Trust Protectors – Should You Have One?

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When creating a trust, determining who you want to serve as trustee(s) and benefit from the trust as beneficiaries are decisions that need to be made for every trust. The role of "trust protector" may not be as commonly known or understood, but the decisions whether to have one and, if so, who might best serve in the role, can be key to a smooth administration. A "trust protector" can provide valuable trustee oversight, flexibility, and inexpensive revisability — especially in long-term or complex trust arrangements. Deciding whether to have one and, if so, who might best serve in the role, can be key to a smooth trust administration.

What is a Trust Protector?
A "trust protector" is a person or entity appointed to monitor and, if necessary, intervene in the administration of a trust. Unlike a trustee, the trust protector does not manage trust assets or distributions. Instead, they are granted specific powers, defined in the trust document, to ensure the trust continues to operate in line with the grantor's intent.

Typical powers of a trust protector may include some combination of the following:

- Removing or replacing a trustee
- Amending trust provisions to comply with changes in law
- Resolving disputes between trustees and beneficiaries
- Approving or vetoing certain trustee actions

This role is especially useful in irrevocable trusts, where flexibility is generally pretty limited.

Does My Trust Need a Trust Protector?
Not every trust requires a trust protector, but there are several scenarios where appointing one may make more sense:

- **Long-Term Trusts**: Trusts designed to last decades or generations benefit from a mechanism to adapt to changing laws and circumstances.
- **Irrevocable Trusts**: Since these trusts are difficult to modify, a trust protector can provide limited flexibility without court involvement.
- **Complex Family or Business Dynamics**: If there's potential for conflict or concern about trustee performance, a trust protector can serve as a neutral safeguard.

- **Asset Protection or Offshore Trusts**: These often include a trust protector as a standard feature to enhance oversight and control.

How Do I Choose the Right Trust Protector?
If you've chosen to include a trust protector, how do you how do you decide which person is the right fit for your particular trust? Electing the appropriate trust protector is critical to ensuring the role adds value rather than complexity, and every situation should be evaluated on its own merits. That said, you might want to consider some or all of the following when making your choice:

- **Independence:** Ideally, the trust protector should not be either a beneficiary or a trustee to minimize or avoid altogether potential conflicts of interest.
- **Expertise:** Legal, financial, or fiduciary experience is beneficial, especially if the trust is complex or long-term.
- **Trustworthiness:** As the name implies, this role requires someone who can be relied upon to act in good faith and consistently with and in furtherance of the grantor's intent.
- **Availability:** The trust protector should be willing and able to serve for the duration of the trust or have a succession plan in place.

Often, clients choose a trusted advisor, attorney, or corporate fiduciary to serve in this role.

Common Misconceptions About Trust Protectors
Despite their growing use, the purpose and/or responsibilities of trust protectors can be misunderstood. Here are a few common misconceptions:

- **"Trust protectors replace trustees."** It depends on what is meant by "replace" in this context. They generally oversee and intervene with the authority to replace one or more trustees with another only when necessary (such as when a trustee is perceived to be abusing his or her position or failing to carry out the terms or intentions of the trust). Trust protectors do not, however, manage assets or make routine decisions by substituting or "replacing" their own judgment for that of the appointed trustee(s).
- **"Only large or offshore trusts need a trust protector."** While the use of trust protectors is common for large or offshore trusts, trust protectors can be helpful in domestic estate plans, especially where flexibility or oversight is desired. Reasons why a particular trustee may have been named at the time of drafting may no longer apply when the time comes. Successor trustees may not be in a position to step in as established in the trust (due to age or health issues, for instance). With a trust protector in place, it can be like having an added layer of defense against life's unexpected twists.
- **"Appointing a trust protector complicates the trust."** If "complicates" means the addition of more words, then yes, the addition of a trust protector does complicate things. Nevertheless, when properly drafted, a trust with a built-in protector can simplify administration of the trust and reduce, or even eliminate altogether, the need for court involvement. Take the situation faced by Jimmy Buffett's widow. With Jimmy's former legal counselor/advisor and his wife on equal footing as trustees, they quickly deadlocked over what can, should, or must be done with the assets and distributions. A well-chosen trust protector in Jimmy Buffett's case could have served as the needed tie-breaking vote and/or insisted upon a "change in attitude" or occasioned a "change in latitude" by ousting whichever of the trustees, in the judgment of the trust protector, seemed to be missing the settlor's intention, or as Jimmy might have said, acting as the "people our parents warned us about."

Final Thoughts
A trust protector is not an essential requirement but, in the right circumstances, can be a valuable addition to a trust. The presence of a trust protector can serve as a "check and balance" feature to help ensure your trust remains effective, adaptable, and aligned with your goals over time by providing oversight after you passed on.

If you're wondering whether a trust protector is right for a new trust you are considering, simply be sure to mention it to your estate planner/drafting attorney. If considering revising an existing trust to add a trust protector, seek a second opinion, separate from the initial drafting attorney, to evaluate your specific needs and objectives and whether these are more likely to be met with or without a trust protector.