TRUST PROTECTOR LIABILITY ISSUES

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State Bar of Texas
44TH ANNUAL
ADVANCED ESTATE PLANNING AND PROBATE
June 3-5, 2020

CHAPTER 2

[1] With much thanks to Norris & Weber Associates Colin R. Byrne and Brooke Ginsburg Guerrero.

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Practice Areas

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Contested Guardianships
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- Named a "Texas Super Lawyer" by Texas Monthly magazine - 2006 through 2019
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- Named by Best Lawyers as Litigation -- Trusts and Estates, "Lawyer of the Year" in Dallas, Texas, in 2015
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TRUST PROTECTOR LIABILITY ISSUES

I. INTRODUCTION.

Although infrequently used, Trust Protectors, Trust Advisors, and Trust Directors (all three titles are used interchangeably throughout this paper) can be a useful method for preventing abuse and providing oversight of the Trustee's actions. With the use of trust protectors, settlors can add an additional mechanism to ensure their intent is fulfilled. But, the use of trust protectors in the United States has not always been well-defined in law. Until 2009, little case discussion on the liability and fiduciary duties of trust protectors, and directed trustees, existed in the United States. Following the *Robert T. McLean Irrevocable Trust* case from Missouri in 2009, the use of trust protectors has slowly expanded to most US jurisdictions, including Texas. *Robert T. McLean Irrevocable Trust v. Patrick Davis, P.C.*, 283 S.W.3d 786 (Mo.Ct.App. 2009). As the current Baby Boomer Generation continues to age, and the transfer of wealth continues, more settlors will likely use trust protectors. With the increased addition of trust protectors, there are many reasons for attorneys to understand the role of the trust protector, whether those trust protectors owe fiduciary duties, who has standing to bring a claim when there is an alleged breach, and whether you can modify the fiduciary duties of the trust protector in the trust document.

Although the Texas Property Code included a subsection describing trust protectors and advisors since June 2015, the statute was amended to address trust protector fiduciary duties and became effective September 1, 2019. Unfortunately, there are no cases describing how to implement and interpret these new changes to the property code.

Therefore, this paper will attempt to provide some guidance to attorneys advising their clients on what fiduciary duties the trust protector may owe, to whom those duties are owed, the reasons to include a trust protector, and liability issues for the directed trustee, beneficiary, and trust protectors. We hope that with this article the reader may be able to get a better glimpse into this new and seldomly used area of law.

II. HISTORY AND ORIGINS OF THE TRUST PROTECTOR, REASONS TO INCLUDE A TRUST PROTECTOR, AND TRUST PROTECTORS IN TEXAS.

A. History of the Asset Protection Trust, English Cases and the Off-Shore Origins of the Trust Protector

1. History and Offshore Origins.

The modern iteration of the trust protector can trace its origins to a number of sources that include non-trustee roles in England; similar roles associated with offshore asset protection trusts; and trust advisors in the United States. Richard C. Ausness, *When Is A Trust Protector A Fiduciary?* 27 Quinnipiac Prob. L.J. 277, 278 (2014). Trust protectors have been used for many years in England and other Commonwealth countries, including several in the Caribbean. *Id*. at 278. "As early as 1893, the Bahamas Trustee Act permitted a settlor, to grant to a person who was not a trustee, the power to influence the actions of a trustee." *Id*. at 278.

The Cook Islands International Trusts Amendment Act first used the term "protector" in 1989. *Id*. at 278. The protector was "the holder of a power which when invoked is capable of directing the trustee in matters relating to the trust and in respect of which matters the trustee has discretion and includes a person who is the holder of a power of appointment or dismissal of trustees." *Id*. at 278. Other jurisdictions expanded the role. *Id.* at 278. For example, the British Virgin Islands' Trust Ordinance of 1961 included a specific list of powers that may be conferred upon a trust protector, including determining the governing laws of the trust, changing the situs of the trust, adding or excluding beneficiaries, and withholding consent to the actions of the trustees. *Id*. at 279.

The growth of the use of trust protectors in the United States is connected to the use of foreign asset protection trusts (also known as offshore trusts) to protect assets against creditors. *Id*. at 279. With assets in foreign trusts, U.S. creditors had difficulty bringing claims because of short statutes of limitations and the foreign jurisdiction's refusal to recognize orders and judgments from U.S. Courts. *Id.* at 279.

Settlors would often appoint a foreign individual or institution who was beyond the reach of U.S. courts to serve as trustee. *Id*. at 280. However, many settlors became wary of giving up complete control of their assets. *Id*. at 280. As a result, settlors appointed trust protectors to oversee their assets, protect against possible wrongdoing, and provide another set of eyes on a foreign trustee. *Id*. at 280. Trust protectors were given powers over the trust and the trustee, such as the power to make distributions from the trust, change the situs of the trust, and remove the trustee and appoint a successor. *Id*. at 280.

In 1997, Alaska and Delaware enacted laws allowing for domestic asset protection trusts, which are similar to the foreign asset protection trusts, but without the complications and uncertainty of having a trust in a foreign country. *Id*. at 280-81. Other states have followed.

2. English and Commonwealth Cases.

The following English and Commonwealth cases are frequently cited in articles discussing trust protectors, as they explain the philosophy behind and foundation for the modern trust protector.

(a) *Skeats v. Evans*, 42 Ch. D. 522, English Chancery Court 1889 ("Skeats' Settlement").

As part of an 1882 marriage settlement, property was transferred to Mary Skeats. *Id*. at 289. Mary and her husband, Joseph Skeats, retained the power to appoint a replacement for any trustee who died, retired, resided abroad, or became incapable of serving. *Id*. at 289. In 1889, two of the original trustees decided to retire. *Id*. at 289. Mary and Joseph exercised their power to appoint a replacement trustee and named Joseph as trustee. *Id*. at 289. The two retiring trustees did not think that Joseph had the power to appoint himself as trustee, even with Mary's consent, so they refused to transfer the trust property to Joseph without court approval. *Id*. at 289.

The Court stated that the validity of Joseph's appointment depended on whether the power in question was fiduciary. *Id*. at 289. Further, it depended on whether the appointer or donee of the power was limited in the way he could exercise the power. *Id*. at 289. For example, Joseph could not sell the office of the trustee to the highest bidder because he cannot exercise the power for his own benefit. *Id*. at 289-290.

The Court concluded that that the power to appoint a successor trustee was fiduciary in nature and that a donee of a power to appoint could not fairly judge his own fitness for the position. *Id*. at 290. Doing so would be inconsistent with his fiduciary obligations to the settlor and the trust beneficiaries. *Id*. at 290.

