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## A Review of Alexander A. Bove, Jr., *Trust Protectors: A Practice Manual with Forms*

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## BOOK REVIEW

### **A REVIEW OF ALEXANDER A. BOVE, JR., *TRUST PROTECTORS: A PRACTICE MANUAL WITH FORMS***

RICHARD C. AUSNESS\*

Alexander A. Bove, Jr. has recently written a thoughtful, comprehensive, and practical book entitled, “Trust Protectors: A Practice Manual with Forms.”<sup>1</sup> Mr. Bove is a practicing lawyer in Boston and has taught courses in estate planning for many years at Boston University School of Law. He frequently serves as an expert witness and has lectured extensively in the United States and Europe on trusts, wills, asset protection, and estate planning.<sup>2</sup> In addition, he has written numerous books and articles on these subjects.<sup>3</sup>

The book describes the powers and rights of a trust protector, as well as the fiduciary duties and potential liabilities associated with this position. The author examines the relationship between the trust protector and the trustee. He also discusses the role of the courts in this area and identifies a number of practical issues that lawyers should consider when they draft trust instruments that contemplate the appointment of a trust protector. Finally, the author provides an extensive collection of forms, both in print and on a compact disc, to assist drafters.

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<sup>1</sup> See Alexander A. Bove, Jr., *TRUST PROTECTORS: A PRACTICE MANUAL WITH FORMS* (2014) [hereinafter *TRUST PROTECTORS*].

<sup>2</sup> *TRUST PROTECTORS*, *supra* note 1, at xiii-xiv.

<sup>3</sup> See, e.g., Alexander A. Bove, Jr., *THE COMPLETE BOOK OF WILLS, ESTATES & TRUSTS* (3d ed. 2005); Alexander A. Bove, Jr., *Selecting a Trust Protector*, 152 *TR. & EST.* 13 (2013); Alexander A. Bove, Jr., *The Case Against the Trust Protector*, 25 *PROB. & PROP.* 50 (2011); Alexander A. Bove, Jr., *The Trust Protector: Trust(y) Watchdog or Expensive Exotic Pet?*, 30 *EST. PLAN.* 390 (2003).

In Chapter Two, the author examines the origins and characteristics of the office of a trust protector. A trust protector is a person who exercises power over a trust, but who is not a trustee.<sup>4</sup> According to the author, “[t]he position of protector is typically included in a trust for the purpose of allowing or causing the trust to adjust to future changes of any nature affecting the purposes of the trust, the interests of the beneficiaries, and the intentions of the settlor.”<sup>5</sup> Although the term seems to have first been used in connection with offshore asset protection trusts,<sup>6</sup> the idea of someone exercising power over a trust is not a new one. Trust *advisors* have performed a similar function in the United States and other countries for almost a hundred years.<sup>7</sup> However, legislatures, courts, and many commentators have failed to recognize this connection and, therefore, have tended to treat the office of trust protector as *sui generis*.<sup>8</sup>

Chapter Three identifies the trust protector as a fiduciary. A recurring theme throughout the book is that trust protectors normally exercise their powers in a fiduciary capacity.<sup>9</sup> This characterization as a fiduciary provides the basis for many of the author’s observations about the powers and rights of trust protectors, their duties and liabilities, and their relationship to trustees. Considering the trust protector as a fiduciary also provides the courts with a basis in enforcing the decisions of trust protectors and reviewing the exercise of their powers. The exact nature of a trust protector’s fiduciary duties will depend on the powers that they exercise, but at a minimum those duties will include loyalty, impartiality, and good faith.<sup>10</sup> The fiduciary status of trust protectors will be discussed in more detail later in this review.

Chapter Four concerns the powers of a trust protector. These powers are typically enumerated in the trust instrument, although in some states, potential powers are also set forth in statutory form.<sup>11</sup> In this chapter, the author provides an extensive list of powers that may be vested in a trust protector, including the powers to: (1) remove, add, and/or replace trustees; (2) add and replace protectors; (3) veto or direct distributions from the trust by the trustee; (4) settle disputes

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<sup>4</sup> See Andrew Holden, TRUST PROTECTORS 2 (David Brownbill ed., 2011); see also TRUST PROTECTORS, *supra* note 1, at 11.

