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Dynasty Trusts and Trust Protectors

Although the relatively recently developed position of a trust protector may be useful in any kind of irrevocable trust, they can be particularly helpful in providing necessary flexibility for dynasty trusts. Dynasty trusts are very long term trusts established to benefit their beneficiaries, generally descendants of the trusts' settlors, and are often also designed to avoid or minimize estate and generation skipping taxes for many generations. These trusts are made possible by the repeal of, or an extreme lengthening of, the Rule Against Perpetuities. In Utah the Rule has been lengthened to 1,000 years. U.C.A § 75-2-1201 through 1209. Thus, for example, a settlor could place in a trust for 1,000 years for the benefit of many generations of after born descendants, $5 Million. This could use up the gift and estate tax unified credit, and if the generation skipping tax exclusion is allocated to the trust, it could use that up, too. The likely result will be that the $5 Million, plus any growth in it, may not be subject to estate, gift, or generation-skipping taxes essentially forever.

The uncertainty in the transfer tax system in the recent past led a number of wealthy people to desire to take advantage immediately of what might be an ephemeral opportunity to make larger tax free gifts, particularly where economic conditions and market volatility would allow the passage of larger proportions of wealth at discounted values.

For all these reasons, dynasty trusts have become an increasingly popular strategy. This strategy can not only save a lot in transfer taxes, which taxes over generations will limit the growth of a family's economic power, but also where distributions are wholly discretionary and subject to spendthrift clauses, it can provide substantial protection for the beneficiaries from creditors. Long term sound investment management is another benefit of the dynasty trust. The single biggest risk to a family's wealth is mismanagement (bad investments, spendthrift habits, unnecessary disputes) by the family members themselves; although such risks cannot be eliminated, they can be reduced through the use of long term trusts.

Although some dynasty trusts are for supporting beneficiaries in a higher standard of living, many are often established with particular goals in mind other than creating generations of trust fund babies. Some common goals are to maintain a family property, such as a

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recreational property, for many generations, to provide a safety net in case of catastrophic illness or injury, or to provide incentives for particular types of behavior by family members, such as obtaining an advanced education, participating in elite athletic, artistic, or other endeavors which are worthwhile but often not lucrative, or providing public service through government or nonprofit agencies or programs which are beneficial to the public at large but pay little. With these types of goals, many members of the family would be assisted for relatively short periods, and would generally not look to the dynasty trust indefinitely for basic support.

Imagine being able to protect and enhance a family fortune and to protect and provide opportunities for family members for 1,000 years at relatively low tax cost; this is the attraction of the dynasty trust.

Some Perspective.

On the other hand, 1,000 years is a very long time. That many years ago, Europe was struggling to finally recover from severe setbacks following the collapse of the Western Roman Empire and was completing the early Medieval period; the most civilized area of Europe was Islamic Spain. China and the Byzantine continuation of the Eastern Roman Empire were the richest, most powerful areas on earth. England was in the control of Scandinavians (a few of whom had visited and abandoned an outpost in North America), and the Norman French nobleman William the Bastard had not yet conquered England to become William the Conqueror (1066) and, among other things, begin a process that developed the English system of feudal estates in land, from which our property law descended.

Although a dynasty trust may well not survive such a long time, and may well be designed to last for only a couple of generations (*e.g.*, until the death of the last grandchild or great grandchild), it is nevertheless true that over long periods of time, even a couple of generations, things change significantly.

Let's look back just 100 years. In 1911, the U. S. sent 20,000 troops to the U. S. Mexican border; Standard Oil was broken up under the Sherman Antitrust Act; the NAACP was incorporated in New York; Hirum Bingham discovered Machu Pichu in Peru; Girl Scouting came to the U. S.; the Triangle Shirt Waist fire in New York City killed 145 workers, mostly girls (all but 13); and no women voted in the U. S., outside a few Western States (starting with Wyoming territory in 1869; in Utah territory in 1870, revoked by Congress in 1887, and reinstated in 1895-1896 in the new Utah state constitution, Art. IV, sec. 1).

Family and societal changes will both be operating at the same time. About 100 years ago the infrastructure in the Western United States was poor. One of my grandfathers had built a career working on building the first electrical systems in California; the other was getting into the road equipment business in Oregon as road building in the West accelerated. Since then, there have been numerous births, deaths, marriages, divorces, loves and hates, agreements and disagreements, educational and medical needs, wars and economic depressions to survive, and so forth, as will also have been the case with any family.

In 1913, the year my father was born, the modern permanent income tax was new, and the federal tax code was considerably shorter. Automobiles and airplanes were innovations which would draw a crowd. The country and its economy have since then turned from substantially rural and agrarian to substantially urban and industrial or knowledge based. My father was and engineer and my mother was a nurse; neither grew up on a farm.

In 1951, the year in which I was born, some hot U. S. companies included Kodak and Polaroid; an apple was a fruit used to make mom's apple pie. The average family annual income was $3,700, the average new house cost $9,000, and an average new car cost $1,500. Libya became independent of Italy, President Truman fired General McArthur during the Korean War, the testing of new nuclear weapons began in Nevada, a uranium boom was underway in Utah, few were concerned with the environmental threats created by the industrial world, and separate-but-equal was still law (*Brown v. Board of Education* was not decided until 1954). The world had learned the meaning of global economic depression, industrialized genocide, total war, and nuclear annihilation, and the U. S. had learned to fear rival economic and political systems on the other side of the planet.

During my lifetime there have been enormous changes, and change continues to accelerate. As England declined as the single largest economic force on earth in the face of United States ascendancy, so likely, in the lifetimes of presently living people, perhaps me, probably of my children, and certainly of my grandchildren, the United States will decline in the face of Chinese economic ascendancy in the world markets.

Families change, social attitudes change, laws change, economics change, and a dynasty trust needs the flexibility to respond, but it will be irrevocable and unamendable by its settlor, who will likely be dead in any event long before the trust is dissipated. Any such trust needs one or more robust mechanisms for allowing for change and flexibility.

Mechanisms of Flexibility.

Trustee Discretion. The first such mechanism is, as with any trust, trustee discretion in making investments, providing benefits, and otherwise applying the trust. This is and always has been a very important source of flexibility and it needs to be respected and maintained. The trustee should be carefully selected and mechanisms should be included in the trust instrument for choosing a good successor trustee. This is standard.

