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Regularizing the Trust Protector

Paul B. Miller*

ABSTRACT: Increasingly, settlors of trusts in on-shore jurisdictions are making use of trust protectors. Protectors serve a variety of functions but generally speaking they are appointed to provide additional security for settlors' expectations that trusts will be administered in accordance with their intentions. Given the potential breadth and variety of functions performed and powers wielded by protectors, their use generates important and profound theoretical issues. Taking its cues from recent efforts to regularize trust protection, this Article addresses questions concerning the extension of fiduciary duties to trust protectors. Amongst other things, it questions the tenability of proposals for broad extension of fiduciary status to protectors and advocates a structured, fact-based approach to fiduciary characterization of trust protection mandates according to which they may be considered fiduciary only if and to the extent they implicate fiduciary powers.

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I. INTRODUCTION

Trust protectors are an orphan of the law, and only slightly less so, of legal scholarship. The fiduciary regulation of conventionally structured trusts (i.e., those that feature a settlor, trustee(s), and beneficiaries) has drawn

* Professor of Law, Notre Dame Law School. I am very grateful for comments from Tom Gallanis, Alexandra Popovici, Rob Sitkoff, and Lionel Smith. I am also appreciative of feedback from fellow symposiasts at the *Iowa Law Review Wealth Transfer Law in Comparative and International Perspective Symposium* held at the University of Iowa College of Law. Further comments would be most welcome at: paul.miller@nd.edu.

considerable attention. The peculiarities associated with fiduciary regulation of conventionally structured charitable trusts are also given thorough treatment.¹ Partly as a result, many trusts scholars hold that fiduciary administration lies within the otherwise disputed “core” of the common law trust, even as they disagree about particular facets of trust fiduciary administration.² Equally, and not surprisingly, most general treatments of fiduciary law take the trust as conventionally structured as a paradigmatic kind of fiduciary arrangement. It is taken for granted that trustees—and no one else, for the purposes of trust law—are fiduciaries of trust beneficiaries (or of trust purposes). Likewise, it is taken for granted that the fiduciary regulation of trusts ought to be primarily focused on protecting beneficiaries.

Trust protectors disrupt common assumptions about the fiduciary administration of trusts.³ Protectors are interpolated between trustees and beneficiaries (or, in the case of charitable trusts, regulators) in the administration of trusts. Generally speaking, protectors provide enhanced protection for settlor intent.⁴ But, unlike parties to the conventionally structured trust, the status of the protector is largely undefined by law. It is instead left to the fertile minds of lawyers. Protectors may be granted a variety of powers (and, indeed, forms of standing not premised on the possession

1. See, e.g., Henry Hansmann, *The Role of Trust in Nonprofit Enterprise*, in *THE STUDY OF NONPROFIT ENTERPRISE: THEORIES AND APPROACHES* 115, 118–21 (Helmut Anheier & Avner Ben-Ner eds., 2003) (examining the role and responsibilities of fiduciaries in the charitable trust context); Rob Atkinson, *Unsettled Standing: Who (Else) Should Enforce the Duties of Charitable Fiduciaries?*, 23 J. CORP. L. 655, 661 (1998); Evelyn Brody, *The Limits of Charity Fiduciary Law*, 57 MD. L. REV. 1400, 1418–23 (1998); James J. Fishman, *Improving Charitable Accountability*, 62 MD. L. REV. 218, 228–31 (2003); Harvey J. Goldschmid, *The Fiduciary Duties of Nonprofit Directors and Officers: Paradoxes, Problems, and Proposed Reforms*, 23 J. CORP. L. 631, 638–49 (1998); Geoffrey A. Manne, *Agency Costs and the Oversight of Charitable Organizations*, 1999 WIS. L. REV. 227, 237–40; Jeremy Benjamin, Note, *Reinvigorating Nonprofit Directors’ Duty of Obedience*, 30 CARDOZ L. REV. 1677, 1687 (2009).

2. See Thomas P. Gallanis, *The Contribution of Fiduciary Law*, in *THE WORLDS OF THE TRUST* 388, 390–94 (Lionel Smith ed., 2013); David Hayton, *The Irreducible Core Content of Trusteeship*, in *TRENDS IN CONTEMPORARY TRUST LAW* 47, 48–52 (A.J. Oakley ed., 1996); Robert H. Sitkoff, *Trust Law as Fiduciary Governance Plus Asset Partitioning*, in *THE WORLDS OF THE TRUST*, *supra*, at 428, 430–34; Daniel Clarry, *The Irreducible Core of the Trust* 22–24 (August 2011) (unpublished LL.M. thesis, McGill University Faculty of Law) (on file with ProQuest Dissertations Publishing).

3. See generally Terence Tan Zhong Wei, *The Irreducible Core Content of Modern Trust Law*, 15 TR. & TRUSTEES 477 (2009) (describing the ways in which protectors challenge the understanding of trusts).

4. Lawrence A. Frolik, *Trust Protectors: Why They Have Become “The Next Big Thing”*, 50 REAL PROP. TR. & EST. L.J. 267, 276–82 (2015); see also John F. Wasik, *Guardians of Trusts*, N.Y. TIMES (Mar. 12, 2014), <https://www.nytimes.com/2014/03/13/business/retirementspecial/guardians-of-trusts.html> (“[T]he legacy part of retirement can be unsettling. If you have planned carefully and set up trusts and wills, you still might have some nagging doubts about how your wishes will be carried out after you are gone. Say you have appointed a trustee you think you can confide in and who understands your intentions. What happens if that trustee turns out to be less trustworthy or dies, or if estate laws change? Then you might need a third party called a ‘trust protector.’”).

and exercise of legal powers),⁵ some of which are identical in nature to powers typically devolved on trustees, but others of which are idiosyncratic. The precise concatenation of powers, or forms of standing granted to a protector, will depend upon what the lawyer drafting the trust deed aims to accomplish for the settlor by making provision for a protector. But in many cases, the protector will enjoy a position of influence over trust administration that will limit or supersede the authority vested in the trustee, and/or condition the rights and expectations of beneficiaries. The scope for significant influence by protectors naturally raises questions about jural and practical relations between settlors, trustees and beneficiaries. More specifically, it gives reason to question assumptions about: (1) settlor passivity and the policy against dead hand control; (2) the unilateral character of authority vested in trustees over matters of trust administration; and (3) the necessity of clear *ex ante* definition of the beneficial entitlements of beneficiaries and/or their enforcement rights relative to trustees.

Unfortunately, these questions have been neglected. A few academic papers describe practices in the use of protectors and take stock of associated legal and practical issues.⁶ But trusts scholars have largely ignored protectors.⁷ This is unfortunate for several reasons.

