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Trusts & Estates Law—Trust Protectors—Increasing Trust Flexibility and Security While Decreasing Uncertainty of Liabilities for Doing So: How Amending Ark. Code Ann. § 28-73-808 to Better Conform with the Modern Trend of Clarifying Trust Protection Could Effectively End the Fiduciary Guessing Game in Arkansas

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TRUSTS & ESTATES LAW—TRUST PROTECTORS—INCREASING TRUST FLEXIBILITY AND SECURITY WHILE DECREASING UNCERTAINTY OF LIABILITIES FOR DOING SO: HOW AMENDING ARK. CODE ANN. § 28-73-808 TO BETTER CONFORM WITH THE MODERN TREND OF CLARIFYING TRUST PROTECTION COULD EFFECTIVELY END THE FIDUCIARY GUESSING GAME IN ARKANSAS

I. INTRODUCTION

The year is 2040.[1] Sadly, death found you some twenty years ago. You lived a remarkable life though, blessed with a long and rewarding career in art. As it turns out, your paintings have noticeably increased in value over the past few years. So much so that the University you left them to in a trust agreement recently made quite the profit when it sold them to a modern art museum in a neighboring state. The University had fallen into financial hardship. But with your thoughtful contribution of more than $60 million in now-liquidated artwork and the blessing of a court, it will worry no more.

Before you died, you executed a testamentary trust that conveyed your gallery to the University to maintain as trustee for the benefit of the public. You probably did not recognize it then, but your attorney seemingly failed to get your full input before drafting the trust. The limitations he placed on the use of your property were astounding. He even went so far as to state that the University could only display your gallery at the University to educate the public. Even more startling, he stated that the University could never sell the gallery for profit. Indeed, the Attorney General nearly prevented the University from selling your gallery, claiming that it was obligated to keep the pieces on display for the public per the terms of your trust.

The Attorney General alleged that the University breached its fiduciary duty as trustee to maintain your gallery for the benefit of its beneficiaries. He argued the University must continue following the directions you left for it in your trust as they reflected your "intent" and because there were more sensible ways for the University to increase revenue. Specifically, he thought you *deliberately* included the provision that restricted the University from selling the paintings for profit. Luckily, the court resolved his misunderstanding.

The court knew of your giving spirit; unlike the Attorney General, it was prepared to develop some theories of its own as to why your trust in-

1. The following facts are similar to those in *Georgia O'Keeffe Foundation (Museum) v. Fisk University*, 312 S.W.3d 1 (Tenn. Ct. App. 2009) and *In re Fisk University*, 392 S.W.3d 582 (Tenn. Ct. App. 2011).

cluded such unrealistic constraints. As you have probably figured out by now, yes, the court *did* decipher your intent to restrict the University from selling your gallery, *except* where the terms of the sale appear reasonable and fair to both parties. At first, the University tried to sell the entire gallery. Nevertheless, the University and Museum reached a compromise for a partial sale so that the University could still display some of the paintings, some of the time. Rest at ease—the court found this sufficient for the transfer of your property.[2]

Solutions for unsuccessful efforts to enforce trust conditions and adhere to the intent of the unavailable settlor, as in the above factual scenario, are the subject of this note. For this deceased settlor, any efforts were too little and came too late. Unlike her, however, trust settlors today can gain the benefit of a sophisticated drafting technique that estate planners across the nation are presently utilizing: trust protection.

"The emergence of trust protectors is one of the most significant recent developments in American trust law."[3] A trust protector is a third-party trust participant who, in the simplest of terms, plays referee between the trustee and beneficiaries of a trust.[4] Most often, protectors have the authority, not only to arbitrate disputes between trust parties, but also to modify or amend a trust's terms or to direct the actions of a trustee.[5] The appointment of a protector lessens the influence a court can have over trust dispositions—like the "rationalized" deviation from trust language as seen above—by vesting authority in a trusted individual to function as a "representative" of the settlor, charged with enforcing her instructions.

The trust protector played a significant role in American trust law in the last decade.[6] The protector's infancy is misleading as its office can add

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2. For a look at using trust protectors in charitable trusts specifically, see Richard C. Ausness, *The Role of Trust Protectors in American Trust Law*, 45 REAL PROP. TR. & EST. L.J. 319, 348–49 (2010). *See also* JEFFREY N. PENNELL & ALAN NEWMAN, ESTATE AND TRUST PLANNING 276–79 (2005).

3. Ausness, *supra* note 2, at 321; Gregory S. Alexander, *Trust Protectors: Who Will Watch The Watchmen?*, 27 CARDOZO L. REV. 2807, 2807 (2006).

4. *See* Philip J. Ruce, *The Trustee and the Trust Protector: A Question of Fiduciary Power. Should a Trust Protector be Held to a Fiduciary Standard?*, 59 DRAKE L. REV. 67, 72 (2010). Based on the specific needs of the parties involved, settlors typically name either personal protectors (e.g., family members, friends, coworkers), or professional/corporate protectors (e.g., accountants, financial advisors, banking institutions), individually or by committee. *Id.* at 71–72. In states without detailed trust-protection legislation, many attorneys simply refer to trust protectors as "independent" or "special" trustees, and generally define them according to Internal Revenue Code (IRC) section 672. They use them to achieve the same purposes, though. This is sometimes the case with trust advisors as well, but to a much lesser extent.

5. John P.C. Duncan & Anita M. Sarafa, *Achieve the Promise—and Limit the Risk—of Multi-Participant Trusts*, 36 AM. C. TR. & EST. COUNS. L.J. 769, 782 (2011).

6. Ausness, *supra* note 2, at 324.

far-reaching versatility to trust management.[7] Some commentators predict the title "trust protector" will be mere commonplace by the end of the decade.[8]

The trust protector's significance to modern trust law best presents itself after first examining the office in its origins offshore.[9] After a discussion of the trust protector's migration to the states, this note examines the varying purposes domestic settlors now have for using protectors,[10] concluding with a description of the recent, legislative trend of enacting protection legislation.[11] Next, the trust protector's role in modern trust law is discussed in relation to the broad goal of trust flexibility.[12] The note references actual Arkansas proceedings to illustrate how those functions add the flexibility and security sought by contemporary settlors.[13]

Unfortunately, however, those presently making use of trust protectors do so virtually unaided by precedent. Unless operating in a jurisdiction with guiding legislation, trust protectors risk incurring potential liabilities with incertitude. By posing a series of hypothetical situations, this note will closely examine the potential liabilities that Arkansas attorneys and trust officers may incur if currently using trust protectors.[14] To end, this note will propose a new piece of legislation for the Arkansas Legislature's consideration that will remedy many of the liability concerns shared by estate planners and trust settlors, while, at the same time, allowing property owners to gain the benefit that this unique trust party has to offer.[15]

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7. *See generally* David M. Grant & Jeremy K. Cooper, *Nevada Laws Provide Top Trust Situs*, NEV. LAW, May 2010, at 22 (explaining that statutory provisions recognizing trust protectors allows for flexibility in the management of unforeseen circumstances); Stewart E. Sterk, *Trust Protectors, Agency Costs, and Fiduciary Duty*, 27 CARDOZO L. REV. 2761, 2763 (2006) (explaining that a trust protector has the ability to mitigate circumstances that could not possibly be foreseen, thus making up for the lack of foresight by the settler).

8. Brian K. Jones & Jerry D. Jones, *Expect the Unexpected*, TRUSTS & ESTATES MAGAZINE, Feb. 1, 2012, at 14, 14–15, *available at* http://wealthmanagement.com/estate-planning/expect-unexpected.

9. *See infra* Part II.A.

10. *See infra* Part II.B.

11. *See infra* Part II.D.

12. *See infra* Part III.

13. *See infra* Part IV.

14. *See infra* Part V.

15. *See infra* Part VI; *see also* Grant & Cooper, *supra* note 7 ("Having a statutory provision recognizing trust protectors and establishing roles in which they may act allows the settlors of a trust to have the flexibility necessary to ensure the trust's proper administration and deal with unforeseen circumstances.").

II. BACKGROUND

A. Origins Abroad

During the 1990s, nearly every state forbade self-settled spendthrift trusts.[16] To gain insulation from creditors and tax liabilities, property owners began settling their trusts in foreign jurisdictions. The office of trust protector was established as a means of indirectly maintaining control over their trusts from afar.[17]

At the settlor's direction, trust protectors were, among other things, able to amend trust language or remove noncompliant trustees—despite the settlor's absence and without judicial affirmation.[18] At least to some degree, the protector became an extension of the settlor herself, standing in her shoes during periods of unavailability.[19]

B. Recognition by Domestic Settlors

Soon thereafter, several states enacted domestic-asset-protection legislation that affords similar insulation to domestic settlors by permitting spendthrift protection over self-settled trusts.[20] By vesting all interests in the trust—legal or equitable, present or contingent—with other parties, settlors remain vested with no interests subject to garnishment.[21] Yet, they can still maintain control and use of the property much like those with offshore asset protection trusts by employing protectors to carry out their wishes.[22]

Along with asset protection, property owners are now employing protectors as checks on trustees of support and special-needs trusts by enhancing discretionary oversight of interactions between beneficiaries and trus-

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16. Ausness, *supra* note 2, at 321–24.

17. Alexander, *supra* note 3.

18. *See id.*; John E. Sullivan III, *Gutting the Rule Against Self-Settled Trusts: How the New Delaware Trust Law Competes with Offshore Trusts*, 23 DEL. J. CORP. L. 423, 500–01 (1998).

19. Sullivan, supra note 18, at 500–01.

20. *E.g.*, ALASKA STAT. ANN. § 34.40.110 (West Supp. 2010); ALASKA STAT. § 34.40.110 (1997).

21. Christopher M. Reimer, *The Undiscovered Country: Wyoming's Emergence as a Leading Trust Situs Jurisdiction*, 11 WYO. L. REV. 165, 180, 193–95 (2011).

22. Thomas O. Wells, *Domestic Asset Protection Trusts—A Viable Estate and Wealth Preservation Alternative*, FLA. B.J., May 2003, at 44. For a closer look at using protectors in spendthrift trusts specifically, see PENNELL & NEWMAN, *supra* note 2, at 257–69. For a closer look at using protectors in asset protection trusts specifically, see William A. Ensing, *Using a Trust Protector in Asset Protection Planning*, *in* 1 ASSET PROTECTION STRATEGIES, PLANNING WITH DOMESTIC AND OFFSHORE ENTITIES 87 (Alexander A. Bove, Jr. ed., 2002).

tees.[23] The need for oversight on a more personal level can be particularly great where, as here, purposes for establishing the trust include providing for ill, young, irresponsible, or mentally-handicapped loved ones.[24]

The most recent trend in American trust law for the use of protectors is their engagement in long-term trusts.[25] Particularly in jurisdictions that have renounced or modified the common-law Rule Against Perpetuities,[26] trust settlors are now retaining protectors to guide and oversee the operation of their dynasty trusts.[27] In some jurisdictions, trusts have the potential to remain operative for longer than was once seen.[28] In this context, protectors can function as mechanisms for achieving long-term security over family wealth by reacting to future changes in circumstances as the settlor would have if she were currently able.[29]

Also, in response to unpredictable federal wealth-transfer tax regulation, trust settlors are now using protectors to alter beneficial interests, amend trust language, transfer assets between trusts, and resettle trusts in low-cost jurisdictions.[30] Over the past decade, the applicability of federal gift and estate taxes to trusts has been speculative at best.[31] With the pro-

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23. *See generally* Charles D. Fox IV, *How "Revocable" is "Irrevocable"? Obtaining Flexibility in Irrevocable Trusts*, 33 OHIO N.U. L. REV. 943, 965–66 (2007).