However, the trustee's duty is to apply the trust as written. U.C.A. § 75-7-801. This, of course, puts a premium on good trust drafting. Nevertheless, something more may well be needed over long periods of time even for the best written trusts because no lawyer has an infallible crystal ball with which to foresee the future, particularly the distant future. An appropriate way to change the trust would be very useful.

Trustees may be given powers to amend some technical aspects of the trust (see U.C.A § 75-7-813(1)(a) allowing powers to be conferred by instrument), but it usually would not be appropriate for the trustee to have the power to amend certain other not so technical things such as key benefits, its own substantial duties, or the power of someone else to remove or call the

trustee to account. Such trustee powers to make technical or other changes are likely to fall short of the goal, because changes outside the range of the trustee's authority to make changes may be needed. The trust may authorize the trustee to decant some or all of the trust so that where the trustee has discretion to distribute principal it could condition the distribution with restrictions such as by distributing to a new trust created by the trustee; this may not work where the principal beneficiary is not also an income beneficiary or if restrictions in the first trust don't continue in the new trust. Even without authority under the instrument, common law decanting or the use of the decanting statute of another state (Utah has no such statute) on a change in situs may be available. For common law decanting see *Phipps v. Palm Beach Trust Co*., 196 So. 299 (Fla. 1949); *In re Estate of Spencer*, 232 N.W.2d 491 (Iowa 1975); *Wiedenmayer v. Johnson*, 254 A.2d 534 (N.J. Super. Ct. App. Div. 1969); Morse v. Kraft, 466 Mass. 92 (2013); Restatement (Second) of Property: Donative Transfers §§ 11.1, 19.4; Restatement (Third) of Property: Wills and other Donative Transfers § 17.1. However, the trustee may not feel comfortable making substantive changes to the trust, even if authorized by the instrument, and even if, or perhaps particularly if, the trustee or one of the cotrustees is a professional or corporate trustee. The trustee may be justifiably concerned with how far it can use such a power without breaching its fiduciary duty. A trust protector can help in making appropriate changes where a trustee cannot or will not.

Mechanisms for the oversight of trustee performance are also useful. Trustees and successors, who may not yet even be born, may not always be as good, diligent, or foresightful as they should be or as the settlor may have desired. Someone with authority to review the trustee's performance may be important, especially when it can be anticipated that some beneficiaries will be unable to effectively do so for themselves. Such inability may be due to everything from birth defects to end stage dementia to self-inflicted disabilities such as drug dependence. Also, and more frequently, such inability of beneficiaries to effectively protect themselves is due to the lack of sophistication of a beneficiary and the need for a beneficiary to finance challenges to a trustee's action or inaction out of the beneficiary's own pocket, while the trustee may be able to fund its defense (subject to later court review) out of trust assets.

One way to obtain some of the desired benefits of an oversight function, is to use cotrustees. This can be quite effective, but has some drawbacks which the use of a trust protector can help solve. Cotrustees may provide a veto to proposed actions by other trustees, or provide a mechanism for redressing wrongful conduct by other trustees. However, using cotrustees will tend to make the trust more expensive to administer. The benefits may well be worth the cost in extra fees, in extra time from requiring the trustees to act by consensus and take time to consult, and in the risk of gridlock if there is no deadlock-breaking mechanism.

The use of cotrustees loses the oversight function where roles are very delimited such as where there are three separate trustees who, pursuant to the trust instrument, are not responsible for each other's actions but only deal with their own specified areas. Such delimited cotrustees have often been benefit trustee, investment trustee, and administrative trustee. If one or more of the subcategories have cotrustees, the oversight of cotrustees can still exist as to that function; and if one or more of the functions is made responsible for another function as well (e.g., the administrative trustee is responsible if either of the other two breach their duties), then the oversight function of cotrustees will still exist.

There is certainly nothing inconsistent in using cotrustees in some configuration for the oversight function on a day-to-day administrative basis, while including a trust protector for more unusual circumstances where the trust protector can add some additional protection. Where cotrustees can't effectively provide the oversight function (*e.g.*, they are overprotective of each other), the trust protector may provide some additional protection, but the oversight function alone may not be enough for a trustor to desire to use one.

Nevertheless, in some circumstances, costs may be minimized where a trust protector, acting as needed, and thus for less compensation, on an annual basis or over some other longer-term time frame, can provide protection against trustee misconduct as to at least some matters for less overall cost and often more quickly and without the need for seeking court approval or action, which may or may not be granted. Providing some intermittent compensation for a trust protector over many years can be much less expensive than even a single fight over trustee removal or other trustee sanction. Further, misconduct may be prevented where the trustee knows someone with appropriate expertise, authority, and funding under the trust (things not always possessed by beneficiaries) is watching the trustee's performance.

There is also a flip side to the oversight function where a trust protector may be useful. Approvals or ratifications by the trust protector can provide certain protections for a good trustee that would be difficult or expensive (*e.g.*, obtaining court approvals) to otherwise obtain. For example, under the instrument, a higher presumption of regularity might be provided with some chance of success (purporting to give absolute protection due to a protector's approval or ratification would be ill advised and unlikely of success), thus either reducing the chance of a frivolous or a "strike" challenge ("do what I want, or I'll make it costly for everyone") by disgruntled beneficiaries, or at least increasing the possibility of early disposition in case of such a challenge. Of course, if a consent, ratification, or other approval from a trust protector is not forthcoming and neither is a clear denial, the trustee does not obtain protection but may, as without a trust protector, end up in court seeking protection through judicial ruling.

A variation on trustee discretion is the use of a special, independent trustee to exercise certain powers, generally tax sensitive powers which if exercised by a particular family member trustee (frequently a beneficiary who also serves as a trustee) would create adverse tax consequences to the family trustee or to the settlor of the trust. The trust may go so far as to allow the trustee or a special trustee to modify certain aspects of the trust to comply with tax rules or to achieve certain tax results (protect a marital deduction, obtain exclusion from the estate of the settlor, assure or end treatment as a grantor trust, etc.). If such modification powers are granted, the trust has strayed into the territory of the trust protector but without the potential added value of having a different person from the trustee make such changes under standards different in important ways from those of a trustee or cotrustee. In some trusts, such trustee power will be adequate, but in very long-term trusts, the trust protector mechanism may be superior.

