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Trust Protectors

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Trust protectors provide flexibility in dealing with problems that develop later with trusts, making it possible to change trustee personnel and even change the terms of the trust without the need for court action. Selection of the trust protector is important, as are the protector's potential liabilities for acting. This paper discusses the many opportunities for trust protectors in trust planning. It then discusses the statutory provisions governing trust protectors and some of the problems that may arise. Finally, it will go through a fairly detailed trust protector provision and examine the reasons for the various provisions.

1. Uses of Trust Protectors

The most obvious use of a trust protector is to make changes to trustee personnel. This is especially useful in special needs trusts, since it is the author's understanding that the beneficiary may not be given a removal and replacement power without disqualifying the trust.

Another key use, especially in special needs trusts, is to permit the protector to amend the trust to comply with statutory and regulatory requirements.

But the range of actions that a trust protector may be authorized to take is virtually limitless. The Uniform Directed Trust Act, Section 6, Comment, anticipates that a trust protector or "director" could be given the authority to take these actions:

- acquire, dispose of, exchange, or retain an investment;
- make or take loans;
- vote proxies for securities held in trust;
- adopt a particular valuation of trust property or determine the frequency or methodology of valuation;
- adjust between principal and income or convert to a unitrust;
- manage a business held in the trust;
- select a custodian for trust assets;
- modify, reform, terminate, or decant a trust;
- direct a trustee's or another director's delegation of the trustee's or other director's powers;
- change the principal place of administration, situs, or governing law of the trust;
- ascertain the happening of an event that affects the administration of the trust;
- determine the capacity of a trustee, settlor, director, or beneficiary of the trust;
- determine the compensation to be paid to a trustee or trust director;

- prosecute, defend, or join an action, claim, or judicial proceeding relating to the trust;
- grant permission before a trustee or another director may exercise a power of the trustee or other director; or
- release a trustee or another trust director from liability for an action proposed of previously taken by the trustee or other director.

Of course, the nature of the trust will dictate which powers make sense.

2. Statutory framework

Texas has a directed trust statute – Texas Trust Code Section 114.0031. Since Delaware enacted the first directed trust statute in 1986, most states have enacted directed trust statutes.

The Texas statute provides a non-exclusive list of actions a protector can take:

- (1) The power to remove and appoint trustees, advisors, trust committee members, and other protectors;
- (2) The power to modify or amend the trust terms to achieve favorable tax status or to facilitate the efficient administration of the trust; and
- (3) The power to modify, expand, or restrict the terms of a power of appointment granted to a beneficiary by the trust terms.

Tex. Trust Code § 114.0031(d).

The Texas statute provides that the advisor (protector) is a fiduciary owing fiduciary duties to the beneficiary except in one case: If the protector's only power is to remove and appoint trustees, advisors, trust committee members, or other protectors and the protector does not exercise that power to appoint the protector's self. This is an important exception for special needs trusts, where it may be difficult to find a protector who is willing to expose herself to potential liability for changing trustees.

So long as there is no willful misconduct or gross negligence on the part of the trustee, the Texas statute protects trustees who act in compliance with a direction from the protector. Also, unless the trust terms provide otherwise, the trustee has no duty to monitor the conduct of the protector, provide advice to the protector or consult with the protector, or communicate with or warn or apprise any beneficiary or third party concerning in instances in which the trustee would or might have exercised the trustee's own discretion in a manner different from the manner directed by the protector.

3. Specific trust protector provisions

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