First, from general theoretical and systemic perspectives, the protector phenomenon offers important lessons about worthy objects of theoretical interest in private law. Private-law theorists typically take the law as posited as static datum for analysis and so neglect underlying forces and processes of change that drive private law's ongoing evolution. Trust protectors are of interest because they show how innovation in legal form can be driven not just in fits and starts by "top down" deliberative development of legal concepts and categories by lawmakers, but may also derive from practices reflecting innovation in legal craft led by able lawyers responding creatively to client needs. Incremental "bottom up" innovation can be quite disruptive, particularly where accommodation means significant loosening or expansion of the law's existing modular structures. Again, the protector provides a compelling illustration: The development is almost entirely to the credit of

5. Frolik, *supra* note 4, at 273–76.

6. See generally Alexander A. Bove, Jr., *The Case Against the Trust Protector*, 37 AM. COLL. TR. & EST. COUNSEL L.J. 77 (2011) (defending the concept of the trust protector and arguing that legal precedent exists to clarify the protector's role); Frolik, *supra* note 4 (examining the history of protectors and relevant statutes and cases regarding their role); Stuart Pryke, *Of Protectors and Enforcers*, 16 TR. & TRUSTEES 64 (2010) (comparing the role of protectors to that of enforcers, a role found largely in offshore trusts); Rebecca Puni, *Exploring the Many Identities of the Protector*, 19 TR. & TRUSTEES 908 (2013) (discussing the role of protectors through agency, contract, and equity principles).

7. Exceptions include Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621, 670–71 (2004); see also Stewart E. Sterk, *Trust Protectors, Agency Costs, and Fiduciary Duty*, 27 CARDOZO L. REV. 2761, 2761–63 (2006) (examining fiduciary duties of trust protectors, and the costs and benefits created by protectors).

trust lawyers aiming to make trusts more responsive to settlor intent. Lawmakers have had to play catch-up, and they have done so inconsistently and with mixed success.⁸

Second, from the perspective of trust law and theory, recourse to protectors raises intriguing questions about the doctrinal “core” of the trust and its relational matrices.⁹ It is assumed that fiduciary administration *by trustees* is a core feature of the common law trust, and likewise that the relational matrices within it are defined by law, according to type of trust, as a matter of public interest. Trust protectors call these assumptions into question; fixed matrices give way to fluid ones, unsettling common assumptions about elements of the doctrinal core of the trust that are responsive to its usual relational characteristics. The trustee enjoys presumptive authority and responsibility for trust administration, but the extent of their authority and responsibility may be conditioned by soft or hard constraints visited upon them via the protector. Beneficiaries (or, for charitable trusts, regulators) ordinarily enjoy exclusive standing to bring enforcement actions against trustees in connection with trust administration, but the interpolation of a protector may mean that standing to enforce the trust is shared with a protector who will act in the interest of the settlor, even where this might be inconsistent with the interests of beneficiaries.

Third and finally, from a fiduciary law perspective, protectors provide an instructive lesson in the limitations of dominant approaches to the identification of fiduciary relationships. Are protectors fiduciaries, and if so, for whom? These are, of course, very basic questions, but they are surprisingly—and, again, I think instructively—difficult to answer. Wide variation in the constitution of mandates of protectorship bedevils the use of relationship identification methods that assume constancy in the constitution of kinds of fiduciary mandate. Furthermore, given that protectors are usually engaged to enhance protection for settlors’ expectations, protectors raise difficult questions about the proper objects of trust fiduciary duties. More specifically, though the standard assumption is that fiduciary duties are owed to the mandate’s beneficiary, it may also be (more generally, and in the context of mandates of protectorship) proper to think of grantors as obligees. Additionally, to the extent that trust protection occurs within an existing framework of fiduciary administration, it raises interesting questions concerning joint fiduciary administration by fiduciaries occupying different, but coordinate, fiduciary roles. Under what circumstances will coordination support fixed joint or joint-and-several liability rules, fixed or presumptive

8. Andrew T. Huber, *Trust Protectors: The Role Continues to Evolve*, PROB. & PROP. MAG., Jan.–Feb. 2017, at 28, 33 (“The use of trust protectors in modern domestic trust planning has outpaced the body of law governing the role. There is little case law dealing specifically with trust protectors, and state statutes are often inconsistent or confusing.”).

9. For an introduction to this debate, see *supra* note 2.

burden-shifting liability rules, and/or discretionary judicial apportionment of liability?

It should already be apparent that protectors deserve more notice than they have received. This symposium is an opportune moment for an essay on protectors that raises basic theoretical questions informed by comparative perspectives. The protector exemplifies increasingly international pressures for, and processes of, change in trust law and practice. Offshore jurisdictions popularized the practice of employing protectors and the practice has since become increasingly prevalent onshore.¹⁰ Along with the protector's growing popularity has come interest in different jurisdictions in clarifying the protector's legal status and obligations.¹¹ Furthermore, in the United States, the National Conference of Commissioners on Uniform State Laws ("NCCUSL") has spearheaded the first comprehensive effort at regularization of protectors through its recently finalized Uniform Directed Trust Act ("UDTA").¹² The UDTA is an interesting and auspicious development in itself, but for present purposes is also valuable to the extent that it informs analysis of different strategies available for clarifying the protector's legal status and obligations.¹³

It would be impossible in this Article to productively address each of the questions just identified. I therefore restrict my attention to those that bear on the fiduciary status and obligations of the protector. These questions figure prominently in the modest literature on protectors and have proven divisive.¹⁴ Some argue that protectors are invariably fiduciaries, while others claim that they are only contingently fiduciary. As I will explain, this divergence of opinion in part reflects the peculiarities (and, in many cases, the limitations) of different methods of identifying fiduciary relationships.

The analysis unfolds as follows. Part II explains why questions concerning the fiduciary status and obligations of protectors have proven difficult, noting

10. See Frolik, *supra* note 4, at 270–71; Puni, *supra* note 6, at 909.

11. See generally ALEXANDER A. BOVE, JR., TRUST PROTECTORS: A MANUAL WITH PRACTICE FORMS (2014) (detailing developments on trust protectors in U.S. law); MARK HUBBARD, PROTECTORS OF TRUSTS (2013) (detailing developments in English law); Grahame Young, *Trust Protectors—An Australian Perspective*, 22 TR. & TRUSTEES 455 (2016) (discussing the role of protectors in Australian law). On New Zealand law, see LAW COMM'N, REVIEW OF THE LAW OF TRUSTS: A TRUSTS ACT FOR NEW ZEALAND 156–60 (2013) (discussing "[c]ustodian and advisory trustees"). "Advisory trustees" perform strictly advisory functions and are therefore not proper analogues of protectors. The Law Commission did take note of protectors, but rather than focus on comprehensive regularization, it focused on judicial powers of removal. See LAW COMM'N, THE DUTIES, OFFICE AND POWERS OF A TRUSTEE: REVIEW OF THE LAW OF TRUSTS FOURTH ISSUES PAPER 61 (2011).

12. UNIF. DIRECTED TR. ACT (UNIF. LAW COMM'N 2017).

13. For another perspective on the UDTA, see generally Alexander A. Bove, Jr., *Trust Protectors in the United States. A Step Behind the Rest of the World*, 22 TR. & TRUSTEES 737 (2016) (lamenting the lack of clarity and consistency regarding protectors in U.S. law).

14. See *id.* at 738 ("Perhaps the most significant issue among US attorneys with respect to the use of protectors is their strong and active debate over whether the protector is or should be regarded as a fiduciary.").

in particular the effect of wide variation in settlors' rationales for appointing protectors, the functions performed by protectors, and the powers conferred upon them. Part III canvasses and comments critically upon different strategies that have been deployed in addressing the fiduciary status and obligations of protectors. Part IV develops an alternative approach to the fiduciary status and obligations of protectors; one that allows for differentiation of fiduciary from non-fiduciary functions, and advocates for recognition of enforcement rights for settlors and their proxies.

