



Special Needs Trusts and Trust Protectors

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What Is a Trust Protector?

A trust protector is a person or entity named in the trust agreement who will help ensure that the special needs trust (SNT) is well managed by the trustee. The trust agreement spells out the extent of the trust protector's responsibilities – the trust protector can monitor or direct the trustee's actions, either periodically or if a problem arises.

Typically, the beneficiaries of a trust monitor the trustee's performance and make sure the settlor's wishes are carried out. However, if the beneficiary of an SNT is unable to supervise the trustee due to the nature of his or her disability, a trust protector may provide this important oversight. The trust protector affords an extra set of eyes and ears to ensure that the SNT is managed well, complies with laws and regulations governing SNTs, and meets the beneficiary's needs.

What Are the Advantages of a Trust Protector?

Trust protectors of irrevocable trusts like an SNT provide flexibility if legal revisions are necessary due to changes in the law or the beneficiary's life circumstances. Absent an appointed trust protector, irrevocable trusts can usually be modified by agreement of all the parties, court order, or decanting. These alternatives can be costly and cause delays. For example, Medicaid eligibility rules are strict, complex, and subject to change. They affect both distribution and administrative provisions of the SNT. When regulatory changes occur, a trust protector may step in to revise the SNT so that eligibility is preserved without the need to go to court.

If conflicts or misunderstandings arise between the beneficiary and the trustee, the trust protector can facilitate communication. Importantly, the trust protector may be empowered to terminate and replace a trustee who is not performing its duties satisfactorily for the benefit of the beneficiary.

Who Should Be a Trust Protector?

Each special needs trust is different, and each beneficiary has unique needs that determine who is the most qualified person to serve as trust protector. In some situations, a family member or close friend might be appointed. In other circumstances, it is preferable to engage a professional fiduciary, accountant, trust company, attorney, or nonprofit organization. More than one trust protector can be selected to address multiple needs, e.g., one person to provide investment oversight and another to monitor distributions. In all cases, it is important to choose someone who is honest, competent, and trustworthy.

Consider Emily's situation. She is an adult with special needs whose parents established an SNT for her that will become effective upon their death. Emily lives in New Mexico, but the rest of her family lives in Montana. She has a close relationship with her sister who advises her about managing her finances. However, Emily doesn't want her sister to serve as trustee because they live so far apart, and her sister is very busy and doesn't have time to fulfill the role of trustee. The trustee is a local professional trust company with experience managing SNTs. Since the professionals are not familiar with Emily or her situation, her sister can perform the less demanding role of trust protector. As a result, a person Emily knows, loves and trusts will be able to appoint or change trustees, monitor financial activity, and help Emily communicate with the trustee.

On the other hand, the trustee for Jay's SNT is his mother, who has been managing his public benefits for decades. The successor trustee is also a trusted family member. However, Jay's mother knows that administering an SNT is complicated, and mistakes can cost her son the benefits he needs. Jay's SNT provides for an experienced professional to serve as trust protector who oversees compliance with myriad and complex regulations governing special needs trusts.

What Powers Should a Trust Protector Have?

To avoid conflict and ensure the SNT's purpose is carried out, the powers of a trust protector must be specifically and unambiguously spelled out in the SNT to the greatest extent possible. Powers will vary depending on the needs of the beneficiary, the skills and knowledge of the trustee, and the settlor's wishes. The parties should determine the nature and extent of the powers based on careful consideration and comprehensive analysis of the reasons and purposes for creating the SNT.

A trust protector often has the power to review financial activity, reports, and accounts. Commonly, a trust protector also has authority to terminate, replace, or appoint a trustee if the trust protector finds it advisable. The trust document should spell out conditions that

would trigger trustee replacement, e.g., “at will” or “upon a showing of reasonable grounds.”

Other powers the SNT may assign to the trust protector include, but are not limited to, the following:

- Modify the terms of the trust in response to changes in law or regulations governing public benefits or tax laws;
- Change the trust’s state of domicile or situs;
- Mediate disputes among trust parties;
- Advise the trustee;
- Interpret the terms of the trust;
- Veto or direct distributions;
- Assist in making investment decisions; and/or
- Change distributions from the trust based on changes in the beneficiary’s life.

What Is a Trust Protector’s Liability?

State laws are inconsistent regarding the duty of care owed by the trust protector to the settlor, the trust, and the beneficiaries. If not explicitly stated in the SNT that the trust protector is a fiduciary, state law will determine if the trust protector is a fiduciary or not. Consequently, it is imperative that drafting attorneys know the relevant state law in order to assign the desired duty of care to each power the trust protector may exercise.

This is a relatively new, somewhat uncertain, and evolving area of trust law. The trust protector may have liability despite language in the trust document that absolves him or her of any duty of care. In 2017 the Uniform Law Commission completed the Uniform Directed Trust Act detailing the role of trust protectors. As of January 2022, sixteen states have enacted the Uniform Directed Trust Act and another two have introduced the act. In some jurisdictions any act of the trust protector that would create a fiduciary duty if performed by the trustee creates the same fiduciary duty when performed by the trust protector. Frequently, state statutes explicitly allow provisions in the SNT to override the statute with respect to the duty of care.

Whatever the level of liability, the trust should be as specific as possible to achieve a reasonable balance. If the trust protector has a fiduciary duty with regard to all actions or inactions, it may be challenging to find someone willing to serve in the role. On the other

hand, relieving the trust protector of all liability may create unreasonable risk for the beneficiary.

Another option may be to have the drafting attorney write a provision to appoint a trust protector at later date when such a role is necessary. The attorney may draft the trust with the trust protector provisions, and then state that a trust protector may be appointed at any time by the settlor, by the drafting attorney, or by a court. By allowing such flexibility, the trust protector may be appointed to make a required change, and then resign his or her duties or be removed, which may avoid any legal fiduciary duties that may attach to such a position.

Although executing an irrevocable trust may seem daunting, a trust protector may provide the reassurance that if the law or circumstances change, he or she can assist with making any required changes.

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