offshore asset protection trust would generally name a trustee who was beyond the jurisdiction of the American legal system.⁵⁴ This was because American courts could order a trustee to hand over the trust assets to American creditors only if the trustee were subject to American law.⁵⁵ A domestic trustee could also be subject to fines and surcharges for failing to comply with the orders of the American courts.⁵⁶ A foreign trustee could be immune from such orders.

Though American investors had a desire to protect their assets from domestic creditors, they were often unwilling to cede full control of their assets to a foreign trustee.⁵⁷ To get around this, asset-protection trust instruments began to name, in addition to a foreign trustee, a domestic "trust protector."⁵⁸ The trust protector would have some limited powers over the trustee, as well as the trust itself.⁵⁹ The trust settlor might name himself as the protector or opt for a third party.⁶⁰ If the settlor named himself as protector, however, it gave the impression he had control over the trust assets or the trustee.⁶¹ A domestic third party was therefore preferred because, although this would require the investor to rely on the judgment of the third party, the investor lessened the risk of a domestic court ordering him to compel the foreign trustee to make the trust assets available to domestic creditors.⁶² If American courts were to have this power, it would defeat the original purpose of the asset protection trust—to protect the trust from domestic creditors.

The settlor also had to determine what powers to give the trust protector. If the protector had too much power over the trustee or the trust assets, the settlor would risk an American court having personal

53. Sterk, *supra* note 2, at 2764.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

jurisdiction over the protector and compelling the trust assets to be made available to domestic creditors.⁶³ A domestic third-party protector with limited powers could be sufficiently shielded from the American settlor and the foreign trustee, preventing American courts from piercing the trust.⁶⁴ A lack of power, however, diminished the trust protector's value to the trust.⁶⁵ The trust's settlor therefore had to be careful to balance the powers of the trust protector with the risk of a court piercing the trust. Not surprisingly, trust protector powers varied from one trust to another.⁶⁶

C. International Statute Framework

The trust protector was created by savvy financiers to lure American dollars to international tax havens. An effort to create a statutory framework for trust protectors began, unsurprisingly, in non-United States jurisdictions where asset protection trusts were most common. The statutes began to appear in the Cook Islands⁶⁷ and were followed by other locales such as Belize,⁶⁸ Bermuda,⁶⁹ Nevis,⁷⁰ the British Virgin Islands,⁷¹ and

63. *Id.* Note, a common practice was to give the protector only veto power over a trustee's decisions; a court could not hold a trust protector liable over decisions the protector never made. *Id.*

64. *See id.*

65. *Id.* at 2765.

66. *See id.*

67. International Trusts Act, 1984 §§ 20–21 (amended 1999) (Cook Islands).

“‘[P]rotector’ in relation to an international trust means a person who, by whatever name or title: (a) has the power to appoint or remove a trustee, or (b) directly or indirectly controls, whether by power of veto or otherwise, the trustees’ exercise of one or more of their powers, functions or discretions under the trust”

Id. § 2. *See also* Sterk, *supra* note 2, at 2765 & n.19.

68. Trusts (Amendment) Act, 2007 § 64 (Belize), available at http://www.ifsc.gov.bz/downloads/trusts_amend_act2007.pdf. “‘Protector’ means the person appointed by the settlor to intercede between the trustees, settlor and beneficiaries.” *Id.* *See also* Sterk, *supra* note 2, at 2765 & n.21.

69. Trustee Amendment Act, 1999 (Berm.).

70. Nevis International Exempt Trust Ordinance, 1994 § 2 (amended 1995).

“‘[P]rotector’ in relation to a trust means a person who is the holder of a power which when invoked is capable of directing a trustee in matters relating to the trust and in respect of which matters the trustee has discretion and includes a person who is the holder of a power of appointment or dismissal of trustees.”

Id.

the Cayman Islands.⁷²

Although these statutes established trust protectors, the levels of duties and responsibilities of the protector were—and are—varied. The statute established by the British Virgin Islands, for example, states that a protector “is not liable to the beneficiaries for the bona fide exercise of the power.”⁷³ Nevis, on the other hand, has determined “a protector shall owe a fiduciary duty to the beneficiaries of the trust or to the purpose for which the trust is created.”⁷⁴

With the creation of these statutes, the trust protector was no longer just a creative invention by lawyers. Although the statutes may have imposed different levels of liability on trust protectors, the position was officially in the books and ready to be used in other venues.

D. *A Domestic Migration*

The trust protector had established itself as a useful tool in international asset-protection trusts. The trust protector was also, however, well-suited for domestic trusts, providing an answer for many common issues that can occur over the life of any trust.

Though the Internal Revenue Service has not yet issued any literature about trust protectors' roles in domestic trusts, statutes have been enacted in a handful of states.⁷⁵ The first United States trust protector statute was established in South Dakota in 1997.⁷⁶ Idaho,⁷⁷ Alaska,⁷⁸ Wyoming,⁷⁹ and

71. BVI Trustee Act, 1961 § 86(3) (amended 2003) (Virgin Is.). “There may be conferred on the settlor or some other person, whether named as protector . . . or by any other name, . . . any powers . . . to do any one or more of the following . . .” *Id.* § 86(2). See also Sterk, *supra* note 2, at 2765 & n.20.

72. Special Trusts (Alternative Regime) Law, 1997 § 7.2 (Cayman Is.). Protectors are known in this act as enforcers. “The only persons who have standing to enforce a special trust are such persons, whether or not beneficiaries, as are appointed to be *enforcers* . . .” *Id.* (emphasis added).

73. BVI Trustee Act, 1961 § 86(3). See also Sterk, *supra* note 2, at 2765 & n.20.

74. Nevis International Exempt Trust Ordinance, 1994 § 9 (amended 1995).

75. See MINNIGH, *supra* note 31, at 3.

76. S.D. CODIFIED LAWS § 55-1B-6 (2004 & Supp. 2010); see Bove, *supra* note 51, at 391 n.1; Sterk, *supra* note 2, at 2769.