II. THE PROBLEM: THE (ALMOST) INFINITE VARIABILITY OF TRUST PROTECTION

Several scholars have noted prevailing uncertainty about the legal status and duties of trust protectors.¹⁵ Indeed, the drafters of the UDTA observe in the Prefatory Note to the Act that:

There is much uncertainty in existing law about the fiduciary status of a nontrustee that has a power over a trust and about the fiduciary duty of a trustee, sometimes called an "administrative trustee" or "directed trustee," with regard to actions taken or directed by the nontrustee. Existing uniform trusts and estates acts address the issue inadequately. Existing nonuniform state laws are in disarray.¹⁶

These observations are strong but not overstated. However, a diagnosis often tells little of the underlying pathology. Why, exactly, is there lack of clarity on the legal status and obligations of protectors? One could point to some seemingly obvious factors. One is that protectors have only recently come into wide use in onshore jurisdictions.¹⁷ Another is that, as is typical of practice-driven innovation, we are in the midst of a period of some delay and uncertainty as lawmakers struggle to analyze and accommodate pressures for change.

That said, we may lack clarity simply because it is genuinely difficult to make sound generalizations about salient features of trust protection. That is, it is difficult to say, as a general matter, whether trust protection involves the undertaking and performance of a fiduciary mandate, and if so, when, why, and to what extent. There are other problems: Suppose protectors are *sometimes* fiduciaries: *For whom* do they serve as fiduciaries? Additionally, recognizing that protectors usually occupy a fiduciary position coordinate with that of a trustee, how should new liability rules imposed on protectors affect the default arrangement of liability rules imposed on trustees?

15. See, e.g., Richard C. Ausness, *When is a Trust Protector a Fiduciary?*, 27 QUINNIPIAC PROB. L.J. 277, 277 (2014); Bove, *supra* note 13, at 738; 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, 69 (2010); Sterk, *supra* note 7, at 2763.

16. UNIF. DIRECTED TR. ACT, Prefatory Note.

17. Sterk, *supra* note 7, at 2764.

I have said that protectors are a hard case for fiduciary law because relevant generalizations are hard to sustain.¹⁸ I shall explain what I mean in a moment. For now though, it may be noted that there *is* one important generalization that can be made of protectors: namely, that the core function of the protector is that of promoting respect for the settlor's intentions in the administration of a trust.¹⁹ To this extent, the role of the protector is continuous with other mechanisms (doctrinal and institutional) by which trust law aims to give effect to settlor intent.²⁰

In my view, the protector's role in ensuring respect for settlor intent explains the high degree of variation seen in specification of mandates of trust protection.²¹ It is hard to sustain pertinent generalizations about protectors precisely because different settlors and counsel will have different intentions for protectors and will accordingly devolve a mixed and highly variable set of rights, powers, and permissions upon them. As a result, the basic role for the protector—securing implementation of settlor intent—is realized through a plurality of functions and mandate-types. While from a policy perspective, this variability might seem to be a “bug” of practice-driven innovation, from a private ordering perspective it is surely a “feature.” Functional and jural flexibility in trust protection enables trust lawyers to achieve different things for different settlors, depending on their specific needs and concerns.²²

If flexibility is a point of functional excellence of trust protection, its appeal is seen in the range of reasons for which a well-advised settlor might appoint a protector. If the settlor's overarching concern is with the implementation of her intentions, there are any number of reasons that might ground worry about the abidance of her intentions over time, and accordingly justify the appointment of a protector with a mandate responsive to those reasons. For instance, the settlor might have reason to question (if not necessarily to doubt) the trustworthiness of her trustees.²³ The settlor may instead, or also, have reason to question her beneficiaries' capacity or

18. Professor Alexander has also made this observation. See Gregory S. Alexander, *Trust Protectors: Who Will Watch the Watchmen?*, 27 CARDOZO L. REV. 2807, 2811 (2006) (“[O]ne size won't fit all, which is one of the reasons why it will be so difficult for courts to figure out just what the fiduciary rules should be with respect to trust protectors.”).

19. This is a point of general consensus but has been articulated most convincingly and fulsomely by Sterk, who describes the protector as “a person whose primary function is to exercise judgment on behalf of the trust settlor.” Sterk, *supra* note 7, at 2767.

20. See Sitkoff, *supra* note 7, at 661–62. This normative orientation of trust law has been articulated best in the work of Robert Sitkoff. See *id.*; Robert H. Sitkoff, *Trusts and Estates: Implementing Freedom of Disposition*, 58 ST. LOUIS U. L.J. 643, 658–60 (2014); see also ROBERT H. SITKOFF & JESSE DUKEMINIER, *WILLS, TRUSTS, AND ESTATES* 2–32 (10th ed. 2017) (discussing “freedom of disposition” in American law).

21. See Alexander, *supra* note 18, at 2811.

22. Ausness, *supra* note 15, at 282–83.

23. For examples, see Jay Adkisson, Opinion, *Trust Protectors—What They Are and Why Probably Every Trust Should Have One*, FORBES (Aug. 25, 2012, 1:03 PM), <https://www.forbes.com/sites/jayadkisson/2012/08/25/trust-protectors-what-they-are-and-why-probably-every-trust-should-have-one>.

motivation to effectively monitor the trustee and to take enforcement action as needed on bases that would resonate with the settlor given *her* intentions (which may, or may not, be aligned with the particular interests of particular beneficiaries).²⁴ The settlor may anticipate that changes bearing on the relative desert of her beneficiaries might justify adjustment of beneficial entitlements or the exercise of dispositive discretions, but worry that the trustee may not respond appropriately.²⁵ Additionally, or alternatively—and particularly for long-term or perpetual trusts—the settlor may worry about the impact of changes in law, policy, or socio-economic context on the realization of her intentions, and doubt the wisdom of leaving it to his or her trustees and/or the courts to respond to same.²⁶ Finally, the settlor might be generally skeptical about the court's capacity or willingness to effectively and efficiently protect her interest in sound administration of the trust (e.g., to detect and act on cause for removal of a trustee).²⁷ Put simply, a settlor may have any number of reasons to distrust or to be wary of placing exclusive trust in trustees, beneficiaries, and/or the courts when settling property on trust;²⁸ for any one or a number of these reasons, she might appoint a protector as additional security for her expectation of implementation of her intentions.

The variety in typical reasons for appointment of a protector is reflected in variability in their functions and in the juridical constitution of their mandates (i.e., in the kinds of rights, powers, and privileges granted to protectors). This is, in turn, key to understanding why questions about the fiduciary status and obligations of protectors are so difficult. While others have noted that the functions and powers of protectors vary,²⁹ there has been little effort to provide synthesis. Thus, I shall now very briefly offer typologies of the functions and powers granted to protectors.

As to functions: I have observed that all protectors are responsible for protection of settlor intent. The particular functions to a protector performs may include *constitutive functions*, *advisory functions*, *supervisory functions*, and *managerial functions*. First, a protector will serve a *constitutive function* where called upon to make decisions about ways in which the trust is constituted (or reconstituted), including decisions regarding choice of jurisdiction, amendment of the terms of the trust, and termination of the trust. Second, a

24. Ruce, *supra* note 15, at 71; see Young, *supra* note 11, at 456 (“To alleviate the obvious problems a person, aptly named the Protector, was appointed to protect the interests of the intended true beneficiaries.”).

