

To protect and serve: Understanding the mercurial role of a protector

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The paradox of the protector is that the role is rather difficult to define and yet this frustration can enable a greater degree of flexibility for Jersey trusts. In 2008 the Royal Court ruled to include fiduciary powers in the role of a protector and in June 2009 ruled that a protector needs to carefully watch any conflict of interest arising from his fiduciary position, but this still leaves an interesting area of trust law that, when suitably utilised, can reap benefits for clients.

A mercurial definition

Articles 24(3) and 24(4) of the Trusts (Jersey) Law 1984 leave it to the trust draftsman to delineate the role of a protector. There is no statutory list of protector rights and powers and it is a matter to be decided by the settlor and the trustees when agreeing the terms of the trust for administration. To confuse matters further, while it is often the case that a single person is appointed as a protector, it is also possible for a committee of protectors to act together either by majority or unanimously when exercising their powers.

A position of trust

When establishing a trust, it can be a difficult concept to accept that the settlor may, for example, no longer own the shares in the business they have built up over the years. In this case, they may need assurance that their intentions when creating the trust will be honoured by the trustees. They might appoint themselves, a close trusted friend or even a professional advisor to maintain a watchful eye over the trustees because they wish to retain some degree of control of what are potentially unknown, and often distant, trustees as the legal title to their assets is being handed over. This third party, known as the protector, is bound by the details as outlined by the trust documents.

The powers and rights of a protector

A protector has negative and/or positive powers under the terms of the trust. Article 24(3) of the Trusts (Jersey) Law 1984 only deals with negative powers (i.e. situations where consent is required), and not positive powers (i.e. situations where specific powers are granted). This leaves a gap in terms of statutory guidance as to whether a protector can have positive powers. I would suggest that the trust document reflects the terms agreed between the parties and is flexible enough to allow for positive powers. There is little room for doubt that positive powers are allowed to be held by protectors, but the question arises as to whether those powers are fiduciary or not (see below).

Negative powers

Negative powers are described as such simply because they prevent the trustees exercising their powers without the consent of the protector. These powers will normally have been drafted to be subject to the protector's consent. Consent is

usually required either before or at the time of the trustees exercising their powers and/or discretions. Areas that require the protector's consent include:

- appointment of income and/or capital
- addition or exclusion of beneficiaries
- shortening the trust period and/or terminating the trust
- changing the proper law and/or forum of administration
- amending the terms of the trust

It is unwise for all (or a substantial number of the trustees' powers) to be subject to protector consent, particularly if the settlor is acting as protector, as it places a question over the independence of the trustees, their discretion and the integrity of the trust structure.

Positive powers

Positive powers are powers given to a protector under the terms of the trust which would normally reside with the trustees. The powers are called "positive" because they are unilateral actions taken by the protector and they are usually restricted to the appointment of a successor protector and/or the removal of and appointment of new and additional trustees.

For more information please contact:



Fritha Ford

Partner | Jersey

t: +44 (0) 1534 601664 | **e:** fritha.ford@collascrill.com



Damian James

Partner | Jersey

t: +44 (0) 1534 601733 | **e:** damian.james@collascrill.com