

## MARCH 2012 NEWSLETTER

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# WHAT IS A TRUST PROTECTOR?

## **NEWS ALERT:**

### **1) DECENNIAL FILING REQUIREMENTS:**

In Pennsylvania, under 54 Pa.C.S. § 503(a) there is a “decennial filing requirement” requiring corporations or other associations (which includes, by definition, corporations, limited partnerships, limited liability companies, or business trusts) to file a decennial report to reserve the use of its name, insignia, or a mark registered in Pennsylvania prior to January 1, 2002. If certain filings were not made within the ten year period of January 1, 2002 and December 31, 2011 (the “Decennial Period”), then other corporations or associations will have the right to register under your corporation or association’s name, or use your insignia or marks.

The exceptions to the decennial filing requirement differ on names versus insignias and marks. For names, there are three general exceptions to this requirement: i) a corporation or association that has made a filing within the Decennial Period except a name reservation filing; ii) a nonqualified foreign business corporation which has registered its name (as there is an annual renewal of name requirement); or iii) the corporation has filed an annual report forwarding its officer information to the Pennsylvania Department of State. For insignias and marks, the exception is if the corporation or association has made any other filing with the

Department of State during the Decennial Period.

If your corporation or association, its insignia or its mark has been in existence since prior to January 1, 2002 and the corporation or association does not fall within one of the above respective exceptions to protect its name, insignia, or mark, it is recommended to make the decennial filing to avoid another business usurping your name, insignia, or mark. We would be glad to help submit the filing, if necessary, to help ensure the protection of your name, insignia, and marks.

## 2) UPCOMING SEMINARS:

**Joseph R. Pozzuolo, J.D., B.B.A. and Jeffrey S. Pozzuolo, J.D., M.B.A., B.S., B.A.**

*“How Middle Income Families Should Prepare for Retirement”*

Wednesday May 23<sup>rd</sup> 1pm-5pm

**Judith P. Rodden, Esquire and Lesley M. Ibanez, Esquire**

*“Commercial and Residential Real Estate Practice Today: From Agreement of Sale to Closing, with Ethics”*

Wednesday June 13<sup>th</sup> 8am-12pm

These seminars are held at the Penn State University, Cooperation Extension (Doylestown)

<http://bucks.extension.psu.edu/>

1282 Almshouse Road

Neshaminy Manor Center

Doylestown, PA 18901-2896

To Register or More Information: Theresa Bloom (215) 881-7402

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## What is a Trust Protector?

A growing trend in trust planning is the use of a Trust Protector. A Trust Protector is a person the settlor or creator of the Trust appoints to ensure that the trustee carries out the settlor's wishes. In other words, a Trust Protector is the watchdog of the trust and trustee.

### **Background**

Historically, settlors appointed Trust Protectors to oversee the foreign trustees who administered their offshore asset protection trusts. Settlors would setup offshore asset protection trusts to shield their assets from the reach of the U.S. government and domestic creditors. However, in order to take advantage of the creditor protection, settlors had to appoint a foreign trustee – a person or company outside the jurisdiction of the U.S. Often a settlor would have concerns about the foreign trustee's administration or the settlor did not like ceding complete control to the foreign trustee. Thus, the settlor would appoint a U.S. Trust Protector to oversee the foreign trustee and protect the settlor's interests during the trust administration.

Over time, the use of Trust Protectors evolved domestically. Domestically, trusts

are lasting longer and longer as states have enacted laws governing the length of time a trust could last. More importantly, as Trusts have grown longer in duration, the trust assets grow. More and more, settlors began appointing Trust Protectors to add flexibility to long-term trusts and to increase the settlor's ability to control the trustee's behavior over the long haul, especially after the settlor has died.

### **The Role of the Trust Protector**

A Trust Protector is not to be confused with a trustee. A trustee works for the benefit of the beneficiaries. The Trust Protector is there to serve the *settlor's* interests. In other words the Trust Protector oversees administration of the trust. Unfortunately, vesting too much power and discretion in a trustee can increase the risk that the trustee will veer away from the settlor's original intentions in creating the trust. The Trust Protector can act as a power check on the trustee.

Furthermore, historically, beneficiaries were responsible for monitoring the actions of trustees. However, as trusts have grown longer in duration and handle greater amounts of assets and distributions, it is not realistic to expect beneficiaries to be able to watch every move of the trustee. The Trust Protector fulfills this role.

Usually, the Trust Protector is a trusted family member or friend, or business associate. For example, the Trust Protector could be the family accountant, lawyer, or other financial advisor. There are also companies that provide trust protector services. By appointing a Trust Protector familiar with the settlor's desires, the settlor can make sure the administration of the trust is aligned with how he intended it.

### **Powers of Trust Protector**

A settlor can grant almost any power to the Trust Protector. Generally, the powers of a Trust Protector fall into one of the following categories:

- Advising trustees;
- Supervising trustees;
- Overseeing distributions to beneficiaries;
- Resolving disputes; and,
- Responding to changes in law or family circumstances.

Some of the more common specific powers granted are:

- The power to amend the trust;
- The power to remove and replace a trustee;
- The power to resolve conflicts between co-trustees or trustee and beneficiaries;
- The power to veto distributions or control spending;

- The power to terminate the trust;
- The power to increase/decrease a beneficiary's interest in the trust based on changes in the beneficiaries' lives;
- The power to approve the addition or removal of beneficiaries; and/or,
- The power to approve change of proper law.

