THE ROLE OF TRUST PROTECTORS IN AMERICAN TRUST LAW

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Editors' Synopsis: In this Article, the Author discusses the general powers, duties, and liabilities of trust protectors in addition to the role of trust protectors in specific types of trusts. The Author points to the legal uncertainties facing the use of trust protectors in many states and argues for amending the Uniform Trust Code to address these uncertainties.

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I. INTRODUCTION

"A trust is an arrangement whereby one person (the trustor) transfers property to another person or entity (the trustee) and directs the trustee to hold the property for the benefit of another person (the beneficiary)."[1] These days, trustees often have significant discretionary and administrative powers.[2] The increased use of institutional trustees,[3] as well as the growing sophistication and complexity of modern trust asset management, have induced many settlors to give their trustees greater power and discretion. In addition, many states have enacted statutes, such as the Uniform Trustees' Powers Act[4] or the Uniform Trust Code[5] (UTC), that confer broad powers upon trustees. However, vesting greater powers and discretion in trustees can also increase the risk that a trustee will fail to carry out the settlor's intent.[6]

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[1] Karen E. Boxx, *Gray's Ghost–A Conversation About the Offshore Trust*, 85 IOWA L. REV. 1195, 1197 (2000).

[2] *See* Henry J. Lischer, *Domestic Asset Protection Trusts: Pallbearers to Liability?*, 35 REAL PROP. PROB. & TR. J. 479, 486–88 (2000).

[3] *See* Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621, 633 (2004).

[4] UNIF. TRS.' POWERS ACT § 3(c), 76 U.L.A. 689 (2006 & Supp. 2009) (identifying twenty-five powers). As of 2004, twelve states had adopted the Uniform Act. *See* GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 551 n. 28, (2nd ed. Supp. 2009). Other states have enacted their own laws enumerating the powers of trustees. *See id.* at n. 30.

[5] UNIF. TRUST CODE § 816 (amended 2004 & 2005), 76 U.L.A. 627 (2006 & Supp. 2009) (listing twenty-six powers).

[6] Settlors, trustees, beneficiaries, and trust protectors may be both male and female. However, I have chosen to use male pronouns to include females for stylistic reasons. For the same reason, I refer to trustees in the singular even though a trust may have multiple trustees.

One possible solution to the settlor's dilemma is the appointment of a trust protector.[7] A trust protector is a person who the settlor appoints to ensure that the trustee carries out the settlor's wishes.[8] As discussed below, a trust protector can play a useful role in trust administration, particularly if the trust is a large one or is expected to last a long time. However, several potential risks are associated with the appointment of a trust protector. First of all, because the use of trust protectors is still relatively uncommon in the United States, the legal landscape is largely *terra incognita*. The few statutes that exist provide very little guidance to practitioners and case law is virtually nonexistent. This Article discusses some of the powers that settlors can give to trust protectors as well as some of the duties and potential liabilities that may come with this position. This Article also suggests what role a trust protector might play in connection with various types of trusts.

Part II of this Article examines the status of trust protectors in the United States. Part III identifies some of the powers that a trust protector may exercise and the sources of these powers. Part IV analyses a trust protector's potential duties and liabilities. Part V discusses how a settlor may employ trust protectors to achieve various goals. Finally, this Article concludes by suggesting that the UTC be amended to explicitly recognize trust protectors and set forth their powers and duties.

II. THE ORIGINS AND CURRENT STATUS OF TRUST PROTECTORS

The emergence of trust protectors is one of the most significant recent developments in American trust law.[9] First popularized in connection with offshore asset protection trusts, trust protectors have a somewhat shady pedigree.[10] However, the use of trust protectors has become more common in trust administration in the United States.[11]

A. Trust Protectors and Offshore Asset Protection Trusts

An asset protection trust is a self-settled spendthrift trust that is created to insulate the settlor's property from creditors' claims.[12] Until recently,

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

[8] *See* James T. Lorenzetti, *The Offshore Trust: A Contemporary Asset Protection Scheme*, 102 COM. L.J. 138, 149 (1997).

[9] *See* Alexander, *supra* note 7, at 2807.

[10] *See* Stewart E. Sterk, *Trust Protectors, Agency Costs, and Fiduciary Duty*, 27 CARDOZO L. REV. 2761, 2764 (2006).

[11] *See* Sitkoff, *supra* note 3, at 670.

[12] *See* Ritchie W. Taylor, *Domestic Asset Protection Trusts: The "Estate Planning Tool of the Decade" or a Charlatan?*, 13 BYU J. PUB. L. 163, 164 (1998).

almost all American courts held that allowing settlors to thwart creditors by making themselves the beneficiaries of self-settled spendthrift trusts was against public policy.[13] Consequently, many U.S. citizens established self-settled trusts in foreign countries where they could take advantage of more debtor-friendly local laws.[14] Although some of these settlors were swindlers and deadbeats, a large portion of them were physicians and other professionals who were concerned about large malpractice awards depleting their assets.[15]

Typically, the settlors of offshore asset protection trusts rely on a number of devices to protect themselves from the claims of American creditors.[16] These devices include antiduress clauses and flight clauses. "An antiduress clause prohibits [a foreign] trustee from complying with any order imposed upon the settlor, a domestic trustee or [a] foreign trustee" by an American court.[17] A flight clause authorizes a foreign trustee "to take whatever actions are necessary in order to protect [trust property] against threats of nationalization, expropriation or political instability."[18]

Notwithstanding the many advantages of offshore asset protection trusts, Americans who set up these trusts in foreign countries are often reluctant to give up all control over their assets to a foreign trustee.[19] To safeguard against wrongdoing by the trustee, the settlors of offshore asset protection trusts rely on devices such as trust protectors and nonbinding letters of intent. A trust protector is a trusted family member or business associate who exercises substantial power over the foreign trustee while enabling the settlor to defeat creditors' claims by purporting to divest himself of any formal control over the trust.[20] Nonbinding letters of intent sometimes are used in connection with trust protectors. A nonbinding letter of intent is a document in which the settlor advises the trustee about the disposition of

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[13] *See, e.g.*, Dexia Credit Local v. Rogan, 624 F. Supp. 2d 970, 975–79 (N.D. Ill. 2009); Ware v. Gulda, 117 N.E.2d 137, 138 (Mass. 1954); *In re* Hertsberg Inter Vivos Trust, 578 N.W.2d 289, 291 (Mich. 1998).

[14] *See* Richard C. Ausness, *The Offshore Asset Protection Trust: A Prudent Financial Planning Device or the Last Refuge of a Scoundrel?*, 45 DUQ. L. REV. 147, 152–56 (2007).

[15] *See Elena Marty-Nelson, Offshore Asset Protection Trusts: Having Your Cake and Eating It Too*, 47 RUTGERS L. REV. 11, 56–57 (1994).

[16] *See* Ausness, *supra* note 14, at 155–56.

[17] *Id.* at 155; *see also* Lorenzetti, *supra* note 8, at 146.

[18] Ausness, *supra* note 14, at 156 (citing Robert T. Danforth, *Rethinking the Law of Creditors' Rights in Trusts*, 53 HASTINGS L.J. 287, 310 (2002)).

[19] *See* Sterk, *supra* note 10, at 2764.

[20] *See* Danforth, *supra* note 18, at 310.

trust property.[21] Although the trustee can ignore the settlor's wishes, the trust protector can override the trustee's decision or even remove the trustee and appoint a more cooperative successor.[22]

Unfortunately for those who have established asset protection trusts in foreign countries, trust protectors have not always been able to screen the trusts from interference by hostile American courts.[23] For example, in *FTC v. Affordable Media, LLC*,[24] a married couple, the operators of an alleged Ponzi scheme, established an asset protection trust in the Cook Islands.[25] The couple designated themselves, along with a Cook Island domiciliary, trustees; in addition, the defendants named themselves as trust protectors.[26] When an American court ordered the settlors to repatriate assets from the trust, the remaining trustee removed the settlors as trustees pursuant to the trust's antiduress clause.[27] The settlors then claimed that they no longer had the power to compel the trustee to comply with the court's repatriation order.[28] However, the court observed that the settlors, in their capacity as trust protectors, had retained the power to remove the trustee and to appoint new trustees.[29] In addition, the court noted that the settlors, acting as trust protectors, could overrule the trustee's determination that the court's order constituted an event of duress.[30] Consequently, the court reasoned that the settlors, in their role as trust protectors, retained the right to direct the foreign trustee to repatriate the trust's assets to the United States.[31] When the settlors persisted in their refusal to comply with the court's order, the court held them in civil contempt and incarcerated them.[32]

The defendants' scheme might have worked if they had been a bit more clever. First, they should not have acted as trustees or appointed any American citizen to act as a trustee of their offshore trust. Furthermore, they should not have appointed themselves as trust protectors or appointed anyone to that position who might be subject to the jurisdiction of an American

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[21] *See* Denise C. Brown, *Caribbean Asset Protection Trust: Here Comes the Sun–Dispelling the Dark Clouds of Controversy*, 7 U. MIAMI BUS. L. REV. 133, 134 (1998).

[22] *See* Lorenzetti, *supra* note 8, at 149.

[23] *See, e.g.*, FTC v. Affordable Media, LLC, 179 F.3d 1228 (9th Cir. 1999).

[24] *Id.*

[25] *See id.* at 1242.

[26] *See id.*

[27] *See id.* at 1232.

[28] *See id.* at 1230.

[29] *See id.* at 1242.

[30] *See id.*

[31] *See id.* at 1243 n.13.

[32] *See id.* at 1233.

court. Instead, they should have appointed a reliable person as trust protector who would not be subject to the jurisdiction of an American court. This plan would have left the FTC, as well as their defrauded former clients, with no recourse but to sue the trustees and trust protector in the Cook Islands.

B. The Status of Trust Protectors Under American Law

Over the past two decades, the use of trust protectors has become more common in the United States.[33] This increase began in the late 1990s when a number of states passed laws to provide some protection to domestic self-settled trusts against creditors' claims.[34] States modeled these domestic asset protection trusts after their offshore cousins, and these trusts typically permit trust advisors or trust protectors, including the settlor, to remove trustees or to veto proposed distributions from the trust.[35] Furthermore, in recent years, partly due to the influence of the UTC, the use of trust protectors has expanded to other kinds of trusts as well.

