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Trust Protectors as Fiduciaries: Three Approaches and Beyond the UDTA

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Trust Protectors as Fiduciaries: Three Approaches and Beyond the UDTA

INTRODUCTION

Trust protectors occupy a somewhat unique position in trusts and estates law. Their function is at times ambiguous and is highly personal to a particular trust. And their history as alternatives – or complements – to trust advisors has been well-documented, as has their use in combatting abuse in some foreign asset protection trusts. In the United States, the exact legal role of the trust protector is unclear, with three major approaches comprising the majority of state models. One approach is to statutorily classify trust protectors, by default, as fiduciaries and thus bound by the same general duties as trustees. Another approach is to statutorily classify trust protectors, by default, not as fiduciaries. A third approach is statutory silence with respect to the status of trust protectors, or where there are guidelines, for them to be ambiguous. Recently, the development of the Uniform Directed Trust Act (UDTA) has refocused discussions around the appropriate model for fiduciary responsibility for trust protectors. This project examines cases under each model to better understand how the default responsibility – and accountability – of trust protectors are being handled, and should be handled, by American courts. The paper samples relevant case law involving trust protectors and then argues in support of one of the three models. It also highlights helpful features of the UDTA and suggests areas of improvement. The paper concludes by rebutting counterarguments and considering policy implications.

This paper analyzes several cases to advocate for classifying trust protectors as fiduciaries by default. Beginning with brief doctrinal background, Part I presents cases under the three models of fiduciary accountability. Part II explores the implications of these different approaches, showing: that statutory silence and/or ambiguity is problematic because it invites unaccountability on the part of trust protectors and requires courts to make ad hoc judgments best left to the settlor; that a default lack of fiduciary responsibility leads to a lack of

accountability for the trust protector; and that default rules requiring trust protectors to serve as fiduciaries serve the interests of the settlor and prevent abuse. In doing so, the paper presents several advantages of the UDTA, such as clarity and flexibility. Part II also considers suggestions for improvement to the UDTA with respect to exculpation clauses and trust protector compensation. Part II concludes by responding to several counterarguments, as well as advocating for more reforms like the UDTA which are systemic and not piecemeal.

I. Selected Cases

A. Background and Introduction to the Models

Though the function of a trust protector has existed for well over a century, the term was not used until the late 1980s.[i] A similar non-trustee position existed in England as a financial tool for well-to-do families, as well as in some British Commonwealth nations.[ii] This was common in the Caribbean.[iii] Trust protectors evolved as a more flexible and alternative tool to traditional trust advisors. The role of trust advisor is oftentimes used interchangeably today with the term trust protector, or trust director. Though there has been some fusion of the terms throughout the years, and trust advisors and directors are comparable to trust protectors in such instances, the roles are different and jurisdictions have made distinctions part of their respective trust codes.[iv] Protectors function as a sort of "alter-ego who can supervise the trust and act to ensure that the purpose of the trust, as envisioned by the settlor, is carried out even if the trustee must be replaced or the terms of the trust must be modified."[v] Today, settlors can use trust protectors to allow, for example, for simpler modification of the trust and to incorporate flexibility "so that the trust will carry out the settlor's intent despite a change in circumstances or the law."[vi] Though trust protectors originally helped extend settlor control over off-shore asset protection trusts,[vii] they are now widely used across domestic trusts as well.[viii]

Though trust protectors have become more widely used, their exact fiduciary duties remain variable across jurisdictions. The First Model is to classify trust protectors as fiduciaries by default. Settlors may choose to limit the liability of a trust protector through the terms of a trust instrument, but under this model, there is a rebuttable presumption that trust protectors must act in good faith and with the same fiduciary obligations as a trustee. Another approach is to classify trust protectors not as fiduciaries by default. Settlors can attempt to impose fiduciary responsibilities on trust protectors, but statutory presumptions can make it difficult to hold a trust protector accountable in instances where the trust instrument is ambiguous, incomplete, or silent as to the settlor's intent. Finally, some jurisdictions remain undecided, providing ambiguous statutory guidance as to the exact duties and liabilities imposed on trust protectors.

The Uniform Trust Code (UTC) implicitly follows the first approach, though its language is somewhat vague. In delineating its stance towards directed trusts, the Code addresses both the trustee's and the trust director's responsibilities: for someone other than the settlor of a revocable trust who possesses the power to direct the trustee, "the trustee shall [follow this individual's direction] unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust."[ix] A non-beneficiary with "power to direct is presumptively a fiduciary … required to act in good faith with regard to the purposes of the trust and the [beneficiaries'] interests. The holder of a power to direct is liable for any loss that results from breach of a fiduciary duty."[x] Though the Code does not address how far a trust protector must go to monitor the actions of the trustee under this language, it is clear that a trust protector who has some power over the trustee must act in good faith, not in self-interest, and must exercise any responsibilities in a fiduciary capacity. And, though the language

does not mention trust protectors explicitly, the comments to the section extend the language to trust protectors equally as to those who hold a power to direct.[xi] Currently, thirty-five jurisdictions have enacted the UTC, with more likely to follow.[xii]

Building on the UTC, the Uniform Law Commission recently completed the Uniform Directed Trust Act (UDTA), "a new uniform law that offers clear solutions to the many legal uncertainties surrounding directed trusts."[xiii] The Act specifically treats the fiduciary duties of a trust director in a clear way, taking established law surrounding trustees and attaching it to the individual who holds powers of trusteeship, even if they are not trustees and are rather trust protectors.[xiv] Trust protectors are assumed to have fiduciary responsibilities for the powers they exercise, responsibilities which do not attach primarily to trustees who act under the direction of those powers.[xv] In effect, directed trustees in such situations are "relieved from the full panoply of fiduciary duties of a unitary trusteeship, [bearing] only a diminished duty to avoid [intentional misconduct] in deciding whether to comply with a director's directions."[xvi] Thus, trust protectors are obligated to act with the same fiduciary responsibilities as a trustee. These include a duty to administer the trust, to act prudently, to act solely in the interests of the beneficiaries or charitable purpose of a trust, to act impartially, to inform and report, and manage the trust property.[xvii] Trustees cannot act in their own interests.[xviii] The UDTA's language thus goes beyond the language of the UTC while also shielding trustees from liability for simply following the direction of a trust protector, provided such compliance is not intentionally improper.

The UDTA is so new that its operation cannot be fully considered, though it has been enacted in thirteen jurisdictions and introduced in four others. However, an approach that aligns with the UDTA clearly represents that of the majority of the states, and it is likely that many states will enact the UDTA – or model their own statutes after it – in the near future. For our

purposes, the UDTA helps to clarify what a clear "Trust Protectors Are Fiduciaries" Model looks like, as contrasted with an opposing approach and one that is ambiguous as to the fiduciary responsibilities of trust protectors. We turn to each model, along with relevant case illustrations.

B. Trust Protectors Are Fiduciaries

Under the First Model, trust protectors are fiduciaries. While this model permits settlors to make decisions about the role and duties of the trust protector that are expressly contrary to statutory language, the default serves to fill in areas of ambiguity and protect against trust protectors who may take advantage of sparsely delineated responsibilities in the trust instrument. In addition to language in the UTC and UDTA, states have enacted similar provisions. South Carolina, for example, requires trust protectors who are not beneficiaries to be considered fiduciaries "with respect to each power granted to such trust protector," and also requires that, in "exercising a power or refraining from exercising any power, a trust protector shall act in good faith and in accordance with the terms and purposes of the trust."[xix] Similarly, Wyoming law states that trust protectors "are fiduciaries to the extent of the powers, duties and discretions granted to them under the terms of the trust instrument."[xx] Though such statutes are admittedly vague about how far outside of their conferred powers trust protectors *must* go in protecting a trust's corpus, they appear to impose more responsibility on trust protectors with respect to overseeing actions by trustees, especially where the trust protectors are aware of malfeasance by a trustee or are aware of action that is within their conferred powers and could limit loss of trust corpus. Existing case law provides insights into the advantages of this model.