24. Ausness, *supra* note 2, at 329–31, 345–46 (noting also that trustees, and corporate trustees in particular, may be more concerned with asset protection and less knowledgeable about the specific needs of the individual beneficiaries). For a closer look at using protectors in support trusts specifically, *see id.* at 343–46.

25. *See, e.g.*, Ruce, *supra* note 4, at 69–73; ALEXANDER A. BOVE, JR., *The Trust Protector: Friend or Fiduciary?*, *in* 2 ASSET PROTECTION STRATEGIES, WEALTH PRESERVATION PLANNING WITH DOMESTIC AND OFFSHORE ENTITIES 207, 234 (Alexander A. Bove, Jr. ed., 2005).

26. "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest." JOHN C. GRAY, THE RULE AGAINST PERPETUITIES 191 (Little, Brown & Co., 4th ed. 1942) (1886). *But see, e.g.*, ALASKA STAT. § 34.27.051 (2000) (1,000 years); N.H. REV. STAT. ANN. § 564:24 (2003) (perpetual); UNIF. STATUTORY RULE AGAINST PERPETUITIES § 1, 8B U.L.A. 223 (2001) (90 years plus common-law approach). To date, over half of the states have adopted the statutory rule (USRAP), including Arkansas. ARK. CODE ANN. §§ 18-3-101 to -109 (Repl. 2012). For more on the statutory rule, see generally Lynn Foster, *Fifty-One Flowers: Post-Perpetuities War Law and Arkansas's Adoption of USRAP*, 29 U. ARK. LITTLE ROCK L. REV. 411 (2007).

27. Duncan & Sarafa, *supra* note 5, at 777–78.

28. Fox, *supra* note 23, at 949–51.

29. *Id.*; *see* Peter B. Tiernan, *Evaluate and Draft Helpful Trust Protector Provisions*, 38 ESTPLN 24, 24, 35 (2011). For more on perpetual and dynasty trusts generally, see generally Jesse Dukeminier & James E. Krier, *The Rise of the Perpetual Trust*, 50 UCLA L. REV. 1303 (2003).

30. *See* Ruce, *supra* note 4, at 70–72; Ausness, *supra* note 2, at 333.

31. *See* John A. Miller & Jeffrey A. Maine, *The Fundamentals of Wealth Transfer Tax Planning: 2011 and Beyond*, 47 IDAHO L. REV. 385, 386–89 (2011); I.R.C. §§ 2601–2663 (generation skipping transfer (GST) tax), 2101–2209 (federal estate taxes), 2501–2524 (federal gift taxes) (2012).

spect of tax reform in the next couple of years, property owners and estate planners face numerous tax-planning difficulties in the near future.[32] Increasing trust flexibility at the outset is perhaps the only feasible way of dealing with such unpredictability.[33]

C. Recognition by Legal Commentators

Commentators have generally taken two alternate views of the office of trust protector. The first view envisions the trust protector as virtually analogous to a trust advisor.[34] The second, which is the majority view, distinguishes a trust protector from a trust advisor based on their respective powers.[35]

Proponents of the former view define a trust advisor as a trust party "who has power to control a trustee in the exercise of some or all of his powers."[36] However, powers to control a trustee can include veto powers, removal powers, appointment powers, modification powers, adjudication powers, and termination powers—all of which have recently been associated with protectors, and none of which are historically associated with advisors.[37] Moreover, these commentators rely on a law-review article entitled *Trust Advisers*, published in 1965, predating the presence of protectors in American trust law.[38] Hence, the label "protector" appears nowhere in that

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32. Miller & Maine, *supra* note 31, at 386–89.

33. Jones & Jones, *supra* note 8, at 16. Before granting broad, unrestrained powers, one should consider the potential adverse tax consequences. The tax consequences of granting powers to protectors primarily depends on the classification of the powers given as either personal or fiduciary, and whether the protector can use them in his favor or for his benefit. Alexander A. Bove, Jr., *The Trust Protector: Trust(y) Watchdog or Expensive Exotic Pet?* 30 EST. PLAN. 390, 395 (2003); *see infra* Part V. A personal power that can be exercised for the benefit of its holder might constitute a general power of appointment, which in turn could signify ownership of the property for income and estate tax purposes. Bove, *supra*, at 395; *see infra* Part V. Bove further contends that, despite a lack of language so restricting the power, a power not exercisable in favor of the protector or for his benefit would not amount to a general power for which tax liability would ensue. Bove, *supra*, at 395. For a discussion of the potential tax benefits gained by establishing ninety-year dynasty trusts in USRAP states, see Jesse Dukeminier, *The Uniform Statutory Rule Against Perpetuities and the GST Tax: New Perils for Practitioners and New Opportunities*, 30 REAL PROP. PROB. & TR. J. 185, 207–10 (1995). For more on using protectors for tax purposes in GST tax trusts and Qualified Subchapter S trusts, see Ensing, *supra* note 22, at 95–96.

34. *E.g.*, Trent S. Kiziah & Lori J. Campbell, *Drafting to Effectuate Grantor's Retention Desires with Respect to Publicly Held Securities*, 46 REAL PROP. TR. & EST. L.J. 199 (2011).

35. *E.g.*, Duncan & Sarafa, *supra* note 5, at 781–83.

36. Kiziah & Campbell, *supra* note 34, at 298 n.186 (quoting Note, *Trust Advisers*, 78 HARV. L. REV. 1230, 1230 (1965)).

37. *E.g.*, Duncan & Sarafa, *supra* note 5, at 781–83; *see also* MARY F. RADFORD ET AL.,THE LAW OF TRUSTS AND TRUSTEES § 992 (3d ed. 2008).

38. *See* Note, *Trust Advisers*, 78 HARV. L. REV. 1230 (1965).

article, and was not used to distinguish an advisor's role from that of a protector's.[39]

Most commentators, on the other hand, note that an advisor's role is characteristically limited to making investment decisions, and often shares a close resemblance to that of a trustee's, whereas a protector's role is broader.[40] For instance, *The Law of Trusts and Trustees* outlines these inherent differences:

> Many of the same considerations applicable to a special trustee and trust protector apply to an advisor. In some ways, a trust protector is a combination between a special trustee and a trust advisor, performing in an advisory capacity in certain situations while also performing a specific function or responsibility.[41]

Furthermore, the drafters of the Uniform Trust Code (UTC) have distinguished the two roles according to their respective powers:

> "Advisers" have long been used for certain trustee functions, such as the power to direct investments or manage a closely-held business. "Trust protector," a term largely associated with offshore trust practice, is more recent and usually connotes the grant of greater powers, sometimes including the power to amend or terminate the trust. Subsection (c) ratifies the recent trend to grant third persons such broader powers.[42]

Finally, the *Restatement Third of Trusts* corroborates both the recent trend of including trust protectors in domestic trusts and their usage in broader capacities than trust advisors.[43]

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39. *See id.* For a discussion of the typical and atypical trust participants and the roles they play in trust administration, see Duncan & Sarafa, *supra* note 5, at 779–83.

40. *E.g.*, Ruce, *supra* note 4, at 74; Duncan & Sarafa, *supra* note 5, at 781–83. *See also* RAYMOND C. O'BRIEN & MICHAEL T. FLANNERY, DECEDENTS' ESTATES: CASES AND MATERIALS 662 (2nd ed. 2011) ("The power to remove a trustee may be retained by the settlor, given to a beneficiary under defined circumstances, or given to a new development–a trust protector.") (internal citations omitted); Comment, Molly S. Magee, *Who Is the Client? Who Has the Privilege?: The Attorney Client Privilege in Trust Relationships in Arkansas*, 65 ARK. L. REV. 637, 637 (2012) ("The trustee is presumably retained because of expertise in a particular area . . . .").

41. GEORGE GLEASON BOGERT ET AL., THE LAW OF TRUSTS AND TRUSTEES § 122 (3d ed. 2008).

42. UNIF. TRUST CODE § 808 cmt. (Supp. 2006) (citations omitted).

43. RESTATEMENT (THIRD) OF TRUSTS § 64 (2003); *id.* § 75 (2007).

D. Consensus Among the States

1. *In the Legislatures*

The respective approaches to trust protection taken among the states vary to some extent.[44] Some states have made substantial revisions to their trust codes, while others, such as Arkansas, have found themselves straddling the fence.

States in the latter group recognize trust protectors only by implication through adoption of the UTC.[45] Section 808 of the UTC gives settlors the option of appointing a trust protector to direct the modification or termination of a trust.[46] The statute goes on to state that trust protectors are fiduciaries, but only *presumptively* so.[47] The trust instrument will still ultimately govern the existence and extent of a protector's fiduciary and nonfiduciary duties. If the instrument fails to provide for such, however, the trust protector *might* be liable under the UTC for actions not taken in good faith, for the sole purposes of the trust or best interests of its beneficiaries.[48]

For these reasons, UTC section 808 has acquired a well-known reputation for ineffectuality as it relates to trust protection. Many commentators assert that its drafters opened the door to impending liabilities for inadequately addressing the standard of care applicable to trust protectors by default.[49] Further, many commentators disfavor the section because it neglects to specify the various powers a protector can exercise, and overlooks the implications of granting such powers.[50] Mentioning protectors by name only

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44. *See generally* Duncan & Sarafa, *supra* note 5, at 819–38. (distinguishing the respective statutes).

45. *See, e.g.*, ALA. CODE § 19-3B-808 (2006); ARK. CODE ANN. § 28-73-808 (Repl. 2012). The Arkansas Trust Code (ATC) nearly mirrors the UTC in its entirety, and applies to all trusts created before, on, or after September 1, 2005. ARK. CODE ANN. §§ 28-73-101 to -1106 (Repl. 2012). With eleven exceptions, the terms of a trust still prevail over the default provisions enumerated in the code. *Id*. § 28-73-105 (Supp. 2009). For a comprehensive overview of the ATC, see Lynn Foster, *The Arkansas Trust Code: Good Law for Arkansas*, 27 U. ARK. LITTLE ROCK L. REV. 191 (2005).

46. UNIF. TRUST CODE § 808(c) (2010).

47. *Id.* § 808(d).

