A Protector By Any Other Name........

Alexander A Bove, Jr
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Abstract

The trust protector has rapidly become one of the most popular and valuable tools for estate planning attorneys today. The problem has been and is that there are two opposing schools of thought in its use. One is that the protector either is not or may be declared not to be a fiduciary regardless of its powers. The other is that that position in almost all cases is so integral to the proper administration of the trust that with very limited exception it should per se be regarded as fiduciary. This discussion, which emphatically supports the latter position, focuses expressly on that issue, was in large part motivated by and is offered in response to a plenary presentation on the subject at the 2015 Heckerling Tax Institute. That presentation essentially declared that the protector will or will not be a fiduciary depending upon the name given to the position under the terms of the trust, without regard to the impact of his powers on the beneficiaries or the purposes of the trust and without regard to the intent of the settlor. This discussion points out the basic lack of support for such an approach and analyzes the protector’s important role in a trust, concluding that with one specific exception, the protector has to be regarded as a fiduciary. The discussion further considers the state laws concerning protectors, which generally reflect either a lack of understanding or a lack of concern about fiduciary law, and explains that the only real impact of such laws
on the issue is made by those few states which provide that the protector is regarded as a fiduciary, regardless of a statement in the trust to the contrary.

Introduction

In Shakespeare’s play, *Romeo and Juliet*, Juliet contemplates that Romeo should deny his surname, on account of the fact that their families were enemies, and Romeo should not be judged (by her family) simply because of the name he bears. Juliet wisely observes that to do so would change nothing between them, and that the name is not him and he is not the name, as embodied in her immortal quote, “that which we call a rose by any other name would smell as sweet.” ¹ Juliet’s astute observation simply and clearly makes the indisputable point that it does not matter what we call something; what matters is what the thing really is.

¹ Shakespeare, Wm. Romeo and Juliet, Act II, scene II
In the 2015 popular and highly respected Heckerling Institute on Estate Planning, one of the lecturers, speaking on the subject of Trust Protectors at a plenary session, went to great lengths to emphasize that in her opinion the name we give the protector in our trusts will legally and conclusively establish his role and liability (or rather, freedom from liability) in serving under the trust. I think that Shakespeare would be the first to disagree, and I would be the second.

The speaker in the Heckerling presentation, Kathleen Sherby, aptly pointed out the widespread confusion surrounding the nature and duties of the trust protector.

Unfortunately, in my opinion, instead of dispelling the confusion, her presentation as a whole (specifics to follow) displayed a clear “bias of ascertainment” that tainted the

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3 For smoother reading, only one gender is used for pronouns.

4 Bias of ascertainment is a phrase used primarily in the medical field, but applicable to any, meaning a “systematic failure to represent equally all classes of cases . . . to be represented in a sample.” Farlex Partner Medical Dictionary. Farlex (2012). The effect of such a bias is to support one’s argument or conclusions by using only those parts of the relevant information and facts that do so, ignoring those which do not support or may undermine the validity of the conclusion.
conclusions drawn and the advice given, not only in the presentation itself but in the accompanying outline as well, serving to do little more than perpetuate the confusion over the role of the trust protector. This discussion is a commentary and critical analysis of the presentation with a view towards clearing up some of the confusion with observations supported by leading cases, treatises, and plain reasoning based on centuries-old trust law.

Perhaps the greatest point of confusion, and the main focus of the Heckerling presentation, is whether the protector is a fiduciary. 5 This is not at all surprising, because most of the domestic statutes containing provision for the trust protector either declare that the protector is not a fiduciary unless the trust provides otherwise, 6 or declare that he is, again unless the trust provides otherwise (i.e., that he is not). 7 Further, even though the overwhelming majority of states with protector provisions favor the fiduciary role (but again, allowing the trust to provide otherwise), and even though

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5 Sherby, supra note 2 at §§ 2.1 and 2.2
6 Sherby, all States Comparison chart, e.g., Alaska, Arizona, So. Dakota.
7 Id., e.g., Delaware, Illinois, Ohio, Michigan, New Hampshire.
virtually every treatise on the subject favors the fiduciary characterization, as does the Uniform Trust Code and the Restatement Third Trusts, an overwhelming number of estate planners routinely declare in their trusts that the protector shall not be a fiduciary, despite the nature of the powers granted and the settlor’s intention. And such an approach is even encouraged by some forms guides. Why these practitioners take this approach is explored later in this discussion, beginning in part I.

There is little question that the trust protector is here to stay. We may not use them in every trust, but few would argue their unique value to long term and dynasty trusts, and many life insurance trusts, if not more. For this reason, it is extremely important that, as estate planning professionals, we accept and assume the responsibility to effectuate clients’ objectives in a manner consistent with established principles of law and consistent with the best interests of trusts and beneficiaries, rather than in a manner

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9 Section 808 (d).
10 Restatement Third Trusts §75.
12 Reference in this discussion to “the best interests of the trust” is intended to mean behavior consistent with the settlor’s intentions, the purposes of the trust, and the best interests of the beneficiaries.
designed to produce the least exposure to liability of parties who are appointed to implement the clients’ plans.

The thrust of this discussion is to discourage the tendency on the part of practitioners from thinking that a party who holds fiduciary powers or is in a fiduciary position and who is placed in that position of trust and confidence by the settlor, may be relieved of all fiduciary duty simply by stating in the trust that he is not a fiduciary. This “fiduciary fear” has been blown way out of proportion. It is not a curse to be a fiduciary, and if exposure to liability is the motivating concern for that fear, such exposure can be reduced to a minimum, as discussed later, but it cannot be drafted away completely. This is not to say that a protector may never act in a non-fiduciary capacity, as illustrated later in the discussion, but such cases are unique and contrary to the inherent nature of the trust protector’s role.\(^\text{13}\)

\(^{13}\) See, e.g., N.H. Rev. Stat. Ann. § 564-B:12 – 1202 (a) (2008) providing that the protector shall not be considered a fiduciary if he is also a beneficiary of the trust.
I. The Background, the Issue, and the Dilemma – The Fear of Fiduciary Duty.

A number of authors credit the offshore trust with the origin of the trust protector.\textsuperscript{14} While that may be true for the name-tag, “protector”, it is certainly not true if we apply the generally agreed definition of the role, which is, “a party who holds powers over a trust but who is not a trustee”.\textsuperscript{15} In this context, cases in the United States date back over a hundred years in dealing with the role of a trust “advisor”, which role clearly embodies the foregoing definition.\textsuperscript{16} Thus, whether the origin of the role is onshore or offshore provides little or no assistance in the legal analysis of the role and its place in the modern day trust. There is one aspect of the role, however, that was brought to light largely as a result of the offshore trust.

The offshore trust we speak of is an irrevocable discretionary trust in an otherwise unusual jurisdiction for the same (i.e., far from the settlor’s domicile), established by a

\textsuperscript{14} See, e.g., Stewart Sterk, Trust Protector, Agency costs and Fiduciary Duty, 27 Cardozo Law Review 2765 April, 2006.
\textsuperscript{16} See, e.g., Warren v. Pazolt 89 N.E.381, (1903); Rice v. Halsey 142 NY.S. 58, (1913); McLenergan v. Yeiser 91 N.W. 682 (1902).
US person for his own benefit. The laws of such jurisdiction would prevent the settlor’s creditors from reaching the trust assets.\(^{17}\) At the same time, of course, the settlor himself could not terminate the trust nor demand distributions by the trustee. While the extremely high degree of safety of the trust assets from the settlor’s creditors offered the settlor comfort, the distance of the assets from “home” together with the total lack of control often gave the settlor some discomfort. The trustees of these trusts, in an effort to generate a comfort level adequate to placate the settlors, influenced legislation formally allowing protectors to serve under the trust, with powers that would allow acceleration of distributions, changes to the trust, and even termination, calling for a return of the assets to the settlor, all at the protector’s sole discretion without court order or inference by the trustee. The question now became, however, who would act as trust protector? Since it would be counter-productive to use a U.S. party (due to that party being subject to U.S. Court jurisdiction), offshore parties, who generally had no knowledge of the settlor or his family, were the logical choice. Typically, the offshore protector candidate would have little to do until the circumstances required him to consider whether he should carry out

some act connected with the trust. While the terms of the trust typically gave him
unlimited discretion in exercising his powers, he would not want to subject himself to
liability in such circumstances and would only agree to serve if he was expressly
exculpated. Logically, then, the offshore statutes provided the presumption that the role
was non-fiduciary and there would be no liability to the beneficiaries.18 And typically,
since the same protection would be provided in the trust, everyone was happy, but it was
seldom, if ever, explained to the client that if the protector, through exercise of a power,
caused loss to the trust, there would be no recourse.19 The risk to the client must have
seemed minimal to the drafting attorney, however, since the main thought was protection
of the assets from creditors while providing reasonable access for the client’s needs.