77. IDAHO CODE ANN. § 15-7-501(b) (2009); see Bove, *supra* note 51, at 391 n.1; Sterk, *supra* note 2, at 2769.

78. ALASKA STAT. § 13.36.370(a) (2008).

79. WYO. STAT. ANN. § 4-10-711 (2009).

Tennessee subsequently enacted statutes.⁸⁰ The U.T.C. makes provisions for trust protectors as well.⁸¹

Noteworthy, though, is the fact most states have *not* created statutes recognizing trust protectors. Nor has case law developed in these states—there is virtually no case law, save one published case in Missouri,⁸² recognizing the trust protector as a fiduciary or indicating the protector's liabilities with regard to the trust. The question remains: Is the trust protector of a domestic trust a fiduciary?

V. ANALYSIS

The trust protector can play a tremendous role in estate planning and trust administration. Not only can the protector act as a conduit between a trust's various parties, the protector may also be able to appoint trustees, approve accounts, and change the terms of a trust. So the protector has powers that can border on those of the trustee—possibly even exceeding them—and may be able to exercise these powers without the liability issues inherent in the fiduciary role of the trustee, right?

Not so fast. First, a brief discussion of fiduciary duty is in order, as well as an analysis of existing law and literature. In an analysis of legal trends, the trust protector may very well carry the same level of liability as a trustee. If a trust protector, like the trustee, is indeed a fiduciary, the protector owes to the trust the highest level of care.

A. *Fiduciary Duty*

“A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence.”⁸³ Fiduciary duty is the “duty of utmost good faith, trust, confidence, and candor owed by a fiduciary . . . to the beneficiary.”⁸⁴ A fiduciary is required to act in all manners for the

80. TENN. CODE ANN. § 35-15-808 (2007). The Tennessee statute mentions trust protectors specifically in its comments. *Id.* § 35-15-808 cmt.

81. UNIF. TRUST CODE § 808 cmt. (amended 2005).

82. Robert T. McLean Irrevocable Trust U/A/D v. Patrick Davis, P.C., 283 S.W.3d 786, 789 (Mo. Ct. App. 2009).

83. Bristol & W. Bldg. Soc'y v. Mothew, [1998] Ch. 1 at 18 (Eng.).

84. BLACK'S LAW DICTIONARY 545 (8th ed. 2004). A fiduciary is “[a] person who is required to act for the benefit of another person on all matters within the scope of their relationship; one who owes to another the duties of good faith, trust, confidence, and candor.” *Id.* at 658.

benefit of another within the scope of their relationship.⁸⁵ A fiduciary is expected to be loyal to the person to whom he owes this duty and to act at all times in the person's interest.⁸⁶ A fiduciary may never put his personal or third party interests before the interests of the person to whom the duty is owed.⁸⁷ Common types of fiduciary relationships are those of a lawyer-client, conservator-ward and guardian-ward, doctor-patient, priest-parishioner, and, of course, trustee-beneficiary.

Key to the fiduciary duty is the liability associated with a fiduciary violating the fiduciary relationship. If a trustee abuses her powers at the expense of the beneficiary, the beneficiary is not limited to recovering from the trust. The trustee will have to forfeit her gains or may have to pay compensatory damages out-of-pocket.⁸⁸

To what standard is the trust protector held? If a trust protector engages in behavior not becoming of a fiduciary, is anything owed to the beneficiaries for this breach? If a trustee violates a fiduciary duty, the trustee will have to compensate the beneficiaries. If a trust protector is free from this level of duty, a license to act in ways not beneficial to beneficiaries is issued, and in doing so, the trust protector avoids the risk of loss inherent to a violation of this duty. Also, if a protector is not a fiduciary, the relationship between the trustee and protector will be very different. "An individual holding a personal power cannot be forced to exercise it . . . [but] he may [exercise it] on a whim, or even for a spiteful or malicious reason."⁸⁹ Are a trust protector's powers personal or fiduciary in nature? This question is analyzed on a case-by-case basis.

B. *Personal Power v. Fiduciary Power*

It is important to determine the difference between those that hold a power in a fiduciary capacity and those that hold a power in a personal capacity. Only those deemed to hold a power in a fiduciary capacity could be deemed to be a fiduciary and therefore owe to the beneficiaries a fiduciary duty. If a trust protector's power is personal, the only duty of the trustee is to follow the direction of the protector and ensure that the direction does not violate the terms of the trust.⁹⁰ If the protector's power

85. *Id.*

86. *See* UNIF. TRUST CODE § 802 & cmt. (amended 2005).

87. *Id.*

88. *See Id.* § 1002(a).

89. *See Bove, supra* note 51, at 391.

90. *See* RESTATEMENT (SECOND) OF TRUSTS § 185 (1959); AM. BANKERS

is held in a fiduciary capacity, the trustee's duty goes beyond the four corners of the document; he must verify the direction does not violate a fiduciary duty owed by the protector to the beneficiaries.⁹¹ The Restatement treats an individual who holds a power in the capacity of a fiduciary as a cofiduciary,⁹² and at least one state has a statute to this effect.⁹³

If the protector's power is personal in nature, the trust protector cannot be forced to exercise this power; the power is not held in a fiduciary capacity, the power is purely at the discretion of the power holder. This means the power can be exercised or not exercised on a mere whim, including exercising the power for reasons of spite or malice, as long as no fraud is involved and it does not violate public policy.⁹⁴ A trustee who is reacting to a personal power is not under a duty to consider the reasons for the exercise or motives as long as the terms of the trust are not being violated.⁹⁵

A number of factors should be considered in determining whether a protector's duty is personal or fiduciary in nature. In some cases, considering the identity of the person appointed as protector and the powers granted to that person can provide some instruction. Consider, for example, the settlor naming his child as protector and giving the protector an unlimited power to add or delete beneficiaries. If the child were then to immediately begin adding and deleting beneficiaries, including adding herself, one could likely assume the settlor would have contemplated the child would, in fact, exercise the power in this manner.⁹⁶ To consider this

ASS'N, CURRENT ISSUES FACING FIDUCIARIES IN THE INVESTMENT OF ASSETS 27 (2010).

