

Protector for Private Family Trust under Indian Trust Act 1882

Swapnali Waghore

PhD Student University of Pune, 411007 Maharashtra India

Abstract

It is a known fact that the two main parties to a deed of trust are "trustee" and a "beneficiary" according to the Indian Trust Act, 1882. But the difficulties arise when the trustee fails to do certain tasks properly or there is an abuse of power in regard to the access of property in question. These difficulties thus led to the birth of this concept of protectors for trust. The introduction of the concept of "trust protectors" is comparatively a new-fangled idea in modern trusts.

The protector of a trustee is assigned with the task of overseeing important decisions. He is also granted with certain flexible rights which party to the trust is not permitted with. The roles and functions of a trust protector are very constructive; however, there is no statutory definition of the term "protector". The complete power and functions with which a protector is vested come only through the trust deed. The challenge arises in the drafting of a trust deed for the roles, power, and function of the protector. Even a single ambiguity in the above genre may lead to severely complicated and problematic situations. This article will help in the understanding of the concept and roles of a protector. It will also help in determining the relationship that is created between a trustee, beneficiary, and the protector under the ambit of Private Family Trusts under the Indian Trust Act. Along with this it is especially important to determine the future of a protector in the Indian scenario and to determine whether it has attempted to remove the fiduciary responsibility of a trustee itself.

INTRODUCTION

The idea of a "trust" is in a general sense extremely straightforward: One individual holds legitimate title to an advantage for another. If you transfer the title of your family farm to another individual and say, "will you please hold my farmland for the ultimate purpose of my family benefit?" in such a scenario, the creation of a trust has been done by you. Basically, there are four important elements that grouped together make a trust. They are namely the 'settlor'¹ (also known as the 'grantor' or the 'trustor'; the 'trustee'²; the 'beneficiaries'³ and the trust itself including its assets.

¹**Settlor/Grantor:** The settlor must be an independent person who creates the trust by placing a certain unencumbered asset that he owns into the Trust, i.e. by transferring that asset to another person (trustee) along with clear instructions that the asset be held for the benefit of a third party. There can be more than one settlor to a Trust; <https://www.primeglobal.net/news/family-trusts-an-overview-suresh-co>

Hence the basic idea is that the ‘settlor’ transfers his assets/property to the ‘trustee’ for the ultimate benefit of the ‘beneficiaries’. Now the duties, responsibilities and the powers of the ‘trustee’ are mentioned in a ‘trust deed’. Generally, a trustee has wide ranging powers about the assets/property that can vary from case to case. He can not only alter the basic day to day operations of the trust and can manage its duties and responsibilities but can also make amendments/modifications to the basic structure of the trust deed hence bringing an alteration to his own powers. He can also as the case may be add or remove any of the beneficiaries or set the limits in the contribution to the charities etc. which makes us understand that a trustee can spin it the way he likes it preferring his own advantage or disadvantage. To balance the ultimate powers of trustee/trustees, the trust deed can have a provision in it for the appointment of a ‘**protector**’. The appointment of a protector is done with the general sense of determining the best interests of the beneficiaries.⁴ The position of a protector is purely consultative in nature. However, this role play is of the utmost importance in the Indian legal scenario, since by the way of the trust deed, it can be made possible that the trustee consults or negotiates with the protector before amending any of the important or basic provision of the trust deed or shall consult in the making of the key decisions that affect the functioning of the trust. The protector’s work and function play a key role in ensuring the best interests of the family trust.⁵

WHY IS PROTECTORAN IMPORTANT ELEMENT TO THE TRUST?