48. The statute provides no further clarification of the trust protector's powers or duties and mentions protectors by name only in commentary. *See* McLean v. Davis, 283 S.W.3d 786, 789 n.3 (Mo. Ct. App. 2009) (addressing this discrepancy).

49. *E.g.*, Sterk, *supra* note 7, at 2770 (asserting that fiduciary obligations of protectors remain somewhat unclear even in states that have already enacted detailed legislation).

50. *E.g.*, Ausness, *supra* note 2, at 349–54 (noting that the UTC mentions only *one* type of power protectors typically exercise); *see infra* Part V.

in commentary has also fostered criticism of UTC section 808.[51] Professor Ausness has urged the uniform drafting committee to readdress the section by enacting a separate black-letter section that expands upon the use of trust protectors.[52]

To resolve these discrepancies, some UTC states have since enacted independent trust-protection legislation.[53] The states most comprehensively recognizing the office of trust protector have enacted statutory provisions to aid practitioners with respect to the powers, duties, and liabilities attributable to a protector.[54] For instance, most states in this group permit protectors to amend trust terms or to move or terminate a trust in response to unforeseeable changes in circumstances, such as new tax regulations or perpetuity laws, without petitioning a court.[55] These states also provide that protectors can remove, replace, and appoint trustees.[56] In some, a protector, when warranted by the circumstances, can modify powers of appointment.[57] Most importantly, a majority of these states explicitly define trust protectors as fiduciaries or nonfiduciaries by default; all observe the common notion that trust language overrides statutory language concerning trust protectors, though.[58]

2. *In the Courts*

As an issue of first impression, the Missouri Court of Appeals offered the only significant appellate discussion of trust protectors by a state court to

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51. *E.g.*, Edward C. Halbach, Jr., *Uniform Acts, Restatements, and Trends in American Trust Law at Century's End*, 88 CALIF. L. REV. 1877, 1916 (2000) (noting various challenges that drafters face in light of the widespread uncertainty with the use of protectors).

52. Ausness, *supra* note 2, at 349.

53. These states include Arizona, Michigan, New Hampshire, Tennessee, Vermont, and Wyoming. For each state's respective legislation, see statutes cited *infra* note 54.

54. *See* ALASKA STAT. § 13.36.370 (Repl. 2003); ARIZ. REV. STAT. ANN. § 14-10818 (2008) (amended 2009); DEL. CODE ANN. tit. 12, § 3313 (1986 & Supp. 2011); HAW. REV STAT. §§ 554G-4, -4.5 (Supp. 2011); IDAHO CODE ANN. § 15-7-501 (1999 & Supp. 2007); MICH. COMP. LAWS ANN. §§ 700-7103, -7809 (1998 & Supp. 2010); NEV. REV. STAT. ANN. §§ 163.5547, -.5549, -.5553, -.5555 (LEXIS Supp. 2009); N.H. REV. STAT. ANN §§ 564B:12-1201 to -1206 (2006 & Supp. 2008); R.I. GEN. LAWS § 18-9.2-2 (1999 & Supp. 2007); S.D. CODIFIED LAWS §§ 55-1B-1 (1997 & amended 2011), -6 (1997 & Supp. 2009); TENN. CODE ANN. § 35-16-108 (Supp. 2007), 35-15-303(7) (2004 & Supp. 2010); UTAH CODE ANN. § 75-7-906 (West 2004); VT. STAT. ANN. tit. 14A, §§ 1101 to 1105 (Supp. 2009); WYO. STAT. ANN. § 4-10-710 (Repl. 2003 & Supp. 2007).

55. *E.g.*, NEV. REV. STAT. ANN. § 163.5553(1)(a)–(b), (h) (Lexis-Nexis Supp. 2009).

56. *E.g.*, *id.* § 163.5553(1)(e), (i).

57. *E.g.*, *id.* § 163.5553(1)(d). *See also* Dukeminier & Krier, *supra* note 29, at 1331–35 (discussing the modification of powers of appointment).

58. *Compare* MICH. COMP. LAWS § 700.7809(1)–(2), (8) (2010) (fiduciary presumption, subject to the terms of the trust), *with* ALASKA STAT. § 13.36.370 (2013) (nonfiduciary presumption, subject to the terms of the trust).

date in *McLean v. Davis*.[59] Following the UTC,[60] the court had to determine what standard of care to apply to a protector where the trust read, "The Trust Protector's authority hereunder is conferred in a fiduciary capacity and shall be so exercised, but the Trust Protector shall not be liable for any action taken in good faith."[61]

The court began its analysis by noting that the protector was a fiduciary according to terms of trust.[62] It continued by discussing a variety of "reasonable" interpretations that it could draw in determining whether the instrument bound the protector to a particular standard of care.[63] Although the court interpreted the statute as formally establishing the office of trust protector, it could not conclude that the statute conferred legal duties on protectors in general.[64] Consequently, the court reasoned that the beneficiaries could recover for the alleged breach based only on the instrument's terms—under principles of either contract or tort law.[65]

The court inferred, however, that because the protector held qualified immunity only for a breach made in *good* faith, the settlor most likely contemplated liability for a breach made in *bad* faith, regardless of whether the protector acted as a fiduciary.[66] As such, it reversed the lower court's order that held him not liable and remanded the case for determination outside of the adopted statute's applicability.[67]

The ruling did not establish an ultimate finding of liability under the UTC—fiduciary or otherwise. However, the court did determine that the protector had a general duty to act in good faith while in his capacity as protector.[68]

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59. 283 S.W.3d 786 (Mo. Ct. App. 2009).
60. *See* MO. REV. STAT. §§ 456.1-101 to -1106 (2004).
61. *McLean*, 283 S.W.3d at 790.
62. *Id.* at 793.
63. *Id.* at 793–94.
64. *See id.* at 794–95 & n.3.
65. *Id.* at 793–94.
66. *Id.* at 795.
67. *McLean*, 283 S.W.3d. at 795.
68. *Id.* at 794. For further commentary on this case, see Ronald R. Volkmer, *Court Examines the Status and Legal Liability of a Trust Protector*, EST. PLAN., Nov. 2009, at 40 (2009). Aside from determinations of American law, the federal courts have at times addressed and given affirmation to protectors with regard to offshore trusts. *See, e.g.*, Shelden v. Trust Co. of Virgin Is., Ltd., 535 F. Supp. 667, 672 (D.P.R. 1982) (upholding the authority to remove trustee and appoint successor without petitioning the court where the instrument did not require such).

III. PRELIMINARY CONSIDERATIONS TO EMPLOYING A TRUST PROTECTOR

A. Typical Concerns of Soon-To-Be Settlors

The probability of improper management of trust assets exacerbates the longer the interests remain valid and the trust operational.[69] Whether the trust is revocable or irrevocable, for purposes of healthcare, charity, spendthrift, or tax planning, contemplation of trust flexibility, to some extent, inevitably fills the mind of each settlor before executing a trust.

The typical settlor would want to know how much control, if any, she could maintain over the trust. She would then consider the effect outside influences may have on the trust's longevity, and through preparation, how she could successfully offset the potential harms resulting. Next, she would ask what, exactly, might assure her that the administration of her trust will not deviate from her instructions, or if unavoidable, that the administration will deviate in a manner she would have desired. She would also be concerned with who, specifically, would be responsible for ensuring that her purpose in establishing the trust retains its full effect in the event she cannot act, or after her passing.

B. Familiar Problems and Unfamiliar Solutions: Introducing Settlors to the Trust Protector

1. *Probing for a Remedy*

A favorable judicial interpretation of a trust's language is frequently the most a settlor can hope for in terms of trust security. This can be a burdensome task for many judges and an unwanted departure from the plan for many settlors.[70] In her absence, the settlor's trust will remain operative; her trustee and beneficiaries will still have standing to petition a court for a modification of its terms.[71] Even assuming the trust parties faithfully abide by the instrument's instructions, factors outside the control of any party can equally work to frustrate the settlor's intent. And bound by traditional common-law principles governing trustees and beneficiaries, the existing parties may be incapable or unwilling to modify the terms of the trust.[72]

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69. The longer the duration of the trust, the more useful a protector can be. Ruce, *supra* note 4, at 69–70.

70. *See infra* Part IV.

71. Assuming the settlor is present, she may intervene only if she has reserved a right in herself sufficient to gain standing. First United Bank v. Phase II, 347 Ark. 879, 894, 69 S.W.3d 33, 43 (2002).

72. *See* Bove, *supra* note 33, at 396–97.

Now consider the addition of a trust party bound not by traditional function, but instead by the distinct grants given by the settlor. Protection legislation provides a few, base standards for the use of trust protectors. However, it still lacks significant resemblance to trust principles guiding other trust offices, as protectors share a distinctive bond with settlors.[73] A number of commentators have suggested it would be impracticable to govern trust protectors with traditional trust-law concepts.[74] Hence, if the trust instrument unequivocally reflects what the protector is and is not authorized to do, a creative estate planner can formulate many ways to heighten security and flexibility in trusts by using a trust protector.[75]

2. *Assessing the Costs*

Whether the use of a trust protector increases or decreases the average cost of operating a trust remains unclear.[76] Some commentators suggest the benefits achieved by a protector may not outweigh the agency costs needed for their hire, which might leave some settlors disinterested.[77] Causes cited for the appreciation of trust expenses include increased communication among trust parties, increased actions taken on their behalves, and increased compensation sometimes needed to employ protectors.[78]

The other view is that, because protectors typically act intermittently, they can negate financial waste of trust assets over time without imposing unnecessary expenses on the corpus. This view acknowledges a protector's ability to authorize, veto, or prevent certain actions taken by trustees and beneficiaries.[79]

For example, vetoing a trustee's discretionary conveyance of a power of appointment to a less-than-competent donee would safeguard trust assets, and incentivize the trustee to strive for future sustentation of the assets.[80]

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73. *See infra* Part V.

74. *E.g.*, Sterk, *supra* note 7, at 2762–63. *See infra* Part V.

75. *See* Duncan & Sarafa, *supra* note 5, at 783; Bove, *supra* note 33, at 390 ("[I]t is this nascent super flexibility, which seems to allow us to deal with almost every conceivable future circumstance (including the excusing of shortcomings in drafting), which makes this position of protector so increasingly popular."); *see also infra* Part IV.

76. Alexander, *supra* note 3, at 2807–08.

77. *E.g.*, Sterk, *supra* note 7. The decision to either use or not use trust protectors is an optional one that many have embraced and, of course, some have not. This proposal will not *force* settlors to *do* anything, though. Only the settlor and her estate planner can determine if the use of a protector would ultimately best suit her needs and those of her beneficiaries.

78. *See id.* at 2774–79.

79. *E.g.*, Ausness, *supra* note 2.