Trust Modification Law. A second mechanism of flexibility is the law relating to trust modifications. U.C.A §§ 75-7-410 through 417. For example, under U.C.A § 75-7-411 a noncharitable, irrevocable trust (i) may be modified or terminated upon consent of the settlor

[who may be long dead] and all beneficiaries even if the modification or terminations is inconsistent with a material purpose of the trust, or (ii) may be terminated upon consent of all beneficiaries if the court [note a court needs to be involved] concludes that continuance of the trust is not necessary to achieve any material purpose of the trust [note the major purpose of a dynasty trust is to last for many generations, thus this sort of termination may not be possible], or (iii) may be modified upon consent of all the beneficiaries if the court [again court involvement] concludes that modification is not inconsistent with a material purpose of the trust. This last provision has some possibilities, but over time the number of beneficiaries of a dynasty trust will grow, both in number and also likely in geographical and emotional distance from each other as family lines diverge, people move, and attitudes remain no less diverse than ever has been the case. The likelihood of obtaining unanimous beneficiary consent will consequently decline. Statutory trustee removal is allowed but generally requires court involvement. Such statutory help for modifications may well prove insufficient.

Beneficiary Action. A third mechanism may be to allow under the instrument for less than a unanimous number of beneficiaries to change certain aspects of the trust, for example, to remove or replace a trustee or to change some very narrowly described technical matters. However, it usually would not be a good idea for beneficiaries to make changes to their benefits. This could in many cases create tax issues and will in almost all cases create practical problems unless a well-crafted power of appointment is used. It is often the case that settlors use trusts in the first place to prevent control by beneficiaries whose judgment may not be sound, may be of unknown quality, or may just differ from that of the settlor. Nevertheless, a limited role for beneficiaries, such as requiring some level of beneficiary consent as to certain matters, may be appropriate whether or not a trust protector is used.

Powers of Appointment. A fourth mechanism would be the use of well-crafted powers of appointment which can be exercised by certain beneficiaries (or sometimes by others not named as beneficiaries), in a nonfiduciary capacity, to modify certain benefits in some ways (*e.g.*, changing proportions among a class of residuary or remainder beneficiaries). These powers can be drafted as general or limited powers, the former attracting an estate tax, the latter usually not, they can be made with a broad or a narrow class of prospective appointees, and they may provide broad or limited definitions of what can be done with the power, such as whether an appointment in further trust is an option (often not since it would attract an estate tax; on the other hand, to trigger this "Delaware tax trap" to attract that tax instead of GST may sometimes be better), and so on.

Nevertheless, such powers of appointment may not always be wise to grant someone the settlor does not personally know (such as after born descendants) unless the power is rather limited in scope so that the settlor's overall scheme won't be disrupted. However, powers of appointment are a fine tool for providing some sorts of flexibility. Modifying or granting powers in the future might be something a trustee could do (*e.g.*, change a limited power to a general power, or eliminate a power altogether), but where a trustee wants to appear not to favor one group of beneficiaries over another, particularly where it will be trustee for these beneficiaries with frequent contact going forward, the trustee may be reluctant to exercise its modification authority except in the clearest and strongest cases. Such a timorous approach may not always

be what a settlor would prefer; thus, for such authority, a trust protector, with a more intermittent "big picture" role, can be a good addition to the use of powers of appointment for flexibility.

Trust Protectors. A fifth mechanism for flexibility may be the use of a trust protector. See generally, Richard C. Ausness, The Role of Trust Protectors in American Trust Law, 45 Real Prop., Trust and Est. L. J. No. 2, 319 (Summer 2010). This is a relatively new concept (the power to direct certain trustee decisions has been around for some time, but broader powers of the sort which are of interest in long term trusts are considerably newer) which generally would be used in addition to the prior described mechanisms, possibly even including in some cases, as an adjunct to court modification. Let's look at this possibility further.

Trust Protectors Generally.

The position of trust protector generally is to provide a person who is independent of the settlor and of the trustee, and usually of the beneficiaries, with authority to make certain choices or take certain actions to further the settlor's overall goals with respect to the trust, often including making certain modifications to the trust, where the settlor cannot do so. The use of the trust protector position has spread into irrevocable trusts of various kinds from its initial common use with off shore asset protection trusts, as attorneys and settlors noted its flexibility and utility to solve problems that are not so readily solved with the other mechanisms of trust flexibility. The trust protector generally can do things for achieving the settlor's goals the settlor himself or herself could not do, for tax (grantor trust, incomplete gift, inclusion in gross estate, etc.), creditor protection (control, fraudulent transfers, etc.), or other reasons (disability, inability to locate, etc.), or because the settlor is dead. See generally, § 122, Different classes of trustees, Bogert, The Law Of Trusts And Trustees (updated 2012).

This mechanism has a great deal to recommend it, but it is not, and cannot be, the true equivalent of a retained control by a settlor. In a long term trust, in particular, the settlor's hand selected trust protector is no more immortal than the settlor, so over time as one trust protector replaces another, there will be an inevitable slide, to one degree or another, from what the settlor would have done if faced with the issue, and since the settlor can't be asked, the amount of divergence can only be guessed at. Also, trust protectors and their successors are no more infallible than are trustees. Nevertheless, the trust protector, even several times removed from the settlor, provides a check and balance in the trust organizational setting and provides a mechanism to more easily do things which otherwise might not be possible or would at least be more cumbersome or expensive to accomplish in some other way. As we will discuss further below, the use of a trust protector is no substitute for good drafting; rather, it adds a new layer of analysis and a new tool to use in a drafting project.

Sources and Types of Authority.

Generally. What is the authority for the creation of the position of trust protector? Contract and trust laws allow for a great many creative variations. This alone is sufficient to allow for the position to exist (see U.C.A § 75-7-105), but the legal results of having such a position require further elaboration by the courts or the legislature. What is the nature of a trust

protector's position? Is the power of a trust protector more like a nonfiduciary power of appointment or is it some form of fiduciary power?

The answer seems to be that where the power is exercisable on behalf of third persons it is presumably some form of fiduciary power. That presumption might be rebutted in some circumstances where there is a clear indication of settlor intent that this not be the case and where there is no conflict with mandatory trust law principles. However, a mere recital that a position is nonfiduciary does not make it so where the actual relationship is otherwise. If a power is clearly intended to allow a person to enhance a benefit for himself or herself or some relative in some way, the power may be one exercisable in a nonfiduciary capacity, rather like a power of appointment; but if it is held for the benefit of third persons, it is probably exercisable in a fiduciary capacity. A position with many types of powers could conceivably be a fiduciary position as to some powers and nonfiduciary as to others, and the nonfiduciary powers may be limited by a confidential relationship or may be not so limited like powers of appointment.