<sup>5</sup> TRUST PROTECTORS, *supra* note 1, at 12.

<sup>6</sup> See Richard Lewis, Note, *The Foreign Irrevocable Life Insurance Trust as Asset Protection: Potential for Abuse and Suggestions for Reform*, 9 CONN. INS. L.J. 613, 618 (2003).

<sup>7</sup> TRUST PROTECTORS, *supra* note 1, at 9.

<sup>8</sup> “Of its own kind or class; unique or peculiar.” *Sui generis*, BLACK’S LAW DICTIONARY (8th ed. 2004).

<sup>9</sup> See TRUST PROTECTORS, *supra* note 1.

<sup>10</sup> See Richard C. Ausness, *When Is a Trust Protector a Fiduciary?*, 27 QUINNIPIAC PROB. L.J. 277, 305-07 (2014).

<sup>11</sup> TRUST PROTECTORS, *supra* note 1, at 44, 48.

among parties to the trust; (5) add or delete trust beneficiaries; (6) change the situs and governing law of the trust; (7) veto or direct investment decisions; (8) authorize special investments or holdings; (9) require consent in order to exercise the power of appointment; (10) grant a power of appointment; (11) determine whether an event of duress has occurred (a power often found in asset protection trusts); (12) amend the trust's administrative provisions; (13) amend the trust's dispositive provisions; (14) amend the trust in response to changes in the law or circumstances that may affect the purposes of the trust; (15) approve trustee accounts; (16) terminate the trust and direct disposition of the assets; and (17) establish terms and conditions with regard to any of the foregoing.<sup>12</sup> Furthermore, as in the case of trustees, additional powers may be implied when necessary for the trust protector to perform essential functions.<sup>13</sup>

Despite the multitude of potential powers that can be vested in a trust protector, the author warns against giving trust protectors too much authority, declaring that:

The objective in granting powers is not to pile on as many powers as one can think of but rather to select those powers that, given the duration and purposes of the trust, would seem most useful in furthering the smooth administration of the trust and the realization of the settlor's intentions.<sup>14</sup>

The author also addresses the question of how each trust protector should exercise his or her vested powers when the settlor appoints multiple trust protectors.<sup>15</sup> He concludes that the rule of unanimity, which applies to co-trustees and requires multiple trustees to act unanimously, should apply to co-trust protectors as well unless the trust instrument provides otherwise.<sup>16</sup>

In Chapter Seven, the author states the trust must provide certain rights in order for a trust protector to carry out his or her duties effectively.<sup>17</sup> These rights include the right to information, standing to enforce claims on behalf of the trust, indemnification for reasonable expenses, and compensation for work performed on behalf of the trust.<sup>18</sup> The author points out that the trust protector's right to

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<sup>12</sup> TRUST PROTECTORS, *supra* note 1, at 46.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 47.

<sup>15</sup> *Id.* at 49-50.

<sup>16</sup> *Id.* at 49.

<sup>17</sup> *See* TRUST PROTECTORS, *supra* note 1, at 71.

<sup>18</sup> *Id.*

information is similar to that of a beneficiary and would include:

...[I]nformation to which the beneficiaries and the protector in a fiduciary position would have the right to view would include the trust instrument itself, and any documents modifying it or appended to it; accounting and financial statements; tax returns and all related schedules; fiduciary appointments and related documents and correspondence, such as removal and appointment of trustees and protectors; trustee minutes; and generally, where the protector is concerned, any information or documents reasonably necessary to enable the protector to knowledgeably consider the exercise of his duties and powers.<sup>19</sup>

Another necessary right of a trust protector is the ability to sue on behalf of the trust in order to enforce claims.<sup>20</sup> Normally, it is the trustee's responsibility to enforce these claims, but there may be some instances where the trustee cannot bring suit because he/she is an adverse party or has some other conflict of interest.<sup>21</sup> Although there is little case law on this issue, a trust protector should have standing to sue when necessary to carry out his duties to the trust.<sup>22</sup> Like a trustee, a trust protector should be indemnified for any expenses incurred on behalf of the trust.<sup>23</sup> Finally, trust protectors should be reasonably compensated for their work.<sup>24</sup>

