

The Role of the Trust Protector



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Since approximately 20 states have modified or abolished the rule against perpetuities, the role of a trust protector is becoming more common in irrevocable trust documents. The trust protector is also sometimes called a special trustee or trust advisor. While the name is not that important, the role certainly can be.

The role of the trust protector is normally a dormant role with a required review of the actions of the trustees typically occurring every 5 to 10 years or as needed. For example, a trust protector can mediate between two different classes of beneficiaries such as income and residuary beneficiaries in the event of a dispute or disagreement. Alternatively the trust protector can be set up as the "decision-maker" rather than a mediator. The trust protector can be given the power to decant or terminate a trust. Trust protectors can also be given the right to settle disputes between the trustee and the beneficiaries.

In some states, the grantor may retain the ability to name a substitute trust protector in the future due to the death or resignation of a trust protector. However, generally speaking, the trust protector should be independent of the grantor and naming the grantor as a trust protector would not be appropriate as the grantor should not retain any decision making power with respect to the trust. Similarly, grantor should not have the power to remove the trust protector, but a third party can be named in the trust who can be given the power to remove the trust protector.

The trust protector should be compensated and permitted to hire attorneys and accountants. Since trusts can run for seven or more generations (depending on the state), flexibility must be stressed. For example, with changes in medical science, questions will arise that we have not currently dealt with (i.e., should human clones be treated as heirs and, if so, are they treated as descendants).

In preparing a trust with a trust protector, try to think back to where we were socially seven generations ago (approximately the 1860s during the American Civil War). Consider a trust as a "compass," a written guide of the grantor's intentions; not specific directions to invest in specific stocks (such as railroad and steel stocks which may have been a good investment after the Civil War or auto companies in the 1950s). But think generally about what the grantor wants done with trust funds, and what direction, if any, he or she wants to leave descendants. Is it important they work for a living? Have charitable intent? Be well-rounded? Raise a family? There is a real need to recognize that in 2160 societal norms will probably be totally different than they are now. Therefore, the trust compass should place a greater emphasis on indicating the general concepts and values that the trust is trying to promote.