25. Ruce, *supra* note 15, at 70.

26. *Id.* at 69–70.

27. Ausness, *supra* note 15, at 283.

28. As also noted by Thomas Gallanis. See Thomas P. Gallanis, *The New Direction of American Trust Law*, 97 IOWA L. REV. 215, 218 n.15 (2011).

29. Variation in protectors' powers, in particular, has been widely noted. See Frolik, *supra* note 4, at 273–76; Pryke, *supra* note 6, at 65; Puni, *supra* note 6, at 909; Ruce, *supra* note 15, at 73–75.

protector will perform an *advisory function* where called upon to give non-binding advice to trustees and/or beneficiaries in connection with ongoing administration of the trust. Third, a protector will serve a *supervisory function* where required to keep abreast of trust administration, to monitor and evaluate trustee performance and/or the condition of trust property, to monitor and evaluate beneficiaries' claims for distributions, and to give or withhold consent to decisions provisionally made by trustees. Finally, a protector will perform a *managerial function* when granted responsibility for making binding discretionary decisions (i.e., first-order managerial decisions, as opposed to second-order supervisory decisions) on matters of ongoing trust administration, whether alone or in consultation with the trustee.

As for powers³⁰: The particular kinds of power conferred upon protectors include *powers of appointment*, *powers of resettlement*, *supervisory and enforcement powers*, *advisory powers*, *veto powers*, and *powers of direction*. First, protectors may be granted *powers of appointment*. These include the conventional trust power of appointing beneficiaries, but in this extended conception, may also include the power to appoint other constituents of the trust, including trustees and successor protectors. Second, protectors may be granted *powers of resettlement*. These powers allow the protector to effectively resettle the trust by altering one of more of its basic terms, including by decanting or variation of its situs. Third, protectors may be granted *supervisory and enforcement powers*, including powers to monitor the performance of trustees and behavior of beneficiaries, to compel information pertinent to trust administration from the trustee, to attach conditions upon the use made of distributions by beneficiaries, and to take enforcement action against trustees or third parties. Fourth, protectors may be granted *advisory powers*, which typically include the power to issue non-binding advisory opinions to trustees in respect to trust administration. Fifth, protectors may be given *veto powers*, which give them indirect and partial control over the administration of the trust through the power to provide or withhold consent to decisions made by the trustee. Sixth and finally, protectors may be granted *powers of direction*, which enable them to make first-order decisions about the administration of the trust, either directly or indirectly through provisions of binding directions to the trustee.

As noted earlier, the wide variation in the types of functions performed by, and powers granted to, protectors are pertinent because it makes it genuinely difficult to answer questions concerning protectors' fiduciary status and obligations. Amongst the issues, three are especially important: first, how to reliably determine the fiduciary or non-fiduciary nature of mandates of trust protection; second, how to define the content and directionality of protectors' fiduciary obligations; and third, how to determine the balance of liability appropriate to coordinate fiduciary administration of trusts by

30. Here, broadly construed as including rights and privileges, as well as legal powers properly so-called. See *supra* note 29 (pointing to the variety seen in powers devolved on protectors).

protectors and trustees. As I explain in Part III below, several prominent approaches to the identification of fiduciary relationships assume relative constancy in the constitution of fiduciary relationships. This assumption is simply not viable for protectors.

III. PROPOSED SOLUTIONS, AND THEIR LIMITATIONS

Trust protectors have attracted limited scholarly commentary and little more legislative or judicial notice. That said, recent analyses highlight questions about the protector's fiduciary status and obligations and suggest different approaches to resolving them.³¹ Three are particularly noteworthy. Under the first, *direct status-based approach*, it is argued that protectors occupy a categorically fiduciary role or position, one that (by virtue of its generality) encompasses all functions performed and powers exercised by them. This methodology is *direct* in that status is premised on direct characterization of the role and responsibilities of protectors or the essential and/or typical juridical constitution of mandates of trust protection. Under the second, *analogical status-based approach*, it is again said that protectors occupy a categorically fiduciary role or position on the basis that their role or position (in general, or in virtue of specific functions performed or powers held) is akin to that of a trustee. If a trustee is a fiduciary as a matter of status, so too should be the protector, for the protector exercises control over the trust in a form or manner similar to that of a trustee. This approach is *analogical* rather than *direct* as it relies on the power of analogy between the positions of trustee and protector in supporting status-based fiduciary characterization of trust protection. A third and final approach calls for a *fact-based analysis* of trust protection; unlike the two status-based approaches, its use implies rejection of the supposition that protectors can be deemed fiduciaries as a general matter. The fact-based analysis calls for case-by-case assessment on the basis of some stipulated criteria that support fact-based demarcation of fiduciary and non-fiduciary mandates. In the example considered here—developed by Matthew Conaglen and Elizabeth Weaver—the criterion of differentiation is that of the reasonable expectations of the settlor in appointing the protector.³²

As noted, one response to uncertainty over the fiduciary nature of trust protection has been to claim that protectors are a fiduciary as a matter of status. Status-based reasoning is common in fiduciary law.³³ It should therefore not be surprising that some have suggested that status should be extended to protectors, impliedly on a direct basis. This is, for example, the

31. In addition to the works discussed below, see *supra* note 15.

32. Matthew Conaglen & Elizabeth Weaver, *Protectors as Fiduciaries: Theory and Practice*, 18 TR. & TRUSTEES 17, 29 (2012).

33. See Paul B. Miller, *The Idea of Status in Fiduciary Law*, in CONTRACT, STATUS, AND FIDUCIARY LAW 25, 25 (Paul B. Miller & Andrew S. Gold eds., 1st ed. 2016).

approach adopted in several offshore jurisdictions.³⁴ It is also the approach favored by legislators in several U.S. states.³⁵ As Ausness has explained, legislation in these states treats “a trust protector [as a] fiduciary for all purposes.”³⁶ Similarly, the Uniform Trust Code establishes a presumption that persons “who [enjoy] a power to direct” the trustee’s decisions are fiduciaries.³⁷ This provision has been interpreted as applying to all protectors without further analysis of the technical meaning “of a ‘power to direct’” or the prevalence of same in mandates of trust protection.³⁸ Broad claims of fiduciary status are also advanced in the literature. Ruce, for example, argues that “[a] trust protector is, and should be, treated as a fiduciary and should be held to the same fiduciary standard as a trustee.”³⁹

While this approach is familiar, it does not provide satisfactory resolution of any of the three key issues flagged at the end of Part II. First, it does not evince a principled basis for fiduciary characterization of trust protection. It consists of a mere assertion of fiduciary status. There is thus no basis for evaluating it. Reasons for doubt about the assertion of status are multiplied when one considers the scope for wide variation in protectors’ functions and powers, as outlined in Part II. Second, it does not give us any basis upon which to determine (a) the proper objects (i.e., ends or purposes) of mandates of trust protection; and, relatedly (b) the directionality of fiduciary duties. Whom or what are trust protectors engaged to protect? To whom are, or should, their duties be owed? Difficult questions, in any case, but nearly impossible to answer without a more reflexive method for characterization of the protector’s legal position. Third, and finally, because this approach involves nothing other than a claim of fiduciary status for protectors, it has nothing to say, in itself, about how the fiduciary status of a protector impacts the conventional fiduciary structure of the trust. More specifically, it provides no basis for determining whether, and if so when, imposition of fiduciary duties on protectors might justify apportionment of liability between protectors and trustees, or the erosion or elimination of liability for trustees.

