

strategies

TRUST PROTECTOR STRATEGIES

The term “Trust Protector” is not familiar to many advisors or to many sophisticated clients who are interested in pursuing advanced estate planning with a maximum amount of control. A trust protector is, in essence, a “watchdog”, a person who watches over the operation of a trust to ensure that proper decisions are being made. A trust protector would typically be a trusted advisor, such as a close friend, business partner or a relative, who is given one or more special powers over the trust or over the trustee, but who also has no day-to-day fiduciary responsibilities. Trust protectors have been used for hundreds of years to provide flexibility to a trust document by vesting powers in a third party which the person who settled or created the trust could not or did not want to retain. In the past they may have been referred to as an “Independent Trustee”, a “Special Trustee” or as the “Trust Advisor”, but regardless of the name, their function and responsibilities are essentially the same.

The use of trust protectors in the United States has become relatively common with irrevocable trusts to ensure that, in the event tax changes or beneficiary changes are required, someone is able to bring the irrevocable trust into compliance with the new laws. At times, revocable living trusts or “normal” estate planning trusts will have trust protector provisions as well, especially with large estates or long-term dynasty trusts.

The South Dakota Trust Protector Statute describes a trust protector’s powers rather succinctly as follows:

“The powers and discretions of a trust protector shall be as provided in the governing instrument and may, in the best interests of the trust, be exercised or not exercised in the sole and absolute discretion of the trust protector and shall be binding on all other persons. Such powers and discretion may include the following:

(1) To modify or amend the trust instrument to achieve favorable tax status or because of changes in the Internal Revenue Code, state law, or the rulings and regulations thereunder; (2) To increase or decrease the interests of any beneficiaries to the trust; and (3) To modify the terms of any power of appointment granted by the trust. However, a modification or amendment may not grant a beneficial interest to any individual or class of individuals not specifically provided for under the trust instrument.”

Other definitions simply provide that the trust protector can act in accordance with the trust instrument that has appointed them, including the power to remove and appoint trustees.

ASSET PROTECTION TRUSTS

When dealing with asset protection trusts, both Domestic Asset Protection Trusts (DAPT) and Offshore Asset Protection Trusts (OAPT) will contain provisions appointing a trust protector and vesting the trust protector with certain powers. Some of the more common powers are: (i) to hire and fire trustees; (ii) to veto or stop a trustee’s intended actions; (iii) to approve trust accountings

for any minor or disabled beneficiaries; (iv) to amend the trust to maintain compliance with changing legislation or tax laws; and (v) to add or remove trust beneficiaries.

Although the trust protector has no full-time responsibilities, they do fulfill a very important role in watching over the trustees and the administration of the trust.



For Further Information on Estate Planning or Asset Protection Strategies, Please Contact:

Law Offices of Robert D. Gillen, Ltd. in Arizona at 480.513.3300 or in Illinois at 630.955.9400.

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