Thus, the essential issue of whether the protector owed any duty to the trust purposes or
the beneficiaries was never addressed, other than to dispose of any duty by drafting it
away or simply relying on the statute, thereby hoping to make it a non-issue.

19 Id.
As a number of U.S. States began to adopt self-settled trust legislation to compete with the offshore jurisdictions, they conveniently and without much thought perpetuated the “non-issue” by either providing in their statutes that the protector was not a fiduciary unless the trust expressly provided otherwise, or that the protector was a fiduciary unless the trust provided otherwise. And this is the dilemma. In other words, the states which reduce the determination of whether a power holder is a fiduciary to a mere question of drafting are encouraging advisors to sidestep a vital trust issue and ignoring one of the most essential principles of trust law – that of fiduciary duty. This is not to say that a power holder, including a protector, can never have a non-fiduciary role. This may occur, for example, where the protector has authority over discretionary distributions and is also a beneficiary of the trust. There, the presumption is that the settlor intended the arrangement to be akin to a personal power of appointment and the power holder/protector need not be held to fiduciary standards. 20 But, as discussed in further detail later, it is clearly foolhardy to suggest that the role of a party who participates in the administration of a trust shall be conclusively established by the words of the trust.

rather than by the actual role of the party. It would be only slightly less sensible than declaring that the trustee shall not be a fiduciary. And this superficial reasoning is not helped by commentators suggesting that the term or name used by drafters will itself be determinative of the legal role, as where it was stressed in the subject outline that the drafters should use the term “trust advisor” if they wanted a fiduciary role, and “trust protector” if they want a non-fiduciary role, suggesting that the actual role they play and the nature of the powers they hold are not important.21

Despite this, I note that the subject outline at §2.1, entitled, “No significance to Name”, cites a Donovan Waters article, “The Protector: New Wine in Old Bottles?”, in which Waters says, “the particular name used to describe the position has no significance”. And Sherby herself says in this part, “there is absolutely no intention to define the role of this third party decision maker by the terminology used or the name

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21 Sherby, supra note 2, at § 9.5, stating, “Be very careful . . . to use the term ‘trust advisor’, when the intention is to grant powers that are inherently those of a trustee, and specifically provide in the trust instrument that the trust advisor is a fiduciary. When providing the third party decision maker with the powers that would otherwise be given to a beneficiary or trustee or that otherwise would require a court action, take care to use the term ‘trust protector’ and specifically provide in the trust instrument that the trust protector is not a fiduciary”. (Emphasis added.)
given”.22 Although I am in total agreement with that comment, it is especially puzzling, since, as illustrated as in great detail in this discussion, the entire balance of Sherby’s outline is devoted to the careful use of the terms, “protector” and “advisor”, when the drafter wishes to denote non-fiduciary and fiduciary roles, respectively.

What I find to be so unfathomably puzzling with all this is the lengths such commentators and states are willing to go to avoid having a party who may be essential to the best administration of a trust from being regarded as a fiduciary. Why this deadly fear of fiduciary duty?

II. The Nature and Implication of Powers over a Trust and The Fiduciary Question.

What does it mean or involve to have powers over a trust, when are they “fiduciary”, and what is a fiduciary power, anyway? It is fundamental law that a power must be either personal or fiduciary. There is no in-between, although there may be

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22 Sherby, supra note 2 at §2.1.
different degrees of impact of the exercise of a power. For instance, a power to change the situs of a trust will have less impact than the power to add or delete beneficiaries, but either can only be personal or fiduciary, not both. It is also well settled that the holder of a personal power is under no obligation to even consider whether he should exercise the power. He can ignore it completely and never exercise it, even if there is some strong reason why it should be exercised. And if he does exercise it, the exercise may be on a whim, or the opposite of what a reasonable person should do, or even in retaliation against an object of the power. 23 What could be less of a fiduciary duty than that? The duty of the holder of a personal power is only to comply with the terms of the power and not to commit a fraud on the power. 24 So what do we mean when we appoint a protector, grant him powers, and then declare that he is not a fiduciary and may exercise the powers in a non-fiduciary capacity? Can that mean anything other than that the powers are personal powers, and not only does the protector have the right to disregard altogether whether a power should be exercised but also the right to exercise a power on a whim, without any regard to the interests of the beneficiaries or the purposes of the trust?

24 Restatement Second Property §20.2; Pitman v. Pitman 50 N.E. 2d 59 MA (1943).
When, for example, we grant a spouse or other party a special power of appointment in favor of the settlor’s issue, do we feel inclined to state that the power is a non-fiduciary power? Never. And do we require the power holder to accept the powers or the position of power holder in writing? Never – but wait! Isn’t that exactly what we do when we appoint a non-fiduciary” protector? What’s the point of that? Apparently, the point – the only point – is to attempt to sidestep the protector’s exposure to liability for negligence or incompetence in exercising or failing to exercise his powers.

A fiduciary power is one where the holder of the power must at least consider from time to time whether to exercise the power, and the only factors in reaching a decision are the best interests of the beneficiaries and the purposes of the trust. The acknowledged duties of the fiduciary power holder expose the power holder to liability for breach of those duties. As noted, this can be the only reason that attorney and

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26 Id.
commentators 27 go to such extraordinary lengths to deny the fiduciary role. But, unfortunately, it seems that no one has asked why! It is common knowledge that a fiduciary may be exculpated for all behavior except fraud or willful misconduct. 28 If this approach is taken then the protector’s exposure is kept to a minimum, and his liability would only result where it was appropriate. On the other hand, do the promoters of the non-fiduciary position really believe that a “non-fiduciary” protector would not be liable for fraud or willful misconduct? Especially where they do not establish that in the appointment or grant of powers? The fact is that even the holder of a personal power can be liable for fraud. 29 So, where is the difference?

The difference lies in the fiduciary’s unavoidable duty of good faith. Regardless of the extent of exculpation in the document, the fiduciary duty of good faith cannot be drafted away, 30 while the holder of a personal power never has a duty of good faith

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27 See, e.g., Sherby, supra note 2 (denying fiduciary role).
28 Loring & Rounds supra note 24, § 7.2.6.
29 Restatement Second Property § 20.2 Reporter Notes.
30 Loring & Rounds, supra note 24, § 6.1.3.
It seems, then, that the question of duty comes down to (or at least should come down to) three issues: 1) What is best for the client, 2) what is the intent of the informed client, and 3) regardless of the first two, what would a court say is the duty of the power holder in question? As to the first two issues, would anyone (except the non-fiduciary promoters) argue that preference should be given to the protector’s interest over those of the beneficiaries and the purposes of the trust? What client would choose that approach if advised of the consequences? As for the third issue, that will in many cases be the deciding factor, since it has been the practice of so many attorneys to draft away all fiduciary duty and related liability.