Many states have enacted statutes that expressly or impliedly authorize settlors to appoint trust protectors. These statutes roughly fall into three categories: (1) statutes that expressly authorize domestic asset protection trusts, (2) statutes based on the UTC, and (3) statutes generally regulating trusts and trust administration. Alaska enacted the first domestic asset protection trust legislation in 1997, and Delaware quickly followed suit.[36] Eleven states presently allow the creation of domestic asset protection trusts in their jurisdictions.[37] Many of these domestic asset protection statutes expressly

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[33] *See* Sitkoff, *supra* note 3, at 670.

[34] *See* Keith Adam Halpern, *Domestic Asset Protection Trusts: What Is Your State of Asset Protection?*, 7 FLA. ST. U. BUS. L. REV. 139, 140–41 (2008). That is not to say that trust protectors, or something like them, were entirely unknown. One of the editors who reviewed this article prior to publication recalled seeing a trust from the early 1900s with a provision for a trust protector.

[35] For a more detailed description of some of these domestic asset protection trust statutes, see Richard W. Nenno, *Planning with Domestic Asset-Protection Trusts: Part II*, 40 REAL PROP. PROB. & TR. J. 477 (2005).

[36] *See* Paul M. Roder, Note, *American Asset Protection Trusts: Alaska and Delaware Move "Offshore" Trusts onto the Mainland*, 49 SYRACUSE L. REV. 1253, 1267–71 (1999); Amy Lynn Wagenfeld, Note, *Law for Sale: Alaska and Delaware Compete for the Asset Protection Trust Market and the Wealth That Follows*, 32 VAND. J. TRANSNAT'L L. 831, 850–51 (1999).

[37] *See* Alaska Trust Act, ALASKA STAT. §§ 34.40.110, 13.36.035–13.36.060 (2008); Delaware Qualified Disposition in Trust Act, DEL. CODE ANN. tit. 12, §§ 3570–76 (2007 & Supp. 2008); MO. ANN. STAT. § 456.5-505 (West 2007); Nevada Spendthrift Trust Act, NEV. REV. STAT. §§ 166.010–166.170 (LexisNexis 2009); N.H. REV. STAT. ANN. § 564-D:1 to 18 (LexisNexis Cum. Supp. 2009); Oklahoma Family Wealth Preservation Trust Act, OKLA.

allow settlors to appoint and remove trust advisors and trust protectors.[38] Furthermore, in some cases, domestic asset protection trusts specifically enumerate the powers of trust protectors.[39]

Eighteen states and the District of Columbia have adopted the UTC.[40] Section 808(b) of the UTC declares that the settlor may authorize a third party to oversee the trustees or make certain decisions about the management or distribution of trust assets.[41] Although the statutory text does not mention trust protectors by name,[42] the comment to that section states that "[s]ubsections (b)–(d) ratify the use of trust protectors and trust advisors."[43] Finally, a few states expressly refer to trust protectors in their general trust administration legislation.[44]

Only fourteen states expressly recognize trust protectors by statute, although a number of other states have implicitly recognized them by adopting the UTC. The remaining states have not acknowledged the existence of trust protectors, even by implication. Furthermore, many of the states that

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STAT. ANN. tit. 31, §§ 10–18 (West Supp. 2009); Rhode Island Qualified Dispositions in Trust Act, R.I. GEN. LAWS §§ 18-9.2-1 to 18-9.2-7 (2003 & Supp. 2009); S.D. CODIFIED LAWS §§ 55-16-1 to 16-17 (Supp. 2008); Tennessee Investment Services Act of 2007, TENN. CODE ANN. §§ 35-16-101 to -112 (2007 & Supp. 2009); UTAH CODE ANN. §§ 25-6-14 (2007); WYO. STAT. ANN. §§ 4-1-505, 4-10-510 to 4-10-523 (2009). For a comparison of the principal features of these various domestic asset protection laws, see David G. Shaftel, *Comparison of the Twelve Domestic Asset Protection Statutes*, 34 ACTEC J. 293 (2009).

[38] *See, e.g.*, ALASKA STAT. §13.36.370(a) (2008); DEL. CODE ANN. tit. 12, § 3313 (2007 & Supp. 2008); R.I. Gen. Laws § 18-9.2-2(9)(iii)(B) (2003 & Supp. 2009); S.D. CODIFIED LAWS § 55-1B-1(2) (2004 & Supp. 2008); UTAH CODE ANN. § 25-6-14(2)(e)(iv) (2007); WYO. STAT. ANN. § 4-10-710(a) (2009).

[39] *See, e.g.*, DEL. CODE ANN. tit. 12, § 3570(11) (2007 & Supp. 2008); N.H. REV. STAT. ANN. § 564-D:1 to 18 (LexisNexis Supp. 2009); R.I. Gen. Laws §§ 18-9.2-1 to 18-9.2-7 (2003 & Supp. 2009); S.D. CODIFIED LAWS §§ 55-1B-6 (2004 & Supp. 2008); UTAH CODE ANN. § 25-6-14(2)(e)(iv) (2007); WYO. STAT. ANN. § 4-10-710(a) (2009).

[40] Alabama, Arkansas, District of Columbia, Florida, Kansas, Maine, Missouri, Nebraska, New Hampshire, New Mexico, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Virginia and Wyoming. *See* MARY F. RADFORD, GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 994 n. 17 (3d ed. 2006).

[41] *See* UNIF. TRUST CODE § 808(b) (amended 2004 & 2005), 7C U.L.A. 604 (2006 & Supp. 2009).

[42] *See* Robert T. McLean Revocable Trust v. Davis, 283 S.W.3d 786, 789 n. 3 (Mo. Ct. App. 2009).

[43] *See* UNIF. TRUST CODE, § 808 cmt (amended 2004 & 2005), 7C U.L.A. 604 (2006 & Supp. 2009).

[44] *See, e.g.*, ARIZ. REV. STAT. ANN. § 14-10818 (Supp. 2008); IDAHO. CODE ANN. § 15-7-501 (2009); MICH. COMP. LAWS ANN. § 700.7103(n) (effective April 1, 2010).

do mention trust protectors in their statutes say nothing about the specific nature of their powers and duties. Therefore, the question arises whether courts can, or should, affirm the validity of trust protectors and identify their powers and duties in the absence of statutory authorization. So far, almost none have done so.

Ironically, the only appellate court to discuss the legal status of trust protectors in any depth expressed doubt about whether trust protectors should be recognized at all. That case was *Robert T. McLean Irrevocable Trust v. Davis*,[45] decided by a Missouri intermediate appellate court in 2009. The case, discussed in more detail below, was primarily concerned with the liability of a trust protector for failing to prevent the trustees of a special needs trust from depleting the trust's assets.[46] However, in a concurring opinion, Judge John Parrish expressed concern that the trust had designated a trust protector "when that term has not been previously accepted or otherwise defined by statute or court opinions of this state."[47] Judge Parrish suggested that courts should exercise caution when evaluating the validity of trusts that designate "obligations or rights of a nature not theretofore established by statute or prior judicial determination."[48] He also concluded that "using procedures other than those time-proven in the law is something that should not be encouraged" in the area of trust administration because any disputes that subsequently arise will require lengthy and expensive litigation to resolve.[49] Nevertheless, after stating his reservations about the settlor's designation of a trust protector in the absence of judicial or statutory recognition, Judge Parrish went on to consider whether the defendant trust protector owed a fiduciary duty to the beneficiary or the trust.[50]

As discussed above, a number of states either expressly mention trust protectors by name in their statutes or implicitly recognize trust protectors by virtue of their adoption of the UTC. However, in the remaining states, the legal status of trust protectors is uncertain. As Judge Parrish's concurring opinion in *Davis* suggests, courts are probably reluctant to create a new body of trust law out of whole cloth. Conversely, courts may also be disinclined to condemn the out of hand use of trust protectors if practitioners are routinely drafting trust instruments that make use of them. Thus, courts may be willing to uphold the use of trust protectors in the absence of express

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[45] 283 S.W.3d 786.
[46] *Id.* at 788.
[47] *Id.* at 795 (Parrish, J., concurring).
[48] *Id.*
[49] *Id.*
[50] *See id.* at 795–96.

statutory recognition on the theory that trust provisions should be considered presumptively valid and effective as long as the provision is not obviously contrary to public policy. Consequently, these courts may be willing to uphold any powers that the settlor gives the trust protector in the trust instrument. Likewise, such courts should also enforce any duties or limitations that the settlor chooses to impose upon the trust protector in the trust. Nevertheless, for states that have not already done so, enacting legislation that recognizes the legal status of trust protectors and describes their powers and duties with some specificity is highly desirable.[51]

C. Potential Uses of Trust Protectors

Although trust protectors are probably most useful when they exercise narrowly defined powers, settlors can give them a wide variety of powers and responsibilities. For example, trust protectors can supervise the trustees of family trusts, particularly when the trustees are not financially sophisticated.[52] In addition, settlors can give trust protectors the power to modify trust terms in response to changing conditions in situations involving dynasty, special purpose, or supplemental needs trusts; settlors may also use them to oversee honorary trusts for animals; and with proper statutory authorization, settlors might even give them the power to modify the terms of charitable trusts.[53] Settlors also may use trust protectors to advise or oversee corporate fiduciaries in exercising discretionary powers.[54] Finally, in an era in which the ownership of many banks changes constantly, another benefit of a trust protector is to provide some stability and continuity in the administering of the trust.

Estate planners and other practitioners should exercise caution when providing for trust protectors in their trust instruments because of some disadvantages to using trust protectors. Perhaps the greatest concern is that the use of trust protectors will increase the agency costs of trust administration.[55] While this complication might not matter when the settlor's and the

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[51] *See infra* Part VI.

[52] *See infra* Part V.B.

[53] *See infra* Part V.D-H.