91. See RESTATEMENT (SECOND) OF TRUSTS § 185 & cmts. c, e; AM. BANKERS ASS'N, *supra* note 90, at 27.

92. RESTATEMENT (SECOND) OF TRUSTS § 185.

93. See, e.g., IND. CODE ANN. § 30-4-3-9(b)(1) (LexisNexis 2006) ("If the person holds the power as a fiduciary, the trustee has a duty to refuse to comply with any direction which he knows or should know would constitute a breach of a duty owed by that person as a fiduciary.").

94. Bove, *supra* note 51, at 391; see also *Pitman v. Pitman*, 50 N.E.2d 69, 74–76 (Mass. 1943) (finding a fraudulent exercise of a power "where the donee acts corruptly for pecuniary gain [and] where he acts primarily for his own personal advantage or that of a third person who is a non-object of the power" (citations omitted)).

95. Bove, *supra* note 51, at 391 (citing RESTATEMENT (SECOND) OF PROPERTY § 18.2 ch. 20 (1986)).

96. BOVE & LANGA, *supra* note 1, at 3; Bove, *supra* note 51, at 392.

as a personal power to the child would seem appropriate, and it would seem the child could not be forced to exercise the power or be forced to refrain from exercising it, including for the child's own benefit.

Consider the same scenario, but this time the settlor appoints his attorney as protector. It would likely not be appropriate for the attorney to delete the settlor's children and grandchildren from the list of beneficiaries or to add himself. In this case, it would be unlikely that the power would be a personal one; rather, it is likely the settlor appointed the attorney as protector in a fiduciary capacity.⁹⁷

As a rule, if the protector is a beneficiary or a person who would be likely to "be an object of the settlor's bounty," the presumption would be the power is personal to the extent it could benefit the protector.⁹⁸ When the protector is someone to whom the settlor would be unlikely to direct a benefit of the trust, and when the protector serves primarily in an advisory role, it is likely the power is fiduciary in nature.⁹⁹

An easier solution to this analysis would be to simply include language in the document regarding the nature of the power, indicating the power should be exercised in a fiduciary capacity if it is so intended.¹⁰⁰ When a disinterested third-party protector is appointed, it is likely the protector is a fiduciary and, as such, owes to the trust the highest level of care.

C. The Uniform Trust Code

The U.T.C. appears to endorse a trust protector's fiduciary duty. As of 2010, twenty-two states and the District of Columbia have enacted some form of the U.T.C.¹⁰¹ With the exception of Utah, each of these states has

97. See BOVE & LANGA, *supra* note 1, at 3; Bove, *supra* note 51, at 392.

98. BOVE & LANGA, *supra* note 1, at 5–6; Bove, *supra* note 51, at 392.

99. BOVE & LANGA, *supra* note 1, at 5; Bove, *supra* note 51, at 392.

100. BOVE & LANGA, *supra* note 1, at 6. Note, however, including language to the opposite effect—the protector "is not a fiduciary"—does not have the same outcome; a majority of protectors are expected to exercise their powers in favor of the trust and not themselves, and to indicate otherwise may cause confusion when there are not clear circumstances to that effect. *Id.*

101. See ALA. CODE §§ 19-3B-101 to -1305 (2007 & Supp. 2009); ARIZ. REV. STAT. ANN. §§ 14-10101 to -11102 (Supp. 2009); ARK. CODE ANN. §§ 28-73-101 to -1106 (Supp. 2009); D.C. CODE §§ 19-1301.01 to -1311.03 (LexisNexis 2001 & Supp. 2010); FLA. STAT. ANN. §§ 736.0101–.1303 (West 2010); KAN. STAT. ANN. §§ 589-101 to -1107 (2005); ME. REV. STAT. ANN. tit. 18-B, §§ 101–1104 (Supp. 2009); MICH. COMP. LAWS ANN. §§ 700.7101–.8202 (West 2002 & Supp. 2010); MO. ANN. STAT. §§ 456.1-101 to

adopted Section 808—the power to direct—in some form.¹⁰² Section 808 of the U.T.C. provides:

(c) The terms of a trust may confer upon a trustee or other person a power to direct the modification or termination of the trust.

(d) A person, other than a beneficiary, who holds a power to direct *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. The holder of a power to direct is liable for any loss that results from breach of a fiduciary duty.¹⁰³

The comments to the Code specifically address trust protectors: “‘Trust protector,’ a term largely associated with offshore trust practice, is more recent and usually connotes the grant of greater powers, sometimes including the power to amend or terminate the trust.”¹⁰⁴ This portion of

456.11-1106 (West 2007 & Supp. 2010); NEB. REV. STAT. ANN. §§ 30-3801 to -38,110 (LexisNexis Supp. 2009); N.H. REV. STAT. ANN. §§ 564-B:1-101 to 12-1205 (LexisNexis 2006 & Supp. 2009); N.M. STAT. ANN. §§ 46A-1-101 to -11-1105 (2007 & Supp. 2009); N.C. GEN. STAT. §§ 36C-1-101 to -11-1106 (2009); N.D. CENT. CODE §§ 59-09-01 to -19-02 (2010); OHIO REV. CODE ANN. §§ 5801.01–5811.03 (LexisNexis 2006 & Supp. 2010); OR. REV. STAT. ANN. §§ 130.001–.910 (West Supp. 2010); 20 PA. CONS. STAT. ANN. §§ 7701–7799.3 (West Supp. 2010); S.C. CODE ANN. §§ 62-7-101 to -1106 (2009 & Supp. 2009); TENN. CODE ANN. §§ 35-15-101 to -1103 (2007 & Supp. 2009); UTAH CODE ANN. §§ 75-7-101 to -1201 (LexisNexis 1993 & Supp. 2010); VT. STAT. ANN. tit. 14A, §§ 101–1204 (West 2010); VA. CODE ANN. §§ 55-541.01 to -551.06 (2007 & Supp. 2010); WYO. STAT. ANN. §§ 4-10-101 to -1103 (2009).