One case where statutory language helped preserve the role of the trust protector and protected the settlor's intent was *Minassian v. Rachins*.[xxi] In this case, the trustee of an irrevocable[xxii] family trust appointed, in the midst of litigation concerning her alleged breach of

fiduciary duty, a trust protector to modify the trust's language in a way that disfavored the other beneficiaries.[xxiii] They sued, arguing that the trust protector lacked the authority to act and that the trustee had breached her fiduciary duties.[xxiv] The trial court agreed with the plaintiffs, but the appellate panel reversed, finding that the settlor allowed for the trust protector to act in accordance with his intent, and that the trust protector's modifications were valid.[xxv]

The trust in this case served to care for the settlor up until his death and for his wife. Specifically, the trustee was instructed to "be mindful that my primary concern and objective is to provide for the health, education, and maintenance of my spouse, and that the preservation of principal is not as important as the accomplishment of these objectives."[xxvi] Further, the settlor provided specific instructions about how the remaining corpus was to be divided upon the death of his wife. He did not want a common trust to exist for the benefit of his beneficiaries.[xxvii] What is clear from the language of the trust was the intent of the settlor to primarily have the trustee – or trust protector – function as a steward for the well-being of his wife; this intent proved crucial to corroborating the actions of the trustee at issue in the case.

At trial, the court preliminarily resolved the issue of whether the beneficiaries had any interest at all in favor of the beneficiaries; the wife then appointed a trust protector.[xxviii] The trust's language permitted the protector to act without court authorization under certain circumstances, and also allowed the trust protector to amend, with absolute discretion, the trust provided that doing so furthered his "probable wishes in an appropriate way."[xxix] The settlor's children argued that the trust protector's actions were invalid, and the trial court agreed, finding that the trust protector's amendment was improper because it had failed to benefit the beneficiaries *as a group*, and because it had, in effect, given the wife absolute discretion over the

trust during her lifetime.[xxx] The court relied heavily on the trust document's language, and did not hear testimony from the trust protector; the wife appealed.[xxxi]

On appeal, the appellate panel reversed. The court first found that the trust protector's appointment was permissible and emphasized that state law provided that a trust protector was subject to fiduciary responsibilities absent a settlor's express instructions.[xxxii] The court then found that the trust protector could delegate discretionary powers and modify the trust.[xxxiii] The court also disagreed with the trial court and found that the trust instrument was ambiguous.[xxxiv] The court made a determination as to the settlor's intent, finding that he had wished for his wife to continue to live in the ways to which she was accustomed.[xxxv] The trust protector had been the original drafter of the trust instrument, and testified that the husband had in fact consulted the trust protector to draft the instrument with the *expectation* that his children would challenge the trust in exactly the way they did in the present case.[xxxvi] In sum, "it appear[ed] that the husband settled on the multiple-trust scheme for the very purpose of preventing the children from challenging the manner in which the wife spent the money in the Family Trust during her lifetime."[xxxvii] Finally, with this analysis complete, the court held that the trust protector's amendments were indeed made to effectuate the settlor's intent and that they were thus within his powers.[xxxviii] The court concluded by emphasizing that though the trust protector thus had broad discretion, and that amendments may have disfavored the plaintiffs, he still could not act in his own interest or breach the fiduciary responsibility he owed to the trust.[xxxix]

The *Minassian* case shows the importance of the Florida Trust Code's default provisions, including its fiduciary provisions, in permitting the existence of, and establishing the authority of, a trust protector, as well as the intent of the settlor. The result of the protections afforded by the statute ensured that the settlor's intent could be effectuated by the trust protector without

concern about abuse, self-dealing, or intentional misinterpretation. The default presumptions also particularly aligned with the settlor's expectations in consulting the potential trust protector when he drafted the trust instrument. As the court in *Minassian* noted, the trust protector had "acted to correct ambiguities in a way to further the husband's probable wishes. As the drafting agent, he was privy to what the husband intended."[xl] The trust protector was in the best position to know and exploit the settlor's intent. Without the default protections, it is unlikely this trust protector would have been selected at all, leaving divinations about the settlor's intent entirely up to the court. Given that it "was the settlor's intent that, where his trust was ambiguous or imperfectly drafted, the use of a trust protector would be his preferred method of resolving those issues," subsequent judicial decisions to remove "that authority from the trust protector and assigning it to a court [would have] violate[d] the intent of the settlor."[xli] Thus, the fiduciary presumption protects the trustee and the beneficiaries by preventing the trust protector from acting in his self-interest, and can also relieve courts of the responsibility of determining the settlor's intent in cases where a trust protector may be better situated to do so.

A second illustrative case is *McDevitt v. Wellin*.[xlii] In this case, the settlor created an irrevocable trust with a trust protector.[xliii] The trust protector promptly notified the trustees that he was unilaterally altering the trust instrument and amending procedures for the removal of trustees and trust protectors.[xliv] Following alleged liquidation of several contested assets by the children-beneficiaries, the beneficiaries attempted to remove the trust protector.[xlv] The key inquiry was whether the trust protector had the authority to make the initial amendments, which, in effect, increased his own power.[xlvi] The court found that the trust protector had not exceeded his authority, emphasizing that the relevant statutory presumption of fiduciary responsibility served as a check on the actions of the trust protector. The court then concluded that though the

trust protector's amendments increased his power, it did "not give him the ability to do anything he want[ed] or to neglect his fiduciary duties."[xlvii] Thus, the trust protector's actions were permissible when he changed provisions on the removal of a trust protector.[xlviii]

In *McDevitt*, the settlor had also imposed restraints on the trust protector, the most notable of which was restricting alterations to the identities of the beneficiaries.[xlix] Even without such provisions, however, the court was adamant that the law served as an effective guardrail such that the trust protector could not, as the children-beneficiaries "fear, … 'act with impunity, with no fear of removal.'"[l] Indeed, the law maintained that any fiduciary who "fails or neglects to comply with [the law] is subject to removal by the court and is liable to any beneficiary" unless "such failure to comply was inadvertent and not intentional and was with reasonable excuse and that the fiduciary has performed his or her duties diligently, faithfully, and efficiently."[li] Thus, not only were the law's fiduciary presumptions important in ensuring a trust protector's accountability, but they also provided enough of a deterrent through liability to ensure that the trust protector acted in accordance with the trust.

The *McDevitt* case highlights another feature of the default fiduciary model in addition to trust protector accountability: limits on overzealous beneficiaries. On the one hand, trust protectors should be held accountable as fiduciaries to ensure that suits against trust protectors can succeed. Were trust protectors not held to the fiduciary standard, then potential suits against a trust protector would seldom succeed given that a trust protector would have no obligations for the court to enforce. But, more subtly, without such provisions, beneficiaries could stymie a trust protector's justified actions on behalf of the trust. In cases where a trust protector is not presumed to have fiduciary responsibilities, his ability to supersede the intent of the beneficiaries may be limited by the beneficiaries themselves. Such beneficiaries could express concern about

leaving authority in the hands of a particular trust protector, arguing that the trust protector should not be trusted with his powers given the lack of fiduciary duties imposed upon him. The beneficiaries could then insist on the replacement of the trust protector with a more favorable party, or try to eliminate the trust protector's influence altogether. Thus, in an inverse manner to a trust protector who self-deals, beneficiaries could weaponize the lack of accountability of a trust protector to strip the trust protector of his powers. Put simply, beneficiaries could veil otherwise selfish motives in cloaks of concern over the lack of accountability of a trust protector who carries out a settlor's intent that is less advantageous to those beneficiaries than they would like. The *McDevitt* court clearly was wary of the sidelining of trust protectors in this manner.

Generally, presumptions in favor of a trust protector's default fiduciary responsibilities effectively permit trust protectors to act efficiently, in accordance with a settlor's intent, and limit the influence of parties acting in ways inconsistent with that intent. These benefits are not present under a regime without such presumptions. We turn to a case under such a regime next.

