A PROTECTOR BY ANY OTHER NAME . . . .

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I. INTRODUCTION

The trust protector has rapidly become one of the most popular and valuable tools for estate planning attorneys today.[1] The problem has been, and remains, that there are two opposing schools of thought in its use.[2] One is that the protector may or may not be declared a fiduciary regardless of its powers.[3] The other is that that position in almost all cases is so integral to the proper administration of the trust that with very limited exception the law should per se regard the protector as fiduciary.[4] This discussion, which emphatically supports the latter position, focuses expressly on that issue, and was in large part motivated by and is offered in response to a plenary presentation on the subject at the 2015 Heckerling Institute on Estate Planning.[5] That presentation essentially declared that the protector will or will not be a fiduciary depending upon the *name* given to the position under the terms of the trust, without regard to the impact of his powers on the beneficiaries or the purposes of the trust, and without regard to the intent of the settlor.[6] This discussion points out the basic lack of support for such an

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1. Reid K Weisbord, *Social Security Representative Payee Misuse*, 117 PENN. ST. L. REV. 1257, 1282 (2013).

2. *See infra* Part VII.

3. *See infra* Part VII.

4. *See infra* Part VII.

5. Kathleen R. Sherby, *In Protectors We Trust: The Nature and Effective Use of Trust Protectors*, 49th Annual Heckerling Institute on Estate Planning, Jan. 12–16, 2015.

6. *Id.*

approach and analyzes the protector's important role in a trust, concluding that with one specific exception, the law has to regard the protector as a fiduciary.[7] This discussion further considers the state laws concerning protectors, which generally reflect either a lack of understanding or a lack of concern about fiduciary law, and explains that the only real impact of such laws on the issue is made by those few states which provide that the protector is regarded as a fiduciary, regardless of a statement in the trust to the contrary.[8]

In Shakespeare's play, *Romeo and Juliet*, Juliet contemplates that Romeo should deny his surname, on account of the fact that their families were enemies, and Romeo should not be judged (by her family) simply because of the name he bears.[9] Juliet wisely observes that to do so would change nothing between them, and that the name is not him and he is not the name, as embodied in her immortal quote, "that which we call a rose [b]y any other name would smell as sweet."[10] Juliet's astute observation simply and clearly makes the indisputable point that it does not matter what we call something; what matters is what the thing really is.[11]

In the 2015 popular and highly respected Heckerling Institute on Estate Planning, one of the lecturers, Kathleen Sherby, speaking on the subject of Trust Protectors at a plenary session, went to great lengths to emphasize that in her opinion the name we give the protector in our trusts will legally and conclusively establish protectors' role and liability (or rather, freedom from liability) in serving under the trust.[12] I think that Shakespeare would be the first to disagree, and I would be the second.[13]

Sherby aptly pointed out the widespread confusion surrounding the nature and duties of the trust protector.[14] Unfortunately, instead of dispelling the confusion in my opinion, her presentation as a whole (specifics to follow) displayed a clear "bias of ascertainment" that tainted the conclusions drawn and the advice given, not only in the presentation itself, but in the

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7. *See infra* Parts II–IV.

8. *See infra* Part III.

9. WILLIAM SHAKESPEARE, ROMEO & JULIET act 2, sc. 2.

10. *Id.*

11. *See id.*

12. *See* Sherby, *supra* note 5. Ms. Sherby has written a subsequent article on the very same topic as part of an ALI CLE Course, entitled, "Estate Planning for the Family Business Owner"; "Directed Trust? Or Enhanced Trust Flexibility? Is there a Difference?: The Nature and Effective Use of Trust Advisors and Trust Protectors As Third Party Decision Makers", July 2015. There is nothing in these materials that would change any of my comments throughout this work.

13. *See infra* notes 9–11.

14. *See* Sherby, *supra* note 5. Bias of ascertainment is a phrase used primarily in the medical field, but applicable to any, meaning a "systematic failure to represent equally all classes of cases . . . to be represented in a sample." *Bias of Ascertainment*, THEFREEDICTIONARY, http://medical-dictionary.thefreedictionary.com/ascertainment+bias [https://perma.cc/TJJ9-UK9V] (last visited Apr. 11, 2016). The effect of such a bias is to support one's argument or conclusions by using only those parts of the relevant information and facts that do so, *ignoring* those that do not support or may undermine the validity of the conclusion. *See id.*

accompanying outline as well, serving to do little more than perpetuate the confusion over the role of the trust protector.[15] This discussion is a commentary and critical analysis of the presentation with a view towards clearing up some of the confusion with observations supported by leading cases, treatises, and plain reasoning based on centuries-old trust law.[16]

Perhaps the greatest point of confusion, and the main focus of the Heckerling presentation, is whether the protector is a fiduciary.[17] This is not at all surprising, because most of the domestic statutes containing provisions for the trust protector either declare that the protector is not a fiduciary unless the trust provides otherwise, or declare that he is, again unless the trust provides otherwise (i.e., that he is not).[18] Further, even though the overwhelming majority of states with protector provisions favor the fiduciary role (but again, allowing the trust to provide otherwise), and even though virtually every treatise on the subject favors the fiduciary characterization, as does the Uniform Trust Code and the Restatement Third of Trusts, an overwhelming number of estate planners routinely declare in their trusts that the protector shall not be a fiduciary, despite the nature of the powers granted and the settlor's intention.[19] In addition, such an approach is even encouraged by some forms guides.[20] Why these practitioners take this approach is explored later in this discussion, beginning in Part II.[21]

There is little question that the trust protector is here to stay.[22] Estate planners may not use them in every trust, but few would argue against their unique value to long-term and dynasty trusts, and many life insurance trusts, if not more.[23] For this reason, it is extremely important that estate planning professionals must accept and assume the responsibility to effectuate clients' objectives in a manner consistent with established principles of law and consistent with the best interests of trusts and beneficiaries, rather than in a manner designed to produce the least exposure to liability of parties who are appointed to implement the client's plans.[24]

The thrust of this discussion is to discourage the tendency on the part of practitioners from thinking that a party who holds fiduciary powers, or is in a fiduciary position and placed in that position of trust and confidence by the

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15. *See infra* Parts II–VI.

16. *See infra* Parts II–VI.

17. *See* Sherby, *supra* note 5, at §§ 2.1, 2.2.

18. *See id*. at § 5 (comparing different states' statutes).

19. *See id*.; RESTATEMENT (THIRD) OF TRUSTS § 75 (2012); LEWIN ON TRUSTS §§ 29-41(Street & Maxwell 18th ed. 2006); UNIF. TR. CODE § 808(d) (UNIF. L. COMM'N 2000).

20. *See* CHARLES D. FOX IV & THOMAS W. ABENDROTH, ESTATE PLANNING STRATEGIES AFTER TAX REFORM: INSIGHT AND ANALYSIS 135–36 (2001).

21. *See infra* Part II.

22. FOX & ABENDROTH, *supra* note 20.

23. *Id.*

24. *See infra* Part II. Reference in this discussion to "the best interests of the trust" is intended to mean behavior consistent with the settlor's intentions, the purposes of the trust, and the best interests of the beneficiaries.

settlor, may be relieved of all fiduciary duty simply by stating in the trust that he is not a fiduciary.[25] This "fear of fiduciary duty" has been blown way out of proportion.[26] To be a fiduciary is not a curse, and if exposure to liability is the motivating concern for that fear, such exposure can be reduced to a minimum, as discussed later, but it cannot be drafted away completely.[27] This is not to say that a protector may never act in a non-fiduciary capacity, as illustrated later in the discussion, but such cases are unique and contrary to the inherent nature of the trust protector's role.[28]

II. THE BACKGROUND, THE ISSUE, AND THE DILEMMA—THE FEAR OF FIDUCIARY DUTY

A number of authors credit the offshore trust with the origin of the trust protector.[29] While that may be true for the name-tag, "protector", it is certainly not true when applying the generally agreed definition of the role, which is, "a party who holds powers over a trust but who is not a trustee."[30] In this context, cases in the United States date back over a hundred years in dealing with the role of a trust advisor, which role clearly embodies the foregoing definition.[31] Thus, whether the origin of the role is onshore or offshore provides little or no assistance in the legal analysis of the role and its place in the modern day trust.[32] There is one aspect of the role, however, that was brought to light largely because of the offshore trust.[33]

The offshore trust we speak of is an irrevocable discretionary trust in an otherwise unusual jurisdiction for the same (i.e., far from the settlor's domicile), established by a United States citizen for his own benefit.[34] The laws of such jurisdiction would prevent the settlor's creditors from reaching the trust assets.[35] At the same time, of course, the settlor himself could not terminate the trust nor demand distributions by the trustee.[36] While the extremely high degree of safety of the trust assets from the settlor's creditors offered the settlor comfort, the distance of the assets from home, together

25. *See infra* Parts IV–V.

26. *See infra* Part II.

27. *See infra* Part II.

28. *See* N.H. REV. STAT. ANN. § 564-B:12–1202(a) (2008) (providing that the protector shall not be considered a fiduciary if he is also a beneficiary of the trust).

29. *See* Stewart E. Sterk, *Trust Protectors, Agency Costs, and Fiduciary Duty*, 27 CARDOZO L. REV. 2761, 2765 (2006).

30. *See* ALEXANDER A. BOVE, JR., TRUST PROTECTORS: A PRACTICE MANUAL WITH FORMS § 2.3 (JURIS PUB. 2014); Sterk, *supra* note 29, at 2763; Sherby, *supra* note 5, at § 2.5.

31. *See* Warren v. Pazolt, 89 N.E. 381 (Mass. 1909); Rice v. Halsey 142 N.Y.S. 58, (N.Y. App. Div. 1913), *aff'd*, 109 N.E. 1091 (1915); McLenegan v. Yeiser, 91 N.W. 682 (Wis. 1902).

32. *See infra* Part V.

33. *See infra* Part V.

34. *See infra* Part V.

35. *See* Alexander A. Bove, Jr., *Offshore Asset Protection Trusts*, TRS. & ESTS. MAG., Nov. 2010, at 67.