102. See ALA. CODE § 19-3B-808 (LexisNexis 2007); ARIZ. REV. STAT. ANN. § 14-10808 (Supp. 2009); ARK. CODE ANN. § 28-73-808 (Supp. 2009); FLA. STAT. ANN. § 736.0808 (West 2010); KAN. STAT. ANN. § 58a-808 (2005); ME. REV. STAT. ANN. tit. 18B, § 808 (Supp. 2009); MICH. COMP. LAWS ANN. § 700.7809 (West Supp. 2010); MO. ANN. STAT. § 456.8-808 (West 2007); NEB. REV. STAT. ANN. § 30-3873 (LexisNexis Supp. 2009); N.H. REV. STAT. ANN. § 564-B:8-808 (LexisNexis 2006); N.M. STAT. ANN. § 46A-8-808 (Supp. 2007); N.C. GEN. STAT. § 36C-8-808 (2009); N.D. CENT. CODE § 59-16-11 (2010); OHIO REV. CODE ANN. § 5808.08 (LexisNexis 2006); OR. REV. STAT. ANN. § 130.685 (West Supp. 2010); 20 PA. CONS. STAT. ANN. § 7778 (West Supp. 2010); S.C. CODE ANN. § 62-7-808 (2009); TENN. CODE ANN. § 35-15-808 (2007); VT. STAT. ANN. tit. 14A, § 808 (2010); VA. CODE ANN. § 55-548.08 (2007); WYO. STAT. ANN. § 4-10-808 (2009). Although many states have not enacted the U.T.C., many have enacted their own code sections allowing for a trust agreement to grant a nontrustee a power to direct, shielding the trustee from liability for losses resulting from investments made pursuant to this third-party power. See e.g., COLO. REV. STAT. § 15-1-307 (2009); GA. CODE ANN. § 53-12-194(c) (West 2003); IND. CODE ANN. § 30-4-3-9(a) (LexisNexis 2006).

103. UNIF. TRUST CODE § 808(c)–(d) (amended 2005) (emphasis added).

104. *Id.* § 808 cmt.

the Code applies directly to the role of the trust protector, and as such, the plain language of the Code is clear: a person who holds the power to direct is presumed to be a fiduciary, and a breach of a fiduciary duty puts the protector on the hook.¹⁰⁵

The Code, however, allows for some wiggle room by the settlor. The comments state, “[A] settlor could provide that the holder of the power is not to be held to the standards of a fiduciary.”¹⁰⁶ The settlor may adjust this duty by drafting language to that effect in the document.¹⁰⁷ But the same comment continues, stating:

A trustee may refuse the direction only if the attempted exercise would be manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty owed by the holder of the power to the beneficiaries of the trust.¹⁰⁸

This inference in the power holder’s breach of a fiduciary duty owed to the beneficiaries reinforces the text of the Code itself: a power holder, including a trust protector, has a fiduciary duty to the beneficiaries.¹⁰⁹

Although the Code grants the settlor some room to make modifications, it would certainly appear to argue in favor of a trust protector owing a fiduciary standard of care to beneficiaries. Importantly, certain states have enacted laws specifically presuming someone with power to direct is a fiduciary.¹¹⁰ In discussing the fiduciary power to direct, the U.T.C. makes specific reference to section 185 of the Restatements (Second) of Trusts, which is discussed next.

D. *The Restatements*

Section 808 of the U.T.C. refers specifically to Restatement (Second) of Trusts section 185 with regard to the power to direct,¹¹¹ as does the

105. *Id.* § 808(d) & cmt.

106. *Id.* § 808 cmt.

107. *Cf. Bove, supra* note 51, at 392 (noting the use of exculpatory language could possibly be misleading for the trustee and questioning the effectiveness of exculpatory language).

108. UNIF. TRUST CODE § 808 cmt.

109. *See id.* § 808(d).

110. *See infra* Part V.G.

111. UNIF. TRUST CODE § 808 cmt.; RESTATEMENT (SECOND) OF TRUSTS § 185 (1959).

Restatement (Third) of Trusts section 64(2).¹¹² The U.T.C. states, “Subsections (b) and (d) are based in part on Restatement (Second) of Trusts § 185 (1959). Subsection (c) is similar to Restatement (Third) of Trusts § 64(2)”¹¹³ The Code continues, “Subsection (c) ratifies the recent trend to grant third persons” greater powers, including the power to terminate or amend the trust.¹¹⁴ The U.T.C. section is based, at least in part, on the distillation of common law found in the Restatement (Second) of Trusts section 185, which states:

If under the terms of the trust a person has power to control the action of the trustee in certain respects, the trustee is under a duty to act in accordance with the exercise of such a power, unless the attempted exercise of the power violates the terms of the trust or is a violation of a fiduciary duty to which such person is subject in the exercise of the power.¹¹⁵

