

## Title

A trust protector with expansive non-fiduciary powers renders the arrangement a pseudo-trust

## Text

In some jurisdictions a trust protector is allowed to exercise critical powers in a non-fiduciary capacity, provided the terms of the particular trust specify that he may do so. See, e.g., 12 Del. C. §3313(a); IMO Ronald J. Mount 2012 Irrevocable Dynasty Trust U/A/D Dec. 5, 2012, C.A. No. 12892-VCS (Del. Ch. Sept. 7, 2017) (the Vice Chancellor honoring a provision in a trust instrument that the protector shall exercise his expansive powers in a non-fiduciary capacity). It would seem that such arrangements are actually pseudo-trusts, accountability being the *sine qua non* of a true trust. One has to wonder why a typical prospective settlor who has been fully informed of the applicable facts and law would ever knowingly elect to deprive his beneficiaries of fiduciary protections. Look for suits against lawyers and others who fail to apprise their principals of the cons, as well as the pros, of settling such pseudo trusts. Cf., §9.9.25 of Loring and Rounds: A Trustee's Handbook (*The Quiet or Silent Trust May Not Be a True Trusts*), which section is reproduced in its entirety in the appendix below. It goes without saying that a trust protector who had been acting as estate-planning lawyer for the settlor of a pseudo-trust would have been subject to fiduciary constraints for his pre-settlement interactions with the settlor notwithstanding the terms of the trust.

## Appendix

### §9.9.25 *The Quiet or Silent Trust May Not Be a True Trust* [from Loring and Rounds: A Trustee's Handbook (2018), pages 1576-1577].

Is a quiet or silent trust illusory? The question is intentionally ambiguous. Is the question whether the trust itself is illusory, or just its quietness? A quiet or silent trust has been defined as “an irrevocable trust that, by its terms, directs the trustee not to inform the beneficiaries of the existence of the trust, its terms and the details of the administration of the trust.”<sup>400</sup> South Dakota, for example, would seem to authorize such trusts by statute. See S.D. Codified Laws §55-2-13, which provides that “[t]he settlor, trust advisor, or trust protector, may, by the terms of the governing instrument, or in writing delivered to the trustee, expand, restrict, eliminate, or otherwise modify the rights of beneficiaries to information relating to the trust.” It seems there are two possibilities:

The first is that Section 55-2-13 means what it says, in which case a quiet or silent trust is something other than the legal/equitable relationship that is the subject of this handbook. Perhaps it is just a constructive principal/agency relationship, the “settlor” being the principal and the “trustee” being the agent. Or perhaps it is just a fancy completed common law gift to the “trustee.”

The second is that a quiet or silent trust is a true trust. If that is the case, then how, as a practical matter, is the trustee to hide the existence of the trust from the beneficiary and comply with applicable tax laws?<sup>401</sup> Assuming that that is possible, then how is the trustee to handle a request for information from the curious beneficiary about the terms of the trust should the beneficiary somehow otherwise get wind of its existence? If the trustee lies to the beneficiary, or intentionally obfuscates, is he not committing an act of actual, or

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<sup>400</sup>Joyce Crivellari, Trust & Estate Insights, May 2013 [A UBS Private Wealth Management Newsletter].

<sup>401</sup>See generally Alan Newman, *The Intention of the Settlor Under the Uniform Trust Code: Whose Property Is It, Anyway?*, 38 Akron L. Rev. 659, 679 (2005) (taxation and the quiet/silent trust).

constructive, fraud against the beneficiary, such that any applicable statute of ultimate repose is tolled?<sup>402</sup> Finally, the trustee's duty to account is a two-edged sword. Yes, it is burdensome for the trustee. But rendering accounts to the beneficiary is also the tried-and-true vehicle for limiting the trustee's liability.

The trustee's duty to provide critical information to the beneficiary is covered generally in §6.1.5.1 of this handbook. The quiet or silent trust is not to be confused with the secret (or semi-secret) trust, which is the subject of Section 9.9.6 of this handbook.

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<sup>402</sup>*See generally* §7.1.3 of this handbook (the Uniform Trust Code's statute of ultimate repose).