36. *See id.*

with the total lack of control, often gave the settlor some discomfort.[37] The trustees of these trusts, in an effort to generate a comfort level adequate to placate the settlors, influenced legislation formally allowing protectors to serve under the trust, with powers that would allow acceleration of distributions, changes to the trust, and even termination, calling for a return of the assets to the settlor, all at the protector's sole discretion without court order or inference by the trustee.[38]

The question now became who would act as trust protector?[39] Since it would be counter-productive to use a United States party (due to that party being subject to United States Court jurisdiction), offshore parties, who generally had no knowledge of the settlor or his family, were the logical choice.[40] Typically, the offshore protector candidate would have little to do until the circumstances required him to consider whether he should carry out some act connected with the trust.[41] While the terms of the trust typically gave him unlimited discretion in exercising his powers, he would not want to subject himself to liability in such circumstances and would only agree to serve if he was expressly exculpated.[42] Logically, the offshore statutes provided the presumption that the role was non-fiduciary and there would be no liability to the beneficiaries.[43] Typically, since the trust instrument would provide the same protection, everyone was happy, but it was seldom, if ever, explained to the client that if the protector, through exercise of a power, caused loss to the trust, there would be no recourse.[44] The risk to the client must have seemed minimal to the drafting attorney, however, since the main thought was protection of the assets from creditors while providing reasonable access for the client's needs.[45] Thus, the essential issue of whether the protector owed any duty to the trust purposes or the beneficiaries was never addressed, other than to dispose of any duty by drafting it away or simply relying on the statute, thereby hoping to make it a non-issue.[46]

As a number of U.S. states began to adopt self-settled trust legislation to compete with the offshore jurisdictions, they conveniently, and without much thought, perpetuated the "non-issue" by either providing in their statutes that the protector was not a fiduciary unless the trust expressly provided otherwise, or that the protector was a fiduciary unless the trust

37. *See infra* Part V.
38. *See infra* Part V.
39. *See infra* Part V.
40. *See* Bahamas Trust Act, 1998, part VI, § 81; Cook Islands International Trust Act 1984, part IV, § 20.
41. *See supra* note 40.
42. *See id.*
43. *See id.*
44. *See id.*
45. *See id.*
46. *See id.*

provided otherwise.[47] This is the dilemma.[48] In other words, the states that reduce the determination of whether a power holder is a fiduciary to a mere question of drafting encourages advisors to sidestep a vital trust issue and ignore one of the most essential principles of trust law—the fiduciary duty.[49] This is *not* to say that a power holder, including a protector, can never have a non-fiduciary role.[50] This may occur, for example, where the protector has authority over discretionary distributions and is also a beneficiary of the trust.[51] There, the presumption is that the settlor intended the arrangement to be akin to a personal power of appointment and the power holder/protector need not be held to fiduciary standards.[52] But, as discussed in further detail later, to suggest that the role of a party who participates in the administration of a trust shall be conclusively established by the words of the trust rather than by the actual role of the party is clearly foolhardy.[53] It would be only slightly less sensible than declaring that the trustee shall not be a fiduciary.[54] This superficial reasoning is not helped by commentators suggesting that the term or name used by drafters will itself be determinative of the legal role, as when it was stressed in the subject outline that the drafters should use the term trust advisor if they wanted a fiduciary role, and trust protector if they want a non-fiduciary role, suggesting that the actual role they play and the nature of the powers they hold are not important.[55]

Despite this, I note that the subject outline at section 2.1, entitled, "No Significance to Name", cites a Donovan Waters article, "The Protector: New Wine in Old Bottles?", in which Waters says, "the particular name used to describe the position has no significance."[56] Sherby herself says in this part, "there is absolutely no intention to define the role of this third party decision maker by the terminology used or the name given."[57] Although I am in total agreement with that comment, it is especially puzzling, since, as illustrated in great detail in this discussion, Sherby's outline devotes the entire balance

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47. *See id*.

48. *See id*.

49. *See id*.

50. *See* Rawson Tr. Co., Ltd. v. Perlman, No. 194-1989 (Bah. Sup. Ct., Apr. 25, 1990); BOVE, TRUST PROTECTORS, *supra* note 30, at § 3.7; LEWIN ON TRUSTS, *supra* note 19, § 29-37; Sherby, *supra* note 5, at § 9.5.

51. *See supra* note 50.

52. *See id*.

53. *See infra* Part III.

54. *See infra* Part III.

55. Sherby, *supra* note 5, at § 9.5 "*Be very careful* . . . to use *the term 'trust advisor'* when the intention is to grant powers that are inherently those of a trustee, and *specifically provide in the trust instrument that the trust advisor is a fiduciary*. When providing the third party decision maker with the powers that would otherwise be given to a beneficiary or trustee or that otherwise would require a court action, *take care to use the term 'trust protector' and specifically provide in the trust instrument that the trust protector is not a fiduciary*." (emphasis added).

56. *Id.* at § 2.1.

57. *Id.*

to the careful use of the terms, protector and advisor, when the drafter wishes to denote non-fiduciary and fiduciary roles, respectively.[58]

What I find to be so unfathomably puzzling with all of this is the lengths to which such commentators and states are willing to go to avoid having a party who may be essential to the best administration of a trust from being regarded as a fiduciary.[59] Why this deadly fear of fiduciary duty?[60]

III. THE NATURE AND IMPLICATION OF POWERS OVER A TRUST AND THE FIDUCIARY QUESTION

What is meant or involved in having powers over a trust, when are they fiduciary, and what is a fiduciary power, anyway?[61] Fundamental law requires that a power must be either personal or fiduciary.[62] There is no in-between, although there may be different degrees of impact of the exercise of a power.[63] For instance, a power to change the situs of a trust will have less impact than the power to add or delete beneficiaries, but can only be either personal or fiduciary, not both.[64] The law is also well settled that the holder of a personal power is under no obligation to even consider whether he should exercise the power.[65] He can ignore it completely and never exercise it, even if there is some strong reason why it should be exercised.[66] And if he does exercise it, the exercise may be on a whim, or the opposite of what a reasonable person should do, or even in retaliation against an object of the power.[67] What could be less of a fiduciary duty than that?[68] The duty of the holder of a personal power is only to comply with the terms of the power and not to commit a fraud on the power.[69] So what do we mean when we appoint a protector, grant him powers, and then declare that he is not a fiduciary and may exercise the powers in a non-fiduciary capacity?[70] Can that mean anything other than that the powers are personal powers, and not only does the protector have the right to disregard altogether whether a protector should exercise a power but also the right to exercise a power on a

58. *See id*.

59. *See infra* Part IV.

60. *See infra* Part VII.

61. *See* Carol Warnick, *Trust Protector as a Fiduciary—To Be or Not to Be*, HOLLAND & HART: FIDUCIARY L. BLOG (Apr. 29, 2013, 11:00 AM), http://www.fiduciarylawblog.com/2013/04/trust-protector-as-a-fiduciary-to-be-or-not-to-be.html [https://perma.cc/ELL4-97PR].

62. *See id*.

63. *See id*.

64. *See id*.

65. GERAINT THOMAS, THOMAS ON POWERS, § 6-187 (1st ed. 1998).

66. *See id*.

67. *In re* Wright, 110 Misc. 480, 481 (Sur. Ct. New York County 1920).

68. *See id*.

69. *See* RESTATEMENT (SECOND) OF PROP.: WILLS & DONATIVE TRANSFERS § 20.2 (2011); Pitman v. Pitman, 50 N.E.2d 99 (Mass. 1943).

70. Bove, *Trust Protectors*, *supra* note 30 § 3.5.

whim, without any regard to the interests of the beneficiaries or the purposes of the trust?[71]

When, for example, we grant a spouse or other party a special power of appointment in favor of the settlor's issue, do we feel inclined to state that the power is a non-fiduciary power?[72] Never.[73] And do we require the power holder to accept the powers or the position of power holder in writing?[74] Never—but wait![75] Is that not exactly what attorneys do when they appoint a non-fiduciary protector?[76] What's the point of that?[77] Apparently, the point—the only point—is to attempt to sidestep the protector's exposure to liability for negligence or incompetence in exercising or failing to exercise his powers.[78]

A fiduciary power is one where the holder of the power must occasionally consider whether to exercise the power, and the only factors in reaching a decision are the best interests of the beneficiaries and the purposes of the trust.[79] The acknowledged duties of a fiduciary power holder expose the power holder to liability for breach of those duties.[80] As noted, this can be the only reason that attorneys and commentators go to such extraordinary lengths to deny the fiduciary role.[81] Unfortunately, no one has asked why.[82] It is common knowledge that a fiduciary may be exculpated for all behavior except fraud or willful misconduct.[83] If this approach is taken, then the protector's exposure is kept to a minimum and his liability would only result where appropriate.[84] On the other hand, do the promoters of the non-fiduciary position really believe that a non-fiduciary protector would *not* be liable for fraud or willful misconduct?[85] Especially where they do not establish it in the appointment or grant of powers?[86] According to the Restatement, even the holder of a personal power can be liable for fraud.[87] So where is the difference?[88]

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71. *Id.* at 4.
72. *See infra* Part V.
73. *See infra* Part V.
74. *See infra* Part V.
75. *See infra* Part V.
76. *See infra* Part V.
77. *See infra* Part V.
78. *See infra* Part V.
79. CHARLES E. ROUNDS, JR. & CHARLES E. ROUNDS, III, LORING & ROUNDS: A TRUSTEE'S HANDBOOK § 6.1 (2015 ed.).
80. *See id.* § 6.1.1.
81. *See, e.g.*, Sherby, *supra* note 5 (denying fiduciary role).
82. *See supra* Part III.
83. ROUNDS & ROUNDS, *supra* note 79, at § 7.2.6.
84. *See id.*
85. *See supra* Part III.
86. *See supra* Part III.
87. RESTATEMENT (SECOND) OF PROP.: WILLS & DONATIVE TRANSFERS § 20.2 (2011).
88. *See* ROUNDS & ROUNDS, *supra* note 79, at § 6.1.3.