This section does not specifically address a trust protector or connote a fiduciary power on one who has a power to direct. It does, however, note that a trustee must be on the lookout to make sure the party with the power to direct does not violate a fiduciary duty. This line is telling: if a trustee must watch out for a violation of a fiduciary duty by a third party, it would follow that a third party with a power to direct would be subject to a fiduciary standard. The comments to the section continue, specifically addressing a personal versus fiduciary power: “A power given to some third person . . . would ordinarily be a power for the benefit of the beneficiaries of the trust generally.”¹¹⁶ Although this passage refers to investment authority, it infers that if the protector is under an obligation to act for the beneficiaries, he is a fiduciary. This is the role most often played by the trust protector. The passage cements the fiduciary versus personal power when it states: “[A] power given to some third person . . . to control the trustee in disposing of or acquiring trust investments, would ordinarily be a power for the benefit of the beneficiaries of the trust”¹¹⁷—a fiduciary power. The comments lay out an example: “[a] power given to a widow to prevent the sale of residential real estate held in trust by refusing to consent to the sale thereof would ordinarily be a power for the benefit of

112. RESTATEMENT (THIRD) OF TRUSTS § 64 reporter’s notes (2003).

113. UNIF. TRUST CODE § 808 cmt.

114. *Id.*

115. RESTATEMENT (SECOND) OF TRUSTS § 185.

116. *Id.* § 185 cmt. c.

117. *Id.*

the widow only,” or in other words, a personal power.¹¹⁸ Moreover, “[i]f the power is for the benefit of someone other than the holder of the power, the holder of the power is subject to a fiduciary duty in the exercise of the power.”¹¹⁹ When a third party is to act for the benefit of the beneficiaries and not for himself, that third party should be held to a fiduciary standard.

The Restatement (Second) of Trusts was originally drafted in 1959 and, of course, reflects legal trends from that time period. It was updated in 2003 with the Restatement (Third) of Trusts, the comments of which specifically address the trust protector. Section 64 states: “The terms of a trust may grant a third party a power with respect to termination or modification of the trust; such a third-party power is *presumed to be held in a fiduciary capacity*.”¹²⁰ The comments continue, “An important development in trust and estate practice in recent years has been the use of trust ‘protectors.’”¹²¹ As with the Restatement (Second), the Restatement (Third) addresses the fiduciary power versus personal power issue, stating: “[w]here the powers were conferred on the protector *virtute officii*, they are presumed to be fiduciary powers,”¹²² and “[a]bsent some clear indication of a settlor’s contrary intent, powers granted to a protector or other third party probably should be deemed to be held in a fiduciary capacity.”¹²³ Note the use of “probably.” Case and common law on this subject is so slim it is not possible for the Restatement to draw a conclusive answer on the subject. The fact the Restatement addressed it specifically, however, shows it is slowly taking a firm and established place in trust doctrine.

To assist in finding a conclusion, it is helpful to see what other jurisdictions have done. As discussed above, trust protectors originated in offshore trusts. As such, case law exists on the subject, albeit from foreign courts. While not binding in American courts, the opinions are instructive.

E. *International Trends*

As discussed above, domestic trust doctrine on this topic is sparse. Some would argue it is nonexistent, with the exception of a couple state statutes and one notable case discussed below.¹²⁴ It is therefore helpful to

118. *Id.*

119. *Id.* § 185 cmt. e.

120. RESTATEMENT (THIRD) OF TRUSTS § 64(2) (2003) (emphasis added).

121. *Id.* § 64 reporter’s notes.

122. *Id.* (emphasis in original).

123. *Id.*

124. *See infra* Part V.F.

look to other jurisdictions to view their legal trends. Though one should hesitate to draw conclusions for American courts by viewing courts of foreign jurisdictions, these foreign jurisdictions have had the most experience with trust protectors and their associated duties, and are therefore the courts most likely to have some insight regarding their fiduciary duty, or lack thereof.

Von Knieriem v. Bermuda Trust Company (also known as the *Star Trusts Case*), for example, was a case in which a trust protector was given the ability to replace and remove the trustee.¹²⁵ The settlor of the trust was a board member of a corporation, some shares of which were held in the trust.¹²⁶ Bermuda Trust was asked to vote the shares it held in favor of the settlor.¹²⁷ When Bermuda Trust wanted additional time to research this request, the trust protector, rather than risk a negative decision by Bermuda Trust, decided to instead remove it as trustee.¹²⁸ When the trust protector requested that Bermuda Trust turn over the shares to the successor trustee, Bermuda Trust petitioned the court for instruction.¹²⁹

The court centered its analysis on whether the trust protector was a fiduciary, or at a minimum, whether the trust protector was to exercise his power to remove or replace the trustee in a fiduciary capacity.¹³⁰ Although the court ruled the action by the protector was appropriate, the court noted that the ability to remove and replace trustees was *essential to the trust and the interests of the beneficiaries*.¹³¹ The court quoted an English case, *In re Skeats Settlement*:

The ordinary power of appointing new trustees . . . imposes upon the person who has the power of appointment the duty of selecting honest and good persons who can be trusted with the very difficult . . . duties which trustees have to perform. He is bound to select to the best of his ability the best people he can find for the purpose.¹³²

The court in this case conclusively established that the power of a trust

125. *Von Knieriem v. Berm. Trust Co. Ltd.* (Bermuda High Court, 1994), in 1 *Offshore Case and Materials* 116 (Giles Clarke ed., 1996).

126. *Id.* at 117.

127. *Id.*

128. *Id.*

129. *Id.* at 117–18.

130. *Id.* at 121–24.

131. *Id.* (emphasis added).