(b) *Jurgen von Knieriem v. Bermuda Trust Co., Ltd. and Grosvenor Trust Co*., [1994] BDA LR 50, Civ. Jur. No. 154) (aka Start Trusts Case).

A trust instrument for a trust in Bermuda gave the trust protector the power to appoint or remove additional trustees. *Id*. at 290. The trust protector removed the original trustee and appointed a new trustee, and litigation followed. *Id*. at 290. The original trustee argued that the trust protector's powers were fiduciary in nature and could only be exercised if in the best interests of the beneficiaries. *Id*. at 290.

Because the trust specifically stated that the trust protector could not be a beneficiary of the trust, the Court concluded the trust protector could not exercise the power to remove and replace the trustee for his own benefit. *Id*. at 290. The Court noted that the power to remove and replace trustees was essential to the trust and the interests of the beneficiaries. 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, 87 (2010). Therefore, the trust protector's powers were fiduciary in nature. *Ausness,* at 290-91. The Court held that the trust protector had not exercised the power to remove and replace for his own benefit, and the removal of the original trustee was valid. *Id*. at 291.

(c) *Centre Trustees (C.I.) Ltd. and Langry Trust Co. (C.I.) Ltd. v. Pabst*, 2009 JLR 202 (Royal Ct. of the Island of Jersey 2009).

Pabst was the trust protector and appointer of a discretionary trust created by his former business associate. *Id*. at 291. The trust owned 50% of a business previously owned by the trust protector and the settlor. *Id*. at 291. The other 50% of the business was owned by a trust established by the trust protector, Pabst. *Id*. at 291.

The trust stated that "no power is vested in the protector in a fiduciary capacity." *Id*. at 291. Certain of the trustee's powers – for example, those involving distributions and investments – could only be exercised with the consent of the trust protector. *Id*. at 291. The trust protector was given the power to appoint new or additional trustees or trust protectors. *Id*. at 291.

Pabst, in his individual capacity, brought claims against the trust. *Id*. at 291. The Court said this created a conflict of interest between Pabst (as the trust protector and appointer) and the trust. *Id*. at 291. It stated that beneficiaries are entitled to have decisions made by the trust protector free of any private interests. *Id*. at 291. The Court concluded that Pabst had a duty to resign as soon as he realized he would bring personal claims against the trust. *Id*. at 292. He would be unable to exercise his duties as trust protector without considering his personal benefit. *Id*. at 292.

B. Reasons to Include a Trust Protector

A trust protector, trust advisor, or trust director is generally known as ". . . a party who holds powers over a trust but who is not a trustee." Alexander A. Bove, Jr., *A Protector By Any Other Name . . . .*, EST. PLAN. AND COMMUNITY LAW J. OF TEX. TECH UNIV. SCH. OF LAW, Vol. 8, No. 1, June 1, 2016, at 5 (internal citations omitted). Trusts, especially those with a longer life, will inevitably face problems. Court intervention can be timely and costly. A trust protector could take on a role similar to a court with the following powers: arbitrate disputes between trustees and/or beneficiaries; modify the trust agreement to correct a mistake or take advantage of favorable tax law; construe terms of the trust and advise parties; monitor the trustee; make changes to trust investments; alter a beneficiary's interest; accelerate or change distributions; terminate a trust; and add or remove beneficiaries and trustees. Andrew T. Huber, *Trust Protectors: The Role Continues to Evolve*, AMERICAN BAR ASSOCIATION, March 14, 2018, at 7-8; *see also* Gregory S. Alexander, *Trust Protectors: Who Will Watch The Watchmen?*, 27 CARDOZO L. REV. 2807, 2811 (Apr. 2006).

If the trust is offshore, then the trust protector is likely local and more accessible. Further, the trust protector may know (or have known) the settlor well and can carry out the settlor's intended wishes,

understand family dynamics, and be a useful problem solver. A trust protector can be used as a mediator between a trustee and beneficiary and will already be familiar with the trust terms and the parties. *Ruce*, at 72.

A settlor may want to involve a trust protector, especially if specific skills and training are needed to manage investment decisions and advise as to discretionary distributions. *Huber*, at 8. Further, a trust protector can monitor a trustee's actions, relieving the beneficiary of the burdensome responsibility of constant oversight. *Ruce*, at 71.

C. Trust Protectors in Texas.

The Texas Property Code did not recognize trust protectors until 2015. See *In re Macy Lynne Quintanilla Trust*, No. 04-17-00753-CV, 2018 WL 4903068, at *5 (Tex. App.—San Antonio, Oct. 10, 2018, no pet. h.). Because of this, the San Antonio Court of Appeals noted that as of October 2018, "there is little authority discussing the role of trust protectors." *Id*. at *5. The Texas Property Code allows for settlors to include trust protectors in their trust documents, discusses limitations on liability for directed trustees, provides a non-exclusive list of powers that can be exercised by the trust protector, and lists specific actions when a trust protector acts in a "nonfiduciary capacity." *See generally* TEX. PROP. CODE ANN. § 114.0031 (West 2019). Unfortunately, *Quintanilla* is the only Texas case to address trust protectors and Section 114.0031, and the San Antonio Court of Appeals noted that as of October 2018, "there is little authority discussing the role of trust protectors." *Quintanilla*, 2018 WL 4903068, at *5. Therefore, practitioners will have to look to other jurisdictions to determine how Texas courts may interpret the recent changes to Section 114.0031.

III. CORE FIDUCIARY DUTIES OF TRUSTEES AND EXCULPATORY CLAUSES.

A. The Duties of Loyalty, Inform, and Account.

Having an understanding of some of the basic fiduciary duties owed by a trustee is critical in understanding what fiduciary duties may be imposed on the trust protector. Listed below are some of the common core fiduciary duties of trustees:

