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The Trust Protector: Trust(y) Watchdog or Expensive Exotic Pet?¹

By Alexander A. Bove, Jr.*

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Use of the trust protector has recently become unusually popular with the US trust attorney, for whom it was heretofore virtually non-existent, and it has become even more popular than before with the offshore trust attorney, who would use it occasionally but not regularly. For instance, the first protector statute in the US was seen in South Dakota in 1997, and in Idaho in 1999, and the first offshore statutory definition of protector was seen in the Cook Islands in 1989.² Why all this relatively sudden attention to, at least for offshore common law jurisdictions, a relatively old concept? This discussion will review the position of protector, its popularity, the advantages and disadvantages, powers and problems, and the responsibilities, if any, of the position, with a view towards assisting the attorney in deciding whether, when, and to what extent to utilize this “modern” development.

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Just what is a protector and why has the concept become so popular?

A definition of protector may be helpful to orient our analysis in the sense that it broadly describes the position as it relates to the trust and the trustee. For instance, the Trust law of Nevis defines the protector as follows:

“ ‘protector’ in relation to an international trust means a person who is the holder of a power which when invoked is capable of directing a trustee in matters relating to the trust and in respect of which matters the trustee has a discretion and includes a person who is the holder of a power of appointment or dismissal of trustees;”

The laws of certain other jurisdictions also provide a definition of protector. A closer look at most such definitions, however, suggests that the definitions perhaps could have been condensed to: “A protector is a powerholder.” And that is about the sum of it, or rather, the beginning of it. That is to say, the nature and range of powers could vary greatly. For instance, the power could be negative, such as a veto power over some proposed act, or positive, such as the power to remove and replace trustees or add beneficiaries, or amend the trust, or even the power to terminate the trust. It is easy to see how generations of practitioners who have been forced to follow tradition and draft trusts with only the “accepted” forms of flexibility (viz., the removal of trustees or the inclusion of a power of appointment, and even then in limited cases) could get carried away with this new form of super flexibility that virtually reverses the original concept of a settlor thoughtfully establishing a trust for specified classes of beneficiaries with specified terms and trustees. Unfortunately, it is this nascent super flexibility which seems to allow us to deal with virtually every conceivable future circumstance (including the excusing of shortcomings in drafting) that makes this position of protector so increasingly popular.

It is this very same attraction, however, that can cause us to casually include powers that do little more than result in conflicts between the protector and the trustee which will result in costly legal disputes, unnecessary tax exposure, the possible deletion of beneficiaries that may have been important to the settlor, and even a distortion of, or worse, a diversion from the original

trust purposes. Thus, one must be extremely discreet and circumspect in the granting of powers to the protector, with a thorough understanding of the consequences of each power.

What powers should be given the protector?

As observed above, there is sometimes the temptation to give the protector as many powers as possible to provide for the ability to contend with any future changes in circumstances, the law, or the beneficiaries.³ Such an approach can be dangerous, if not reckless, however, and just the opposite approach is often better. That is, having in mind the purposes of the trust, and using history as a guide, the settlor and the professional should attempt to reasonably anticipate the powers that would likely assist in carrying out the trust purposes which would be better held in the hands of someone other than the trustee.

While there is no “standard” set of powers to be given to the protector, depending upon the wishes of the settlor and the aggressiveness of the attorney, following is a list of powers commonly seen in whole or in part in trusts which utilize a protector (note that not infrequently only one or two such powers may be included, such as the power to remove and replace trustees and the power to veto or advise on investments):⁴

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

Although it is clear that the protector clearly cannot be given a power to further an illegal purpose, it may not always be clear when public policy questions arise. For instance, could the protector be given the power to prevent any beneficiary from seeing a copy of the trust? Or to exculpate a trustee for failure to account? Or the power to deny a beneficiary the right to an accounting? Clearly such powers offend the very premise of a trust and would likely be struck down.⁵

What is the relationship between the protector and trustee?

