The Trust Protector

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The trust protector is a person who may play one or more of several roles. It may be policing the trusteeship or enforcing the trusts as if he were a sole beneficiary. This protector can be given the responsibility to supervise and approve trustee actions of all kinds. At the same time the protector is not the trustee and must not in any way carry out any of the functions of the trustee. As a result the protector is not subject to accountability towards the beneficiaries. A protector looks after the various interests of the settlor in creating the trust, even when the protector is looking out for the beneficiary’s concerns.

In essence one may say the protector is an intervener between the trustee and the beneficiary. The protector’s job is to police the trustees. It is sometimes said that the powers of protectors are really all about retention of settlor influence if not control. However, this is not completely true as the appointment of an independent professional protector can provide a genuine independent mechanism to oversee the administration of the trust. The appointment of a protector can therefore have a number of advantages, particularly in the area of disputes where the protector can play an important role to work alongside the trustees and beneficiaries and facilitate any areas of disagreement and ensure a flow of communication and reporting between all the parties involved. The role of the protector is essentially a hybrid role between being a defender of the interests of the beneficiaries and a facilitator or mediator where an independent third party is required.

Below are some examples of specific powers given to a protector:

- Monitor and agree the trustees’ fees;
- Carry out periodic reviews of the administration of the trust;
- Require an accounting or audit, with power to nominate the auditors;
- Be consulted or have veto powers before the trustees make any discretionary payments to beneficiaries or objects of a power;
- Be consulted or have veto powers over sales of particular shareholdings or other trust property;
- Direct generally or only in specific areas the exercise of trustees investment or other managerial discretions.
- Withhold consent where requisite before a beneficiary can institute legal proceedings against the trustee;
- Withhold consent to the trustees’ proposed exercise of a power to amend the administrative or managerial powers of the trust;
- Remove and appoint trustees;

Maltese legislation provides for the appointment of a protector in Article 24A of the Trusts and Trustees Act, Chapter 331 of the Laws of Malta. Article 24A also provides that subject to the terms of the trust the protector shall have the following powers:

(a) to appoint a new or additional trustee;
(b) to remove a trustee;
(c) to require the trustee to obtain his discretion.

As one notes the Trusts and Trustees Act only sets out general parameters for the appointment of a protector and the legislator leaves the actual terms and conditions of appointment of the protector up to the parties involved. Indeed the powers of the protector may be classified as personal powers or as fiduciary powers depending upon the intention of the settlor as it appears from the trust instrument and from the surrounding circumstances.

Personal powers arise where the settlor’s intention is to confer some individual benefit or protection upon the protector. A person holding a personal power cannot be forced to exercise it and in fact need not even consider whether to exercise it. If the person holding such a power does exercise it he may do so on the basis of any motivation he deems fit so long as he does not commit a fraud on the power.

On the other hand if the protector’s powers are fiduciary, which is more likely the case, then the protector would have a greater responsibility. Fiduciary powers arise where the settlor intends that the protector exercises his powers to benefit beneficiaries or objects in ways appropriate to fulfil the settlor’s purposes and expectations. Except for special cases where the power must be exercised even though there is a discretion as to how it must be exercised, the power need not be exercised. However, the protector must independently consciously consider from time to time whether or not to exercise the power and he must exercise it responsibly according to the purpose for which it was conferred on him and must not act on the basis of any expectation of the settlor. Thus the protector must exercise the power bona fide for the purposes for which the settlor created it and must not fetter or release the power or receive any personal benefit unless authorised in the trust instrument expressly or by necessary implication.

It is almost always a good idea to specifically state in the trust instrument that the trust protector should serve such role in a fiduciary capacity. By specifying that the protector has a fiduciary power, the settlor is imposing a duty of loyalty and impartiality on the protector and ensuring that any actions the protector takes are for the good of the trust and its beneficiaries, rather than for his or her personal gain.

That said, whatever powers the protector is granted, he is not a trustee and must not be deemed to replace the trustee. Potentially, there is a greater risk of the trust being deemed to be a sham by the court where the protector has wide powers and there is a close relationship between the settlor and the protector to the extent that it could be argued that the protector is no more than a puppet of the settlor and thus effectively in control of the trust at the direction of the settlor. Therefore, such situations must be avoided when drafting the trust instrument in order not to have problems at a later stage.

The strongest criticism of trust protectors is that their involvement complicates the trust administration and makes it more expensive. In order to avoid this, some argue that the protector should be given the minimal power necessary to achieve the settlor’s objective. Duplication of effort should be avoided wherever possible. Unless the settlor is concerned about the honesty of beneficiaries or trustee he should direct his protector that he may accept what they say without verification.
The protector can serve a critical function outside the trust while acting in conjunction with the trustee to enhance the carrying out of the settlor’s wishes, but not without responsibility to interested parties if the protector breaches his duty. In such a role he can introduce flexibility and respond to future needs and changes. In this context, the protector can be useful and should be considered where such flexibility and outside consultation is indicated, especially where it is anticipated that the trust is to extend considerably into the future, including, for instance, special needs trusts, dynasty trusts, or business in succession trusts.

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