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- With respect to the first ruling request, Daughter had a pre-October 22, 1942, general power of appointment to which the grandchildren would succeed when Daughter dies. To the extent that any grandchild disclaimed his or her interest in that power of appointment or died during the 21-year period following Daughter's death, some great-grandchildren might succeed to her power of appointment. Under the Section 2041 regulations, the power of appointment held by the great-grandchildren and more remote beneficiaries would be considered a power created before October 22, 1942, and consequently the release or lapse of such a power would not be treated as the exercise of the power and would have no adverse estate or gift tax consequences.
- With respect to the second ruling request, Daughter's heirs cannot succeed to any interest in the trust until Daughter's death pursuant to the terms of the trust. Consequently, Daughter's great-grandchildren could disclaim their interest and there would be no adverse estate or gift tax consequences.
- With respect to the third ruling request, a beneficiary who survives Daughter but dies before reaching a specified age will have a general power of appointment over the continuing trust. If the beneficiary survives the 21-year term following Daughter's death but dies without exercising the power of appointment, the remaining assets in the continuing trust are to be distributed to the beneficiary's estate. Thus, the assets will be included in the gross estate of the continuing beneficiary for federal estate tax purposes if the beneficiary dies before the continuing trust terminates.
- With respect to the fourth ruling request, the proposed modifications would not have any adverse generation-skipping transfer tax consequences. The modification would fall within the scope of Reg. 26.2601-1(b)(4)(i)(D)(1), which provides that a modification of the governing instrument of an exempt trust is valid under applicable state law and will not have adverse GST consequences when the modification does not shift a beneficial interest to any beneficiary who occupies a lower generation than the person or persons who held the beneficial interest prior to the modification and the modification does not extend the time for the vesting of any beneficial interest in the trust beyond the period provided for in the original trust. That was the case here.

- With respect to the fifth ruling request, because the proposed construction of the trust clarified ambiguous terms of the trust and reflected the rights of the parties under applicable law, the proposed construction of the trust would not result in a taxable gift by any of the beneficiaries of the trust.

### III. Trust Protector – Standing

*Carberry v. Kaltschmid*, 2018 Cal. App. Unpub. LEXIS 3900, 2018 WL 2731898 (2018).

- The Court in this unpublished case ruled that a trust protector does not have standing to compel trustees to account.
- Husband created a trust for his widow and six children that became irrevocable upon his death in 2014. Two of his children were named as trustees. The original trust protector resigned in 2015 and he named a successor trust protector (who was not related to any of the beneficiaries).
- The trust terms provided that: (a) the protector acted in a fiduciary capacity; (b) the protector had the powers to amend or modify the trust (but not to expand its own powers), construe the trust in the event of an ambiguity, the power to sign documents to exercise its powers, the power to appoint a special trustee, the power to appoint successor trustees if there is a vacancy not filled by other trust terms, the power to terminate an uneconomical trust, and the power to change the trust situs and governing law; (c) the trustee had no duty to investigate the trustee’s actions or inactions, audit the trust books, or evaluate portfolio performance; and (d) the protector was entitled to compensation.
- In January 2016, the protector wrote the trustee to inquire about a trust loan and the status of an ongoing dispute among the trustees and requested an accounting. Counsel for a trustee advised that the parties were working on a settlement. In February, the protector wrote another letter asking for the settlement agreement and stated that “as Trust Protector, I have a fiduciary duty to keep myself informed of the condition of the administration of the Trust”. Counsel for a trustee responded that they were working with the family to resolve the disputes, and that counsel for the trustees and the beneficiaries agreed that the protector would not be accused of not fulfilling his duties if he placed his work on hold while the family worked on resolution.
- In September, the protector sued to compel the trustees to account and provide information (although the only “information” sought other than the accounting was a copy of the settlement agreement). The protector made allegations that the trust was delinquent with tax filings and had incurred high legal fees. He also sought confirmation of his ability to appoint a special trustee. A trustee opposed, arguing that: (a) the protector lacked standing to demand an accounting; (b) the high fees were the fees of the prior protector which were part of the dispute; (c) the parties were in mediation to resolve the trust disputes; and (d) that accountings had been provided to the beneficiaries.

- The trial court dismissed the protector’s claim for lack of standing and the protector appealed. On appeal, the court of appeals affirmed on the following grounds:
  - The probate code provides that a trustee is to provide accountings to beneficiaries and that a trustee or a beneficiary has standing to compel a trustee to account. The protector is not a beneficiary and there is no authority giving a non-beneficiary protector standing to compel an accounting.
  - The trust terms do not entitle the protector to compel an accounting. The trust terms require the trustee to account to the beneficiaries only. None of the powers granted to the protector include the power to compel an accounting.
  - The trial court was not required to grant an amorphous request that the court compel the trustees to communicate generally with the protector when no specific information was identified.
  - A concurring opinion noted that: (1) a law review article concluding that a trustee who has the power to remove a trustee has a duty to stay informed about the trust is irrelevant because this protector did not have the power to remove trustees; and (2) the authority granted the protector does not render the protector the functional equivalent of a trustee.

