



Trust Protectors for Special Needs Trusts

The Voice is the e-mail newsletter of The Special Needs Alliance. This installment was written by Special Needs Alliance member Gregory Wilcox of Berkeley, California. Greg's firm focuses on government benefits and estate planning for the elderly and for individuals with disabilities. He is a Certified Elder Law Attorney (CELA) and co-author of Special Needs Trusts: Planning, Drafting, and Administration and of California Elder Law Resources, Benefits, and Planning. He is a core faculty member in attorney training conferences given by California Advocates for Nursing Home Reform (CANHR) in San Francisco, and frequent contributor of articles on special needs topics in CANHR's Legal Network News.

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By Gregory Wilcox

Loving parents set up a special needs trust (SNT) for their child with disabilities and name themselves as trustees. They intend to fund it with assets upon their deaths and provide for the appointment of the husband's sister as the successor trustee when both parents are gone. The lawyer who drafts the trust realizes that the sister might not be available to serve as successor trustee when the time comes because she is about the same age as the parents. However, no other family members or friends are suitable to serve, so the drafter recommends naming a local younger attorney to serve. In all likelihood, the younger lawyer will survive the parents and still be available to serve as successor trustee for the child. How could this plan go wrong?

The problem with this recommended solution is that no one is given authority to supervise the younger successor trustee. This is particularly troubling because he is a stranger to the family and has minimal experience in managing trusts. Moreover, a core characteristic of a SNT is the trustee's broad discretion over distributions: whether, when and what kind of distributions to make. The parents are understandably not comfortable with a proposed plan that vests such broad discretion and authority in a person they do not know, without any check on its exercise.

Typically, a state's trust law assumes that trust beneficiaries will supervise the trustee, and that beneficiaries will call the trustee to account if the trust is mismanaged. However, that expectation cannot be met if the trust beneficiary has a disability that affects his capacity to understand financial matters. In many cases, the beneficiary of a SNT is unable to adequately supervise the trustee's actions.

One solution to this common problem is the appointment of a Trust Protector. The SNT agreement names a person to monitor the trustee's actions periodically to help ensure that the trust is managed well. The Trust Protector's primary duties are to protect the interest of the SNT beneficiary, to uphold the settlors' intent, and to counsel a misguided trustee. While the concept of a Trust Protector has merit, implementation raises many questions.

First, who should be appointed as a Trust Protector? [Sometimes there is a family member who does not have the time to serve as a trustee but is able to undertake the less labor intensive role of a Trust Protector.](#) Sometimes private professional fiduciaries are willing to serve as a Trust Protector, particularly if an independent party would be helpful in that role. The SNT may also name an accountant, attorney, or nonprofit organization to serve in this role.

A second consideration is the breadth of authority the Trust Protector should be given (i.e., the Trust Protector's powers). At a minimum, a Trust Protector should have the power to review the reports and accounts of the trustee (which is, of course, what a trust beneficiary without disabilities would typically be capable of doing). Further, a Trust Protector usually is given the authority to terminate the trustee if the Trust Protector decides that a replacement is necessary or advisable. Finally, a Trust Protector often has the right to name a replacement trustee if the named trustee is removed from office, resigns, or is unable to continue to serve.

However, the power to terminate an existing trustee and hire a new trustee raises additional questions. For instance, should the Trust Protector be given the authority to terminate the trustee "at will" or only upon a showing of "reasonable grounds"? What grounds are considered "reasonable" when it comes to replacing a trustee? In an effort to avoid giving the trustee too much power and discretion, the settlors of the SNT similarly should avoid giving the Trust Protector too much authority.

A Trust Protector is often given additional authority beyond the right to review trustee accountings and replace trustees. For example, a SNT sometimes gives a Trust Protector the power to revise certain provisions in the trust agreement. In this way, a Trust Protector is able to keep pace with changes in tax laws and public benefit eligibility rules, and to respond to the beneficiary's current needs and capabilities. However, any powers to revise the trust agreement should be guided by an intent to preserve or maximize the beneficiary's eligibility for public benefits. If no limitations are placed on the Trust Protector, his or her revisions to the SNT agreement, or even the mere existence of the power to revise the agreement, might result in unintended consequences that risk undermining the purpose and effectiveness of the SNT. A Trust Protector also may be given certain less frequently encountered powers, including the authority to name an advisory group to guide the

trustee's actions, to mediate disputes between the trustee and beneficiary, or to control the costs of trust administration. The Trust Protector also might be allowed to add or remove successor beneficiaries, to approve distributions, to control investments or investment advisors, and to deviate from express trust provisions, such as changing the identity of named successor trustees. These are but a few of the possible powers that may be given to a Trust Protector.

A third question is: what are the actual duties of a Trust Protector? Certainly one of the Trust Protector's primary duties is to ensure good trust management by reviewing the trustee's periodic accountings and reports. Some Trust Protectors also have a duty to consult with the trustee on an annual or other periodic basis. It is important to consider how much responsibility to vest in a Trust Protector, and to outline the consequences of the Trust Protector's failure to perform. For instance, should the trust agreement make the Trust Protector legally liable to the SNT or its beneficiary if the Trust Protector does not adequately review accountings and reports? Should the Trust Protector be liable if he or she does not terminate the trustee for cause, or if the Trust Protector was not careful enough in choosing a replacement trustee? Does the Trust Protector have a "fiduciary duty" (a very high level of care) to the beneficiary, similar to that which the trustee owes to the beneficiary? If the persons creating a SNT ascribe too many duties and too high a level of care to the Trust Protector (especially if a failure to perform makes a Trust Protector legally liable to the SNT or the beneficiary) they may find that no one is willing to take on the job!

A fourth question is: what are the rights of a Trust Protector? While a Trust Protector may have the right to review all trustee reports and accountings, less obvious is the right of a Trust Protector to be paid for his or her time undertaking these duties. It is a rare Trust Protector who will accept such responsibilities without compensation. Limiting a Trust Protector's compensation to a reasonable fee based on an arm's length standard should help to avoid many of the conflicts of interest that might arise, considering that the Trust Protector is being paid by the very trustee that he or she supervises.

Finally, SNT settlors who are considering naming a Trust Protector should work with an experienced drafting attorney to address a number of other factors, including:

- Any adverse tax implications caused by giving a Trust Protector broad powers, e.g., if the Trust Protector can appoint himself or herself as a trustee, or change the trust provisions to benefit the Trust Protector personally.
- Necessary coordination of the Trust Protector's authority and duties with those of the trustee and any [advisory committee](#) or professionals appointed to guide the trustee.

- *Minimizing the risk that no Trust Protector will agree to serve if the duties are overly burdensome or unnecessarily expose the person serving to legal liability. (Accordingly, wise trust settlors may encourage their proposed Trust Protector to participate in the drafting process.)*
- *Drafting to deal with the lack of statutory authority regarding Trust Protectors in some states. There is no specific law currently (2017) authorizing and regulating Trust Protectors except in eleven states: Alaska, Arizona, Delaware, Idaho, Michigan, Nevada, New Hampshire, South Dakota, Tennessee, Vermont, Wisconsin, and Wyoming. As a result, the trust must be carefully drafted to provide necessary definitions and rules for handling issues that may arise with the Trust Protector.*

A Trust Protector may be well suited to supervise the trustee of a SNT. A Trust Protector also serves as an essential safety valve to address changes in circumstances during the term of the trust. However, naming a Trust Protector requires a very thoughtful review of the various implications of the position, and careful drafting to address all of the questions that should be answered in each individual case. A well-crafted Trust Protector provision adds significant value to a SNT.

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