To a great extent the answer to this question depends upon whether the protector is deemed to be a fiduciary, a critical issue and one discussed in greater detail below. This is because if and to the extent the protector is not a fiduciary, or to put it more precisely, if the power in question held by the protector is a personal power rather than a fiduciary power, then the trustee's position vis a vis the protector will be quite different. That is, an individual holding a personal power cannot be forced to exercise it and in fact need not even consider whether to exercise it. And if he does exercise such a power, he may do so on a whim, or even for a spiteful or malicious reason, so long as he does not commit a fraud on the power.⁶ Therefore, a trustee who must in some way consider or react to a personal power is under no duty to look behind the exercise (or non-exercise), or review the motives for or reasonableness of its exercise, so long as the terms governing the exercise have been satisfied.⁷

On the other hand, if the protector's powers are fiduciary, which is more likely the case, then the trustee is in a much more delicate position, and the delicacy of the position will be increased where the applicable provision contains an exculpatory clause (as it often does), words to the effect that: "The trustee shall not be held liable for acting or for not acting in following the directions of the protector pursuant to the powers given the protector hereunder." Even a brief reflection on the import of such a provision quickly reveals how troublesome and misleading it can be in a fiduciary setting.

Would one assume from this statement, for instance, that a trustee can freely follow a protector's direction which is patently improper though technically within the protector's powers? And is a

trustee exculpated if such trustee proposes an improper act which is only carried out because the act was given the required consent of the protector?⁸

It should be apparent, then, that regardless of the extent of the powers of the protector and the extent of exculpatory language relieving the trustee of duty or responsibility, the trustee must nevertheless recognize and honor his fiduciary obligations and question the protector where called for. If we were to hold otherwise, the very premise of the trust would fail, and to paraphrase one author, the trustee would not be a trustee at all but rather an agent for the protector.⁹

Who may serve as protector, and, once and for all, is the protector a fiduciary?

The reason these issues are posed together is that in some cases, one may depend on the other. For example, say that the protector is given the power to add or delete beneficiaries, without restriction, and in the first instance, the settlor names his daughter as protector. Pursuant to the power, the daughter proceeds to delete her siblings and their issue from the pool of beneficiaries and adds her spouse and children as beneficiaries. Under these circumstances it is likely that the settlor would have contemplated that the daughter could and in fact might exercise the power in such a way, and so the power would be considered a personal power and the daughter's exercise would be appropriate. On the other hand, say that the settlor's attorney was named protector and given the same power. Would it be appropriate for the attorney to delete the settlor's children and grandchildren as beneficiaries and substitute his own? In the latter case, of course, the power would not be construed as a personal one, and the attorney would clearly have a duty to consider the intentions of the settlor and the purpose of the trust, in a fiduciary capacity. Any exercise of the power that benefited the attorney in such a case, directly or indirectly, would subject the protector to liability for a breach of fiduciary duty, if not cause the acts to be invalid as a fraud on the power.¹⁰

It should be clear, then, that as to the question of whether the protector should be viewed as a fiduciary, some considerable inference can be drawn from the settlor's choice of protector (and successor protectors), as well as the particular powers granted. As a general rule, if the

appointed protector is a beneficiary or a person who would likely be an object of the settlor's bounty and there is no language or facts to dictate otherwise, then to the extent the exercise of a particular power could benefit the protector, there is likely to be a presumption that it is a personal power. If the protector is someone in an advisory capacity to the settlor or someone the settlor would be unlikely, under normal circumstances, to name as a beneficiary, the power will most likely be a fiduciary one. Of course, an easy way to avoid the question would be to include appropriate language in the trust, perhaps simply providing that the protector's powers must be exercised in a fiduciary capacity.