[54] *See infra* Part V.C.

[55] According to Professor Robert Sitkoff, agency costs are "the sum of the costs of the principal's 'monitoring expenditures,' the costs of the agent's 'bonding expenditures,' and the 'residual loss' as measured by the reduction of welfare experienced by the principal' as the result of the divergence in the principal's and the agent's interests." Sitkoff, *supra* note 3, at 637 (citing Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 308 (1976)). These agency costs can arise when the interests of the principal and the agent are misaligned. *See*

beneficiaries' interests are aligned, it will increase agency costs when their interests are not.[56]

Furthermore, introducing trust protectors into the existing trust law framework may create a situation where the trustee becomes the de facto agent of the trust protector rather than being the agent of the settlor or the beneficiaries.[57] This situation is a particular concern if the settlor gives the trust protector extensive power over the administration of the trust.[58] A third problem is that introducing trust protectors may create "an inefficient diffusion of responsibility."[59] According to Professor Sterk, the trustee may exercise less care in making investment or distribution decisions if he expects the trust protector to review them, while the trust protector may rely too heavily on the trustee to make these determinations and fail to exercise independent judgment.[60] Finally, when choosing a trust protector, settlors face the problem of finding one who will be honest, competent, and reliable. As in the case of trustees, choosing the wrong person to act as trust protector could be harmful to the trust and its beneficiaries.

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id. In such cases, the agent's performance on behalf of his principal may not be as zealous as the principal would like. Professor Sitkoff refers to this problem as shirking. *See id.* at 635–37. Because of information asymmetry between principal and agent, the principal must spend resources on monitoring costs to prevent shirking by the agent. *See id.*

Professor Sitkoff has applied an agency cost analysis to trusts and concluded that problems of shirking and monitoring are often found in trust administration, and therefore, significant agency costs are likely to occur in connection with the administration of private trusts. *See id.* at 623. Where trusts are concerned, these agency costs will primarily consist of the additional fees and expenses that trustees will generate to comply with increased accountability requirements. *See id.* at 635–37. However, they may also include more intangible costs such as administrative inefficiency. Professor Sitkoff has acknowledged that the appointment of a trust protector might give rise to additional agency costs because the appointment creates a series of new relationships, namely settlor–protector, trustee–protector and beneficiary–protector, but concluded that "the net reduction in agency costs is likely to outweigh these costs." *Id.* at 671. More recently, however, Professor Stewart Sterk has observed that the trust protector is also an agent and that this agency status generates new forms of agency costs. *See* Sterk, *supra* note 10, at 2773. In addition, Professor Gregory Alexander has concluded that introducing trust protectors into trust administration complicates existing problems when determining who is the agent and who is the principal in these new relationships–the settlor, the beneficiaries, or both. *See* Alexander, *supra* note 7, at 2808.

[56] *See* Alexander, *supra* note 7, at 2808–09.

[57] *See* Sterk, *supra* note 10, at 2777.

[58] *See* Alexander, *supra* note 7, at 2811.

[59] Sterk, *supra* note 10, at 2778.

[60] *See id.*

III. POWERS EXERCISABLE BY A TRUST PROTECTOR

A settlor has almost no limit to the types of powers that he may authorize a trust protector to exercise. Generally, settlors may appoint trust protectors to: (1) advise trustees, (2) supervise the actions of trustees, (3) direct or veto distributions of trust income or principal, (4) arbitrate disputes among beneficiaries or between beneficiaries and the trustee, and (5) modify the provisions of the trust instrument in response to changing external conditions.

A. Advising Trustees

Traditionally, settlors have appointed trust advisors to provide financial advice to trustees or appointed cotrustees with separate responsibilities. However, settlors may also appoint trust protectors to advise the trustee about investment decisions or about discretionary distributions to beneficiaries. If the trustee is a bank or trust company, it probably already will have access to in-house financial advisors. On the other hand, if the trustee is not financially sophisticated, the settlor may prefer to appoint a trust protector with expertise in financial matters to provide advice, particularly if the trustee will receive other powers as well. A trust protector also can advise the trustee on matters concerning discretionary distributions to beneficiaries. For example, a family member who is familiar with the character and financial condition of the beneficiaries of a family trust may be able to provide useful information or advice to an institutional trustee about potential distributions. Where an educational, support, or special needs trust is involved, a trust protector may be able to advise the trustee about whether the trustee should distribute trust funds to the beneficiary and, if so, how much the distribution should be. Corporate fiduciaries may be uncomfortable making discretionary distributions to beneficiaries on their own. Making these decisions with the support of a disinterested third party may make this task somewhat easier for a bank or trust company. Finally, when a state requires trustees to notify certain qualified beneficiaries of their potential interest in a trust,[61] a settlor may wish to authorize the trust protector to provide direction to the trustee regarding notification of qualified beneficiaries as required by statute.

B. Supervising Trustees

If the settlor is concerned that the trustee is inexperienced in financial affairs or may in the future be less able to manage the trust's property prop-

[61] *See* T.P. Gallanis, *The Trustee's Duty to Inform*, 85 N.C. L. REV. 1595, 1608 (2007) (quoting Taylor v. Nationsbank, 481 S.E.2d 358, 362 (N.C. Ct. App. 1997)).

erly, he should consider appointing a trust protector and vest him with the power to oversee the trustee's actions.[62] Although institutional trustees can obtain professional investment advice when necessary, in some cases the settlor might want to establish an additional system of checks and balances, particularly if the principal asset of the trust is unique property such as a small business, real property, or art collection.[63] If the settlor is concerned that the trustee will be incapable of making intelligent investment decisions, he may wish to appoint a trust protector with the power to direct or veto the trustee's investment decisions.[64]

One of the most important powers that a settlor can give a trust protector is the power to remove a trustee, cotrustee, or successor trustee and to appoint a replacement.[65] Settlors often give trust protectors this power in connection with foreign asset protection trusts to defeat attempts by American courts to order trustees to repatriate trust assets.[66] However, this power may be useful for ordinary domestic trusts by enabling trust protectors to remove trustees who are not doing a good job of administering the trust. In addition, the settlor can authorize the trust protector to remove and replace trustees without court approval when their investment strategies or distribution policies are inconsistent with the provisions of the trust instrument.[67] In addition, the settlor may authorize the trust protector to exercise the power of removal when the trustee moves the situs of the trust to a jurisdiction that requires one or more trustees to be a resident of the state.[68] Finally, if the trust protector is an attorney or an accountant, the settlor may wish to empower him to review and approve accountings of the trustee.[69] This provides some professional oversight over the activities of the trustee and protects the trust beneficiaries against negligence or misfeasance.[70]

C. Overseeing Distributions to Trust Beneficiaries

The settlor might authorize the trust protector to direct, consent, or veto a trustee's action or inaction in making discretionary distributions to beneficiaries.[71] While leaving the trustee to make decisions about the distribution

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[62] *See* Sterk, *supra* note 10, at 2767.
[63] *See id.* at 2770–73.
[64] *See id.* at 2785.
[65] *See id.* at 2768 n. 36.
[66] *See* Roder, *supra* note 36, at 1256.
[67] *See* Sterk, *supra* note 10, at 2768.
[68] *See id.* at 2779.
[69] *See id.* at 2773.
[70] *See id.* at 2768.
[71] *See id.* at 2779.

of trust income or corpus to beneficiaries is normally best, one could envision a situation in which a corporate fiduciary is primarily concerned with asset management and may not have much personal knowledge about the character, maturity, or financial circumstances of the beneficiaries. In such a case, a nonbeneficiary family member might act as a trust protector and in that capacity oversee the distribution of trust assets to other family members who are trust beneficiaries.[72]

The settlor also may empower the trust protector to change the substantive provisions of the trust, including provisions that affect the rights of trust beneficiaries.[73] For example, a settlor might authorize a trust protector to add or delete beneficiaries. Settlors sometimes include this power in offshore asset protection trusts to protect against creditors' claims.[74] However, this power also might be useful in family trusts to provide for contingencies such as serious illness, disability, or unexpected financial emergencies on the part of one of more beneficiaries that are not foreseen at the time of the trust's creation.[75] The settlor may also wish to empower a trust protector to increase or decrease any interest of the beneficiaries to the trust, to grant a power of appointment to one or more trust beneficiaries, or to terminate or amend an existing power of appointment.

In addition, a settlor may authorize a trust protector to consent to or veto the exercise of a power of appointment. This power might be useful to guard against the risk that the donee of a general power will make inappropriate appointments of trust property. This matter might be of particular concern to the settlor if the donee is elderly or otherwise susceptible to undue influence. Although this issue is less of a problem when the donee has a special power, because the power to appoint is limited, the settlor might want to give the trust protector the power to prevent a donee (such as a doting parent or grandparent) from appointing property to improvident children or grandchildren.

Finally, the settlor could authorize a trust protector to terminate the trust prior to its expected date of termination under certain circumstances. Ordinarily, the *Claflin* rule prevents the beneficiaries of a testamentary trust from unilaterally terminating the trust before all trust purposes are fulfilled, at least if the settlor is dead.[76] However, circumstances unforeseen by the

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[72] *See id.* at 2779.

[73] *See id.*

[74] *See* Roder, *supra* note 36.

[75] *See* Sterk, *supra* note 10, at 2779.

[76] *See Claflin v. Claflin*, 20 N.E. 454 (Mass. 1889); *cf.* RESTATEMENT (SECOND) OF TRUSTS § 337 (1959) (stating that upon consent from all beneficiaries, the trust may be terminated unless "continuance of the trust is necessary to carry out a material purpose.").

settlor may justify terminating the trust prematurely. One solution to the *Claflin* doctrine problem is for the settlor to empower a trust protector to terminate the trust and make a final distribution of trust assets if the costs of administration threaten to deplete the trust's remaining assets.