The difference lies in the fiduciary's unavoidable duty of good faith.[89] Regardless of the extent of exculpation in the document, attorneys cannot draft away the fiduciary's duty of good faith, while the holder of a personal power never has a duty of good faith (other than to comply with the terms of the power and not to commit a fraud on the power).[90] It seems, then, that the question of duty comes down to (or at least should come down to) three issues: (1) what is best for the client; (2) what is the intent of the informed client; and (3) regardless of the first two, what would a court say is the duty of the power holder in question?[91] Regarding the first two issues, would anyone (except the non-fiduciary promoters) argue that the law should give preference to the protector's interest over those of the beneficiaries and the purposes of the trust?[92] What client would choose that approach if advised of the consequences?[93] As for the third issue, it will in many cases be the deciding factor because it has been the practice of so many attorneys to draft away all fiduciary duty and related liability.[94]

If the circumstances of a case and the intent of a settlor dictate that the power holder had a fiduciary duty, then no amount of drafting can change that, any more than it could dictate that the trustee was not a fiduciary.[95] To suggest that a court could not hold that there should be some recourse where there is clear negligence or a blatant disregard of the interests of affected parties (e.g., the beneficiaries) is to challenge the very sense of justice.[96] One commentary on the issue noted that there should be "equitable compensation [to the damaged parties] for breaches of non-trust fiduciary duties", suggesting that this is a trend in the law and that there is a duty of care even though the role is a non-fiduciary one.[97] The commentary referred to a case on the very issue, where the court noted that the extent of liability of a fiduciary for negligence should be the guideline of the "general duty to act with care imposed by those who take it upon themselves to act for or advise others, . . . and that duty of care is the *same duty arising from the circumstances in which they were acting, not from their status or description*."[98]

Lastly, speaking of trusts in the law, we must consider the position taken by the major treatises and by the states.[99] The default position in the Uniform

89. *See id.*
90. *See id.*
91. *See id.* at § 6.
92. *See id.*
93. *See id.*
94. *See id.*
95. *See id.*
96. *See* R.P. Austin, *Moulding The Content of Fiduciary Duties*, *in* TRENDS IN CONTEMPORARY TRUST LAW 153–55 (A.J. Oakley ed. 1996).
97. *Id.*
98. *Id.* (citing Henderson v. Merrett Syndicates Ltd. [1995] 2 AC 145 (UK)) (emphasis added).
99. *See* AUSTIN SCOTT & WILLIAM FRATCHER, SCOTT ON TRUSTS § 185 at 565 (4th ed. 1987).

Trust Code, for example, is that the protector (a person who holds a power to direct a trustee) "is presumptively a fiduciary," and Scott & Fratcher on Trusts states, "[w]here the person on whom the power of control . . . [over the trust] is neither a co-trustee nor a beneficiary but is a third person otherwise unconnected with the administration of the trust, the power is ordinarily conferred on him as a fiduciary and not for his own benefit."[100] Perhaps even more significant is the position taken in the recent draft version of the Uniform Directed Trusteeship Act proposed by the National Conference of Commissioners on Uniform State Laws, which proposes that "Except as otherwise provided in subsection (c), a trust [protector] is subject to the same fiduciary duties . . . as a trustee would be in the exercise or non exercise of the same power under the same circumstances."[101]

Then there are the state laws.[102] The great majority of states with protector provisions provide that the protector (or equivalent), *will* be a fiduciary, but most allow for the trust to state otherwise.[103] The minority of states provide that the protector shall *not* be a fiduciary unless the trust provides otherwise.[104] There are seven states that provide fiduciary status with no allowance of a contrary provision in the trust.[105] The obvious, if not embarrassing, confusion among the states has to be the result of different viewpoints and understanding of the role by the legislatures, who have no doubt received guidance and advice from their local estate planning bar.[106] Some have suggested that in many cases the reason for this is the trust instruments name attorneys as trust protectors, and they prefer to serve without exposure to liability (relying of course on state law so providing) despite cases, commentary, treatises, basic fiduciary law, and simply sound reasoning to the contrary.[107] However, there is one concern that may have escaped them.[108]

The typical legal malpractice policy covers an attorney for claims "arising out of the conduct of the insured's profession *as a lawyer*."[109] The

100. UNIF. TR. CODE § 808(d) (UNIF. L. COMM'N 2000); *see* SCOTT & FRATCHER *supra* note 99, at 565.

101. DIRECTED TRUSTEESHIP ACT § 8(a) (NAT'L CONF. OF COMM'RS ON UNIF. ST. L., Proposed Official Draft 2016) http://www.uniformlaws.org/shared/docs/divided%20trusteeship/2015mar_DTA_Mtg%20Draft.pdf [https://perma.cc/8SQE-S9YS].

102. *See id*.

103. *See id*.

104. ALASKA STAT. ANN. § 13.36.370–375 (West 2013); ARIZ. REV. STAT. ANN. § 14-10818 (2013); IDAHO CODE ANN. § 15-7-501 (West 2007); S.D. CODIFIED LAWS § 55-113-1 (2015).

105. *See* MICH. COMP. LAWS ANN. § 700.7803 (West 2010); MISS. CODE ANN. § 91-8-308 (West 2014); N.C. GEN. STAT. ANN. § 36C-8A-1 (West 2012); TENN. CODE ANN. § 35-15-808 (West 2015); VT. STAT. ANN. tit. 14A § 808 (West 2009); VA. CODE ANN. § 64.2-770 (West 2014); WYO. STAT. ANN. § 4-10-808 (West 2007).

106. *See* DIVIDED TRUSTEESHIP ACT § 204(b), *supra* note 101.

107. *See* SCOTT & FRATCHER *supra* note 99.

108. *See* DIRECTED TRUSTEESHIP ACT § 8(a) *supra* note 101.

109. Taken from the author's malpractice insurance contract (emphasis added).

typical contract goes on to include acts as a guardian, conservator, trustee, etc., but *only* includes such roles when conducted "*in a fiduciary capacity*"[110] So one might question the value of insisting that the protector (who is also an attorney) is not a fiduciary.[111] He is certainly not acting as a lawyer, as that clearly implies a fiduciary duty.[112] This leads to the question of whether the non-fiduciary will be able to obtain liability coverage at all.[113] If the insurer believes that a court will respect the non-fiduciary, non-liability language, what is there to insure?[114] Either the premiums would be next to nothing or just arbitrary; or perhaps, if an attorney is the protector, a special rider could be added to the existing policy.[115] In short, it may be far easier to admit to the fiduciary role and reduce the standard of conduct than to risk losing insurance coverage in case of a lawsuit.[116]

IV. CONSIDERING SPECIFIC POWERS—FIDUCIARY OR NON-FIDUCIARY?

In the theories and conclusions presented in the commentary at issue, Sherby suggests that there are "non-trustee-type" powers that may be granted to a party (the protector) in a non-fiduciary capacity, versus "trustee-type" powers that may, or rather typically, are granted to a trustee in a fiduciary capacity.[117] She apparently believes that this simple distinction of powers *by itself* establishes the duty or absence of duty on the part of the power holder.[118] Taking this simplistic approach, the objective is to treat the protector as a non-fiduciary by only giving him powers that Sherby would classify as non-fiduciary.[119] But what makes a power a fiduciary power or a non-fiduciary power?[120] If we grant a fiduciary power to a party we declare to be a non-fiduciary, and the party accepts the role and the power that goes with it, would that not make the party a fiduciary as to that power?[121]

Sherby goes on to suggest that an infallible way to establish the distinction is to consider those powers "that are otherwise lodged with a court" because "the court is not a fiduciary who would ever be subject to suit for the decisions the court makes."[122] Does this mean that Sherby really believes the court would not have in mind the best interests of the

110. *Id.* (emphasis added).
111. *Id.* (emphasis added).
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*
117. Sherby, *supra* note 5, at § 7.3(c).
118. *See id.*
119. *See id.*
120. *See id.*
121. *See id.*
122. *See id.*

beneficiaries and the purposes of the trust?[123] Is she suggesting that because one cannot sue the court, the court would treat its powers as personal powers and act capriciously?[124] Clearly that is not and cannot be the case.[125] Following this reasoning, Sherby concludes, "There is absolutely no reason that a trust protector who is granted this type of power [referring apparently to her list of a dozen non-fiduciary powers that could be decided by a court] should in any manner be a fiduciary."[126] Sherby discusses a few of the powers she enumerates, which are her guaranteed non-fiduciary powers.[127]

One of these powers includes the power to modify the trust instrument (apparently without limitation).[128] This is the strongest of her enumerated powers.[129] This is a power of appointment, and since there are no limitations in Sherby's illustration, it could be regarded as a general power of appointment.[130] But, let us assume that Sherby must have had in mind an express limitation that the protector could not exercise the power in any way for his own benefit, thereby making it a special power (since granting the protector a general power of appointment would introduce a host of additional issues).[131] The first question we must ask—and not just for this power but for *every* power granted to the non-fiduciary protector—is, what is the reason a settlor would grant this power on an expressly non-fiduciary basis; that is, a personal power.[132] Is the reason to allow non-judicial changes on an arbitrary basis without regard to the interests of the beneficiaries or the settlor's purpose in establishing the trust?[133] That would be a truly difficult premise to accept.[134] It could change the terms of the beneficiaries' trust interests including changing the terms of a power of appointment.[135]

Again, this grants the protector a limited power of appointment, but also the power to voluntarily change the shares of dispositive schemes of the settlor's original trust.[136] Once more, the question of the settlor's intent in granting the power must be the controlling factor.[137] Therefore, the settlor must intend for the protector to have the ability to add or remove beneficiaries

123. *See id.*
124. *See id.*
125. *See id.* Interestingly, no comments were made regarding appeal of a court's non-fiduciary decision. *Id.*
126. *See id.*
127. *See id.*
128. *See id.*
129. *See id.*
130. RESTATEMENT (SECOND) OF PROP.: WILLS & DONATIVE TRANSFERS § 11.1, cmt. c. (2011).
131. *See id.*
132. *See id.*
133. *See id.*
134. *See id.*
135. *See* Sherby, *supra* note 5.
136. *See id.*
137. *See id.*

of the trust and substantially change the terms of the trust without consulting with the settlor.[138]

Still, there is the possibility of treating this as a general power of appointment—again we give Sherby the benefit of the doubt by assuming that she would suggest a limitation on the exercise so as to prohibit the protector from exercising it to benefit himself or his family, or subject it to reach by its creditors; although without that, in an expressly non-fiduciary role, he could do so, opening the door to potentially catastrophic tax and other results for the client and beneficiaries.[139] At the same time, this power also includes the ability to modify the administrative or dispositive terms of an irrevocable trust in response to changing conditions in situations involving long-term, special purpose, charitable or third party special needs trust, which is likely what the settlor had in mind, but now has no guarantee his intentions will be respected[140]