Uniform Trust Code. Some states have legislation or are considering legislation on the matter. For example, section 808 "Powers to Direct" of the Uniform Trust Code (which section was not adopted in Utah when it adopted the Uniform Trust Code as U.C.A § 75-7-101 et seq.) provides for trust protectors and advisors as follows:

> (b) If the terms of a trust confer upon a person other than the settlor of a revocable trust power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of the power unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust.
> (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.

The official comments about these provisions include these useful statements:

> "Advisers" have long been used for certain trustee functions, such as the power to direct investments or manage a closely-held business. "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. Subsection (c) ratifies the recent trend to grant third persons such broader powers.
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> . . . . [F]or the type of donative trust which is the primary focus of this Code, the holder of the power to direct is frequently acting on behalf of

> others. In that event and as provided in subsection (d), the holder is presumptively acting in a fiduciary capacity with respect to the powers granted and can be held liable if the holder's conduct constitutes a breach of trust, whether through action or inaction . . . .
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> Powers to direct are most effective when the trustee is not deterred from exercising the power [as directed by a trust protector or investment advisor, etc., holding a directive power] by fear of possible liability. On the other hand, the trustee does have overall responsibility for seeing that the terms of the trust are honored. For this reason, subsection (b) imposes only minimal oversight responsibility on the trustee. A trustee must generally act in accordance with the direction. 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.
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> The provisions of this section may be altered in the terms of the trust. See Section 105 [*i.e.*, U.C.A § 75-7-105]. A settlor can provide that the trustee must accept the decision of the power holder without question. Or a settlor could provide that the holder of the power is not to be held to the standards of a fiduciary. A common technique for assuring that a settlor continues to be taxed on all of the income of an irrevocable trust is for the settlor to retain a nonfiduciary power of administration. See I.R.C. Section 675(4).

These provisions and comments are consistent with the provisions of the Uniform Trust Code as adopted in Utah dealing with investment directions (U.C.A § 75-7-906, presumptively a fiduciary duty) and appear to set forth sound principles for courts to apply even without affirmative legislation about trust protectors in states such as Utah.

Restatement of Trusts. The Restatement (Third) of Trusts § 64 (2002) concurs with these principles:

> (2) 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.

The Restatement's Comment on Subsection (2) describes the nature of the power this way:

> [S]uch powers are normally fiduciary in character. This is true even if the extent of the third party's discretion (*e.g.*, if the grant of authority is accompanied by such terms as "absolute" or "sole and uncontrolled") is such as to limit judicial intervention to situations in which the grantee acts in bad faith, from improper motives, or without regard to the purposes of the trust or power.

Case Law. The Reporter's notes to the foregoing Restatement provision cite to some prior analogous cases relating to special trustee powers and to literature on the English experience with similar provisions. There are not many cases in the United States.

The most significant United States case to date on trust protectors is *Robert T. McLean Irrevocable Trust v. Patrick Davis, P.C.*, 283 SW3d 786 (Mo. Ct. App. 2009) in which a successor trustee sued predecessor trustees and the attorney serving as trust protector for improper administration and depletion of the trust assets of a special needs trust. The claim against the trust protector was that he had failed to monitor the prior trustees while they improperly depleted the trust assets. The trust protector had the right under the instrument to remove a trustee. The trial court granted the trust protector's motion to dismiss or for summary judgment, but the appellate court reversed. Missouri had adopted Uniform Trust Code Section 808. The trust instrument said the trust protector's authority "is conferred in a fiduciary capacity," and that the trust protector will "not be liable for any action taken in good faith." The court found no immunity would exist for actions in bad faith and that material issues of fact existed as to whom the fiduciary duty of good faith is owed. Is it owed to the beneficiary or to the trust itself including the duty to protect the trust itself from foreseeable injury? This question was left for further development by the trial court. However, some duty of care and loyalty to someone or something is implied by the fiduciary duty of good faith. The decision was issued by a three-judge panel with two separate concurring opinions, both concurring opinions stating they were concurring reluctantly in the main opinion. The reasons for the reluctance are worth reviewing.

Judge Parrish stated in his concurrence "Trusts are, in my opinion, dangerous devices when they undertake to break new ground insofar as designating obligations or rights of a nature not heretofore established by statute or prior judicial determination. In my opinion, a valid criticism of trusts, in general, is that there is limited supervision for their administration . . . . for that reason I suggest that breaking new ground by using procedures other than those time-proven in the law is something that should not be encouraged." The irony of criticizing the attempt to solve his fundamental criticism of trusts (limited supervision) through the use of a trust protector appears to have escaped Judge Parrish.

Judge Ralmeyer, in her concurrence emphasized the limited holding of the main opinion, and stated "…I do not agree as a matter of law the duty of the Trust Protector was to the beneficiary, at least not in the traditional sense…." She also stated that the "allegation that the Trust Protector was informed that the trustees were inappropriately spending trust funds is not the same as an allegation that the Trust Protector was acting in bad faith." She believed, however, the trial court lacked sufficient basis to rule there was no fiduciary duty under the contract, but went on to say "I do not believe it is appropriate for this Court to make up the duties of a trust protector out of whole cloth." On the other hand, some court at some point needs to find what the relationship was and apply appropriate duties to fit it in order to perform the court's function of resolving disputes; this has long been the common law method, the very method that developed the traditional fiduciary duties of trustees and is presently and actively at work developing the fiduciary duties in other contexts such as those of corporate directors and limited liability company managers.

These three opinions in this case, the main one and the two concurring opinions, set forth a range of judicial attitudes that may be expected in connection with the use of a trust protector. New developments in other courts are sure to follow, as the courts try to fit the relatively new position of trust protector into more general concepts of meeting the settlor's intentions and of enforcing a level of fiduciary duties where third parties are dependent on the powers of others, and try to do so in a manner fitting to the circumstances and the relationships of the persons involved. Good draftsmanship as to trust protectors can help solve, or, we can hope, even prevent, a lot of these problems, and drafting techniques will develop over time with longer experience of attorneys with trust protectors.

In another case, *Minassian v. Rachins*, 152 So.3d 719 (Fla. Dist. Ct. App. 2014) the court upheld a trust protector provision under the Florida version of section 808 of the Uniform Trust Code, and upheld the trust protector's amendment to the trust to clarify an ambiguity in the instrument consistent with the intent of the grantor, even though the clarification came after the beneficiaries had begun litigation, and although the intent of the grantor was shown by affidavit of the trust protector who was the attorney who drafted the trust. Trust protectors can be a very powerful tool.