D. Resolving Disputes

The settlor also may find it desirable to give the trust protector the power to interpret the terms of the trust instrument at the request of the trustee or the beneficiaries.[77] In the absence of such a power, the parties may have to bring an action in court to interpret ambiguities in the trust instrument.[78] This process is expensive and potentially avoidable if the trust protector, assuming that he is either a legal professional or is a close family member, has the power to interpret the trust instrument in lieu of a court action.[79]

E. Responding to Changes in the Law or Family Circumstances

Tax laws and laws concerning trust administration change over time as do family circumstances. Therefore, the settlor usually seeks to make the terms of a testamentary or irrevocable inter vivos trust as flexible as possible, particularly when the settlor expects the trust to last for a long time. Traditionally, the settlor does this by vesting the trustee with discretionary power over the distribution of trust income and principal and, in some cases, with the power to modify the terms of the trust to take advantage of changes in the law. A more recent device for adding flexibility to the terms of irrevocable trusts is decanting.[80] A decanting provision in the trust instrument gives the trustee the power to appoint some or all of the trust principal or income to another trust, provided that the beneficiaries are the same.[81] A number of states have enacted statutes that authorize trustees to decant trust property into another trust.[82]

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[77] *See* Jeffrey Evans Stake, *A Brief Comment on Trust Protectors*, 27 CARDOZO L. REV. 2813, 2814–15 (2006).

[78] *See id.*

[79] *See id.*

[80] *See* Alan Halperin & Michelle R. Wandler, *Decanting Discretionary Trusts: State Law and Tax Considerations*, 29 TAX MGMT. EST., GIFTS & TR. J. 219 (2004).

[81] *See* William R. Culp, Jr. & Briani Bennett Mellen, *Trust Decanting: An Overview and Introduction to Creative Planning Opportunities*, 45 REAL PROP. TR. & EST. L.J. 1, 2 (2010); Jeffrey A. Kern & H. Allan Shore, *So You Left Your Trust at Home When You Moved to Florida*, 83 FLA. B.J. 55, 57–58 (May 2009).

[82] *See* ALASKA STAT. § 13.36.157 (2008); ARIZ. REV. STAT. ANN. § 14-10819 (2005); DEL. CODE ANN. tit. 12 § 3528 (2007); FLA. STAT. ANN. § 736.04117 (West Supp. 2010); 2009 Nev. Stat. 782 (enacting trust decanting provisions in Chapter 163 of the Nevada Revised Statutes); N.H. REV. STAT. ANN. § 564B-4-418 (Lexis Nexis Supp. 2009); N.Y. EST.

However, an alternative to decanting exists if the settlor does not want to vest this power in a trustee. Instead, the settlor may require the trustee to obtain the trust protectors' permission to decant or may vest this power solely in the trust protector. Furthermore, some state statutes provide that a settlor may grant a trust protector the power to directly modify the distributive provisions of a trust under certain circumstances.[83]

In addition, if the trust is a family trust, dynasty trust, or special needs trust, the settlor can include a provision authorizing the trust protector to amend or modify the trust instrument to take advantage of any subsequent changes in the rule against perpetuities; laws relating to restrains on alienation; or other laws restricting the terms of the trust, the distribution of trust property, or trust administration. An increasing number of states are changing their laws to allow settlors to exercise some control over trust assets for longer periods of time.[84]

Finally, changes in tax laws or trust administration requirements may have a significant impact on the financial condition of the trust. Consequently, a settlor should allow the trust protector to move the situs of the trust from a high-cost state, such as New York or California, to a low-cost state, such as Nevada or Delaware. The original trustees may not have the power to change the situs of the trust, or they may be reluctant to do so. A prudent settlor might authorize the trust protector to take advantage of a change in situs when the trust protector believes that the circumstances warrant such a move.

IV. DUTIES AND POTENTIAL LIABILITIES OF TRUST PROTECTORS

As Part III points out, trust protectors may be vested with a variety of powers, either by the settlor or by statute. But what happens if a trust protector refuses to exercise a power or improperly exercises it? In other words, should the law treat a trust protector as a fiduciary like a trustee or is he free to act as he sees fit? Second, if a trust protector owes some duty, what standard of conduct applies? Is the test due care, good faith, or some other standard? Third, if a trust protector does exercise his powers as a fiduciary, to whom does he owe a fiduciary duty? Finally, what remedies are

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POWERS & TRUSTS LAW § 10-6.6(b) (McKinney 2002 & Supp. 2010); N.C. GEN. STAT. § 36C-8-816 (2009); S.D. CODIFIED LAWS § 55-2-15 (Supp. 2008); TENN. CODE ANN. § 35-15-816(b)(27) (2007).

[83] *See, e.g.*, S.D. CODIFIED LAWS § 55-1B-6(3) (2004 & Supp. 2008); WYO. STAT. ANN. § 4-10-710(a)(xi) (2009).

[84] *See infra* at Part V.F.

available in such cases to an injured party? Rather surprisingly, only one appellate court has attempted to answer any of these questions.

A. *Robert T. McLean Irrevocable Trust v. Davis*

McLean, decided by the Missouri Court of Appeals in 2009, was the first and only case to consider whether a successor trustee has standing to sue a trust protector for failing to prevent a former trustee from improperly depleting trust assets.[85] In 1996, the trust beneficiary, Robert McLean, was seriously injured in an automobile accident that left him a quadriplegic.[86] McLean hired one of the defendants, Michael Ponder, to represent him in the resulting personal injury lawsuit, and McLean received a large sum of money when the parties settled.[87] In 1999, McLean's grandmother used the money from the settlement to fund a special needs trust for McLean to supplement the benefits he received from various government assistance programs.[88] The trust instrument designated Ponder as the trust protector.[89] When the original trustees resigned, Ponder exercised his power as trust protector to appoint Patrick Davis, Daniel Rau, and their law firm, Patrick, Davis, P.C., as successor trustees.[90] According to McLean, he and his attorney notified Ponder in 2000 that the trustees were spending trust funds inappropriately.[91] In 2001, Davis resigned, and Ponder appointed Brian Menz as a successor trustee.[92] Ponder then resigned as trust protector and appointed Tim Gilmore as his successor.[93] Menz resigned as trustee in 2002, and Linda McLean, the beneficiary's mother, was appointed to replace Menz as trustee.[94] In 2005, Ms. McLean brought suit on behalf of the trust against Ponder, Gilmore, Davis, Rau, and Menz.[95]

Insofar as Ponder was concerned, the complaint alleged that he breached his fiduciary duties as trust protector and acted in bad faith.[96] Specifically, the plaintiff claimed that the trust protector failed to monitor and

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[85] *See* Robert T. McLean Irrevocable Trust v. Davis, 283 S.W.3d 786 (Mo. Ct. App. 2009).
[86] *See id.* at 789.
[87] *See id.*
[88] *See id.*
[89] *See id.*
[90] *See id.* at 790.
[91] *See id.*
[92] *See id.*
[93] *See id.*
[94] *See id.*
[95] *See id.*
[96] *See id.*

report trust expenditures, failed to prevent the former trustees from acting against the interests of the beneficiary, and placed his loyalty to the former trustees above those of the beneficiary.[97] The plaintiff also alleged that the trust protector's failure to monitor the trust enabled the trustees to deplete trust assets and improperly remove $500,000 from the trust.[98] In response, Ponder asked the trial court to dismiss the lawsuit or, in the alternative, to grant a summary judgment for the defendant.[99] Finding that the trust protector had no legal duty to supervise the trustees, the trial court ruled in favor of the defendant.[100]

On appeal, the Missouri Court of Appeals considered whether the defendant had breached any fiduciary duty to the beneficiary.[101] The appellate court began its analysis by identifying various elements of a claim for breach of fiduciary duty: (1) the existence of a fiduciary relationship between the plaintiff and defendant, (2) breach of a fiduciary duty that arises out of that relationship, (3) causation, and (4) resulting harm.[102] The court declared that to defeat the plaintiff's claim the defendant must prove the absence of one of these essential elements, and to prevail on a motion for summary judgment, the defendant must present undisputed facts to negate one of the elements of the plaintiff's claim.[103] In response, the defendant argued lack of causation because the beneficiary did not have to rely on the trust protector alone but instead could have petitioned a court of equity to remove the trustees if the trustees had acted improperly.[104] In addition, the defendant contended that neither state law nor the trust agreement imposed a duty on the trust protector to monitor or supervise the trustees' activities.[105]

Turning to the causation issue, the court observed that the only legal authority the defendant offered to negate the causation requirement was a statute, since repealed,[106] and two cases holding that a beneficiary had standing

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[97] *See id.* at 791.
[98] *See id.* at 795.
[99] *See id.* at 791.
[100] *See id.* at 792.
[101] *See id.*
[102] *See id.* at 792–93.
[103] *See id.* at 793.
[104] *See id.*
[105] *See id.*
[106] *See* MO. REV. STAT. § 456.190, *repealed by* L. 2004, H.B. 1511 § A.

to bring a lawsuit against a trustee.[107] The court concluded that these cases did not support the defendant's claim that a beneficiary's failure to sue a trustee was sufficient to negate the causation element in a cause of action against a trust protector for breach of fiduciary duty.[108] Interestingly, the court's reasoning, while nominally concerned with causation, seemed to be more concerned with the duty issue than with causation. In effect, the court implicitly assumed that by giving the trust protector the power to remove a trustee, the settlor intended that the trust protector, rather than the beneficiary, would be primarily responsible for monitoring the trustees' behavior and take whatever action was necessary to protect the interests of the beneficiary. Therefore, the trust protector could not shift this responsibility onto the beneficiary by claiming that the beneficiary should have had a court remove the guilty trustee.