Though all of Sherby's suggested non-fiduciary powers give me concern, this one is clearly so incongruous with her proposal that it astonishes me that she included it.[141] To appreciate the contradiction in concepts and potential disservice to the client or to the attorney following this line of reasoning, let us look at the terms of this power and remind ourselves just what is a non-fiduciary power held by a party who is a non-fiduciary.[142]

As observed in Part II above, a power can either be fiduciary or non-fiduciary, and here, Sherby's suggestion, if not outright direction, is to grant the protector only non-fiduciary powers.[143] As pointed out, a non-fiduciary power is a personal power, and the holder of a personal power who is not a fiduciary "owes no duty to anyone to consider the exercise of that power," and he is at liberty to declare that he will never exercise it.[144] He can exercise it unfairly, according to his whims, and even in retaliation against an object of the power.[145] A beneficiary in such a case has no standing to complain and cannot succeed in getting a court to order an exercise of the power.[146] In addition, the power, being personal, may only be exercised by the power holder and of his own volition, so others may not instruct or direct its exercise.[147]

In applying the foregoing principals to the power in question, how can we ask the protector to amend the trust "in response to changing conditions,"

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138. *See id.*
139. *See id.*
140. *See id.*
141. *See id.*
142. *See id.*
143. *See supra* Part II.
144. GERAINT THOMAS, THOMAS ON POWERS § 6-187 (Street & Maxwell 2nd ed. 1998).
145. *Id.*
146. *Id.* at § 6-105.
147. *Id.*

as suggested in Sherby's power?[148] On what would the non-fiduciary protector be required to base his decision in determining the nature and extent of the amendment?[149] How can he, as a non-fiduciary with no duty, be expected to concern himself with "changing conditions?"[150] And since this would be clearly outside his role, would he be exposing himself to liability as a "voluntary fiduciary" with a higher standard of behavior?[151] Of course, if there is a question in the protector's mind on this, he can simply refuse to act, *with impunity*, because he has every right to do so as the holder of a personal power.[152]

The powers chosen for the foregoing comments are perhaps the more "potent" of Sherby's dozen powers, and clearly can have a greater impact on the trust and the beneficiaries than some of the others, such as the power to mediate disputes or the power to remove and replace trustees.[153] But it is difficult to conceive of a power over a trust that could not impact the beneficiaries or the trust's purposes in some way.[154] For example, say that a protector has the non-fiduciary power to change the situs of a trust.[155] The protector and all the beneficiaries reside in Florida, where there is no income tax.[156] The protector moves to California and decides a change of situs to that state would be convenient for them, but that results in an income tax to the trust. Sherby conveniently sidesteps any such illustrations or observations on such possible disadvantages to the non-fiduciary arrangement.[157] She also conveniently sidesteps, if not misstates, the results of reported cases in her effort to support the argument that the protector is not a fiduciary.[158]

For instance, one of the landmark international cases on the fiduciary issue is the *Von Knieriem* or Star Trust case of Bermuda.[159] In that case, a protector had the power to remove and replace the trustee of a trust.[160] The protector removed the trustee and appointed a replacement corporate trustee.[161] The removed trustee questioned the grounds for the removal and the appointment of a successor, and refused to step down.[162] What is especially pertinent, in light of this discussion, is that the subject trust did not

148. *See* Sherby, *supra* note 5.
149. *See id.*
150. *See id.*
151. *See id.*
152. *See id.*
153. *See id.* In the latter case, for some reason, she limits the power to asset protection trusts and a certain type of special needs trust. *See id.*
154. *See id.*
155. *See id.*
156. *See id.*
157. *See id.*
158. *See id.*
159. Jurgen von Knierien v. Bermuda Trust Co., Ltd. [1994] Bda LR 50, Civil Jur. No. 154.
160. *See id.*
161. *See id.*
162. *See id.*

state whether the protector was a fiduciary, or whether the power to remove and replace the trustee was a fiduciary power.[163] Prior to this case, there were extremely few reported cases on the trust protector, especially on whether the protector was to be considered a fiduciary.[164] Therefore, the case gained considerable international attention.[165]

The removed trustee petitioned the court to consider the validity of the removal and appointment, arguing that the power to remove and replace the trustee was a fiduciary power and must be "exercised responsibly not arbitrarily in the interest of the beneficiaries as a whole and not simply according to the personal wishes of the protector vs. the settlor or both."[166] The question before the court was whether the power to appoint a trustee was a fiduciary power, which called for special consideration in the selection of the trustee, or a personal power, which could be exercised on a whim, as Sherby would have it.[167]

In reviewing the importance of the role of the trustee of a trust and certain English decisions on trustee appointment, the *Von Knieriem* court held that the power to remove and replace the trustee was in fact a fiduciary power, and the protector was to exercise it in a fiduciary manner.[168] The protector's selection of a successor trustee was held to have been consistent with the protector's fiduciary duty to select the best candidate he could for that position.[169]

In her own commentary on the case, Sherby refers to *In re Skeats Settlement*, the English case in which the *Von Knieriem* court in large part based its decision.[170] Sherby quotes a small part of the *Skeats* case quoted by the court, which she carefully selected from a much larger quote cited by the court, in which the *Skeats* Court asks whether a trusteeship could be "sold to the highest bidder."[171] Sherby takes this part of the larger quote and declares it to be the reason for the court's decision, stating, "*For that reason*, the power was fiduciary in nature, but being fiduciary in nature *was held to mean that the 'appointor' could not personally benefit*."[172] This is simply misfocused and misleading.[173] The protector in this case did not benefit, nor was there ever a question or even the slightest suggestion that he would personally benefit from the appointment, as Sherby's quote inferred.[174] In

163. *See id.*
164. *See id.*
165. *See id.*
166. *In re* Skeats Settlement [1889] 42 Ch. D 522 (UK).
167. *See id.*
168. *See id.*
169. *See id.*
170. *See* Sherby, *supra* note 5, at § 3.2.
171. *See id.*
172. *Id.* at § 7.3(b) (emphasis added).
173. *See id.*
174. *In re* Skeats Settlement [1889] 42 Ch D 522 (UK).

fact, in regard to the fiduciary question of appointing a successor trustee, the following excerpt of the *Von Knieriem* court's quote from *Skeats* is worth noting, on which its decision *was* in fact based, but conveniently omitted from Sherby's outline:

> The ordinary power of appointing new trustees under a settlement such as this, of course, imposes upon the person who has the power of appointment the duty of selecting honest, good persons who can be trusted with the very difficult, onerous, and often delicate duties which trustees have to perform. He is bound to select, to the best of his ability, the best people he can find for the purpose. . . . Because it is a power which involves a duty of a fiduciary nature; and I therefore come to the conclusion, independently of any authority, that the power is fiduciary power.[175]

Despite Sherby's analysis of *Von Knieriem* and attempt to distract from the pure fiduciary issue of the power to appoint a trustee, the bottom line in both *Skeats* and *Von Knieriem* is that the power to appoint a trustee is a *fiduciary* power.[176] A fundamental and important conclusion may be drawn from this: If the exercise of the power in question can directly or indirectly affect the interests of the beneficiaries, the purpose of the trust, or the proper administration of the trust, it is likely to be a fiduciary power, regardless of what drafters might call it or how they might characterize it.[177]

V. CASE LAW VS. THE STATUTES

In spite of the few state statutes providing either that the protector is not a fiduciary, or that he is but the trust can provide otherwise, and notwithstanding commentators such as Sherby, the solid and indisputable fact is that virtually every reported case dealing with the fiduciary issue has held that the protector is a fiduciary.[178] The only notable exception is when the protector with a power over trust distributions is also a beneficiary.[179]

This Part will review a number of cases, and subsequently comment on the effect and efficacy of state statutes going one way or the other.[180] Can such opposing statutory positions on the fiduciary issue mean that states differ on their definitions of fiduciary or fiduciary duty?[181] Or are some just turning a blind eye to established case law and principles embedded in trust law solely for economic purposes?[182] How is the public's interest served by

175. *Id.* at 526–27.

176. *See* Bove, *Trust Protectors*, *supra* note 30.

177. *See* Bove, *The Trust Protector: Are they Friends or Fiduciaries? And Should Every Trust Have One?*, TR. & ESTS. (Nov. 2005).

178. *See supra* Part IV.

179. Rawson Tr. Co., Ltd. v. Perlman, No. 194-1989 (Bah. Sup. Ct., Apr. 23, 1990).

180. *See supra* Part V.

181. *Rawson Tr. Co., Ltd.*, No. 194-1989.