That is, if the circumstances of a case and the intent of a settlor dictate that the power holder had a fiduciary duty, then no amount of drafting can change that, any more than it could dictate that the trustee was not a fiduciary. To suggest that a court could not hold that there should be some recourse where clear negligence or a blatant disregard of

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31 See note 21, supra.
the interests of affected parties (e.g., the beneficiaries) is to challenge the very sense of
justice. One commentary on the issue noted that there should be “equitable
compensation” (to the damaged parties) for breaches of non-trust fiduciary duties”,
suggesting that this is a trend in the law and that there is a duty of care even though the
role is non-fiduciary one, 32 The commentary referred to a case on the very issue, where
the court noted that the extent of liability of a fiduciary for negligence should be the
guideline of the “general duty to act with care imposed by those who take it upon
themselves to act for or advise others, . . . and that duty of care is the same duty arising
from the circumstances in which they were acting, not from their status or description
(emphasis added).”33

Lastly, speaking of trusts in the law, we must consider the position taken by the
major treatises and by the states. The default position in the uniform trust code, for
example, is that the protector (a person who holds a power to direct a trustee) “is

1996, 153, 155.
presumptively a fiduciary,. . .”\textsuperscript{34} and Scott & Fratcher on Trusts States, “where the person on whom the power of control (over the trust) is neither a co-trustee nor a beneficiary but is a third person otherwise unconnected with the administration of the trust, the power is ordinarily conferred on him as a fiduciary and not for his own benefit.”\textsuperscript{35} And the recent draft version of the Uniform Divided Trusteeship Act proposed by the National Conference of Commissioners on Uniform State Laws, proposes that “Except as otherwise provided in subsection (c) a trust (protector) is subject to the same fiduciary duties . . . as a trustee would be in the exercise or non exercise of a power under the same circumstances.”\textsuperscript{36}

And then there are the state laws. The great majority of states with protector provisions provide that the protector (or equivalent), will be a fiduciary,\textsuperscript{37} but most allowing for the trust to state otherwise. The minority of states provide that the protector

\textsuperscript{34} Uniform Trust Code § 808 (d).
\textsuperscript{35} Austin Scott & William Fratcher, the Law of Trusts § 185 at 565 (4\textsuperscript{th} ed. 1987-91). (Herein “Scott”).
\textsuperscript{37} Through the adoption of the Uniform Trust Code, §808 (d), www.uniformlaws.org/Act.aspx?Title=Trust%20Code.
shall **not** be a fiduciary unless the trust provides otherwise. 38 And there are seven states which provide fiduciary status with no allowance of a contrary provision in the trust. 39

The obvious, if not embarrassing confusion among the states has to be the result of different viewpoints and understanding of the role by the legislatures, who have no doubt received guidance and advice from their local estate planning bar. Some have suggested that the reason for this is that in many cases, attorneys are named as trust protectors, and they prefer to serve without exposure to liability (relying of course on state law so providing) despite cases, commentary, treatises, basic fiduciary law, and simply sound reasoning to the contrary. But, there is one concern that may have escaped them.

The typical legal malpractice policy covers an attorney for claims “arising out of the conduct of the insured’s profession as a lawyer”. 40 (Emphasis added.) The typical contract goes on to include acts as a guardian, conservator, trustee, etc., but only includes

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38 Alaska, AS 13.36.370-375; Arizona, A.R.S. 14-10818; Idaho Code 15-7-501; South Dakota, S.D. Codified Laws §§ 55-1B-1 et seq.
40 Taken from the author’s malpractice insurance contract.
such roles when conducted “in a fiduciary capacity” \(^{41}\) (Emphasis added). So one might question the value of insisting that the protector (who is also an attorney) is not a fiduciary. He is certainly not acting as a “lawyer”, as that clearly implies a fiduciary duty. This leads to the question of whether the non-fiduciary will be able to obtain liability coverage at all. If the insurer believes that the non-fiduciary, non-liability language will be respected by a court, what’s to insure? Either the premiums would be next to nothing or just arbitrary, or perhaps, if an attorney is the protector, a special rider could be added to the existing policy. In short, it may be far easier to admit to the fiduciary role and reduce the standard of conduct.

III. Considering Specific Powers – Fiduciary or Non-Fiduciary?

In the theories and conclusions presented in the commentary at issue, \(^{42}\)

Commentator Sherby suggests that there are “non-trustee-type” powers which may be

\(^{41}\) Id.

\(^{42}\) Sherby, supra, note 2.
granted to a party (the protector) in a non-fiduciary capacity,\textsuperscript{43} versus “trustee-type” powers that may or rather typically are granted to a trustee, obviously in a fiduciary capacity. She apparently believes that this simple distinction of powers by itself establishes the duty or absence of duty on the part of the powerholder. \textsuperscript{44} Taking this simplistic approach, the obvious objective is to treat the protector as a non-fiduciary by giving him only powers that would in themselves be considered (in her opinion) non-fiduciary. But what makes a power a fiduciary power or a non-fiduciary power? And if we grant a fiduciary power to a party we declare to be a non-fiduciary and the party accepts the role and the power that goes with it, wouldn’t that make the party a fiduciary as to that power?

Sherby goes on to suggest that an infallible way to establish the distinction is to consider those powers “that are otherwise lodged with a court. . . .”,\textsuperscript{45} because “the court is

\textsuperscript{43} Id. at part 7.3 (c).
\textsuperscript{44} Id.
\textsuperscript{45} Id.
not a fiduciary who would ever be subject to suit for the decisions the court makes." 46 Does this mean that Sherby really believes the court would not have in mind the best interests of the beneficiaries and the purposes of the trust? Is she suggesting that because one cannot sue the court, the court would treat its powers as personal powers and act capriciously? Clearly that is not and cannot be the case. (Interestingly, no comments were made regarding appeal of a court’s “non-fiduciary” decision.) And following this reasoning, Sherby concludes, “There is absolutely no reason that a trust protector who is granted this type of power (referring apparently to her list of a dozen non-fiduciary powers that could be decided by a court) should in any manner be a fiduciary.” 47 So let’s take a look at a few of the dozen powers that she enumerates which are her guaranteed non-fiduciary powers. 48

- The power to modify the trust instrument (apparently without limitation).

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46 Id. at page 13-26, 27.
47 Id.
48 Id.
We can’t get a more powerful power than this. This is a power of appointment, and since there are in Sherby’s illustration no limitations, it could be regarded as a general power of appointment. But let us assume that Sherby must have had in mind an express limitation that the protector could not exercise the power in any way for his own benefit, thereby making it a special power (since granting the protector a general power of appointment would introduce a host of additional issues). The first question we must ask – and not just for this power but for every power granted the “non-fiduciary” protector – is, what is the reason a settlor would grant this power on an expressly non-fiduciary basis; that is, a personal power. To allow non-judicial changes on an arbitrary basis without regard to the interests of the beneficiaries or the settlor’s purpose in establishing the trust? That would be a truly difficult premise to accept.

- Change the terms of the beneficiaries’ trust interests including changing the terms of a power of appointment.

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49 Restatement Second Property § 11.1 comment (c).
Again, this grants the protector a limited power of appointment, but also the power to voluntarily change the shares of dispositive schemes of the settlor’s original trust. And again, the question of the settlor’s intent in granting the power must be the controlling factor.

- Add or remove beneficiaries of the trust.

Still, again, a general power of appointment, but again we give Sherby the benefit of the doubt by assuming that she would suggest a limitation on the exercise so as to prohibit the protector from exercising it to benefit himself or his family, or subject it to reach by its creditors, although without that, in an expressly non-fiduciary role, he could do so, opening the door to potentially catastrophic tax and other results for the client and beneficiaries.

- Modify the administrative or dispositive terms of an irrevocable trust in response to changing conditions in situations involving long-term, special purpose, charitable or third party special needs trust.
Though all of Sherby’s suggested non-fiduciary powers give me concern, this one is clearly so incongruous with her proposal that it is astonishing to me it was included. To appreciate the contradiction in concepts and potential disservice to the client or to the attorney following this line of reasoning, let’s look at the terms of this power and remind ourselves just what is a non-fiduciary power held by a party who is a non-fiduciary.

As observed in part II above, a power can either be fiduciary or non-fiduciary, and here, Sherby’s suggestion, if not outright direction, is to grant the protector only non-fiduciary powers. As pointed out, a non-fiduciary power is a personal power, and the holder of a personal power who is not a fiduciary “owes no duty to anyone to consider the exercise of that power”; and he is at liberty to declare that he will never exercise it.”50 He can exercise it unfairly, according to his whims, and even in retaliation against an object of the power. A beneficiary in such a case has no standing to complain and cannot succeed in getting a court

to order an exercise of the power. 51 In addition, the power, being personal, may only be exercised by the power holder and of his own volition, so he may not be instructed or directed by others as to its exercise.52

In applying the foregoing principals to the power in question, how can we ask the protector to amend the trust “in response to changing conditions?” as suggested in Sherby’s power? On what would the non-fiduciary protector be required to base his decision in determining the nature and extent of the amendment? How can he, as a non-fiduciary with no duty, be expected to concern himself with “changing conditions?” And since this would be clearly outside his role, would he be exposing himself to liability as a “voluntary fiduciary” with a higher standard of behavior? Of course, if there is a question in the protector’s mind on this, he can simply refuse to act, with impunity, since he has every right to do so as the holder of a personal power.