To these objections, an expected retort might be that the underlying problems go to execution, not methodology as such. Status-based reasoning may sometimes be clumsily applied to protectors, but it could be applied with

34. See, e.g., Belize Trusts Act 1992, ch. 202 § 16(5) (revised ed. 2011); Nevis International Exempt Trust Ordinance, 1994 § 9 (amended 1995) (St. Kitts & Nevis); Rawcliffe v. Steele, 1993-95 MLR 426, 513 (High Ct. of Justice, Isle of Man 1995).

35. See Sterk, *supra* note 7, at 2769 (commenting on legislative provisions in state law of Idaho, Tennessee, South Dakota and Wyoming); see also 760 ILL. COMP. STAT. 5/16.3(c) (2016) (all three statutes defining trust protectors as fiduciaries); MICH. COMP. LAWS ANN. § 700.7809(1)(a)–(b) (West 2012) (same); N.H. REV. STAT. ANN. § 564-B:12-1202 (2008) (same).

36. Ausness, *supra* note 15, at 293.

37. UNIF. TRUST CODE § 808(d) (UNIF. LAW COMM’N 2010).

38. Sterk, *supra* note 7, at 2770.

39. Ruce, *supra* note 15, at 69.

greater nuance and accordingly have greater plausibility. If there is to be anything to this reply, it must be supported by analysis that renders explicit plausible grounds for the extension of fiduciary status to protectors. Happily, an excellent example is found in the UDTA. The UDTA deftly addresses the question of the fiduciary character of trust protection, and it also offers clear statements on the content and directionality of protectors' duties, and the impact of the latter on conventional fiduciary liability rules.

I have said that the UDTA addresses each of the three key issues about trust protectors noted earlier. The most important of these is the question whether and if so, when and why, protectors should be deemed fiduciaries. The UDTA endorses a status-based approach to this issue but does so on an indirect analogical basis. The statute declares all protectors fiduciaries on the basis that they exercise the powers of trustees or powers akin to those of trustees.⁴⁰ The extension of status to protectors is thus justified on the basis of resemblance between the legal incidents of their role and that of the trustee.

The UDTA relies upon analogical reasoning to address protectors' duties. As the UDTA drafters note, "existing statutes tend to say only that a trust director is a 'fiduciary,' without specifying which kind of fiduciary or which fiduciary duties apply."⁴¹ They rightly recognize this as problematic. The UDTA drafters reason that, to the extent that protectors' powers are akin or identical to those of trustees, it is only reasonable to hold protectors to trustees' fiduciary duties.⁴² Thus, the UDTA subjects protectors to "the *same* fiduciary duty and liability in the exercise or nonexercise of [a] power . . . as a sole trustee in a like position and under similar circumstances" where "the power is held individually," and "as a cotrustee in a like position and under similar circumstances" where "the power is held jointly with [the] trustee or another" protector.⁴³ The Prefatory Note explains that "[t]he logic behind these rules is that *in a directed trust the trust director functions much like a trustee in an undirected trust. Accordingly, the trust director should have the same duties as a trustee in the exercise or nonexercise of the director's power of direction . . .*"⁴⁴

Finally, the UDTA recognizes that the question of the appropriate balance of liability is complex and fact-dependent. More specifically, it recognizes that in approaching the question one must be mindful that: (a) the appointment of a protector will result in a variable division of power between protector and trustee (with the precise allocation to be specified by the settlor in the trust deed); (b) the division of power will often entail

40. UNIF. DIRECTED TR. ACT § 8 & cmt. (UNIF. LAW COMM'N 2017); *see also id.* Prefatory Note ("[T]he [UDTA] imposes a mandatory minimum of fiduciary duty on . . . trust [protectors] in accordance with the traditional principle that a trust is a fiduciary relationship.").

41. *Id.* § 8 cmt.

42. *Id.* § 8(a)(1).

43. *Id.* (emphasis added).

44. *Id.* Prefatory Note (emphasis added).

allocation of powers to protectors that would otherwise lie with trustees; and (c) that, in either event, trustees will often be subject to (i.e., liable to comply with) protectors' powers. Recognizing these complexities, the UDTA provides for diminishment or exclusion of trustees' fiduciary duties where the protector's discretion is controlling. Thus, the Act requires the trustee to "take reasonable action to comply with" decisions of the protector and absolves the trustee of liability for associated acts, save where compliance would entail willful misconduct.⁴⁵

The UDTA offers appealing solutions and not just because they are clear and principled. The choice of methodology reflected in the Act—analogue status-based reasoning—is attractive for several reasons. First, analogue reasoning is familiar in that it is widely relied upon in fiduciary law more broadly.⁴⁶ Second, there is reason to think that analogue reasoning is particularly apt here, as protectors are often granted powers ordinarily reserved for trustees.⁴⁷ Third, legislated fiduciary norms are almost always ascribed on the basis of status, which might suggest that status-based methodology is particularly suitable for use in legislation. Fourth, the analogue variant on the status-based method enabled the drafters of the UDTA to avoid the cost and complexity of devising a status-based framework specifically for protectors. And finally, the overall scheme of the UDTA reveals a decided preference for parsimony, which in turn affords clear rule of law and efficiency advantages.

Special attention should be paid to drafting strategies which enable the UDTA to overcome limitations often associated with analogue status-based reasoning in fiduciary law (notably: inflexibility as a result of reliance on status, and distortion as a result of reliance on analogue). Cumulatively, these strategies enable significant tailoring of fiduciary norms. The UDTA provides for tailoring in the following ways: first, it provides for the principled exclusion of non-fiduciary powers, carefully itemizing powers which are not to be considered fiduciary;⁴⁸ second, it enables settlors to waive the fiduciary duties that would otherwise apply to a protector in the exercise of a power, to

45. *Id.* § 9(a).

46. Indeed, it found a champion in the distinguished English private law scholar, Peter Birks:

The truth is that 'fiduciary' is one of those words which means what it does, and what it does is to form a bridge from the express trust to other analogous situations. . . . The word is thus the vehicle for the extension of incidents of the express trust to trust-like situations. A fiduciary relationship is a relationship analogous to that between express trustee and beneficiary, and a fiduciary obligation is a trustee-like obligation exported by analogue.

Peter Birks, *The Content of Fiduciary Obligation*, 34 *ISR. L. REV.* 3, 8 (2000).

47. For cautionary arguments against this strategy, see generally Conaglen & Weaver, *supra* note 32; Sterk, *supra* note 7. See also Alexander, *supra* note 18, at 2811 (emphasizing the difficulty in transplanting fiduciary standards to trust protectors).

