

SPECIAL OLYMPICS NEWSLETTER

Trust Protector Committees for Special Needs Trusts, By A. Kel Long, III, Attorney

Special needs trust come in different forms and styles, but one common feature is that the trust is designed to last for the lifetime of our mentally disabled loved one. We also know that "lifetime" can turn out to be a long time. How then do you write a trust today that can adjust for future changes in the child's circumstances or governmental benefit programs? Just as importantly, how do you ensure that the funds are managed properly by future trustees that you may not know or have chosen? The answer, in my experience, is a Trust Protector Committee. Here are two scenarios where this will help.

First, when selecting the trustee, we may want to initially name financially skilled and trust worthy family members. That is often a good solution, but the beneficiary may very well out live those family members. This is where a bank trust department can fill the gap (or the bank can certainly be named as the initial trustee). In this writer's experience naming a bank trust department is a sound solution for a long-term trust.

But what if the originally named bank later becomes unsatisfactory? For example the bank might increase its fees significantly; the investment returns may become sub par; or the trust administrator at the bank becomes non responsive to the beneficiary's needs. The solution is to include in the trust agreement a provision to remove and replace the bank. But who should hold the power to remove and replace the bank as trustee? Certainly not the child or outsiders he or she might come under the influence of. This is where a Trust Protector Committee comprised of close relatives or friends could help. This group could hold the power to remove and replace the trustee, without having to first seek court approval. In this way, the trust would not be held hostage by an uncooperative bank.

The Trust Protector Committee membership could also evolve over time. For example, younger relatives like grandchildren or nieces and nephews could be added as they become of mature age. Of course, serving on the Trust Protector Committee is voluntary. A grandchild could decide not to serve, but I have found that most relatives will feel a moral duty to "look out" for their disabled relative. Also, because the Trust Protector Committee serves only in an oversight role, they are not exposed to legal liability for what happens with the trust. By adding committee members over time as they become of age, the Trust Protector Committee can expand and continue over a long period of time.

A common example of where a Trust Protector Committee is needed is when the bank trustee goes through a merger and the bank's good long-term employees leave the bank. The new employees handling the trust are inexperienced and non responsive to legitimate requests for distributions. It is therefore time to fire the bank and replace them with a different bank. The

Trust Protector Committee could investigate and interview other banks and then select a replacement bank trustee.

A second scenario of concern is the probability (really certainty) that governmental benefits such as Medicaid will change in the near or distant future. The trust that we write today may not comply with the Medicaid rules of tomorrow. The result will be loss of benefits unless the trust can be modified to comply with the new rules. Thus, the trust should include a modification provision. But who should hold the power to modify the trust? Here again, the Trust Protector Committee is a valuable solution. The Trust Protector Committee could hold the power to modify the trust terms in ways to benefit the disabled beneficiary. Without a modification provision written into the trust agreement, the only way to modify a trust under state law is to seek court approval. The court approval process is not only slow and costly, but also unpredictable.

Conclusion. Our disabled loved ones are dependent on us to provide for them today and after we are gone. Because they do not have the ability to financially support themselves, the inheritance you leave them must be protected to ensure it lasts for the rest of their life, which may be a very long time. The Trust Protector Committee is there to stand in your place to make the adjustments necessary to ensure that the purposes of the special needs trust are fulfilled.

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