C. Trust Protectors Are Not Fiduciaries

Under the Second Model, trust protectors are not fiduciaries by default. This model leaves determinations of the duties of trust protectors up to settlors. By way of example, typical statutory language in such states resembles the following: "Subject to the terms of the trust instrument, a trust protector is not liable or accountable as a trustee or fiduciary because of an act or omission of the trust protector taken when performing the function of a trust protector under the trust instrument."[lii] There have been very few cases litigated under these states' regimes, but one case in particular sheds valuable insights into the shortcomings of this model.

One of the few cases arising of out a state that did not have fiduciary default presumptions is *Robert T. McLean Irrevocable Trust*.[liii] The case is illustrative especially thanks

to its multiple retrials and appeals. In this case, a trust was created for a settlor to hold the money distributed by an insurance company following the settlor's personal injury. The trust stipulated that an appointed trust protector had powers of trustee removal and trustee reappointment, as well as the power to fill a vacated trusteeship.[liv] The trust also stated that the trust protector's powers were conferred in a fiduciary capacity, but that the trust protector "shall not be liable for any action taken in good faith."[lv] After several trustee resignations very early on in the life of the trust, the trust protector selected a replacement trustee.[lvi] During this trustee's tenure, the trust lost more than $500,000.[lvii] After several years, this trustee, along with the original trust protector, resigned, and replacements were selected; however, this trustee also resigned, and eventually the settlor's mother became trustee.[lviii]

Missouri law, even today, limits some of the fiduciary responsibilities of a trust protector, though the statutory language is more complex than in many other states. Though the statute does require that trust proctors "act in a fiduciary capacity in carrying out the powers granted to the trust protector in the trust instrument, and shall have such duties to the beneficiaries, the settlor, or the trust as set forth in the trust instrument," the legislature permitted settlors to appoint trust protectors in a nonfiduciary capacity.[lix] Further, the statute explicitly says that a "trust protector is not a trustee, and is not liable or accountable as a trustee when performing or declining to perform the express powers given to the trust protector in the trust instrument," nor are trust protectors liable "for the acts or omissions of any fiduciary or beneficiary under the trust instrument."[lx] As if to belabor this point even further, the legislature elaborated, and went on to say that trust protectors are "exonerated from … liability for [their] acts or omissions, or arising from any exercise or nonexercise of [expressly conferred] powers … unless … a preponderance of the evidence [shows] that [their] acts or omissions … were … in breach of [their] duty, in bad

faith or with reckless indifference."[lxi] This provision expressly prevents bad faith, self-interested actions by a trust protector, but in doing so also limits liability for good faith actions.

With this statutory context in mind, the landscape of *McLean* becomes clearer. In the case, the settlor's mother sued the original trust protector, asserting that he had a duty to monitor the trustee's actions and remove ineffective trustees, and that the failure to remove the trustee in question resulted in the substantial economic loss.[lxii] Initially, she had brought suit against all the former trustees and trust protectors, but this action was dismissed in favor of the original trust protector. After she settled with the other parties, the original trust protector was the only remaining party on appeal.[lxiii] The appellate court, with an admittedly sparse record on which to base its decision, considered whether there had been a breach of any fiduciary duty.[lxiv] The trust protector argued both that he did not have a duty to monitor or oversee the trustees, and even if he had, that his failure to do so did not lead directly to loss in the trust corpus.[lxv] A fractured appellate panel failed to agree on most of the substance of the case, but the main holding was joined by two concurrences. Together, they did not agree with the trial court's outright dismissal of the case.[lxvi] The first judge noted that the trust instrument clearly conferred limited powers on the trust protector which had to be exercised in a fiduciary capacity, and that the trust protector clearly could not act in bad faith.[lxvii] But the judge struggled to resolve several key issues: 1) the intent of the settlor; and 2) in whose interest the trust protector was meant to serve, be that the settlor, beneficiaries, or trust itself.[lxviii] What was clear was the judge's deference to the state legislature, which had not imposed – and still does not impose – default fiduciary duties on trust protectors, instead leaving that decision up to the settlor or to be inferred by a court based on the relationship of the settlor and trust protector.[lxix] Because the instrument had not specified, the only clear liability for the trust protector was in cases of bad faith.[lxx] One concurrence argued for

adherence only to the strict language of the trust instrument, agreeing that the trust protector would not have been liable outside of bad faith actions.[lxxi] The other concurring judge did not find any de facto duties imposed on trust protectors, and did not even feel that the trust protector's right to remove and reappoint trustees meant that he also had a *duty* to do so.[lxxii]

Following this 2009 decision, the case was remanded.[lxxiii] At the retrial, the court held that the trustee could be removed by the trust protector but owed nothing in terms of financial reports to the trust protector.[lxxiv] The court also did not impose default duties on the trust protector to oversee the trustee, but wrote that the trust protector could not "simply ignore [trustee] conduct which threatened the purposes of the trust."[lxxv] Ambiguously, in the event of such conduct, and provided the trust protector was "made aware," a "duty may have arisen [to require the] [t]rust [p]rotector … to remove a trustee."[lxxvi] What was not clear from this reasoning was *who* needed to inform the trust protector, whether the trust protector had to affirmatively inquire about the health of the trust corpus, and whether the court's use of "may have arisen" meant that such a duty *actually did arise*.

The case was again heard on appeal.[lxxvii] The court was not able to find enough support in the evidence to link the original $500,000 loss to a direct failure to remove the trustee by the trust protector.[lxxviii] The court was silent as to whether fiduciary duties applied in this case beyond prohibitions on bad faith actions by the trust protector, whether trust protectors should generally be required to oversee trustees, and how much courts should look beyond the language of the trust itself when making such determinations. What is clear, though, is that the limited language of the trust instrument limited the ability of this court to definitively hold the trust protector accountable for the trustee's loss of $500,000. Because there were no statutorily-imposed duties, this effectively meant that the diminution in the trust corpus went unchecked.

The *McLean* case represents many of the problematic results of regimes which do not impose duties on trust protectors by default. What is clear from the multiple trials and appeals is that the trust instrument in question was not thorough – either by design, or due to oversight in drafting – with respect to the exact duties of the trust protector. This resulted in ambiguity about the settlor's intent regarding the exact function of the trust protector beyond facilitating replacements for vacancies in trusteeships. Practically, this resulted in an unaccountable trustee and a trust protector who was virtually useless in preventing substantial loss to the trust corpus. Whether this loss was intentional, or negligent, does not negate the disastrous outcome for the settlor and beneficiaries. And regardless of whether the trustee acted in good faith, the lack of accountability imposed upon the trust protector rendered the office nearly nominal.

More generally, this case highlights that the model of no default fiduciary responsibilities for trust protectors invites ambiguity where settlors are incomplete in their reasoning in their trust instruments. This ambiguity risks harm to the purposes of the trust. Questions surely are more likely to arise about why some duties, such as reappointment of trustees, are imposed, but others are ignored, such as supervision of those trustees. What should happen in such instances is then left up to the parties on an ad hoc basis, or, in the case of mismanagement and resultant litigation, to judges who are ill-equipped to divine a settlor's intent and to untangle fact-intensive disagreements between parties. When this occurs, judges may butt heads about determinations, as the array of opinions in the *McLean* saga demonstrate. And this rarely leads to positive outcomes for settlors, more likely amounting to further drains on trust corpus.