182. *Id.*

a state's attempt to exculpate by law those who are instrumental to the operation of trusts established under that state's law?[183] Before discussing the cases, it must be noted that they are, without exception, from non-United States jurisdictions.[184] This may be the reason (though certainly not a justifiable one) that no United States court, most notably the Missouri Court of Appeals in the protector-made-popular *McLean* case, refused to even consider any of those decisions, despite the fact that they were all common law jurisdictions.[185] In *McLean*, for instance, the Missouri court basically observed that it had no idea what a protector is, whether a protector owed a duty to anyone, and if he did, to whom he might owe a duty.[186] Had the court even made a cursory analysis of any of the cases discussed below, all of these questions would have been addressed.[187] As to the appropriateness of the United States court's consideration of non-United States decisions on a "local" matter, one need only look to many of the early United States Supreme Court decisions to be convinced.[188] Take one landmark 1875 case, for example, repeatedly cited in the field of trusts: *Nichols v. Eaton*.[189] In that landmark decision on spendthrift trust law, *most* of the cases cited by the Supreme Court in support of its opinion are *non*-U.S. (English) cases![190] To my knowledge, no one has ever questioned that fact or even suggested that it was not a sound basis for the court's decision.[191]

Accordingly, we will consider the opinions of learned justices from the Isle of Man, Jersey, the Cayman Islands, the Bahamas, and Bermuda in the hope that a review of the opinions in these cases will help practitioners, and even the courts, understand that the basis of whether there is fiduciary duty on the part of the trust protector, or whether a protector's power is a fiduciary power, can only lie in the settlor's intent and the circumstances of the particular case and *not* in language that summarily dictates that the protector is not a fiduciary and there is no fiduciary duty.[192]

In perhaps the earliest case to deal with the trust protector, a settlor established a trust for the benefit of individuals (belonging to a certain group) to be selected at the trustees' discretion with the consent of the protector.[193] The trust also provided for a "vesting day", when the protector would select permanent beneficiaries in appointed shares.[194] The protector also had the

183. *Id.*
184. *Id.*
185. Robert T. McLean Irrevocable Tr. v. Patrick Davis, P.C., 283 S.W.3d 786 (Mo. Ct. App. 2009).
186. *Id.* at 794.
187. *Id.*
188. Nichols v. Eaton, 91 U.S. 716 (1875).
189. *Id.*
190. *Id.* at 723–28.
191. *See id.*
192. *See infra* Part V.
193. Rawcliffe v. Steele [1993–95] Manx. LR 426 (Isle of Man).
194. *Id.*

power to appoint trustees, as well as his own successor.[195] The trust further provided for a default beneficiary—The Red Cross Society of Ireland.[196] There was one problem: No protector was appointed under the trust.[197] Some parties argued that the trust was invalid, that the absence of the protector, whose role was so fundamental to the trust, was a defect that the court could not remedy, so there was never a trust to begin with.[198] Others argued that the entire corpus should simply be distributed to the Red Cross Society of Ireland, since without a protector no consent could be given to distribution to other beneficiaries.[199]

The court held that although the protector's powers were discretionary, "they were fiduciary" in nature and therefore subject to the court's control if he was to exercise them capriciously or if he refused to act at all (both of which he could do if this were a personal power).[200] Furthermore, the protector's fiduciary duty, as "protector of the trusts, was in this instance owed not to the settlor but to the beneficiaries."[201] (*McLean* Court take note!) Thus, although he (the protector) was not a trustee, the position was, as a fiduciary one, analogous to that of a trustee, and the court could in principle appoint a protector with fiduciary powers in the same way that it could appoint a trustee in order to prevent a trust from failing for want of a trustee.[202]

The court went on to observe that the result might be different if the protector's "individual characteristics were not necessary to the exercise of his powers," that only the protector chosen by the settlor could exercise them.[203] But clearly, that was not, and typically is not, the case.[204] In most trusts, the protector holds an office.[205] If one protector ceases to serve, then some procedure will appoint a successor or some party will decide that the office will be terminated.[206] There is a strong presumption in the law that powers granted or acquired as the result of appointment to an office are powers considered for the benefit of others and not personal powers.[207] For a settlor to knowledgeably agree that any arbitrary party holding the office at

195. *Id.*
196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.*
200. *Id.*
201. *Id.* at 429.
202. *Id.*
203. *Id.*
204. *Id.*
205. Matthew Conaglen & Elizabeth Weaver, *Protectors as Fiduciaries: Theory and Practice*, 22 TR. & TRUSTEES (2012), http://clients.squareeye.net/uploads/xxiv/trust_and_trustees_ew.jan12.pdf [https://perma.cc/DJ2X-S24X].
206. *Id.*
207. Annotation, *Agreement Conditional Upon Obligor Securing Public Office*, 45 A.L.R. 1399 (1926).

some unknown future date should have such powers as to add or delete beneficiaries, or modify the trust on a capricious basis without liability, would be strange indeed.[208] Thus, the fact that it is an office rather than an individual appointment in itself suggests a fiduciary relationship.[209] In fact, there is actually a United States case supporting this position.[210]

The *Von Knieriem* case, discussed earlier, was decided during the same period as *Steele*.[211] *Von Knieriem* dealt with the question of whether the power to remove and appoint trustees was or should be a fiduciary power.[212] As it turned out, removal of the trustee was not so much in question as was the appointment of a successor trustee.[213] Despite Sherby's emphasis on the requirement that the protector receive no personal benefit from the exercise of the power, this requirement applies to every fiduciary power, but it had no application to the facts in *Von Knieriem*.[214] Thus, although it was part of the basis for the holding in the *Skeats* case, cited by the *Von Knieriem* court, it was *not* the basis for the *Von Knieriem* decision, and it was misleading for Sherby to suggest it was.[215] The question for the *Von Knieriem* court was simply this: If a person has the power to appoint a trustee, may he appoint anyone, without regard to the appointee's experience, knowledge, or character?[216] Or must he appoint "the best people he can find for the purpose?"[217]

The Bermuda Court stressed as the primary requirement that the protector appoint a party suitable for the position.[218] Restrictions appropriate for a fiduciary power include not making a capricious or irrational appointment, or one for an improper motive.[219]

While it should be easy to see why the power to appoint a trustee should be a fiduciary power, what about the power to appoint a protector?[220] Could that be a fiduciary power?[221] In a 2004 Cayman Islands case, that was the question before the court.[222] In that case, **F** (the way the opinion referred to him) established a discretionary trust for the benefit of his wife and four sons.[223] A majority of beneficiaries could appoint a protector who in turn

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208. *See* Gathright's Tr. v. Gaut, 124 S.W.2d 782, 784 (Ky. 1939).
209. *See* Conaglen & Weaver, *supra* note 205.
210. *See Gathright's Tr.*, 124 S.W.2d at 784.
211. *Supra* note 159.
212. *Supra* note 159.
213. *Id.*
214. *See* Sherby, *supra* note 5.
215. *See* Bove, *The Trust Protector*, *supra* note 177.
216. *Id.*
217. *Id.*
218. *See* Jurgen von Knierien v. Bermuda Trust Co., Ltd. [1994] Bda LR 50, Civil Jur. No. 154.
219. *Id.*
220. *In re* Circle Trust [2006] CILR 323 (Cayman Islands).
221. *Id.*
222. *Id.*
223. *Id.*

could remove and appoint trustees, among other things.[224] A family dispute arose when two of the sons charged **F** with improper withdrawal of trust assets.[225] To gain control of the dispute (through the appointment of a protector), **F**'s wife and two of the sons appointed **F** as protector.[226] Then **F**, as protector, removed the disputing son as trustee and appointed one of the sons who sided with him as successor trustee.[227]

The disputing sons petitioned the court to rule that the appointment of **F** as protector and the removal of the son as trustee were invalid, because they were fiduciary powers and were "tainted" by irrationality, bad faith, and improper motive.[228] Since the protector had the power to remove and appoint trustees, the court said, the protector's powers were fiduciary, and "therefore the powers of the beneficiaries appointing him ought also to be fiduciary."[229] The court further noted that even though the status of a beneficiary in and of itself imposes no fiduciary obligations, "even a beneficiary may be clothed with a power to which some fiduciary obligation is attached."[230] Thus, the appointments of **F** as protector and the son as successor trustee was invalid.[231]

Of course, there can be situations where the protector is *not* a fiduciary.[232] The basic rule then is when the protector has a clearly personal power, he may use that power to benefit himself, such as when the settlor gives the protector the power to direct principal distinctions to the beneficiaries, and at the same time names the protector as a discretionary beneficiary.[233] The *Rawson Trust Co.* case is frequently cited to illustrate that point.[234] In *Rawson*, the settlor established a trust for the benefit of three beneficiaries who were also appointed protectors.[235] The terms of the trust provided that the trustee could take no action without the consent of the beneficiary or protector.[236] One of the protectors resigned as permitted by the trust, and another was temporarily suspended by conditions imposed on the trust, leaving only one protector.[237] The sole protector, perceiving complexities in the administration of the trust, approved a decanting of the trust into a new trust, maintaining herself as sole protector, and excluding the other two as protectors (but not as beneficiaries).[238] The trustee and one of

224. *Id.*
225. *Id.*
226. *Id.*
227. *Id.*
228. *Id.*
229. *Id.*
230. *Id.* at 324.
231. *Id.*
232. *See* BOVE, TRUST PROTECTORS, *supra* note 30, at § 3.6.
233. *Id.*
234. Rawson Tr. Co. Ltd. v. Perlman, No. 194-1989 (Bah. Sup. Ct., Apr. 25, 1990).
235. *Id.*
236. *Id.*
237. *Id.*
238. *Id.*

the beneficiaries sought a ruling on whether the sole protector was acting as a fiduciary, and if so, whether she breached her fiduciary duty.[239]

Interestingly, in considering whether the protector's power was a fiduciary power which, if exercised, must be for the benefit of the beneficiaries as a whole, or a personal power that the protector may exercise for the benefit of the power holder, the court cited this excerpt from the United States treatise, Scott on Trusts:

> The holder of the power is subject to liability, for exercise or non exercise of the power only if he holds it as a fiduciary and not solely for his own benefit. It is a question of interpretation of the trust instrument in the light of all the circumstances whether the power is conferred upon him or his sole benefit or for the benefit of the beneficiaries of the trust . . . . On the other had where the power of control is conferred upon one of the beneficiaries, the power is more likely to be, although it is not necessarily, conferred upon him or his own benefit and not for the benefit of the other beneficiaries also.[240]

The court held that under the circumstances of this case, the settlor, in granting the protector or beneficiaries such powers over their own interests, did not intend that they be held to fiduciary standards.[241] In this regard, the court stated:

> Looking at all the provisions set out in the 1982 Deed, and the fact that the Trustee may be otherwise uncontrollable even by the Courts, I would think that that power of veto the Protectors had over everything the Trustee could do was to ensure that no beneficiary, and the Protectors were all also beneficiaries, would suffer unduly because of those powers the Trustee was given. Without the right of veto, a beneficiary would have stand by helplessly and see whatever interest or share he might expect (or indeed the whole Stead Fund) distributed to a follow beneficiary exclusively! There is nothing in this extensive power which is against the conclusion to which I have come, that it is, that the Protectors are not fiduciaries. I would hold, therefore, that the Protectors of the Stead Fund are not fiduciaries and were given the power, though in an elaborate provision to protect their own interests.[242]

The *Rawson* case is a good illustration of the court's general attitude that the protector is a fiduciary unless there is a compelling reason to conclude that the protector is not.[243] Interestingly, Sherby does not cite

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239. *Id.*
240. *Id.*
241. *Id.*
242. *Id.*
243. *See* Alexander A. Bove, Jr., *The Case Against the Trust Protector*, 37 ACTEC L .J. 77, 82 (2011).