A protector is a person who is above 18 years of age and is mentally stable to be designated by the settlor to oversee the functions of the trust by the trustee. A protector works as a decision gate to the powers granted to the trustees for the betterment of the trust under the terms and agreements of the

²**Trustee:** The trustee is responsible for all compliance and administrative responsibilities and takes care of all fiduciary responsibilities. The trustee owes a duty of care of good faith to the beneficiaries and act in the best interests of all beneficiaries. The Trustee is responsible to look after trust funds by investing & managing it and distributing the income to various beneficiaries at the end of each financial year. The Trustee must also maintain books of account and lodge relevant income tax returns with the tax office; *Ibid*

³**Beneficiary:** The beneficiary is a person for whose benefit and profit the trust asset is held and managed by the trustee. The beneficiary or beneficiaries may be either specifically named in the Trust Deed or may be a sufficiently defined group of persons (for example “all children and grandchildren”). A settlor can also be named as beneficiary of the trust. In most of the trust deeds “initial beneficiaries” are noted in a schedule and are usually family members or other close relatives. There are classes of beneficiary who can be parents, grandparents, brothers, sisters, children, grandchildren, aunts, uncles, nephews, and nieces of initial beneficiaries; *Ibid*

⁴<https://www.mourant.com/file-library/media---2020/the-role-of-a-protector---july-2020.pdf>

⁵ <https://taxguru.in/corporate-law/transfer-property-trust.html>

trust deed.⁶ Hence the powers of the protector are in addition to that of the trustees and he can allow or restrain the trustees in committing any function enshrined to them through the trust deed. As has already been mentioned, the functions of the protector can vary from case to case and a similar assertion can be made about their continuity under the Indian trust domain since many people have undermined the capacity of a protector since it comes in conflict with that of the trustees. The concept of 'protector' is much of a new innovation under the Indian Trust Act, 1882 and the legal judgments and the case laws in this domain are really inadequate.

The powers of a protector in comparison to that of a trustee do not go hand in hand. A protector is not responsible to oversee the day-to-day activities of the trust and its minimal functions. However, there can be a variety of factors to keep a protector participate in the smooth functioning of the trust. When a decision is undertaken to establish a trust, most of its control and legal ownership is vested in the hands of the trustees. By the way of appointing a protector of the trust, the settlor is comforted in a number of ways one of them being the achievement of independency over the actions of the trustees in their functioning. In a judicial matter of *Isle of Man case of Rawcliffe v Steele*⁷, the trust deed envisaged for the protector's prior approval in situations of income and capital distribution by the trustees. Also, in this case, the protector had the wider power to remove or appoint new trustees.⁸

However, not many of the settlors are ready to invest in the appointment of the protector as they feel such a decision would end up emerge extra expenses. Hence in most of the cases, it can be seen as a common set of practice that the settlor appoints any of his trusted friend or a family member as the protector instead of some institution dealing in such services.⁹

LEGALITY OF THE TRUST PROTECTORS

A trustee is appointed under section 60 of the Indian Trusts Act, 1882. However, there is no specific provision related to 'protector' in the trust act. The function of the 'protector' in India is usually undertaken by the 'settlor'.¹⁰ However the jurisdictions of Dubai, New Jersey, Barbados, the Cook Islands, Mauritius, St. Vincent, Malaysia, and a few other states have enabled the provisions concerning protectors.¹¹

Nonetheless, this lacuna is the urgent need of the hour to be filled. What if such a situation arises when the trustee fails to work according to the best expectations of the settlor or what in the case if the trustee plays out in a way

⁶<https://www.oldmutualwealth.co.uk/Adviser/literature-and-support/knowledge-direct/trusts/general/the-role-of-a-protector/>

⁷[1993 - 95] MLR 426 IoM SGD

⁸<https://www.bedellcristin.com/knowledge/briefings/protectors-are-their-powers-fiduciary-and-does-the-court-have-power-to-intervene/#:~:text=The%20protector%20was%20a%20fiduciary,protect%20the%20interests%20of%20beneficiaries%22>

⁹Ibid

¹⁰<https://academic.oup.com/tandt/article-abstract/9/6/75/1664239?redirectedFrom=PDF>

¹¹<https://nomoretax.eu/protectors-of-a-trust/>

that violates the trust functions in its totality? Generally, the position of the trustee cannot be ruled out once accepted, unless annulled by the court or if there is any specific provision in the trust deed permitting the same.¹² Hence it would be the best practice to insert a provision in the trust deed empowering a protector of the trust to ensure the proper functioning of the trust or for keeping a check over the activities of the trustee.