48. UNIF. DIRECTED TR. ACT § 5.

the extent waiver would be permitted for similarly situated trustees under state law;⁴⁹ and third, the Act permits settlors to impose additional duties or liabilities on protectors or trustees by express stipulation.⁵⁰ Put simply, the UDTA allows for significant flexibility in the application of fiduciary duties to protectors by allowing settlors to ratchet fiduciary duties up or down.⁵¹

The methodology the UDTA employs is sensible. It allows for significant fact-sensitive tailoring of fiduciary norms for protectors. However, in my view it is not sufficiently flexible and fact-sensitive. There are three concerns. First, an attribution of fiduciary status being encompassing, the Act does not allow for the possibility of non-fiduciary mandates of trust protection or *substantive* demarcation⁵² of fiduciary from non-fiduciary powers (other than nominate categories of excluded powers). Second, the Act does not contemplate that the content and directionality of protectors' duties ought to be variable, with variations determined by the specific constitution of protectors' mandates, rather than by analogical extension of trustees' duties. The UDTA does repeatedly caution of the need for context-sensitive and "flexible" application of trustees' duties to protectors, but it remains to be seen whether judges will heed the call for caution.⁵³ Third, apportionment of liability between protectors and trustees is handled by way of *ex ante* rules which, by their nature, are incapable of working finer adjustment of the balance of liability between protectors and trustees in light of material contingencies in trust deeds and trust administration (i.e., *ex ante* allocation of power by the settlor and *ex post* mandate performance by protectors and trustees).

In my view, the scope and scale of variation in the functions performed and powers vested in protectors suggest that one would do better with a method that enables differentiation of fiduciary from non-fiduciary mandates

49. See *id.* § 8(a)(2) ("[T]he 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.").

50. *Id.* §§ 8(c), 9(c).

51. Additionally, the UDTA specifically provides for calibration of fiduciary duties in cases where protectors' powers are administered jointly with trustees (calibration for shared liability) and where protectors' powers are latent or "springing" in the sense of being vested conditionally (calibration for conditional liability). *Id.* §§ 8 cmt., 9 cmt.

52. That is, demarcation on the basis of the legal or juridical nature of the power as distinguished from differentiation on the mere basis of party characterization.

53. UNIF. DIRECTED TR. ACT § 8 cmt. ("In applying the law of trustee fiduciary duties to a trust director, a court must make use of the flexibility built into fiduciary law. . . . Fiduciary principles are . . . amenable to application in a context-specific manner that is sensitive to the particular circumstances and structure of each directed trust."). The blackletter of section 8 emphasizes the need for contextual judgment as well, inasmuch as protectors are made subject to duties that would apply to trustees "in a like position and under similar circumstances." *Id.* § 8(a)(1)(B). But the explicit instruction to account for context in this way will be useful only to the extent that a protectors' power (and/or broader mandate and circumstances in which the power is to be exercised) has an analogue in the trustee.

based on their *particular* constitution. This approach favors structured fact-based analysis as a methodology of choice.

Supposing that the better approach will be fact-based, there remains the question of how it ought to be specified. As is true of status-based methods, fact-based approaches are commonplace in fiduciary law,⁵⁴ but they are also notoriously unruly. They falter, conceptually and practically, where criteria for the identification of fiduciary relationships are contested or prove inadequate to the challenge of enabling reliable sorting of fiduciary from non-fiduciary relationships.⁵⁵ The strength of fact-based analysis is thus a function of stipulated criteria for identifying fiduciary relationships. Do the criteria direct attention to material typical or essential properties of fiduciary relationships? If posited criteria are not actually criteria at all (e.g., if they are mere placeholders for criteria, or worse, for questions about criteria), or if they are poorly selected (e.g., if they include immaterial or inessential characteristics of fiduciary relationships), one will suffer for relying on a fact-based approach.

The potential upside and downside risks of fact-based methodology can be appreciated by reflecting on a framework for protectors proposed by Conaglen and Weaver. Conaglen and Weaver begin by noting, astutely, that analysis here “becomes complicated because of the range of powers and positions that a protector can hold.”⁵⁶ They defend adoption of a fact-based approach on this basis, noting:

The breadth of the range of powers to which the ‘protector’ label can be applied means that the question whether a protector is, or is not, a fiduciary must be approached on a case-by-case basis, rather than on a global basis by reference to some supposed (but actually non-existent) category of ‘protectors’. It is . . . unwise in the extreme to make sweeping statements about protectors . . .⁵⁷

Conaglen and Weaver are right to say that protectors are not amenable to status-based analysis because the category—“protector”—cannot readily be typified. Fact-based analysis helpfully directs attention to the *actual* incidents of a particular relationship and the question whether they include distinguishing properties of fiduciary relationships. This being the case, there are two further important methodological questions: First, what incidents or properties ought one to examine? Second, how is one to determine whether a particular incident or property of a relationship is distinctively fiduciary?

54. See Paul B. Miller, *The Fiduciary Relationship*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 63, 65–69 (Andrew S. Gold & Paul B. Miller eds., 2014).

55. Both problems have frustrated the development of fact-based fiduciary jurisprudence in Canada, for example. See Paul B. Miller, *A Theory of Fiduciary Liability*, 56 MCGILL L.J. 235, 243–52 (2011).

56. Conaglen & Weaver, *supra* note 32, at 17.

57. *Id.* at 20.

Conaglen and Weaver have an answer for the first question but equivocate on the second. As we shall see, the equivocation proves fatal to the viability of their account.

Conaglen and Weaver reasonably suggest that fact-based analysis ought to be focused on the powers conferred on protectors by settlors: “The question [of the fiduciary character of protectors] must be approached in a more confined way, by asking whether a particular power held by a particular protector is—or is not—held in a fiduciary capacity.”⁵⁸ However, they do not identify criteria capable of supporting differentiation of fiduciary and non-fiduciary powers. Instead, consistent with Conaglen’s other work, the authors advocate a nice-sounding but analytically empty “reasonable expectations” framework of analysis.⁵⁹ Under this approach, popularized by Paul Finn, a relationship (or, here, a power) is to be identified as fiduciary or otherwise on the basis of the reasonable expectations of the parties.⁶⁰ If the parties’ transaction⁶¹ was such as to generate an expectation, reasonably held, that the protector would hold and exercise a power on a fiduciary basis, so the power should be deemed. If otherwise, the power will be considered vested and held on a personal basis. As Conaglen and Weaver put it:

The general thrust of the inquiry can . . . be stated thus: if we are trying to decide whether trust protectors are, or are not, fiduciaries, the initial focus of our attention should be on the question whether it is legitimate to expect that the protector would act in the interests of someone else to the exclusion of his or her own several interests.⁶²

While Conaglen and Weaver helpfully follow up by showing that courts tend to focus on differentiating kinds of power when determining whether or not a protector is a fiduciary,⁶³ to further suggest that this inquiry is, or could be, conducted on the basis of reasonable expectations analysis is not illuminating. One could say that *any* exercise in determining the allocation of legal entitlements or burdens is premised on reasonable expectations analysis because the concept of a reasonable expectation is itself conclusory. A court

58. *Id.*

59. *See id.* at 18.

60. P.D. Finn, *The Fiduciary Principle*, in *EQUITY, FIDUCIARIES AND TRUSTS* 1, 54 (T.G. Youdan ed., 1989); *see also* James Edelman, *When Do Fiduciary Duties Arise?*, 126 *LAW Q. REV.* 302, 317–18 (2010) (“Canadian, English and Australian courts, following the lead of [Paul] Finn, have all been moving to coalesce . . . factors into a test based upon the ‘reasonable’ or ‘legitimate’ expectations of the principal. . . . ‘[R]easonable expectations’ are part of the process of determining, by implication or expression, the nature of the fiduciary duties which have been undertaken” (footnotes omitted)).