Rawson.[244] The only two non-United States cases that she cites are *Von Knieriem* and *Centre Trustees*.[245] As noted earlier, Sherby's discussion of the *Von Knieriem* decision omitted the most important and far reaching impact of the decision—the power to appoint a trustee is a fiduciary power.[246] The *Centre Trustee* case, although not as widely discussed as *Von Knieriem*, had an equally impactful ruling addressing the important question of whether a fiduciary duty can simply be drafted away.[247] As she did with the *Von Knieriem* decision, Sherby attempted to play down the court's position that the role of the protector is a fiduciary one.[248] In fact, a review of the decision in *Centre Trustees* would disclose comments the court made such as, "there would be no doubt in our view that the powers of the protector are fiduciary."[249] The facts of the case disclose that the trust instrument required the protector's consent for numerous key decisions under the trust.[250] In the course of administration, a dispute arose involving the protector.[251]

The issue in the case was whether to remove the protector, as there was a conflict on the part of the protector who brought a claim against the trust.[252] If the protector was considered a fiduciary, the claim would have placed him in a position of conflict.[253] The language of the trust provided, "[f]or the avoidance of doubt, it is hereby declared that no power is vested in the protector in a fiduciary capacity."[254] If the protector had no fiduciary duty, by the language of the trust proposed declaring the same, then the issue would have been resolved because there is no rule against a non-fiduciary having a claim against a trust.[255] However, the court held that the language negating fiduciary duty should not be interpreted in such a strict manner.[256] On the basis that a party holding a fiduciary power has a duty to consider exercising the power, such a power holder who has been "excused" from his fiduciary duty, *is not excused from his fiduciary role simply by so stating*.[257] Rather, the court said, such language "would simply mean that he is not under an obligation to consider from time to time whether . . . to exercise [the powers].[258] If he does exercise them, then they have to be exercised for the

244. *See* Sherby, *supra* note 5.
245. *See id.*
246. *See id.*
247. Centre Trs., Ltd. v. Van Rooyen, [2009] JRC 109 para. 25 (Jersey) (citing a trust provision stating: "For the avoidance of doubt it is hereby declared that no power is vested in the Protector in a fiduciary capacity.").
248. Sherby, *supra* note 5, at § 3.3.
249. *Centre Trs., Ltd.*, [2009] JRC 109 para. 25.
250. *Id.* at para. 7.
251. *Id.*
252. *Id.* at para. 15.
253. *Id.*
254. *Id.* at para. 25.
255. *Id.*
256. *Id.* at para. 33.
257. *Id.* at para. 22 (emphasis added).
258. *Id.* at para. 28.

benefit of one or more of the beneficiaries."[259] In other words, if the circumstances of the appointment and the intention of the settlor rendered the powers or the role fiduciary, then no amount of drafting will change that.[260]

There can also be situations where a protector has both a fiduciary and a non-fiduciary power.[261] In one example of such a case, the settlor established a trust for the benefit of his family, which included his sister as a beneficiary.[262] He also named her as protector of the trust with the power to veto the addition or removal of beneficiaries that the trustee may propose, and the power to appoint new trustees other than herself.[263] The sister appointed a professional trustee to assist in the administration, but the existing trustee refused to acknowledge the appointment or to cooperate with the new trustee.[264] The sister petitioned the court to declare her trustee appointment valid.[265] The existing trustee argued that because the sister was both protector and a beneficiary she had a conflict of interest, and further, that this action against the existing trustee was itself evidence of that fact.[266] Thus, not only should the court invalidate her trustee appointment, but the court should also remove her as protector.[267] The sister argued that the two roles were not mutually exclusive.[268] She also asserted that she appointed the new trustee in good faith and in the interest of the trust and the beneficiaries as a whole.[269]

The court agreed with the sister, acknowledging that the power to appoint a trustee is a fiduciary power and held that the sister acted consistently with that power.[270] The fact that she also may have held a personal power was independent of that, as long as she did not use the fiduciary power to favor herself.[271] The new trustee was an impartial, independent professional who was suitable for the position.[272]

In Part 7.3(c) of Sherby's outline, she enumerates powers that are "typically granted to the trust protector", continuing on to say with reference to those powers, "there is absolutely no reason that a trust protector who is granted this type of power should in any manner be a fiduciary."[273] Among her guaranteed non-fiduciary powers is the power to modify (amend) a

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259. *Id.*
260. *Id.*
261. *In re* Papadimitriou [2001] 03 MLR (Ch. D) 287 (Isle of Man).
262. *Id.*
263. *Id.*
264. *Id.*
265. *Id.*
266. *Id.*
267. *Id.*
268. *Id.*
269. *Id.*
270. *Id.* at 249.
271. *See id.*
272. *Id.*
273. *See* Sherby, *supra* note 5, at § 7.3(c).

trust.[274] She offers no caveat or qualification for the use and application of this or other powers except to say that the reason they are not granted to beneficiaries or reserved by the settlor is that they would likely have adverse tax consequences.[275] Thus, Sherby would have us grant to a third-party, on a non-fiduciary basis, an unlimited power to amend the trust with no limitations on its exercise and no liability for damages or legal fees to rectify errors or wrongdoings.[276]

In one case, illustrating the risks of such an arbitrary approach, a settlor established trusts for his children.[277] The trusts (all identical) provided for two protectors (two of the children).[278] The protectors had substantial powers, including the power to amend the trusts.[279] The trust also provided that either of the two protectors could exercise any of their powers individually, and the exercise of power by one of the protectors shall bind the other.[280] It further provided that a vote of 75% of the beneficiaries would remove a protector.[281] In the midst of a bitter dispute between the two protectors, one of the protectors exercised his power to amend the trust and signed an amendment removing the second protector and providing that the beneficiaries could not remove the first protector.[282] Upon learning of this, the second protector brought suit to have the amendment declared void.[283] The first protector maintained that no limitations existed on the power to amend and that the amendment was valid because nothing in the language of the trust expressly imposed a fiduciary duty on the first protector or on the powers.[284] Interestingly, despite the first protector's argument, after the other parties submitted their arguments maintaining the fiduciary questions, the first protector reconsidered his argument; although he did not concede, he did agree that the power "was subject to certain constraints of a fiduciary nature."[285] In the end, the court observed that there was a "heavy burden" on the first protector to explain and justify the necessity for an extreme amendment as being for a proper purpose and in the interests of the beneficiaries as a whole.[286]

Furthermore, considering the idea of a broad power of amendment with no fiduciary duty and the obvious attendant risks that would accompany such

274. *Id.*
275. *Id.*
276. *Id.*
277. *In re* Internine & Intertraders Trs. [2005] JLR 236 (Jersey).
278. *Id.*
279. *Id.*
280. *Id.* at 253, para. 55.
281. *Id.*
282. *Id.*
283. *Id.*
284. *Id.*
285. *Id.* at 262, para. 78.
286. *Id.*

an arrangement, the court made some interesting speculations.[287] Although the unilateral amendment by the first protector to gain sole control over the trust elicited a strong reaction, what would be the difference (so far as the interests of the beneficiaries are concerned) if the two protectors acted together?[288] What if they deleted the beneficiaries' power to remove them or the power of any future protectors to amend?[289] "What logical basis would there be," the court asked, "for concluding that such a move was permissible if done by agreement of the two first protectors but impermissible if done unilaterally?"[290] Additionally, in an earlier comment the court observed that the facts and circumstances of the case "put beyond any doubt whatever the fiduciary nature of the role of protectors (whether the first or successor) and of the powers conferred on them and the need for that role to be performed, and those powers to be exercised, for the benefit of the beneficiaries as a whole."[291] In short, to suggest that the unrestricted power to amend or modify a trust that a protector may exercise with no regard for the interests of the beneficiaries or the purpose of the trust and, therefore, would be a non-fiduciary power, is a pure exercise in risk and a reckless suggestion.[292]

The foregoing cases are directly illustrative of the non-United States common law courts' attitudes towards the trust protector over the past twenty plus years.[293] Although Sherby comments that protectors "have been used in one form or another in England and other jurisdictions for a long time," in fact, they have not been in common use in England at all.[294] I could not find a single English case on the subject, although all of the jurisdictions that have reported cases on trust protectors, per se, have been in jurisdictions which, like the United States, derived their law from the English common law.[295] The decisions and opinions in the foregoing cases reflect the fundamental precepts and theories of trust and fiduciary law rather than an arbitrary characterization that is inconsistent with such law.[296] In my opinion, the approach taken by many of the states in regards to the fiduciary issue attempts to offer validity and even enforceability to such an arbitrary characterization.

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287. *Id.* at 258, para. 66.
288. *Id.*
289. *Id.*
290. *Id.*
291. *Id.*
292. Sherby, *supra* note 5, at § 7.3(c)(2).
293. *Id.*
294. *Id.* at § 3.1.
295. *See id*. (not representative of common use of protectors in England).
296. *Id.* In recent years, the concept of the "divided trust" has surfaced, allowing the trustee to be exculpated for certain functions that are assigned to another party but that otherwise would have been a function of the trustee. *See, e.g.*, Mary Clarke & Diana Zeydel, *Directed Trusts: The Statutory Approaches to Authority and Liability*, EST. PLAN. MAG., Sept. 2008, at 14. But some view this as a trust towards abandonment of the fiduciary concept altogether. *See, e.g.*, Alexander A. Bove, *The Death of the Trust*, TR. & EST. MAG., Feb. 2014, at 51.