Addressing the duty issue more explicitly, the court observed that a duty to another could: (1) be imposed by statute, (2) arise out of a prior relationship between the parties or from a set of circumstances that required one party to exercise due care to avoid injury to the other, or (3) be assumed by a party by contract or express agreement.[109] Since no statute imposed any duties on a trust protector, the court went on to consider whether some sort of duty might have arisen from the relationship between the trust protector and the trustees or from the language of the trust agreement itself.[110] The court pointed out that the language of the trust agreement did not specify how the settlor expected the trust protector to exercise his powers; however, the court concluded that the agreement did confer these powers to the trust protector in a fiduciary capacity.[111]

This conclusion led the court to then consider what standard of care was applicable to a trust protector who acted in a fiduciary capacity.[112] First, the court declared that one could be held liable if he was negligent in the performance of a fiduciary duty.[113] At the very least, the court concluded, a fiduciary owed a duty of trust, confidence, candor, and good faith.[114] In this case the trust instrument, which declared that the trust protector would "not

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[107] *See* Robert T. McLean Irrevocable Trust v. Davis, 283 S.W.3d 786, 793 (Mo. Ct. App. 2009) (citing Deutsch v. Wolff, 994 S.W.2d 561, 566–67 (Mo. 1999); Siefert v. Leonhardt, 975 S.W.2d 489, 492–93 (Mo. Ct. App. 1998)).

[108] *See McLean*, 283 S.W.3d at 793.

[109] *See id.*

[110] *See id.* at 794.

[111] *See id.*

[112] *See id.*

[113] *See id.*

[114] *See id.* (quoting BLACK'S LAW DICTIONARY 658 (8th ed. 2004)).

be liable for any action taken in good faith," reinforced the good faith standard.[115] According to the court, this instrument suggested that the trust protector could be held liable for actions that he took in bad faith.[116] The plaintiff could argue that the trust protector had a duty to supervise the actions of the trustees and remove them for misconduct, with failure to do so being bad faith.[117] Consequently, the court concluded that because the exact nature of the trust protector's duties and responsibilities were in dispute, the trial court erred in granting the defendant's motion for summary judgment.[118]

In addition, the court observed that another issue of material fact had not yet been resolved: namely, *to whom* did the trust protector owe this fiduciary duty of good faith? The plaintiff assumed that the trust protector owed a fiduciary duty to her son, the beneficiary.[119] The court, however, suggested that language in the trust instrument that declared that it was to "'constitute a plan for the financial management of the trust estate'" might be construed to mean that the trust protector owed a fiduciary duty to the trust as a separate entity rather than to the beneficiary.[120] The fact that the successor trustee brought suit against the trust protector in the name of the trust and not in the name of the beneficiary also may have supported this conclusion. In any event, the court did not attempt to answer this question, instead leaving it for the trial court to resolve.[121] In this case, a suit in the name of the beneficiary probably would not have mattered because McLean was the sole beneficiary of the trust and, thus, the only person who suffered harm when the trust's assets were depleted.

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[115] *Id.*

[116] *See id.* at 795.

[117] *See id.* at 794–95.

[118] *See id.* at 794.

[119] *See id.*

[120] *Id.* Although a trust is often thought of as relationships among and between the grantor, beneficiaries, and trustee, *Scott and Ascher on Trusts* suggests that the trust is also something in of itself. "It seems proper, therefore, to define the trust either as a relationship with certain characteristics or perhaps as a legal institution involving such a relationship." 1 AUSTIN W. SCOTT, WILLIAM F. FRATCHER & MARK L. ASCHER, SCOTT AND ASCHER ON TRUSTS, § 2.1.4 (5th ed. 2006).

[121] *See McLean*, 283 S.W.3d at 794.

B. In What Situations Should a Trust Protector Be Considered a Fiduciary?

This question was central in *McLean*.[122] As the court in *McLean* pointed out, a number of places exist to look for an answer.[123] The first is a statute that either imposes a mandatory rule that a trust protector be treated as a fiduciary or, more likely, sets forth a default rule that mandates fiduciary treatment unless the settlor provides otherwise.[124] As mentioned earlier, a number of states recognize trust protectors by statute. However, only three of these statutes specify whether trust protectors are fiduciaries. The Alaska and Arizona statutes declare that a trust protector shall not be liable as a fiduciary or trustee unless provided for in the trust instrument.[125] This approach allows the settlor to determine what powers, if any, the trust protector will exercise in a fiduciary capacity. Michigan's statute, on the other hand, declares that the trust protector "is a fiduciary to the extent of the powers, duties, and discretions granted to him under the terms of the trust"[126] and further states that "[i]n exercising or refraining from exercising any power, duty, or discretion, the trust protector shall act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries."[127] However, another provision qualifies this language by declaring that the terms of the trust may provide that a trust protector may exercise certain powers of administration in a nonfiduciary capacity.[128] But even then, the statute declares that a trust protector must act in good faith.[129]

Section 808(b) of the UTC provides that "[a] person, other than a beneficiary, who holds a power to direct is presumptively a fiduciary . . . ."[130] The comment to section 808 makes it clear that its provisions can apply to trust protectors.[131] Because section 808(b) uses the word "presumptively," it suggests that the settlor could elect to relieve the trust protector of his fiduciary duties.[132] Also noteworthy is that section 808(b)'s presumption ex-

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[122] *See id* at 793.

[123] *See id.*

[124] *See id.*

[125] ALASKA STAT. § 13.36.370(d) (2008); ARIZ. REV. STAT. ANN. § 14-10818(D) (Supp. 2008).

[126] MICH. COMP. LAWS ANN. § 700.7809(1)(a) (West 2009).

[127] *Id.* at § 700.7809(1)(b).

[128] *See id.* at § 700.7809(2).

[129] *See id.*

[130] UNIF. TRUST CODE § 808(d) (amended 2004 & 2005), 7C U.L.A. 604 (2006 & Supp. 2009).

[131] *See id.* at § 808 cmt.

[132] *See id.* at § 808.

tends only to the power to direct and does not expressly apply to other powers.[133]

In the absence of statutory guidance, the trust instrument should identify what, if any, fiduciary duties a trust protector owes. As *McLean* illustrates, the language of the trust instrument must clearly and completely address this issue if the parties want to ensure against future litigation.[134] At the same time, the settlor should realize that each fiduciary duty imposed on a trust protector creates a corresponding right to seek judicial relief if the person to whom the duty is owed feels the trust protector violated that duty. Thus, in some cases, imposing fiduciary duties on the trust protector may actually increase the chances of litigation. The possibility of civil liability for alleged violations of fiduciary duties might discourage family members or others from agreeing to serve as trust protectors, particularly if they are expected to serve without compensation.

C. What Standard of Conduct Applies?

If a trust protector is deemed to be a fiduciary, the next issue is determining what standard of conduct is applicable. A number of possible approaches exist: The first one is to hold a trust protector to the same standard of conduct regardless of the type of power that he exercises. This standard of conduct could be reasonable care, good faith and fair dealing, and loyalty. Like a trustee, the trust protector's duty of loyalty would prohibit self-dealing and conflicts of interest, and also impose an affirmative duty of impartiality and prudence. Another approach would impose different standards of conduct, depending on the type of the power that the trust protector exercises. For example, the trust protector might be subject to a good faith standard when exercising discretionary powers such as removing a trustee, approving or vetoing the exercise of a power of appointment, changing the substantive provisions of the trust, making or authorizing discretionary distributions, changing the situs of the trust, or modifying other trust provisions. On the other hand, a due care or prudent investor standard might be more appropriate when the trust protector exercises such powers as advising the trustee about investments or exercising the power to approve or veto the trustee's investment decisions.

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[133] *See id.*

[134] *See* Robert T. McLean Revocable Trust v. Davis, 283 S.W.3d 786 (Mo. Ct. App. 2009).

D. To Whom Does the Trust Protector Owe a Fiduciary Duty?

Imposing fiduciary duties on a trust protector is a meaningless gesture unless someone has standing to enforce these duties in a court of law. Consequently, determining to whom the trust protector owes a fiduciary duty is essential. Possible candidates include: (1) the settlor if he is alive, (2) the trustee, (3) the beneficiaries, or (4) the trust as a separate entity. Statutes provide little guidance on this issue. As mentioned earlier, the Alaska and Arizona statutes merely provide that a trust protector is not liable as a fiduciary unless the trust instrument provides otherwise.[135] A Michigan statute provides that a trust protector is a fiduciary and must act in good faith and "in accordance with the terms and purposes of the trust and the interests of the beneficiaries."[136] This language suggests that the trust protector owes a fiduciary duty to the trust beneficiaries. However, this language also may authorize a trustee to sue on behalf of the trust if the trust protector acts in a way that is inconsistent with "the terms and purposes of the trust."[137] As noted in Part C, there are questions whether the trust itself should be treated similarly to an entity.[138] Finally, section 808 of the UTC provides that certain persons, including trust protectors, are presumptively fiduciaries and are required to act in good faith "with regard to the purposes of the trust and the interests of the beneficiaries."[139] This language is similar to that in the Michigan statute and suggests that both the trust beneficiaries and the trustees may have standing to take legal action against a trust protector who acts improperly.

Unfortunately, virtually no case law exists on this issue. In *McLean*, the plaintiff trustee contended that the trust protector owed a fiduciary duty to her son, the beneficiary.[140] However, the court pointed out that the trust instrument declared that it was to "'constitute a plan for the financial management of the trust estate,'" thereby suggesting that the trust protector might owe a fiduciary duty to the trust itself, rather than to the beneficiary.[141] Unfortunately, the court in *McLean* did not provide a definitive

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[135] *See* ALASKA STAT. § 13.36.370(d) (2008); ARIZ. REV. STAT. ANN. § 14-10818 (Supp. 2008).

[136] MICH. COMP. LAWS ANN. § 700.7809(1)(b) (West 2003 & Supp. 2009).

[137] *Id.*

[138] Even if the trust is treated similarly to an entity, presumably either a trustee, beneficiary, or grantor would have to bring the action on behalf of the trust, calling into question if there really is any reason to ask whether duties are owed to the trust as an entity.

[139] UNIF. TRUST CODE § 808(d) (amended 2004 & 2005), 7C U.L.A. 604 (2006 & Supp. 2009).

[140] *See McLean*, 283 S.W.3d at 794.