Unfortunately, many practitioners have come to believe that the inclusion of language to the effect that the protector shall not be deemed to be a fiduciary will conclusively settle the question. This is a little like saying, "regardless of what type of animal walks through these gates, it will be deemed to be a horse". While such a statement is bound to be correct if enough different animals pass through the gates, why would we not want to correctly identify each animal, or in this case each protector, or each power? The attempt to have it both ways is undoubtedly to prevent potential protectors from being "scared off" by the assumption of possible liability, which is similar to the reason for the language exculpating a trustee for submitting to the powers of the protector. Other than that concern, however, and in the absence of a personal power, it is a challenge to imagine why a settlor would grant extensive powers to an individual (or committee) for any purpose other than to see to the proper carrying out of his wishes in establishing the trust. What would be the sense of it? If, for instance, a protector is given the power to change the situs and governing law of the trust, would anyone conclude that the power was given so that the protector could arbitrarily and for no apparent reason shift the situs from one jurisdiction to another just for the fun of it? Or would it rather be that while the settlor felt the original jurisdiction seemed a good choice at the inception of the trust, being unable to foresee the future he wanted to allow for a change of jurisdiction if it appeared to be in the best interests of the beneficiaries and the trust?

And what about the power to remove and replace trustees? Couldn't that be some sort of neutral power, not necessarily fiduciary in nature, as many attorneys thought? This very issue was raised in a 1994 case heard in Bermuda.¹¹ In that case a protector was given the power to

remove and replace the trustee. The protector exercised its power to remove the trustee, appointing a successor corporate trustee, but the removed trustee questioned the appropriateness of the protector's actions and petitioned the court for instructions before it would turn over the trust assets.

The court centered on the key question of whether the protector was a fiduciary, or at least whether the power to remove and replace the trustee must be exercised in a fiduciary capacity. The court pointed out that the power to remove and replace trustees was viewed to be essential to the integrity of the trust and the interests of the beneficiaries (when would it not be?). The protector is therefore "bound to select to the best of his ability the best people he can find for that purpose."¹²

Another fact arguing convincingly in favor of fiduciary status is where the position of protector is established as an office, as it is with the trustee, rather than as the appointment of an individual per se. That is, where the trust provides for the office of protector, including the appointment, removal, and resignation of a protector, the appointment of one or more successor protectors, the powers and compensation of the protector, etc., it would be extremely difficult, at best, to refute the argument that the powers attach to the "office" and not to the individual holding the office. Such a structure would unquestionably require the office-holder to act reasonably and not for personal motives, having in mind the purpose behind the creation of the office: to protect the integrity and carry out the purposes of the trust.

In sum, if the protector was in fact appointed to "protect", then he has to be regarded as a fiduciary as to the powers falling into that category and he cannot be released from his obligations merely by language stating the contrary.¹³ If he accepts the position knowing the powers granted him, he must consider whether or not to exercise those powers and he must act reasonably, having in mind the interests of the trust and the beneficiaries – it is not like deciding whether to read a newspaper or go to the movies.

Is the protector subject to court supervision?

If the protector is a fiduciary, then it would necessarily follow that he is subject to the supervision of the appropriate court.¹⁴ Such supervision would presumably include the power of the court to surcharge a protector and even to remove or appoint a protector under appropriate circumstances. In a 1995 Isle of Man case, that very issue was presented to the court. In *Steele v Paz, Ltd*,¹⁵ a trust provided that the protector of the trust was to consent to the selection of beneficiaries, and was to consent to all distributions to beneficiaries. The problem was that no protector was named, nor was there a provision in the trust to name one. The court decided that the protector's powers in this case were fiduciary powers; the protector was therefore a fiduciary, and it was clearly within the court's power to appoint a fiduciary rather than abandon the trust.