VI. THE STATE STATUTES

Every one of our states and the District of Columbia recognizes trusts and, with qualified exception, respects the fiduciary duty of the trustee.[297] Similarly, they all recognize the fiduciary duty of a guardian, conservator, executor, administrator, and agent.[298] These are all parties who act for the benefit of others and are held to a degree of trust, confidence, and loyalty to the interests of the parties for whom they are acting.[299] The problem is that most states do not recognize, or are not yet ready to recognize, the fiduciary duty of a protector who acts for the beneficiaries of a trust.[300] As discussed earlier, for a protector to be a non-fiduciary is entirely possible, but this is the exception and not the rule.[301] Nevertheless, as also observed earlier, several states have passed laws that make it the default rule, and many others have made it simply a matter of drafting to apply the exception and disregard the rule.[302] Why is that? Has the fear of fiduciary duty infiltrated the legislators as well? Do the non-fiduciary states have a different definition of "fiduciary" than the rest of us?[303] Or are they simply following the controversial lead and disregarding the concept and turning a blind eye to the underlying law and the cases?[304]

For any student of trust law, to see how casually the states treat the concept of fiduciary duty is quite disheartening.[305] Anyone who studies the history, development, and purpose of the trust protector must quickly come to the conclusion that it is inherently a fiduciary role.[306] Yet states provide that it is simply a matter of drafting.[307] Does any state permit a trust to provide that the trustee shall be a non-fiduciary?[308] Of course, there are states that allow divided trusteeships, which allow exculpation of a trustee, but *only* where the exculpated duty is assumed by another party, and even in those cases, the trustee is still considered a fiduciary.[309] Other than Delaware, however, I know of no state that allows the fiduciary duty to be omitted completely, otherwise there would be no trust.[310] It is troubling that so many

297. *See e.g.*, IDAHO CODE ANN. § 15-7-501(4) (West 2015); S.D. CODIFIED LAWS § 55-1B-4, 5 (2015).
298. *Id.*
299. *Id.*
300. *In re* Circle Tr. [2006] CILR 323 (Cayman Islands).
301. *See supra* Part V.
302. *See supra* Part IV.
303. *See supra* Part IV.
304. *See supra* Part IV.
305. S*ee* Philip J. Ruce, *The Trustee and the Trust Protector: A Question of Fiduciary Power. Should a Trust Protector Be Held to a Fiduciary Standard?*, 59 DRAKE L. REV. 67, 95 (2010).
306. *See id.*
307. *Id.*
308. *Id.*
309. *See* DEL. CODE ANN. tit. 12, § 3303(a) (2015).
310. *See* Bove, *The Death of the Trust*, *supra*, note 296.

state legislators believe that the words of a trust can dictate a legal relationship even when the facts dictate otherwise.[311]

For some reason, a few states make a distinction between trust advisors and trust protectors, with the advisor typically being the party who could direct the trustee as to trust investments.[312] It was generally regarded that the advisor, but not necessarily the protector, would be a fiduciary.[313] This may be what gave rise to Sherby's theory that the name given to the particular party will conclusively determine his role and liability.[314] Historically, trust advisors were outside parties engaged to advise the trustee on trust investments.[315] When the trust specifically provided that the trustee must follow the advisor's investment direction, there was no question that the advisor was considered a fiduciary, and the trustee's liability for bad investment decisions was materially reduced *but not eliminated*.[316] Such treatment of the advisor (who might be called a protector) as a fiduciary has persisted through the years, and few would consider stating in a trust that the advisor was to serve in a non-fiduciary capacity.[317]

The Uniform Trust Code (UTC) offers statutory guidance to the fiduciary question.[318] Section 808(d) of the UTC provides that, "[a] person, other than a beneficiary, who holds a power to direct is presumptively a fiduciary who, as such, is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries."[319] Unfortunately, section 105 of the UTC gives the settlor the power to override that provision, as a result the arbitrary characterization of fiduciary relationships remains.[320] For those states that have adopted UTC § 808 intact, at least there is a default option in favor of fiduciary duty.[321] It is also significant to note that there are several states that provide that the protector will be a fiduciary under state law with no provisions that the trust may declare otherwise.[322] What do these

311. *See supra* Part IV.

312. *See* Ruce, *supra* note 305.

313. Sherby, *supra* note 5, at § 8.5.

314. *See id.*

315. *Id.*

316. *See, e.g.*, *In re* Cross' Estate, 172 A. 212 (1934). There the fiduciary had the power to direct the other as to the sale of certain shares held by the trust. *Id.* The non-directing fiduciary recommended those shares be sold but the directing fiduciary refused to consent, resulting in large losses to the trust. *Id.* The lower court held both fiduciaries liable, but the decision was reversed on appeal. *In re* Cross' Estate, 176 A. 101 (1935). Nevertheless, the appellate court did not question the lower court's opinion that the non-directing fiduciary would not be protected if it stood by the directing fiduciary's abuse of discretion, and that the non-directing fiduciary could have applied to the court for permission to sell the shares. *Id.*

317. *See* UNIF. TR. CODE § 808(d) (Unif. Law Comm'n 2000).

318. *Id.*

319. *Id.* § 105.

320. *See id.* § 808(d).

321. *See id.*

322. MISS. CODE ANN. §§ 91-8-808, 1201 (2014); N.C. GEN. STAT. § 36C-8A-1-11 (2012) (with limited exceptions); TENN. CODE. ANN. §§ 35-15-808, 1201–1206 (West 2004); VA. CODE. ANN. § 64.2-770 (2015) (providing fiduciary treatment regardless of trust provisions to the contrary); WYO. STAT. ANN. §§ 4-10-808, 710–11 (2007).

states know that the others do not?[323] The question is of what state legislators took into consideration when drafting the law, rather than what they knew.[324] They undoubtedly considered the typical role and powers of the protector and its potential impact on the trust and the beneficiaries.[325] Legislators also considered, perhaps at the first level of importance, what would be the typical settlor's intent and expectations in appointing a party to this important position.[326] As for Sherby's comment on this, she suggests that practitioners "avoid at all costs" these four states that conclusively presume the protector is a fiduciary.[327]

For practitioners in those states that continue to allow the fiduciary duty to be drafted away, what they and the practitioners who take that approach fail to consider is that if the protector's role or power is truly fiduciary, then do those practitioners really believe a court would ignore that just because of the statute?[328] To explore arguments and commentary that preceded the adoption of the law on the fiduciary question in the various states might be really interesting. For one thing, no one would question the fact that legislators began by looking at, and to an extent actually copying, the law from the offshore jurisdictions, whose laws were in great part motivated by what would attract offshore settlors of asset protection trusts.[329] But what convinced legislators that allowing a party's fiduciary duty to be drafted away would be in the public interest?[330] We are left with the distinct impression that the primary motivation was the avoidance of exposure to liability.[331] There can be no other answer.[332] Interestingly, and perhaps partly in response to the no-liability movement, the Uniform Law Committee on Directed Trusteeship has made what I consider to be a monumental statement, striking a major blow to the theory that fiduciary duty can be drafted away.[333] In the second draft of the Directed Trusteeship Act, section 8(a) relating to the Duties of Trust Director (which specifically includes a trust *protector*), provides, "a trust director is subject to the same fiduciary duties in the exercise or nonexercise of a power . . . as a . . . trustee would be in the exercise or nonexercise of the same power under the same circumstances."[334] Given the credentials, experience, and purposes of the Committee, nothing more need be said.[335]

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323. *See supra* note 322.
324. *See id.*
325. *See supra* Part II.
326. *See supra* Part II.
327. *See* Sherby, *supra* note 5, at § 9.3.
328. *See supra* note 322.
329. *See* Bove, *Offshore*, *supra* note 35.
330. *See supra* note 322.
331. *See id.*
332. *See id.*
333. *See* DIRECTED TRUSTEESHIP ACT § 8(a) *supra* note 101.
334. *Id.*
335. *See id.*

VII. CONCLUSION

A large part of the trust and estates community is playing fast and loose with the concept and application of fiduciary duty, which is truly dismaying.[336] As noted earlier, the only reason for this seems to be to avoid personal liability on the part of the protector, which I referred to as the "fear of fiduciary duty."[337] This is particularly strange, if not misguided, because under applicable law, reducing the protector's exposure to liability to an extremely low level such as willful misconduct is quite possible.[338] In effect, this reflects only a slightly higher level of duty as that of a non-fiduciary.[339] The difference, and the heart of the problem that apparently escapes those who believe fiduciary duty can be drafted away, is that the court may hold a proclaimed non-fiduciary that the court deems a fiduciary to a higher standard than willful misconduct.[340] That is to say, where the non-fiduciary appointment either carries no standard at all or simply rejects duty and liability altogether, the court may impose what it believes to be the standard applicable under the circumstances.[341] Thus, the non-fiduciary drafters may be shooting themselves in the foot in attempting to dodge liability altogether.[342]

What is equally dismaying, and what I believe fundamentally undermines Sherby's entire argument, is that, like most of the commentators who favor the non-fiduciary designation, Sherby's commentary conspicuously omits any meaningful discussion of the critical legal distinction between a *fiduciary power* and a *personal power*.[343] Instead, her focus is on the *name* we use for the position, directly concluding that if we call the protector an "advisor" he will be deemed a fiduciary, and if we call the protector a "protector" he will *not* be deemed a fiduciary.[344] Little could be more superficial and misleading.[345] Specifically, she says, "Be very careful . . . to use the term 'trust advisor' when the intention is to grant powers that are inherently those of a trustee, and specifically provide in the trust instrument that the trust advisor is a fiduciary"; a few lines later Sherby instructs the practitioner to "take care to use the term 'trust protector' and specifically provide the trust instrument that the trust protector is not a

336. *See supra* Part II.
337. *See supra* Part II.
338. *See* Centre Trs., Ltd. v. Van Rooyen, [2009] JRC 109 para. 28 (Jersey).
339. *See supra* Part V.
340. *See supra* Part II.
341. *See supra* Part II.
342. *See supra* Part II.
343. Sherby, *supra* note 5, at § 9.5.
344. *Id.*
345. *See id.*

fiduciary."[346] She suggests this rule be applied to powers "that would otherwise require a court action," or be given to a beneficiary or trustee.[347]

Sherby goes in this part to say that only by "developing a consistent use of terminology do we as practitioners have any hope of educating the state legislatures and state courts as to the differences between the types of powers that can be given to third party decision makers."[348] Once again, she takes the position that the word or term we use will dictate the court's decision regardless of the circumstances or the settlor's intention, and if we use the chosen words frequently enough, the legislatures and the courts will become "educated," as she put it, and will base the conclusion on the word we use and not the facts of the case.[349]

Importantly, as noted above, Sherby fails to consider or comment on the fact that a non-fiduciary power can only be a personal power, and that a personal power has *no* duties attached to it other than not to commit a fraud on the power.[350] As I stated, this is what I believe to be one of the fatal flaws in Sherby's argument.[351] The exercise of a personal power, if the powerholder exercises it at all (the powerholder may disregard it altogether, or even arbitrarily release it), may be whimsical, capricious, or even in retaliation against an object.[352] What settlor would want this? And as for the good faith requirement that the parties occasionally raise, the duty of good faith with respect to a personal powerholder means just this: "He must only comply with the terms of the power. In the event that he does exercise the power, he must do so honestly and properly he cannot[,] for example[,] exercise it excessively or fraudulently."[353] Good faith, therefore, in this context, does *not* extend to being kind or thoughtful to the objects of the power or to doing what is in anyone's best interest.[354] He may totally disregard such concerns with impunity.[355] In other words, the holder of a personal power simply cannot commit a fraud on the power, and *he has no other duty*![356]

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346. *See id.* at § 10.5.