According to the author, a trust protector serving in a fiduciary capacity has a number of duties that are inherently attached to that office.<sup>25</sup> These are discussed in Chapter Five. One of the most controversial of these duties is the duty to monitor the trustee.<sup>26</sup> This issue arose in *Robert T. McLean Irrevocable Trust v. Patrick Davis, P.C.*,<sup>27</sup> when a successor trustee sued the trust protector for failing to monitor the activities of a trustee who depleted the assets of the \$1.7 million trust set up to support a quadriplegic accident victim.<sup>28</sup> Reversing a summary judgment for the defendant, a Missouri appeals court remanded the case back to the trial court to determine whether

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<sup>19</sup> TRUST PROTECTORS, *supra* note 1, at 73.

<sup>20</sup> *Id.* at 75-80.

<sup>21</sup> *Id.* at 78-79.

<sup>22</sup> *Id.* at 71.

<sup>23</sup> *Id.*

<sup>24</sup> TRUST PROTECTORS, *supra* note 1, at 75-83.

<sup>25</sup> *See id.* at 55.

<sup>26</sup> *Id.* at 57-59.

<sup>27</sup> TRUST PROTECTORS, *supra* note 1, at 58 (citing *Robert T. McLean Irrevocable Trust v. Patrick Davis, P.C.*, 283 S.W.3d 786, 789-92 (Mo. Ct. App. 2009)).

<sup>28</sup> TRUST PROTECTORS, *supra* note 1, at 1.

the trust protector had a duty to monitor the trustee's actions, and if necessary, to remove him.<sup>29</sup> The author, who served as an expert witness for the plaintiff in that case, strongly believes that such a duty exists when the trust protector has the power to remove the trustee.<sup>30</sup>

In addition, the author expresses the idea that, when exercising a power, a trust protector must act impartially and may not personally benefit from his actions.<sup>31</sup> Moreover, a trust protector should avoid conflicts of interest and should exercise independent judgment rather than acting as an agent of the trustee or the trust beneficiaries.<sup>32</sup> Consequently, when a trust protector's consent is required for certain purposes, he should not give blanket *ex ante*<sup>33</sup> consent to the trustee, but instead should retain his right to oversee the trustee's actions.<sup>34</sup>

Like a trustee, a trust protector who violates or fails to carry out his fiduciary duties risks being held personally liable for any losses the trust suffers as a result of his breach of duty.<sup>35</sup> In Chapter Six, the author considers this issue as well as the wisdom and effectiveness of exculpatory clauses. Responding to the common practice of relieving trust protectors from liability for breach of their fiduciary duties, the author declares that "[w]here the position is a fiduciary one, total exculpation would be against public policy, although exposure can be limited to acts which are in the category of gross negligence, bad faith, dishonesty, fraud, or willful misconduct."<sup>36</sup>

In Chapter Eight, the author explores the complex and potentially contentious relationship between trust protectors and trustees. Since the trustee, not the trust protector, holds title to the trust property, it is often the trustee who will carry out the directions of the trust protector.<sup>37</sup> In cases where the trust protector's powers are negative, such as the power to veto distributions, the power to veto will trump the power to distribute. For this reason, a number of state statutes purport to exonerate a trustee who merely carries out a trust protector's instructions.<sup>38</sup> However, as the author points out, these statutes have "the deleterious effect of undermining, if not

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<sup>29</sup> *Id.* at 3.

<sup>30</sup> *Id.* at 59.

<sup>31</sup> *Id.* at 60.

<sup>32</sup> *Id.* at 62-63.

<sup>33</sup> "Based on assumption and prediction, on how things appeared beforehand, rather than in hindsight." *Ex ante*, BLACK'S LAW DICTIONARY (8th ed. 2004).

<sup>34</sup> TRUST PROTECTORS, *supra* note 1, at 60-62.

<sup>35</sup> *Id.* at 65.

<sup>36</sup> *Id.* at 68.

<sup>37</sup> *Id.* at 11, 85-86.

