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Trust Protectors: To Protect and To Serve?

What is a Trust Protector?

That which we call a Trust Protector can, in reality, bear any number of different names - advisor, appointer, guardian etc. – and these have all been used in various different jurisdictions and in various different contexts to describe a variety of differing roles. It is therefore difficult to provide a definition of a trust protector which encompasses the potential breadth of the position.

Aware of these limitations, however, Andrew Holden in his book *Trust Protectors* has helpfully provided what he describes as a ‘working definition’ which allows us to at least have a broad outline within which to discuss them:

“Protector’ means a person occupying an office created by a trust instrument distinct from that of trustee, whether or not referred to as protector, upon which has been conferred power(s) or right(s) enabling the office-holder to participate in the administration of the trust or the disposition of trust assets.”

In reality, protectors most frequently arise when assets are being transferred to an offshore trust structure and the settlor is concerned about ceding control of their assets to unknown trustees with wide powers and a broad discretion. It is easy therefore to see the appeal of appointing someone whom the settlor knows and trusts to scrutinise, police and, if necessary, veto the trustees’ decisions. A protector will usually have the power to appoint and remove the trustees, but may also have authority to approve or direct other actions to be taken by the trustees, for example in relation to distributions or investment decisions.

Removing Protectors under the Trust Instrument

In an ideal world, this would work perfectly albeit one might question why a properly chosen trustee would need the type of policing imposed by a protector– the settlor can relax knowing that their goals are being considered by a trusted individual (or corporation). However, the powers that protectors are often granted can lead to an inherent tension in their allotted role: between protector and trustee in the first place, and sometimes between protector and beneficiary.

It is therefore very important, at the time the trust instrument is drawn up, to think ahead, and plan for a scenario where that individual may need to be removed from office – either of their own volition or otherwise. An unwilling or an unwanted protector can be a very difficult thing to get rid of, and can lead to a huge administrative burden and expense for the trust.

In order to avoid this, a trust instrument should have (a) an express power of resignation (b) a mechanism to deal with the death or incapacity of a sitting protector, and (c) an express power of removal.

Resignation

When dealing with trust protectors often the first consideration is whether or not the powers they hold are fiduciary or personal. The answer is often fact specific - a '*question of construction of the particular trust deed as to whether a particular power of a protector is fiduciary or not*' (Re the Bird Charitable Trust [2008] JLR 1) – but the tendency in reported cases has been to hold that protectors' powers are held in a fiduciary capacity except in cases where the protector is also a beneficiary and could therefore reasonably be expected to act in their own interest above all.

This can cause difficulties because it is accepted that a fiduciary may not release his powers except where this is permitted by the terms of the trust instrument or by the consent of the beneficiaries (who would all need to be adults), or by the court (see *Re Eyre* (1883) 49 LT 259, 260

In those circumstances, an express power of resignation under the trust deed is infinitely preferable, although even then there can be debate about whether such powers have been utilised effectively.

Most notably, in *Re the Bird Charitable Trust*, the same person was the protector for two different trusts and he signed two instruments in the same terms, one in respect of each trust, purporting to remove himself as protector and appoint a successor protector in his place. The successor protector then sought to appoint new trustees. However, the drafting of the two trusts instruments was different as regards their powers of resignation and the court held that the instrument of removal and appointment was only effective for one trust and not the other.

Death or Incapacity

If a Protector dies then they are removed from office, but this can leave the trust in disarray if there is no drafting to deal with this contingency. This is because if, on a proper construction of the trust instrument, the powers of the trust protector are

considered to have been conferred on them in their individual capacity only, then the powers will die with them.

Moreover, another consequence that could arise from the death or serious incapacity of a protector is that they leave a vacancy - there is no protector able to exercise the powers set out in the trust instrument. This could lead to paralysis, depending on the way in which the particular trust instrument is drafted.

The trust instrument should, therefore, contain a mechanism for the replacement of the departing protector and make express provision for how the trust is to be administered in any interregnum period (*Re Circle Trust* (2006) 9 ITELR 676 (Cayman)).