[141] *Id.*

answer to this question, leaving it instead for the trial court to resolve on remand.[142]

E. Remedies for Breach of Fiduciary Duty

Very little legal authority exists as to what sort of remedies are available when a trust protector acts—or fails to act—in bad faith or commits some other breach of fiduciary duty. One would assume that a court of equity would have the power to compel a trust protector to refrain from acting in a way that is inconsistent with the provisions of the trust instrument or that threatens to harm the trust or the interests of the trust beneficiary. Likewise, a court probably could order a trust protector to exercise an affirmative power when necessary to carry out an essential trust purpose. Finally, a court could no doubt remove a trust protector who proved to be dishonest, incompetent, or unwilling to carry out his duties. In other words, a court of equity would have the same powers over a trust protector as it currently has over a trustee.

A more difficult question is whether a trust protector, like a trustee, may be held liable for financial losses that have resulted from negligence or a breach of fiduciary duty. Actions that might result in such liability include making poor investment decisions, failing to monitor the actions of a trustee, authorizing or directing trust assets to improper parties, self-dealing, and engaging in transactions with a conflict of interest. What little legal authority exists suggests that trust protectors will be treated like trustees. For example, the Michigan statute unequivocally states that "[t]he trust protector is liable for any loss that results from the breach of his or her fiduciary duties."[143] The statute also limits somewhat the effect of exculpatory clauses in trust instruments by declaring that "[a] term of a trust that relieves a trust protector from liability for breach of his or her fiduciary duties is unenforceable" to the extent that it "relieves the trust protector of liability for acts committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the trust beneficiaries."[144]

Whether a court would have the power to surcharge a trust protector, as is permitted with a trustee, is not clear.[145] The only reported case to discuss the potential tort liability of a trust protector is *McLean*, discussed above. In *McLean*, the court reversed the trial court's dismissal of the plaintiff's tort

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[142] *See id.*

[143] MICH. COMP. LAWS ANN. § 700.7809(1)(c) (West 2003 & Supp. 2009).

[144] *Id.* at § 700.7809(8)(a).

[145] If a court could not surcharge a trust protector, the aggrieved party would need to file a tort claim.

claim against the trust protector, reasoning that he could be required to reimburse the trust for any losses caused by his breach of fiduciary duty in failing to prevent the trustees' improper dispersal of trust funds.[146]

V. PROVIDING FOR TRUST PROTECTORS IN VARIOUS TYPES OF TRUSTS

When drafting a trust instrument, the settlor, or his attorney, can define the trust protector's powers as broadly or narrowly as he chooses.[147] Consequently, if the drafter provides for a trust protector in a trust instrument, the drafter should carefully consider what powers a trust protector must have to protect the trust beneficiaries and carry out the wishes of the settlor. This depends on the type of trust involved and the objectives that such a trust is designed to achieve. This portion of the Article considers what role trust protectors might play in connection with various types of trusts, including asset protection trusts, classic family trusts, marital deduction trusts, discretionary trusts, support and special purpose trusts, supplemental needs trusts, dynasty trusts, honorary trusts for animals, and charitable trusts.

A. Domestic Asset Protection Trusts

Domestic asset protection trusts are usually irrevocable.[148] Under this arrangement, the settlor typically retains no beneficial interest in the trust during the period in which it is irrevocable.[149] Unlike offshore asset protection trusts, the settlor of a domestic asset protection trust generally does not need to worry about such things as civil unrest or nationalization of trust property.[150] Therefore, the principal role of the trust protector is to serve as an intermediary between the settlor and the trustee. Consider the following example:

> Dr. Green, a 40-year-old orthopedic surgeon, wishes to put $3 million worth of stocks and bonds into a domestic asset protection trust. The trust is irrevocable for twenty years. The trustee is authorized, but not required, to distribute income and up to 5% of the trust corpus each year to Dr. Green's children.

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[146] *See McLean*, 283 S.W.3d at 795.

[147] *See* Alexander, *supra* note 7, at 2810.

[148] *See* MO. STAT. ANN. § 456.5-505(3) (West 2007); NEV. REV. STAT. § 166.040(2)(a) (LexisNexis 2009); R.I. GEN. LAWS § 18-9.2-2(10)(ii) (2003 & Supp. 2009).

[149] *See* Wagenfeld, *supra* note 36, at 848.

[150] *See* Lischer, *supra* note 2, at 515.

In this example, Dr. Green might want to require the trustee to obtain the consent of the trust protector before distributing trust income or principal to the children.[151] In addition, Dr. Green might empower the trust protector to modify the trust in response to changes in the tax laws and authorize him to appoint a successor trust protector. Dr. Green might also give the trust protector the power to remove and replace the trustee or to change the situs of the trust if the situs state repeals or modifies its asset protection statute in a way that adversely affects the settlor or beneficiary's interests.

B. Traditional Family Trusts

The traditional family trust typically embodies a relatively straightforward distributive scheme. In most cases, the settlor's surviving spouse will receive a lifetime income interest in the trust, while the settlor's children will receive vested remainders. The trust will usually terminate at the death of the spouse or when all of the surviving children have reached a certain age. Consider the following example:

> Ms. Smith, a wealthy socialite, establishes a trust in her will. Ms. Smith's residuary estate will make up the corpus of the trust. Under the terms of the trust, her surviving spouse will receive income from the trust for life, and at his death the couple's children will receive the trust principal in equal shares when the last child reaches the age of thirty-five. A trust company is named as trustee.

Appointing a trust protector in this case is probably not necessary. A corporate fiduciary will have access to expert advice about asset management decisions and, therefore, having a trust protector to perform the same function is redundant. Assuming that the surviving spouse is not very young, the trust is unlikely to last more than twenty years after Ms. Smith's death. However, if Ms. Smith wants to provide for unforeseen contingencies, she could appoint a trust protector and empower him to amend the trust if unexpected deaths, disabilities, or changes in tax laws occur.

A different situation may arise if the settlor names as trustee a family member with little or no asset management experience. In that case, the settlor might want to appoint a trust protector who has financial expertise and

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[151] This example assumes that Dr. Green is not concerned about the federal transfer tax implications of this arrangement and also assumes that the law of the trust situs will treat Dr. Green's transfer of the stocks and bonds as a completed and nonfraudulent transfer as far as future creditors are concerned.

vest him with some power over the management of trust assets. The following example illustrates this:

> Mr. Jones establishes a trust in his will. His residuary estate will constitute the corpus of the trust. Under the terms of the trust, Mr. Jones's surviving children will receive income from the trust. At the death of the last child, each of Mr. Jones's grandchildren then living will receive an equal share of the trust principal. Mr. Jones's surviving spouse will serve as trustee.

If Mr. Jones's spouse is elderly or has no financial management experience, he could appoint a trust protector and direct the trust protector to advise the trustee on investment matters. Mr. Jones might even require the trustee to obtain the trust protector's consent before making any major investment decisions. In addition, if some of the grandchildren are young or financially unsophisticated, the settlor might also give the trust protector the power to review the trustee's accounts. Finally, Mr. Jones should give the trust protector the power to appoint a successor trustee if the settlor has not already named one in the trust instrument.

Finally, if the trustee is also a beneficiary, having the settlor appoint a nonbeneficiary to act as trust protector may be desirable. Consider this example:

> Ms. Brown establishes a trust in her will. Ms. Brown's residuary estate will constitute the corpus of the trust. Under the terms of the trust, her husband will receive the income from the trust for his life, and at his death her children, including Ms. Brown's children by a prior marriage, will receive the trust corpus. Mr. Brown will serve as sole trustee.

In this situation, Mr. Brown has a de facto conflict of interest. Any investment decisions that produce income at the expense of long-term capital appreciation are likely to generate displeasure on the part of the remainder beneficiaries, particularly the children by Ms. Brown's prior marriage. If Ms. Brown insists on naming her husband as trustee, a helpful approach might be to appoint a trust protector with the power to veto investment decisions, interpret provisions of the trust instrument, and review the trustee's accounts. This arrangement may head off disputes between the trustee and the children and reduce the appearance of a conflict of interest for Mr. Brown.

C. Discretionary Trusts

The need for a trust protector may be greater if the trustee has the discretion to direct income from the trust or trust principal to various potential beneficiaries. Consider the following example:

> Mr. Johnson wants to establish a testamentary trust. His residuary estate will fund the trust. The will gives the trustee discretion to distribute income from the trust to the settlor's children until they reach the age of thirty-five. The children will receive equal shares of the trust corpus when the last child reaches the age of thirty-five.

Assuming that the trustee is a corporate fiduciary, the primary function of a trust protector is to arbitrate any disputes that might arise between the trustee and beneficiaries over discretionary distributions of trust income and, if necessary, to interpret the provisions of the trust instrument. This ability hopefully will enable the parties to resolve conflicts without incurring the expense of litigation. On the other hand, if the trustee is a family member with personal knowledge of the needs of the beneficiaries, the settlor probably has less need to give the trust protector the power to overrule the trustee's judgment on discretionary distributions.

D. Support Trusts and Special Purpose Trusts

Most support trusts use broad language, such as "comfortable maintenance and support" to define the beneficiary's right to income or principal from a support trust. For example:

> Ms. Gray wants to establish a testamentary trust funded from her residuary estate. The will provides that the trustee may distribute as much of the trust's income and corpus as may be necessary to provide for the comfortable maintenance and support of her son, James, during his life. The will further provides that after the death of James, Harvard University will receive the trust corpus. Ms. Gray intends to appoint her brother, Robert, as trustee.

This arrangement may result in some awkwardness for Uncle Bob because James may feel that more money is necessary to provide him with a comfortable level of support than Bob is willing to distribute from the trust. In such cases, a trust protector might be able to interpret the trust instrument for the parties or otherwise act as an "honest broker" when disagreements such as this arise between a beneficiary and the trustee. Also, as in other

situations in which a settlor appoints a family member to serve as trustee, the settlor might prefer to empower a trust protector with financial expertise to advise the trustee about investment decisions.

The same logic applies to educational and other special purpose trusts. The trust instrument will sometimes use broad or vague language to describe the purposes for which trust funds may be spent. For example, suppose a trust authorizes the trustee to pay "all reasonable expenses any of my children incur while attending an institution of higher learning." John, one of the settlor's children, wants the trustee to provide funds for him to take ballet lessons at the Joffrey Ballet School. If the trustee, reacting to pressure from other beneficiaries, decides that the trust should not pay the cost of dance lessons, the trust protector might be able to resolve the issue and thereby avoid resorting to expensive and acrimonious litigation with John.