### **Situations where a Trust Protector is Recommended**

Examples of situations where using a Trust Protector would be beneficial include:

- *Long Term Trust.* If the settlor intends to setup a trust that will last several generations, he should consider the appointment of a Trust Protector. For example, dynasty trusts or generation-skipping transfer trusts have become more popular. With these types of trusts, circumstances are likely to change. The changes may be external, such as changes in the economy that affect the trust's performance or changes in tax laws, or the changes may be among beneficiaries to the trust, such as when: a) a beneficiary incurs an unexpected disability; b) a corporate fiduciary changes ownership; c) a beneficiary is undergoing a divorce; d) a beneficiary is unable to manage his estate due to illness, incompetence, addiction(s) or other similar circumstances, temporarily, or permanently; or, e) a beneficiary may need an extraordinary, unexpected one time distribution for education, marriage, divorce, buying a home or otherwise. A Trust Protector can account for and make the changes necessary when changes occur by making or withholding distributions.
- *Multiple Trustees.* If the settlor intends to appoint multiple trustees, he should appoint a Trust Protector. The Trust Protector can be the final arbiter in disputes between or among the trustees. The Trust Protector can also easily replace a difficult or underperforming trustee if necessary.
- *Trustee without Sufficient Knowledge.* A settlor may appoint an individual trustee without sufficient knowledge as to asset management and investing. In this case, the settlor could appoint a financially savvy Trust Protector to oversee the individual trustee. In another situation, the settlor may appoint a corporate trustee without knowledge as to the family dynamics or settlor's intentions. In this case, the settlor may appoint a Trust Protector who has specific knowledge of the family and family circumstances. The Trust Protector can provide the additional guidance necessary where the trustee lacks information.
- *Many Beneficiaries.* Similar to the long term trust situation, if the trust will have many beneficiaries, spread out over multiple generations, a Trust Protector is useful. The Trust Protector will oversee distributions

by the trustee making sure that the distribution scheme is aligned with the settlor's original intentions. Thus, if the settlor intended beneficiaries to receive distributions according to their needs, the Trust Protector can ensure that the trustee is favoring those beneficiaries that require it.

- *Preventing Litigation.* Perhaps the greatest use of a Trust Protector lies in its ability to prevent litigation. If there is a dispute, whether between trustees, or between trustees and beneficiaries, the Trust Protector can be the mediator and have the final say. By using a Trust Protector to resolve disputes, the trust can avoid litigation which can be costly and time consuming.

Ultimately, a Trust Protector provides additional oversight and flexibility. While a trustee's loyalty – whether to the trust or the beneficiaries – may not be clear, the Trust Protector's loyalty is always to the settlor and the settlor's intentions. A Trust Protector can help to administer the trust by monitoring the trustee's actions and making decisions in the operation of the trust and distribution of assets. Any individual desiring to establish a long term trust that potentially could have many beneficiaries or may require multiple trustees should seriously consider appointing a Trust Protector.

If you are interested in updating your Trust to include a Trust Protector, feel free to contact Joseph R. Pozzuolo, Esquire, Stephen P. Taylor, Esquire, or Jeffrey S. Pozzuolo, Esquire at our offices to obtain legal guidance to achieve, protect and ensure your original goals and original intentions are carried out.

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## **Publications**

All of the following professional publications and past newsletters written by attorneys of this office are available by clicking here: [http://pozzuolo.com/Pubs Articles.shtml](http://pozzuolo.com/Pubs%20Articles.shtml)

### **Corporate/Tax**

Design Buy-Sell Agreements For Maximum Utility

Deferred Compensation Rewards And Retains Key Employees

How To Use Non-Qualified Deferred Compensation Arrangements As A Business, Retirement And Tax Planning Tool

Protecting A Client's Business From Unfair Competition Using Restrictive Covenants

Money Purchase Pension Plan Falls Out Of Favor

Why An Employment Contract Is Mandatory

What Type of Qualified Corporate Retirement Plan Best Serves Your Business, Tax And Retirement Needs

Structuring Loans From Qualified Plans - How To Handle The Strict Tax Rules

How An S Corporation Avoids The Double Taxation Incurred When Excessive Compensation Is Treated As A Dividend

Bankruptcy - How To Prevent It And How To Cope With It Should It Happen To Your Business

How To Look, Act And Sound Like A Professional Corporation

How Mortgage Lenders Should Draft Broker Agreements To Avoid RESPA Violations

How to Structure a Suitable Buy-Sell Agreement

### **Estate Planning**

Estate Planning For Pet Owners

The Limited Liability Company -A Sophisticated Tool For Estate Planning

Diversify Strategies For An Effective Estate Plan

Use Wills To Maximize Family Protection And Minimize Tax

Six Proven Estate Planning Techniques

Divorce Raises The Need For Performing An Estate Planning Review

Divorce and Estate Planning

Remarriage Situations Can Raise Special Estate Planning Considerations

College Funding Tool Offers Estate Planning Advantage

Drafting The Durable Power Of Attorney For Wealth Protection Purposes

Why Living Wills Advance Directives Are An Essential Part Of Estate Planning

Special Needs Trust - An Estate Planning Tool For The Disabled

Adapt Estate Planning Strategies to Fit the Needs of Same-Sex Couples

***Actual resolution of legal issues depends upon many factors, including variations of facts and state laws. This newsletter is not intended to provide legal advice on specific subjects. It is to provide insight into legal developments and issues. You should always consult with legal counsel before taking any action on matters covered in our updates.***

This newsletter is courtesy of Pozzuolo Rodden, P.C.

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