132. *Id.* at 123 (quoting *In re Skeats Settlement*, [1889] 42 Ch. 522 at 526–27 (Eng.)).

protector to appoint and remove a trustee is a fiduciary one.¹³³

Rawcliffe v. Steele is a case from the Isle of Man involving a trust document that specified the trust protector was to consent to the selection of, and distributions to, the beneficiaries.¹³⁴ The issue in this case was a trust protector position that had never actually been filled.¹³⁵ The question brought to the court was whether the trust protector position was one that had to be appointed by the court, much like a trustee.¹³⁶ The court stated that the trust protector's powers in this case were fiduciary in nature, and therefore, the appointment was subject to court supervision.¹³⁷

A Canadian case addresses trust advisors, which, as discussed above, are one form of trust protector, though limited to investment advice.¹³⁸ The trust from *In re Rogers* provided that "the executors and trustees shall be 'governed by the advice of' one who is neither a beneficiary nor a trustee or executor himself."¹³⁹ After the death of the settlor, the advisor-protector personally acquired an interest in an asset partly held by the trust and subsequently entered into negotiations conflicting with the interests of the trust.¹⁴⁰ The situation that resulted enabled the trust protector to sell his own shares, but at the same time he was able to withhold his consent to sell the shares held in the trust account.¹⁴¹ The trustee, who desired to sell the trust's shares and give the proceeds to the trust beneficiaries, petitioned the court to intervene.¹⁴² The advisor-protector maintained that his ability to withhold consent was "exclusive"—it was a personal power and not a fiduciary one—and the court did not have the authority to override this power.¹⁴³

The court disagreed with the advisor-protector and allowed the sale of the trust assets without his consent.¹⁴⁴ The court stated,

133. *Id.* at 124.

134. *Rawcliffe v. Steele*, 1993–95 MLR 426, 427 (High Court, Isle of Man); *see also* Bove, *supra* note 51, at 393.

135. *Rawcliffe*, 1993–95 MLR at 437.

136. *Id.*

137. *Id.* at 513.

138. *See supra* Part IV.A.

139. *In re Rogers* (1928), 63 O.L.R. 180, 182 (Can. Ont. Sup. Ct.); *see* BOVE & LANGA, *supra* note 1, at 9.

140. *In re Rogers*, 63 O.L.R. at 184–85.

141. *Id.* at 186–87.

142. *Id.*

143. *Id.* at 183.

144. *Id.* at 185.

[T]o contend that the so-called control over the management of the estate given him can hamper or limit the power of the court to advise the trustees and to give directions for the due administration of the estate is to place [the advisor-protector] in the . . . position of a sort of super-trustee who is neither responsible to the trustees or the beneficiaries nor subject to the control or direction of the Court.¹⁴⁵

In essence, according to a similar analysis by American attorneys Alexander A. Bove, Jr. and Melissa Langa, the advisor-protector was appointed to protect the trust.¹⁴⁶ If this is indeed the case, the protector who accepts this role must exercise these powers in a fiduciary nature—the protector must act reasonably and keep the interests of the beneficiaries in mind.¹⁴⁷

Due to the few sources of domestic trust protector doctrine, it is helpful to look to these foreign jurisdictions to at least get a glimpse of how the powers of the trust protector have been viewed in jurisdictions in which they have been in use the longest. Although the cases generally analyze the individual power of the trust protector rather than the trust protector's role as a whole, it would seem clear the trend in foreign jurisdictions is to treat the trust protector as a fiduciary. The powers held by the protector and the necessity of those powers to the operation of the trust make the powers of the protector indispensable when they are incorporated into a trust document. Consequently, a trust protector's duties are viewed as fiduciary in nature.

F. The One Domestic Indicator? Missouri's Robert T. McLean Irrevocable Trust U/A/D v. Patrick Davis, P.C.

For a role as new as that of a trust protector, trying to establish a legal trend or make a prediction about how a court will treat a trust protector's duties becomes a challenge, especially when the resources necessary for an analysis of legal trends are virtually nonexistent. Model acts and case law in foreign jurisdictions can give us some idea of how a court may view the protector's duties, but they are a poor substitute for a published domestic case. Fortunately, in January 2009, such a case appeared before the Missouri Court of Appeals.

Even though the case ultimately ended in an order to remand, the case was an issue of first impression in that it dealt directly with the

145. *Id.* at 183.

146. BOVE & LANGA, *supra* note 1, at 9–10.

147. *Id.*

fiduciary duties of a trust protector. *Robert T. McLean Irrevocable Trust v. Patrick Davis, P.C.* involved a special needs trust set up for the victim of a car accident.¹⁴⁸ The attorney who tried the case for the victim was appointed as trust protector, with an individual and a corporation as co-trustees.¹⁴⁹ The trust document stated, specifically, “The Trust Protector’s authority hereunder is conferred in a fiduciary capacity and shall be so exercised, but the Trust Protector shall not be liable for any action taken in good faith.”¹⁵⁰ The document gave the protector the right to remove and appoint new trustees, as well as to resign as trust protector and appoint a successor trust protector.¹⁵¹

The original trustees resigned, and the protector appointed new trustees, including the law firm which had referred the accident victim to the protector for representation, and with whom the protector had an ongoing referral relationship.¹⁵² Eventually, the beneficiary complained to the protector that the trustees were spending the trust’s money inappropriately.¹⁵³ A succession of trustee and protector appointments followed, including the resignation of the original trust protector and the appointment of a new one.¹⁵⁴ The beneficiary brought suit against the original protector, claiming the protector had breached his fiduciary duty by acting in bad faith when he failed to monitor trust expenditures, by failing to stop the trustees from acting contrary to the interests of the beneficiary, and by placing his loyalty to the trustees above his loyalty to the beneficiary.¹⁵⁵ The lower court ultimately ruled that the protector did not have any legal duties to oversee the trustees, and the court granted the protector’s motion to dismiss.¹⁵⁶

On appeal, the protector argued Missouri law does not impose specific duties on a trust protector to monitor a trustee, and he therefore only had the duties set forth in the document.¹⁵⁷

148. *Robert T. McLean Irrevocable Trust U/A/D v. Patrick Davis, P.C.*, 283 S.W.3d 786, 789 (Mo. Ct. App. 2009).

149. *Id.*

150. *Id.* at 790.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at 790–91.

156. *Id.* at 791–92.

