

Trust Protectors in Oregon: Co-Fiduciary or Sleeping Lion?

On June 29, 2005, Governor Kulongoski signed Senate Bill 275, making the Oregon Uniform Trust Code the law in Oregon, effective January 1, 2006. The Oregon UTC was enacted to remove ambiguities in existing law and practice, and to keep Oregon current with the national trend. By the end of 2006, 18 states and the District of Columbia had enacted the UTC, and of those states that have not, many are considering doing so.

Many in the legal and trust fields have embraced the adoption of the UTC. Before the UTC was enacted, the legal landscape of Oregon trust law resembled the Wild West. Judges, practitioners, and trustees had little statutory guidance to help them resolve trust-related issues. Most often, those involved in a trust law dispute settled the matter outside the courtroom. Such settlements led to a dearth of case law, which in turn resulted in still more settled cases. Although a couple of “bloodbaths” have made the news, they have been few and far between. The Oregon UTC now provides statutory guidance on many relatively common trust issues. However, as comprehensive as the UTC may be, it still fails to address several trust law areas. One such area is that of the role, rights, and responsibilities of the trust protector, which is the focus of this article.

Trust Protector: What the Heck Is It?

Oregon’s version of the UTC does not address the trust protector, and no universal, common law definition of the role exists. An amalgam of the various descriptions of the

role of the trust protector provides that a trust protector is an individual or entity with specific powers to direct the trustee in administering a trust. A trustee’s powers are either specifically provided in the trust instrument or, in default, are statutorily imposed. *See, e.g.*, ORS 130.650-.730. However, because there are no similar default statutory provisions granting powers to the trust protector, powers must be set forth in the trust instrument if they are to exist at all. Common trust protector powers include the powers to:

- remove, add, and replace the trustee;
- veto or direct trust distributions;
- add or delete beneficiaries;
- change the trust’s situs or governing law;
- veto or direct investment decisions;
- consent to the exercise of a power of appointment;
- determine whether an event of duress has occurred;
- amend the trust’s administrative provisions;
- amend the trust’s dispositive provisions;
- approve trustee accounts; and
- terminate the trust.

These powers are often described as negative (*e.g.*, a veto right), positive (*e.g.*, trustee removal), springing (*e.g.*, commencing on the incapacity of the settlor), and/or durable (*e.g.*, withstanding the incapacity of the settlor). From a theoretical perspective, state courts also can be considered *de facto* trust protectors. Under ORS 130.050, courts have the

same equitable authority to exercise any power that a trust protector or a trustee can exercise.

A settlor often nominates a co-trustee when the settlor is uncomfortable having a single trustee manage the trust estate. In other cases, a settlor may opt to nominate a trust protector to oversee and potentially restrain the trustee's control of the trust estate. To the extent that the trust fails to set forth how nominated *co-trustees* are to manage the trust, ORS 130.610 provides default guidelines for such management. However, there are no similar statutory default provisions governing the interaction between a trustee and a trust protector. Obviously, this lack of statutory guidance would cause problems if a trust instrument were to nominate a trust protector and fail to set forth the rights and responsibilities of that position. Moreover, problems may arise if a trust instrument nominates more than one party as trustee but fails to make clear that the parties are to serve as co-trustees. In that event, it could be argued that one of the trustees is not a trustee or co-trustee but, rather, a trust protector. If such a conclusion is reached, the question would then become whether the co-trustee provisions of ORS 130.610 apply to the relationship between the trustee and the trust protector.

Trust Protector Acceptance

Trustee status does not arise simply by virtue of the trustee being designated as such in the trust document. Conceptually similar to offer and acceptance in contract law, under trust law the trustee has to accept the appointment. Acceptance criteria vary widely among corporate trustees. When a corporate trustee is asked to serve as trustee, it must comply with regulations, policies, and procedures before formal acceptance will be effective. Similarly, trustees who are individuals must manifest their acceptance of the appointment either in writing or by their actions. *See* ORS 130.600. Because there are no similar statutory provisions controlling a trust protector's acceptance of the position of trust protector, it is unclear how such acceptance is effected or if acceptance is even necessary. In other words, can a party become a trust protector merely by being designated as such in a trust instrument and failing to refuse to serve? Does mailing a trust instrument to the nominated protector create liability for the protector, the named protector does nothing when a reasonable protector would have acted?

To Be or Not to Be – A Fiduciary, That Is

Black's Law Dictionary defines a "fiduciary relation" as a relationship "founded on trust or confidence reposed by one person in the integrity and fidelity of another." *Black's Law Dictionary* 626 (6th ed. 1990). When considering this definition as it relates to a trust protector, two questions arise. First, is a trust protector a fiduciary? Second, if the

trust protector is a fiduciary, to whom is the trust protector's fiduciary duty owed? Is the duty owed to the trust, the settlor, the beneficiaries, or someone or something else?

Some instruments expressly provide that the trust protector is or is not a fiduciary. However, such a declaration is like saying, "[r]egardless of the type of animal that passes through these gates, it will be deemed to be a horse." *Alexander A. Bove, Jr., Trust Protectors, Trusts & Estates*, Nov. 2005, at 29. ORS 130.685(4) imposes a fiduciary duty on anyone who has a power to direct. It is not advisable to attempt to avoid the imposition of fiduciary duties on the trust protector by calling the position by another name. Implicit in all conduct undertaken by a trust protector is an understanding that all duties will be carried out with reasonableness and good faith, which serve as the foundation of fiduciary relationships. Regardless of the name used to identify a person holding traditional trust protector authority and responsibilities, practitioners should presume that such person will be deemed to be operating under fiduciary duties.

To whom the trust protector owes fiduciary duties is unclear. The existence and object of the duty most certainly depends on the particular authority and responsibility at issue, and the surrounding circumstances.

Valuable Tool or Double-Edged Sword?

The most common power exercised by a trust protector is the power to remove and replace a trustee. With individuals and companies constantly relocating and with corporate trustees changing hands with increasing frequency, this power can be very valuable. When creating a trust, settlors often select as trustee an individual or institution with whom they have an existing relationship. Later, through moving, acquisition, merger, or otherwise, the trust may be administered in another jurisdiction or by another trust officer or individual. This is a prime example of when the trust protector should act.

But what happens if the trust protector does not act in good faith or does nothing when it should act? For example, can the trust protector remove a trustee for no apparent reason at the expense of the trust? In *Von Knieriem v. Bermuda Trust Co., Ltd.*, the court considered whether the trust protector was a fiduciary when the protector decided to replace the current trustee. 1 BOCM 116 (Berm. High Ct. 1994). The court held that the test for determining whether the protector is a fiduciary is whether the protector is acting in the best interests of the trust and its beneficiaries. An additional factor is whether the trust instrument provides for a succession of protectors, or provides that a protector

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appointment is personal to one individual and that the office lapses when that individual no longer serves. Other courts have failed to release a protector of its fiduciary responsibility even though the trust expressly so provided. *See In re Rogers*, 63 O.L.R 180 (Ont. 1928). When an attorney attempts to draft certain limits on a protector's liability, he or she is wise to remember that courts are loath to release protectors from their fiduciary duties regardless of the wording of the trust.

Conclusion

Trustees are selected for a number of reasons, not the least of which is confidence in the capability of the trustee to carry out the settlor's desires. Trust protectors are often used to provide an additional level of assurance that those wishes will be carried out. However, before creating the position of trust protector in any trust instrument, the settlor must understand not only the potential benefits of having a trust protector, but also the potential risks that accompany that role.

Stuart B. Allen, JD, CTFA
Allen Trust Company
Portland, Oregon