Other Legislation. Some states with trust protector legislation include South Dakota, which passed the first such statute in 1997 (S.D. Codif. Laws §§ 55-1B-1 *et seq.*). Closer to home, such statutes exist in several states surrounding Utah; Idaho, which passed one in 1999 (Idaho Code Ann. §§ 15-7-501, *et seq.*), Wyoming (Wy. St. Ann. §§ 4-10-710, *et seq.*), Arizona (Az. Rev. Stat Ann. § 14-10818), and Nevada (Nev. Rev. Stat. Ann. 163.5547, *et seq.*). Alaska has an unusual statute (Alaska Stat. § 13.36.370), which purports to make the trust protector, absent contrary trust provisions, "not liable or accountable as a trustee or fiduciary." Arizona's statute has a similar provision.

The Alaska and Arizona attempts to make something which usually really will have fiduciary features to it (*e.g.*, where for the benefit of third persons) somehow nonfiduciary by mere fiat will likely result in the need for the creation of some sort of "nonfiduciary" duty to fill the gap if beneficiaries are not to be left at the mercy of arbitrary decisions or reckless disregard for the trust. See generally Alexander A. Bove Jr., The Case Against the Trust Protector, 25 Probate and Property, No. 6, November-December 2011, p. 50 (arguing against statutory attempts to make a type of fiduciary somehow not a fiduciary, because, among other reasons, no settlor would want such a thing). Even if the term "fiduciary" is not used with respect to a given relationship, it still may be a confidential relationship subject to additional duties and remedies. "Although the relationship between two persons is not a fiduciary relationship, it may nevertheless be a confidential relationship. Conversely, a fiduciary relationship may exist even though the parties do not enjoy a confidential relationship." Restatement (Third) of Trusts § 2 (2003), comment b(1).

It would not take much for a Utah court to find a trust protector, even if not a "fiduciary" as to some matter, at least to be in a confidential relationship with the trust or its beneficiaries, which relationship could create a presumption against the trust protector. Certain relationships are presumed to be confidential. See *Baker v. Pattee*, 684 P.2d 632

(Ut. 1984) and *Blodgett v. Martsch*, 590 P.2d 298 (Ut. 1978) (presumption of confidential relationship between parent and child [note: this is not clear under subsequent cases] and between trustee and cestui que trust). The burden with respect to the issue of fairnesss or unfairness may shift in such a case to the party benefitted by an action. See *Baker v. Pattee*, 684 P.2d 632 (Utah 1984) (stating that in some cases, but not this case, a confidential relationship is presumed; however, if a confidential relationship exists, "A presumption of unfairness arises which must be overcome by countervailing evidence, and the burden shifts to the defendant [the party to the confidential relationship] to prove absence of unfairness by a preponderance of the evidence"). See further, Utah Rule of Evidence 301(a) relating to the effect of a presumption. The lack of provisions in the Utah Trust Code would not prevent such result. The Utah Uniform Probate Code provides: "Unless displaced by the particular provisions of this Code, the principles of law and equity supplement its provisions". U.C.A. § 75-1-103. The Utah Uniform Trust Code reiterates this rule. U.C.A. § 75-7-106. See also *In re Estate of Wagley*, 760 P.2d 316 (Utah 1988) (recognizes the appropriateness of equitable principles supplementing the probate code under U.C.A. § 75-1-103).

Remedies in either a fiduciary relationship situation or a confidential relationship situation may not be much different and could include a constructive trust, damages (*e.g.*, quantum meruit recovery, third party beneficiary contract, negligence), injunctions, and the like; there are a great many ways a court can craft a remedy. See generally U.C.A. § 75- 7-1001 (remedies for breach of trust). One way to look at a confidential relationship is as a form of a fiduciary relationship but with lesser duties due to the differences in the actual relationship of the parties. It is hard to see why the form of available remedies for a breach in either situation should be drawn from different judicial tool boxes. There may be a difference between a fiduciary duty based remedy and a confidential relationship based remedy, but for a breaching trust protector, one or the other would apply and neither would be pleasant, and which turns out to be harsher overall is certainly not clear at this time and will (as it should) vary case by case.

Duty to Whom?

To whom is the trust protector's duty owed? This is a most important question. Let's answer this question initially with another question. To whom is the trustee's duty owed? The answer to both questions is equivocal. The settlor makes a gift and can condition it as he or she pleases, yet the enforcement of trustee duties falls to the beneficiaries, not to the settlor. The goal of the trust protector is to help assure the trust is carried out as the settlor intended (or is believed to have intended) but in almost every case the settlor will not be available (usually due to death) and the settlor would not, even if available, in most cases be able to enforce the duties of the trust protector without adverse tax and other results (the very reason the powers were not retained directly by the settlor in the first place); thus, the enforcement of such duties again falls to the beneficiaries but could also possibly fall to the trustee in some cases. However, even with the enforcement burden falling to the beneficiaries, it does not necessarily follow that the duty of either a trustee or trust protector is to the beneficiaries, rather than to the intention of the settlor, or as it might be stated, to the trust itself. Particularly given the quasi-corporate nature of estates and trusts under modern statutes (like the Uniform Probate Code; see U.C.A. § 75-3-808), this

duty to the trust itself is a realistic possibility, perhaps more so for a trust protector than for a trustee, which has traditionally been viewed as owing its duties to the beneficiaries in implementing the settlor's intent under the trust instrument. The Uniform Probate Code rule is designed to make the estate a quasi-corporation so as to protect the personal representative's personal assets from estate liabilities. Uniform Law Comments to UPC § 3-808. This principle applies as well under the Uniform Trust Code. See U.C.A. § 75-7-1010).

A difference in to whom duties are owed could provide some basis for a difference in the standard of conduct applicable to, or in the protections available for, or in the persons who may enforce the duty against, a trust protector accused of some form of breach of duty, compared to a trustee similarly accused. That the protector's duty is to the trust itself in at least some situations, rather than directly to beneficiaries, may be expressly stated in the instrument which could apply a dual level of duty (consistent with the dual standard of conduct described in the next section). Even without an express provision in the instrument a court may find a dual level of duty such that the duty prior to a determination to act by a mandatory direction to a trustee concerning the exercise of the trustee's usual duties, or for action not in the usual realm of a trustee (*e.g.*, for not investigating the trustee or for making or not making trust changes) runs to the trust. We will come back to the level of duty of a trust protector; let's turn to standing to enforce whatever duty exists.