157. *Id.* at 793.

The court agreed—without guidance from the legislature regarding the duties of a trust protector, the protector’s duties are limited to those outlined in the document and “*the nature of the relationship between the parties.*”¹⁵⁸ The court also noted the document offers the protector immunity for actions taken in good faith—noting no immunity exists for actions taken in bad faith.¹⁵⁹

The court acknowledged that the beneficiary would certainly expect the protector to appoint trustees with the purposes of the trust in mind. The likely intent of the settlor in appointing a protector would involve the protector having some level of protective or supervisory duty exercised over the trustees, especially considering the protector had the duty to prevent a trustee from serving at any time through his removal power.¹⁶⁰ The case was remanded to the lower court for consideration of whether the protector had breached a duty.¹⁶¹

This Missouri court is the first to publish a case on the subject of the fiduciary duty of a trust protector. It is telling that the court analyzed not just the language within the four corners of the document, but the intent of the settlor to have someone “protecting” the trust and the expectation of a duty that can be determined in part through the relationship of the protector and the beneficiary.¹⁶² The court could have remanded the case based solely on the issue of fact regarding the document’s language—whether it was proven that the protector had acted in good or bad faith.¹⁶³

This ruling is an indicator of the view that will likely be taken of trust protectors in cases to come. It would seem intuitive in many cases that the trust protector is appointed to do just that—protect. A trust protector does indeed have a duty to the beneficiary that may go beyond what is found in the four corners of the trust document. Although this court did not create

158. *Id.* at 794 (emphasis added).

159. *Id.* at 795.

160. *Id.* at 794–95.

161. *Id.*

162. *Id.*

163. *See id.* at 795–96 (Parrish, J., concurring) (arguing the issue before the court was one of fact, dealing with the specific language of the document). Because the document provided no liability for a protector acting in good faith, the issue before the lower court was whether the protector’s actions conformed to this standard. Judge Parrish wrote, “I contend that any actions taken . . . by the person denoted as the trust protector can only be judged on the basis of whether his actions, or inactions, occurred in a manner contrary to the precise language in the trust document in question.” *Id.* at 796.

a final ruling on the issue of fiduciary duty, it is clear that when a trust protector is granted a power in a fiduciary capacity, he is to conduct himself solely in the interests of the beneficiaries.¹⁶⁴

G. *Fiduciary Duties in State Statutes*

Finally, there are several states that have enacted statutes regarding trust protectors. A look at the language of these statutes gives a glimpse into the likely direction of future statutes and the general attitude of state lawmakers on this issue.

For example, Idaho's trust code defines a "trust protector" as "any disinterested third party whose appointment is provided for in the trust instrument."¹⁶⁵ The statute states, unequivocally, that a "fiduciary" is defined as "a trustee[,] . . . executor, administrator, or personal representative of a decedent's estate, or any other party, including a trust advisor or a *trust protector*, who is acting in a fiduciary capacity for any person, trust, or estate."¹⁶⁶ Idaho's preference for a fiduciary level of care is clear.

South Dakota does not use the term "fiduciary," but uses fiduciary language when it states, "The powers and discretions of a trust protector shall be as provided in the governing instrument and may be exercised or not exercised, in the best interests of the trust"¹⁶⁷ Similarly, Tennessee states, in its "powers to direct" code section, "A person, other than a beneficiary, who holds a power to direct 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."¹⁶⁸ The statute continues, stating, "The holder of a power to direct is liable for any loss that results from breach of a fiduciary duty."¹⁶⁹ The Tennessee statute mentions the trust protector specifically in the statute's comments: "[This statute] ratif[ies] the use of trust protectors and advisors."¹⁷⁰ Finally, the Wyoming code has a section devoted solely to the trust protector's fiduciary status, which is short and succinct. The section, in its entirety, reads, "Trust

164. See *id.* at 794 (majority opinion) (noting the protector's "duties are owed to the trust itself" and "include a duty to protect the trust").

165. IDAHO CODE ANN. § 15-7-501(1)(g) (2009).

166. *Id.* § 15-7-501(1)(c) (emphasis added).

167. S.D. CODIFIED LAWS § 55-1B-6 (Supp. 2010).

168. TENN. CODE ANN. § 35-15-808(d) (2007).

169. *Id.*

170. *Id.* § 35-15-808 cmt.

protectors are fiduciaries to the extent of the powers, duties and discretions granted to them under the terms of the trust agreement.”¹⁷¹

Alaska, typical of its broad and hands-off approach to trust doctrine, takes the opposite stance: “[A] trust protector is not liable or accountable as a trustee or fiduciary because of an act or omission of the trust protector taken when performing the function of a trust protector”¹⁷² Alaska’s statute notwithstanding, the overall statutory is moving toward a fiduciary standard for a trust protector.

H. Policy Issues

The international and domestic trend is overwhelmingly in favor of holding a trust protector to a fiduciary standard. There are, however, other issues to consider.

For instance, if a trust protector is indeed a fiduciary, then what is the effect of a trust document that includes exculpatory language to the opposite effect? If the trust document attempts to release the trust protector from his or her fiduciary obligations, it would follow that the trustee is not liable for taking direction from the trust protector, assuming the document instructs him or her to do so.¹⁷³ What if the trust protector’s instructions are blatantly against the spirit and intent of the trust instrument? Is the trustee exculpated if the trustee proposes an act that is improper, but can then show the act was carried out because the protector ratified the action or gave his or her consent?¹⁷⁴

With regard to the trust advisor, a subspecies of the trust protector, the previously referenced *Harvard Law Review* note, *Trust Advisors*, commented: “Exculpatory provisions will not relieve a fiduciary of liability if the provision (1) does not cover the breach of duty involved, (2) is against public policy, or (3) was inserted in the instrument without the knowledge and consent of the settlor.”¹⁷⁵ On the subject of trust advisors, states have almost universally held them to be fiduciaries.¹⁷⁶ The note states, “No less care will be expected of an advisor with such [investment] powers than of the trustee himself, and the advisor should be surchargeable

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171. WYO. STAT. ANN. § 4-10-711 (2009).
172. ALASKA STAT. § 13.36.370(d) (2008).
173. See Bove, *supra* note 51, at 392.
174. *Id.* at 392.
175. Note, *supra* note 50, at 1235.
176. See Bove, *supra* note 51, at 394.

for failure to direct investment prudently.”¹⁷⁷ As discussed above, the trust advisor is a subcategory of trust protectors. It is likely the trust advisor doctrine would apply to trust protectors as well.

