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Demystifying Trust Protectors in New York: Building Flexibility Into Irrevocable Trusts

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Demystifying Trust Protectors in New York: Building Flexibility Into Irrevocable Trusts

By Britt Burner and Louis Pierro

Overview

Trust protectors, often referred to as Trust advisors in New York practice, are third parties empowered to guide, direct, or correct a trust's administration without serving as trustee. By conferring targeted powers on a non-trustee, grantors can add flexibility to otherwise rigid irrevocable structures, preserve public benefits, and avoid costly court interventions. Although New York lacks a statute specifically defining trust protectors, its courts recognize and enforce the role. Many other states have enacted directed trust statutes, and the Uniform Trust Code contemplates similar functions in UTC § 808(b). Understanding the purpose and practical uses of a trust protector helps practitioners identify where the designation can maximize trust utility and benefit the client and intended beneficiaries.

What a Trust Protector/Advisor Is

A trust protector or advisor is typically appointed by the grantor to ensure the trustee carries out the grantor's intent. The role often includes discretionary powers and is best filled by a disinterested third party. While it can be unsettled whether a trust protector is a fiduciary, a best practice is to act according to fiduciary standards to minimize risk and align with the trust's purposes.

Irrevocable trusts in an Elder Law/Special Needs practice that can usually benefit from a protector/advisor structure are as follows:

- Medicaid Asset Protection Trusts (MAPTs)
- Veterans Benefits Trusts
- Special Needs Trusts (SNTs)
- Descendants' trusts for asset protection and tax planning

While New York case law in elder and special needs contexts is relatively scant, a protector can deliver practical flexibility across these common planning scenarios.

Why the Role Matters

The role of the trust protector can be vital to the longevity of a plan involving an irrevocable trust. The main purpose is to carry out the grantor's intent. A protector

helps ensure the trust operates in a manner consistent with the grantor's overall estate plan, especially when circumstances change after execution. A protector can be especially useful after the death of the grantor when other methods of amending or revoking an irrevocable trust are no longer available.

When properly empowered, a protector can maximize and preserve government benefits by amending trust provisions. This power can allow for flexibility to respond to changes in Medicaid, SSI, VA, or tax law. Attorneys must be mindful that powers are drafted carefully to avoid granting powers to a trust protector that could make assets available for means-tested programs.

Discretionary authority granted to a trust protector may affect eligibility for means-tested benefits if it permits distributions that could benefit the applicant. In *Iannotti v. Commissioner of the New York State Department of Health*, 2001 N.Y. App. Div. LEXIS 5460 (N.Y. App. Div., 2001), the Appellate Division affirmed a determination that an inter vivos trust constituted an available resource for Medicaid eligibility purposes where the designated trust protector possessed discretionary authority to distribute trust assets for purposes including medical assistance. The risks of such broadly drafted authorities were later illustrated in *United Presbyterian House at Syosset v. Lincks*, 2003 N.Y. Misc. LEXIS 414 (Sup. Ct. Nassau Cnty. 2003), where the same trust became the subject of litigation by a nursing facility seeking payment for the grantor's care. The court permitted recovery from the trust assets, underscoring that discretionary powers capable of benefiting the grantor may undermine both Medicaid planning and creditor protection.

Avoiding the cost of conflicts among beneficiaries, trustees or other parties that could lead to court intervention is another way using a protector can preserve trust assets. By channeling disputes to an advisor rather than the courts, families can resolve issues more efficiently and preserve relationships, eliminating litigation and related expense where possible.

Foundational Drafting and Qualifications

Protectors should be independent. Common standards include disqualifying anyone who is a current trustee, beneficiary, grantor, or a person "related or subordinate" to the grantor under Internal Revenue Code § 672(c). Model language can define the role's function as directing the trustee in matters concerning the trust and assisting in achieving the grantor's broader estate planning objectives. Firms often nominate protectors in the original trust or allow a later appointment by a designated party or, if needed, by a court. New York practitioners sometimes create or use a separate appointing entity for continuity and liability protection (for example, a Delaware LLC).