**Drafting Point:** Unlike the role of a Trustee, a Trust Protector does not have implied common law powers or duties. The Trust Protector’s powers are governed by the instrument (and in some states, by statute). From a drafting perspective, the Trust Protector is more akin to an attorney-in-fact than a traditional fiduciary and the powers of a Trust Protector should be clearly articulated.

Sources:

Steve R. Akers, *et al. Recent Developments - 2018*, Heckerling Institute on Estate Planning (2018)  
Dana G. Fitzsimmons, Jr., *Review of the Past Year’s Significant, Curious, or Downright Fascinating Fiduciary Cases (at least it seems to me)*, Heckerling Institute on Estate Planning (2018)

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Jack focuses his practice on estate and trust planning, administration, and litigation. He has been published in various state and national publications and is a frequent presenter on topics relating to estate and trust law. Jack received his B.A. from Wittenberg University in 2008; and his J.D. from Washington and Lee University in 2011. He was admitted to the Maryland Bar in 2011 and has practiced in Maryland since 2011.

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### Publications

Lawyers of the firm have published articles on tax and other topics related to their professional interests, including: *"Medicaid Planning for Maryland Family Lawyers,"* MARYLAND BAR JOURNAL, Vol. 49, No. 2 March/April 2016 (Co-Author with Phyllis J. Erlich); *"Self-Settled Asset Protection Trusts for Married Couples in Maryland,"* Steve Leimberg's Asset Protection Planning Newsletter (April 2015); *"The Terms of the Trust: Extrinsic Evidence of Settlor Intent"* ACTEC JOURNAL, Spring 2014 (Co-author with Anna Katherine Moody); *"Benevolent Benefactors Be Aware: Changes in Medicaid Policy Result in Fairer Treatment of Gifts,"* MARYLAND BAR JOURNAL, Vol. 47, No. 3, May/June 2014 (Co-author with Laurie S. Frank); *"Is this the Death of Ahlborn? The Self-Defeating Expansion of States, Authority to Seek Reimbursement Under the Medicaid Secondary Payer Act,"* NAELA NEWS, February/March 2014 (Co-author with Jason A. Frank). *Resisting the Contractarian Insurgency: The Uniform Trust Code, Fiduciary Duty, and Good Faith in Contract,* ACTEC JOURNAL, Winter 2010; *"Asset Protection and Tenancy by the Entirety,"* ACTEC JOURNAL, Spring 2009; *"Perfect Ambiguity: The Role of the Attorney in Maryland Guardianships,"* MARYLAND JOURNAL OF CONTEMPORARY LEGAL ISSUES, 1996.

### Lectures/Course Presentations

Lawyers of the firm participated as a lecturers in various continuing education programs for lawyers, including: *"Succession Planning: Not Just for Senior Lawyers"* (MSBA 2018); *"A Survey of the Common Types of Fiduciary Litigation"* (University of Baltimore Law Forum 2018 Symposium); *"Estate Planning for Federal Employees"* (U.S. Census Bureau 2018); *"Deadman Statute and Hearsay Issues and Objections for Orphans' Court Judges"* (Judicial College of Maryland 2018); *"Elder Financial Abuse: 2018 Update"* (MSBA 2018); *"Pesky and Persistent Evidentiary Issues in Estate & Trust Litigation"* (MSBA 2018); *"Contested Guardianships"* (NAELA Maryland-DC Chapter 2017); *"Transmittal of Issues from Orphans' Court to Circuit Court"* (Judicial College of Maryland 2016); *"ABA Section of Real Property, Trust & Estate Law Domestic Asset Protection Trust Planning: Jurisdiction Selection Series"* (eCLE, ABA 2015); *"Document Drafting for the Elder Law"*



*Practitioner"* (MSBA 2015); *"Orphans' Court Judges' Orientation,"* (Judicial Institute of Maryland 2015); *"Maryland Trust Act,"* (MSBA 2014); *"Heirs, Legatees and Related Issues,"* (Judicial Institute of Maryland 2013); *"Estate/Tax Implications of DOMA after the Windsor Case"* (MSBA 2013); *"Asset Protection, An Overview for Maryland Estate and Trust Lawyers,"* (MSBA 2013); *"A Beneficiary's Right to Information,"* (MSBA 2012); *"Trust Litigation: The Enforcement of Beneficiary Rights,"* (MSBA 2011); *"Asset Protection: An Overview for Maryland Estate and Trust Lawyers,"* (MSBA 2010); *"Back to the Future, Schoukroun and the Spousal Election,"* Hot Topics in Elder Law, (MICPEL 2009); *"A Match Made In Heaven – Using Tenancy by the Entirety for Creditor Protection Without Sacrificing Estate Planning,"* (MSBA 2009); *"Asset Protection – A Guide for Maryland Estate and Trust Lawyers,"* (MICPEL Advance Estate Planning Institute 2006); *"Revocable Inter Vivos Trusts,"* (MICPEL 2004 and 2006); *"Valuation Discounting,"* (MICPEL 2003; MSBA 2002 and 2003); *"Business Valuation,"* (MICPEL 1998); *"Family Partnerships,"* (MICPEL 1996); *"Avoiding Probate - Will Substitutes,"* 1996; *"Basic Estate Planning,"* (MICPEL 1993).