<sup>38</sup> *Id.* at 89, 91.

disregarding altogether, the basic role of the trustee, which is to administer and protect the integrity of the trust.”<sup>39</sup> Therefore, according to the author, at the very least, “...the trustee [as a fiduciary] has a duty to make a reasonable inquiry into the details and propriety of the protector’s instructions, rather than to blindly follow such instructions.”<sup>40</sup> If the trustee believes that the terms of the trust do not permit the trust protector’s instructions, he should refuse to comply with them, and, if necessary, apply to the appropriate court for instructions.<sup>41</sup>

Chapter Nine examines the interaction between courts and trust protectors. As the author points out, there are almost no cases involving this issue in the United States.<sup>42</sup> On the other hand, he laments:

[t]he fact that there have been hundreds of cases dealing with the subject of trust advisors unfortunately has been totally ignored by the [American] courts, despite the fact that the roles are the very same and that such cases may offer the courts important insight in the process of resolving issues involving the protector.<sup>43</sup>

The author concedes that courts do not have much of a role to play when the trust protector is not a fiduciary, because a non-fiduciary is free to do as he pleases as long as he does not act contrary to the terms of the trust.<sup>44</sup> However, a court’s potential involvement in the trust’s affairs is greatly increased when the trust protector is deemed to be a fiduciary. In that instance, courts should have the power to oversee or review the trust protector’s conduct.<sup>45</sup>

This judicial oversight may take a number of forms. For example, the author identifies a foreign case in which a court appointed a trust protector when the settlor failed to do so.<sup>46</sup> Other foreign courts exercised the power to remove a trust protector for a serious breach of trust.<sup>47</sup> Based on these foreign cases, and *Papiernik*

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<sup>39</sup> TRUST PROTECTORS, *supra* note 1, at 92.

<sup>40</sup> *Id.* at 99.

<sup>41</sup> See RESTATEMENT (THIRD) OF TRUSTS § 75 cmt. e (2007).

<sup>42</sup> TRUST PROTECTORS, *supra* note 1, at 111.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 113-14.

<sup>45</sup> *Id.* at 117.

<sup>46</sup> TRUST PROTECTORS, *supra* note 1, at 117 (citing *Rawcliffe v. Steele* [1993] Manx LR 426, 514 (Isle of Man)).

<sup>47</sup> *Id.* at 117, 119 (citing *Re Freiburg Tr., Mourant & Co., Trs., Ltd. v. Magnus* [2006] 6 ITEL 1078 (Jersey RC); *Centre Trustees (C.I.) Ltd. & Langry Tr. Co. (C.I.) Ltd. v. Pabst*, 2009 JLR 202 (RC2009); *In the Matter of the Circle Tr.*, [2006] CILR 323 (Cayman Is.)).

*v. Papiernik*,<sup>48</sup> an Ohio case involving a trust *advisor*, the author concludes that American courts should have the power to appoint or remove trust protectors when circumstances warrant such action.<sup>49</sup> In addition, the author argues that a court, upon the request of an interested party, should be able to review the appointment of a trust protector, who, like a trustee, is a fiduciary under the trust.<sup>50</sup>

Relying on *Re Rogers*,<sup>51</sup> a Canadian case involving a recalcitrant trust advisor, the author concludes that following a trust protector's exercise of a power, or his refusal to exercise a power, a court may override his decision and take action on its own if it determines that the trust protector's conduct was improper under the circumstances.<sup>52</sup> Similarly, a court should also have the authority to suspend a trust protector's powers to prevent a breach of fiduciary duty, considering it has the power to remove a protector as well as override his decisions.<sup>53</sup> Furthermore, the author concludes that a court has the power to surcharge a trust protector when his wrongful conduct causes a financial loss to the trust.<sup>54</sup> This result is consistent with the way courts treat trust advisors.<sup>55</sup> Finally, although courts are generally reluctant to interfere with the exercise of a discretionary power, in certain cases, it may become necessary for a court to compel the exercise of a trust protector's power.<sup>56</sup>

