

## The development of the use and role of protectors in Guernsey trusts law

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Recent Royal Court judgments have clarified the position of protectors in Guernsey trusts law. In this Q&A, partner Gavin Ferguson from Ogier's Guernsey Private Client and Trusts team explains the background, the recent developments in the roles of protectors, and the thought required in appointing a suitable protector.

### Recap on the role of protectors

The offshore fiduciary industry began to see protectors being introduced during the mid to late 1980s. The rise in the popularity of their use may be attributed to many concerns but the following factors, rightly or wrongly, appear to dominate perceptions:

- as trusts as a general concept for wealth and estate planning opened up to a greater number of jurisdictions, protectors have been seen as a useful means of placating cautious settlors unfamiliar with equitable arrangements, who may be uncomfortable with endowing their trustee with unfettered control of their assets
- at a time when trust structures were being used extensively as tax planning vehicles and/or for asset protection, settlors often preferred to keep their names out of the trust documentation in an attempt to preserve a greater degree of privacy.

Whether or not these motives remain prevalent today, the result is a common misconception that the protector's role is solely aimed at protecting the position of the settlor. In most cases a protector will have been appointed by the settlor (at least in the first instance) and consequently has been seen to be the settlor's "eyes and ears" in respect of a trust or, at the aggressive end of the spectrum, even the settlor's alter ego or proxy.

A further legacy of the manner in which protectors were historically appointed is the lack of clear planning for their role in relation to a trust. As a settlor appointee, very little thought was given to the choice of protector; settlors preferring to appoint a close friend/family member or

trusted advisor rather than necessarily someone with experience or knowledge of the workings of trusts. Additionally, it was often the case that protector provisions in the trust instrument were hastily drafted. As a result, over the last few years the fiduciary industry has faced a number of issues in their administration of such trusts including:

- the ability (or lack of) to remove protectors
- clarity over the succession of protectors
- whether a protector's duties are fiduciary or not
- whether protectors have the right to remuneration or indemnification

### **What is the position now?**

It has taken some time for both offshore jurisprudence and academic study to catch up with the use of protectors. However, we now have access to both, albeit such material remains limited. Moreover the role of the protector remains, in most cases, outside the scope of statute. Nevertheless recent case law has clarified a number of points. In July 2015 the Royal Court of Guernsey in *Re K Trust* confirmed that as a matter of Guernsey law, the protector's duty will always be owed to the beneficiaries of the trust regardless of their relationship with the settlor and whatever the settlor's motives for appointing them.

In this case, it resulted in the court finding it necessary to remove the protector due to the breakdown in the protector's relationship with the trustee and the beneficiaries, despite the protector's protestations that only she had been privy to the settlor's wishes during his lifetime and therefore only she could properly fulfill the role of protector. The case also discussed protector provisions in the trust instrument as to the circumstances in which a successor protector must or may be appointed and the consequences of failing to comply with the trust provisions; and the ability of a protector to demand an indemnity from the trustees in respect of any liabilities arising as a result of holding office. In the first instance, the court decided that the protector could not be compelled to name a successor (although in this instance they were not required to do so under the terms of the trust in any event). In the second, the court determined that a protector should not ordinarily expect any greater protection than that afforded by the trust instrument.

### **What has the trust industry learnt?**

A protector, whether it is an individual, a corporate or a committee, can be very valuable in assisting with the administration of a trust. However, its value will always be limited by the choice of protector and the clarity of the protector provisions in the trust instrument. Whilst the courts have demonstrated a willingness to accept the transferability of their powers in respect of trustees to apply also to protectors, such powers cannot be assumed whilst the protector's role remains outside the scope of relevant legislation. For example, as seen above, the courts

have recognised an obvious divergence in the roles of trustees and protectors – that the protector will not have possession of the trust fund – to justify its decision that a protector will not generally be entitled to an indemnity in respect of liabilities arising from its office.

It is therefore crucial that an appropriate protector is chosen in the first instance. Moreover, it is just as important as it is with the trustee, to set out in full the protector's role in the trust instrument. This extends not just to their powers (whether positive or powers of consent) but also to ensure adequate planning for the role of protectors for the life of the trust i.e. protector succession planning and the ability to add, remove, remunerate and, if appropriate, indemnify a protector.

### **Who may benefit from the appointment of a protector?**

The short answer is "everyone". It is advantageous not just for the beneficiaries in terms of ensuring trustee accountability, but also very helpful to trustees to have the right protector. The right protector will understand what the trustees are doing or trying to achieve, and will help to avoid or to mitigate any potential conflicts between trustees and beneficiaries. The appointment of a protector can help to resolve issues before they escalate and become damaging, divisive and expensive.

### **Choosing the right protector**

There are a number of factors that one should consider in appointing a protector of a trust such as:

- their age
- their relationship with the settlor and the beneficiaries
- the likelihood of their benefitting from the trust in the future
- their familiarity with trusts and the role of protector

One would normally want a protector to be able to carry out their role for several years – for that reason the age of the person chosen is relevant. It should be considered whether it is appropriate to appoint a protector who is particularly close to any of the beneficiaries or the settlor e.g. a spouse or close family friend. Such relationships don't always last and it is often at the time of relationship crises that the administration of the trust needs to be at its smoothest.

Further, if the person is so close to the settlor that there is a chance (perhaps as a default beneficiary) that they may one day benefit from the trust, then they should not be appointed a protector due to the inevitable conflict of interest that arises. Finally, the appointee should be someone who has some degree of understanding of how trusts operate and are administered and can therefore be of most value to the trustee and be best placed to serve the interests of the beneficiaries.

Taking all of these considerations into account, it is not surprising that the number of settlors opting for professional protectors is on the rise. Professional protectors have the necessary technical expertise to hold the trustees to account, to understand their role, and how to exercise their powers in the interest of the beneficiaries. Further, they can be relied upon to build professional relationships with the beneficiaries and do so in an impartial manner. In Guernsey, any professional protector is required to be licensed by the Guernsey Financial Services Commission meaning that there would always be an additional layer of oversight to ensure the proper administration of the trust.

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