61. Conaglen and Weaver focus on the expectations of the settlor, but the logic of reasonable expectations analysis would seem to require that one focus on evidence material to the expectations of all parties, including the protector and trustee.

62. Conaglen & Weaver, *supra* note 32, at 18.

63. *Id.* at 24–35.

deems an expectation reasonable or unreasonable at the *end* of analysis, after having soundly applied some *legal criteria of reasonableness*. Thus, to say that in sorting fiduciary from non-fiduciary powers the courts have reached conclusions about whether an expectation held was reasonable is really to say nothing at all, for the construction placed on the power is dispositive of the question whether the expectation was reasonably held. Put otherwise: To ask whether a fiduciary expectation in respect of a power is reasonably held is simply to restate the question whether the power is fiduciary or not.

If this were all that might be said for fact-based analysis, one might think it not very promising at all. As allied to a reasonable expectations framework, the fact-based approach cannot resolve any of the three key issues that we have considered thus far. Given that it does not supply any positive criteria by which one might distinguish fiduciary from non-fiduciary powers, it cannot assist us in differentiating fiduciary from non-fiduciary mandates of trust protection. It has nothing to say on the calibration of protectors' fiduciary duties, whether as to content or directionality. And it likewise has nothing to say about the appropriate balance of liability as between trustees and protectors.

Fortunately, there is more to be said for fact-based analysis. In the section to follow, I explain how fact-based analysis oriented by the Fiduciary Powers Theory of fiduciary relationships enables principled demarcation of fiduciary from non-fiduciary mandates of trust protection and provides resources with which to productively address questions concerning the calibration of protectors' duties and balancing of liability as between protector and trustee.

IV. AN ALTERNATIVE

I have suggested that a structured fact-based analysis is preferable in this context to status-based analysis, given the inconstancy of protectors' mandates and the hazards of assimilating protectors and trustees. But I have also cautioned that the soundness of fact-based analysis depends on how governing criteria are stipulated. In what follows I develop a variant on the structured fact-based approach that relies on a theory of fiduciary relationships (the Fiduciary Powers Theory, or "FPT") that I have developed elsewhere.⁶⁴ I will first explain the methodological implications of the FPT and its claims about the nature of fiduciary relationships and will then show how it can be profitably applied to protectors.

As to methodology: The FPT suggests that all fiduciary relationships share certain essential formal properties. Reference to the formal properties of fiduciary relationship is practically significant—for adjudication and for social practices that depend on clear demarcation of various forms of legal

64. Miller, *supra* note 54, at 69–90; see also generally Paul B. Miller, *Justifying Fiduciary Duties*, 58 MCGILL L.J. 969 (2013) (discussing the justifications for fiduciary duties); Paul B. Miller, *Justifying Fiduciary Remedies*, 63 U. TORONTO L.J. 570 (2013) (discussing the justifications for fiduciary remedies).

relationship—to the extent that it permits principled and predictable identification of fiduciary relationships. The FPT offers a constructive interpretation of existing methods of identifying fiduciary relationships and, equally importantly, patterns in the development of fiduciary law resulting from legislative and judicial deployment of these methods. More specifically, the FPT shows how status-based identification of fiduciary relationships can be coherent and justifiable in spite of risks of over-generalization.⁶⁵ It also explains why most existing status-based categories of fiduciary relationships merit fiduciary status given their typical constitution. Equally, the FPT shows how fact-based identification of fiduciary relationships can operate in a coherent and predictable way, at or beyond the margins of status, by guiding fact-based construction of particular relationships.⁶⁶ A further methodological advantage of the FPT is that it shows how status- and fact-based analysis can be understood as mutually consistent.⁶⁷ Status-based analysis is appropriately relied upon to the extent that the formal properties of fiduciary relationships are genuinely typical of a category of relationship to which a designation of status is attached. Fact-based analysis is appropriate where these generalizations cannot safely be made, or where there is reason to question their validity in a given case.

Second, as to the nature of fiduciary relationships: The FPT claims that all fiduciary relationships are founded on mandates under which a fiduciary is granted discretionary powers for other-regarding purposes. Ordinarily, these purposes engage specific practical interests of an identified beneficiary or set of beneficiaries.⁶⁸ However, they may instead be in the nature of abstract institutional or public-oriented purposes, something that is commonplace, for example, in the fiduciary administration of private organizations and governmental or quasi-governmental bodies.⁶⁹ In any case, under the FPT, the critical formal properties of a fiduciary relationship are those of *power*, *discretion*, and an *other-regarding purpose*.⁷⁰

The centerpiece of the FPT is its recognition that fiduciary relationships feature mandates under which a fiduciary is granted *fiduciary powers*. It is through the exercise of fiduciary powers that a fiduciary performs his mandate. Fiduciary powers are legal powers derived from, and so traceable to, the person (i.e., the legal personality) of the grantor(s) of the mandate under which the fiduciary acts. As a kind of legal power held under mandate, fiduciary powers enable the fiduciary to alter the legal position of those for

65. See Miller, *supra* note 54, at 49–50.

66. *Id.* at 48.

67. *Id.* at 46.

68. See Finn, *supra* note 60, at 1–3; Edelman, *supra* note 60, at 304–05.

69. See generally Paul B. Miller & Andrew S. Gold, *Fiduciary Governance*, 57 WM. & MARY L. REV. 513 (2015) (analyzing governance mandates in fiduciary relationships).

70. The notion of *mandate* is also essential under the FPT, but it goes to relationship formation and execution rather than to constitution.

whom he acts. The exercise of fiduciary powers accordingly implicates the fiduciary in the formation and alteration of jural relationships on behalf of those he represents. For example, he may exercise his power to acquire a right, discharge a duty, or grant a license or permission. He may also exercise a right, occasion a liability, or make binding decisions about the future enforcement of rights or assertion of claims to remedies. These are but a few illustrative examples.

An implication of the FPT is that the fiduciary, serving in a representative capacity under his mandate,⁷¹ acts on an independent basis for others in its discharge. This implies that all fiduciaries have latitude for judgment in the exercise of their powers. The caveat that powers must be *discretionary* to be considered fiduciary encapsulates this point. A person who acts as a mere proxy for another may be accountable for acts in fraud of the powers conferred upon him, but he is not a fiduciary.

Another important implication of the FPT is that the fiduciary enjoys and exercises his powers subject to the *other-regarding purposes* for which they were granted. The other-regarding quality of a power is critical to differentiation of the bases on which powers can be held and exercised by or for a legal person. If a power is held without stipulation as to an other-regarding purpose, or in circumstances in which same cannot be implied in law, it is presumed to be held in a personal capacity and so is treated as a kind of legal entitlement of which its bearer can make personal use, as he sees fit. If a power is instead granted expressly or impliedly for an other-regarding purpose it will be deemed held by way of mandate and so must be exercised in a fiduciary capacity for those purposes. Ordinarily, other-regarding purposes will be expressly stipulated by the grantor of the mandate under which the fiduciary acts (e.g., by a legislative body, in the case of mandates arising by legislation, or by private persons, in the case of mandates arising by way of personal grant of power). However, where a grant is silent as to its purpose, a court may imply a restricted set of other-regarding purposes based on its construction of the grantor's intentions.