80. *See id.* at 331; *see also* Sterk, *supra* note 7, at 2768 (noting that litigation costs can be avoided simply by requiring a trustee to gain the approval or consent of a protector before taking certain, specified actions). This category of donees may include, for example, irre-

Also, the exercise of administrative authority, such as removing a trustee for fiduciary breach without engaging a lawsuit, can save the litigation expenses that would otherwise be necessary to do so.[81] Finally, tactical modifications to trust procedures, such as moving the situs jurisdiction[82] or amending the interests in the trust to gain financial advantages presented by changes in tax laws and regulations, can likewise add to a protector's potential to maintain and even increase trust principal.[83]

IV. ILLUSTRATION OF BENEFIT

A. *Alexander v. McEwen*[84]

Review of this case shows the need for nonjudicial alternatives to trust security and flexibility where interactions between trust participants impede the successful administration of the trust. The unfortunate results seen in this case are attributable to both fiduciary misconduct and judicial inaction.[85]

1. *The Disposition*

Anne McEwen, before passing, established the Anne Stodder McEwen Trust, which provided in part for any remaining balance in her Individual Retirement Account (IRA) to be paid on her death to her son, Fred McEwen, and her daughter, Kelsey McEwen.[86] The trust directed a one-third share in the IRA balance to Fund E, "the Anne Stodder McEwen Trust for Frederick

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sponsible individuals, particularly elderly or young individuals, and individuals susceptible to undue influence.

81. Sterk, *supra* note 7, at 2773. Regardless of how the vacancy occurs, it will likely be more costly to the trust if a co-trustee or beneficiary has the authority to replace the trustee or appoint a successor. Ausness, *supra* note 2; *see* BOVE, *supra* note 25, at 212 (suggesting that beneficiaries lack objectivity and noting that the power to appoint successor trustees creates a taxable, beneficial interest); Foster, *supra* note 45, at 220 (noting the difficulties beneficiaries confront in agreeing on modifications of a trust, which would include appointing new trustees, particularly where there are many or contingent beneficiaries); Ensing, *supra* note 22, at 95–97 (discussing similar tax-related consequences on the estate of a settlor when she retains the right to appoint successor trustees).

82. "The location or position (of something) for legal purposes, as is lex situs, the law of the place where the thing in issue is situated." BLACK'S LAW DICTIONARY 1392 (7th ed. 1999).

83. In addition to the courts, the ATC gives trustees a limited ability to modify trust language to achieve a settlor's tax objectives. ARK. CODE ANN. §§ 28-73-416, -814 (Repl. 2012). However, trustees must first inform all beneficiaries, including qualified beneficiaries, and evade objection in order to make a valid transfer to a different jurisdiction. *Id.* § 28-73-108(d)–(e) (Repl. 2012).

84. 367 Ark. 241, 239 S.W.3d 519 (2006).

85. *See id.,* 239 S.W.3d at 519.

86. *Id.* at 243, 239 S.W.3d at 521.

John McEwen," and a two-thirds share to Fund F, for "Kelsey McEwen Alexander."[87] Some five years later, however, Ms. McEwen amended the trust by revoking both funds and establishing separate, independent trusts for her children under the same terms and titles.[88]

Kelsey acted as trustee for both trusts, and it appears she acted as sole trustee.[89] Fred suffered from a costly neuropathy condition that restricted him to the use of a wheelchair.[90] When Ms. McEwen passed, Kelsey petitioned the court, contending that Fred's interest in the account "predeceased" Ms. McEwen when her mother revoked the funds from the initial trust and resettled her IRA in a separate trust that was not directly payable to Fred.[91]

According to Kelsey, she remained the sole beneficiary of the IRA proceeds.[92] Fred contended that the separation had no bearing on his mother's intent to devise each sibling's IRA share in accordance with the initial trust.[93] He also filed a counterclaim requesting that Kelsey be removed and replaced as trustee.[94]

2. *The Court's Decision*

The circuit court rejected Kelsey's claim, agreeing instead with Fred's interpretation of the instruments.[95] More pertinent to this discussion, however, it denied Fred's request to remove Kelsey as trustee and awarded her $125,000 in legal fees.[96] Unsatisfied, Kelsey appealed the IRA designation to the Supreme Court of Arkansas, to which Fred responded by cross-appealing the remaining two issues.[97] In particular, he directed the court's attention to the following trust provision: "Any *corporate* trustee shall be entitled to reasonable fees commensurate with its duties and responsibilities . . . ."[98]

On appeal, Kelsey again found no support for her interpretation of the IRA designation.[99] The majority opinion deferred to the circuit judge's wide discretion in removing trustees, dismissing Fred's cross-appeal for failing to

87. *Id.* at 244–45, 239 S.W.3d at 525.
88. *Id.* at 243, 239 S.W.3d at 521.
89. *Id.*, 239 S.W.3d at 521.
90. *Alexander*, 367 Ark. at 248, 239 S.W.3d at 525 (Glaze, J., dissenting in part).
91. *Id.* at 245, 239 S.W.3d at 522–23. .
92. *Id.*, 239 S.W.3d at 522–23.
93. *Id.*, 239 S.W.3d at 521.
94. *Id.* at 247–48, 239 S.W.3d at 524.
95. *Id.* at 243, 239 S.W.3d at 521.
96. *Alexander*, 367 Ark. at 243, 247, 239 S.W.3d at 521, 524 .
97. *Id.* at 243, 239 S.W.3d at 521.
98. *Id.* at 248 n.1, 239 S.W.3d at 525 n.1 (Glaze, J., dissenting in part) (emphasis added).
99. *Id.* at 245–46, 239 S.W.3d at 522–24.

"develop his argument," though the argument was properly preserved for appeal.[100] The majority reached this conclusion despite Fred's contentions that "Kelsey is biased, that there is a hostile relationship between him and Kelsey," and that Kelsey refused to cooperate in "the division of personal property."[101] The record also reflected that Kelsey, while "acting as trustee, quit making Fred's necessary health care payments."[102]

As for Kelsey's legal fees, the court affirmed the authorizing order, but remanded the issue for further consideration as to what services Kelsey actually performed as trustee.[103]

> A trustee is entitled to reasonable compensation out of the trust estate for services as trustee, unless the terms of the trust provide otherwise or the trustee agrees to forgo compensation. Where a trust specifically states that a trustee is to serve without compensation, such a provision might be enforceable. No such provision is found in Anne's trust.[104]

3. *The End Results*

Regrettably, the majority chose to exercise judicial minimalism in dismissing Fred's cross-appeal to remove Kelsey as trustee. In fact, the majority itself stated that mutual hostility due to ill feelings could constitute grounds for removal.[105] Under the Arkansas Trust Code (ATC), a court may remove a trustee for, among other grounds, a "serious breach of trust," or, if "because of unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively, the court determines that removal of the trustee best serves the interests of the beneficiaries."[106]

Because the majority chose not to indicate how Fred failed to develop his argument on the bases of bias, fiduciary breach, mutual hostility, and unfitness, we can only speculate as to those claims. Writing for the dissent, Justice Glaze elaborated to this end, further questioning Kelsey's inappropriate hostility in refusing to share personal items and family memorabilia with Fred.[107] By the close of the legal dispute, Kelsey herself was the only party involved that never at least acknowledged her inappropriate behavior as trustee.[108] Yet, ironically, she still walked away in better condition than Fred, despite both courts rejecting her claim.

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100. *Id.*at 247–48, 239 S.W.3d at 524–25.
101. *Id.* at 247–48, 239 S.W.3d at 524.
102. *Alexander*, 367 Ark. at 248, 239 S.W.3d at 525 (Glaze, J., dissenting in part).
103. *Id.* at 247, 239 S.W.3d at 524.
104. *Id.* at 247, 239 S.W.3d at 524 (citations omitted).
105. *Id.* at 248, 239 S.W.3d at 524.
106. ARK. CODE ANN. § 28-73-706(b)(1), (3) (Repl. 2012).
107. *Alexander*, 367 Ark. at 249 n.2, 239 S.W.3d at 525 n.2 (Glaze, J., dissenting in part).
108. *Id.* at 243, 239 S.W.3d at 521.

No provision in the trust specifically stated that Kelsey was to serve as trustee without compensation—but this misses the point. The trust only specifically addressed *providing* compensation, not serving as trustee *without* compensation. As the dissent observed, "Anne's trust specifically awards fees *only* to a corporate trustee, not an individual trustee."[109]

Kelsey was an individual trustee—not a corporate trustee.[110] For this reason, the majority could have found that Kelsey was not entitled to fees because, irrespective of whether the trust specifically stated that she was to serve without compensation, it still *provided otherwise* for awarding all trustee fees from the corpus.[111] Nevertheless, because Ms. McEwen's amendment to the trust gave rise to a disputable ambiguity, Kelsey had adequate grounds to seek judicial interpretation of its terms and secured at least the right to recover up to $125,000 from Fred.[112]

4. *A Belated Resolution*

A protector with directive authority could have forced Kelsey to make Fred's medical payments as instructed by the trust instrument.[113] Further, Fred's neuropathic affliction left him at a gross vulnerability in that he was in dire need of the payments.[114] Coupled with Kelsey's reluctance to cooperate, his illness likely resulted in his practical inability to monitor her actions in administering the trust. To ensure that Fred remain well-informed of his rights as a beneficiary, a protector could have obligated Kelsey to account to Fred without requesting judicial intervention.[115]

Moreover, if Fred had already incurred damages because of Kelsey's inaction, a protector could have compensated him for his losses by adjusting

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109. *Id.* at 248, 239 S.W.3d at 525 (Glaze, J., dissenting in part).

110. *See id.*, 239 S.W.3d at 525.

111. *See* James v. Echols, 183 Ark. 826, 39 S.W.2d 290, 292 (1931) ("[T]he trustee accepts the trust and. . . he accepts the trust upon the conditions named in it and is entitled to no other or greater compensation than the will allows.").

112. For a look at using protectors in trusts with IRAs, see James L. Boring, *Protection of Inherited IRAs*, 36 AM. C. TR. & EST. COUNS. L.J. 577, 607–09 (2010).

113. *See* Sterk, *supra* note 7, at 2768–69.

114. *See Alexander*, 367 Ark. at 248, 239 S.W.3d at 525 (Glaze, J., dissenting in part).

115. According to Sterk, a protector "might be in a position to relieve the trust beneficiaries of the primary responsibility for monitoring the trustee," both protecting against concealment of information and foregoing the litigation costs of challenging a trustee in court. Sterk, *supra* note 7, at 2768; *see* ARK. CODE ANN. § 28-73-201 (2005). At the same time, a protector's discretionary authority to unilaterally remove the trustee from office for noncompliance would further incentivize the trustee to adhere to his or her primary duty to report to the beneficiary. *See id*. § 28-73-813 (2005). A settlor might require the trustee to account to the protector, or require the trustee to do so at the protector's request. For more on the difficulties beneficiaries face in enforcing trusts, see Ruce, *supra* note 4, at 95.

his interests in the trust.[116] Similarly, a protector could have gone around Kelsey and personally made the distributions when it became apparent that the siblings were at odds. As another option, the protector could have modified or amended the trust language in such a way to protect Fred against similar harm in the future.[117]

Alternatively, a protector with the authority to interpret trust language could have bypassed the need for litigation by settling the dispute at the request of one of the parties.[118] Not only would this have averted the litigation expenses, but it would have also more effectively honored Ms. McEwen's purposes for the trust by keeping discretionary authority over the instrument outside of the courts. The presiding justices did not know Ms. McEwen; further, there was little indication of what may have influenced her to separate the funds, or to use the term "corporate trustee" despite placing her daughter in office.