Practicing lawyers, particularly those who are new to the area of trust protectors, will find the material in Chapter Ten especially useful, as it contains a copious amount of practical planning and drafting advice. The first issue for a drafter and his client to decide is whether or not to provide for a trust protector in the trust instrument.<sup>57</sup> The author cautions that trust protectors should not be used in conjunction with certain entities, such as LLCs, partnerships, and corporations.<sup>58</sup> On the other hand, irrevocable trusts can benefit from the addition of a trust protector, particularly if the trusts are expected to be of long duration.<sup>59</sup> Trust protectors can also be used in connection with revocable trusts if there is reason to think that the

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<sup>48</sup> *Id.* at 120 (citing *Papiernik v. Papiernik*, 544 N.E.2d 664, 45 Ohio St. 3d 337 (Ohio 1989)).

<sup>49</sup> TRUST PROTECTORS, *supra* note 1, at 117-20.

<sup>50</sup> *Id.* at 120.

<sup>51</sup> *Id.* at 122 (citing *Re Rogers*, [1929] 1 D.L.R. 116 (Can. Ont., C.A.)).

<sup>52</sup> TRUST PROTECTORS, *supra* note 1, at 122-23.

<sup>53</sup> *Id.* at 123-24; *see also Re M. Settlement* [2009] JRC 140 para. 2 (Jersey RC).

<sup>54</sup> TRUST PROTECTORS, *supra* note 1, at 124-25.

<sup>55</sup> *See Warner v. First Nat'l Bank of Minneapolis*, 236 F.2d 853, 861, 1956 U.S. App. LEXIS 2841 (8th Cir. 1956).

<sup>56</sup> TRUST PROTECTORS, *supra* note 1, at 125-26.

<sup>57</sup> *Id.* at 130.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 138.

settlor may become incapacitated at some time in the future.<sup>60</sup>

Once the decision is made to utilize a trust protector, the parties must decide what qualities they are looking for in a potential appointee. According to the author, “[t]o some extent, the knowledge, experience, and judgment required in a candidate for the position of protector will depend upon the extent of the powers to be given the protector.”<sup>61</sup> If the trust protector’s powers are narrow and do not require any special knowledge, then a candidate may be suitable simply by way of being responsible, sensible, and trustworthy.<sup>62</sup> On the other hand, the appointment of an individual with a professional background, such as an attorney, accountant, or trust officer, may be necessary if the trust is complicated, large, or of long duration.<sup>63</sup> It is also in the best interests of the settlor and beneficiaries not to have a person who maintains an interest in the trust be a trust protector, in order to avoid concerns of self-interest, bad faith, or breach of fiduciary duties.<sup>64</sup>

Another issue a drafter and his client may face is whether the settlor should appoint more than one person to serve as trust protector. Although there are certain advantages to having a single individual act as a trust protector, the author notes that a use of a committee might be better in some cases.<sup>65</sup> He also considers the pros and cons of appointing a corporation or a limited liability company to serve as trust protector.<sup>66</sup>

Some of the most practical information in the book is located in the section on drafting considerations.<sup>67</sup> The author declares that the trust instrument should clearly state that the trust protector is a fiduciary and will act in a fiduciary capacity.<sup>68</sup> The drafter should also set forth the basis upon which the trust protector shall be compensated.<sup>69</sup> The trust protector should be authorized to hire agents to assist him in carrying out his duties.<sup>70</sup> Like a trustee, a trust protector should be entitled to reimbursement from the trust for expenses incurred to defend against claims brought against him. However, a trust protector should not be reimbursed for successful

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<sup>60</sup> *Id.* at 138.

<sup>61</sup> TRUST PROTECTORS, *supra* note 1, at 138.

<sup>62</sup> *Id.* at 138-39.

<sup>63</sup> *Id.* at 141.

<sup>64</sup> *Id.* at 139.

<sup>65</sup> *Id.* at 145.

<sup>66</sup> TRUST PROTECTORS, *supra* note 1, at 146.

<sup>67</sup> *Id.* at 146-47.

<sup>68</sup> *Id.* at 147.

<sup>69</sup> *Id.* at 148.