According to *Section 11*¹³ of the Indian Trusts Act, 1882, the trustees are embodied with two responsibilities in general. First one is to work towards fulfilling the purposes of the trust and the second is to follow the orders and directions of the settlor. Hence the trustee is kind of bound to fulfil the above-mentioned objectives and departure from these rules is forbidden. However, the aforesaid section also mentions an exception that the trustees can altogether bring a modification to the terms and agreements with the settlor for the ultimate good and fulfilling the purpose of the trust (indicated at the time of creation of the trust through the trust deed).¹⁴ Further, in terms of section 11 above, the settlor can draft the trust deed in a way that it imposes a condition over the trustee to undertake every decision concerning the trust after the prior approval of the protector appointed.¹⁵

POPULARITY OF THE PROTECTOR IN MODERN TIME

Trusts has been originated with numerous reason such as change of various legal regimes and policies of various jurisdictions, family dynamics which have changed the current trust environment. The increase in popularity of protectors, and use, development because of the asset protection trusts in international financial centres. In the past popularity of the protector was on offshore jurisdiction but now a days the appointment of protector forms a part of mainstream tax planning in most of the recognised jurisdiction which recognise trusts. Trusts here cover various types or characterisation of trusts. The longer duration and irrevocable form of trust, the more likely trust protector will become a useful tool. Many problems have potentially

¹²<https://www.businessstoday.in/opinion/columns/private-trust-deed-how-to-safeguard-documents-legality-against-contingencies-trustee/story/390538.html#:~:text=A%20private%20trust%20in%20India,created%20by%20a%20trust%20deed.&text=The%20trust%20deed%20has%20superseding,the%20administration%20of%20the%20trust.>

¹³**Section 11 in The Indian Trusts Act, 1882:** -

Trustee to execute trust.—The trustee is bound to fulfil the purpose of the trust, and to obey the directions of the author of the trust given at the time of its creation, except as modified by the consent of all the beneficiaries being competent to contract. Where the beneficiary is incompetent to contract, his consent may, for the purposes of this section, be given by a principal Civil Court of original jurisdiction. Nothing in this section shall be deemed to require a trustee to obey any direction when to do so would be impracticable, illegal or manifestly injurious to the beneficiaries.

¹⁴<https://www.livemint.com/Money/lLx4aRgceFzms4SDoBWCgO/Trustees-need-to-fulfil-purpose-of-trust-obey-author8217.html>

¹⁵Ibid

emerged in this kind of trust such as trust is irrevocable but future arising problem cannot be foreseen by the settlor at a time of creation of the trust. Also, when settlor dead he cannot have his input, so how the trust adapt to these problems. There are a number of common problem can arise such as change in law over the time, family situation has change, or beneficiary could unexpectedly die or he/she does not need trust income any longer, in some cases social norms change.¹⁶ The role of protector can be as wide or as narrow and has many or few powers as the trust instrument defines, in modern time in general protectors administrative and dispositive power¹⁷i.e. fiduciary power being extended. While dealing with the power and duties of the protector while dealing with the trust's powers would determine, and on which draftsperson should be as specific as possible.

CONCLUSION

The concept of protector is come to light in recent years mostly when settlor think to create an offshore trust and appoint corporate trustee. It is constant concern of the settlor when he put huge amount of money far from his country and in the hands of unknown trustee, settlor always wants his assets must be in good hands for that reason the concept of protector is emerged. Protector is the person or body of person who keep an eye on trustee when they manage the trust. In wider sense trust protector is someone who can understand the concern and wishes of the settlor. Appointing a trust protector can offer broad, narrow or flexibility in the administration of the trust however, the current uncertainty in legal statute and legal effects of the trust protector should give pause who think its magic bullet. The element of protector is newly adopted in the trust law, some jurisdiction has mentioned about the rights and duties as well other requirements in the statute but there are many jurisdictions which are silent about the provisions.A trust protector is possible and practical solution to limitations in trust law, one of the practical roles of protector is that of a mediator. In opinion of the researcher the development of trust is deeply associated with the distributive functions of power which is the true key of trust.

¹⁶ Philip J. Ruce, The Trustee and the Trust Protector: A Question of fiduciary Power. Should a Trust Protector be held to Fiduciary Standard, Drake Law Review, 12/12/2010.

¹⁷ Dispositive powers of a fiduciary refer to a grant of discretion of a person in a fiduciary capacity.