

Focus | Probate, Trusts & Estates/Tax Law

Five Hazards to Avoid in Appointing a Trust Protector

BY GREG SAMPSON AND CLEVE CLINTON

Unanticipated changes in the law or circumstances may derail a careful plan to preserve a client's intent to transfer wealth through trusts.

A "trust protector" originated from a need to protect offshore trusts from unchecked foreign trustees in unfriendly jurisdictions. Many planners now view it as an elixir to cure all unknown ills and as a staple in many planner's forms for all planning.

We recently examined several different "train wreck" trusts—each with different protector concerns. Each was set on a course to destroy the grantor's express plans; moreover, they all raised serious ethical questions and even possible fiduciary breaches by the planner or protector. Thus, our current top five warnings:

1. Not You. Naming the drafting attor-

ney as protector likely violates our conflict-of-interest rules of professional responsibility—between the client and their attorney (see Rule 1.08). A protector who benefits from compensation, broad powers and a broadly written exculpatory clause—and is also the drafter—appears to be in direct conflict with his or her client's best interest. Moreover, the professional rules essentially prohibit the client's waiver of such a conflict without independent counsel. Self-appointment also violates the fiduciary duty of loyalty and duty to provide representation only for the client's best interest. In short, do not do it.

2. If Not You, Then Who? Protector selection and succession is crucial—impartiality and independence are mandatory. Many protector powers we have seen essentially usurp the Trustee's powers or otherwise leave the trustee impotent. Proper initial

selection of a trustee overcomes the necessity to override or micromanage that trustee. Consider whether removing liability protections for the trustee and granting the protector only the powers to remove and replace the trustee solves the bulk of any likely problem.

3. Beware of Overbroad Powers. The boundaries of a protector's powers are not defined by case law; thus, locating the boundaries of enforceable powers is a bit of a wild west. Yet, clearly in Texas, a protector acts as a fiduciary unless the protector's powers are limited to removing and replacing a trustee, as provided in Trust Code §114.0031. Trust amendment powers we have seen attempt to redraw power boundaries far beyond appropriate adjustments for scrivener errors, changes in tax law, situs or controlling law or qualifying as a special needs trust or like benefits in favor of a beneficiary. Know this: protector granted powers beyond removing or appointing a successor trustee will be judged on a fiduciary standard much like a trustee's actions.

4. Avoid Over-Exculpation. Capable trustees may require broad limited liability provisions; however, blanket protections and added burdens of proof only encourage abuses of power. The Trust Code §114.007 invalidates trust provisions attempting to relieve a trustee's liability for bad faith breaches—intentionally or with reckless indifference to the beneficiary's interest. Moreover, language attempting to relieve abuse of a fiduciary duty liability or liability arising from a lawyer's confidential relationship with the settlor are ineffective. Yet, §114.007(c) suggests that a trustee may, under the trust terms, be relieved from some trust duties or restrictions; however, §114.007(c) is subject to §111.0035. With no definitive case law, the statutory suggestion that some trust duties or

restrictions can properly be relieved is open for debate and speculation. Surely even these "safe harbor" notions do not permit enforcement of planner/protector inserted trust provisions attempting to insulate the protector. Disturbingly, we have seen provisions requiring proof of clear and convincing evidence of bad faith acts, gross negligence, or intentional misconduct, requiring the trust to pay all protector defense costs, and providing blanket indemnification of the protector.

5. Consider the Grantor's Intentions. Not all trusts need trust protectors. Alternatives should be considered, such as allowing beneficiaries to remove and replace trustees with independent trustees. Powers to amend should be strictly limited to necessities for the trust to operate as intended and perhaps require the consent of the Trustee or others affected by the change. Granting unlimited use of trust funds to defend a protector is ill-advised, as it provides little deterrent to abuse by the protector, and financially penalizes the beneficiaries who seek to end the abuse. Also, one should anticipate how to avoid contests and litigation over the meaning of protector terms.

As a final note, because protector provisions can have grave consequences to the grantor's plan and liability for the fiduciaries and planner, they should be used judiciously and sparingly. The grantor must know potential abuses and measures to keep all fiduciaries in check when deciding what to include in the final documents. The planner, in the face of underdeveloped statutory restrictions on abuse, must provide those protections through careful drafting. **HN**

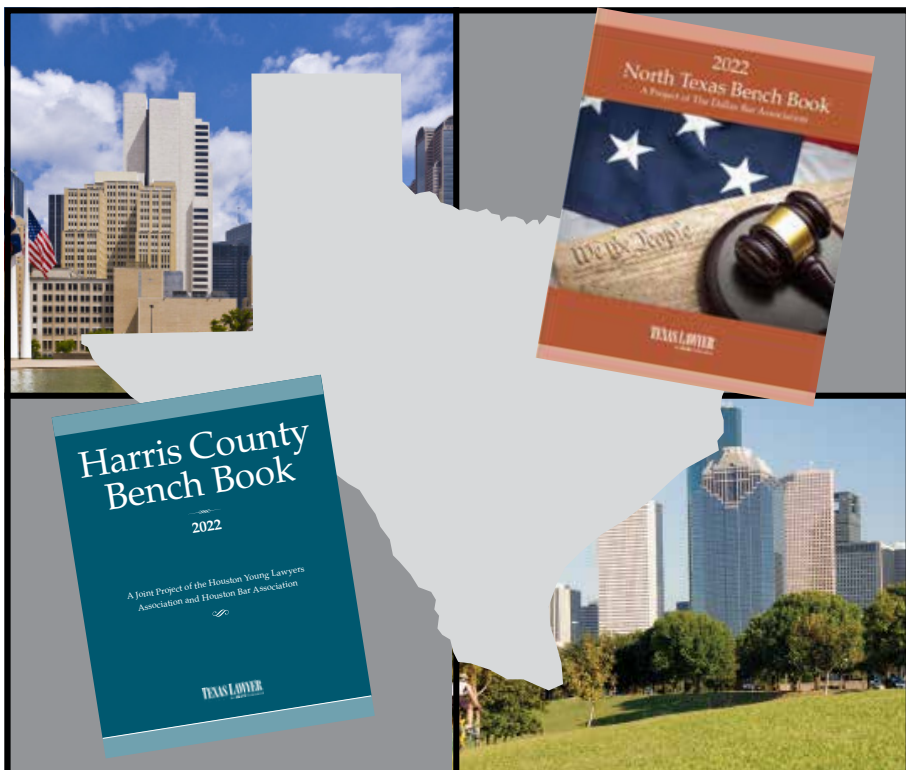
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KELLY A. CARTER

Always aspiring to serve his community in the highest capacity possible, Kelly A. Carter began his public service career when he earned a commission in the United States Air Force. He served the nation as a B-1B Weapon Systems Officer, flying over 100 combat missions.

Kelly decided to supplement his experience in the cockpit with experience in the courtroom and enrolled in Southern Methodist University's Dedman School of Law. While in law school, he served members of the Dallas community through the Van Sickle Family Law Clinic, and as an intern for the Federal Public Defender's Office and the Collin and Dallas

County District Attorney's Offices. After graduation, Kelly joined the Rockwall County District Attorney's Office where he gained significant trial and legal experience.

In 2022, Kelly launched his own law practice with the goal to provide all people, especially those of modest means, access to affordable, high-quality, and complete justice. ECL is proud to assist Kelly in his efforts to serve the community.