Unless restricted by the instrument (*e.g.*, by giving the standing to enforce the duties of the trust protector solely to the beneficiaries even where the duty is to the trust), where the duty runs to the trust, the trustee may enforce it and the beneficiaries' ability to enforce the duty either will be concurrent with that of the trustee, in which event the trustee may be relieved of a duty to do so where the beneficiaries have elected to do it themselves, or will be limited to situations where the trustee, in breach of the trustee's duty, fails to enforce the protector's duty, in which latter event presumably the beneficiaries will seek recourse against both the trust protector and the trustee. Where a duty of the trust protector to the trust is to protect against something done or not done by the trustee it would be odd and inappropriate for the trustee to have standing to enforce the duty, and at least in such situations, the standing must fall exclusively to the beneficiaries.

After determining to act in the usual realm of the trustee by giving such a mandatory direction to the trustee where the protector's duty runs to the beneficiaries, they may then enforce it the same way they would enforce the duty against the trustee. The trustee may be relieved of the duty on receipt of a direction from the trust protector superseding the trustee. In any other situation in which the duty of the trust protector runs to the beneficiaries, the trustee may not be so relieved of a duty.

It may well be best to simply provide in a trust instrument that the beneficiaries have the sole right to enforce the duties of the trust protector, regardless of to whom the duties run. This may well be a good result in a court case without such a trust provision. However, with or without a trust instrument provision, such a result as to standing would not change to whom the duty runs and the level of duty that is appropriate given to whom the duty runs.

Trust Protector v. Trustee Standards and Protections.

General. Let's compare the standards of duty and protections against liability which may be available for a trust protector to those available for a trustee. The big difference is the more limited role of the trust protector. It is not a cotrustee and thus should not be liable as a cotrustee for failure to redress a breach by the other cotrustee based on "actual knowledge or information which would cause a reasonable trustee to inquire further" (U.C.A § 75-7-1010(6)), unless of course the trust instrument requires this. Rather, the trust protector's liability likely would be based on some other standard, typically one set forth in the trust instrument. A lower standard than the exculpatory standard for trustees set forth in U.C.A § 75-7-1008 (no relief from liability for bad faith or reckless indifference to the purposes of the trust or the interests of the beneficiaries) probably would not be enforceable, at least where the protector has assumed to take action which is in the usual realm of the trustee (as opposed to failing to take action, a situation discussed further below). Nevertheless, the very narrowness of the fiduciary responsibility of the trust protector under the terms of the instrument provides additional protection for the trust protector; conversely, the broader the responsibility of the trust protector, the greater the fiduciary duty the court is likely to find. Thus, the responsibilities of the trust protector should be kept narrow and targeted to the key areas where changes may be needed or oversight would be most useful. It should also be noted that to the extent the trust protector can direct or otherwise override a trustee, the trustee should obtain protection under provisions such as those described above under the Uniform Trust Code relating to directive powers.

Levels of Standards. The standard for a trust protector should, as a matter of good policy, be rather limited for a failure to take action. It is not generally desirable for a protector to supplant the special expertise or duty of a trustee, and thus the protector should not be held responsible for the trustee's failings where it has not so supplanted the trustee; rather, in any case where there is any rational reason for the protector not to take action, even if it is aware of a trustee breach, the trustee should be exclusively responsible to the beneficiaries, and the trustee should be unable to assert rights to contribution against the protector. For example, if the trustee breach is relatively minor and the potential cost to undo the breach would be greater than the potential benefit, the protector may rationally decide not to act. The beneficiaries may have a different view of the cost-benefit analysis, but the protector has breached no duty.

Further, where the protector has been given an oversight function, the protector should have no duty to even investigate the trustee's actions unless they are found, based on credible information available to the protector (with credibility determined in good faith by the protector), to be so blatantly imprudent as to be inexplicable or otherwise so very clearly a problem that it must be dealt with because no rational person would fail to deal with it. This is not the same as the inquiry notice provided in U.C.A. § 75-7-1010(6) for cotrustees to investigate each other, but should be much more narrow so that a reasonable suspicion would not create a duty to investigate further. The trust instrument should be able to limit the duty to investigate even further, as a matter of policy. The beneficiaries may themselves still investigate if they wish and if a clear problem is found, come again to the protector for its consideration of the matter, or ask a court for relief against the trustee, but not against the trust protector. Perhaps a trust instrument could provide for submission of an issue to the protector and a time to act or not before proceeding to court. However, to the extent the trust instrument provides that only the trust

protector can protect the beneficiaries in some way, the duties of the trust protector will of necessity be greater.

Assuming that the trust instrument does not deprive the beneficiaries of the ability to protect themselves and other circumstances do not effectively deprive them of such ability, what damage have the beneficiaries suffered by reason of a failure to act of the trust protector even if found to be a breach of its duty? The protector's fee for considering the matter? The same damage to which the trustee would be subject? That same damage less the amount which would have been preventable if the beneficiaries had protected themselves or otherwise mitigated damage? Who should have the burden of making a showing as to preventable damage: should the beneficiaries be required to defeat a presumption that their damages were preventable, or should the protector be required to demonstrate what would have been preventable? Can these issues be governed by a trust instrument? Given the limited role of the protector in adding to and not subtracting from the traditional protections for beneficiaries, a good argument could be made for a presumption against the beneficiaries in such a case and to allow the matter to be governed by a trust provision. Although it is too early to provide definitive answers to these and other questions, the use of trust protectors remains a good idea in appropriate situations and providing protections for them under the trust instrument is worth the ink.

Let's turn now to the situation where the protector acts. If the protector chooses to act in a way which supplants the trustee, for example, if the protector directs a change in trust investments or some similar action normally in the purview of the trustee, the protector should have no less a duty than the trustee. The trustee's duty will vary with the decision at issue, with less leeway for imprudent investments than for denying certain benefits where the instrument contemplates more personal judgment on the part of the trustee, for example, beyond the typical health, support, and maintenance standard. It should be remembered that a trustee's fiduciary duty is not monolithic but also has layers which would also apply to the protector were the protector to make directions to the trustee in the affected areas. There is a good deal of flexibility to tailor the trustee's duty as to different matters under a trust instrument.

If, however, the action is not a typical trustee action, such as modifying the trust, then the protector should be liable only if it arbitrarily ignores the purposes of the trust or simply refuses to rationally consider the matter.