E. Supplemental Needs Trusts

Supplemental needs trusts are designed to pay for medical and other expenses that patients incur that Medicaid or other government health care programs do not pay for.[152] The effect of supplemental needs payments on Medicaid eligibility are strict, complex, and subject to change.[153] Therefore, providing a mechanism for responding to changing Medicaid regulations is advantageous for the settlor of a supplemental needs trust. Because changes in Medicaid regulations may affect distributive as well as administrative provisions of a trust, empowering a trust protector to modify trust provisions when appropriate might be advisable. Of course, the settlor may prefer to authorize the trustee, rather than the trust protector, to modify the terms of the trust.

F. Dynasty Trusts

The term "dynasty trust" is commonly applied to trusts that may last more than one or two generations.[154] Traditionally, the rule against perpetu-

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[152] *See generally*, Michael A. Bottar, *Robbing Peter to Pay Paul: Medicaid Liens, Supplemental Needs Trusts and Personal Injury Recoveries on Behalf of Infants in New York State Following the* Gold *Decision*, 53 SYRACUSE L. REV. 175 (2003); Craig P. Goldman, *Render unto Caesar That Which Is Rightfully Caesar's, but Not a Penny More Than You Have To: Supplemental Needs Trusts in Minnesota*, 23 WM. MITCHELL L. REV. 639 (1997); Joseph A. Rosenberg, *Supplemental Needs Trusts for People with Disabilities*, 10 B.U. PUB. INT. L.J. 91, 99–103 (2000).

[153] *See* 42 U.S.C. § 1396p(d) (2000).

[154] *See* Jesse Dukeminier & James E. Krier, *The Rise of the Perpetual Trust*, 50 UCLA L. REV. 1303, 1312–16 (2003); Joshua C. Tate, *Perpetual Trusts and the Settlor's Intent*, 53 U. KAN. L. REV. 595, 617–20 (2005).

ities effectively limited the duration of private trusts.[155] However, in recent years, many states have modified the rule or abrogated it altogether.[156] Because dynasty trusts can last a very long time, they can give rise to a variety of dead hand problems.

> Mr. Vanderbilt wants to establish a testamentary trust funded from his residuary estate, which he expects to be $200 million. The will provides that his descendants will receive the income from the trust per stirpes for one hundred years. At the end of that period, Mr. Vanderbilt's descendants, then living, shall receive the trust proceeds per stirpes. Mr. Vanderbilt has named the First National Bank & Trust Company to serve as trustee.

In this case, appointing a trust protector who can stand in the shoes of the settlor and respond to changing conditions and family circumstances might be desirable for Mr. Vanderbilt. To enable the trust protector to meet these challenges, the settlor should give the trust protector the power to amend the trust's administrative and substantive trust provisions under certain circumstances, to appoint a successor trust protector, to remove and appoint trustees, and to change the situs of the trust or interpret the provisions of the trust in light of changed conditions.

G. Honorary Trusts

Some states now allow persons to create honorary trusts for pet animals.[157] Under this arrangement, the settlor transfers property, usually at death, to a third party for the purpose of caring for the pet. However, in most jurisdictions, the transferee (trustee) is not obliged to use the property to care for the pet. If the transferee refuses to accept this responsibility, a resulting trust results and the property reverts to the settlor or the settlor's

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[155] The rule provides that "'no interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest.'" See CORNELIUS J. MOYNIHAN & SHELDON F. KURTZ, INTRODUCTION TO THE LAW OF REAL PROPERTY 256 (4th ed. 2005) (quoting JOHN CHIPMAN GRAY, THE RULE AGAINST PERPETUITIES § 201 (4th ed. 1942)).

[156] *See* Lischer, *supra* note 2, at 513–14; Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356, 373–78 (2005).

[157] *See* Unif. Trust Code § 408 (amended 2004 & 2005), 7C U.L.A. 490 (2006 & Supp. 2009); *In re* Searight's Estate, 95 N.E.2d 779 (Ohio Ct. App. 1950); *see also* Rachel Hirschfeld, *Ensure Your Pet's Future: Estate Planning for Owners and Their Animal Companions*, 9 MARQ. ELDER'S ADVISOR 155 (2007).

estate.[158] Furthermore, if the trustee accepts the property and then fails to take care of the animal, the trust fails and the property reverts to the settlor's residuary legatees or passes to the remaindermen if there is a gift over.[159]

These rules may make sense doctrinally, but they potentially frustrate the settlor's intent. If a statute or judicial decision permits, the settlor should be allowed to designate a trust protector with the power to remove and replace the designated trustee of an honorary trust if the trustee refuses to serve or fails to carry out the terms of the trust. The settlor also might specifically give the trust protector the power to authorize the trustee to expend trust funds, including part of the trust corpus, for unforeseen and extraordinary medical expenses for the animal.

H. Charitable Trusts

Because charitable trusts are not subject to the rule against perpetuities, they may last indefinitely.[160] Unfortunately, the passage of time creates a problem when the original charitable purpose can no longer be carried out effectively. When this problem occurs, the trustee must request a court to exercise its powers under the doctrine of *cy pres* to modify the terms of the trust.[161] However, a better and cheaper approach might be to authorize a trust protector to exercise a form of private *cy pres* by terminating the trust or changing the trust terms when the original charitable purpose can no longer be carried out.

Another problem with charitable trusts is that it is difficult to prevent trustees from acting improperly, particularly if the beneficiaries are not identified.[162] In such cases, the settlor does not have standing to take legal action against the trustees and instead must rely on the state attorney general to act on behalf of the public.[163] This approach may not be a satisfactory state of affairs because state attorneys general are not always willing to car-

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[158] *See* 2 AUSTIN WAKEMAN SCOTT, WILLIAM FRANKLIN FRATCHER & MARK L. ASCHER, SCOTT & ASCHER ON TRUSTS § 12.11 (5th ed. 2006).

[159] *See id.*

[160] *See* RESTATEMENT (SECOND) OF TRUSTS § 365 (1959); *see also* Mary Kay Lundwall, *Inconsistency and Uncertainty in the Charitable Purposes Doctrine*, 41 WAYNE L. REV. 1341, 1343 (1995); Robert J. Lynn, *Perpetuities: The Duration of Charitable Trusts and Foundations*, 13 UCLA L. REV. 1074, 1075 (1966).

[161] *See* RESTATEMENT (THIRD) OF TRUSTS § 67 (2003); Unif. Trust Code § 413 (amended 2004 & 2005), 7C U.L.A. 509 (2006 & Supp. 2009).

[162] Perhaps the most flagrant example of trustee misconduct involved the Bishop Estate in Hawaii. *See generally*, Symposium, *The Bishop Estate Controversy*, 21 U. HAW. L. REV. 353 (1999).

[163] *See* RESTATEMENT (SECOND) OF TRUSTS § 391 (1959).

ry out the settlor's intent.[164] Therefore, authorizing the settlor or another person to act as trust protector and enforce fidcuiary duties against the trustees of charitable trusts when the state attorney general declines to do so might be better.

VI. CONCLUSION

The concept of the trust protector has progressed from its dubious origins in offshore asset protection trusts to an emerging feature of private express trusts in the United States.[165] However, despite the increasing popularity of trust protectors, current law poorly defines their powers and duties and their legal status is uncertain in many states. These states should enact statutes to delineate the powers and fiduciary duties of trust protectors.

To encourage this process, the UTC should be revised to provide a model for states to consider when they enact legislation to address these issues. As more specifically discussed below, the UTC should specify some of the powers that a settlor may confer upon a trust protector and adopt good faith as the minimum standard of conduct expected of a trust protector. Also, sections 405 and 408 of the UTC should be amended to authorize the appointment of trust protectors in connection with charitable and honorary trusts.

The UTC should expressly authorize settlors to appoint trust protectors. At the present time, section 808(b) of the UTC does not mention trust protectors by name but merely provides that a settlor may authorize a third party to oversee the trustees' actions and make certain decisions about administering the trust.[166] Only in the comment to section 808 does the UTC identify trust protectors by name or authorize their use in private express trusts.[167] In light of the increasing acceptance of trust protectors in American law, the UTC should authorize the use of trust protectors in a separate black-letter section.

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[164] *See* Evelyn Brody, *Whose Public? Parochialism and Paternalism in State Charity Law Enforcement*, 79 IND. L.J. 937, 998–99 (2004); Ronald Chester, *Grantor Standing to Enforce Charitable Transfers Under Section 405 (c) of the Uniform Trust Code and Related Law: How Important Is It and How Extensive Should It Be?*, 37 REAL PROP. PROB. & TR. J. 611, 628–29 (2003).

[165] *See* Sitkoff, *supra* note 3, at 670.

[166] *See* UNIF. TRUST CODE § 808(b) (amended 2004 & 2005), 7C U.L.A. 604 (2006 & Supp. 2009).

[167] *See id.* § 808 cmt., 7C U.L.A. 605.

Besides authorizing settlors to appoint trust protectors,[168] the UTC should identify at least some of the powers that the trust instrument may assign to a trust protector. This approach would provide guidance to lawyers and estate planners but still enable them to provide trust protectors with additional powers as circumstances warrant. Although a number of state statutes enumerate the powers that trust protectors may exercise,[169] only South Dakota[170] and Wyoming[171] provide a truly comprehensive list of these powers.[172] Both South Dakota and Wyoming statutes identify twelve powers, though not the same twelve.[173] Among the powers common to both statutes are, inter alia, the power to modify the trust instrument to take advantage of changes in the tax laws;[174] to amend the trust instrument to take advantage of laws governing restraints on alienation, distribution of trust property, and trust administration;[175] to remove and replace trustees;[176] to increase or decrease the interests of trust beneficiaries;[177] to appoint a successor trust protector;[178] to interpret the terms of the trust;[179] and to change the situs or gov-

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[168] *See, e.g.*, ALASKA STAT. § 13.36.370(a) (2008); ARIZ. REV. STAT. ANN. § 14-10818(A) (Supp. 2008); DEL. CODE ANN. tit. 12, § 3313 (2007 & Supp. 2008); IDAHO CODE ANN. § 15-7-501(e) (2009); MICH. COMP. LAWS § 700.7103(n) (2003 & Supp. 2009); R.I. GEN. LAWS § 18-9.2-2(9)(iii)(B) (2003 & Supp. 2009); S.D. CODIFIED LAWS § 55-1B-1(2) (2004 & Supp. 2008); UTAH CODE ANN. § 25-6-14(2)(e)(iv) (2007); WYO. STAT. ANN. § 4-10-710(a) (2009).