<sup>70</sup> *Id.* at 148-49.

lawsuits against him that involve bad faith, gross negligence, or willful misconduct.<sup>71</sup>

The trust instrument should enumerate the trust protector's powers. As the author observes, this "array of powers may be very brief or very broad, depending upon the objectives of the settlor, the purposes of the trust, the duration of the trust, and the circumstances of the family or other beneficiaries."<sup>72</sup> The author identifies and discusses at least twenty powers, rights, and restrictions that the drafter should consider including in the provisions of the trust: 1) the power to remove and replace the trustee; 2) the power to enforce claims; 3) the right to reimbursement; 4) the right to information; 5) the power to amend the trust; 6) the power to add or delete beneficiaries; 7) the power to decant; 8) the power to appoint into another trust; 9) the power to change the situs or governing law of the trust; 10) the power to terminate the trust; 11) the power to consent to or veto the trustee's actions; 12) a prohibition against actions that that would adversely affect the tax situation of the settlor's or a beneficiary's estate; 13) the provision of a mechanism for filling vacancies or appointing successor trust protectors; 14) a list of parties who are excluded from serving as trust protectors; 15) a provision dealing with the resignation of the trust protector; 16) a provision dealing with the trust protector's incapacity; 17) insolvency or disappearance; 18) a savings provision in case some aspect of the trust violates the Rule Against Perpetuities; 19) standards for limiting the trust protector's liability; 20) a reference to statutory powers that may be incorporated by reference; and 21) an anti-duress provision.<sup>73</sup>

The author has several other suggestions to offer the drafters of trust instruments. One helpful technique is a non-binding "letter of wishes" to assist the trust protector in the exercise of his discretion.<sup>74</sup> The trust instrument may also provide for a "springing" protector who would be appointed under certain circumstances by the trustee, a disinterested third party, or a majority of the beneficiaries.<sup>75</sup> Finally, the author examines some of the tax consequences that might arise in connection with the selection of a trust protector and the exercise of his powers.<sup>76</sup>

As the foregoing description indicates, the author's book contains a wealth of practical information and sage advice about trust protectors and their role in trust administration. However, there are

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<sup>71</sup> TRUST PROTECTORS, *supra* note 1, at 149.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 150-67.

<sup>74</sup> *Id.* at 167-68.

<sup>75</sup> *Id.* at 175-76.

<sup>76</sup> TRUST PROTECTORS, *supra* note 1, at 179-86.

two recurring themes that run throughout the book which merit further discussion. The first is that drafters and their clients need to have a clear idea about the trust's structure, assets, and objectives.<sup>77</sup> They also should know something about the character and circumstances of the trust's beneficiaries.<sup>78</sup> Armed with that knowledge, they can select the right person to serve as trust protector and identify the powers that he will need to perform his duties effectively. In other words, the trust instrument should give the trust protector all of the powers necessary to do his job, but at the same time, it should not vest him with unnecessary powers that may cause friction with the trustee or interfere with the efficient administration of the trust.

The second recurring theme is whether, and under what circumstances, a trust protector should be considered a fiduciary,<sup>79</sup> as seen in Chapter Three. The author first considers the difference between a personal power and a fiduciary power. As he points out:

A personal power is one that can be exercised by the powerholder for the powerholder's own benefit, or for the benefit of other parties or purposes, without regard, in either case, to the settlor's intentions (other than as may be expressed in the terms of the power...) and without regard to any sense of fairness, reasonableness, or common sense.<sup>80</sup>

A personal power may be general or limited.<sup>81</sup> The donee of a general power may exercise the power for the benefit of anyone, including himself, his estate or his creditors.<sup>82</sup> On the other hand, if the power is limited or special, the donee may only exercise the power for the benefit of a specific beneficiary class.<sup>83</sup> The donee of a personal power owes no fiduciary duties; however, any exercise that constitutes a fraud of the power is void and can be revoked by a court.<sup>84</sup>

In contrast, the donee of a fiduciary power, such as a trustee, must act for the benefit of another, and in so doing must place the interest of that person ahead of his own interests.<sup>85</sup> A fiduciary owes a duty of loyalty, prudence, and impartiality to the beneficiaries of the

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<sup>77</sup> See TRUST PROTECTORS, *supra* note 1.

<sup>78</sup> *Id.*

<sup>79</sup> See *id.* at 11.