As to the right to surcharge a protector who is regarded as a fiduciary, this would certainly follow if it is acknowledged that the courts have supervision over protectors. In the United States the question has actually been answered through the courts' treatment of trust "advisors", a position used fairly often in this country, and although not thought of as a "protector", it amounts to exactly that. Further, the position of trust advisor has almost invariably been held to be a fiduciary position, demanding a duty of "loyalty and impartiality".¹⁶ And as one Harvard Law Review commentary observed in addressing the responsibilities of a trust advisor who is not a trustee, "No less care will be expected of an advisor with such [investment] powers than of the trustee himself, and the advisor should be surchargeable for failure to direct investment prudently."¹⁷

What are the rights of the protector?

An interesting question that necessarily follows the fiduciary issue is whether the protector, if deemed to be a fiduciary, has the rights of a fiduciary, and if the protector is not a fiduciary, whether he has any rights at all. If the protector's power or powers are personal, then even though his duties and responsibilities to the trust or to the beneficiaries are practically non-existent, he nevertheless would have the right to information necessary to knowledgeably exercise the power, as well as the right to enforce a properly exercised power. For instance, a

protector who is given the personal power to appoint income or principal would certainly have the right to obtain a trust accounting, showing the income and corpus of the trust that is subject to the power; similarly, if he had the power to add or delete beneficiaries he would also have the right to see the trust instrument to determine the nature and extent of all beneficial interests. On the other hand, he should clearly not have the right, for example, to petition the court for fees or expenses, or to question a trustee's performance, or a beneficiary's right to distributions, etc., since the power is a personal one and not for the furtherance of the trust.

If and to the extent the protector is considered to be a fiduciary, however it should follow that he has at least some of the rights of a trustee, but due to the paucity of cases on the subject the extent of such rights is not very clear. Despite this, some rights would have to be implied, and there are a few cases which are helpful and seem to recognize such implied rights. For instance, in the *Von Knieriem* case,¹⁸ the court considered an action brought by the protector to force the removed trustee to transfer the trust assets to the new trustee appointed by the protector. In a United States case, a trust protector was approved by the court as a plaintiff in an action against a trustee for breach of trust.¹⁹ In neither of these two cases did the court suggest that the protector, since not a trustee, had no standing to exercise the right of a fiduciary to petition the court or prosecute a case.

But how far would the protector's rights extend? Could the protector (who is a fiduciary), for instance, seek an order: For compensation? Or indemnification by the trust? To employ agents? To redress a trustee? Once again, it will depend upon the circumstances of the case and the language governing the protector, but in one US decision, the court clearly acknowledged the protector's right to remove a trustee and seek an accounting and possible surcharge of the previous trustee.²⁰

There may be some actions that might be beyond the implied powers of a protector in carrying out his function (such as the right, without express authorization, to employ agents), but other rights should be apparent. For instance, if a protector is acting pursuant to the powers given and on behalf of the trust, there should be little or no question that he is entitled to reasonable compensation and reimbursement for his reasonable expenses, and although one leading

commentator seems to take some issue with this,²¹ courts both in the United States and offshore have unequivocally upheld the right of a non-trustee who was deemed to be a fiduciary to receive compensation for services and expenses reasonably incurred in carrying out his duties.²² Accordingly, unless the protector's powers are purely personal, it would be difficult to argue that an authorized person, especially one characterized by the court as a fiduciary, should not be compensated for services and reimbursed for reasonable expenses for acting in furtherance of the trust, and as with any fiduciary, whether in an express or implied position, the court has inherent jurisdiction to award costs and compensation where appropriate. In fact, where the protector is a fiduciary, it should follow that he would have a lien on the trust assets for his reasonable fees and expenses.²³

What are the US tax implications of the role of protector?

