

The role of trust protectors unzipped

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What is a protector and is it a useful role?

The role of protectors is still a grey area in many senses. Are they quasi-trustees or are they just a safety valve? Do they have active or only negative powers? What is the tax treatment of trusts with onshore protectors? Here we will examine briefly these questions with the conclusion that protectors should have limited powers only, in part due to taxation concerns where protectors are 'onshore' and protectors must be mindful always about where and how they exert control of trusts. We believe that protectors should never be a settlor, beneficiary and protector of a trust however they are indispensable parts of modern trusts in an ever changing, challenging and still fraudulent world. Protectors must guard beneficiaries from rogue trustees, overcharging or underperforming investment managers, frivolous beneficiaries, as well as changes in trust laws or their taxation.

So what is a protector?

The protector of a trust is not a trustee; in contrast a protector is someone who has some control over how trustees exercise their powers. Protectors are meant to ensure trustees are managing trusts and their assets in accordance with their mandate, ensuring that all relevant factors are taken into account.

The protector is usually appointed by the settlor and a protector's powers, be they negative (i.e. power to block trustee decisions only such as power to block distributions to beneficiaries or trust investments) or positive (i.e. power to make fundamental changes to the trust such as adding or removing beneficiaries or trustees), are stipulated in the trust document.

There is no statutory definition of the word 'Protector' in the laws of Barbados, New Zealand, the British Virgin Islands (BVI), Cayman, Jersey or Guernsey. The same position has sometimes been described as an 'adviser', 'appointed person', 'appointor', 'supervisor' or 'guardian'. Nevertheless, 'protector' is the most common title.

Whichever term is chosen, the protector will be named in the trust document. Often this is by reference to a particular individual or company (for example, 'Mrs X or 'Protector 1 Limited'), however it is also possible to define the position by reference to a defined position that may be held by different people (for example, 'the person appointed under clause X' of the trust document).

There is no legal requirement to appoint a protector when creating a trust, and indeed many trusts do not have protectors. We feel it is highly advisable. It is usually a decision of the settlor alone. Where the trust document does provide for a protector, however, the purpose of the role is to vet and oversee the trust and its workings.

There may be personal reasons for appointing a protector (e.g. close connection with a family business which is specialised and entwined in various ways with the trust) or as a safeguard (there are sadly many unscrupulous

trustees and trust investment advisers who make decisions seemingly in order to make secret profits rather than to benefit the trust, its aims and beneficiaries). Leaving aside mistrust, trust treatment, especially in relation to taxes, is evolving globally and a sound jurisdiction (or trust company) now may not be so in 10 or 20 years' time.

Who should be a protector?

The choice of who to appoint as protector is open however as you may have surmised, a professional person with deep knowledge of trusts and taxes and who has the best wishes of the beneficiaries and settlor at heart is ideal. The settlor can be a protector however if so, the settlor should never also be a beneficiary in our view, lest the trust might be deemed a sham as the trust assets in such cases could not be deemed to be disposed of genuinely. Beneficiaries can be protectors although this may lead to conflict and conflict of interest with other beneficiaries. A trusted professional friend or relative often adopt the position. In some cases the settlor might prefer to appoint a professional protector like Bayern Legal which would perhaps be more likely to act impartially in the event of a family dispute, whether among the beneficiaries or between the trustee and a beneficiary.

The only likely restriction is that the protector would not normally also be a trustee, as this would defeat the purpose of having a separate role, but there is no legal restriction on this.

What powers might a protector have?

Protectors are invariably fiduciaries and so owe a duty of care to the beneficiaries. Whenever the protector's involvement is required, it must consider what course of action is in the beneficiaries' best interests, and the courts can remove any protector who is not in line!

Although the courts have not yet fully identified when a protector can bring legal proceedings, it is accepted that he has standing to do so in any matter relating to the exercise of his powers under the trust or in any matter where his powers are relevant.

Examples of positive powers include the appointment or removal of trustees, advising the trustee to act in a certain way, adding or removing beneficiaries and transferring the trust to a different jurisdiction. Negative powers typically involve requiring the protector's consent before the trustee can do something, for example, transferring assets to beneficiaries, decisions relating to any substantial trust investment and amending the class of beneficiaries or terms of the trust generally. In some cases, trustees are merely bound just to keep the protector informed of any such material actions or changes.

Protector's roles in court cases have been found to mean it must ensure the trustees have due regard to the settlor's wishes not to ensure that the settlor's wishes are always carried out as an inalienable right. As life changes after the passing of a settlor, trustees are and must be flexible having regard to changes in relevant circumstances. This was underlined by the Jersey case of the Matter of the A Trust [2012] JRC 169a.

How we can help?

Protectors provide an invaluable role for any trust. Beneficiaries are often clueless about their rights, are often intentionally kept in the dark by trustees (and in a recent case affecting a friend, the trustees, main beneficiary and protector have all connived to diminish the remaining beneficiaries' rights!) and are loathe to spend money on lawyers who they may trust less than the trustees! Bayern Legal has 15 years' experience in offshore trusts and can be used as a regulated, experienced but impartial protector to families and their trusts.

The legal framework in which trusts (who sets up Panama trusts now?), investments (is it safe to have assets in the UK when Labour is threatening to nationalise private assets?) and beneficiaries (who move abroad and marry internationally so much more) exist is changing so rapidly, modern-day trusts need protectors to help trusts adapt when required. Protectors provide a much needed lever to rein in some of the sharks of the investment world and sadly, fiduciary world also.

Protectors also exist to give beneficiaries confidence that their trust is being managed correctly, that they are being listened to, not least when the settlor who understood the trust may have since passed on. Settlers should know that their protector will maintain that confidence and ensure the beneficiaries are benefitted by the trust and its goals.

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