<sup>80</sup> *Id.* at 20.

<sup>81</sup> See *id.* at 20-21.

<sup>82</sup> TRUST PROTECTORS, *supra* note 1, at 20.

<sup>83</sup> *Id.* at 21.

<sup>84</sup> *Id.* at 20.

<sup>85</sup> *Id.* at 21.

trust and may be held liable for actions or decisions that violate these fiduciary duties.<sup>86</sup>

The author states that most of the early offshore asset protection statutes provided that all powers granted to a trust protector were assumed to be personal unless the trust instrument provided otherwise.<sup>87</sup> This approach was also adopted by a number of American statutes.<sup>88</sup> Consequently, many trust and estate lawyers assume that trust protectors should not be described as fiduciaries. According to the author:

...[T]he legal community in general began to regard the protector as a party who could be granted virtually unlimited powers over a trust but who, at the same time, could be free from all liability for any exercise, failure to exercise, negligence, or even refusal to exercise a power in the face of a danger to a trust.<sup>89</sup>

There are two reasons for the preference for personal powers. First, trust lawyers believed that broad immunity from liability was necessary to induce people to agree to serve as trust protectors.<sup>90</sup> Second, they were concerned that treating trust protectors as fiduciaries would encourage trustees and beneficiaries to more easily overturn their actions in court.<sup>91</sup>

Nevertheless, the author makes a compelling argument that trust protectors should be treated as fiduciaries in most cases.<sup>92</sup> First, he examined the reasoning of those courts from foreign jurisdictions that have found trust protectors to be fiduciaries.<sup>93</sup> He also surveyed American court decisions involving trust advisors and found that most courts held that trust *advisors* were fiduciaries.<sup>94</sup> Even if trust protectors are not exactly the same as trust advisors, their functions are sufficiently similar that it would be illogical to treat one as a fiduciary but not the other. The author also maintains that trust protectors occupy an office or position that is inherently fiduciary in

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<sup>86</sup> *Id.* at 21-23.

<sup>87</sup> TRUST PROTECTORS, *supra* note 1, at 13.

<sup>88</sup> *Id.* at 14.

<sup>89</sup> *Id.* at 15.

<sup>90</sup> *Id.* at 13-14.

<sup>91</sup> *Id.* at 14.

<sup>92</sup> TRUST PROTECTORS, *supra* note 1, at 16.

<sup>93</sup> *Id.* at 16, 18 (citing *Jurgen Von Knieriem v. Berm. Tr. Co., Ltd.* [1994] Bda LR 50, Civil Jur. No. 154; *In re Skeats' Settlement* [1889] 42 Ch. 522, ChD (Eng.); *Rawcliffe*, *supra* note 46; *Re Freiburg Tr., Mourant & Co., Trs., Ltd.*, *supra* note 47; *In re Circle Tr.*, *supra* note 47).

<sup>94</sup> TRUST PROTECTORS, *supra* note 1, at 9 (citing *Warner v. First Nat'l Bank of Minneapolis*, 236 F.2d 853, 861 (8th Cir. 1956); *Lewis v. Hanson*, 128 A.2d 819, 36 Del. Ch. 235 (Del. 1957); *Gathright's Tr. v. Gaut*, 124 S.W.2d 782, 276 Ky. 562 (Ky. Ct. App. 1939)).

nature.<sup>95</sup>

Having concluded that one who holds the office of trust protector must be considered a fiduciary, there remains the question of what exactly this means. The duties and powers vested in a trustee provide some guidance to this question. For example, trust protectors are often given the power to direct or veto investment decisions.<sup>96</sup> In such instances, it would seem that they should have the same duty of prudence with respect to these investment decisions that a trustee would have. Likewise, if a trust protector is given the power to direct or veto distributions from the trust to various beneficiaries, he should be held to a standard of fairness and impartiality in the same manner as a trustee. On the other hand, when a trust protector is vested with powers that are not analogous to those commonly vested in a trustee, the scope of a trust protector's fiduciary duties must be determined from the nature of the power that he is tasked with exercising.