To a considerable extent, the question of whether there will be tax consequences on the granting of powers to a protector depends upon whether the power is personal or fiduciary, and if personal, whether the power can be exercised in favor of the protector or for his benefit.²⁴ If the latter, the power is likely to be treated as a general power of appointment, and, depending on the remaining provisions of the trust, the protector may be treated as the owner of the property for US income and estate tax purposes.²⁵ If the power cannot be exercised by the protector for himself or for his benefit, then the power will be treated as a special power, and with limited exception, there would be no tax consequences to the protector regardless of whether the power is personal or fiduciary, unless the protector is also a beneficiary of the trust and the exercise of the power causes a reduction of such benefits.²⁶

If the power is held in a fiduciary capacity but could nevertheless be exercisable in favor of the protector or for his benefit, it could result in negative US tax consequences unless the power is limited by an ascertainable standard.²⁷ Note that in the typical case utilizing a protector, a settlor would almost never specify a standard, such as "health, education, maintenance, and support," and therefore, when a power can benefit the protector, there is the risk that the protector could face unwanted tax consequences just by holding the power. Nevertheless, this author believes that where the power, both by inference and fiduciary duty, could not be exercised in favor of

the protector or for his benefit even though not so restricted in its language, the power would not be held to be a general power, and adverse tax consequences would not result. For instance, as illustrated earlier, if the settlor's attorney or other professional advisor were given the power to add or delete beneficiaries or to amend the dispositive provisions of the trust, this certainly would not suggest that the attorney or advisor could delete the settlor's children and insert his own, or amend the trust to give the advisor's spouse a power of appointment. Therefore, despite the lack of a "standard", the protector who is a fiduciary should not be deemed to possess a general power of appointment for U.S. tax purposes.²⁸

There could also be adverse tax consequences to a protector who could not exercise the power for his own benefit but could exercise the power in favor of someone to whom the protector owed a legal obligation of support. In such a case the protector would be taxed on any trust income used for that purpose, and the property could be included in the protector's estate for estate tax purposes, unless the power is clearly subject to an ascertainable standard or the equivalent as explained above.²⁹

In view of the foregoing, then, one should be cautious about appointing a spouse, children, or other close relation as protector with powers to benefit the protector himself or his dependents, as in such cases, it may be difficult to avoid adverse U.S. tax consequences.

What special drafting issues are brought into play along with a protector?

One commentator has stated, "the strongest criticism of trust protectors is that their involvement complicates the trust administration and makes it more expensive".³⁰ And materials given to settlors and their attorneys by a Gibraltar trust company include the statement, "Arguably a protector can give greater security but this also creates a greater administrative burden for the trustees, and consequentially increases costs. Use of a protector can also result in some delay in the trustees exercising their powers and discretions whilst the consent of the protector is sought."

This may be so, but it is only one factor in considering a protector in the first place, and any such complication and expense can definitely be lessened by the inclusion of well thought-out and

carefully drafted trust provisions which make clear the protector's rights and responsibilities in dealing with the trustee and the beneficiaries, the rights and responsibilities of the trustee in dealing with the protector, and the rights of the beneficiaries in dealing with both.

For instance, unless the protector's powers (or any of them) are intended to be purely personal, why complicate matters and generate needless expense by declaring that the protector shall not be a fiduciary? Why leave open the question as to whether a protector (who is a fiduciary) is entitled to reasonable fees and expenses? Or whether he can employ agents to help carry out his responsibilities? Or whether he can seek indemnification from the trust before acting? Or engage tax counsel to determine the consequences of his acts? Or whether he is entitled to access to all trust records, documents, and accounts? Even in cases where the protector's powers are limited, it would seem that consideration of every one of the foregoing issues would eliminate otherwise unavoidable questions and therefore expense. Thus, they should each be addressed in drafting provisions relating to the protector.

In addition, the more apparent questions must be thoughtfully covered, including appointment of a successor protector in the event the current protector ceases to serve for any reason, as well as removal of a protector, if desired. The appointor (or remover) could be the former protector, the settlor and/or his spouse (having in mind the tax ramifications), the trustee, the beneficiaries, or an outside party (sort of a protector second level), or even a committee. A practitioner must be mindful that some of these choices may have tax and/or fiduciary ramifications. Other drafting issues include what constitutes the protector's consent when such is required, and in the case of a veto power, when may the trustee act if the protector does not respond? Typically, veto provisions allow the trustee to act if a protector does not overtly veto a distribution or transaction, or if the protector does not respond within a specified time (e.g., thirty days) after notice to the protector of the proposed distribution or transaction. And should every transaction by the trustee be subject to the protector's veto or consent? Consideration should be given to allowing the trustee to administer the trust without such disruption and only require approval in larger or significant transactions (e.g., over a specified dollar amount, or on the sale of certain property or closely held business interests).