The Fiduciary Powers Theory provides a sound analytical structure for fact-based identification of fiduciary relationships. The theory suggests that, when engaged in fact-based analysis, courts ought to proceed by addressing the following questions in a stepwise way: (1) *Has the would-be fiduciary been granted legal powers?*; (2) *Are the powers discretionary?*; and (3) *Have the powers been granted, expressly or impliedly, for an other-regarding purpose?* When a court answers each of these three questions affirmatively, it is compelled to conclude that the relationship in question is fiduciary. If instead it reaches a negative finding

71. On the representative nature of fiduciary mandates, see Paul B. Miller, *Fiduciary Representation*, in FIDUCIARY GOVERNMENT (Evan J. Criddle et al. eds., forthcoming 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3096507.

on any of the three questions, it ought to conclude that the relationship is not fiduciary.

The structure above is one of general application, meaning that it should be applied to protectors just as it would be otherwise. Following the stepwise analysis, a court should first consider the threshold question whether a protector has been granted powers, properly so-called, by the settlor. Supposing that he has, the court must then consider (1) whether those powers are discretionary, and (2) whether they have been granted for an other-regarding purpose. Again, if, but only if, the court finds in the affirmative on each of these points should the protector be deemed a fiduciary. Other questions of construction will then arise in relation to calibration of the protector's duties and the balance of fiduciary liability to be borne by the protector and trustee respectively.

We may now turn our attention to the relative utility of the different approaches we have considered in addressing our three key issues: capacity for effective differentiation of fiduciary from non-fiduciary mandates, calibration of fiduciary duties, and balancing of fiduciary liability between protectors and trustees.

First, the FPT-structured fact-based approach offers advantages over the alternatives in facilitating principled and predictable differentiation of fiduciary from non-fiduciary mandates. Status-based approaches—while defensible in other contexts—are inapt here because they are premised on untenable generalizations. In some cases—perhaps many cases—protectors are granted fiduciary powers. However, in other cases they are not. Status-based approaches ignore this variegation.⁷² Fact-based approaches are, by design, sensitive to it. That said, it must be emphasized that the viability of fact-based analysis is a function of the quality of posited criteria for identifying fiduciary relationships. The FPT-structured variant provides a robust set of criteria, permitting courts to make meaningful distinctions between trust protection mandates and between elements of a given mandate. It preserves flexibility as a functional virtue of trust protection but ensures that fiduciary duties will be applied as and to the extent appropriate.

Second, the FPT-structured fact-based approach also informs the calibration of fiduciary duties for trust protectors in a way that the alternatives do not. The direct status-based approach has nothing to say about the fiduciary duties of protectors, a point emphasized by the UDTA drafters. The indirect or analogical status-based approach *is* informative but operates on the questionable basis that fiduciary duties, like fiduciary status, can in general be safely transposed—with contextual adjustment—from trustees to protectors. By contrast, the alternative developed here suggests that courts

72. The UDTA provides for the exclusion of some non-fiduciary powers, but the exclusions are not especially broad, nor are they based on a general distinction between fiduciary and non-fiduciary powers. UNIF. DIRECTED TR. ACT § 5 (UNIF. LAW COMM'N 2017).

ought to calibrate the content and directionality of fiduciary duties to suit the characteristics of particular mandates. More specifically, it suggests that the courts ought, in calibrating duties, to be very attentive to the nature of, and balance between, powers conferred on protectors and trustees respectively under a given trust deed. If, for example, a protector is granted a discretionary power that, in its ordinary exercise, entails a subordinate administrative role relative to the trustee, it may be appropriate to apply a duty of good faith to the protector rather than the more robust loyalty obligations that apply to the trustee. On the other hand, if the discretionary powers of the protector are so broad as to exclude powers in the trustee, or if in the exercise of same the protector is clearly in an ascendant administrative position, the protector ought to be subject to robust standards of loyalty and care. Finally, FPT-structured analysis takes us in a novel direction on the directionality of fiduciary duties. The UDTA suggests that the directionality of duties for protectors should track that of state law on the duties of trustees—i.e., the duties should be always and only be owed to beneficiaries.⁷³ By contrast, under the FPT, directionality is a function of the construction placed on the purposes attached to a protector's mandate. If a mandate, or particular subset of powers, is explicitly or implicitly conferred for the benefit of beneficiaries, the usual assumptions about directionality are sound. But where a mandate or set of powers is instead conferred primarily to secure the settlor's expectations, it may be appropriate to treat the settlor as the obligee.

Finally, the alternative approach advocated for here provides a basis for more finely crafted decisions on the balance of liability between protectors and trustees. Direct status-based approaches do not provide any insight in circumstances like this, where fiduciary status is claimed for different categories of actor, each of whom is conjointly involved in fiduciary administration. The analogical approach employed in the UDTA addresses the issue of balance of liability but with the limitation adverted to earlier. The Act presupposes divisions of power between trustee and protector that are amenable to fixed rules assigning full liability to the protector, trustee, or both simultaneously.⁷⁴ In my view, rather than be settled by fixed *ex ante* rules, the balance of liability should instead be determined judicially *ex post*, through a context-sensitive assessment of the relationship between the powers of the trustee and protector respectively as they bear on a particular matter of trust administration. To what extent did each enjoy significant discretion in the exercise of the power(s) in question? A framework permitting discretionary apportionment of liability would allow the courts to determine, based on their construction of the trust deed and analysis of evidence relating to actual practices of trust administration, whether and if so to what extent, a protector or trustee should bear the greater burden of fiduciary liability.

73. *See id.* § 8.

74. *Id.* § 9.

V. CONCLUSION

Trust protectors warrant more attention than they have received. They are an instructive example of practice-driven innovation in legal form, and as is characteristic of this kind of innovation, lawmakers are struggling to catch up. Inattention is just one factor. Another is the complexity of the innovation; trust protection practices significantly impact the conventional structure of the trust and conventional trust administration. Various jurisdictions now recognize protectors, and there is some evidence of interest in thorough regularization. The challenges facing lawmakers are significant and go well beyond the scope of this Article, however, amongst the most significant challenges facing lawmakers is that of clarifying whether, and if so, under what circumstances a protector will be a fiduciary, and to whom will he owe fiduciary duties. Existing authority on this point is limited and gives no indication of emerging consensus. While the lack of consensus may reflect systemic lag in the law's accommodation of practice-driven innovation, I have suggested that it might also reflect the fact that there are genuinely deep and difficult problems associated with development of an apt framework of fiduciary norms for protectors. Protectors perform different functions and enjoy different kinds of powers in different kinds of trust. The challenge for lawmakers is therefore one of devising a framework of fiduciary norms that is appropriately responsive to the mutability of trust protection. Having examined alternatives, I argue that a fact-based approach, structured in light of the Fiduciary Powers Theory (FPT) of fiduciary relationships, offers a suitable framework for analysis of protectors. Unlike the alternatives, the FPT enables fiduciary regulation of protectors in a manner sensitive to material contingencies, permitting one to regularize the fiduciary functions of the protector in a way that preserves the prized functional flexibility of trust protection.