D. Silence or Ambiguity about Fiduciary Role of Trust Protectors

A third broad approach to the fiduciary role of trust protectors sits in between the other bright line default positions: complete statutory silence with respect to the status of trust

protectors, or where there are guidelines, for them to be ambiguous about fiduciary responsibilities. In the case of ambiguous language, trust protectors may be mentioned by statute, but exact fiduciary responsibilities are either unspecified or left to the discretion of the settlor. Since these approaches both fall between the other two models, and face similar challenges, it is most useful for the purposes of this paper to group them together. The variation in how courts approach disputes under such regimes is considerable. But, in most cases, ambiguity forces courts to not only make ad hoc determinations of what fiduciary responsibilities should be, but also strain to interpret settlors' intent more often. Though courts frequently may struggle whenever they must interpret a settlor's intent, clear statutes presume intent and thus serve as default presumptions about settlor intent. Ambiguous or nonexistent statutory guidelines do not provide such guidance. This does not always advantage the settlor.

In one case, a trust was principally controlled by a trust protector, with a trustee relegated to administrative responsibilities.[lxxix] The trust protector fraudulently purchased a multi-million-dollar life insurance policy, among other misdeeds, and was effectively a "grifter."[lxxx] In the end, the trust protector did not succeed in keeping the value of the life insurance policy. But the court, guided by virtually no statutory provisions, struggled to determine exactly how to characterize the trust protector's role, settling on "agent".[lxxxi] The court noted that the trust protector had "virtually unlimited control and authority over the trust."[lxxxii] And the court was able to use the fact that the beneficiaries were unaware of the true nature of the trust protector's actions as the basis for voiding the life insurance policy.[lxxxiii] But, had the beneficiary been somewhat aware of the trust protector's actions, and had the trust protector more competently leveraged statutory ambiguity surrounding his limited liability for actions taken with the tacit awareness of the beneficiaries, it is not clear that the outcome would have been so positive. In other words, this

case represents a court jumping through procedural hoops instead of simply finding that a trust protector clearly violated a fiduciary duty to a settlor. Last, from a pragmatic standpoint, though these "grifters" did not get away with their fraud, the litigation proved costly for the victim.

Automatic safeguards may help prevent some of these frauds by ensuring that trust protectors automatically assume fiduciary responsibility and liability for misdeeds. This might discourage grifters and help potential victims be more skeptical if a trust protector insists on language in a trust instrument that limits liability to actions only taken by a trustee. At the very least, automatic safeguards could speed up proceedings such that victims like the one in this case do not have to fight on procedural grounds.

But outside of the universe of naked grift, statutory ambiguity can prove problematic as well. Courts have struggled to identify the exact responsibilities of trust protectors in instances where trust instruments are unclear. This results in courts stepping in to manufacture outcomes. In one case, the court tried to circumvent ambiguous guidance by parsing differences between so-called "formal" and "informal" fiduciary duties.[lxxxiv] The court dismissed the suit against the trust protector and forced the parties to enter arbitration. What is clear from this example is that, absent statutory guidance about the relationship between trust protector and settlor, courts may find themselves inventing schemes that serve a particular outcome in the case. It is not clear that such an ad hoc approach is generalizable, nor does it invite consistency across litigated cases.

Last, there might be instances where statutory ambiguity could prove logistically problematic by leaving unresolved ambiguities in individual trust language. For example, ambiguous trust language about the exact fiduciary responsibilities of a trust protector could lead to tension between the fiduciary responsibilities of a trustee and the powers of the trust protector. One court explained that there could be circumstances where "a specific provision of a trust

allowing for appointment of a trust protector may infringe on trustee's fiduciary duty to the beneficiaries." [lxxxv] And, in addition to this potential friction, beneficiaries may not be well positioned to remedy even innocent problems that arise from such circumstances. As the court in *Eleanor Pierce* explained, trust settlors are often long-deceased, and this can make it difficult to determine whether a trustee is "faithfully representing the wishes of the dead settlor."[lxxxvi] Moreover, for non-innocent problems, beneficiaries are not always well-positioned to ensure compliance through actions for breach of fiduciary duty. They often do not have the necessary expertise to know when a breach has occurred, are frequently dependent on the trustee or trust protector and thus reluctant to file suit, and frequently wary of bearing the costs of litigation.[lxxxvii]

It is easy to imagine circumstances where the same challenges of the beneficiary-trustee relationship could plague an unchecked beneficiary-trust protector relationship. Just as beneficiaries may be reluctant to pursue actions on alleged breaches of fiduciary duty, they may be especially reluctant to do so where the duty itself of a trust protector is not clearly established by a settlor and by statute. And beneficiaries ultimately bear the cost of litigation that either aims at determining, in the best-case scenarios, or remedying, in the worst-case scenarios, fiduciary breaches by trust protectors. So, though there are obvious benefits to a trust protector that functions properly, cases show that ambiguous rules surrounding the exact obligations of a trust protector can actually harm beneficiaries by requiring too much of them and run counter to the intent of the settlor. Among other observations from Sections B and C, these constitute some of the reasons for adopting a "fiduciary by default" model. Part II picks up on this line of reasoning.

II. Getting the Standard Right

Part II presents three arguments in response to the cases in Part I. Section A argues that statutory silence and/or ambiguity about the fiduciary duties of trust protectors falls short

because it invites unaccountability on the part of trust protectors and requires courts to make ad hoc judgments best left to the settlor. Section B asserts that a default lack of fiduciary responsibility leads to a lack of accountability for the trust protector. Section C suggests that default rules requiring trust protectors to serve as fiduciaries serve the interests of the settlor and prevent abuse. Section D builds on Section C to suggest an improvement to the UDTA. And Section E considers and responds to several potential counterarguments.

A. The Silent/Ambiguous Model Falls Short

Statutory silence and ambiguity do not hold trust protectors accountable and require courts to make ad hoc judgments. The case law showed that ambiguity serves neither the settlor, nor any other parties acting in good faith. The law could easily permit a settlor to draft around statutory provisions, but the absence of clear guidelines – or guidelines at all – simply invites abuse.

Generally, statutory silence can often be the byproduct of novelties in the law. Though trust protectors are relatively new, and though trust law moves at a glacial pace, trust protectors have been around long enough such that legislatures have had ample opportunity to wrestle with how best to approach their fiduciary responsibilities. Dozens of states have followed the UTC, and the availability of the UDTA makes it unlikely that legislatures can hide for much longer from providing some guidance where their statutory provisions are scant, unclear, or nonexistent.

Ambiguity in statutes can, of course, be unintentional. Legislators frequently enact laws with the expectation that they will operate in one manner, only to find in practice that they fail to conform to their expectations. Additionally, as laws mature and litigation enters the judicial pipeline, the contours of how laws impact litigants become clearer. All of this aside, *intentional* ambiguity simply leaves the door open for trust protectors to take advantage of settlors. As the *PHL, Ron,* and *Eleanor Pierce* cases show, ambiguity leaves courts in the difficult position of

stepping in for the legislature and making ad hoc determinations that can be inconsistent across case outcomes and easily exploited by savvy trust protectors.

Ambiguity might also arise from a reliance on common law. Some states assume that their long-settled common law doctrines provide enough guidance to make statutory innovations unnecessary. But relying on common law alone does not bring with it the benefits of statutory solutions. Statutory provisions offer clarity for all parties involved, from settlors to judges, and ensure consistency that common law cannot always achieve. Also, statutory guidance such as the UDTA is developed based on precedent in many jurisdictions. This means that statutory models are better prepared for unforeseen situations not explicitly dealt with by existing common law, especially in jurisdictions with few cases concerning trust protectors. Last, caselaw is not always settled – indeed, in the absence of clear guidance from legislatures, courts might disagree on important questions of trust law. So, especially when common law is not settled, statutory guidance is preferable to reliance on oftentimes ambiguous common law.

Perhaps the biggest area of uncertainty in an ambiguous arrangement is the exact nature of a trust protector's fiduciary duties. Though a court might find that a trust protector is a fiduciary, judges may have difficulty understanding exactly what aspects of that role are inherent to the protector, and what must be specified by a settlor. Most obviously, it may be that a settlor mistakenly assumes that a trust protector is bound by the same fiduciary duties as a trustee. A judge may be reluctant to apply such a strict standard to a trust protector without explicit statutory guidance to that effect. It is likely that ambiguity surrounding the duties of trust protectors will be a short-lived feature in the legal landscape. With most states adopting the UTC, and given the clarity afforded under the UDTA, the silent/ambiguous model is already fading from relevance, and will likely be replaced in the coming years.