On this point, one approach that is commonly taken with which this author strongly disagrees, is where the trust gives the protector (who has veto or consent power) the authority to give the trustee a blanket consent to all actions taken by the trustee unless and until such *carte blanche* is withdrawn by the protector. If the power in the protector is a fiduciary power (which it is likely to be and which would then require the protector to consider whether to veto or give consent in each case), why would not such a blanket consent be a *prima facie* breach of fiduciary duty by the protector? And what would be the trustee's exposure for accepting and acting on such a blanket consent?

The trust should also contain provisions allowing the trustee to act during any period where there is no protector serving, as could happen where a protector dies or becomes incompetent and a successor is not quickly appointed. Further, the trust should provide (which few trusts do) that a protector may resign the office, and how this is accomplished; similarly, any protector should acknowledge his acceptance of the office in writing. (For powers that are purely personal, of course there is no "office" and no acknowledgement is necessary.)

This is neither a required list nor an exhaustive review of all drafting issues involved, since the particular circumstances surrounding the particular trust and reason for the protector may generate fewer or additional considerations. Nevertheless, the discussion should point out that neither the position of protector nor the drafting issues relating to the position should be treated casually.

Conclusion

When one considers the reported case law on the subject, knowledgeable commentary, the history of fiduciary law, and the very purpose of having a protector, the question of the true role of the protector should hardly be a question at all. At the outset, the very choice of the term "protector", is suggestive. As one justice put it, "It seems to me that it would be wrong to entirely neglect the terminology involved. The word 'protector' seems to me to connote a role for the person holding that position even before one considers the detailed provisions relating to it. A 'protector' is, presumably, one who 'protects'. But what is he to protect?"³¹ In the

relevant document in this case, the protector was referred to as a “protector of the trust” (or as we customarily say, the “trust protector”), and in this regard, the court stated, in answer to its own question, “It is, therefore, the settlement that he is obliged to protect”³² (emphasis added).

As such, then, 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 response to future needs and changes that a trustee could not or would certainly be reluctant to do. In this context, then, the position can be uniquely useful and should definitely be considered in any trust where such flexibility and outside consultation is indicated.

At the same time, however, we as advisors and drafters must not be vague about it or ignorant of the ramifications of the position, as that is often what has proved to be the real source of the problems. Perhaps, then, we should take a lesson from the character Humpty Dumpty when he said to Alice, “When I use a word, it means just what I choose it to mean – neither more nor less.”³³ so that when we decide to utilize the position of a protector in a trust, let us present it in a thoughtful way so that the position is deemed to be just what we choose it to be – neither more nor less.

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¹ This article is excerpted from a paper presented by the author before the American College of Trust and Estate Counsel in March, 2003.

² Idaho Code § 15-7-501 (Michie 1990); S. D. Codified Laws §§ 55-1B-1, 55-1B-4 to 55-1B-7 (Michie 1997); Cook Islands International Trust Amendment Act § 3 (1989).

³ For an extensive list of possible powers, some of them admittedly undesirable, see Antony Duckworth, *Protector – Fish or Fowl?*, Journal of International Trust and Corporate Planning, Vol. 4 No. 3, (December 1995) (*hereinafter* “Duckworth”).

⁴ This is by no means a recommended schedule of powers. In fact, an uninformed use of some of these can lead to undesirable legal and tax ramifications as discussed *infra*.

⁵ Duckworth, *supra* note 3, at 137.