> Duty of Loyalty: The duty of loyalty is the hallmark of a fiduciary relationship. The trustee must at all times place the interests of the beneficiary above his own. *Slay v. Burnett Trust*, 187 S.W.2d 377 (Tex. 1945). The trustee is not permitted to "place himself in a position where it would be for his own benefit to violate his duty to the beneficiaries." William F. Fratcher, *Scott on Trusts* § 170 (4th ed. 1987); RESTATEMENT (SECOND) OF TRUSTS § 170 (1959).
>
> Duty to Keep and Render Accounts: A trustee is under a duty to the beneficiaries of a trust to keep full accounts of the trust estate that are clear and accurate. William F. Fratcher, *Scott on Trusts* § 172 (4th ed. 1987); RESTATEMENT (SECOND) OF TRUSTS § 172 (1959). A beneficiary may demand a written statement of accounts covering the trust's transactions. TEX. PROP. CODE ANN. §113.151(a) (West 2019).
>
> Duty of Full Disclosure: A fiduciary has an affirmative duty to make a full and accurate disclosure of all material facts necessary for the beneficiaries to protect their interests. *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996); citing *Montgomery v. Kennedy*, 669 S.W.2d 309, 313 (Tex. 1984); *Kinszbach Tool Co. Inc. v. Corbett-Wallace Corp.*, 160 S.W.2d 509, 513 (Tex. 1942). The rationale for this rule is described below:
>
> > The trustee is under a duty to the beneficiaries to give them on their request at reasonable times complete and accurate information as to the administration of the trust. The beneficiaries are entitled to know what the trust property is and how the trustee has dealt with it. They are entitled to examine the trust property and the accounts and vouchers and other documents relating to the trust and its administration. Where a trustee is created for several beneficiaries, each of them is entitled to information as to the trust. Where the trust is created in favor of successive beneficiaries, a beneficiary who has a future interest under the trust, as well as a beneficiary who is presently entitled to receive income, is entitled to such information, whether his interest is vested or contingent.
>
> William F. Fratcher, *Scott on Trusts* § 173 (4th ed. 1987). A trustee has a fiduciary duty, upon demand by the beneficiary, to furnish the beneficiaries with a formal trust accounting; to inform a beneficiary of the nature and amount of the trust property; the trustee's management actions; and the intent of the trustee regarding the future administration of the trust estate; and to allow the beneficiary to inspect the books and records of the trust. *Shannon v. First Nat'l Bank*, 533 S.W.2d 389, 393 (Tex. Civ. App.—San Antonio 1976, writ ref'd n.r.e.); William F. Fratcher,

supra § 173; RESTATEMENT (SECOND) OF TRUSTS § 173 (1959). The fiduciary duty of full disclosure operates before and after litigation has been filed and is probably in addition to any obligations of disclosure imposed by the "discovery" provisions of the Texas Rules of Civil Procedure. *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996); *In re Peterson*, No. 07-03-0512-CV, 2004 WL 88872 at *2 (Tex. App.—Amarillo, Jan 20, 2004, pet. denied) (mem. op.) (not designated for publication).

Duty to Exercise Reasonable Care and Skill: For matters other than investments, "a trustee is under a duty in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property." *See* William F. Fratcher, *supra* § 174; RESTATEMENT (SECOND) OF TRUSTS § 174.

B. Exculpatory Clauses and Limitations.

Another aspect to consider is trustee exculpatory clauses, and the limitations placed on settlors wanting to include such clauses in their trust documents. "An exculpatory clause is a clause in a trust agreement that limits the trustee's liability for certain conduct." David F. Johnson, *A Trustee's Use of Exculpatory, Release, and Disclaimer-Of-Reliance Clauses in Texas* at 2, https://m.winstead.com/portalresource/lookup/poid/Z1tOl9NPluKPtDNIqLMRVPMQiLsSwKZDm83!/document.name=/Trustee%20Use%20of%20Exculpatory%20Release%20and%20Disclaimer%20Clauses.pdf ("Johnson"). Generally, these exculpatory clauses are enforceable and can limit a trustee's liability. *Id.* at 4, citing *Dolan v. Dolan*, No. 01-07-00694-CV, 2009 WL 1688532, at *4 (Tex. App.—Houston [1st Dist.] June 18, 2009, pet. denied) (mem. op.).

Examples: "The trustee may rely upon the written opinion of any attorney." David F. Johnson, *Exculpatory Clauses in Trust Documents are "Somewhat" Enforceable in Texas*, November 13, 2015, https://www.txfiduciarylitigator.com/2015/11/exculpatory-clauses-in-trust-documents-are-somewhat-enforceable-in-texas/ ("Johnson 2015"). "The trustee shall be saved harmless from any liability for any action he or she may take, or for the failure of such trustee to take any action, if done in good faith and without gross negligence." *Id*.

For many years in Texas, there was a common law restriction on exculpatory clauses applying to trusts – a trustee could not be exculpated from conduct that was a benefit to himself. Frank N. Ikard, Jr., *Exculpatory Clauses* at 3, Dec. 17-18, 2009, https://ikardlaw.com/wp-content/uploads/2018/01/exculpatory_clauses_Frank.pdf . "It would be contrary to public policy of this state to permit the language of a trust instrument to authorize self-dealing by a trustee." *Id*. at 3, citing *Langford v. Shamburger*, 417 S.W.2d 438, 444 (Tex. Civ. App. 1967), *writ ref'd n.r.e*. (October 25, 1967) and *disapproved of by Texas Commerce Bank, N.A. v. Grizzle*, 96 S.W.3d 240 (Tex. 2002).

However, in 2002, this thinking was rejected by the Texas Supreme Court. *Id*. at 3. In *Grizzle*, the Texas Supreme Court concluded that a trust could relieve a trustee of liability for self-interested transactions and that public policy did not bar such a provision. *Id.* at 4, citing *Grizzle*, 96 S.W.3d 240. This greatly expanded the scope of exculpatory clauses that were enforceable, as the Texas Supreme Court was willing to follow the settlor's intent to forgive even bad *intentional* conduct by trustees. *Johnson*, at 11 (emphasis added).

In response to the holding in *Grizzle*, the Texas legislature made changes. In 2006, Property Code Sections §111.0035 and §114.007 became law, which had the effect of modifying the holding in *Grizzle*. TEX. PROP. CODE ANN. §§ 111.0035, 114.007 (West 2019).

Texas Property Code §111.0035(b)-(c), titled "Default and Mandatory Rules; Conflict Between Terms and Statute" provides:

> (b) The terms of a trust prevail over any provision of this subtitle, except that the terms of a trust may not limit:
>
> (1) the requirements imposed under Section 112.031;
> (2) the applicability of Section 114.007 to an exculpation term of a trust;
> (3) the periods of limitation for commencing a judicial proceeding regarding a trust;
> (4) a trustee's duty;
>
> (A.) with regard to an irrevocable trust, to respond to a demand for accounting made under Section 113.151 if the demand is from a beneficiary who, at the time of the demand:
>
> (i.) is entitled or permitted to received distributions from the trust; or
> (ii.) would receive a distribution from the trust if the trust terminated at the time of the demand; and
>
> (B.) to act in good faith and in accordance with the purposes of the trust;
>
> (5) the power of a court, in the interest of justice, to take action or exercise jurisdiction, including the power to:

(A.) modify, reform, or terminate a trust or take other action under Section 112.054;
(B.) remove a trustee under Section 113.082;
(C.) exercise jurisdiction under Section 115.001;
(D.) require, dispense with, modify or terminate a trustee's bond;
(E.) adjust, deny, or order disgorgement of a trustee's compensation if the trustee commits a breach of trust; or
(F.) make an award of costs and attorney's fees under Section 114.064; or
(G.) the applicability of Section 112.038.