To the contrary, someone who knew Ms. McEwen personally might well have been able to answer such questions.[119] Like the court, a protector could have issued a legally valid ruling after examining all the evidence

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116. *See* Ausness, *supra* note 2, at 331. As an aside, co-trustees are usually required to act by consensus, whereas a protector can make determinations as a single unit. *See* ARK. CODE ANN. § 28-73-703(a) (Repl. 2012) (allowing majority action). This further enhances flexibility by lessening the impact of unnecessary correspondence and refusals to compromise over trust operations. *See* Sterk, *supra* note 7, at 2776; *see also* BOVE, *supra* note 25, at 212 (suggesting that the authority to change trust interests or trust beneficiaries is best held by an independent party—i.e., not a settlor, trustee, or beneficiary).

117. Settlors occasionally vest this authority with trustees. However, partly because of the competing interests between settlor and beneficiary, trustees often refrain from making such modifications despite even clear indications that the settlor would have desired the modification. Sterk, *supra* note 7, at 2767.

118. *See* Ausness, *supra* note 2, at 345. Courts typically give deference to a trustee's discretion in providing for beneficiaries and are generally reluctant to declare that a trustee should operate or should have operated differently. *See, e.g.*, Salem v. Lane Processing Trust, 72 Ark. App. 340, 344, 37 S.W.3d 664, 667 (2001). A private-party determination by a protector would increase objectivity and fairness at the outset. PENNELL & NEWMAN, *supra* note 2, at 253. Conversely, the potential for an abuse of discretion is greater where trustees are allowed to interpret trust language. *Id.* ("Thus seen, trustee discretion can be pretty close to a blank check, subject to little restraint or oversight."). *See also* ARK. CODE ANN. §§ 28-73-815 to -816 (Repl. 2012) (providing trustees with considerable discretion).

119. *See* Tiernan, *supra* note 29, at 25–26 (claiming that family members and friends are logical choices to serve as protector, based on a presumption of personal knowledge of the circumstances and parties involved). For a family member or friend reluctant to take on legal duties—whether fiduciary or not—a settlor might consider proposing a right of disclaimer. For instance, "X, as Trust Protector under this Agreement, shall have the exercisable right, in writing and delivered to the trustee, to at any time disclaim, renounce, suspend, or decrease any powers, duties, or discretion granted him herein."

before him; unlike the court, he could have followed his own discretion, including what Ms. McEwen told him.[120]

In all likelihood, a protector would have removed Kelsey from office.[121] Because she seemingly continued to frustrate her mother's intent by disregarding the terms of the trust, she had no business continuing to serve as trustee. In turn, a protector could have appointed a replacement trustee who, in the protector's judgment, Ms. McEwen would have so chosen to further the trust's purposes.[122]

B. *Bank of America, N.A. v. Brown*[123]

Review of *Bank of America, N.A. v. Brown* illustrates the need for a nonjudicial means of trust security and flexibility where, despite an unequivocal showing of intent, minor technicalities in or omissions from a trust instrument can thwart the settlor's purpose in establishing the trust.

1. *The Disposition*

On March 9, 1990, Roy Lyndell Sharpe properly executed both an inter vivos trust and a testamentary trust.[124] Under both instruments, Sharpe named the Worthen Bank and Trust Company ("Worthen") of Little Rock, Arkansas, as sole trustee.[125] The court found the following directions appearing in the testamentary trust to be equally applicable to the inter vivos trust:

> It is my intent that Worthen Bank and Trust Company, N.A., shall be the sole Trustee of this Trust, however, if because of any unforeseen event Worthen Bank and Trust Company, N.A., cannot administer this Trust from its Trust Department within the boundaries of the City of Little Rock, Arkansas, then my attorney, or in his absence any Court of compe-

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120. For Ms. McEwen, the employ of a professional protector might have also been desirable in light of Kelsey's fiduciary inexperience and the many conflicts of interest between her and her brother. While less knowledgeable of Ms. McEwen and her wishes, the employ of a professional (or corporate, institutional, etc.) protector can be particularly valuable where conflicts of interests exist. *See* Ausness, *supra* note 2, at 344. The circuit court suggested an independent corporate trustee divide the personal property. *Alexander*, 367 Ark. at 248, 239 S.W.3d at 524. However, even had Ms. McEwen appointed a corporate trustee in the first place, the trustee would still face the difficulties mentioned *supra* notes 80, 81, 115–18, whereas a corporate protector would be more favorable for the same reasons a personal protector would be. *See also infra* notes 146–48.

121. *See* Ausness, *supra* note 2, at 330. *See generally* ARK. CODE ANN. § 28-73-706 (Repl. 2012).

122. *See* Ausness, *supra* note 2, at 333–34.

123. 2011 Ark. 446, 2011 WL 5110201,.

124. *Id.* at 1–2, 2011 WL 5110201, at *1.

125. *Id.*, 2011 WL 5110201, at *1.

> tent jurisdiction, shall select the trust institution to continue to administer this Trust as Trustee.[126]

The trusts named Charles A. Brown as the attorney responsible for appointing successor trustees.[127] Through a series of mergers spanning from the early 1990s through 2009, Bank of America succeeded Worthen as trustee.[128] Bank of America sent Mr. Brown a notification stating that a team of its corporate trustees operating out of Dallas, Texas, would be taking over the administration of Sharpe's trusts.[129] Brown filed suit in Pulaski County Circuit Court to have Bank of America removed as trustee so that he could appoint a successor trustee within the boundaries of Little Rock, as instructed by Mr. Sharpe.[130]

2. *The Court's Decision*

The circuit court granted Brown's request and removed Bank of America from office.[131] On appeal, however, the Supreme Court of Arkansas reversed, holding that Brown lacked standing to bring the matter before the circuit court.[132] The court found that Brown lacked standing for two reasons: one related to the specific rights given to him by Sharpe and the other to his status under the trusts.[133]

According to the ATC, a settlor, cotrustee, or beneficiary of a trust may petition a court for the removal of a trustee from office.[134] Because Brown was none of these, but instead Sharpe's personal attorney, the court found that he lacked an actual "interest" in the trust that would give him standing to petition for Bank of America's removal.[135] The court stated, "[A] direction to employ a named lawyer as attorney for the trustee is ordinarily intended merely to promote efficient administration of the trust rather than to confer a benefit on the lawyer."[136]

Brown then asserted that the ATC should not apply as both trusts were created prior to its enactment.[137] Like the circuit court, the Supreme Court

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126. *Id.*, 2011 WL 5110201, at *2–3.
127. *Id.*, 2011 WL 5110201, at *2.
128. *Id.*, 2011 WL 5110201, at *2–3.
129. *Bank of Am.*, 2011 Ark. 446, at 2, 2011 WL 5110201, at *3.
130. *Id.*, 2011 WL 5110201, at *3.
131. *Id.*, 2011 WL 5110201, at *3.
132. *Id.* at 4, 2011 WL 5110201, at *6.
133. *Id.* at 2–3, 2011 WL 5110201, at *4–5.
134. ARK. CODE ANN. § 28-73-706 (Repl. 2012).
135. *Bank of Am.*, 2011 Ark. at 2, 2011 WL 5110201, at *4.
136. *Id.* at 2, 2011 WL 5110201, at *4 (quoting RESTATEMENT (THIRD) OF TRUSTS § 48 cmt. B, at 237 (2003)).
137. *Id.* at 3, 2011 WL 5110201, at *4–5(*citing* ARK. CODE ANN. § 28-73-105 (Repl. 2012), which provides the authority to remove trustees and appoint their successors).

agreed that both trusts authorized Brown to appoint successor trustees.[138] Even so, it reasoned, he lacked standing to enforce that authority because neither instrument provided a means of personally removing Worthen from office, irrespective of the ATC's applicability.[139]

3. *The End Results*

Under Sharpe's trusts, Brown had authority to appoint a successor trustee if Worthen either ceased serving as trustee altogether or ceased serving as trustee within the city of Little Rock.[140] Worthen ceased serving in both regards.[141] As the circuit court presumably did, the Supreme Court could have interpreted the trusts as implicitly acknowledging that Worthen's removal would be required in order for Brown to appoint a successor.

Yet, the lack of an expressly granted removal authority in the trusts created a situation where the court could justifiably deny Brown standing in accordance with ATC section 28-73-706. This author believes the court could have—and indeed, should have—deferred to the circuit court and held to the contrary.[142] However, more important to this analysis, Sharpe's purposes for the *ultimate* disposition of his property were not given effect.[143]

4. *A Belated Resolution*

Simple enough, a protector could have removed Bank of America from office when Worthen breached the agreement.[144] Next, the protector could have appointed a successor trustee capable of, and willing to, administer the

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138. *Id.* at 3, 2011 WL 5110201, at *5.

139. *Id.*, 2011 WL 5110201, at *5–6. *But cf.* United States v. Mount Vernon Mortg. Corp., 128 F. Supp. 629 (D.D.C. 1954) *aff'd sub nom.* Mount Vernon Mortgage Corp. v. United States, 236 F.2d 724 (D.C. Cir. 1956) (holding that co-trustees renounced their positions by transferring trust property against the terms of the trust, whereby the appointment of successor trustees was necessary).

140. *See Bank of Am.*, 2011 Ark. at 1, 2011 WL 5110201, at *2.

141. *See id.* at 2, 2011 WL 5110201, at *3.

142. *See In re* Smart's Trust, 181 N.Y.S.2d 647 (N.Y. Sup. Ct. 1958) (allowing the appointment of an out-of-state trustee *only* because the settlor had not specifically confined trust operations to the state of New York and the trust allowed the appointment of *any* successor trustee). *See generally* GEORGE GLEASON BOGERT ET AL., THE LAW OF TRUSTS AND TRUSTEES § 527 nn. 39–45 (discussing numerous cases that support the removal of trustees for general disobedience to trust terms).

143. The ruling seemed to sanction a trustee's ability to disregard the terms of a trust without proving it acted for the sole purposes of the trust and in the best interests of the beneficiaries. Here, any mention of Brown in either instrument was essentially inconsequential.