Removal of a Protector

Drafting an express power to remove a protector gives rise to an important question – who should be allowed to exercise it? It very much depends on the circumstances of the specific trust: sometimes this right is given to a third party, sometimes the beneficiaries, sometimes a committee of co-protectors, sometimes the trustees themselves. Regardless of the chosen solution it is a difficult decision, and much thought should be given as to how this power should be exercised while preserving the proper relationships between the various parties.

Furthermore, if the protector is a fiduciary, then the power to remove them is likely to also be construed as a fiduciary power (see *Re Circle Trust*). This means it must be exercised in good faith and in the best interests of the beneficiaries.

An alternative may be to specify circumstances in which a protector is automatically removed from office. This could be useful in a variety of different situations – for example, as in *Rawson Trust Co v Perlman* (1990) 1 BOC 31, the protectorship was ‘suspended’ if the protector ever became resident in the United States (which would have compromised a tax advantage for the trust).

Who guards the guards?

In circumstances where an unwilling or unwanted protector refuses to resign and the provisions of the trust instrument do not give rise to grounds for removal, the next question is whether the Court has jurisdiction to order the removal of the protector from office.

Re the K Trust (Guernsey Judgment 31/2015) has provided some welcome clarification on this point. The case concerned a protector who clung to office despite repeated requests from the beneficiaries for her to resign. The breakdown in relations between the protector and the beneficiaries resulted in an application to Court seeking the protector’s removal.

The Court held that it will apply similar principles to those applicable to cases concerning the removal of trustees in line with the Jersey case of *Re the A Trust*. By reference to *Letterstedt v Broers* (1883-84) LR 9 App Cas 371, Deputy Bailiff McMahon found that, whilst it was not a jurisdiction to be exercised lightly, under the Court’s inherent jurisdiction, it does have power to order the removal of a protector exercising fiduciary powers where the protector remaining in office adversely affects the welfare of the beneficiaries and the competent administration of the trust.

The Court decided not to follow the Isle of Man case of *Re Papadimitriou* in which it was held that the Court would only exercise its power of removal under exceptional circumstances.

Breakdown in relations

The Court in *Re the K Trust* ordered the removal of the protector on the grounds that the protector should have realised a long time ago that her position was untenable, particularly in view of the numerous requests for her removal. It was held that the test for removal was satisfied on the basis that there was evidence of a breakdown in relations between the protector and the beneficiaries (which the trustee attested to) and that this was thwarting the competent administration of the trust.

Similarly, in *Re the A Trust* a breakdown in relations between the protector and the beneficiaries was brought about in part by the protector's misconceived view of his role as "living enforcer and guardian" of the settlor's wishes. The Court found that by the time the case came to trial the relationship had broken down irretrievably and that there was evidence of mutual distrust and hostility which was having, and was likely to continue to have, a detrimental effect on the competent administration of the trust.

As with removal of trustee cases, it is important to bear in mind that a mere personal disagreement between the protector and beneficiaries will not satisfy the test. This point was emphasised in *Re the K Trust* in which it was found that there was evidence that the deterioration in relations went beyond simple personal distrust and was having a negative impact on the administration of the trust.

Costs

An unreasonable protector should be aware that their intransigence will not be looked kindly upon by the courts. Where a protector is ordered to be removed from office and is found to have been at least partly responsible for a breakdown in relations, as was the case in both *Re the K Trust* and *Re the A Trust*, it is likely that a Court would order the protector to pay at least a proportion of the costs out of their own pocket.

Conclusion

It is easy to see why a settlor might be tempted to appoint a protector as a valuable means of providing a degree of reassurance when setting up a trust. However, it can be a double-edged sword where their appointment hampers the smooth administration of the trust and so it is important to think carefully about the scope of the protector's powers and any mechanism for removal.

Case law shows that there is often ambiguity over what the protector's actual role is, which is perhaps epitomised by the differing titles applied to them. This ambiguity can lead to fractious relationships between the protector, the trustees, and the beneficiaries and expensive Court applications. The idea that a protector is there "to protect and to serve" at times may be a distant reality insofar as the interests of the beneficiaries and the proper administration of the trust is concerned.

This article is written by Richard Manyon, Andrew Willan and Emily Gailey of the contentious trusts and estates team at Payne Hicks Beach. It is based on a presentation given by the authors with Edward Parkes of Harcus Sinclair LLP.