(c) The terms of a trust may not limit any common-law duty to keep a beneficiary of an irrevocable trust who is 25 years of age or older informed at any time during which the beneficiary:

(1) is entitled or permitted to receive distributions from the trust; or
(2) would receive a distribution from the trust if the trust were terminated.

TEX. PROP. CODE ANN. § 111.0035(b)-(c) (West 2019). Texas Property Code §114.007(a), titled "Exculpation of Trustee," provides:

(a) A term of a trust relieving a trustee of liability for breach of trust is unenforceable to the extent that the term relieves a trustee of liability for:

(1) a breach of trust committed:

(A) in bad faith;
(B) intentionally; or
(C) with reckless indifference to the interest of a beneficiary; or

(2) any profit derived by the trustee from a breach of trust.

TEX. PROP. CODE ANN. § 114.007(a) (West 2019). These sections instituted parameters for exculpatory clauses. A settlor cannot relieve a trustee of liability for a breach of trust committed in bad faith, intentionally, or with reckless indifference to the interest of a beneficiary. §114.007(a). Further, a trustee cannot be relieved of the duty to respond to demand for an accounting or to act in good faith and in accordance with the purposes of the trust. §111.0035(b)(4).

The terms of the trust control, unless the trustee's conduct is covered by the statutes. Thus, a settlor can still relieve the trustee of some duties, such as not making certain disclosures or from acting with negligence (as long as the negligence does not result in a profit to the trustee). See generally *Johnson 2015*.

IV. DO TRUST PROTECTORS AND ADVISORS OWE FIDUCIARY DUTIES?

Although many scholars have argued on both sides of the "fiduciary question," and trust protectors may not owe fiduciary duties in other U.S. jurisdictions, the new changes to Section 114.0031 provide that, with certain exceptions, a trust protector "is a fiduciary regardless of trust terms to the contrary. . . ." TEX. PROP. CODE ANN. § 114.0031(e) (West 2019); see also *Bove*, at 1.

A. To Whom Are the Fiduciary Duties Owed?

As trust protector law evolves in the United States, more jurisdictions have come to conclude that trust protectors owe fiduciary duties. *Bove*, at 10. Putting aside the Texas Property Code for a moment, there are several other things to evaluate to determine whether the power held by a trust protector is "fiduciary" or "personal."

The Uniform Trust Code takes the default position that a protector is presumptively a fiduciary, and the treatise *Scott & Fratcher on Trusts* notes that when a person who holds "a power of control" over trust assets, and is "neither a co-trustee or 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." *Id*. at 10; citing UNIF. TR. CODE § 808(d) (UNIF. L. COMM'N 2000) and William F. Fratcher, *Scott on Trusts* § 185 (4th ed. 1987) (Prof. Bove's article discusses the status of various state laws, as of 2016, and how the majority of states provide that a trust protector is a fiduciary, but allow the trust terms to opt-out of conferring fiduciary duties on the trust protector). Essentially, if a power is conferred on the trust protector, the power is a fiduciary power and is not to be used for the protector's own benefit.

To determine who the trust protector owes fiduciary duties to, practitioners need to examine the trust terms to see if the particular power the protector wants to exercise is a fiduciary power (for the benefit of someone other than the protector) or personal power (where the protector "owes no duty to anyone to consider the exercise of that power."). *Bove*, at 13. If the trust terms declare that the protector's powers are only personal, then it is theoretically possible the protector owes no fiduciary duties to the beneficiaries, settlor, trustees, or other trust protectors, and there could be a standing issue if a party tried to petition the court to exercise such a personal power. *Id*. Another author opined that

"[f]rom the few cases that are beginning to emerge, it is becoming evident that the [p]rotector is in a far more precarious position than a trustee." Caroline Garnham, *Bahamas: Proposed amendments to the Foundation Act, Dynasty Planning and getting our message across*, STEP, p. 3 (Nov. 6, 2008), http://step.org/sites/default/files/Branches/Foundation_act_Nov2008.pdf. Outside of the United States, other courts have considered the question of whether a power is "fiduciary" or "personal" when the trust terms are silent. The Bermuda Supreme Court held that when a trust instrument was silent as to whether the appointment and removal of a trustee was a personal power or fiduciary power, the power was fiduciary and the protector owed fiduciary duties to the trust beneficiaries to replace the trustee "in a fiduciary manner." *Id*. at 3; and *Bove*, at 14-15 (both discussing the "Star Trusts Case"). Ultimately, Prof. Bove states that "[i]f the exercise of a 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 . . . ." *Bove*, at 16. This is a broad, encompassing definition that could include just about any action taken by a trust protector.

But there may be limitations to whom the fiduciary duties are owed. One common exception is "when the protector with a power over trust distributions is also a beneficiary." *Bove*, at 16; citing *Rawson Tr. Co., Ltd. v. Perlman*, No. 194-1989 (Bah. Sup. Ct., Apr. 23. 1990) (referring to a case from the Bahamas Supreme Court). To determine whether there is a limitation on the protector's fiduciary duties one must look to (1) the settlor's intent; and 2) consider the "circumstances of the particular case" at hand. *Bove*, at p.17-18. In *Rawson*, the three beneficiaries of the trust were also the three trust protectors. *Bove*, at 21. The Court was asked to determine whether one of the beneficiary/trust protectors breached a fiduciary duty when he decanted the trust assets into a new trust. *Id*. Ultimately, the Court concluded that because all three beneficiaries—who were also trust protectors—had the right to veto any decision to protect their own interests, the settlor intended to make their powers personal, rather than fiduciary in nature. *Id*. at 21-22. Basically, the trust protector "is a fiduciary unless there is a compelling reason to conclude that the [trust] protector is not." *Id*. at 22.

B. Can the Fiduciary Duties be Modified?

The new changes to Section 114.0031 are mainly in Subsection (e), which are explicit that "[a]n advisor is a fiduciary regardless of trust terms to the contrary . . . ." TEX. PROP. CODE ANN. § 114.0031(e). But, at the same time, the settlor can modify those fiduciary duties for certain acts by the advisor. *Id*. The statute states:

> An advisor is a fiduciary regardless of trust terms to the contrary <u>*except that the trust terms may provide that an advisor acts in a nonfiduciary capacity if*</u>: (1) the advisor's only power is to remove and appoint trustees, advisors, trust committee members, or other protectors; and (2) the advisor does not exercise that power to appoint the advisor's self to a position described by Subdivision (1).