51 Id. at § 6-105.
52 Id.
The powers chosen for the foregoing comments are perhaps the more “potent” of Sherby’s dozen powers and clearly can have a greater impact on the trust and the beneficiaries than some of the others, such as the power to mediate disputes or the power to remove and replace trustees. (In the latter case, for some reason she limits the power to asset protection trusts and a certain type of special needs trust.) But it is difficult to conceive of a power over a trust that could not impact the beneficiaries or the trust purposes in some way. For example, say that a protector has the non-fiduciary power to change the situs of a trust. The protector and all the beneficiaries reside in Florida where there is no income tax. The protector moves to California and changes the situs of the trust to California, resulting in an income tax to the trust. Sherby conveniently sidesteps any such illustrations or observations on the possible disadvantages to the non-fiduciary arrangement. She also conveniently sidesteps, if not misstates, the results of reported cases in her effort to support the argument that the protector is not a fiduciary.
For instance, one of the landmark international cases on the fiduciary issue is the Von Knieriem or Star Trust case of Bermuda.\textsuperscript{53} In the facts of that case, briefly, a protector had the power to remove and replace the trustee of a trust. The protector did remove the trustee and appointed a replacement corporate trustee. The removed trustee questioned the grounds for the removal and the appointment of a successor, and refused to step down. What is especially pertinent in light of this discussion, is that the subject trust did not state whether the protector was a fiduciary or whether the power to remove and replace the trustee was a fiduciary power. Up to the time of this case, there were extremely few reported cases on the trust protector – especially on whether the protector was to be considered a fiduciary – this case itself being one of the first. Therefore, the case gained considerable international attention.

The removed trustee brought a petition asking the court to consider the validity of the removal and appointment, arguing that the power to remove and replace the trustee was a fiduciary power and must be “exercised responsibly not arbitrarily in the interest of the

beneficiaries as a whole and not simply according to the personal wishes of the protector vs. the settlor or both”.

The question before the court was, was the power to appoint a trustee a fiduciary power, which called for special consideration in the selection of the trustee, or a personal power, which could be exercised on a whim, as Sherby would have it.

In reviewing the importance of the role of the trustee of a trust and reviewing certain English decisions on trustee appointment, the Von Knieriem court held that the power to remove and replace the trustee was in fact a fiduciary power, and it was to be exercised in a fiduciary manner by the protector. The protector’s selection of a successor trustee was held to have been consistent with the protector’s fiduciary duty to select the best candidate he could for that position.

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54 In Re Skeats Settlement [1889] 42 Ch D 522.
In her own commentary on the case, Sherby refers to *In re Skeats Settlement*, the English case in which the *Von Knieriem* Court in large part based its decision. Sherby quotes a small part of the *Skeats* case quoted by the court, which she selected from a much larger quote cited by the court, in which the *Skeats* Court asks whether a trusteeship could be “sold to the highest bidder”. Sherby takes this part of the larger quote and declares it to be the reason for the court’s decision, stating, “For that reason, the power was fiduciary in nature, but being fiduciary in nature was held to mean that the ‘appointor’ could not personally benefit.” (Emphasis added). This is simply misfocussed and misleading. The protector in this case did not benefit, nor was there ever a question or even the slightest suggestion that he would personally benefit from the appointment as Sherby’s quote inferred. In fact, on the fiduciary question of appointing a successor trustee, it is noteworthy that the following is taken from the *Von Knieriem* Court’s quote from *Skeats*, on which its decision was in fact based (but conveniently omitted from Sherby’s outline):

55 Sherby, supra note 2, §3.2 International Case Law.
56 Id, part 7.3(b).
“The ordinary power of appointing new trustees, under a settlement such as this is, of course imposes upon the person who has the power of appointment the duty of selecting honest and good persons who can be trusted with the very difficult, onerous and often delicate duties which trustees have to perform. He is bound to select to the best of his ability the best people he can find for the purpose . . .

Because it is a power which involves a duty of a fiduciary nature; and I therefore come to the conclusion, independently of any authority, that the power is fiduciary power.”

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Despite Sherby’s analysis of Von Knieriem and attempt to distract from the pure fiduciary issue of the power to appoint a trustee, the bottom line in both Skeats and Von Knieriem is that the power to appoint a trustee is a fiduciary power, and a fundamental and important conclusion may be drawn from this. If the exercise of the power in question can directly or indirectly affect the interests of the beneficiaries, the purpose of

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57 Skeats, supra note 52 at page 526, 527.
the trust, or the proper administration of the trust, it is likely to be a fiduciary power, regardless of what drafters might call it or how they might characterize it.

IV. Case Law vs. the Statutes

In spite of the few state statutes providing that the protector is not a fiduciary, and others which say that he is but the trust can provide otherwise, and notwithstanding commentators such as Sherby, the solid and indisputable fact is that virtually every reported case dealing with the fiduciary issue has held that the protector is a fiduciary. The only notable exception has been where the protector with a power over trust distributions was also a beneficiary.\(^{58}\) This part will review a number of the more important cases and subsequently comment on the effect and efficacy of state statutes going one way or the other. Can such opposing statutory positions on the fiduciary issue mean that states differ on their definition of fiduciary or fiduciary duty? Or are some just turning a blind eye to established case law and principles embedded in trust law solely for

\(^{58}\) Rawson Trust Co., Ltd. v. Perlman [1990] BHS J. No. 64.
economic purposes? How does it serve the public interest for a state to attempt to
exculpate by law those who are instrumental to the operation of trusts established under
that state’s law? Before discussing the cases, it must be noted that they are, without
exception, from non-US jurisdictions. This may be the reason (though certainly not a
justifiable one) that no US Court, most notably the Missouri Court of Appeals in the
protector-made-popular McLean Case,⁵⁹ refused to even consider any of those decisions,
despite the fact that they were all common law jurisdictions. In McLean, for instance, the
Missouri Court basically observed that it had no idea what a protector is, whether a
protector owed a duty to anyone, and if he did, to whom he might owe a duty.⁶⁰ Had the
court even made a cursory analysis of any of the cases discussed below, all of these
questions would have been addressed. As to the appropriateness of the U.S. Court’s
consideration of non-US decisions on a “local” matter, one need only look to many of the
early United States Supreme Court decisions to be convinced. Take one landmark 1875
case, for example, repeatedly cited in the field of trusts: Nichols v. Eaton.⁶¹ In that
landmark decision on spendthrift trust law, most of the cases cited by the Supreme Court

⁶⁰ Id. At 794.
in support of its opinion are non-US (English) cases! To my knowledge, no one has ever questioned that fact or even suggested that it was not a sound basis for the court’s decision.

Accordingly, we will consider the opinions of learned justices from the Isle of Man, Jersey, the Cayman Islands, the Bahamas, and Bermuda in the hope that a review of the opinions in these cases will help practitioners, and even the courts, understand that the basis of whether there is fiduciary duty on the part of the trust protector or whether a protector’s power is or is not a fiduciary power can only lie in the settlor’s intent and the circumstances of the particular case and not in language that summarily dictates that the protector is not a fiduciary and there is no fiduciary duty.

In perhaps the earliest case to deal with the trust protector, a trust was established for the benefit of individuals (belonging to a certain group) to be selected at the trustees’ discretion with the consent of the protector. The trust also provided for a “vesting day”,
when permanent beneficiaries would be selected in shares appointed by the protector.

The protector also had the power to appoint trustees, as well as his own successor. The trust further provided for a default beneficiary – The Red Cross Society of Ireland. There was one problem: No protector was appointed under the trust. Some parties argued that the trust was invalid, that the absence of the protector, whose role was so fundamental to the trust, was a defect that the court could not remedy, so there was never a trust to begin with. Others argued that the entire corpus should simply be distributed to the Red Cross Society of Ireland, since without a protector, no consent could be given to distribution to other beneficiaries.