144. *See* O'BRIEN & FLANNERY, *supra* note 40, at 662.

trusts in Little Rock.[145] If the trusts could no longer serve Sharpe's purposes, the protector could have exercised a power of termination and distributed the assets in a manner that Sharpe would have.[146] Through these measures, no parties involved would be required to appear before a court.[147]

V. A FORECAST OF LEGAL UNCERTAINTY

The value of using trust protectors inevitably hinges on whether they are declared fiduciaries.[148] This determination is paramount because it signals the fiduciary obligations that give rise to enforceable interests.[149] When drafting a trust, a settlor can, and *always* should, designate whether her trust protector holds any powers in a fiduciary capacity. Even still, the existence of a fiduciary relationship is a question of law,[150] and one that remains unanswered with regard to trust protectors.[151]

A. Initial Implications Based on *Bank of America v. Brown*

1. *Questions Answered*

Let us say Mr. Sharpe had given the power to "Charles A. Brown, as my Trust Protector," rather than to "Charles A. Brown, as my Attorney," but still omitted removal authority and otherwise used the exact same language appearing in both instruments. The court would presumably consider the

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145. *See* BOVE, *supra* note 25, at 234. Protectors should have the ability to appoint their own successors as well, provided the successor is not within the meaning of a related or subordinate party to the grantor under I.R.C. § 672(c). A settlor could also restrict certain individuals from ever serving as a protector to the trust. In the event of an unexpected vacancy, trustees should be able, temporarily, to assume the protector's duties. In such a case, a successor protector could be appointed by the trustee with the consent of a majority of the beneficiaries.

146. *See* Ausness, *supra* note 2, at 331–32. In Arkansas, terminating a failing trust can be burdensome, troublesome, and in some instances unmanageable altogether. The requirements include, for example, gaining unanimous consent among beneficiaries and qualified beneficiaries, if any exist. *See* ARK. CODE ANN. §§ 28-73-110(a), -410 to -414 (Repl. 2012). *See also* Foster, *supra* note 45, at 220–27 (discussing various options for terminating a trust in Arkansas). As an aside, a settlor could always give her protector an elective power to change the situs jurisdiction of the trust.

147. Whether vacancy stems from removal or resignation, courts can potentially to take control over some or all of the trust's operations by default if the matter cannot be resolved without filing judicial petition. *See* ARK. CODE ANN. §§ 28-73-704(e), -705, -706 (Repl. 2012).

148. *See infra* Part V.C–E.

149. *See* Cole v. Laws, 349 Ark. 177, 185–86, 76 S.W.3d 878, 883 (2002).

150. Long v. Lampton, 324 Ark. 511, 520, 922 S.W.2d 692, 698 (1996).

151. *See infra* Part V.E.

"ordinary functions" assumed by trust protectors, as it did in *Bank of America* with attorneys, before granting or denying Brown standing.[152]

In doing so, it would discover that the most widely recognized uses for a trust protector are directing or modifying the actions of trustees, and removing, replacing, and appointing trustees.[153] As such, Sharpe's purpose in establishing the trusts would not likely fail simply due to the omission of a protector's generally expected power to remove trustees, and Bank of America would likely lose its suit against Brown seeking reinstatement.[154]

2. *Questions Not Answered*

If Sharpe *had* given Brown the authority to remove Worthen from office, the dispute would never have arisen. The result would probably be no different if the instrument labeled Brown as a trust protector instead of an attorney. But the issue is not so simple, and the answer does not resolve the ultimate issue. True, Brown would have standing to enforce the trusts; however, unanticipated problems would arise, none of which would allow the court to rely on current ATC provisions for a solution.[155]

B. The Fiduciary Relationship

To impose a legal duty, one must owe a duty to another.[156] A fiduciary relationship generally exists where one individual has a duty, expressly or impliedly, to subordinate himself and his actions to serving the best interests

152. *See Bank of Am., N.A. v. Brown*, 2011 Ark. 446, at 2, 2011 WL 5110201, at *5.

153. *See* Ruce, *supra* note 4, at 73–74.

154. If a settlor wishes to limit the protector to appointing, as opposed to removing and replacing, trustees, consider qualifying the extent of the protector's authority to vacancies. Of course, the protector's discretion to remove and replace trustees can be refined to any standard: "X, as Trust Protector, shall have the power to appoint as a successor Trustee or Protector only an individual (or institution) meeting all qualifications for the respective office to be filled as set forth in this Agreement."

155. *See infra* Part V.B. Indeed, "[W]e as legal advisers and drafters must not be vague about it or ignorant of the ramifications of the [trust protector] position, as that is often what has proved to be the real source of the problems." BOVE, *supra* note 25, at 234.

156. Long v. Lampton, 324 Ark. 511, 520, 922 S.W.2d 692, 698 (1996).

of another, which must precede a finding of fiduciary breach.[157] The party claiming the relationship holds the burden of proving its existence.[158]

Once a fiduciary relationship is established, a party can prove a fiduciary breach by showing a "betrayal of a trust and benefit [of a] dominant party at the expense of [a party subject to] his influence."[159] The breaching party is liable "to the other for harm resulting from a breach of the duty imposed [on him] by the relationship."[160]

That duty only arises where the subordinate party contemplated the action or inaction as being within the scope of the fiduciary relationship.[161] Laws governing fiduciary relationships are related to principal-agent relationships.[162] Based on this undertaking, the agent owes a duty to the principal to conform to a standard of care greater than ordinary contract law would impose on him,[163] and not all agreements between individuals give rise to fiduciary obligations simply because they appear contractual in nature.[164] The law provides different standards of care based on the unique circumstances of the relationship.[165]

C. Assessing the Fiduciary Duties of the Trust Protector

Barring the terms of a trust, the nature of a trust protector's powers will generally determine whether he held office in a fiduciary capacity.[166] If the protector could exercise or not exercise his powers without consideration of the settlor's intent or purposes for the trust, his powers would most likely be personal—i.e., nonfiduciary.[167] As a personal power is not enforceable

157. Cole v. Laws, 349 Ark. 177, 185 76 S.W.3d 878, 883 (2002); *see also* Knox v. Regions Bank, 103 Ark. App. 99, 105, 286 S.W.3d 737, 741 (2008) (stating that Arkansas courts look to the "factual underpinnings" of each case). The Eighth Circuit Court of Appeals defines a fiduciary more narrowly than do the Arkansas courts, more reluctant to impose fiduciary duties outside of the trustee context. *E.g.*, Hunter v. Philpott, 373 F.3d 873, 876 (8th Cir. 2004).

158. *See* Country Corner Food and Drug v. First State Bank and Trust Co., 332 Ark. 645, 654, 966 S.W.2d 894, 898 (1998).

159. Cole, 349 Ark. at 185–86, 76 S.W.3d at 883.

160. *Long*, 324 Ark. at 518, 922 S.W.2d at 696–97 (1996).

161. *See id.* at 517–19, 922 S.W.2d at 696–98.

162. Carpenter v. Layne, 2010 Ark. App. 364, at 10, 374 S.W.3d 871, 877.

163. Evans Indus. Coatings, Inc. v. Ch. Ct. of Union Cnty., 315 Ark. 728, 733–34, 870 S.W.2d 701, 703 (1994).

164. *See* Dent v. Wright, 322 Ark. 256, 261, 909 S.W.2d 302, 304–05 (1995); *Evans*, 315 Ark. at 733–34, 870 S.W.2d at 703–04.

165. *See Carpenter*, 2010 Ark. App. 364, at 10, 374 S.W.3d 871, 877.

166. *See* Ruce, *supra* note 4, at 80–82.

167. *See id.*

against its holder, the protector would presumably owe no legal duty other than to exercise or not exercise the powers in a nonfraudulent way.[168]

On the other hand, if it appeared that the trust protector's powers were given to carry out an important trust objective, benefit an adverse party, or serve the best interests of the beneficiaries, the powers would most likely be fiduciary in nature.[169] As such, the protector may be held to a higher standard of care, such as that required of trustees, in which case the protector must comply with the standards of fair dealing, good faith, honesty, and loyalty in protecting the best interests of the beneficiaries.[170] Yet, in most instances, this standard of care would be inappropriate for trust protectors.[171]

D. Ascertaining the Trust Protector's "Principal"

It may be impracticable to declare a principal-agent standard that labels the principals, whether they are the settlors or the beneficiaries, in all trust protector relationships by default.[172] Many settlors expect the latter, others the former.[173]

While the protector may indeed be a fiduciary, the settlor appointed him to function as a trust protector—not as a trustee. To date, there has been a noticeable tendency to equate the trust protector with a trustee, which in certain cases is understandable.[174] However, in many instances this can seriously undermine basic principles of the principal-agent relationship, and unnecessarily take away from a trust protector's worth.[175] The settlor's intent for employing a protector must dictate the capacity in which the protector acts; otherwise, diffusion in responsibility may occur.[176]

Trustees, unlike trust protectors, own legal title to trust assets subject to an equitable obligation to invest, maintain, and distribute those assets for the

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168. *See id.* Along with a clause restricting a protector from using his powers for his own benefit, a trust should also restrict a protector's ability to use his powers for the benefit, be it direct or indirect, of a related or subordinate party as defined in I.R.C. § 672(c) (1998).

169. *See id.*

170. Hardy v. Hardy, 222 Ark. 932, 940–41, 263 S.W.2d 690, 695 (1954).

171. Sterk, *supra* note 7, at 2785 ("To induce protectors to function as settlors intend them to function—as monitors of trustee behavior—trust law must devise and apply a more deferential standard of review than that applied to trustees."); *see supra* Part V.B.

172. Ruce, *supra* note 4, at 80–82.

173. Indeed, "one size won't fit all, which is one of the reasons why it will be so difficult for courts to figure out just what the fiduciary rules should be with respect to trust protectors." Alexander, *supra* note 3, at 2811.

174. *See generally* Kiziah & Campbell, *supra* note 34, at 228 (noting a jurisdictional lack of uniformity).

175. *See* Busby v. Worthen Bank & Trust Co., 484 F. Supp. 647, 652 (E.D. Ark. 1979) (explaining that a trustee is "subject to what is probably the highest standard of fiduciary duty known to the law").

176. *See* Sterk, *supra* note 7, at 2781.

benefit of the trust's beneficiaries.[177] They necessarily contemplate and undertake this duty to put the interests of the beneficiaries before their own.[178] Aside from directing trust investments, trust protectors mainly function in a different capacity toward the other trust parties[179]—hence, the trust protector is not a cotrustee. Where it may be appropriate to hold a trustee to its traditionally high standard of care in prudently managing trust investments,[180] it might not be appropriate to require that same standard of a protector in exercising a qualified—albeit fiduciary—power to remove a trustee.[181]

From its inception, settlors have primarily engaged the trust protector's office to serve their own interests.[182] Settlors created the position for purposes of asset protection, which probably remains the most popular way to use them to date.[183] The emerging trend in employing protectors, moreover, is to gain tax benefits for settlors of long-term trusts.[184] Although useful to beneficiaries as well, the very nature of a trust protector's powers indicates that most protectors contemplate owing duties, if any, to the settlors as opposed to the beneficiaries.[185] The trust protector's principal cannot be said in all cases to be either the settlor or a beneficiary, but the short history of this trust party lends favor to the settlor.[186]

To illustrate a misalignment of intentions, imagine a settlor does not wish for her protector to owe any duties to her beneficiaries. Yet, she fails to include language in her trust that reflected that mutual understanding. Without interacting with, or perhaps even knowing of, the trust's beneficiaries, the trust protector will probably be liable to the beneficiaries for his actions under current Arkansas law if functioning in a fiduciary capacity.[187]

Indeed, a trust protector will be of little value to a trust settlor if the law, even by default, intrudes upon the mutual agreement made between settlor and protector. If amended, the law could still ensure that a trust remains profitable for its beneficiaries, and at the same time, accomplish its purpose of exempting individuals from personal liability where no duty was

177. *See* Halliburton Co. v. E.H. Owen Family Trust, 28 Ark. App. 314, 319, 773 S.W.2d 453, 456 (1989).

