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CONSTANT LAW GROUP PC

Estate Planning • Wealth Preservation

What's Inside

- PROVIDING FLEXIBILITY BY ADDING TRUST PROTECTORS TO YOUR ESTATE PLANNING



Constant Law Group PC
George Constant

52 Waltham Street
Lexington, MA 02421

(888) 849-5993

info@constantlegal.com
www.constantlegal.com

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Providing Flexibility by Adding Trust Protectors to Your Estate Planning

Trust protectors (aka Trust Advisors) have long been used in British Commonwealth countries, originating with offshore asset protection trusts. With these trusts, their role was limited mostly to overseeing the foreign trustee and to make sure the trust maker's intent was fulfilled.



Today, trust protectors are increasingly being used with trusts that are located here in the U.S. And, while their main job is still to oversee the trustee and make sure your intentions are followed after unforeseen changes in the law and other matters, they can be given additional duties that will provide you and your beneficiaries with added flexibility, security and peace of mind.

In this issue of *The Constant Quarterly*, we will look at the role of a trust protector, the varied powers one can be given, who should and should not be named as one, and how a trust protector can ensure your plans are interpreted and carried out as you intended.

WHAT IS A TRUST PROTECTOR?

A trust protector is someone you name in your trust document to oversee your trustee and make sure your trust carries on in the way you intended. This should be a trusted friend or advisor, someone who knows and understands your motives, family values and desires when you created your trust. In the case of a trust that will last many years, like a multi-generational trust, a trust protector is often an institution rather than a specific person.

A trust protector can begin to act immediately (for example, if your trust is irrevocable), or can take an active role only under certain circumstances (for example, at your incapacity or death). Think of your trust protector as your substitute,

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someone who can speak for you if there is uncertainty in interpreting your trust's instructions, or the law changes and that change affects your trust. Your trust protector also can provide guidance for the trustee and protect your beneficiaries from a trustee that is not meeting its responsibilities, is overreaching, or is unresponsive.

HOW MUCH POWER SHOULD YOU GIVE YOUR TRUST PROTECTOR?

The trust protector's duties and powers are defined in the trust document, and can range from extremely limited to extremely broad. How much power you give your trust protector is completely up to you. Traditionally, the trust protector's role has been a defensive one: to ensure that the trustee carries out the grantor's wishes and to protect the beneficiaries from an under-performing or over-reaching trustee. But if you give your trust protector more power, the role can become a proactive one, allowing your trust protector to act before wrongs occur.

Some of the duties and powers you can give your trust protector include:

Oversee, Remove and Replace the Trustee

Your trust protector can oversee your trustee, providing guidance in interpreting your trust's instructions and holding the trustee accountable. You can also give your trust protector the power to remove and replace the trustee. This authority can be restrictive, limited to specific bad behavior by the trustee that can include being unresponsive to the beneficiaries, not providing acceptable recordkeeping, reporting and tax filings, or

charging too much for services. The authority can also be extensive, allowing the trust protector to remove and replace the trustee for no specific reason (without cause). Usually potential replacements (successor trustees) are named in the trust document, but it may also be possible for the trust protector to select a successor trustee.

Just having these oversight provisions in place is often enough to keep a trustee in line. And if it does become necessary to remove a trustee, it is much easier for the trust protector to do this (because he or she already has the authority) than for the beneficiaries to reach

an agreement and ask for court removal, which is a time-consuming, expensive and unpleasant procedure.

You can also allow your trust protector to control spending by the trustee, and even limit the trustee's compensation, which can go a long way toward preventing disputes.

Resolve Disputes

You can also make your trust protector the mediator if disputes should arise between co-trustees, between the trustee and a beneficiary, or even among beneficiaries. Having the trust protector as the final arbiter in disputes over interpreting the provisions of the trust document can sometimes avoid costly and unpleasant trust litigation.

You could even give your trust protector the ability to sue or defend lawsuits involving the trust assets.

Modify Your Estate Plan

You may also want to allow your trust protector to actually make some changes to your trust. For example, you could allow your trust protector to change the situs (location in which the trust is regulated) to a state that has more favorable asset protection or income tax laws, should the need arise.