The court held that although the protector’s powers were discretionary, “they were fiduciary” in nature and therefore subject to the court’s control if he were to exercise them capriciously or if he refused to act at all (both of which he could do if this were a personal power). Furthermore, the protector’s fiduciary duty, as “protector of the
trusts, was in this instance owed not to the settlor but to the beneficiaries. . . .”\(^{52}\) (McLean Court take note!) Thus, although he (the protector) was not a trustee, his position was analogous to that of a trustee, and the court could in principle appoint a protector with fiduciary powers in the same way that it could appoint a trustee in order to prevent a trust for failing for want of a trustee.”\(^{53}\)

The court went on to observe that the result might be different if the protector’s “individual characteristics were not necessary to the exercise of his powers” that only the protector chosen by the settlor could exercise them. But clearly, that was not and typically is not the case. In most trusts, the protector holds an office. If one protector ceases to serve then some procedure will apply to appoint a successor, or for some party to decide that the office will be terminated. There is a strong presumption in the law that powers granted or acquired as the result of appointment to an office are powers to be considered for the benefit of others and not personal powers. It would be strange indeed

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53 Id.
for a settlor to knowledgeably agree that any arbitrary party holding the office at some
unknown future date should have such powers as to add or delete beneficiaries or modify
the trust on a capricious basis without liability. Thus, the fact that it is an office rather
than an individual appointment suggests a fiduciary relationship. In point of fact, there is
actually a United States case supporting this position.\textsuperscript{64}

During the same period as the \textit{Steele} case above, was the \textit{Von Knieriem} case,\textsuperscript{65}
discussed earlier. \textit{Von Knieriem} dealt with the question of whether the power to remove
and appoint trustees was or should be a fiduciary power. As it turned out, removal of the
trustee was not so much in question as was the appointment of a successor trustee.

Despite Sherby’s emphasis on the "requirement" that the protector receive no personal
benefit from the exercise of the power, this requirement applies to every fiduciary power,
but it had no application to the facts in \textit{Von Knieriem}. Thus, although it was in part the

\textsuperscript{64} Gathright’s Trustee v. Gaut 124 S.W. 2\textsuperscript{nd} 782 KY (1939).
\textsuperscript{65} Supra, note 52.
basis for the holding in the *Skeats* case,\textsuperscript{66} cited by the *Von Knieriem* Court it was not the basis for the *Von Knieriem* decision. The question for the *Von Knieriem* court was simply this: If a person has the power to appoint a trustee, may he appoint anyone, without regard to the appointee’s experience, knowledge, or character? Or must he appoint “the best people he can find for the purpose?”\textsuperscript{67}

The Bermuda Court in fact stressed as the primary requirement that the protector appoint a party suitable for the position. He could not make a capricious or irrational appointment or one for an improper motive – restrictions appropriate to a fiduciary power.

While it should be easy to see that the power to appoint a trustee should be a fiduciary power, what about the power to appoint a protector? Could that be a fiduciary

\textsuperscript{66} Supra, note 50.
\textsuperscript{67} Id.
power? In a 2004 Cayman Islands case, 68 that was the question before the court. In that case F (the way the opinion referred to him) established discretionary a trust for the benefit of his wife and four sons. A protector could be appointed by a majority of the beneficiaries, and the protector in turn could remove and appoint trustees, among other things. A family dispute arose when two of the sons charged F with improper withdrawal of trust assets. In order to gain control of the dispute (through the appointment of a protector), F’s wife and two of the sons appointed F as protector. Then F as, as protector, removed the disputing son as trustee and appointed one of the sons who sided with him as successor trustee.

The disputing sons petitioned the court to rule that the appointment of F as protector and the removal of the son as trustee were invalid, because they were fiduciary powers and were “tainted” by irrationality, bad faith, and improper motive. Since the protector had the power to remove and appoint trustees, the Court said, the protector’s powers were fiduciary, and “therefore the powers of the beneficiaries appointing him

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68 In Re Circle Trust [2006] CILR 323 (Cayman Islands).
ought also to be fiduciary.” The court further noted that even though the status of a beneficiary in and of itself imposes no obligations of a fiduciary nature, “even a beneficiary may be clothed with a power to which some fiduciary obligation is attached”, citing *In Re Papadimitriou*, and others. Thus, the appointment of F as protector and the son as successor trustee were invalid.

Of course, there can be situations where the protector is not a fiduciary. The basic rule in this regard is where the protector has a clearly personal power and may use that power to benefit himself, such as where the settlor gives the protector the power to direct principal distinctions to the beneficiaries and at the same time names the protector as a discretionary beneficiary. The *Rawson Trust Co. case* is frequently cited to illustrate that point. In *Rawson*, the settlor established a trust for the benefit of three beneficiaries who were also appointed protectors. The terms of the trust provided that the trustee could take no action without the consent of the beneficiary/protector. One of the protectors

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69 Id.
70 Id. at 324.
71 Id. at 330.
72 Infra, note. 57.
resigned as permitted by the trust and another was temporarily suspended by conditions imposed on the trust, leaving only one protector. The sole protector, on account of perceived complexities in the administration of the trust, approved a decanting of the trust into a new trust, maintaining herself as sole protector, and excluding the other two as protectors (but not as beneficiaries). The trustee and one of the beneficiaries sought a ruling on whether the sole protector was acting as a fiduciary and if so, whether she breached her fiduciary duty.

Interestingly, in considering whether or not the protector’s power was a fiduciary power which, if exercised must be for the benefit of the beneficiaries as a whole, or a personal power which may be exercised for the benefit of the power holder, the court cited this excerpt from the U.S. treatise, Scott on Trusts:

73 Rawson Trust Co. v. Perlman [1990] BHS J. No. 64 (Bahamas), citing Scott, supra note 35.
“The holder of the power is subject to liability, for exercise or non exercise of the power only if he holds it as a fiduciary and not solely for his own benefit. It is a question of interpretation of the trust instrument in the light of all the circumstances whether the power is conferred upon him or his sole benefit or for the benefit of the beneficiaries of the trust . . . On the other hand where the power of control is conferred upon one of the beneficiaries, the power is more likely to be, although it is not necessarily, conferred upon him or his own benefit and not for the benefit of the other beneficiaries also.”

In holding that under the circumstances of this case, the settlor, in granting the protector/beneficiaries such powers over their own interests, did not intend that they be held to fiduciary standards. In this regard, the court said:

“Looking at all the provisions set out in the 1982 Deed, and the fact that the Trustee may be otherwise uncontrollable even by the Courts, I would think that that

74 Id. at para. 96.
power of veto the Protectors had over everything the Trustee could do was to ensure that no beneficiary, and the Protectors were all also beneficiaries, would suffer unduly because of those powers the Trustee was given. Without the right of veto, a beneficiary would have stand by helplessly and see whatever interest or share he might expect (or indeed the whole Stead Fund) distributed to a follow beneficiary exclusively! There is nothing in this extensive power which is against the conclusion to which I have come, that it is, that the Protectors are not fiduciaries. \textsuperscript{75} I would hold, therefore, that the Protectors of the Stead Fund are not fiduciaries and were given the power, though in an elaborate provision to protect their own interests." \textsuperscript{76}

The \textit{Rawson} case is a good illustration of the court’s general attitude that the protector is a fiduciary unless there is a compelling reason to conclude that he is not.

Interestingly, \textit{Rawson} is not cited by Sherby. The only two non-US cases cited by her are

\textsuperscript{75} Id. at para. 98.
\textsuperscript{76} Id. at para. 99.
the *Von Knieriem* case\textsuperscript{77} and the *Centre Trustees* case.\textsuperscript{78} As noted earlier, Sherby’s discussion of the *Von Knieriem* decision omitted the most important and far reaching impact of the decision, which was that the power to appoint a trustee is a fiduciary power. The *Centre Trustee* case, although not so widely discussed as *Von Knieriem*, had an equally impactful ruling, in that it addressed the important question of whether fiduciary duty can simply be drafted away.\textsuperscript{79} As she did with the *Von Knieriem* decision, Sherby attempted to play down the court’s position that the role of the protector is a fiduciary one.\textsuperscript{80} In fact, a review of the decision in the *Centre Trustees* case would disclose comments by the court such as, “there would be no doubt in our view that the powers of the protector are fiduciary.”\textsuperscript{81} The facts of the case disclose that the protector’s consent was required for numerous key decisions under the trust. In the course of administration, a dispute arose which involved the protector.