Core Powers and How They Work

Trust protector powers are defined by the trust and should be tailored. Certain authorities are common, including:

- Amending the trust for legal changes or beneficiary circumstances. For example, if a MAPT remainder beneficiary later needs Medicaid, the protector can amend the disposition to an SNT rather than an outright bequest if the document grants that power and sets procedures for notice and effective dates.
- Decanting, when authorized, to appoint assets in further trust for existing beneficiaries, allowing modernized terms without court intervention.
- Changing governing law and situs of administration to a more favorable jurisdiction when appropriate.
- Removing and appointing trustees promptly by notice, helping preserve continuity when a trustee underperforms or circumstances change. The protector cannot self-appoint as trustee or serve simultaneously as protector and trustee.
- Terminating uneconomical or inadvisable trusts and distributing principal to the appropriate beneficiaries, if doing so is in their best interests and the power is expressly conferred.
- Consulting on construction issues, approving accountings and trustee compensation, and examining books and records to inform protector decisions. These consultation and information rights help the protector function effectively without becoming a de facto supervisor of the trustee.
- Exercising specific rights to resolve conflicts of interest, such as voting closely held business interests when the trustee has personal incentives, or deciding whether a special dividend is income or principal when a trustee-beneficiary might be conflicted.

Appointment, Removal, Resignation and Incapacity

Best practice is naming the protector in the trust. If clients are unable to identify a proper person at the time of drafting, the trust instrument can authorize appointment as needed later. Some documents permit appointment by a named person, an entity, or even income beneficiaries (though the latter is generally not recommended).

A protector may also need to be named if the position is vacant due to removal or resignation. The trust can authorize a designated party to remove any protector with or without cause, adding a practical check-and-balance on the role itself. Well-drafted clauses address resignation and provide streamlined procedures to determine incapacity and transition the role, limiting gaps in oversight or direction. The success of the protector provisions are rooted in thoughtful drafting.

Removing and appointing trustees promptly by notice can help preserve continuity when a trustee underperforms or circumstances change. It is important to note that a trust protector cannot self-appoint as trustee, nor may they serve simultaneously as both protector and trustee. Courts generally respect clearly drafted removal provisions in trust instruments; however, the exercise of those powers may still be subject to judicial oversight, particularly when broader structural changes to the trust are sought. For example, in *Allen v. Annalett*,

214 A.D.3d 1359 (4th Dep't 2023), the Appellate Division affirmed that the trust protector of an irrevocable trust possessed the authority to remove an independent trustee pursuant to the terms of the trust agreement. This decision underscores the courts' willingness to enforce protector powers as written, provided the instrument clearly delineates the scope of that authority.

By contrast, in *Matter of Hettrick*, 61 Misc. 3d 1220(A) (Sur. Ct. Erie Cnty. Nov. 19, 2018), a trust protector exercised authority granted under a will to remove existing trustees and appoint a successor, contingent on transferring the trust's situs to Virginia. The Surrogate's Court declined to approve the transfer, concluding that the petitioners had not demonstrated that moving the trust would meaningfully facilitate its administration. The court emphasized that the governing instrument reflected an intent for New York law to apply. This decision illustrates that while protector powers may include trustee removal, courts may still scrutinize related actions that effectively alter the administration or governing jurisdiction of the trust.

Important Limits on Amendment Powers

Thoughtful constraints avoid unintended consequences. It is prudent to limit the powers of the protector to ensure the grantor's intent is paramount. Permissible amendments commonly include correcting drafting errors, updating trustee powers, conforming to legal changes, and granting certain powers of appointment.

Prohibited amendments typically include those that would render trust assets available for Medicaid eligibility, altering vested beneficiary rights, reducing estate tax charitable or marital deductions, or adding/removing beneficiaries unless the instrument specifically authorizes it. Procedures often require a signed writing with notice to the grantor (if living), income beneficiaries, and the trustee, with the protector setting the effective date.

The importance of these limitations is reflected in *United Presbyterian House at Syosset v. Lincks*, 2003 N.Y. Misc. LEXIS 414 (Sup. Ct. Nassau Cnty. 2003), where the court reiterated that under EPTL 7-3.1 a grantor's creditors may reach the maximum amount that could be distributed for the grantor's benefit from a self-settled trust. Even where a trust includes a protector with amendment authority, that power cannot cure the fundamental creditor exposure inherent in a trust created for the benefit of the grantor.