§ 114.0031(e)(1)-(2) (emphasis added). If the trust terms include the above exception, then the trust protector's ability to remove and appoint trustees, trust committee members, or other protectors, will be considered a "personal power" (non-fiduciary) rather than a fiduciary power. The decision to make such a power "personal" rather than "fiduciary" needs to be thoroughly explained to clients. Practitioners must be careful to advise their clients that without including the above exception in the trust terms, any acts taken by the trust protectors are considered a fiduciary power and will subject the trust protector to fiduciary liability.

C. Who has Standing to Bring a Cause of Action for Breach of Fiduciary Duty?

The one Texas case that briefly discusses trust protectors may provide some guidance as to who has standing to bring a cause of action for breach of fiduciary duty. In *Quintanilla*, the San Antonio Court of Appeals upheld the trial court's ruling granting summary judgment that the former trust protector did not have standing (i.e., is not an "interested person") to demand an accounting, or receive any financial information regarding the trusts. *Quintanilla*, 2018 WL 4903068, at *4-5. The Court reasoned that "'[t]here is very little case law interpreting the meaning of the phrase 'interested person,'" but that generally speaking, only trustees and beneficiaries have standing to demand financial information. *Id*. at *5 (internal citations omitted). Moreover, the former trust protector did not have any financial interests in the trusts, he received no compensation from the trusts for serving as trust protector, and the trust agreement only gave him "power to appoint, remove, and replace the Trustee in accordance with the terms of the [trust] agreements." *Id*. at *5. Absent any provision in the property code, the Court relied on the language of the trust agreement to make their decision. *Id*. at *5; see also TEX. PROP. CODE ANN. § 114.0031(d) (which lists some potential powers a settlor may grant to the trust protector). Practitioners should be specify what powers are granted to the trust protector, as the *Quintanilla* Court was resistant to determine the trust protector had any standing to obtain financial information when the trust terms only granted him limited powers. A trust protector may need to have access to trust financial records and accountings to determine whether or not removal

of a trustee is warranted. If this is the case, could it be possible that a future Texas court may determine the trust protector has no standing to allege a breach of fiduciary duty against a trustee who refuses to provide financial records and/or an accounting when the trust terms do not specifically entitle a protector to trust financial records and/or accountings?

Determining who has standing to bring suit for breach of fiduciary duty seems to be left to the trust terms. One analysis may be to first determine whether the particular power exercised by the trust protector is a "fiduciary power" or "personal power," as discussed earlier. *Bove*, at 13. Such a "personal power" could be that the trust protector, who is also a beneficiary of the trust, has the authority to make discretionary distributions. *Id*. at 6. The settlor may have intended that power to be personal, since the protector would also be affected by the decision to make such a discretionary distribution. *Id*. But saying all of the trust protector's powers are non-fiduciary, personal powers can be risky as a court may hold that the trust protector exercised the "personal power" for the benefit of someone other than himself, potentially exposing the trust protector to fiduciary liability. *Id*. at 6, 13. If the power is personal, the protector can "exercise it unfairly, according to his whims, and even in retaliation against an object of the power . . . [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." *Id*. at 13.

Luckily, the new changes to the Property Code provide that if a person, other than the trustee, has the power to "direct, consent to, or disapprove a trustee's actual or proposed investment decisions, distribution decisions, or other decisions, the person is an advisor." TEX. PROP. CODE ANN. § 114.0031(e). An advisor is a fiduciary regardless of trust terms to the contrary, unless the exception discussed above is included in the trust terms. Therefore, the beneficiaries will have standing to sue the trust protector for breach of fiduciary duty as the trust protector is considered a fiduciary regardless of trust terms to the contrary.

V. SEPTEMBER 1, 2019 CHANGES TO PROPERTY CODE SECTION 114.0031 AND THE UNIFORM DIRECTED TRUST ACT

A. Legislative Intent in the Recent Changes to Section 114.0031 of the Texas Property Code.

1. Texas Legislature's Procedural History in Changing Section 114.0031 of the Property Code.

The Texas Legislature first enacted the original directed trust and advisor statute on June 19, 2015. *Act of June 19, 2015*, 84th Leg., R.S., ch. 1108, §2, 2015 Tex. Sess. Law Serv. Ch. 1108 (H.B. 3190) (codified as TEX. PROP. CODE ANN. § 114.0031). Reasoning for the enactment of this statute is best described the legislative committee report:

> Interested parties contend that as the traditional roles and responsibilities of trustees have evolved, estate planning has grown more complex and the use of trusts for multi-generational planning by families has grown more widespread.

House Comm. on Bus. & Indus., Bill Analysis, Tex. H.B. 3190, 84th Leg., R.S. (Apr. 29, 2015). Unfortunately, a review of the legislative history does not show much detail on the debate, if any, that took place before the enactment of the original version of Section 114.0031. Presumably, the sponsors of H.B. 3190 saw the changing landscape of directed trusts and decided it was time for Texas to adopt such a provision.

The current version on Section 114.0031 includes changes from the Real Estate, Probate, and Trust Law Section of the State Bar of Texas ("REPTL"). *House Comm. on Judiciary & Civ. Juris.*, Bill Analysis, Tex. H.B. 2246, 86th Leg., R.S. (Apr. 18, 2019). REPTL lobbied the legislature to change Section 114.0031 to prevent settlors from creating a trust "with no true fiduciary." The prior language of Section 114.0031(e) reads as follows:

> (e) If the terms of a trust give a person the authority to direct, consent to, or disapprove a trustee's actual or proposed investment decisions, distribution decisions, or other decisions, the person is considered to be an advisor and a fiduciary when exercising that authority except that the trust terms may provide that an advisor acts in a nonfiduciary capacity.

Act of June 19, 2015, 84th Leg., R.S., ch. 1108, §2, 2015 Tex. Sess. Law Serv. Ch. 1108 (amended 2019) (current version at TEX. PROP. CODE ANN. § 114.0031). This language was vague and could be interpreted as allowing the settlor to completely avoid placing any fiduciary duties on the trust advisor if the trust terms provided such an arrangement. The recent changes to Section 114.0031, specifically the changes of the fiduciary duty requirement, are as follows:

> (e) If the terms of a trust give a person the authority to direct, consent to, or disapprove a trustee's actual or proposed investment decisions, distribution decisions, or other decisions, the person is an advisor. An advisor is a fiduciary regardless of trust terms to the contrary except that the trust terms may provide that an advisor acts in a nonfiduciary capacity if: (1) the advisor's only power is to remove and appoint trustees, advisors, trust committee members, or other protectors; and (2) the advisor does not exercise that

> power to appoint the advisor's self to a position described by Subdivision (1).
> (e-1) Subsection (e) does not prohibit the exercise of a power in a nonfiduciary capacity as required by the Internal Revenue Code for a grantor or other person to be treated as the owner of ant portion of the trust for federal tax purposes.