All this requires a conscious decision by the protector whether to refrain from acting or to take action. If the protector adequately reviews the situation based on available information (with no requirement to conduct continuous or roving investigations, and no duty to investigate further at all, at least absent inexplicable trustee behavior or other extraordinary circumstances) and arrives at a decision that is not irrational, it should be protected. A decision which is not irrational is not the same as a decision deemed to be reasonable by a court in some "objective" way (*i.e.*, in the court's subjective view of what should be objective). Rather, since it is the protector's personal judgment which the settlor desires and not some disembodied ideal of reasonableness, the protector's decision should be given great deference in matters not supplanting the trustee function (in cases of supplanting the trustee, the trustee's duty, whatever it is, should apply). Unless no rational person could come to the decision, the decision should be respected even if otherwise not deemed reasonable. This is similar to the business judgment rule

(but perhaps more so). The emphasis would be on a rational process, not whether the result is to be deemed reasonable or not, so a court would not be able to substitute its judgment for that of the protector.

Thus, for a trust protector, there should be two general levels (each with its own subparts) of standards in keeping with what a settlor would likely intend in order to maximize the respective values of the trust protector and of the trustee by avoiding the problem of an overly activist trust protector. This has been cogently argued in Stewart E. Sterk, Trust Protectors, Agency Costs, and Fiduciary Duty, 27 Cardozo L. Rev. 2761, 2792 (2006):

> One might object that this regime--limited accountability for the protector's failure to act; fiduciary liability for actions taken by the protector--will skew the protector's incentives towards inaction. From an agency cost perspective, however, this system of skewed incentives is a plus, not a minus. The tension between authority and accountability is central to every agency relationship. A settlor's objective in using a trust protector is to make the trustee more accountable without removing from the trustee the authority to act in areas where the trustee has presumed expertise. A regime in which the protector generally defers to the trustee's decisions, intervening only in extraordinary circumstances, has the potential to advance the settlor's objectives better than a regime in which the protector has incentives to intervene in day-to-day management. Imposing fiduciary duties on the protector when the protector exercises its power reduces threats to the trustee's authority. By contrast, imposing fiduciary duties on the trustee [sic] when the protector fails to act would introduce increased protector intervention, and a corresponding reduction of the trustee's authority. At the same time, the knowledge that the protector has power to intervene, even if the protector has limited financial incentive to do so, supplements the prospect of fiduciary duty liability as a mechanism for holding the trustee accountable.

Levels of standards based on the actual relationships and interests of the parties, established in the trust context by the explicit, or (if need be) implicit, intentions of the settlor, would not at all be unusual in the application of fiduciary duties. After all, there are, and long have been, ranges of fiduciary duties; one-size-fits-all fits none. "The scope of the transactions affected by the relation and the extent of the duties imposed are not identical in all fiduciary relations." Restatement (Second) of Trusts § 2 (1959), comment b; Restatement (Third) of Trusts § 2 (2003), comment b. For example, the fiduciary duty of a corporate director is not the same as that of a shareholder in a closely held business (see *McLaughlin v. Schenk*, 220 P.3d 146 (Utah 2009) (close corporation shareholders owe the same duties owed by partners-utmost good faith and loyalty to all shareholders of the corporation as to their investment interest, but not necessarily as to an employment interest) [note: this rule is subject to later specific legislation relating to shareholder duty, but the general analysis of duty remains important]), and neither duty is the same as that of a trustee. As pointed out in *McLaughlin*, the interests at stake make a difference as to the duty to apply.

Differences in Protection. On the other hand, since the trust protector is not a trustee, it may not be entitled directly to the benefit of the provisions of the Uniform Trust Code designed

to provide some protections for trustees, although a good argument could be made for the application of these provisions by analogy. However, it may be best to include some reasonable indemnification, exculpation, or other protective provisions in the trust instrument in order to provide a contract basis for protection in case statutory protections are not deemed to apply directly or by common law analogy, or to use the trust instrument to tailor such protections as may otherwise be available.

For example, the six months from disclosure or one year from termination, statute of limitations applicable to trustees might not apply to a trust protector (U.C.A. § 75-7-1005), rather some more general limitation periods might apply. Some possibilities of limitations periods which might apply if the trustee limitation did not, include U.C.A. §§ 78B-2-305 (three years for injury to property, or relief based on fraud or mistake (after discovery)), 78B-2-307 (4 years for liability not founded on writing, fraudulent transfer act liability, or relief not otherwise provided by law), 78B-2-309 (six years for obligations founded upon an instrument in writing). If there were separate limitations periods for trust protectors than trustees, a breaching trustee could be freed from claims while the trust protector which did not commit the breach but which may have failed to redress the breach would remain liable, but may find itself unable to seek contribution or indemnity from the breaching trustee due to the passing of the trustee limitation period. Some contractual protection for a trust protector to limit the time for claims may be appropriate to try (public policy arguments may need to be met), but it probably should not be shorter than the analogous trustee limitation.

However, it may well be appropriate to also apply to trust protectors, the trustee limitation period, and a number of other trustee protections by analogy. Other trustee protections which may apply by analogy, and for which backup or tailoring contractual provisions may be useful, include such things as contribution (*see* U.C.A. § 75-7-1002 (2)), attorney fees and costs payable from trust assets for defending or prosecuting actions in good faith (*see* U.C.A. § 75-7-1004(2)) and exculpation (s*ee* U.C.A. § 75-7-1008(2)).

Some General Drafting Concerns.

If a trust protector is to be used, modifications may be needed in numerous places throughout a typical trust instrument to specify certain areas of a trust protector's special authority compared to the general authority of the trustee, the authority of holders of powers of appoint, or the special authority of others which may be provided under an instrument; also, it may be wise to include some more general provisions in a separate section dealing with the trust protector role.

Limited Role. First, I would advise against making the trust protector role too pervasive. It is not desirable that the trust protector become, in essence, a cotrustee, because then the time and cost savings will not materialize. It is even less desirable that a trust protector become, in essence, a super-trustee, because this would tend to eliminate the desired robust decision making from the trustee, which may come to view itself as a secondary decision maker at the mercy of being constantly overridden by the trust protector. For example, it may be best, absent clear abuses, to keep the trust protector out of day-to-day benefit decisions and exercises of trustee discretion and out of investment decisions (other than, perhaps, as to certain key closely held

business interests, but even as to such key interests the advisor should consider the matter long and hard first).