\textsuperscript{77} Jurgen *Von Knieriem* v. Bermuda Trust Co.
\textsuperscript{78} Centre Trustees, Ltd. V. Jacque Van Rooyen, et al [2009] JRC 109 (Jersey).
\textsuperscript{79} Id. at para. 25, citing a trust provision stating: “For the avoidance of doubt it is hereby declared that no power is vested in the Protector in a fiduciary capacity.”
\textsuperscript{80} Sherby supra, note 2, at §3.3.
\textsuperscript{81} Centre Trustees supra note 76 at para. 28.
The issue in the case was whether the protector should be removed, as there was a conflict on the part of the protector who brought a claim against the trust. If the protector was considered a fiduciary, the claim would have placed him in a position of conflict. The language of the trust provided, “for the avoidance of doubt, it is hereby declared that no power is vested in the protector in a fiduciary capacity.” If the protector had no fiduciary duty, as proposed by the language of the trust declaring the same, then the issue would have been resolved, since there is no rule against a non-fiduciary having a claim against a trust. But the court held that the language negating fiduciary duty should not be interpreted in such a strict manner. On the basis that a party holding a fiduciary power has a duty to consider exercising the power, such a power holder who has been “excused” from his fiduciary duty, is not excused from his fiduciary role simply by so stating. Rather, the court said, such language “would simply mean that he is not under an obligation to consider from time to time whether to exercise (the powers). If he does exercise them, then they have to be exercised for the benefit of one or more of the

82 Id.
beneficiaries.” In other words, if the circumstances of the appointment and the intention of the settlor rendered the powers or the role fiduciary, then no amount of drafting will change that.

There can also be situations where a protector has both a fiduciary and a non-fiduciary power. In one example of such a case, the settlor established a trust for the benefit of his family, which beneficiaries included his sister. He also named her as protector of the trust with the power to veto the addition or removal of beneficiaries that may be proposed by the trustee, and the power to appoint new trustees other than herself. The sister appointed a professional trustee to assist in the administration, but the existing trustee refused to acknowledge the appointment or to cooperate with the new trustee. The sister petitioned the court to declare her trustee appointment valid. The existing trustee argued that since the sister was both protector and a beneficiary she had a conflict of interest, and further, that this action against the existing trustee was itself evidence of

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83 Id.
84 In Re Papadimitriou [2001] 03 MLR 287 (CHD) Isle of Man.
that fact. Thus, not only should her trustee appointment be declared invalid, she should be removed as protector. The sister argued that the two roles were not mutually exclusive. Her appointment of the new trustee was done in good faith and in the interest of the trust and the beneficiaries as a whole.

The court agreed with the sister, acknowledging that the power to appoint a trustee is a fiduciary power, holding that the sister acted consistently with that power. The fact that she also may have held a personal power was independent of that, as long as she did not use the fiduciary power to favor herself. The new trustee was an impartial, independent professional and suitable for the position.

In part 7.3 (c) of Sherby’s outline, she enumerates powers that are “typically granted to the trust protector”, continuing on to say with reference to those powers, “there is absolutely no reason that a trust protector who is granted this type of power should in

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85 Id. at p. 249.
any manner be a fiduciary.” Among her guaranteed non-fiduciary powers is the power to modify (amend) a trust. She offers no caveat or qualification of the use and application of this or the other powers in this category except to say that the reason they are not granted to beneficiaries or reserved by the settlor is that they would likely have adverse tax consequences. Thus, Sherby would have us grant to a third party on a non-fiduciary basis an unlimited power to amend the trust with no limitations on its exercise and no liability for damages or legal fees to rectify errors or wrongdoings.

In one case, illustrating the risks of such an arbitrary approach, a settlor established trusts for his children. The trusts (all identical) provided for two protectors (two of the children). The protectors had substantial powers including the power to amend the trusts. The trust also provided that either of the two protectors could exercise any of their powers individually and the exercise by one of them shall bind the other. It further provided that a protector could be removed by a vote of 75% of the beneficiaries.

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86 Sherby, supra note 2, at §7.3 (c).
87 In Re Internine and Intertraders Trusts [2005] JLR 236 (Jersey).
88 Id. at p. 253 para. 55.
In the midst of a bitter dispute between the two protectors, one of them exercised his power to amend the trust and signed an amendment removing the second protector and providing that he (the first protector) could not be removed by the beneficiaries. Upon learning of this, the second protector brought suit to have the amendment declared void. The first protector maintained that there were no limitations on the power to amend and nothing in the language of the trust expressly imposed a fiduciary duty on him or on the powers so the amendment should be valid. Interestingly, despite the first protector’s argument, after the other parties submitted their arguments maintaining the fiduciary questions, the first protector reconsidered his argument, and although he did not concede, he did agree that the power “was subject to certain constraints of a fiduciary nature.” In the end, the court observed that there was a “heavy burden” on the first protector to explain and justify the necessity for an extreme amendment as being for a proper purpose and in the interests of the beneficiaries as a whole.

89 Id. at p. 262 para. 78.
Further, considering the idea of a broad power of amendment with no fiduciary
duty and the obvious attendant risks that would accompany such an arrangement, the
court made some interesting speculations. Although the unilateral amendment by the
first protector to gain sole control over the trust elicited a strong reaction, what would be
the difference (so far as the interests of the beneficiaries are concerned) if the two
protectors acted together? What if they deleted the beneficiaries’ power to remove them
or the power in any future protectors to amend? “What logical basis would there be”, the
court asked, “for concluding that such a move was permissible if done by agreement of
the two first protectors but imperishable if done unilaterally”?\(^90\) And in an earlier
comment it was observed that the facts and circumstances of the case “put beyond any
doubt whether the fiduciary nature of the role of protectors (whether the first or
successor) and of the powers conferred on them and the need for that role to be
performed, and those powers to be exercised, for the benefit of the beneficiaries as a
whole.”\(^91\) In short, it is a pure exercise in risk, to say the very least, to suggest that the
unrestricted power to amend or modify a trust may be exercised with no regard for the

\(^{90}\) Id. at p. 258, para. 66.

\(^{91}\) Id.
interests of the beneficiaries or the purpose of the trust, and therefore would be a non-fiduciary power.\textsuperscript{92}

The foregoing cases are directly illustrative of the non-U.S. common law courts attitude towards the trust protector over the past twenty plus years. Although Sherby comments that protectors “have been used in one form or another in England and other jurisdictions for a long time”, \textsuperscript{93} in fact, they have not been in common use in England at all. I could not find a single English case on the subject, although all of the jurisdictions that have reported cases on trust protectors, per se, have been in jurisdictions which, like the United States, derived their law from the English common law. The decisions and opinions in the foregoing cases reflect the fundamental precepts and theory of trust and fiduciary law rather than an arbitrary characterization that is inconsistent with such law.\textsuperscript{94}

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\textsuperscript{92} Sherby, supra note 2, at §7.3 (c)(2).
\textsuperscript{93} Sherby, supra note 2, at §3.1, Long Term Use in England.
\textsuperscript{94} In recent years, the concept of the “divided trust” has surfaced, allowing the trustee to be exculpated for certain functions that are assigned to another party but that otherwise would have been a function of the trustee. See, e.g., Mary Clarke and Diana Zeydel, “Directed Trusts: The Statutory Approaches to Authority and Liability”, Estate Planning Magazine, September 2008, p. 14. But some view this as a trust towards abandonment of the fiduciary concept altogether. See, e.g., Alexander A. Bove, “The Death of the Trust”. Trust & Estates Magazine, Feb. 2014, p. 51.
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In my opinion, the approach taken by many of the states to the fiduciary issue attempts to offer validity and even enforceability to just such an arbitrary characterization.

The State Statutes.

Every one of our states and the District of Columbia recognizes trusts and, with qualified exception,\textsuperscript{95} respects the fiduciary duty of the trustee. Similarly, they all recognize the fiduciary duty of a guardian, conservator, executor, administrator, and agent. These are all parties who act for the benefit of others and who are held to a degree of trust, confidence, and loyalty to the interests of the parties for whom they are acting.