178. *See* ARK. CODE ANN. § 28-73-802(a) (Repl. 2012) ("A trustee shall administer the trust solely in the interests of the beneficiaries.").

179. *See supra* Part II.C.

180. *See* ARK. CODE ANN. § 28-73-804 (Repl. 2012).

181. *See infra* Part V.C.

182. *See supra* Part II.B; *see also* Sterk, *supra* note 7, at 2763 ("As the living embodiment of the dead settlor, the protector has the potential to mitigate the foresight problems associated with dead hand control.").

183. Alexander, *supra* note 3, at 2807 (citing Sterk, *supra* note 7, at 2764).

184. *See supra* Part II.B.

185. *See infra* Part VI, app. subsec. (c).

186. *See supra* Part II; Ruce, *supra* note 4, at 80–82.

187. *See* ARK. CODE ANN. § 28-73-808(d) (Repl. 2012).

undertaken.[188] It just needs to favor a balance between a settlor's interest in managing her own affairs and a beneficiary's interest in ensuring the internal stability of the trust.[189] At present, depending on the type of power at issue and the applicable standard of care, a trust protector can potentially owe "duties" to the trust's settlor, beneficiary, trustee, and perhaps to the trust itself.

E. Applying the Duties of the Trust Protector Under Current Law

What standard of care will the law require of trust protectors? The settlor's intent should be the dispositive factor in answering this question,[190] and interrelated factors are often necessary to decipher that intent. Trust instruments should describe in detail the standards applicable to a protector. Aside from trust language, the most conspicuous answer would originate from the type of power at issue.[191] However, the better question to ask is *how* the protector can exercise the power he has, as opposed to *what type* of power the protector has to exercise, to account for the settlor's intent.

Potentially, a trust protector could be held to a fiduciary standard with respect to some of his duties and powers, while held to a different standard with respect to others.[192] The extent of his liability would be even more unclear.[193] It would of course depend on the particular standard of care applied, but the protector could be removed from his office, face liability for monetary damages to a trust resulting from his breach of a duty, or perhaps even civil liability in tort to some, or all, of the other trust parties.[194] Conversely, the protector could possibly forego all liability.

Example: Settlor grants her protector the power to remove her trustee for "clear divergence from trust directions," or "verified evidence of self-dealing."

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188. *See infra* Part VI, app. subsec. (a).

189. *See infra* Part VI, app. subsec. (a)(2).

190. *See* Bailey v. Delta Trust & Bank, 359 Ark. 424, 432, 198 S.W.3d 506, 512–13 (2004) ("The cardinal rule in construing a trust instrument is that the intention of the settlor must be ascertained.").

191. *See* Sterk, *supra* note 7, at 2782.

192. *See* Ruce, *supra* note 4, at 80–82. For instance, the same trust protector might hold both personal and fiduciary powers over the trust. But, the misuse of a purely personal power would not warrant fiduciary liability on the mere grounds that the protector held fiduciary powers. A breach of a fiduciary power, on the other hand, would lend a different result. *See id.* at 84.

193. RESTATEMENT (THIRD) OF TRUSTS § 64 cmt. a (2003) ("It is a question of interpretation whether and to what extent the person to whom the power is granted is subject to fiduciary duties in exercising it.").

194. *See* Ruce, *supra* note 4, at 80–92.

This settlor unlikely expects her protector to share in the trust's financial, operational, and managerial responsibilities.[195] Indeed, she appointed her trustee to serve those functions, based on her trustee's qualifications.[196] Rather, the protector is restricted from exercising his power to specific criterion, and essentially acting as a "defender" against the prospect of some future impropriety.

Because the power appears exercisable only for the benefit of adverse parties, it will most likely constitute a fiduciary power.[197] As such, the protector would presumably be held to the duty of good faith in exercising, or in failing to exercise, that particular power.[198]

Example: Settlor grants her protector the authority to "at any time and from time to time, remove any trustee under this trust agreement."

Here, this trustee will remain employed for as long as the trust protector says and no longer. The trustee will be acutely aware of this, potentially allowing a substitution in professional discretion from time to time. Although personal and exercisable at the protector's election, this protector's control, be it express or implied, over the financial success or failure of the trust in its entirety, would indicate the settlor's contemplation of a more significant relationship of trust between her and her protector. This might be an instance where, despite trust language to the contrary, the protector might be held liable for bad faith, gross negligence, or willful indifference to the interests of others.[199] However, it would be a discretionary decision for the circuit judge to make.[200]

Example: Settlor grants her protector the authority to appoint successor trustees and fill vacancies in the office of trustee as they may arise from time to time.

This protector, like Mr. Brown in *Bank of America*, has no discretion to remove any trustee from office, but unqualified discretion to appoint successors.[201] Yet, in *Bank of America*, the court found Brown to be an "incidental beneficiary" as the trust's attorney, and thus denied him standing.[202] Perhaps this suggests that the power to appoint successors is essentially unenforceable without an accompanying power to remove—absent the trustee, on its own accord, delegating something it does not rightfully have to the true power holder.

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195. *See id*. at 94–95.

196. *See id.*

197. *See* Hosey v. Burgess, 319 Ark. 183, 191, 890 S.W.2d 262, 266 (1995) (indicating that a mere coincidental benefit is not by itself sufficient for a finding of fiduciary breach).

198. *See* Sterk, *supra* note 7, at 2783–804.

199. RESTATEMENT (THIRD) OF TRUSTS § 64 cmt. c (2003).

200. *See* Ruce, *supra* note 4, at 92–94.

201. 2011 Ark. 446, at 1, 2011 WL 5110201, at *2.

202. *Id.* at 2–3, 2011 WL 5110201, at *4–5.

Nevertheless, this is a personal power that the protector can exercise or not exercise at his sole election. Barring fraud, it would be unenforceable against him.

Example: Settlor of a support trust appoints a protector and, along with the power to advise her trustee at the trustee's request, grants her protector "the right to terminate the trust if thought necessary for the well-being of my son." Indeed, this protector has substantial authority over the trust and livelihood of its beneficiary. But the power is in the form of a beneficial interest. The protector would be the holder of a power of appointment and therefore not a fiduciary to the extent not provided otherwise by the trust.[203]

Example: Settlor grants same power as in the previous example, but modified the availability of terminating the trust to where the protector has "knowledge, based on reliable evidence, that my son has used, smoked, or ingested illegal drugs." This settlor does not expect her protector to manage the trust or to assume any typical trustee functions. In fact, she has qualified the protector's capacity to the extent that no action can be taken unless or until the occurrence of one specified event—to which there will be one, specific result.

True, she could have given this responsibility to her trustee if she so desired. But perhaps her trustee was a highly successful financial investor living outside the city, and maybe she felt that her niece, who lived down the street and shared social circles with her son, could more effectively accomplish this particular goal. The protector, however, did undertake the duty to watch over the beneficiary, and the ATC would presumably consider her a fiduciary and subject to the standard of good faith toward the trust and its beneficiaries.[204]

F. Effect of Exculpation Clauses on the Trust Protector

Can a trust protector be released from all liability to a trust party if the settlor simply provides an exculpation clause[205] in the trust to that effect? Or, perhaps by deeming the protector's powers personal rather than fiduciary? The ATC does not address the issue.[206] Thus, such a clause would presumably be valid under statutory law.[207]

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203. *See* I.R.C. § 2041 (2011).

204. *See* Alexander, *supra* note 3, at 2811; *see also* Ausness, *supra* note 2, at 346 (discussing the common ambiguities and broad language that often appear in support trusts).

205. "A contractual provision relieving a party from any liability resulting from a negligent or wrongful act." BLACK'S LAW DICTIONARY 588 (9th ed. 1999).

206. However, the ATC does allow settlors to use exculpatory clauses with trustees. ARK. CODE ANN. § 28-73-1008 (Repl. 2012). For trustees, an exculpation clause is valid to the extent that it does not release a trustee from liability for acts taken in bad faith or with reckless indifference to others. *Id.* § 28-73-1008(a)(1). Furthermore, the relieving term is not

The Supreme Court of Arkansas, however, would disagree[208]—assuming the court does not find it a matter of public policy preempted by the legislature. The court has routinely held that, regardless of the terms in a trust agreement, a *fiduciary* must always adhere to a standard of good faith and fair dealing.[209] Since this is already the base standard, presumptively, for trust protectors, it seems a formal exculpation clause relieving a protector from liability would be unnecessary.

That is, a nonfiduciary protector already has immunity from personal liability.[210] If a fiduciary protector cannot be exculpated to a lesser standard of care than that already imposed, a clause providing otherwise would serve no purpose other than to qualify a protector's powers as personal, rather than fiduciary.[211] As previously mentioned, the settlor and protector must first be well aware of the adverse tax consequences this can have on the trust and their estates.[212]

G. A Brief Look at the Interplay Between Trustee and Trust Protector

If a trustee acts in good faith, yet its compliance with a nonfiduciary trust protector's direction results in a material breach of trust, which party would bear the liability?[213]

Example: Settlor grants her trust protector the authority to direct trust investments and distributions. Further, settlor requires her trustee to comply with the protector's directions. The trust states that any rights, duties, powers, or obligations of the trust protector shall be held only in nonfiduciary capacities. At the protector's direction, the trustee makes a poor investment that results in a breach of what would typically be a protector's fiduciary power.

If the direction was not manifestly against the terms of the trust,[214] and the trustee could not have foreseen a breach of the protector's fiduciary du-

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enforceable if inserted as a result of an abuse of trust between the trustee and settlor. *Id.* § 28-73-1008(a)(2).

207. One commentator notes that, "The extent to which the language of the trust may trump or modify the fiduciary duties of the trust protector is an important question that will be debated as the role of the trust protector plays out in the future." Volkmer, *supra* note 68, at 41.

208. *See* Cole v. Laws, 349 Ark. 177, 185, 76 S.W.3d 878, 883 (2002).

209. *E.g.*, *id.*

210. *See* Ruce, *supra* note 4, at 80–82.

211. A trust should excuse successor trustees and protectors from any liability associated with the acts of predecessors.

212. *See supra* note 33 and accompanying text.

213. If compelling a protector's consent, a trust should provide a timeframe in which the trustee is restricted from acting, such as twenty or thirty days, after which the trustee can act unabatedly.