TEX. PROP. CODE ANN. § 114.0031(e)-(e-1) (West 2019). Now the code specifies that an advisor is a fiduciary regardless of what the trust document provides, except that the settlor may limit that the trust advisor acts as a nonfiduciary if their only power is to remove and appoint trustees, advisors, trust committee members, or other protectors. § 114.0031(e); see also *House Comm. on Bus. & Com.*, Bill Analysis, Tex. H.B. 2246, 86th Leg., R.S. (May 2, 2019). Changes were also made to clarify tax requirements for the IRS, which are not a subject of this article. As discussed earlier, the decision to say that the trust protector acts in a non-fiduciary capacity when removing and appointing trustees comes with risks. Practitioners should take care to thoroughly explain such risks to clients. One interesting ambiguity is the power to appoint and remove "advisors" and "protectors," even though Subsection (a)(1) says that "'advisor' includes protector." *Id*. Could this be a signal that the legislature, or at least REPTL, wants to distinguish between an "advisor" and "protector" in future changes to this section?

B. Uniform Directed Trust Act.

As for future changes regarding trust protector liability, the Texas Legislature and practitioners should look to the recently promulgated Uniform Directed Trust Act ("UDTA"). UNIFORM LAW COMMISSION, *Uniform Directed Trust Act with Prefatory Notes and Comments*, (2017) (Apr. 1, 2020, 4:16 PM), https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=eedab7b6-8fd9-29f1-835f-ed4f385e12aa&forceDialog=0. The authors of the UDTA succinctly describe the current state of existing U.S. law regarding fiduciary duties of trust protectors and directed trustees: "[e]xisting uniform trusts and estates acts address the issue inadequately [, and] [e]xisting nonuniform states laws are in disarray." *Id*. at 1. One can only wonder why any new article on this subject is welcome. Although it is a secondary source, the UDTA is a great reference for practitioners looking to learn more about including trust protectors in their trust instruments.

The UDTA contemplates that fiduciary duties of a directed trustee will be reduced in direct relation to increases in power by the trust director (the UTDA uses the term "trust director" in lieu of trust protector or trust advisor). *Id*. at 2. Essentially, the "trust director functions much like a trustee in an undirected trust." *Id*. But, no matter how much additional power is vested with the trust director, a directed trustee shall have some minimal amount of fiduciary duties, and the authors of the UDTA declined any suggestion to allow the complete elimination of fiduciary duties for directed trustees. *Id*. Directed trustees also have a duty to avoid wilful misconduct. *Id*. at 2.

Section Eight of the UDTA addresses the "Duty and Liability of Trust Director," which is set out in full below:

> (a) Subject to subsection (b), with respect to a power of direction or further power under Section 6(b)(1):
>
> (1) A trust director has the same fiduciary duty and liability in the exercise or non-exercise of the power:
>
> (A) If the power is held individually, as a sole trustee in a like position and under similar circumstances; or
> (B) If the power is held jointly with a trustee or another trust director, as a co-trustee in a like position and under similar circumstances; and
>
> (2) The terms of the trust may vary the director's duty or liability to the same extent the terms of the trust could vary the duty or liability of a trustee in a like position and under similar circumstances.
>
> (b) Unless the terms of a trust provide otherwise, if a trust director is licensed, certified, or otherwise authorized or permitted by law other than this [act] to provide health care in the ordinary course of the director's business or practice of a profession, to the extent the director acts in that capacity, the director has no duty or liability under this [act].
> (c) The terms of a trust may impose a duty or liability on a trust director in addition to the duties and liabilities under this section.

Id. at 17-18. The UDTA imposes the same liability on a trust director as if the director were in the shoes of a trustee that was otherwise undirected. Section Eight follows the great majority of state directed trust statutes, but provides specific authority that the director "absorbs" the fiduciary duties of a similarly situated trustee, rather than other state laws which "tend to say only that a trust director is a 'fiduciary,' without specifying which kind of fiduciary or which fiduciary duties apply," (i.e., the duties of loyalty,

keep & render accounts, full disclosure, etc.). *Id*. at 19; *see also* TEX. PROP. CODE ANN. § 114.0031(e) (providing that an advisor is a fiduciary regardless of trust terms to the contrary, with certain exceptions).

This makes sense in that removing liability from the director when they make a decision for the trustee would be an easy way of skirting any fiduciary duty owed by the trustee. For instance, say a trustee was unsure about making a decision regarding trust assets. If the trustee colluded with the trust director (who would have no fiduciary duties), the director could make the decision for the trustee, and if the decision turned out to hurt the trust assets or the beneficiary, then potentially both the trustee and trust director could be off the hook for breach of fiduciary duty. *See also* George T. Bogert et al., THE LAW OF TRUSTS AND TRUSTEES § 965 at 120-22 (3d ed. 2010) (discussing a similar situation in which the court, presumably, would hold that someone needs to be held accountable to the beneficiaries). Sections 10 and 11 discuss this in more detail, as well as the unique standards when it comes to information sharing, as well as the duty to monitor, inform, and give advice. *UDTA*, at 18.

Section Nine of the UDTA addresses the "Duty and Liability of Directed Trustee." Section Nine of the UDTA is set out in full below:

> (a) Subject to subsection (b), a directed trustee shall take reasonable action to comply with a trust director's exercise or non-exercise of a power of direction or further power under Section 6(b)(1), and the trustee is not liable for the action.
> (b) A directed trustee must not comply with a trust director's exercise or non-exercise of a power of direction or further power under Section 6(b)(1) to the extent that by complying the trustee would engage in wilful misconduct.
> (c) An exercise of a power of direction under which a trust director may release a trustee or another thrust director from liability for breach of trust is not effective if:
>
> (1) The breach involved the trustee's or other director's wilful misconduct;
> (2) The release was induced by improper conduct of the trustee or other director in procuring the release; or
> (3) At the time of the release, the director did not know the material facts relating to the breach.
>
> (d) A directed trustee that has reasonable doubt about its duty under this section may petition the [court] for instructions.
> (e) The terms of a trust may impose a duty or liability on a directed trustee in addition to the duties and liabilities under this section.