You could also give your trust protector the power to amend or revoke the trust agreement, in its entirety or in part; to add or delete specific beneficiaries or classes of beneficiaries; to change the terms of distributions to beneficiaries; even pour into another trust for the same beneficiaries, if your state allows that. These powers may

be extremely beneficial to the trust's ability to follow your intentions as tax laws change, as well as to protect the assets from potential predators and creditors.

Delegate Responsibilities among Advisors

Traditionally, and still with many trusts, the trustee handles everything—recordkeeping, tax returns, distributions, investing, etc. But over time, people have discovered that it is beneficial to allocate some of this responsibility to different parties that have different strengths.

Consider giving your trust protector the ability to appoint, oversee and substitute other professionals. For example, the management of your trust could be divided like this:

- *An Administrative Trustee* maintains trust records, accounts, and tax returns. If the trust is governed by laws in a different state (often for tax or asset protection reasons), the administrator will usually be a local institution or professional.
- *A Distribution Trustee or Adviser* that has discretion and can make or withhold distributions from the trust to the beneficiaries. Typically this will be an objective third party, which insulates the trustee from pressure and liability associated with the power to distribute trust assets. This is especially important if a beneficiary's creditor tries to force distributions from the trust.
- *An Investment Trustee or Adviser* oversees or directs trust investments, and may be granted specific powers, including: to hold, maintain or cancel life insurance; to direct the sale or exchange of property; and to open, manage and close accounts. A general trustee is held to the prudent investment standard because of its fiduciary duty and, as a result, has restrictions on the investments it can make. Having an investment advisor that is not bound by the prudent investor rule or held to the same standard will provide more flexibility in investments.
- *The "General" Trustee* handles everything that is not delegated.

WHO SHOULD SERVE AS TRUST PROTECTOR?

Ideally, your trust protector should be someone who knows you, your motives, desires, and intentions when you established your trust. It cannot be you or a family member who is a beneficiary of your trust because of possible tax complications. An unrelated third party—a family friend, an advisor, the attorney who drafted your trust, or your family CPA—is often the best choice. They obviously must be willing to serve in this capacity, and your trust document should specify if they are to be paid for their services.

Test Your Knowledge

1. **Using a trust protector is a new concept in estate planning. True or False**
2. **A trust protector's main job is to keep the beneficiaries in line. True or False**
3. **How much power you give your trust protector is up to you. True or False**
4. **A trust protector can only remove a trustee for very bad behavior. True or False**
5. **A trust protector is never permitted to make changes to the trust document. True or False**
6. **A trust protector is a good choice to be a mediator between the trustee and the beneficiaries. True or False**
7. **Your trust protector should be someone who knows and understands your motives, family values and desires when your trust is created. True or False**
8. **A trust protector can protect your beneficiaries from a trustee that is not meeting its responsibilities, is overreaching or is not being responsive. True or False**
9. **The trustee is required to handle all administrative and investment duties of your trust and can never delegate to others. True or False**
10. **You can be your own trust protector. True or False**

Answers: 1, 2, 4, 5, 9 and 10 are false. 3, 6, 7 and 8 are true.

Planning Tip: There is currently very little case law on trust protectors, and they are not required by law to be fiduciaries, as trustees are. Your trust should clearly state whether you want your trust protector to act in a fiduciary capacity and be held to a higher standard, or not act in a fiduciary capacity.



WHO SHOULD HAVE THE POWER TO REMOVE OR REPLACE THE TRUST PROTECTOR?

This probably should not be you, unless the replacement is explicitly limited in the document to someone who is not related or subordinate to you. You could possibly give this power to the beneficiaries or an unrelated third party. Leaving this decision to the courts would be time-consuming and costly.

Planning Tip: If your plan has asset protection elements, no beneficiary should have the power to remove or replace the trust protector. Doing so could cause your trust to be under the control of a beneficiary and that could put the entire asset protection part of your plan in jeopardy.

IS A TRUST PROTECTOR RIGHT FOR YOU?

The use of trust protectors is an excellent way to provide added flexibility, security and peace of mind in trust planning, especially since you can control how much power the trust protector is given. If you would like to discuss adding a trust protector to your estate planning, please call our office. We are ready to help.



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