B. The "Trust Protectors Are Not Fiduciaries" Model Falls Short

Section B argues against this model. As is evidenced from the *McLean* case, a lack of presumptions imposing fiduciary duties can diminish the incentive for a trust protector to fully oversee the trustee. This is especially true where a trust instrument is unclear. A lack of accountability, while certainly an option for a settlor wishing to free a trust protector from fiduciary responsibilities, should not be the default under the law.

Some proponents of this model suggest that one major advantage is to encourage the use of trust protectors. Under this theory, liability for the actions of trustees may discourage protectors from undertaking the role in the first place. As one commentator asserts, a "Trust Protector should be able to exercise wholly independent discretion to fire Trustees without worrying about whether the Trust Protector will be sued by somebody."[lxxxviii] This is especially important for asset protection contexts where creditors may target a trustee.[lxxxix] And one might see how a trust protector may be particularly concerned where a trust protector must fund potential litigation himself. Further, a major goal when appointing a trust protector is to protect against corruption, but not over-police the trust "so that it can be easily manipulated by the …Beneficiaries."[xc] In other words, increasing the fiduciary responsibilities of a trust protector might actually run counter to the purposes of the trust where such action results in beneficiaries gaining too much control over the trust in ways that were not in line with a settlor's intent.

Though concerns about trust protector's willingness to serve may be warranted, they do not justify presumptions against fiduciary responsibilities. Rather, a settlor should be free to limit the responsibilities and duties of a trust protector for circumstances in which concerns about the trust protector being sued may be especially high, such as potential intrafamilial conflict. And, more subtly, an approach that limits the duty of a trust protector places too much pressure on the

clarity of the trust instrument. Even this skeptic acknowledges that, where the law does not impose duties on a trust protector but a settlor does, "fiduciary duties need to be clearly and specifically set out -- otherwise, the Trust Protector has the potential to be sued if anything goes wrong with the Trust even if the Trust Protector did not know about it."[xci] It is dangerous – and unrealistic – to assume that individual settlors will draft crystal clear language. As several of the cases in Part I show, it is likely that trust documents will not always provide exact guidance about trust protectors' responsibilities in every situation that could arise where a trustee gets into hot water. Put simply, a legal regime that requires a settlor to bear the burden of clarity can lead to litigation where such clarity is absent, and this ultimately can prove costly for the trust.

Another important problem is the ability of beneficiaries to overcome the will of a trust protector who is not subject to fiduciary duties. As one practitioner warns, "where the protector is expressly exculpated from liability, the beneficiaries are at the mercy of the protector regardless of how negatively the protector's decision to exercise or not to exercise such powers, or even the protector's decision not to decide, impacts on them."[xcii] Criticizing approaches from states like Alaska,[xciii] this commentator instead suggests that the law should not permit settlors to easily draft away fiduciary constraints on a trust protector, let alone require that trust protectors be insulated by default.[xciv] Indeed, he argues that a trust protector should be presumed a fiduciary unless the trust instrument *and* the facts and circumstances suggest otherwise.[xcv] Such a presumption will resolve longstanding questions, "such as whether the protector is entitled to consideration, to hire agents, or to initiate actions on behalf of the trust and beneficiaries, as well as that needlessly elusive question of to whom the protector owes a duty."[xcvi] In this sense, a final shortcoming of this model is that it would leave the role of trust protector uncertain. Without clear statutory guardrails for the duties, responsibilities, and liabilities, the role might take on a

life of its own in ways that ultimately are inconsistent. This inconsistency is bound to lead to confusion among courts seeking to establish predictable precedent, and likely will not favor settlors for whom certainty – and security – are major impetuses for establishing a trust in the first place. Thus, on the whole, the "Trust Protectors Are Not Fiduciaries" model falls short. Clear language that imposes fiduciary duties on trust protectors is a far more consistent, protective, and predictable approach, one we advocate for in Section C.

C. The "Trust Protectors Are Fiduciaries" Model Works Best

There are clear pitfalls of both the non-fiduciary-by-default model and the silent/ambiguous model. The UTC and UDTA approaches, where a trust protector is a fiduciary by default, avoid many of the pitfalls of these models while also allowing for flexibility for a settlor. In addition to promoting accountability, consistency, and clarity, the UDTA approach in particular brings other important benefits. First, the UDTA approach provides for flexibility depending on the individual desires of settlors. At its most basic level, the Act correlates a trust director's duties to a "trustee in a like position and under similar circumstances."[xcvii] The Act also allows for these duties and liabilities to be scaled up or down, just as they can be for a similarly situated trustee.[xcviii] This means that "duties that are default for a trustee are default for a similarly situated trust director;" the same is true for mandatory duties, exoneration clauses, or grants of extended discretion.[xcix] This not only improves upon state statutes which classify trust protectors as fiduciaries by default by adding a scaling feature, but also explicitly clarifies the exact nature of that fiduciary relationship as being equal to a similarly situated trustee. This solves perhaps the biggest flaw with the silent/ambiguous approach.

More generally, as Professors Morley and Sitkoff[c] point out, this "absorptive" model of fiduciary responsibility whereby a trust protector absorbs the corresponding characteristics of the

trustee offers certainty, removes the need to "spell out an entire fiduciary law for trust directors in complete detail," and permits variations should state lawmakers want to formulate more specific guidelines.[ci] It also allows courts to make determinations that work best for particular settlors depending on the trust instrument's specific language and the context.[cii] And for settlors who wish a power to be springing, the Act allows for a trust director's duties to "arise at a particular moment, rather than applying continuously, such that the director would not be under constant obligation to monitor the administration of the trust."[ciii]

Another helpful feature of the UDTA is that it provides narrow exceptions for certain types of trust protectors, such as medical professionals.[civ] This ensures that doctors are not subject to special liability risk if serving in a trust protector role, as can be the case for family doctors who are trusted by potential settlors but who may not be fully aware of the liability that stems from their service in such a role.[cv] Along the same lines, the Act adeptly provides special rules for charitable and special needs trusts, and this provides benefits for states and settlors.[cvi]

Some of the major concerns about unaccountability that arose in cases like *McLean* and *Eleanor Pierce* are clearly addressed by the specific language in the UDTA. And because the UDTA allows for a settlor to scale the duties and liabilities of a trust protector *in relation* to the trustee(s), the Act also inherently solves a concurrent challenge that incomplete or absent trust protector laws do not handle: the exact relationship *between* the trust protector and the trustee. A major source of friction across the available cases is between these two actors, particularly when the trust protector's main function is to remove or replace the trustee under certain conditions. By ensuring that both the trust protector and trustee are subject to liabilities relative to the duties of the other, the Act may, in practice, lead the trustee and trust protector to function more as symbiotes than as adversaries. This is even more true thanks to the Act's approach to information

sharing between the two roles.[cvii] At the end of the day, this will only increase the sense of security for settlors and likely improve relations between beneficiaries and trust protectors.

Another major feature of the UDTA that will perhaps be the most important in limiting drains on trust corpus is the Act's language surrounding when either trust protectors or trustees must inform beneficiaries about the other's misconduct. The Act relieves both parties of the need to monitor, inform, or give advice to beneficiaries or other parties about instances "in which the trustee [or trust protector] might have acted differently."[cviii] This relieves both parties of constantly monitoring each other and also diminishes the likelihood that one of the two will attempt to undermine the other by strategically conveying information to beneficiaries in ways that are unfavorable to the other. Though this, in isolation, might disfavor beneficiaries by disincentivizing trustees and trust protectors from proactively monitoring one another, the UDTA's fiduciary provision ensures that the monitoring and informing provision functions to increase the efficiency of the trust without hurting beneficiaries.