[169] *See* ALASKA STAT. § 13.36.370(b) (2008); ARIZ. REV. STAT. ANN. § 14-10818 (2005 & Supp. 2008); IDAHO CODE ANN. § 15-7-501(6) (2009).

[170] *See* S.D. CODIFIED LAWS § 55-1B-6 (2004 & Supp. 2008).

[171] *See* WYO. STAT. ANN. § 4-10-710(a) (2009).

[172] *See also* Alexander A. Bove, Jr., *The Trust Protector: Trust Watchdog or Expensive Exotic Pet?*, 30 EST. PLAN. 390 (2003) (identifying eleven powers that a settlor may give a trust protector).

[173] *See* S.D. CODIFIED LAWS § 55-1B-6 (Supp. 2008); *See* WYO. STAT. ANN. § 4-10-710(a) (2009).

[174] *See* S.D. CODIFIED LAWS § 55-1B-6(1) (2004 & Supp. 2008); WYO. STAT. ANN. § 4-10-710(a)(i) (2009).

[175] *See* S.D. CODIFIED LAWS § 55-1B-6(11) (2004 & Supp. 2008); WYO. STAT. ANN. § 4-10-710(a)(ii) (2009).

[176] *See* S.D. CODIFIED LAWS § 55-1B-6(4) (2004 & Supp. 2008); WYO. STAT. ANN. § 4-10-710(a)(vii) (2009).

[177] *See* S.D. CODIFIED LAWS § 55-1B-6(3) (2004 & Supp. 2008); WYO. STAT. ANN. § 4-10-710(a)(xi) (2009).

[178] *See* S.D. CODIFIED LAWS § 55-1B-6(8) (2004 & Supp. 2008); WYO. STAT. ANN. § 4-10-710(a)(iii) (2009).

[179] *See* S.D. CODIFIED LAWS § 55-1B-6(9) (2004 & Supp. 2008); WYO. STAT. ANN. § 4-10-710(a)(viii) (2009).

erning law of the trust.[180] In addition, the UTC should set forth a procedure for the appointment of a successor trust protector if the original trust protector resigns, dies, or becomes unable to continue serving.[181]

The UTC currently declares that trust protectors are presumptively considered to be fiduciaries.[182] Instead, the UTC should determine whether the trust protector is a fiduciary and, if so, to whom fiduciary duties are owed and what standards of conduct are applicable. Because it is not always clear to whom a fiduciary duty is owed, the UTC should provide that the trust protector owes duties to the settlor, if he is alive, or to the beneficiaries, if the settlor is deceased.[183]

As to standards of conduct, one approach would be to establish a floor of good faith for trust protectors, but allow the settlor to impose a higher level of conduct, similar to that of a trustee. However, a better approach would be to set forth a default rule that distinguishes between discretionary acts and those which involve professional expertise and judgment. Under this approach the UTC could further apply a good faith standard to discretionary acts as a default rule and declare that a trust protector must act prudently or exercise reasonable care when he oversees or directs the trustee's investment decisions. At the same time, however, the UTC should make it clear that the settlor is free to define the nature of the trust protector's fiduciary duties and specify to whom these duties are owed.

Trust protectors might also be able to play a useful role in mitigating problems associated with the administration of charitable trusts.[184] For example, section 405 of the UTC could be amended to authorize the settlor to appoint a trust protector to exercise a private *cy pres* power by terminating the trust or by changing the trust terms if the original charitable purpose can no longer be carried out. This provision also could be amended to allow another person to act as the trust protector when the testator is dead to en-

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[180] *See* S.D. CODIFIED LAWS § 55-1B-6(7) (2004 & Supp. 2008); WYO. STAT. ANN. § 4-10-710(a)(v) (2009).

[181] This provision would apply only to situations in which the trust instrument failed to provide for the appointment of a successor trust protector.

[182] *See* UNIF. TRUST CODE § 808(d) (amended 2004 & 2005), 7C U.L.A. 604 (2006 & Supp. 2009).

[183] The UTC should provide that a trust protector owes a fiduciary duty to the beneficiaries when the settlor has appointed a trust protector to protect beneficiaries from wrongdoing or poor judgment on the part of the trustee. However, in cases where the settlor does not intend for the trust protector to serve as a check on the trustee, he could provide in the trust instrument that the trust protector owes a fiduciary duty to the trustee instead, or in addition to, any duty owed to the beneficiaries.

[184] *See* Stake, *supra* note 77, at 2818–19.

force fiduciary duties against the trustees of charitable trusts if the state attorney general declines to enforce those duties. Although section 405 already allows a settlor to maintain an action to enforce a charitable trust,[185] it does not apply to testamentary charitable trusts. In the case of those trusts, allowing a trust protector to act as a surrogate for the deceased settlor is desirable.

Finally, section 408(b) of the UTC could be amended to provide for the appointment of trust protectors in connection with honorary trusts. This provision currently authorizes the settlor (or the probate court) to appoint a person to enforce the trust or to remove and replace the original trustee if he refuses to serve or fails to carry out the terms of the trust.[186] This person is essentially a trust protector and should be identified as such.

This Article concludes with some suggested modifications of the UTC that incorporate the proposals set forth above:

> (1) A trust instrument, including one which creates a charitable trust or an honorary trust for the support of an animal, may provide for the appointment of a disinterested third party to act as a trust protector.[187] A trust protector is an individual or committee of individuals appointed pursuant to the terms of a trust who has the power to supervise, direct, or take certain actions with respect to the trust.[188]
>
> (2) The powers of a trust protector shall be as provided in the trust instrument and may include, but are not limited to, the following:
>
> (a) to modify or amend the trust instrument to achieve favorable tax status or because of changes in the Internal Revenue Code, state law, or the rulings and regulations implementing such changes;
>
> (b) to modify or amend the trust instrument to take advantage of changes in the Rule Against Perpetuities, law

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[185] *See* UNIF. TRUST CODE § 405(c) (amended in 2004 & 2005), 7C U.L.A. 486 (2006 & Supp. 2009).

[186] *See* UNIF. TRUST CODE § 408(b) (amended 2004 & 2005), 7C U.L.A. 490 (2006 & Supp. 2009).

[187] *See* ALASKA STAT. § 13.36.370(a) (2008). The Alaska statute does not mention charitable or honorary trusts. *See id.*

[188] *See* MICH. COMP. LAWS § 700.7103(n) (West 2010). The Michigan statute further declares that trust protectors do not include either settlors or holders of a power of appointment. *See id.*

governing restraints on alienation, or other laws restricting the terms of the trust, the distribution of trust property, or the administration of the trust;

(c) to appoint a successor trust protector;

(d) to review and approve the accountings of a trustee;

(e) to change the governing law or principal place of administration of the trust;

(f) to remove and replace any trust advisor for the reasons stated in the trust instrument;

(g) to remove a trustee, cotrustee, or successor trustee and to appoint a replacement;

(h) to interpret the terms of the trust instrument at the request of the trustee or a beneficiary;

(i) to advise the trustee or cotrustee on matters concerning any beneficiary;

(j) to direct, consent, or disapprove a trustee's or cotrustee's action or inaction in making distributions to beneficiaries;

(k) to increase or decrease any interest of a trust beneficiary, to grant a power of appointment to one or more trust beneficiaries, or to terminate or amend any power of appointment granted by the trust, provided that no modification, amendment or grant of a power of appointment may grant a beneficial interest to any person or class of persons not specifically provided for under the trust instrument or to the trust protector, the trust protector's estate or for the benefit of creditors of the trust protector;[189]

(l) to terminate the trust; and

(m) to provide direction to the trustee regarding notification of trust beneficiaries pursuant to section 813 of this Code.[190]

(3) Except as provided below, a trust protector is a fiduciary when exercising the powers, duties and discretions granted to him under the terms of the trust.

(a) Unless the trust instrument provides otherwise, the trust protector shall exercise reasonable care when

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[189] The above powers are enumerated in WYO. STAT. ANN. § 4-10-710(a)(i)–(xi) (2009).

[190] These additional powers are enumerated in S.D. CODIFIED LAWS § 55-1B-6(5) & (12) (2004 & Supp. 2008).

> performing routine administrative duties or when providing professional advice. Unless the trust instrument provides otherwise, the trust protector shall act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries when exercising any other power, duty, or discretionary act.
>
> (b) The trustee shall act in accordance with a trust protector's exercise of the trust protector's specified powers and will not be liable for so acting. However, the trustee shall not act in accordance with a trust protector's attempted exercise of a power if the exercise would be contrary to the terms of the trust or if the trust protector's exercise would constitute a breach of fiduciary duty that the trust protector owes to the beneficiaries of the trust.[191]

Hopefully, the next revision of the UTC will address some of the issues this Article raises. In the meantime, those states that have already adopted the UTC or have statutorily recognized trust protectors on their own should consider adopting some or all of the provisions set forth above.

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[191] This subsection is based on MICH. COMP. LAWS ANN. § 700.7809 (1)–(4) (West 2010). This provides as a general rule that a trustee is not liable for carrying out a directive from the trust protector that appears to be legitimate. However, the trustee would be liable if he or she carried out an order from the trust protector that was contrary to an express provision of the trust instrument or an obvious breach of the trust protector's fiduciary duty. In the latter case, the trustee would also be liable for any loss to the trust caused by carrying out a trust protector's order. This provision is intended to punish a trustee who is negligent or who colludes with the trust protector to act against the interest of the beneficiaries.