The very terminology of the role should not be taken lightly. That a trust protector is called a “protector” gives some credence to a trust protector having a fiduciary duty. In accepting the trust protector’s duties, the trust protector must have some idea he or she is there to act reasonably and in the best interests of the beneficiaries.¹⁷⁸ The court, in *Rawcliffe v. Steele*, stated, “It seems to me that it would be wrong entirely to neglect the terminology involved. The word ‘protector’ seems to me to connote a role for the person holding that position A ‘protector’ is, presumably, someone who ‘protects.’”¹⁷⁹

Of course, it is hoped that a trustee would recognize his or her fiduciary duty, act for the sole benefit of the beneficiaries regardless of direction from the protector, and request instruction from the court where the two cannot come to an agreement. Even so, a problem would clearly exist where a nonfiduciary has the ability to instruct a fiduciary under the terms of the document. Holding the protector to a fiduciary standard seems to be a better policy. Otherwise, the entire purpose of a trustee as a fiduciary would fail, as would the basic premise of a trust.¹⁸⁰ The trustee would cease being a trustee and would become a mere agent of the trust protector.¹⁸¹ Alternatively, if a trustee’s powers to act are conditioned on the trust protector’s approval, the trust protector would effectively become a co-trustee.¹⁸²

Additionally, guidance can be gleaned from the intent of the settlor. When the settlor appoints a trust protector, does it not seem likely on some level he or she intends the protector to exercise the same level of prudence as other trust professionals?¹⁸³ If a trust protector is directing investments, for example, it would seem likely the settlor would want the protector to

177. Note, *supra* note 50, at 1231 (citing *Warner v. First Nat’l Bank*, 236 F.2d 853, 862–63 (8th Cir. 1956)).

178. Bove, *supra* note 51, at 393. “[I]t is not like deciding whether to read a newspaper or go to the movies.” *Id.*

179. *Rawcliffe v. Steele*, 1993–95 MLR 426, 510–20 (High Court, Isle of Man).

180. Bove, *supra* note 51, at 394.

181. *Id.* at 392 (citing MAURIZIO LUPOI, TRUSTS, A COMPARATIVE STUDY 258 (2000)).

182. RESTATEMENT (THIRD) OF TRUSTS § 75 (2007); Sterk, *supra* note 2, at 2790.

183. See Sterk, *supra* note 2, at 2791.

exercise the same level of care, loyalty, and impartiality as a trustee.¹⁸⁴

VI. CONCLUSION

It is important that drafters, administrators, beneficiaries, financial professionals, and all those who will touch a trust over its life be aware of the issues and risks of using an entity surrounded by undetermined legal doctrine. A lesson, perhaps, can be taken from the trust advisor, whose guiding principals were still being formed in the 1960s:

Counsel should take great care in deciding whether a trust advisor is necessary to solve the problem he faces. Other devices, having received more thorough judicial treatment, will be more predictable in operation. In using a trust advisor, full understanding of the limitations of the device and careful briefing of the client as to the responsibilities and potential liabilities of the adviser will enable counsel to guide and forewarn clients most effectively.¹⁸⁵

Simply because one has the ability to use the trust protector does not mean one should. As with any trust clause or tool, careful considerations should be made regarding the needs of the beneficiaries and the likelihood they and the settlor will need a protector over the life of the trust. A trust protector's powers—and with those powers, the trust protector's ability to abuse them—are not necessarily limited by established legal doctrine.

Indeed, a trust protector's powers can be very broad—broad enough that the trust protector may have the potential to do some damage. If a trust protector does not have a fiduciary duty, who is to protect the beneficiary from the trust protector? Visions of “trust protector advisors” create nightmares of a never-ending bureaucracy, paralyzing a trustee's ability to administer a trust with an endless array of fiduciary and nonfiduciary advisors that all need to be persuaded in order to accomplish anything at all.¹⁸⁶ It could be argued a trustee has his hands full just trying to convince beneficiaries of the correct course of action. Holding a trust protector to a fiduciary standard puts the protector and the trustee on the same plane and holds them to the same standard—a standard of loyalty, prudence, and impartiality—while allowing them the freedom to act within their separate roles.

184. *Id.*

185. Note, *supra* note 50, at 1240.

186. See Gregory S. Alexander, *Trust Protectors: Who Will Watch the Watchmen?*, 27 CARDOZO L. REV. 2807, 2807–09 (2006).

A trust protector can serve as a very useful tool in the right circumstances. When acting in conjunction with the trustee, the protector can bring valuable insight regarding the original desires of the settlor. But in carrying out the settlor's wishes, the protector must have some level of duty to which he or she is beholden. The trust protector, held to a fiduciary standard, can bring great flexibility in a changing trust environment and in response to the future needs of the trust.¹⁸⁷ While a protector can potentially complicate a trust's administration and increase the expenses associated therein, the protector can also "provide a measure of security to the [s]ettlor and [b]eneficiaries as it can act as a buttress against a [t]rustee's potential abuse of power or malpractice."¹⁸⁸

187. Bove, *supra* note 51, at 397.

188. DASH & LIBURD, *supra* note 18, at 14.