Id. at 21-22. Similar to Texas, the UDTA releases a directed trustee from fiduciary liability unless the directed trustee engaged in wilful misconduct. Again, the UDTA points to Section 10 and 11, which discuss limitations and exclusions from this exculpation. This section also provides that a directed trustee may petition the court for instruction. *Id*. at 22. In the UDTA, "wilful misconduct" is a mandatory minimum, and this standard may not be reduced by the terms of the trust instrument. *Id*. at 24 (emphasis added).

Interestingly, the comments on the "wilful misconduct" standard in Section Nine provide a great source of discussion on the logic behind the inclusion, or exclusion, of such a standard. *Id*. at 24. The states are split into two groups: (1) the majority, "no duty statutes" in Alaska and Nevada, which "provide that a directed trustee has no duty or liability for complying with an exercise of a power of discretion;" and (2) the minority, "reduced duty statutes" in Texas and Delaware, which provide that "a directed trustee is not liable for complying with a direction of a trust director unless by doing so the directed trustee would personally engage in 'wilful' or 'intentional' misconduct." *Id*. at 24-25. The majority reasons that if a settlor gave a trust director authority to make the final decision (i.e., the power to veto the directed trustee) the trust director is "the exclusive bearer of fiduciary duty" and the directed trustee bears no responsibility for whatever decision is made. *Id*. at 24. The minority, which includes Texas, reasons that a trustee must always be held accountable in some way. *Id*. at 25. But the trustee's accountability is reduced to "facilitate the settlor's intent that the trust director, rather than the directed trustee, be the primary or even sole decision maker" when the trustee's decision is "subject to a power of direction." *Id*. The authors of the UDTA chose to follow the "reduced duty" reasoning because it is "more consistent with traditional fiduciary policy" and a "total elimination of duty in a directed trustee is unnecessary to satisfy the needs of directed trust practice." *Id*. Practitioners should look to discussion in the UDTA comments for further guidance regarding the "wilful misconduct" standard.

What other duties do a trust director and directed trustee owe? Sections 10 and 11 provide the following information on these duties. Section 10, titled "Duty to Provide Information to Trust Director or Trustee," is set out in full below:

> (a) Subject to Section 11, a trustee shall provide information to a trust director to the extent the information is reasonably related both to:
>
> (1) The powers or duties of the trustee; and
> (2) The powers or duties of the director.

(b) Subject to Section 11, a trust director shall provide information to a trustee or another trust director to the extent the information is reasonably related both to:

(1) The powers or duties of the director; and
(2) The powers or duties of the trustee or other director.

(c) A trustee that acts in reliance on information provided by a trust director is not liable for a breach of trust to the extent the breach resulted from the reliance, unless by so acting the trustee engages in wilful misconduct.
(d) A trust director that acts in reliance on information provided by a trustee or another trust director is not liable for a breach of trust to the extent the breach resulted from the reliance, unless by so acting the trust director engages in wilful misconduct.

Id. at 26-27. Section 11, titled "No Duty to Monitor, Inform, or Answer," is set out in full below:

(a) Unless the terms of a trust provide otherwise:

(1) A trustee does not have a duty to:

(A) Monitor a trust director; or
(B) Inform or give advice to a settlor, beneficiary, trustee, or trust director concerning an instance in which the trustee might have acted differently than the director; and

(2) By taking an action described in paragraph (1), a trustee does not assume the duty excluded by paragraph (1).

(b) Unless the terms of a trust provide otherwise:

(1) A trust director does not have a duty to:

(A) Monitor a trustee or another trust director; or
(B) Inform or give advice to a settlor, beneficiary, trustee, or another trust director concerning an instance in which the director might have acted differently than a trustee or another trust director; and

(2) By taking an action described in paragraph (1), a trust director does not assume the duty excluded by paragraph (1).

Id. at 29. The UDTA does not impose liability for when a trust director or trustee may have acted differently than the trust director or trustee. *Id*. The clarification came from a Virginia case where a directed trustee was not liable for a trust director's failure to diversify the trust investment assets, but instead the directed trustee was held liable for "failing to advise the beneficiaries about the risks of the investment director's actions." *Id*. at 29-30, citing *Rollins v. Branch Banking & Trust Company of Virginia*, 56 Va. Cir. 147 (2002). Additionally, if a trustee or trust director so chooses to inform a beneficiary that he would have acted differently, the trustee or trust director does not assume the duty (providing a safe harbour for trust director or trustee who decides to express their opinion). *Id*. at 30.

Although Section 114.0031 of the Texas Property Code is new, practitioners who wish to learn more about trust protectors should read in detail the recently published UDTA. This section of the paper simply tries to give a summary of the UDTA to provide the reader with more details on how to interpret Section 114.0031.

VI. TRUSTEE LIABILITY FOR RELYING ON TRUST PROTECTORS.

A. Administrative Hat for the Trustee when Relying on Advice of Trust Protectors and Trust Advisors.

One interesting area of law is whether the "custodial," "administrative," or "directed" trustee is shielded from liability when he or she relies on the direction of the trust protector. Dave Folz, *Directed Trustees in Texas – New Section 114.0031*, COLLIN COUNTY BAR ASSOCIATION ESTATE PLANNING/PROBATE SECTION, p.2 (Aug. 12, 2016), https://www.collincountybar.org/assets/Councils/McKinney-TX/library/Dave%20Folz%20Directed%20Trustees%20in%20Texas%20New%20Section%20114.0031.pdf.[1] Trust protectors can direct the trustee to take specific actions, which the trustee must follow, and absent wilful misconduct or gross negligence, the trustee is shielded from liability. *Folz*, at p.2. So, what kind of actions can the trust protector direct the trustee to perform? Dave Folz's article has a great discussion on the following types of direction, and why such a direction may be necessary:

[1] The authors of this paper would like to thank Dave Folz for providing direction on this seldom discussed area of the law and allowing the use of his article in this paper.

> Many types of direction can be included in a trust. The list of powers in [Section 114.0031] is non-exclusive. A few of the most important are:
>
> (a) *Investments*; This power can be very broad or limited to a special asset or specific actions, i.e., choose or replace board members for the Family LLC;
> (b) *Distributions* - Typically, this will be someone who is close to the beneficiary and is best able to access the beneficiary's needs. This might be especially appropriate for a beneficiary with special needs or a trust with incentives or other requirements that require close supervision or awareness of the beneficiary's lifestyle or medical condition. If this is a second marriage situation and the surviving spouse of the second marriage is the trustee, a distribution trustee as to the children of the first marriage might likewise be helpful;
> (c) *Power to Change Situs or Governing Law*; This power could be important if beneficiaries move, state income tax law changes, decanting or perhaps spendthrift protection is more favourable in another state;
> (d) *Tax Decisions*;
> (e) *Power to Modify a Power of Appointment*
> (f) *Trust Termination [in part, or in full]*;
> (g) *Powers of Protection* – These might include powers to allow standing to give instructions, interpret the trust, resolve differences between trustees, beneficiaries or other investment advisors, determine capacity of the trustee, beneficiary or other advisors, or to prosecute, defend, or join an action, claim or judicial proceeding.