In sum, the UDTA model that encapsulates the next generation of the "fiduciary by default" model preserves settlor intent, promotes accountability, and prevents inconsistency while also allowing for maximal flexibility on the part of settlors and legislators.

D. Beyond the UDTA

On its face, the UDTA is clear and comprehensive. The Act is certainly a remarkable attempt at standardizing trust administration, and, if widely adopted, could eliminate much uncertainty in litigation. But there may be areas for further development. This section explores two of these areas: the prohibition of exculpation clauses; and clearer compensation models.

First, settlors should not be able to exculpate a trust protector. A trust protector may be best off as a fiduciary, and settlors may be ill-positioned to adequately determine when and how

to limit the duties and liabilities of their trust protectors when they draft trust language. The UDTA prides itself on limiting the requirements of the trust protector to monitor and report on misdeeds by trustees. This clearly is a judgment on the part of the drafters that stricter requirements might discourage otherwise competent individuals from serving as trust protectors. While this may be true, the UDTA language may not entirely resolve situations where a trustee oversteps authority or makes errors. In the case of overstepping, the trust protector's only recourse may be removing the trustee, and this can cause complications and require time and resources to find a suitable replacement. In the case of error, a trust protector who is not actively monitoring the actions of a trustee may not be able to assist beneficiaries once trust corpus has been diminished thanks to the trustee's missteps. Eliminating the ability of settlors to include exculpation clauses could address some of these concerns, especially since settlors are far more limited with respect to how much they can exculpate trustees. Trustees cannot be exculpated from their duties to act prudently, impartially, and to properly administer the trust, no matter what the settlor indicates. Though a settlor can spread the duties around between multiple trustees, limit the scope of a trustee's powers, and add layers of control through powers of appointment, the settlor cannot effectively exculpate *all* of these actors, nor can she exculpate a trustee from her duties under the Act. It seems unnecessary to allow a settlor to exculpate the trust protector. Eliminating this option only furthers the UDTA's intent to treat trustees and trust protectors equally. As one writer observed, trust protectors are really like traffic cops who can write tickets;[cix] it might be worth requiring that they impose fines. At the very least, legislators should monitor the efficacy of the UDTA and make adjustments based on trends in litigation.

The UDTA can also improve its approach to trust protector compensation. Currently, § 16(3) requires that trust protectors receive "reasonable compensation." As Morley and Sitkoff

explain, compensation varies depending on the particular power, and can be negligible where a trust protector's role is minimal.[cx] The comments to § 16(3), along with the accompanying legislative note, stress that "a state that provides statutory commissions for a trustee should refrain from using the same commission formula for a trust director and should instead use a rule of reasonable compensation."[cxi] This approach is rooted in concerns over overcompensation of trust directors, particularly for those that do little, but does not properly account for trust protectors who do not maintain a continuous involvement over time.[cxii] "At the same time, the state might take the occasion of enacting the UDTA to abandon statutory commissions for trustees too, as the reasonable compensation of a directed trustee is likely to be less than that for a trustee that is not directed."[cxiii] Though this approach leaves discretion to state lawmakers and settlors, overcompensation could be better addressed by capping compensation, particularly for commercial trust protectors. Also, the drafters could consider incorporating more specific formulas for trust protector compensation. This could expedite litigation where trust protector compensation is at issue, allowing parties to simply point to statutory default formulas instead of arguing over how best to define "reasonable compensation." Regardless, the UDTA is unusually sparse in its handling of the compensation issue. More detail may be helpful.

Overall, the UDTA is a remarkable legal achievement. But there are opportunities for improvement. Prohibiting exculpation clauses and delineating compensation are two possibilities. More possibilities will likely arise as the Act is implemented and cases litigated.

E. Responding to Counterarguments

This section responds to several potential counterarguments to the adoption of the fiduciary standard. First, some might argue that there have not been enough cases on fiduciary responsibilities of trust protectors to warrant such sweeping reform. While it is true that there

have not been as many cases from which to draw data as compared to other areas of trusts and estates law, there have been enough to spur the drafting of the UDTA. Additionally, available cases are not the only impetus behind the UDTA and other calls for reform. The inconsistency between states is bewildering. And the absence of guidance in many jurisdictions presents very real problems for estate planners and litigants alike. In short, waiting for reform with respect to the fiduciary responsibilities of trust protectors would be like letting a small splinter fester until amputation becomes necessary. It is best to address concerns early and definitively.

Second, with respect to compensation models, there are merits to flexibility. Using a "reasonable compensation standard" may prove most adaptable to changing circumstances. However, the UDTA should include specific models of compensation and boilerplate language for a variety of scenarios. The Act could, for example, provide default rules for corporate and non-corporate trust protectors. It could provide a scale based on trust complexity, with more complex trusts classified in a different compensation category than those in which the trust protector may only be marginally and irregularly involved. This might, but not necessarily need to, be tied to whether the powers of the trust protector are springing. Additionally, legislatures could couple this more specific model with special tax incentives depending on policy preferences. For states which may be wary of large trust protector companies, a tax break could be given for trusts which utilize non-corporate trust protectors, such as a neutral family friend. If states wish to leverage the economy of scale to increase the use of trust protectors, on the other hand, tax incentives could be used to spur the growth of companies delivering cutting edge, affordable, and knowledgeable services from their trust protectors. Regardless, providing more specific default compensation rules might be more useful, both for settlors and for legislators.

Third, with respect to exculpation clauses, there may be drawbacks to an approach that does not allow a settlor to limit the fiduciary responsibilities of a trust protector. Most obviously, a core tenet of trusts and estates law is to enable settlor control of her assets and the terms of a planning instrument. For some observers, settlors should be able to vary the duties and liabilities of a trust protector depending on the specific circumstances. On its face, this objection makes sense. Settlors should be able to decide how much they wish for any agent involved in the administration of their estate to be subject to lawsuits. But, because settlors cannot exculpate a trustee from acting in accordance with the common law fiduciary duties,[cxiv] it seems fair to remove this possibility for trust protectors as well. Limiting exculpation clauses to specific contexts – such as for medical professionals serving as trust protectors, for example, as is mentioned in the UDTA – may mean that trust protectors would be bound to the same obligations as trustees. On balance, under such a regime, settlors are more likely to be better off.

An interesting permutation of this argument against this paper's suggestions on exculpation clauses is that trust protectors should be afforded the same latitude as other non-trustees, such as holders of discretionary powers of appointment. These individuals have the benefit in many cases of doing virtually whatever they please – including not exercising their powers at all. So, the argument here is that if the holder of a discretionary power of appointment can be free of liability for inaction, so should a trust protector whose role is similarly discretionary. However, this analogy is misguided. The reasons motivating a settlor to appoint a trust protector are sufficiently different from the reasons for a powerholder choosing to create a power of appointment. Holders of discretionary powers of appointment are also not fiduciaries. A large part of their freedom to act *is dependent* upon the understanding that they cannot be sued for failing to, say, make a distribution. In the case of a trust protector, her role is frequently tied

to the removal and reappointment of a trustee, among other important functions. A settlor's expectations for how and when a trust protector acts in this capacity are clearly very different than a settlor's expectations for the holder of a discretionary power of appointment.

Finally, some might argue that these reforms, though rooted in maximizing settlor control and limiting litigation, may actually favor the big players in an increasingly corporatized trust market. As trust protectors become more popular, a uniform approach might result in the reduction of "little guy" trust protectors, an increase in commercial trust protectors, and/or a general consolidation of the corporate players seeking to leverage a uniform legal marketplace. Though this concern is understandable, it seems premature at this juncture. And the benefits of a standardized approach may substantially outweigh the risks of creating another behemoth in the financial planning industry. Also, there may be real cost savings, both in time and capital, from a commercialized trust protector market that can be passed on to settlors and beneficiaries, especially where a trust protector may seek minimal compensation and the costs of compensating – or finding and vetting – someone without experience may be higher than utilizing an experienced trust protector. And, if consolidation and lack of market choice become real problems, legislatures can enact regulatory reforms that address some or all of these concerns. Put simply, reform on a large scale should not be discouraged only on economic grounds. These concerns may be nonexistent, overblown, or easily addressed outside of the courtroom.