The problem is that most of the states do not recognize or are not yet ready to recognize the fiduciary duty of a protector who acts for the beneficiaries of a trust.\textsuperscript{96} I have discussed earlier that it is entirely possible for a protector to be a non-fiduciary, but this is the exception and not the rule. Nevertheless, as also observed earlier several states have passed laws that make it the default rule, and many others have made it simply a matter

\textsuperscript{95} See, e.g., Idaho Code § 15-7-501 (4); South Dakota Codified Laws §§ 55-18 4, 5.
\textsuperscript{96} See, e.g., Circle Trust, supra, note 67.
of drafting to apply the exception and disregard the rule. Why is that? Has the fear of fiduciary duty infiltrated the legislators as well? Do the non-fiduciary states have a different definition of “fiduciary” than the rest of us? Or are they simply following the controversial lead and disregarding the concept and turning a blind eye to the underlying law and the cases?

For any student of trust law, it is quite disheartening to see how casually the states treat the concept of fiduciary duty. Anyone who studies the history, the development and the very purpose of the trust protector must quickly come to the conclusion that it is inherently a fiduciary role. And yet states provide that it is simply a matter of drafting. Does any state permit a trust to provide that the trustee shall be a non-fiduciary? Of course, there are states that allow divided trusteeships which allow exculpation of a trustee but only where the exculpated duty is assumed by another party.97 Other than Delaware, however, I know of no state which allows fiduciary duty to be omitted.

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97 See e.g., 12 Del. Code § 3303 (a).
completely, otherwise there would be no trust.\textsuperscript{98} It is troubling to think that so many state legislators believe that the words of a trust can dictate a legal relationship even when the facts dictate otherwise.

And speaking of words, for some reasons, a few states make a distinction between “trust advisors” and trust “protectors”\textsuperscript{99}, the advisor typically being the party who could direct the trustee as to trust investments. It was generally regarded that the advisor, but not necessarily the protector, would be a fiduciary.\textsuperscript{100} This may be what gave rise to Sherby’s theory that the name we give the particular party will conclusively determine his role and liability\textsuperscript{101}. Historically, trust “advisors” were outside parties engaged to advise the trustee on trust investments. When the trust specifically provided that the trustee must follow the advisor’s investment direction, there was no question that the

\textsuperscript{98} See The Death of the Trust, supra note 93.
\textsuperscript{99} Trust advisors, Id.
\textsuperscript{100} Sherby, supra note 2, at 9.5. “Make Sure To Use The Terms ‘Trust Protector’ and ‘Trust Advisor’ Appropriately and Consistently.”
\textsuperscript{101} See Trust Advisors, supra, note 98.
advisor was considered a fiduciary, and the trustee’s liability for bad investment decisions was materially reduced but not eliminated. Such treatment of the “advisor” (who might well be called a protector) as a fiduciary has persisted through the years, and few would even think about stating in a trust that the advisor was to serve in a non-fiduciary capacity.

Nevertheless, the beginning of a knowledgeable and more considered approach to the fiduciary question from a statutory standpoint, was the uniform Trust Code (UTC). Section 808 (d) of the UTC provides that, “a person, other than a beneficiary who holds a power to direct is presumptively a fiduciary who, as such is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries.”

Unfortunately, section 105 of the UTC gives the settlor the power to override that provision, so we are back to arbitrary characterization option, although for those states

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102 See, e.g., In The Matter of Cross, 172 D. 212 (1934), where one fiduciary was the power to direct the other as to (the sale of certain shares held by the trust). The non-directing fiduciary recommended those shares be sold but the directing fiduciary refused to consent, resulting in large losses to the trust. The lower court held both fiduciaries liable, but the decision was reversed on appeal. (176 D. 101 (1935)). Nevertheless, the appeals court did not question the lower court’s opinion that the non-directing fiduciary would not be protected if it stood by in the directing fiduciary’s abuse of discretion, and that the non-directing fiduciary could have applied to the court for permission to sell the shares.
that have adopted the UTC\textsuperscript{103} and section 808 intact, at least we have a default option in favor of fiduciary duty. It is also significant to note there are several states that provide the protector will be a fiduciary under state law with no provisions that the trust may declare otherwise.\textsuperscript{104} What do these states know that the others don’t? I believe it is more a question of what they took into consideration in drafting the law rather than what they knew. They undoubtedly considered the typical role and powers of the protector and his potential impact on the trust and the beneficiaries. They no doubt also considered, perhaps at the first level of importance, what would be the typical settlor’s intent and expectations in appointing a party to this important position. As for Sherby’s comment on this, she suggests that practitioners “Avoid at all costs” these ‘four’ states that conclusively presume the protector is a fiduciary.\textsuperscript{105}


\textsuperscript{105} Sherby, supra note 2, at §9.3.
For practitioners in those states that continue to allow fiduciary duty to be drafted away, what they and the practitioners who take that approach fail to consider is that if the protector’s role or power is truly fiduciary, do they really believe a court would ignore that just because of the statute? It might be really interesting to explore arguments and commentary that preceded the adoption of the law on the fiduciary question in the various states. For one thing, no one would question the fact that they began by looking at and to an extent actually copying the law from the offshore jurisdictions, whose laws were in great part motivated by what would attract offshore settlors of asset protection trusts.106. But what was it that convinced them that it would be in the public interest to allow a party’s fiduciary duty to be drafted away? We are left with the distinct impression that the primary motivation was the avoidance of exposure to liability. There can be no other answer. Interestingly and quite significantly, and perhaps partly in response to the no-liability movement, the Uniform Law Committee on Divided Trusteeship has made what I consider to be a monumental statement, striking a major blow to the theory that fiduciary duty can be drafted away. In the first draft of the Divided Trusteeship Act,

106 Bove, note 33, at §185.
section 204 (b) relating to the Duties of Trust Director (which specifically includes a trust protector), provides, “a trust director is subject to the same fiduciary duties in the exercise or non-exercise of a power . . . as a trustee would be in the exercise or non-exercise of the same power under the same circumstances.” Given the credentials, experience, and purposes of the Committee, nothing more need be said.

V. Conclusion

It is truly dismaying that such a large part of the trust and estates community is playing so fast and loose with the concept and application of fiduciary duty. As noted, earlier, the only reason for this seems to be to avoid personal liability on the part of the protector, which I referred to as the “fear of fiduciary duty”. This is particularly strange, if not misguided, because under applicable law, it is quite possible to reduce the protector’s exposure to liability to an extremely low level, such as willful misconduct.107

In effect, this reflects only a slightly higher level of duty as that of a non-fiduciary. The

107 See, e.g., Centre Trustees, supra note 75, at para. 28.
difference, and the heart of the problem that apparently escapes those who believe fiduciary duty can be drafted away, is that a proclaimed non-fiduciary who is found by a court to be deemed a fiduciary may be held by the court to a higher standard than willful misconduct. That is to say, where the non-fiduciary appointment either carries no standard at all or simply rejects duty and liability altogether, the court may impose what it believes to be the standard applicable under the circumstances.\textsuperscript{108} Thus, they may be shooting themselves in the foot in attempting to dodge liability altogether.

What is equally dismaying is that, like most of the commentators who favor the non-fiduciary designation, Sherby’s commentary conspicuously omits any meaningful discussion of the critical legal distinction between a fiduciary power and a personal power.\textsuperscript{109} Instead, her focus is on the name we use for the position, directly concluding that if we call the protector an “advisor” he will be deemed a fiduciary, and if we call the protector a “protector” he will not be deemed a fiduciary. Little could be more

\textsuperscript{108} Section II supra.
\textsuperscript{109} Sherby, supra note 2, at §9.5.
superficial. Specifically, she says, “Be very careful . . . to use the term ‘trust advisor’

when the intention is to grant powers that are inherently those of a trustee, and

specifically provide in the trust instrument that the trust advisor is a fiduciary”,¹¹⁰ and a

few lines later she instructs the practitioner to “take care to use the term ‘trust protector’

and specifically provide the trust instrument that the trust protector is not a fiduciary.”¹¹¹

She suggests this rule be applied to powers “that would otherwise require a court action”,

or be given to a beneficiary or trustee.¹¹²

Sherby goes in this part to say that only by “developing a consistent use of

terminology do we as practitioners have any hope of educating the state legislatures and

state courts as to the differences between the types of powers that can be given to third

party decision makers. (Emphasis added.)¹¹³ Once again, she takes the position that the

word or term we use will dictate to the court what its decision should be regardless of the

¹¹⁰ Id.
¹¹¹ Id.
¹¹² A personal power may be beneficial, meaning the powerholder may be an object of the power, or non-

beneficial, meaning that he may not, but in either case, no fiduciary duties attach to a personal power. Hayton &

¹¹³ Sherby, supra note 2 at §9.5.
circumstances or the settlor’s intention, and if we use the chosen words frequently enough, the legislatures and the courts will become “educated”, and the conclusion will be based on the word and not the facts of the case.