214. ARK. CODE ANN. § 28-73-808 (Repl. 2012).

ties occurring, the trustee would not be liable.[215] As the protector would qualify as a person with the power to direct the actions of a trustee, he would presumptively be a fiduciary according to the ATC.[216] However, the trust explicitly stated that he held his authority in a nonfiduciary capacity, which would mean his powers were personal and therefore not enforceable against him. This may represent one circumstance in which a trust could potentially bear no responsibility to its beneficiaries under current state law.

Example: Same facts as in the previous example, except the trust expected the trustee and protector to reach a mutual agreement before the trustee could make any significant deviation in investment strategies. Further, it only provided the protector with the authority to consent to, approve, or veto the trustee's proposals. The trust, moreover, failed to specify the standard of care applicable to the protector. After considering a new plan, the two come to a mutual agreement that results in a fiduciary breach. The beneficiaries sue them both.

Unlike a power to direct,[217] neither the UTC nor the ATC provides that a person with a power to *consent* to, *approve*, or *veto* a modification is presumptively a fiduciary. The commentary to UTC section 808 distinguishes a power to direct and a power to veto.[218] The protector's consent power does not give him the authority to *make* the trustee do anything. Only if the protector had power to impose on the trustee a duty to gain his consent before acting would the protector be exercising directive authority. Thus, it might be fair to say that, under the ATC, a person with the power to consent to or approve a trust modification is presumptively *not* a fiduciary charged with fiduciary duties—in which case the trustee might bear all liability for the breach, regardless of the protector's involvement or influence.[219]

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215. *Id.* § 28-73-1006.

216. *Id.* § 28-73-808(d).

217. *Id.*

218. *See* UNIFORM TRUST CODE § 808 cmt (2012).

219. Difficulty obtaining a protector's consent can be especially problematic where the trust contains a spendthrift provision in favor of a beneficiary. If the trustee fails to make a distribution within a "reasonable" amount of time, a creditor of the beneficiary can garnish the assets from the beneficiary's bankruptcy estate. ARK. CODE ANN. §§ 28-73-502, -506 (Repl. 2012); *see also* Wetzel v. Regions Bank (*In re* Reagan), 433 B.R. 263, 267 (W.D. Ark. 2010) (showing that Arkansas courts have not defined "reasonable time"), *aff'd sub nom.* Wetzel v. Regions Bank, 649 F.3d 831 (8th Cir. 2011). Moreover, beneficiaries cannot compel the distribution themselves. Cotham v. First Nat'l Bank of Hot Springs, 287 Ark. 167, 172–73, 697 S.W.2d 101, 104 (1985).

H. Compensation of the Trust Protector

With all these potential liabilities, a trust protector might be entitled to compensation for his services if the instrument provides for such.[220] If the instrument were silent regarding compensation, a protector could only receive compensation if he held the office as a fiduciary.[221] The ATC only ensures adequate compensation and reimbursement of expenses for trustees.[222] It does *not* provide such assurances for trust protectors, nor does it contemplate compensation for a fiduciary outside the context of a trustee in general.[223]

I. The End Result

Thus, the ultimate question arises: would it be prudent for an individual to accept a protectorship under the current, uncertain conditions of the office's role in Arkansas?[224]

VI. CLARIFICATION & CONCLUSION

An estate planner practicing in Arkansas need not yet assume he or she can draft away all rights, duties, and liabilities of trust protectors and those acting in concert with protectors. This developing area of trust law is unquestionably still in its infancy.

The vast urgency that settlors and their estate planners alike have in using the trust protector is evident and understandable: the office of trust protector embodies an unprecedented conception of trust flexibility. With its youth, however, comes unpredictability. What began as a localized phenomenon among a few particular states has become a common trend across the nation. State legislation will continue to develop the role of the trust protector in American trust law to reflect the endeavors of practitioners and the needs of their clients.

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220. *See* BOVE, *supra* note 25, at 222. Also, a settlor might consider indemnifying a protector for the costs associated with defending against a claim for breach where a court finds that the protector's conduct does not amount to gross negligence or willful misconduct.

221. *See id.* at 227–29.

222. *See* ARK. CODE ANN. §§ 28-73-708, -709 (Repl. 2012).

223. For a settlor reluctant to compensate an additional trust officer, limiting compensation to reimbursement for personal expenses may be worth considering, particularly when appointing a family member or friend. Alternatively, a settlor might consider employing a protector through the payment of a retainer fee.

224. At least to date, legal scholarship has not indicated that attorneys commonly serve as protectors. However, for attorneys who are serving, or who have an interest in doing so, one commentator advises they verify that their liability policies cover such services. BOVE, *supra* note 25, at 221–22.

Estate planners have already been—and will likely continue—appointing protectors in Arkansas trust instruments.[225] Amending section 28-73-808 of the ATC would signify Arkansas's participation with other states in one of trust law's most pressing developments today. In doing so, the default roles, duties, and liabilities of trust parties provided by the legislation will give more certainty to estate planners in making predictions while drafting their clients' trust agreements.[226]

For the time being, the legislature can assume that it has ratified the office of trust protector into Arkansas trust law. Naturally, it can further assume that settlors and estate planners will, as best they can, react accordingly.

J. Andy Marshall[*]

APPENDIX

ARK. CODE ANN. § 28-73-808. Trust Protection—Powers, Duties, and Liabilities of Trust Participants.[227]

> A trust instrument may provide for the appointment of a trust protector. For purposes of this section, a person designated with a title or label whose powers are similar to those specified in subsection (c) is a trust protector, except to the extent otherwise provided in the trust instrument.

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225. Other states following the UTC have also noted the use of protectors in their jurisdictions. *E.g.*, N.C. GEN. STAT. ANN. § 36C-8-808 N.C. cmt. (West 2005) (amended 2012) ("Subsections (b), (c) and (d) introduce a concept of the trust protector or advisor that has not been addressed by statute in prior North Carolina law but was being used by practitioners in drafting trust instruments."); ME. REV. STAT. tit. 18-B, § 105 Me. cmt. (requiring protectors to act in good faith toward beneficiaries by keeping them well informed); Mclean v. Davis, 283 S.W.3d 786, 795 (Mo. Ct. App. 2009).

226. The legislature might consider this note's proposed statute, appended *infra*. For its own analysis, it might look to the protection legislation already enacted in other jurisdictions. *See* statutes cited *supra* note 54. And for guidance on how the legislation could be incorporated within the ATC, see 2008 NH Laws 374 (codified as N.H. REV. STAT. ANN. §§ 564-B:12-1201 to -1206 (LexisNexis 2008) (specifying the most relevant codified section of the session law pertaining to trust protectors and trust advisors)).

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227. The following statutory proposal was drafted primarily by compiling statutory provisions enacted in other states that would help clarify trust protection in Arkansas. *See* statutes cited *supra* notes 53, 54. Commentary provided by the authors cited *supra* notes 2, 7, 17, 22, 25, and 33 was also influential, particularly with respect to liabilities.

The powers and duties of a trust protector shall be as provided in the governing instrument and binding on all other persons. With the exception of subsection (a)(4), this section shall apply to a trust instrument only to the extent that its provisions are not superseded by the trust instrument:

(a) A trust protector, other than a trust protector who is a beneficiary of the trust, is subject to the following:

(1) The terms of a trust may provide that a trust protector may exercise his or her powers in a nonfiduciary capacity. If the governing instrument is silent in this regard, the trust protector is a fiduciary to the extent of the powers, duties, and discretion granted to him or her under the terms of the trust.

(2) If the trust protector, whether appointed by the settlor or a preceding trust protector, is operating as a fiduciary, he or she shall owe the duties associated therewith to:

(i) The settlor of the trust while the settlor is still living, and

(ii) The beneficiaries of the trust if the settlor of the trust is no longer living.

(3) So long as the trust protector acts in his or her capacity as trust protector, the trust protector is subject to the following in exercising or refraining from exercising any power or duty:

(i) The trust protector shall exercise reasonable care in exercising any administrative or nondiscretionary duty or power, and

(ii) The trust protector shall act in good faith and in accordance with the purposes for the trust as evident by the governing instrument in exercising any other duty, power, or discretion.

(4) A term of a trust that relieves a trust protector from his or her liability for breach of his or her fiduciary duties is unenforceable to the extent that either of the following applies:

(i) The term relieves the trust protector of liability for acts committed in bad faith or with reckless indifference to the purposes of the trust, or

(ii) The term was inserted as the result of an abuse by the trust protector of a fiduciary or confidential relationship to the settlor.

(5) The trust protector is liable for any loss that results from the breach of his or her fiduciary duties, but not for loss that results from the breach of his or her nonfiduciary duties enumerated in the governing instrument.

(6) The trust protector is entitled to reasonable compensation for the performance of his or her fiduciary duties, but not for the performance of those duties held in a nonfiduciary capacity.

(b) When the terms of a trust provide for a trust protector, all trustees responsible to the trust are subject to the following:

(1) A trustee shall act in accordance with a trust protector's exercise of the trust protector's specified powers, and shall not be liable in doing so for any loss that results from any of the following:

(i) The trustee's compliance with a nonfiduciary direction of the trust protector,

(ii) The trustee's failure to take any action that requires a prior authorization of the trust protector if the trustee timely sought but failed to receive the authorization, or

(iii) Seeking a determination from the court regarding the trust protector's actions or directions.

(2) A trustee shall be liable for any loss that results from any of the following:

(i) The trustee's compliance with a direction of a trust protector that is contrary to the terms of the trust document, or

(ii) The trustee's compliance with a direction of a trust protector that would result in a fiduciary breach of the trust protector's fiduciary duties.

(3) A trustee shall account to the trust protector at the trust protector's request.

(c) Powers attributable to a trust protector may include, but are not limited to, the following:

(1) Modify or amend the trust instrument to achieve favorable tax status or respond to changes in the Internal Revenue Code, state law, or the rulings and regulations thereunder;

(2) Increase or decrease the interests of any beneficiaries to the trust;

(3) Modify the terms of any power of appointment granted by the trust. However, a modification or amendment may not grant a beneficial interest to any individual or class of individuals not specifically provided for under the trust instrument;

(4) Remove and appoint a trustee;

(5) Consent to a trustee's action or inaction relating to investment of trust assets or in making distributions to beneficiaries;

(6) Terminate the trust;

(7) Veto or direct trust distributions;

(8) Change situs of the trust;

(9) Appoint a successor trust protector;

(10) Interpret terms of the trust instrument;

(11) Advise the trustee on matters concerning a beneficiary; and

(12) Amend or modify the trust instrument to take advantage of laws governing restraints on alienation, distribution of trust property, or the administration of the trust.

(d) The powers provided pursuant to subsection (c) may be incorporated by reference to this section at the time a testator executes a will or a settlor signs a trust instrument, in whole or in part.

(e) The provisions in this section are applicable to testamentary charitable trust settlements notwithstanding § 28-73-405.