CONCLUSION

Trust protectors are "an orphan of the law, and only slightly less so, of legal scholarship," whose "status … is … [often] left to the fertile minds of lawyers."[cxv] There is considerable variation with respect to how states handle the duties, responsibilities, and liability of trust protectors. Though some of this variation leaves the door open for settlors to personalize their

approaches to the role, different models present unique challenges for settlors and for courts. This paper examined case law on trust protectors and argued in favor of the UTC and UDTA approaches of classifying trust protectors as fiduciaries by default. The paper also advocated for the UDTA's framework broadly, emphasizing its clarity and flexibility, and suggested two areas where the Act might improve. Though the future of doctrine governing trust protectors is uncertain, the momentum is clearly moving in favor of statutory rules imposing fiduciary duties upon them. Assuming the UDTA picks up steam, the role of trust protector will become standardized and be a valuable tool in effectuating a settlor's intent as she plans her estate. Future research must be attentive to how the UDTA is implemented, interpreted by courts, and used by lawyers when drafting instruments. It may also consider trends in the use of trust protectors during the COVID-19 pandemic and in crises more generally.

Broadly, the development of new tools like the UDTA also highlight a final important point for policymakers: standardization and comprehensive reform are the way to go. Too often, uniform changes to the law are stymied by the competing interests of states and by efforts to make small changes in a piecemeal fashion. Though such an approach certainly reflects the proclivities of some cautious members of the legal academy, it does not deliver sweeping solutions. Our problems are too great, and opportunities too numerous, to take small steps forward. Lawmakers should consider the efficacy of a systemic reexamination of other spheres of trusts and estates, but also should adopt such an approach as they wrestle with criminal justice reform, tax reform, environmental regulation, civil rights, voting rights, and other areas of necessary policy improvements. The UDTA is the result of thinking big. If we can do it for trust protectors, then we can do it across the landscape of American law.

ENDNOTES

[i] Richard Lewis, Note, *The Foreign Irrevocable Life Insurance Trust as Asset Protection: Potential for Abuse and Suggestions for Reform*, 9 CONN. Ins. L.J. 613, 618 (2003).
[ii] Richard C. Ausness, *When Is a Trust Protector a Fiduciary?*, 27 Quinnipiac Pro. L.J. 277, 278 (2014).
[iii] *Id.*
[iv]For more information on the development and role of the trust advisor specifically, *see* Note, *Trust Advisors,* 78 Harv. L. Rev. 1230 (1965). Though this piece is less recent than others cited in this paper, it helpfully lays out aspects of the role of the trust advisor and situates them in the larger landscape of trusts and estates. Separately, it is also worth noting that the Uniform Directed Trust Act, discussed starting on the next page, may open the door for further nuance with respect to terminology. The Act says that a "trust director" includes a fiduciary with traditional powers of investment or distribution. It may result that "directors" are treated as fiduciaries, "advisors" as non-fiduciaries, and trust protectors as something in between as dictated by a particular instrument. *See* Wayne E. Reames, *Beyond UTC Section 808 and the Uniform Directed Trust Act*, 45 ACTEC L.J. 61, 63 (2019). For now, the paper will move forward acknowledging that terminology varies in some instances, but this does not affect the paper's arguments concerning the status of trust protectors and their equivalents.
[v] Lawrence Frolik, *Trust Protectors: Why They Have Become the Next Big Thing*, 50 Real Prop. Tr. & Est. L.J. 267, 268 (2015).
[vi] *Id.* at 269.
[vii] *See* James T. Lorenzetti, *The Offshore Trust: A Contemporary Asset Protection Scheme*, 102 Com. L.J. 138, 149 (1997). It appears that trust protectors especially proved helpful in off-shore trusts designed to shield settlor's assets from tort liability. *Id.* at 140. In such cases, settlors sought to add extra layers of oversight over trustees who were subject to local, not American law. The protector provided the settlor with indirect control over a trustee while also keeping assets shielded from creditor claims. *Id.* at 149-50. Now, the creditor-protection aspect of such arrangements is a feature of domestic self-settled trusts as well, so settlors have more options that do not require resorting to off-shore alternatives when seeking relief from the prying eyes of creditors. *See* David M. English, *The Impact of Uniform Laws on the Teaching of Trusts and Estates,* 58 St. Louis U. L.J. 689, 693 (2014).
[viii] It is worth pointing out that the role of trusts and trust protectors has become more prominent in popular culture. On the one hand, as anti-elite sentiment has grown, trusts – especially offshore trusts – have become an easy scapegoat for political hacks in their rhetorical arsenal. This has been the case on the left, but also to some extent on the right, both across cable news and online. Instances of such tactics are too numerous to list, but their existence is somewhat unique in that few features of estate planning are deployed in such a manner. In addition to featuring in this socio-political context, trusts and trust protectors have also begun to attract attention from Hollywood filmmakers seeking to capitalize on popular curiosity about the scandals of the wealthy. One need only look to a recent film like *The Laundromat*, direct by Steven Soderbergh and featuring a star-studded case, as an example of a comedic dramatization of the use of trusts and shell companies to take advantage of hard-working Americans.
[ix] UNIF. TRUST CODE § 808(b) (2000) (amended 2010).
[x] UNIF. TRUST CODE § 808(d) (2000) (amended 2010).

[xi] UNIF. TRUST CODE § 808 cmt. at 142 (2000) (amended 2010).
[xii] In addition to the District of Columbia, the states which have adopted the UTC are geographically, demographically, and economically diverse, and include: Illinois, Connecticut, Colorado, New Jersey, Minnesota, Kentucky, Maryland, Mississippi, Wisconsin, Montana, Massachusetts, West Virginia, Michigan, Vermont, Arizona, North Dakota, Ohio, Alabama, Florida, Pennsylvania, Oregon, Arkansas, North Carolina, Virginia, South Carolina, New Hampshire, Missouri, Tennessee, Maine, Utah, New Mexico, Wyoming, Nebraska, and Kansas. More detailed discussion of the UTC and the states which have enacted it would be cumulative, but more information is provided by the Uniform Law Commission.
[xiii] 3 John D. Morley & Robert H. Sitkoff, *Making Directed Trusts Work: The Uniform Directed Trust Act*, 44 ACTEC L.J. 3, 6-7 (2019). For more information about the creation of the UDTA and more helpful resources, *see* ULC, Acts, Directed Trust Act, https://www.uniformlaws.org/viewdocument/final-act-with-comments-24?CommunityKey=ca4d8a5a-55d7-4c43-b494-5f8858885dd8&tab=librarydocuments.
[xiv] *Id*. at 7, citing the UDTA §§ 8-9.
[xv] *Id.*
[xvi] *Id.*
[xvii] *See* RESTATEMENT (THIRD) OF TRUSTS §§ 76-84. *See also* UNIF. TRUST CODE §§ 801-804; U.D.T.A. §§ 8-11.
[xviii] UNIF. TRUST CODE § 802 & cmt.
[xix] S.C. Code Ann. § 62-7-1005A.
[xx] Wyo. Stat. § 4-10-711.
[xxi] *Minassian v. Rachins*, 152 So. 3d 719 (Fla. Ct. App. 2014).
[xxii] The trust had been revocable up until the settlor's death. The trustee in question was the spouse of the settlor, with whom the beneficiaries – the settlor's children – did not get along. It appears that the children sought to access more of the corpus in the trust sooner, and that division under the terms amended by the trust protector disfavored their eventual share that would have been set aside upon her death.
[xxiii] *Minassian,* 152 So. 3d at 720.
[xxiv] *Id.*
[xxv] *Id.*
[xxvi] *Id.* at 721.
[xxvii] *Id.*
[xxviii] *Id.* at 721-22.
[xxix] *Id.* at 722.
[xxx] *Id.*
[xxxi] *Id.* at 723.
[xxxii] *Id.* at 723-24.
[xxxiii] *Id*. at 724. The court summarized, saying that "the Florida Statutes do permit the appointment of a trust protector to modify the terms of the trust." It emphasized that the children's suggested interpretations would have rendered entire sections of the state's Trust Code useless.
[xxxiv] Extensive discussion of this conclusion is not especially pertinent to the fiduciary aspect of the trust protector's role, but, in sum, the court felt that the provisions of the trust at issue conflicted enough to be ambiguous, and particularly noted that the references to the settlor's