347. DAVID J. HAYTON & OSHLEY ROY MARSHALL, COMMENTARY AND CASES ON THE LAW OF TRUSTS AND EQUITABLE REMEDIES § 3-110 (Street & Maxwell 11th ed. 2003). A personal power may be beneficial, meaning the power holder may be an object of the power, or non-beneficial, meaning that he may not, but in either case, no fiduciary duties attach to a personal power. *Id.*

348. Sherby, *supra* note 5, at § 10.5 (emphasis added).

349. *See id.*

350. THOMAS, *supra* note 144, at 6-101, 6-185; David Hayton, *English Fiduciary Standards and Trust Law*, 32 VAND. J. TRANSNAT'L L. 555, 581 (1999).

351. *See* Sherby, *supra* note 5.

352. RESTATEMENT (SECOND) OF PROP.: WILLS & DONATIVE TRANSFERS § 14.2 (2011); Hayton, *supra* note 350, at 581–82; THOMAS, *supra* note 144, at 6-187.

353. THOMAS, *supra* notes 144, 350.

354. *See id.*

355. *See id.*

356. *See id.*

At the outset of Sherby's commentary, she cites a comment by Donovan Waters, a noted scholar, noting Professor Waters' observation that the name used to describe the position of protector has no significance.[357] Once again, Sherby only was that part of the quote that serves her purpose.[358] In the article, Waters discusses the "two schools of thought" with respect to the protector (the name he himself uses throughout his article): those of accountability (for the fiduciary role) and non-accountability (for the role where the power is personal).[359] Professor Waters takes the position that unless the settlor clearly intended the powers to be personal as to the particular party chosen as protector, then the *position will be fiduciary*.[360] Here is the more complete part of Waters' conclusion in that regard:

> In these circumstances . . . , use by the settlor of the personal confidence (right or privilege) should be limited to those situations only where the indolence or capriciousness, the self-concern or idiosyncrasy of the power-holder in the exercise or non exercise of the power cannot harm the interests of others. At that point, where such harm does begin to take place, the power should expressly become one when the grantee can no longer consider his own interest—it should become a fiduciary power.[361]

Despite all of this, Sherby goes on to make practice points that actually contradict her non-fiduciary stance.[362] She suggests, for example, that the trust instrument "should state the standard to be used for measuring the *liability* of a trust protector."[363] (We thought she claimed there was *no* liability?) Sherby further states the instrument should provide that the protector should "not be liable in the absence of bad faith or reckless indifference . . . to the interests of the beneficiaries."[364] Is she now suggesting that there *is* some sort of duty? Is she suggesting that the non-fiduciary maybe has just a "wee bit" of fiduciary duty? She seems now to ignore the fact that *there is no fiduciary duty where the power holder is not a fiduciary*.[365]

A further dilemma created by Sherby is that she recommends that the trust compensate non-fiduciary protectors.[366] The problem this generates is the creation of an employer/employee or principal/agent relationship, which now creates certain fiduciary duties, which again contradicts her underlying,

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357. Sherby, *supra* note 5, at § 2.1; Donovan W. M. Waters, *The Protector: New Wine in Old Bottles?*, *in* TRENDS IN CONTEMPORARY TRUST LAW 63 (A. J. Oakley ed. 1996).

358. *See* Bias of Ascertainment, *supra* note 14.

359. *See* Waters, *supra* note 357, at 67.

360. *See id*.

361. *See id*. at 122.

362. *See id*.

363. Sherby, *supra* note 5, at § 8.5.

364. *See generally id.*

365. *Id.*

366. *See id*. at § 8.10.

strongly stated premise that the protector is not a fiduciary and has no fiduciary duties to anyone.[367] How can Sherby reconcile this? She cannot.[368] Once we open the fiduciary door, the duties she tried to lock out are brought in.[369]

As a final point, I note that neither Sherby's presentation nor her outline made a single reference to the settlor's intent and understanding in naming a protector.[370] I am sure that no one, not even Sherby, would question the fact that if the settlor *intended* the protector (or whatever one might call him) to be bound by fiduciary duty, then it would be grossly negligent on the part of the drafter to intentionally provide otherwise in the trust.[371] Where there is no mention in the trust of whether the position is fiduciary or not, it is well-settled law that the settlor's intent will control.[372] Sherby simply ignores this essential element and assumes that the term "protector" means non-fiduciary.[373]

Further regarding the settlor's intent, Sherby takes the position that it is better for the trust and beneficiaries to dispense with any fiduciary duty, rather than make it an issue for the settlor.[374] But would an informed settlor agree? Consider this: A client is about to execute a trust in which she has appointed a protector with extensive powers.[375] Before signing, the attorney says to the client: "Ms. B., your trust names a protector (your brother, your close friend, your attorney, your accountant, or some party you do not even know right now as others will appoint him in the future) with the powers, among other things, to remove any one or more of your children or grandchildren as beneficiaries; to add other beneficiaries as the protector might decide; to change the terms of your trust in a simple or drastic way; or even to terminate your trust before the time you have designated, all at his total discretion and without regard to what you or your family might want or need in the future.[376] We think this is a good idea as it gives your trust a great deal of flexibility.[377] By the way, you should also understand that your protector is under no duty to 'do the right thing,' or to do anything for that matter, or to consider what is best for your beneficiaries.[378] Furthermore, if

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367. *See id.*

368. *See id.*

369. *See id.*

370. *See id.* at § 2.

371. *See* SCOTT & FRATCHER, *supra* note 99, at § 164.1; ROUNDS & ROUNDS, *supra* note 79, at § 6.1.2.

372. *Id.*

373. *See* Sherby, *supra* note 5, at § 8.

374. Sherby, *supra* note 5; *see* SCOTT & FRATCHER, *supra* note 99, at § 164.1; ROUNDS & ROUNDS, *supra* note 79, at § 6.1.2.

375. *See supra* Part III.

376. *See* Bove, *The Case*, *supra* note 243.

377. *See id.*

378. *See* Jay Adkisson, *Trust Protectors—What They Are and Why Probably Every Trust Should Have One*, FORBES, http://www.forbes.com/sites/jayadkisson/2012/08/25/trust-protectors-what-they-are-

he makes a costly mistake, or acts against your wishes or the wishes of your family, or is just plain reckless and causes a loss to the trust, he will have no liability to anyone, so long as he does not commit an actual fraud.[379] If all that is okay with you, just sign here."[380]

Of course, you would be embarrassed even to consider making such a presentation to your client, because no competent settlor would agree to such ridiculous terms; in addition, she would look at you and wonder, whom do you represent?[381] Or perhaps more likely, she would respond, "Are you nuts? Why would I sign that?" Of course, why *would* any settlor agree to such an arrangement?[382] A settlor who establishes a trust to hold all or the bulk of her estate, and grants such powers to another, would expect that person to exercise his best judgment in a manner consistent with the settlor's intentions and in the interests of the intended beneficiaries; I cannot put it simpler that that.[383]

While I respect the time and effort Sherby has obviously put into her commentary on trust protectors and advisors, I do not believe that her commentary will be helpful to practitioners in utilizing the position to benefit clients.[384] In fact, I think it could be harmful. I do, however, compliment her on the excellent and thorough analysis and schedule of the various state statutes relating to trust protectors; I believe this particular information could be helpful to practitioners.[385]

I note once again that the underlying, repeated theme of Sherby's commentary is to avoid the fiduciary designation "at all costs"; I caution practitioners not to succumb to the fear of fiduciary duty, to more carefully consider the true reasons for the appointment of a protector, and to face the fact that a fiduciary responsibility is in the best interests of the trust and the beneficiaries.[386] That is to say, instead of going to such lengths to exculpate the protector, why not consider, as a primary objective, the protection of the clients' and beneficiaries' interests and the furtherance of the purposes of the trust, rather than be so concerned about protecting the protector?[387] Why do we not have the same concern about protecting the trustee?[388] As noted in this discussion, the protector's exposure to liability can be reduced to a pretty low level, if desired.[389]

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and-why-probably-every-trust-should-have-one/#49b2694491d8 [https://perma.cc/T46Z-HENB] (last visited Feb. 22, 2016).

379. *See* Bove, *The Case*, *supra* note 243.
380. *Id.*
381. *Id.*
382. *See supra* Part IV.
383. *See supra* Part IV.
384. *See* Sherby, *supra* note 5.
385. *See id.*
386. *See id.* at § 9.3.
387. *See id.*
388. *See id.*
389. *See supra* Part IV.

So instead of focusing on the total elimination of the protector's liability and fiduciary duty, why not concern ourselves with the clients' and beneficiaries' lack of recourse if the protector causes serious loss to the trust on account of gross negligence or intentional disregard of duties?[390] This would be the case where the party is not a fiduciary and is declared to have no duty.[391] It is difficult to believe that a conscientious trust attorney would condone this arrangement for a client.[392] Unfortunately, many attorneys are led to believe that such an arrangement is perfectly acceptable when they hear presentations and read materials such as that of Sherby's and others, which rely on the theory that where the trust protector is concerned, form will prevail over substance.[393] The problem with that theory is that it has never worked before, and it will not work now.[394] In other words, a rose will still be a rose, no matter what we call it.[395]

390. *See supra* Part IV.
391. *See supra* Part IV.
392. *See supra* Part IV.
393. *See supra* Part IV.
394. *See supra* Part IV.
395. WILLIAM SHAKESPEARE, ROMEO & JULIET act 2, sc. 2.