Importantly, as briefly noted above, Sherby fails to consider or comment on the fact that a non-fiduciary power can only be a personal power\textsuperscript{114} and that a personal power has no duties attached to it other than not to commit a fraud on the power.\textsuperscript{115} This is a huge and what I believe to be one of the fatal flaws in her argument. The exercise of a personal power, if it is exercised at all (it may be disregarded altogether by the power holder,\textsuperscript{116} or even arbitrarily released),\textsuperscript{117} may be whimsical, capricious, or even in retaliation against an object.\textsuperscript{118} (What settlor would want this?) And as for the “good faith” requirement that is occasionally raised, the duty of good faith with respect to a personal power holder means just this: “In the event he does exercise the power, he must

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\textsuperscript{114} Thomas, supra note 46, at 6-101 and 6-185.
\textsuperscript{116} Restatement Second Property §14.2.
\textsuperscript{117} Hayton, supra note 100, at 581, 582.
\textsuperscript{118} Thomas, supra note 46 at 6-187.
do so honestly and properly: he cannot, for example, exercise it excessively or fraudulently”.\textsuperscript{119} Good faith, therefore, in this context, does not extend to being kind or thoughtful to the objects of the power or to doing what is in anyone’s best interests. He may totally disregard such concerns with impunity. In other words, the holder of a personal power simply cannot commit a fraud on the power, and he has no other duty!

At the outset of Sherby’s commentary, she cites a comment by Donovan Waters, a noted scholar, stating that the name used to describe the position of protector has no significance.\textsuperscript{120} In the article she cites, Waters discusses the “two schools of thought” with respect to the protector (the name he himself uses throughout his article), those of accountability (for the fiduciary role) and non-accountability (for the role where the power is personal), and he takes the position that unless the settlor clearly intended the powers to be personal as to the particular party chosen as protector, then the position will be fiduciary. Here is the relevant part of Waters’ conclusion in that regard:

\begin{flushright}
\textsuperscript{119} Supra, notes 113-117. \\
\textsuperscript{120} Sherby, supra note 2. at §2.1, citing Donovan Waters, the Protector: New Wine in Old Bottles, Trends in Contemporary Trust Law, Oakley Edition. 1996.
\end{flushright}
“In these circumstances . . . . . , use by the settlor of the personal confidence (right or privilege) should be limited to those situations only where the indolence or capriciousness, the self-concern or idiosyncrasy of the power-holder in the exercise or non exercise of the power cannot harm the interests of others. At that point, where such harm does begin to take place, the power should expressly become one when the grantee can no longer consider his own interest – it should become a fiduciary power.”¹²¹

Despite all of this, Sherby goes on to make practice points that contradict her non-fiduciary stance. She suggests, for example, that the trust instrument “should state the standard to be used for measuring the liability of a trust protector”¹²². It should provide, she says, that the protector should “not be liable in the absence of bad faith or reckless indifference . . . to the interests of the beneficiaries.”¹²³ So is she now suggesting that there is some sort of duty? Is she suggesting that the non-fiduciary maybe has just a wee

¹²¹ Waters. Id at p. 122.
¹²² Sherby, supra note 2 at §9.7.
¹²³ Id.
bit of fiduciary duty? She seems now to ignore the fact that there is no fiduciary duty
where the power holder is not a fiduciary.\textsuperscript{124}

A further dilemma created by Sherby is that she recommends that the non-fiduciary protector be compensated. The problem this generates is that an
employer/employee or principal/agent relationship is would then be created, which now
creates certain fiduciary duties, and which again contradicts her underlying, strongly
stated premise that the protector is not a fiduciary and has no fiduciary duties to anyone.
How can she reconcile this? She cannot. Once we open the fiduciary door, the duties she
tried to lock out are brought in.

As a final point, and one so essential and critical to this entire discussion that I
believe it could stand alone to resolve the issue, I note that neither Sherby’s presentation
nor her discussion made a single reference to settlor’s intent and understanding in naming

\textsuperscript{124} Supra notes 113-117.
a protector. I am sure that no one, not even Sherby, would question the fact that if the settlor intended the protector (or whatever one might call him) to be bound by fiduciary duty, then it would be grossly negligent on the part of the drafter to intentionally provide otherwise in the trust. And where there is no mention in the trust of whether the position is fiduciary or not, it is well-settled law that the settlor’s intent will control.125 And yet, Sherby simply ignores this essential element and assumes that, no matter what else, the term, “protector” means non-fiduciary.

Regarding the settlor’s intent, Sherby rather seems to take the position that it is better for the trust and beneficiaries to dispense with any fiduciary duty, rather than make it an issue for the settlor. But would an informed settlor agree? Consider this: Your client is about to execute a trust in which she has appointed a protector with extensive powers. Before signing, you say to the client, “Ms. B., your trust names a protector (your brother, your close friend, your attorney, your accountant, or some party you don’t even know right now as he will be appointed by others in the future) with the power, among

125 See, e.g., Scott, supra note 34 at §164.1; Loring & Rounds, supra note 24 at §6.1.2.
other things, to remove any one or more of your children or grandchildren as

beneficiaries, to add other beneficiaries as he might decide, to change the terms of your

trust in a simple or drastic way, or even to terminate your trust before the time you have

designated, all at his total discretion and without regard to what you might have wanted

or what your family might want or need in the future. We think this is a good idea as it

gives your trust a great deal of flexibility. By the way, you should also understand that

your protector is under no duty to ‘do the right thing’, or to do anything for that matter, or

to consider what is best for your beneficiaries. Furthermore, if he makes a costly mistake,

or acts against your wishes or the wishes of your family, or is just plain reckless and

causes a loss to the trust, he will have no liability to anyone, so long as he does not

commit an actual fraud. If all that is okay with you, just sign here.”

Of course, you would be embarrassed even to consider making such a

presentation to your client, because no competent settlor would agree to such ridiculous

terms, and in addition, she would look at you and wonder, whom do you represent? Or
perhaps more likely she would respond, “Are you nuts? Why would I sign that?” And of course, why would any settlor agree to such an arrangement? It is too obvious to require argument to say that a settlor who establishes a trust to hold all or the bulk of her estate, granting such powers to another would expect that person to exercise his best judgment in a manner consistent with the settlor’s intentions and in the interests of the intended beneficiaries. I cannot put it simpler that that.

While I respect the time and effort Sherby has obviously put into her commentary on trust protectors and advisors, I don’t believe that her commentary will be helpful to practitioners in utilizing the position to benefit clients. I do, however, compliment her on the excellent and thorough analysis and schedule of the various state statutes relating to trust protectors, and I believe this could be helpful to practitioners.
In any event, I note once again that the underlying, repeated theme of Sherby’s commentary is to avoid the fiduciary designation “at all costs”;¹²⁶ and I caution practitioners not to succumb to the fear of fiduciary duty, to more carefully consider the true reasons for the appointment of a protector, and to face the fact that a fiduciary responsibility is in the best interests of the trust and the beneficiaries. That is to say, if, instead of going to such lengths to exculpate the protector, why don’t we consider as a primary objective the protection of the clients’ and beneficiaries’ interests and the furtherance of the purposes of the trust, rather than be so concerned about protecting the protector? Why is it we don’t have the same concern about protecting the trustee? As noted in this discussion, the protector’s exposure to liability can be reduced to a pretty low level, if desired. So instead of focusing on the total elimination of the protector’s liability and fiduciary duty, why don’t we concern ourselves with the clients’ and beneficiaries’ lack of recourse if the protector causes serious loss to the trust on account of gross negligence or intentional disregard of “duties”? (This would be the case where the party is not a fiduciary and is declared to have no duty). It is difficult to believe that a

¹²⁶ Sherby, supra note 2 at § 9.3.
conscientious trust attorney would condone this arrangement for a client. Unfortunately, many of them are led to believe that such an arrangement is perfectly acceptable when they hear presentations and read materials such as Sherby’s and others, declaring that where the trust protector is concerned, form will prevail over substance. The problem with that theory is that it has never worked before, and it won’t work now. In other words, a rose will still be a rose, no matter what we call it.