



# Using Trust Protectors

Presented by the Hammond Law Group

# Introduction

- **Jessica Showers**

- **Juris Doctorate from New England's School of Law in Boston, Massachusetts**
- **Member, Colorado and El Paso County Bar Associations**
- **Member, American Academy of Estate Planning Attorneys**
- **Member, El Paso County Bar Association, Probate Section, Vice Chair.**

# What is a Special Co-Trustee?

- **Trust Protector/Special Co-Trustee/Trust Advisor**
  - **What is it?**
    - Nominated by Trustor to ensure Trustee carries out Trustor's intent;
    - Holder of discretionary powers;
    - A disinterested third-party
      - But, maybe a fiduciary, unsettled law in other states – *Best Practice*: to act in accordance with fiduciary act
  - **Qualifications**
    - May not serve as Trustee at the same time - but could have been a *former* Trustee
  - **Independent**
    - Not a beneficiary
    - Not the Trustor/Grantor
    - Not “related or subordinate” to
      - A beneficiary
      - A member of the family of the Trustor/Grantor or beneficiary
      - If over 2% of compensation from someone, subordinate to them

# What is a Special Co-Trustee? (cont'd)

- **Appointment - How is one appointed?**
  - Nominated by the Trustor/Grantor in the trust document (*Best Practice*); OR
  - First independent successor acts; OR
  - If no independent successors
    - Majority of successors appoint one – this is generally (hopefully) outlined in Trust document
- **Authority**
  - In General, comes from Trust document itself – may be some state law – Colorado Uniform Trust Code – C.R.S. 15-5-807 Delegation by Trustee
  - Common Areas:
    - Valuation; Exercising Rights/Powers under the Trust; Amending the Trust; Consultation; Resolving disputes; Correction of Errors; Removal of Trustee

# Using Trust Protectors: Values & Exercising Rights

- **Valuation & Exercising Rights Under Trust**

- **Valuation**

- *Example:*

- The Trustee is a beneficiary and is to be given \$1 million worth of closely-held stock. The Trust Protector would be asked to value the stock. There would be an inherent conflict of interest in having the ordinary Trustee value the stock. This might also be the case when the stock is going to a beneficiary other than the Trustee, especially when the Trustee is a remainder beneficiary.

- **Voting Rights**

- *Example:*

- The Trustee is an executive at Family Business. Exercise of the rights to vote the shares of Family Business is or may be viewed as a conflict of interest. For example, the trust could vote the shares to increase salaries of the executive / Trustee. Therefore, the Trust Protector would be asked to exercise those voting rights.

# Valuation & Exercising Rights (cont'd)

- **Life Insurance Policies**

- *Example:*

- The trust owns a life insurance policy on the lives of each child. The Trustee is one of the children/beneficiaries. The Trustee would be deemed to have an incident of ownership over the policy, causing inclusion in the Trustee's estate. This provision requires the Trust Protector to exercise powers over the life insurance, thereby removing the incidents of ownership from the Trustee. The removal of the incidents of ownership removes the estate taxation in the Trustee's estate.

- **Discretionary Distributions of Trust Income and Principal**

- *Example:*

- The Trustee is the income beneficiary of the trust. An issue arises regarding whether a special dividend is principal or income. The Trust Protector would be brought in to make the decision whether the special dividend is "income" or "principal", thus removing the conflict of interest.

# Valuation & Exercising Rights (cont'd)

- **Gifting Powers**

- *Example:*

- The trust provides authority for gifting to descendants in unequal amounts. The Trustee and the Trustee's descendants may be permissible donees. To the extent the Trustee wishes to favor them, the Trust Protector would be appointed to remove the conflict of interest. Also, this removes the risk of a General Power of Appointment over the assets for the Trustee. A General Power of Appointment for the Trustee would cause estate tax inclusion in the Trustee's estate and, therefore, estate taxation.

- **Property Located In Another Jurisdiction**

- *Example:*

- The Trust Protector may appoint an Ancillary Trustee to control and administer property located in another jurisdiction.

- **Correction of Mistakes**

- **Remove/Replace Trustees**

- Can be accomplished through CO State law. Using a Trust Protector allows for the issue to be resolved internally.

# Using Trust Protectors: Amendment Powers

- **Amendment Powers:**
  - Since you don't have a crystal ball....
  - Trust Protector may be given the legal authority to amend the trust where the Trustor is unavailable to make the change.
  - When changes may be made should be stated in the Trust document. Some examples include...





# Trust Protector: Amendment Powers (cont'd)

- **Changes in Law or Beneficiary Circumstances**

- *Example:*

- One of the beneficiaries wins the lottery. While the trust requires the trust to be divided equally, everyone agrees that the assets should go to the non-winning beneficiaries. The Trust Protector can act to amend the trust to remove the bequest to the winner. Otherwise, the winner would have to make a gift to the non-winning beneficiaries, likely using their applicable exclusion.

- **Repeal of Federal Death Taxes**

- *Example:*

- The trust had been done to shelter as much as possible from the estate tax. But for the estate tax, the assets would have been given outright to the surviving spouse. In the event of a repeal of the federal estate tax, the Trust Protector could terminate the trust and give the assets outright to the surviving spouse.

# Trust Protector: Amendment Powers (cont'd)

- **Amendment Powers**
  - **Terminate the Trust**
  - **Add/Remove Beneficiaries to a Trust**
  - **Grant/modify/revoke Beneficiary's power of appointment**
  - **Change distribution standard for beneficiary**
  - **Change the Trust situs**

# Using Trust Protectors: Consultant

- **Consultation Powers:**
  - **Construe terms of the Trust and advise the Trustee and Beneficiary of the same**
  - **Interpret the right of a Beneficiary to accountings and other Trust information**
  - **Approve Trust accountings and Trustee compensation**

# Using Trust Protectors: Resolving Disputes

- **Resolution of Disputes**

- *Example:*

- A dispute arises among the beneficiaries, maybe including the Trustee. One of the beneficiaries is threatening litigation. Beneficiary 1 was to receive all household goods and personal effects. Beneficiary 2 was to receive all investment assets, such as stocks and bonds. Beneficiary 3 was to receive the remainder. The grantor/decedent owned a valuable painting, to which she was emotionally attached. The Trust Protector has the ability to resolve this dispute and keep it out of the court. The Trust Protector, if they so choose, could authorize the parties to go to court or to arbitration.

# Duties & Liabilities

- **Standard of Conduct**
  - Most likely serving in a fiduciary role
  - **CRS 15-1-103** Fiduciary definition includes:
    - Trustee;
    - Any other person acting in a fiduciary capacity for any person, trust, or estate.
- **Breach of Duty**
  - May be detailed in Trust document
  - Governed by state law
    - CO Uniform Trust Code
- **Liability to Trust or to Beneficiaries?**

# Who Should Serve as Trust Protector?

- **Independent**
  - Non-Family Member
  - Not the same entity/person as Trustee
- **Trusted Advisor**
  - Attorney
  - CPA
  - CFP
- **Nomination not required – could be appointed later**

# Why a Trust Protector is Important?

- **Carry out the true intent of the Trustor**
  - This, of course, assumes the true intent of the Trustor can be determined.
- **Save money**
  - Depends on who is appointed as Special Co-Trustee but, does save potential legal costs if court involvement for changes became necessary.
- **Save relationships**
  - Allows the disputes to be handled in, potentially, a less combative setting.
  - Avoidance of litigation