children could have been consistent with a favorable financial result for them just as easily as an unfavorable one. *See Minassian* at 725-26.
[xxxv] *Minassian* at 726.
[xxxvi] *Id.* at 726-27. The trust protector also explained that the settlor had "referred to his daughter in derogatory terms, and that the daughter had not seen her father in years."
[xxxvii] *Id.* at 727.
[xxxviii] *Id.*
[xxxix] *Id.*
[xl] *Id.*
[xli] *Id.*
[xlii] *McDevitt v. Wellin,* 90 F. Supp. 3d 579 (D.S.C. 2015).
[xliii] *Id.* at 580.
[xliv] *Id.*
[xlv] *Id.* at 580-81.
[xlvi] *Id.* at 581-83.
[xlvii] *Id.* at 586.
[xlviii] *Id.*
[xlix] *Id.* at 584-86.
[l] *Id.* at 586.
[li] *Id.*
[lii] Alaska Stat. § 13.36.370(d)
[liii] *Robert T. McLean Irrevocable Trust v. Patrick Davis, P.C.,* 283 S.W.3d 786 (Mo. Ct. App. 2009).
[liv] *Id.* at 789-90.
[lv] *Id.* at 790.
[lvi] *Id.* at 789-90.
[lvii] *Robert T. McLean Irrevocable Trust v. Ponder*, 418 S.W.3d 482, 490 (Mo. Ct. App. 2013).
[lviii] *Robert T. McLean Irrevocable Trust v. Patrick Davis, P.C.,* 283 S.W.3d 786, 789-90 (Mo. Ct. App. 2009).
[lix] Missouri Stat. § 456.8-808(6) R.S.Mo.
[lx] *Id.*
[lxi] *Id.*
[lxii] *Robert T. McLean Irrevocable Trust v. Patrick Davis, P.C.,* 283 S.W.3d 786, 790-91 (Mo. Ct. App. 2009).
[lxiii] *Id.* at 792.
[lxiv] *Id.*
[lxv] *Id.* at 793.
[lxvi] *Id.* at 792, 795.
[lxvii] *Id.* at 794.
[lxviii] *Id.* at 795.
[lxix] *Id.* at 794.
[lxx] *Id.* at 795.
[lxxi] *Id.* at 796 (Parrish, J., concurring).
[lxxii] *Id.* (Rahmeyer, J., concurring).
[lxxiii] *See Robert T. McLean Irrevocable Trust v. Ponder,* 36V010500665-01 (Mo. Cir. Ct. 2011).
[lxxiv] *Id.* at 3.

[lxxv] *Id.*
[lxxvi] *Id.*
[lxxvii] *See Robert T. McLean Irrevocable Trust v. Ponder*, 418 S.W.3d 482 (Mo. Ct. App. 2013).
[lxxviii] *Id.* at 490-96.
[lxxix] *See PHL Variable Ins. Co. v. 2008 Irrevocable Trust,* 970 F. Supp. 2d 932 (D. Minn. 2013).
[lxxx] *Id.* at 938. The facts of the case are dismaying, and more likely to feature in a cinematic rendering of the perils of trust protectors than in the stoic halls of a district court. The victim was a hardworking woman and the abuses by the protector egregious. A more detailed discussion of the misdeeds of the agents of this trust would be unnecessary, but suffice it to say that the trust protector and associated parties represent the very worst of abusers of authority that can exist in such relationships.
[lxxxi] *Id.* at 943-44.
[lxxxii] *Id.* at 943.
[lxxxiii] *Id.* at 944-45.
[lxxxiv] *Ron v. Ron*, 2020 U.S. App. LEXIS 34887 (5th Cir. 2020).
[*lxxxv*] *In re: Eleanor Pierce (Marshall) Stevens Living Trust*, 159 So. 3d 1101, 1111 (La. Ct. App. 2015).
[lxxxvi] *Id.* at 1110 (citing Sterk, *Trust Protectors, Agency Costs, and Fiduciary Duty,* 27 Cardozo L. Rev. 2761, 2777 (2006)).
[lxxxvii] *Id.* at 1111.
[lxxxviii] Jay Adkisson, *The Trust Protector As Fiduciary, And Why Maybe That Is A Bad Idea*, Forbes (Oct. 29, 2013), https://www.forbes.com/sites/jayadkisson/2013/10/29/the-trust-protector-as-fiduciary-and-why-maybe-that-is-a-bad-idea/?sh=37f8e2191cfc
[lxxxix] *Id.*
[xc] *Id.*
[xci] *Id.*
[xcii] Alexander A. Bove, Jr., *The Case Against the Trust Protector*, 37 ACTEC L.J. 77, 83 (2011).
[xciii] *See* Alaska's non-fiduciary-by-default statute, *supra* note 54.
[xciv] Bove, 37 ACTEC L.J. at 90-91.
[xcv] *Id.* at 91.
[xcvi] *Id.*
[xcvii] UDTA § 8(a)(1).
[xcviii] *Id.* § 8(a)(2).
[xcix] 3 John D. Morley & Robert H. Sitkoff, *Making Directed Trusts Work: The Uniform Directed Trust Act*, 44 ACTEC L.J. 3, 34 (2019).
[c] Morley and Sitkoff's perspectives are especially valuable since they served as Reporter and Chair, respectively, of the drafting committee for the UDTA.
[ci] *Making Directed Trusts Work* at 35. As these scholars point out, the ability to build in flexibility for states is especially important with respect to duties to diversify and the provision of information to beneficiaries. *See also* ROBERT H. SITKOFF & JESSE DUKEMINIER, WILLS, TRUSTS, AND ESTATES 807, 653-54 & 681-82 (10th ed. 2017).
[cii] *Id.* at 36.
[ciii] *Id., explaining UDTA § 8.* As the comment to UDTA § 8 explains by example, a distribution power might only arise if a beneficiary requests it, and so the trust protector would not have to do anything unless and until such a request arises. This tool may prove especially helpful for settlors with multiple trustees, trust protectors, or holders of powers of appointment.

[civ] *Id.* at 37.
[cv] *Id.*
[cvi] *Id.* at 37-8.
[cvii] *Id.* at 48, explaining UDTA § 10(b).
[cviii] *Id.* at 50-1, citing to UDTA §§ 11(a) and (b). The authors note that the Act's language not only expands existing law to cover how trust protectors should act – they were usually not specifically considered under previous regimes – but also streamline relevant language in a way that helps settlors and courts.
[cix] John F. Wasik, *Guardians of Trusts,* N.Y. Times (Mar. 12, 2014), https://www.nytimes.com/2014/03/13/business/retirementspecial/guardians-of-trusts.html?searchResultPosition=1
[cx] 3 John D. Morley & Robert H. Sitkoff, *Making Directed Trusts Work: The Uniform Directed Trust Act*, 44 ACTEC L.J. 3, 55 (2019).
[cxi] *Id.*
[cxii] *Id.*
[cxiii] *Id.*
[cxiv] *See* RESTATEMENT (THIRD) OF TRUSTS §§ 76-84, *supra* note 17.
[cxv] Paul B. Miller, *Regularizing the Trust Protector*, 103 Iowa L. Rev. 2097 (2018).