



Trust Protectors: A Practice Manual with Forms

Alexander A. Bove Jr.

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The trust protector is generally regarded as a relatively new position in trust law, and the key feature of the position is that the protector may be granted powers over the trust, which are generally superior to those of the trustee. This places the protector in a position where, by the exercise of his powers, he can cause the trust to adjust to unforeseen changes or new conditions without the need for court action or beneficiary approval. This work takes the firm position that, with only limited exception, the role of the protector is a fiduciary one, imposing on the protector a duty to act in the best interests of the purposes of the trust and the beneficiaries.

Unfortunately, a substantial segment of the legal community, as well as the legislative bodies of a number of international jurisdictions, have taken a position that the protector is not a fiduciary, or that he may be declared in the trust not to be a fiduciary, and that the power granted him under the trust may be declared to be personal powers, whether or not such is the case, and thus he would have no liability for his actions or inactions while serving as protector. This attraction of providing total exculpation of the protector has effectively engendered a quick acceptance of the position by the bulk of the legal community and even by the legislatures of a number of jurisdictions, though almost totally unsupported by relevant case law. As a result, we have been seeing trusts which incorporate the use of a protector having the power to make critical dispositive and administrative decisions, as well as extensive modifications to the trusts without being exposed to liability for negligence or bad decisions which result in damages.

This work will examine in detail the role of the protector of the trust, the relationship between the protector and the trustee, between the protector and the beneficiaries, and the protector's responsibilities to the purposes of the trust. It will demonstrate with legal support that the role of the protector is not a new role, that, in fact, the protector is simply a new name for the decades-old position of trust advisor, and that the trust advisor is consistently regarded as a fiduciary in relevant treatises and has been repeatedly held to be a fiduciary in relevant cases. The discussion will also review and analyze the historical issues and professional commentary relevant to trust law and the role of protector, as well as case decisions in various international jurisdictions which have shed light on the issues and some of the positions taken in the statutes of a number of jurisdictions in the United States and across the world. All legal aspects of the role will be examined, including the rights of the protector, the protector's relationship to the trustee, and the courts' regard for and treatment of the position.

Further, the work will discuss in detail all of the practical considerations in using a protector, such as selection and special drafting considerations, the use of a protector in a foundation, and, in brief, the numerous tax issues that may apply. The conclusion will be that with only very limited exception, which will be explained, the protector is unquestionably a fiduciary, and just as a trustee, he should be held to fiduciary standards. Accordingly, while it is certainly possible to grant personal powers to an individual under a trust, those powers per se conflict with the duties of a protector. And while it is also possible to reduce the fiduciary liability of a protector to a minimum, it is not possible to eliminate it entirely, regardless of trust language attempting to do so.

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