

Is Your Trust Unguarded? Use a Trust Protector.

Read on to learn ways of preventing trust administration issues and the best way to choose a trust protector.

Brief History of Trust Protectors

A trust protector is someone who serves as an appointed authority over a trust that will be in effect for a long period of time. Trust protectors can help ensure that trustees maintain the integrity of the trust, and make solid distribution and investment decisions, and are often given the power to adapt the trust to changes in law and circumstance.

Trust Protectors were originally implemented in offshore trusts. These trusts were established in foreign jurisdictions where local laws offered attractive creditor protections. Trust protectors also offered enduring administrative benefits for those with long-term protection goals: Trust modification would be easier and more cost-effective over a lifetime via a trust protector's actions rather than following the local judicial proceedings.

Trust protectors are a fairly new and now commonly used trust feature in the United States. They first came into use domestic use after Alaska passed legislation in 1997. Use of trust protectors has become attractive as they allow for maximum flexibility, preserve the longevity of trusts, and help ensure the creator's intentions are carried out. At least 22 states expressly recognize trust protectors. The majority require that the protector's powers be detailed within the trust instrument. Some of the states' laws are fairly comprehensive, but many fail to clarify the powers and restrictions of the protector.

Trust Protector Powers

A trust protector can be given as few or as many powers as the trust maker desires. While it may be tempting to give a trust protector a wide array of powers to deal with every possible future circumstance, the trust maker should carefully consider the specific purposes and goals for their trust and only give the trust protector powers that will further those purposes and goals.

Whenever changes occur, as they are bound to do, the trust protector has the power to modify the trust to carry out the trust maker's intent. Significantly, the trust protector has the power to act without going to court – a key benefit which saves time and money and honors family privacy. Allowing for appointment of a trust protector can help to ensure consistent long-term trust administration. Trust protectors can:

1. Monitor trustee actions. Remove or replace a trustee either for misconduct or inability or unwillingness to serve.
2. Change the situs (State) of the trust for tax or other reasons, such as changes in the law.
3. Resolve conflicts between beneficiaries and trustee(s) or between multiple trustees
4. Modify distributions from the trust because of changes in beneficiaries' lives such as premature death, divorce, drug addiction, disability, or lawsuit
5. Add new beneficiaries
6. Veto potentially impractical investment decisions

Note: The key to making a trust protector work is being very specific about the powers available to that person. It's important to authorize that person, and any future trust protectors, to fulfill their duty to carry out the trust maker's intent - not their own.

Fiduciary v. Non-Fiduciary

Not all states expressly permit the use of trust protectors, but that does not mean that they cannot be used in such states. Jurisdictions that have trust protector legislation generally provide for this under a 'power holder' provision in the state's trust code. To determine whether a trust protector acts as a fiduciary, one must review the trust document. If the trust document does not explicitly state whether the trust protector is a fiduciary, the state's trust code will apply. For instance, the North Carolina Uniform Trust Code provides that power holders serve as fiduciaries by default – this can be modified in the trust document. If a trust protector is a fiduciary, there is a duty to act in the best interest of the beneficiaries and the role of trust protector carries a much higher risk of lawsuits by disgruntled beneficiaries or trustees.

Best Practice: These Trusts Benefit Most From Protectors

While all trusts can benefit from trust protector services, complex and long-term trusts such as generation-skipping trusts and dynasty trusts benefit the most. Without a trust protector, irrevocable trusts can only be modified by unanimous agreement of the beneficiaries (non-judicial settlement agreement), court order, or decanting. All of these alternatives can be complicated, costly, or cause delays. Dynasty and generation-skipping trusts are used for many generations and span for hundreds of years or more. Many laws and family changes can occur over long periods of time, and trust protectors allow for responding to these changes expediently and cost-effectively.

Ideal Selection of a Trust Protector

Trust protectors will potentially make decisions that reflect legislative and life changes. The former requires a solid understanding of trust and tax law, and the latter should be free of family conflict. Ideally, a trust maker will select a party outside of the family who has professional experience in trust law and/or finance. This provides a knowledgeable party monitoring trust administration while at the same time avoiding favoritism or hostility among family members. Choosing a non-familial party also helps ensure confidentiality of the trust terms.

A trust protector can be an individual, entity, or committee. Depending on the goal of the trust maker, having multiple people on a committee of varying areas of expertise may prove beneficial.

Review

At TrustCounsel, we recommend use of trust protectors in virtually all long-term trusts. They can be fairly easily added to some irrevocable trusts if the trust grantor is living. We can also advise current trust protectors, or even serve as trust protector through an affiliated company, TrustProtector, LLC.