It may be that (somewhat analogous to a court), unless the protector has actual knowledge of some issue of potential abuse or corruption, it need not (but may) investigate or otherwise take action, and need not even review trustee performance as to areas of primary trustee responsibility or any other matter, unless a sufficient level of reason to do so is brought to the protector's attention (*e.g.*, by a beneficiary as to trustee abuses or by the trustee or a beneficiary as to possible need to modify the trust for tax or other purposes). The court analogy can't be pushed too far, but it is not farfetched; one role the trust protector fills is as a potentially very efficient resolver of disputes or potential disputes between the trustee and the beneficiaries, or between cotrustees, or among the beneficiaries. Problems related to obtaining court approvals or relief (large costs, long-time frames, generalist judges without trust and estate experience and without the ability or authority to make business-type decisions, etc.) have led many drafters to embrace the use of trust protectors. In any event, keep the trust protector's role defined, discreet, and reasonably limited to respect the critical role of the trustee.

Specific Authorities. Second, be rather specific as to the trust protector's role in particular matters (*e.g.*, changes for tax purposes), perhaps with some more general authority, as well (*e.g.*, to review accountings, to bring challenges, to conduct an investigation, etc., if it sees fit, but without a general requirement to do so). The specifics as to particular types of authority (*e.g.*, change a limited power to a general power) may be necessary to make sure the trust protector, in the face of a skeptical judiciary or an adverse trustee or beneficiary, will actually be able to fulfill the desired role. General terms, while useful, may be insufficient alone. In establishing a proper balance among the parties, consider employing variations on the authority of a trust protector to veto some limited trustee decisions, or to require advance trust protector consent for certain decisions, or to initiate certain decisions on its own unilaterally, or in appropriate cases, with trustee or beneficiary consent.

A common authority for a trust protector is to remove a trustee or add a cotrustee. This may well prevent a trustee from straying in the first place, where it can be removed or replaced quickly and easily, but in case of trouble, a quick and relatively easy solution can be at hand. However, in keeping with maintaining trustee primary authority, such removal authority should not be used to make the trustee excessively beholden to the protector rather than the beneficiaries. It may be wise to require some level (majority, supermajority, or less than a majority) of beneficiary consent before a removal not based on market forces (*e.g.*, too high a trustee fee expense) or some other limited basis; or, *vice versa*, if some proportion of beneficiaries are given the power to remove a trustee, the consent of the trust protector could be required in order, for example, to prevent the removal of a good and cautious trustee by aggressive beneficiaries. (Note: this sort of provision highlights that the trust protector's duty is not always directly to the beneficiaries.)

Succession. Third, provide for succession to the trust protector where it dies, resigns, or is removed. Although a settlor may want a trust protector only while a particular person is able to serve, so that there would be no replacement, it will more frequently be true that a trust protector can add value even after the death or failure to be able to serve of the original protector.

Be very careful with removal of a trust protector except by a court or maybe by some super-majority of beneficiaries; almost certainly those subject to the trust protector's supervision, the trustees, should not have such power, perhaps not even with a majority of the beneficiaries' consent. Who should appoint a successor protector? The protector may be granted authority to name its own replacement, or beneficiaries could do so, or some combination of the protector and beneficiaries could do so, or a court could do so. However, a standard of independence should be established so that a trustee or beneficiary or a person closely associated with either will not be able to become a trust protector. It will often be best to forbid the settlor or the settlor's spouse from serving. It may be possible to provide standards of experience or other qualifications for a trust protector. Consider the possibility of what might happen if there is a time gap before a successor protector is appointed (*e.g.*, a protector with power to name a successor dies without having done so). Perhaps a court could appoint the protector temporarily, or, after a certain time lapse, permanently, or perhaps, particularly as to some types of authority where prompt action may be necessary, the trustee could temporarily exercise the authority (or be given the discretion to do so) until the successor protector has been appointed.

Explicit Standards. Fourth, provide a standard of care or duty such as good faith, with exculpatory provisions for the trust protector, and provide other protections, as well, of the sort described above (time limits for claims, etc.). If the protector is to provide independent guidance in certain areas, that independence needs to be assured so that the effect of threats of those (whether trustees or beneficiaries) who would abuse the situation can be minimized. For the same reason that a trustee should not be able to remove a protector, it may be best not to allow a trustee to challenge a decision of the protector either at all (leaving it to the beneficiaries) or without some substantial beneficiary consent, even where the duty of the protector runs to the trust rather than directly to the beneficiaries. Seriously consider having the trust pay expenses of actions brought or defended by the protector. Also, consider providing for contribution, exoneration, or indemnity for the protector against the trustee, but not the other way around, to the extent allowable by law, in cases where the trustee and protector are both held liable but their duties are not identical (*e.g.*, where the protector has not actively supplanted the trustee, but may have failed to investigate a matter), so that the trustee will be primarily responsible; naturally, if their duties are identical, cotrustee contribution should apply.

However, do not try to make believe that a trust protector with the power to act for the benefit of a third person is not a fiduciary of some sort. This may fail utterly in which event stronger duties than desired may apply, or it may succeed entirely in which event the beneficiaries either may be left subject to the sort of absolute power which tends to corrupt absolutely or be left subject to uncertainty where a court may need to try to create some workable standard to fill the gap. If a gap needs to be filled, then for a long time, as the common law process or the legislative process (or both) work their various forms of law making, the standard will be quite uncertain but almost certainly will be surprising to some degree. It may well be best in drafting to work where possible with known fiduciary legal principles but limit them through clear definitions of the limited role of the protector and by providing workable protections within those principles.

Precatory Guidance. Fifth, don't be afraid to be creative within the practical realities of the situation and with a view to the long-term accomplishment of the goals of the trust. For this,

it is good to have the settlor describe in the instrument his or her general purposes and goals. This can be done with recitals of precatory, nonbinding, considerations and statements of desires. This provides guidance to the drafter up front, and to the trustee, the trust protector, beneficiaries, and others, perhaps many generations removed from the settlor.

Consider Professional Trustee. Sixth, consider the use of a good professional trustee. This will simplify the life of the trust protector greatly. Investment strategy is not likely to be overly risky, exercises of discretion are not likely to be driven by questionable motives, and tax issues are solved which arise when beneficiaries are also trustees. The need for an activist role by the protector is thus minimized, and the protector can fulfill its primary functions without being tempted to go too far. Besides, a corporate trustee could provide the sort of continuity over a very long time that we mortals cannot.