



What is a Trust Protector?

- The sky is the limit!
 - ▣ "A disinterested third party whom the settlor appoints to represent his or her best interests in the administration of the trust"
 - ▣ "The role trust protector is a function that carries out enumerated administrative and strategic purposes generally not reserved to the trustee, settlor, or beneficiaries. There is no mandate that the trust protector actually "protect" the trust. The name itself could be anything and has no inherent meaning."




What is a Trust Protector?

- Does not need to be one person
- Powers blend with other trust parties
 - ▣ Trustees distinguished
 - ▣ Directors distinguished
 - ▣ Grantors distinguished



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Legal Framework

- Refresher:
 - ▣ Texas Trust Code
 - §§ 111.001 et seq. of Texas Property Code
 - ▣ Common Law
 - § 113.051
 - ▣ Restatements 2d & 3d
 - NOT adopted in Texas
 - ▣ Uniform Trust Code
 - NOT adopted in Texas



Legal Framework

- TTC § 114.0031:
 - (a) In this section:
 - (1) "Advisor" includes protector.
 - (2) "Investment decision" means, with respect to any investment, the retention, purchase, sale, exchange, tender, or other transaction affecting the ownership of the investment or rights in the investment and, with respect to a nonpublicly traded investment, the valuation of the investment.
 - (b) This section does not apply to a charitable trust as defined by Section 123.001.
 - (c) For purposes of this section, an advisor with authority with respect to investment decisions is an investment advisor.
 - (d) A protector has all the power and authority granted to the protector by the trust terms, which may include:
 - (1) the power to remove and appoint trustees, advisors, trust committee members, and other protectors;
 - (2) the power to modify or amend the trust terms to achieve favorable tax status or to facilitate the efficient administration of the trust; and
 - (3) the power to modify, expand, or restrict the terms of a power of appointment granted to a beneficiary by the trust terms.



Legal Framework

- TTC § 114.0031:
 - (e) If the terms of a trust give a person the authority to direct, consent to, or disapprove a trustee's actual or proposed investment decisions, distribution decisions, or other decisions, the person is an advisor. An advisor is a fiduciary **regardless of trust terms to the contrary** except that the trust terms may provide that an advisor acts in a nonfiduciary capacity if:
 - (1) the advisor's only power is to remove and appoint trustees, advisors, trust committee members, or other protectors; and
 - (2) the advisor does not exercise that power to appoint the advisor's self to a position described by Subdivision (1).
 - (e-1) Subsection (e) does not prohibit the exercise of a power in a nonfiduciary capacity as required by the Internal Revenue Code for a grantor or other person to be treated as the owner of any portion of the trust for federal income tax purposes.



Legal Framework

• TTC § 114.0031 (cont.):

(f) A trustee who acts in accordance with the direction of an advisor, as prescribed by the trust terms, is not liable, except in cases of wilful misconduct on the part of the trustee so directed, for any loss resulting directly or indirectly from that act.

(g) If the trust terms provide that a trustee must make decisions with the consent of an advisor, the trustee is not liable, except in cases of wilful misconduct or gross negligence on the part of the trustee, for any loss resulting directly or indirectly from any act taken or not taken as a result of the advisor's failure to provide the required consent after having been requested to do so by the trustee.

(h) If the trust terms provide that a trustee must act in accordance with the direction of an advisor with respect to investment decisions, distribution decisions, or other decisions of the trustee, the trustee does not, except to the extent the trust terms provide otherwise, have the duty to:

- (1) monitor the conduct of the advisor;
- (2) provide advice to the advisor or consult with the advisor; or
- (3) communicate with or warn or apprise any beneficiary or third party concerning instances in which the trustee would or might have exercised the trustee's own discretion in a manner different from the manner directed by the advisor.

(i) Absent clear and convincing evidence to the contrary, the actions of a trustee pertaining to matters within the scope of the advisor's authority, such as confirming that the advisor's directions have been carried out and recording and reporting actions taken at the advisor's direction, are presumed to be administrative actions taken by the trustee solely to allow the trustee to perform those duties assigned to the trustee under the trust terms, and such administrative actions are not considered to constitute an undertaking by the trustee to monitor the advisor or otherwise participate in actions outside the scope of the advisor's authority.



When to Deploy

- Modify a power of appointment
- Terminate the trust or change its termination date
- Direct investments
- Release, renounce, suspend, or limit powers otherwise conferred on another party (including the trustee or the trust protector him- or herself)
- Veto or direct discretionary trust distributions
- Delay or accelerate scheduled distributions
- Add or delete trust beneficiaries
- Consent to the exercise of a power of appointment



When to Deploy (cont.)

- Amend the trust's dispositive provisions
- Approve the trustee's accounts
- Mediate or to arbitrate disputes between the trustee and the beneficiaries
- Interpret the rights of beneficiaries
- Change a distribution standard
- Modify the rule against perpetuities which might apply to the trust
- Direct the allocation of principle and income
- Run a business owned by the trust
- Appraise unmarketable securities or other assets for trust purposes
- Vote shares of a trust
- Set trustee compensation



When to Deploy – Recommended

- Add, remove, or replace trustees
- Correct ambiguities or scrivener's errors
- Change the situs and governing law of the trust
- Convert a trust into a supplemental needs or other special-purpose trust
- Amend the trust's administrative provisions (particularly to achieve a favorable tax consequence or address a change in law)



Potential Issues

- Fiduciary Issues
- Tax Consequences
- To whom is the duty owed?



Potential Issues (cont.)

- Acceptance & Resignation
- Succession
- Duty to monitor or report



Potential Issues (cont.)

- Who should (or should not) serve?
 - ▣ Grantor
 - ▣ Trustee
 - ▣ Beneficiary
 - ▣ Friends
 - ▣ Professionals



Best Practices

- Don't fear the Paladin!
- Keep it simple/Don't lost the forest for the trees!
- Name the right people




Best Practices

- Avoid fiduciary duties (probably)
- Power to release
- Acceptance & contiguous service



Best Practices

- Death or incapacity of trust Protector
- Duty to monitor or report
- Compensation



Enter the Paladin: Using Trust Protectors to Solve Trust Problems

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Questions?

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