

Verne, B. Michael

From: [REDACTED]
Sent: Thursday, January 03, 2013 1:40 PM
To: Verne, B. Michael
Subject: Trust Protectors and control under 801.1(b)

Mike,

I have a question as to whether a Trust Protector controls a trust. I have only seen this addressed in one informal opinion:

<http://www.ftc.gov/bc/hsr/informal/opinions/1206005.htm>

Trust Protectors seem to be used primarily in non-US trusts. They are separately designated fiduciaries appointed by the Grantor, presumably to ensure compliance with the Grantor's intent of the Trust, and as such they may have power to enforce trust provisions thereby also protecting the interests of all involved including the beneficiaries.

Here are my facts as I now understand them. This relates to family trusts holding voting shares in a UK corporation. Grantor holds approximately 30% of the corporation directly. Grantor established a number of family trusts which collectively hold the remaining shares of the corporation, although no one trust holds 50% or more of the voting shares of the corporation. None of the trusts are revocable and the Grantor does not have a reversionary interest in the corpus of the trusts. Grantor does not have the power to remove and replace 50% or more of the trustees of any trust. Grantor does appoint a Trust Protector for each trust. However, Grantor can only appoint not remove these Trust Protectors. I understand that the Trust Protector terms are fairly short, likely close to six months and then subject to reappointment which is not required. The Trust Protectors have the power to remove and replace 50% or more of the trustees for each trust of which they are designated the Trust Protector. As you note in the above informal opinion, this last fact could support a conclusion that a Trust Protector controls each trust it is designated to protect. (However, for reasons detailed below, I think this is not the right conclusion.) Finally, Grantor has designated the same natural person as the Trust Protector for each of the family trusts collectively holding approximately 70% of the voting shares of the corporation. Although this could lead to a conclusion that the Trust Protector is the UPE of the corporation, I think that this is not a correct conclusion for the following reasons:

1. First and foremost, the Trust Protector is very much a form of a trustee, in a sense a trustee of trustees or a super trustee. Like a trustee, the Trust Protector is a fiduciary appointed by the Grantor to protect the interests of all involved – the Trust, the Grantor and the beneficiaries. Certainly, if the Grantor appointed the same person as trustee to each family trust, that would not make the trustee the UPE of the corporation.
2. Further, although the Grantor may not remove the Trust Protector, as with trustees the rights of the Trust Protector are limited. The term is short, the powers are limited, and I suspect that they can be removed for cause. Also, at the end of this short term, the Grantor can appoint a new Trust Protector if he chooses.
3. Although in this case the Trust Protector is the same person for each family trust, the Trust Protector has a unique fiduciary obligation to each family trust, again much like a trustee, and no one trust holds a controlling share in the corporation.
4. Also like a trustee, there is nothing in the role or designation as Trust Protector that would give that person any rights to the corpus of the trust, any rights to revoke the trust or any reversionary interests. As with a trustee, the Trust Protector is strictly a fiduciary.
5. The Trust Protector is not and cannot be either a beneficiary of the trusts and the Grantor cannot appoint himself as Trust Protector. A conclusion that this "unrelated" fiduciary with no economic stake in the corpus of the trusts is the UPE would seem unusual and inconsistent with the intent of 801.1(b).

For all these reasons, I think it is appropriate to consider the Trust Protector as a form of a trustee, and as such conclude that as with trustees the Trust Protector does not have control of a trust to which it is appointed as a fiduciary. Therefore, here the corporation would be its own UPE.

Do you agree?

Many thanks,



AGREE - THE CORPORATION IS
ITS OWN UPE.

BW
1/3/13

K. WALSH CONCURS