



# Adverse Witness

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## Trust protectors: 4th DCA issues decision

In a landmark decision, the Florida Fourth District Court of Appeal authored the first appellate opinion in Florida approving of the use of trust protectors and affirming their authority to modify a Florida trust instrument. See *Minassian v. Rachins*, 2014 WL 6775269 (Fla. 4th DCA Dec. 3, 2014). Trust protectors are individuals who are appointed by the terms of the trust to carry out specific duties separate and apart from those given to a trustee. Traditionally, trust protectors were rarely used in trust documents, mainly due to the uncertainty of how the courts would interpret the use of their powers in conjunction with Florida statutes. In recent years, Florida estate planning attorneys have begun to use trust protectors more frequently to modify trust provisions, especially in “friendly” situations where litigation was unlikely. *Minassian*, however, will pave the way for estate planners to feel more comfortable using trust protectors even when potentially litigious heirs are involved.

In *Minassian*, the settlor named his estate planning attorney as his trust protector. According to the attorney, the settlor had specific instructions about how his trust should be administered for his wife’s benefit after his death. The settlor anticipated that his children (the remainder beneficiaries), would be infuriated with his plan, and that one or more of them may try to sue his wife (the sole trustee after the settlor’s death) for breach of trust. After the settlor’s death, the children filed suit against his wife, alleging that she had breached her fiduciary duties by improperly administering the trust. During the litigation, the estate planning attorney used his powers as trust protector to modify certain of the trust’s provisions. These modifications were inconsistent with the position that the children had advanced in the litigation. The children thereafter filed a supplemental complaint to declare the modifications invalid. The trial court agreed with the children’s arguments at summary judgment, and invalidated the trust protector’s modifications.

Florida’s Fourth District Court of Appeal reversed the trial court’s decision, holding that: (1) trust protectors are authorized under Florida law; (2) the powers granted to the trust protector in the trust instrument in question were authorized by Florida law; and (3) the settlor’s intent to use a trust protector instead of the court system to resolve the dispute between his wife and children should be upheld under Florida law. First, the Court held that because the Florida Trust Code confers on a trustee “or other person a power to direct the modification or termination of the trust,” trust protectors are authorized under Florida law. *Id.* at \*4; see also Fla. Stat. § 736.0808(3). Second, the Court held that the power to modify a trust does not violate the trustee non-delegation rule, since it is the settlor, and not the trustee, who is delegating the modification power to the trust protector. *Minassian*, 2014 WL 6775269, at \*5. Third, the Court held that Florida Statutes §§ 736.0410 through 736.0415, and § 736.0412, do not provide the exclusive means by which one may modify a trust under the Florida Trust Code. Rather, Florida Statute § 736.0808(3) provides that a trust instrument may confer the power of direct modification to persons other than trustees. *Id.* Lastly, the Court held that where it was the settlor’s intent to resolve ambiguous language in the trust instrument by the use of a trust protector, “[r]emoving that authority from the trust protector and assigning it to the Court violates the intent of the settlor.” *Id.* at \*8.

Barring a future negative opinion from the Florida Supreme Court, trust protectors are here to stay, and will likely be utilized more often in years to come. Now that Florida attorneys finally have an appellate decision upon which they can rely, estate planners and litigators alike should be studying the Florida Trust Code so that they are ready to defend, or attack, the actions trust protectors may take in the future.

*Jamie Schwinghamer, Esquire is a senior associate in the Naples office of Hahn Loeser & Parks LLP, and focuses her practice on estate, trust and guardianship litigation. Ms. Schwinghamer attended the University of Miami School of Law, earning her J.D., magna cum laude, in 2006. Allison Christensen, Esquire is also an associate in the Naples office of Hahn Loeser & Parks, and focuses her practice on estate, trust and commercial litigation. Ms. Christensen attended Wayne State University Law School, earning her J.D., cum laude, in 2009. To learn more about Ms. Schwinghamer and Ms. Christensen, please visit the Hahn Loeser & Parks LLP website at: [www.hahnlaw.com](http://www.hahnlaw.com).*