One such duty is the duty to monitor the trustee's actions. The author argues persuasively that if the settlor authorizes the trust protector to remove the trustee, there is an implied duty on the part of the trust protector to monitor the trustee's behavior to determine whether removal might be warranted.<sup>97</sup> In other words, even if the power to remove the trustee is discretionary, the trust protector still has a duty to behave in a responsible manner.

This issue came up recently in *Robert T. McLean Irrevocable Trust v. Patrick Davis, P.C.*,<sup>98</sup> which the author discusses in Chapter One.<sup>99</sup> In that case, the plaintiff, a successor trustee, alleged that the trust protector should have removed the prior trustee, when evidence first came to light that the prior trustee might be spending the trust's money improperly.<sup>100</sup> Unfortunately, the trust instrument was somewhat contradictory. It provided that "[t]he Trust Protector's authority...is conferred in a fiduciary capacity and shall be so exercised, but..." then went on to declare that "...the Trust Protector shall not be liable for any action taken in good faith."<sup>101</sup> In the first appeal, the appellate court reversed the trial court's summary judgment for the trust protector, finding that there were disputed issues, including the nature of the trust protector's fiduciary status,

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<sup>95</sup> TRUST PROTECTORS, *supra* note 1, at 11.

<sup>96</sup> *Id.* at 105.

<sup>97</sup> *Id.* at 102.

<sup>98</sup> TRUST PROTECTORS, *supra* note 1, at 1 (citing *Robert T. McLean Irrevocable Trust v. Patrick Davis, P.C.*, 283 S.W.3d 786, 2009 Mo. App. LEXIS 276 (Mo. Ct. App. 2009)).

<sup>99</sup> TRUST PROTECTORS, *supra* note 1, at 1-4.

<sup>100</sup> *Id.* at 3 (citing *Robert T. McLean*, 283 S.W.3d at 790).

<sup>101</sup> *Robert T. McLean*, 283 S.W.3d at 796 (Parish, J., concurring).

which needed to be resolved in subsequent proceedings.<sup>102</sup> Although the *McLean* decision suggested that the trust protector was a fiduciary in some respects, it shed little light on what these duties might be. The court in *McLean* also failed to determine the extent to which the trust's exculpatory clause affected these duties.

Despite the lack of controlling case law in the United States on the issue of a trust protector's fiduciary duties, the author firmly believes that trust protectors have such duties and that they are an inherent aspect of the position.<sup>103</sup> This, in turn, suggests that settlors cannot entirely relieve a trust protector of all liability for breach of these duties by means of an exculpatory clause. In his view, a court should disregard any exculpatory provision that purported to relieve a trust protector of liability for bad faith, fraud, or willful misconduct when these actions caused harm to the trust or its beneficiaries.<sup>104</sup>

To conclude, legal commentators agree that trusts are one of the most flexible tools available to clients for the efficient disposition of their property. However, as the author observes:

The protector is probably one of the most significant developments to date in trust law and practice. Through the use of protectors, trusts that have been rendered ineffective or that have proven to fall short of the settlor's objectives because of changes in circumstances or changes in the law can be revised, restored, and in some cases even re-written by a protector given the powers to do so.<sup>105</sup>

Legal scholars will appreciate the author's description of the rise of the trust protector in the United States, as well as his analysis of a trust protector's powers, rights, duties, and liability. For practicing lawyers, the author presents a detailed list of do's and don'ts to guide them when they include a trust protector in a trust instrument. Those who practice in this area will also benefit from the comprehensive collection of drafting forms that are included at the end of the book and on a compact disc. These forms are clearly written and can be understood by settlors and other lay persons, as well as by those with legal training. Together, they cover virtually any contingency that may arise in connection with the role of a trust protector. In sum, this book is a significant contribution to the literature on trust protectors and a great benefit to the field of trusts

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<sup>102</sup> For a discussion of the subsequent history of the case, see Ausness, *supra* note 10, at 296-301. See also TRUST PROTECTORS, *supra* note 1, at 3.

<sup>103</sup> TRUST PROTECTORS, *supra* note 1, at 4.

<sup>104</sup> *Id.* at 16.

<sup>105</sup> *Id.* at 193.

and estates.