Id. at p.4-5. (emphasis added). As stated by Mr. Folz, these are just some of the areas that a trust protector can direct a trustee.

1. Gross Negligence and Wilful Misconduct in Relying on the Trust Protector or Advisor.

Subsections 114.0031 (f) – (g) provide a safe harbour for a trustee who is directed by the trust protector to do or refrain from doing a particular action, as well as a directed trustee who is required to get consent from a trust protector (and the protector fails to provide that consent)—except in situations where there is wilful misconduct or gross negligence on the part of the directed trustee. TEX. PROP. CODE ANN. § 114.0031(f)-(g) (West 2019). The subsections read as follows:

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

§ 114.0031(f)-(g) (emphasis added).

2. Definition of Gross Negligence or Wilful Misconduct.

The Property Code does not define "gross negligence" or "wilful misconduct." Black's Law Dictionary defines "gross negligence" as "[a] conscious, voluntary act or omission in reckless disregard of a legal duty and of the consequences to another party, who may typically recover exemplary damages," and is also termed as "wilful and wanton misconduct." *Gross negligence*, BLACK'S LAW DICTIONARY (10th ed. 2014). Other statutes and case law can help us determine how a court could define each term, and allow practitioners to advise their clients against behavior that may meet these standards. The Civil Practice and Remedies Code defines gross negligence as an act or omission:

> (A) which when viewed objectively from the standpoint of the actor at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and
> (B) of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the right, safety, or welfare of others.

TEX. CIV. PRAC. & REM. CODE ANN. § 41.001(11)(A)-(B) (West 2019). The Texas Supreme Court held that the jury should analyze the objective element of extreme risk as whether there would be a "likelihood of serious injury to the plaintiff," and the subjective element as "the plaintiff must show that the defendant knew about the peril, but his acts or omissions demonstrate that he did not care," and the risk taken "should be 'examined prospectively from the perspective of the actor, not in hindsight.'" *Medina v. Zuniga*, 593 S.W.3d 238, 247-248 (Tex. 2019) (internal citations omitted). Circumstantial evidence can be used to prove both of these elements. *Mobile Oil Corp. v. Ellender*; 968 S.W.2d 917, 921

(Tex. 1998). In *Dolan*, the First Court of Appeals determined that when a trustee invested 40% of the value of a trust in a start-up company, and received nothing in return as security or collateral for the investment, let alone an ownership interest in the start-up, he risked placing the beneficiary in financial ruin, which "constitutes an extraordinary or extreme risk of harm." *Dolan v. Dolan*, No. 01-07-00694-CV, 2009 WL 1688532, at *5 (Tex. App.—Houston [1st. Dist.] June 18, 2009, pet. denied) (mem. op.). When the start-up company—a needlepoint business owned by the trustee's wife—started to fail, the trustee continued to fund the company with trust funds whenever his wife needed money for the business. *Id*. The *Dolan* court opined that the jury could have concluded that the trustee, who was an experienced businessman, had "actual, subjective awareness that [the start-up] was failing, yet he continued to advance funds to [his wife], without limitation" and "proceeded with a conscious indifference to the rights, safety, and welfare of others," particularly the beneficiary. *Id*. at *5-6.

The "wilful misconduct" standard is not as well defined as "gross negligence." Black's Law Dictionary defines "wilful misconduct" as "[m]isconduct committed voluntarily and intentionally." *Wilful misconduct*, BLACK'S LAW DICTIONARY (10th ed. 2014). In *Texas Pig Stands*, the Fifth Circuit held that a bankruptcy trustee was found to have "committed wilful misconduct by wilfully failing to pay taxes" when the bankruptcy trustee thought it would be a better plan to defer taxes payments until the business looked more profitable. *In re Texas Pig Stands, Inc.*, 610 F.3d 937, 944-45 (5th Cir. 2010). Although bankruptcy is a noticeably unique area of law, discussion as to when a court found wilful misconduct is instructive to practitioners looking for guidance. In a discussion on whether a school teacher was liable under the Coverdell Act, the Eastland Court of Appeals cited cases from the Texas Supreme Court and the First Court of Appeals which discussed "wilful misconduct," and opined that

> 'wilful' is the like the phrase 'heedless and reckless disregard' and means 'that entire want of care which would raise the belief that the act or omission complained of was the result of a conscious indifference to the right or welfare of the person or persons to be affected by it.'

Morrone v. Prestonwood Christian Academy, 215 S.W.3d 575, 582 (Tex. App.—Eastland 2007, pet. denied) (internal citations omitted). Ultimately, the court opined "that the term is synonymous with 'gross negligence.'" *Id*. (internal citations omitted).

B. Risk of the Trust Protector "Selling the Seat of the Trustee."

Like with most positions of power, there are risks. One such risk is that the trust protector will use his power for his own benefit. The classic question is: will the trust protector sell the role of trustee for his own financial gain? This was addressed in the *Skeats' Settlement*, in which the Court said that the trust protector could not sell the seat of the trustee because he cannot exercise his power for his own benefit. Moreover, the Property Code provides that although the trust protector acts in a non-fiduciary capacity when his "only power is to remove and appoint trustees . . . or other protectors," the trust protector cannot "exercise that power to appoint the advisor's self . . ." to one of those positions. TEX. PROP. CODE ANN. § 114.0031(e)(1)-(2) (West 2019). Presumably, the court would scrutinize an appointment when the trust protector fills one of those positions with a family member or a person who paid for the position.

Additional cooks in the kitchen can create more complexity and less efficiency. Drafting must clearly explain, identify, and distinguish the roles and responsibilities between the trust protector, trustees, advisors, or others involved. *Folz*, at 7. Otherwise, this role may create more confusion than good and lead to litigation. *Id*. at 7. Further, the trust should clearly provide for the appointment, removal, and compensation of trust protectors. *Ausness*, at 312. There should be clear standards of conduct for the trust protector. Without them, problems will arise and court intervention will be required.

VII. CONCLUSION.

Although the new changes to Property Code Section 114.0031 have not been discussed by any Texas court, hopefully this article provides the reader with an understanding of the origins of the trust protector, basic fiduciary duties, where the law is heading, and how to prevent common liability issues when including a trust protector.