

# PROTECTORS

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## OCORIAN BRIEFING

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**It is common for trusts to include provisions appointing a protector and vesting in the protector varying degrees of responsibility for overseeing or intervening in the administration of a trust.**

Where a protector is required, the trust instrument will usually provide for the appointment of the first protector and those areas of the trust where the protector's oversight is required. The settlor and the trustees will ordinarily agree these areas in advance and the trust instrument will be drafted accordingly.

### **Who may be a protector?**

There are generally no restrictions as to who may be appointed as a protector of a trust. It is common practice for a protector with a professional background to be appointed (e.g. a long standing family lawyer or accountant) or perhaps a trusted adviser, friend or relative.

When considering candidates for the office of protector, it is important to ensure that the appointed person has the necessary skills and understanding to perform the role. The office of protector may be held by an individual, a committee or a corporate entity.

Provision should always be made in the trust instrument for a protector's succession. This ensures that, should the protector be incapacitated in any way, the trustees are not left in a position where they are unable to exercise their powers.

In most jurisdictions there is no rule against the settlor or any beneficiary of a trust also being the protector of that same trust, however a protector will be wary of potential conflicts of interest when discharging that role. An appointee from within the family may have an in depth understanding and knowledge of the family members and their respective needs and requirements and the trust fund itself (e.g. shares in a family business) which favours his or her appointment. However, an

appointee from within the family may find it more difficult to exercise or be seen to be exercising his or her powers as protector in an impartial manner, particularly in the event of a family disagreement or hostile litigation. An alternative approach might be to appoint a non-family member such as a long standing professional adviser to the family or a protector provided by a professional trust company that has no conflict of interest and is more likely to be and be seen to be impartial in the exercise of his or her powers. A professional protector may also benefit from previous experience of issues faced in a range of similar circumstances.

### **What are the functions of a protector?**

A protector's functions and role will usually be determined by the terms of the trust instrument itself. Generally, he or she will have a mandate to perform an oversight function in terms of the exercise of key powers by the trustees.

It is common practice for the protector to be given a power of veto over the exercise of certain powers by the trustees and to be required to provide his or her prior or simultaneous written consent to the exercise of certain powers by the trustees. Typically, the powers requiring a protector's consent might include, but not be limited to:

- addition or exclusion of beneficiaries;
- appointment of capital;
- termination of the trust;
- shortening the trust period;
- changing the proper law; and
- variation of the trust terms.

Indeed, a protector's power of veto can be attached to a broad range of trustees' powers, both dispositive and administrative, dependent upon the wishes of the settlor. This power of veto may be described as a negative power.

Alternatively, a protector may be given positive powers. For example, the protector can be vested with the power to appoint and remove trustees.

**What are the responsibilities of a protector?**

As the nature and extent of a protector's role will vary from one trust to another and from jurisdiction to jurisdiction, it will be a question for determination on each occasion whether all or some of the protector's powers are, or should be, fiduciary in nature. Some powers (such as the power to appoint trustees) will normally be fiduciary, but it may be appropriate for certain powers to be given to a protector in a beneficial capacity (so that those powers can be exercised as the protector chooses, for his or her own benefit), or in a limited capacity (so that they must be exercised in good faith for the purposes for which they are given).

Where the protector's powers are fiduciary, the protector must consider whether or not to exercise his or her powers and can only exercise those powers in good faith in accordance with the terms of the trust and in the interests of the beneficiaries as a whole.

Established in 1971, Ocorian has led the provision of a wide range of private client services including not only trustee and trust administration services for trusts with protectors but also protector services for externally administered trusts. Our award winning business is built on a 45 year strong philosophy of client focused and director led service.

**Ocorian was recognised as the 'Trust Company of the Year' at the annual STEP 2016/2017 private client awards ceremony.**

## KEY CONTACTS

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