⁶ Geraint Thomas, *Thomas on Powers*, (1st ed. Street & Maxwell 1998); *Pitman v. Pitman*, 50 N.E.2d. 69 (MA 1993).

⁷ *Restatement (Second) Property* sec. 18.2 Chapter 20 (1986).

⁸ *In re Cross*, 172 A. 212 (N.J. 1934), (*reversed on other grounds*) 176 A. 101 (N.J. 1935). See also Austin Scott & William Fratcher, *The Law of Trusts* § 185, at 574 (4th ed. Little Brown 1987) (*hereinafter* “Scott”).

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- ⁹ Marizio Lupoi, *Trusts, A Comparative Study*, at 258 (Cambridge University Press 2000).
- ¹⁰ *Restatement (Second) Property*, § 20.2 (1986).
- ¹¹ *Von Knieriem v. Bermuda Trust Co. Ltd.*, 1 BOCM 116 (Bermuda High Court 1994).
- ¹² *In re Skeats Settlement*, 42 ChD 522, 526 (1889).
- ¹³ *In re Rogers*, 63 O.L.R. 180 (Ontario 1928).
- ¹⁴ *id.*
- ¹⁵ *Steele v. Paz, Ltd.*, Manx LR 102 426 (High Court, Isle of Man 1993-95).
- ¹⁶ Scott, *supra* note 8, at § 185.
- ¹⁷ *Trust Advisors*, 78 Harvard Law Review 1230, 1231 (1965).
- ¹⁸ *Von Knieriem*, 1 BOCM 116 (Bermuda High Court 1994).
- ¹⁹ *Sheldon, et. al. v. The Trust Company of The Virgin Islands, Ltd.*, 535 F. Supp. 667, 671 (D. Puerto Rico 1982).
- ²⁰ *id.*
- ²¹ Anthony Duckworth, *Protector – Fish or Fowl Part II*, 5 Journal of International Trust & Corporate Planning 1, 24 (1996), (*hereinafter*, “Duckworth, Part II”).
- ²² *United States National Bank of Portland v. First National Bank of Portland*, 142 P. 2d 785 (Oregon 1943); and *Lloyds Bank International (Cayman) Ltd v. ByLeven Corp. SA* Cayman Island Law Reports 1994-1995, 519 (20 October 1995).
- ²³ Scott, *supra* note 8, at § 242.3.
- ²⁴ For a more detailed discussion of the tax implications of powers of appointment, see Alexander A. Bove, Jr., *Powers of Appointment – More (Taxwise) Than Meets the Eye*, Estate Planning, Vol. 28 No. 10 (October 2001).
- ²⁵ Internal Revenue Code (IRC) § 678(a) (income tax) and IRC § 2041(a) (estate tax).
- ²⁶ Bove, *supra* note 24, at 500, and note the exception that would apply in certain jurisdictions where a special power is exercised in a manner that would postpone vesting beyond the applicable rule against perpetuities. See IRC § 2041(a)(3).
- ²⁷ IRC sec. 2041(b); Treas. Reg. § 20-2041-1(c)(2), and IRC § 674(b)(5).
- ²⁸ See e.g., *Matter of Stillman*, 433 N.Y.S. 2d 701 (1980). Further, some states prohibit the exercise of such a power for the powerholder’s benefit, e.g., N.H. Rev. Stat. Ann. § 564-A:3(IV) (2000), and *Allan v. Nunnally*, 180 F.2d 318 (5th Cir. 1950), citing New York law.
- ²⁹ Treas. Regs. § 20.2041-1(c)(1).
- ³⁰ Duckworth Part II, *supra* note 21 at 32.
- ³¹ *Steele v. Paz, Ltd.*, Manx LR 102 426 at 119-120 (High Court, Isle of Man 1993-95).
- ³² *id.*
- ³³ Lewis Carroll, *Through the Looking Glass*, Chapter VI (Macmillan 1871).