A trust protector's powers, no matter how broadly drafted, must always be exercised in light of the grantor's intent, which remains the guiding principle in trust administration. Courts have repeatedly underscored that even when instruments grant expansive authority, fiduciaries cannot act in ways that undermine the purposes for which the trust was established. In *Matter of Rivas*, 30 Misc. 3d 1207(A) (Monroe Cty. Sur. Ct. 2011), the court rejected a proposal to invest the entire trust corpus in the University of Rochester's long-term investment pool, reasoning that doing so would frustrate the grantor's purpose, impermissibly dilute fiduciary oversight, and create potential conflicts of interest, highlighting that even broad trustee or advisory authority is constrained by the Prudent Investor Act and the duty of undivided loyalty.

Meanwhile, the principles articulated in *In re Estate of Rubin*, 143 Misc. 2d 303 (Nassau Cnty. Sur. Ct. 1989), reinforce the legitimacy of grantor-directed limitations on fiduciary authority. In that case, the Surrogate's Court of Nassau County upheld provisions in a codicil granting advisors the power to direct co-executors in administering the estate, holding that such restrictions did not constitute an impermissible delegation of authority. The court emphasized that a testator or grantor may impose conditions on fiduciaries so long as those conditions are neither unlawful nor contrary to public policy. Fiduciaries remain accountable for fulfilling their duties, and the court retains oversight when there is reason to suspect a breach of fiduciary obligations. *Rubin* thus illustrates that advisory controls, whether over trustees or executors, are consistent with the longstanding principle that grantors may structure fiduciary powers to effectuate their specific intent, provided the mechanisms of oversight and fiduciary accountability are preserved.

Standards of Conduct, Liability and Indemnification

Drafters frequently impose a good-faith standard and expressly state that the protector acts in a nonfiduciary capacity, limiting liability for good-faith acts, omissions, or forbearance. Clear indemnification language helps make the role sustainable in contentious situations.

In *Tekiner v. Bremen House, Inc.*, 2024 N.Y. Misc. LEXIS 926 (Sup. Ct. N.Y. Cnty. 2024), the court deferred a beneficiary motion to remove a trust protector and committee members, emphasizing that alleged breaches of fiduciary duty and mismanagement require a full evidentiary record before altering trust governance. The decision illustrates that even when a protector has broad appointment and removal powers, courts are cautious about intervening prematurely, particularly where substantive rights and complex financial arrangements are at stake.

To avoid a financial burden to the protector on a personal level, clauses can be included to reimburse for defense costs unless there is conclusive proof, by clear and convincing evidence, of self-dealing or intent to harm beneficiaries. Concern for a personal cost could be a reason for a candidate to refuse the role, especially in litigious or contentious circumstances.

Another way to lighten the responsibility of the protector is to eliminate the duty to monitor or supervise trustees, or to prevent or minimize losses. This reinforces that the protector's role is episodic and purpose-driven, not continuous oversight. At the same time, trustees remain subject to traditional fiduciary duties in administering the trust for the benefit of its beneficiaries. In the supplemental needs context, these duties may include balancing the welfare of the disabled beneficiary with the interests of remainder beneficiaries.

In *Matter of Hettrick*, 61 Misc. 3d 1220(A) (Sur. Ct. Erie Cnty. Nov. 19, 2018), the Surrogate's Court considered a testamentary supplemental needs trust where a trust protector exercised authority to remove the existing trustees and sought to facilitate a transfer of the trust's situs to another state. The court declined to approve the transfer, emphasizing that the trustees remained bound by their fiduciary obligations under New York law and that the governing instrument reflected an intent for the trust to be administered within that legal framework. The decision illustrates that even where protector powers exist, courts remain attentive to preserving the fiduciary structure and statutory purpose of supplemental needs trusts.

Protectors may be empowered to hire advisors and rely on their recommendations without independent investigation, allowing informed decisions without assuming an impractical supervisory burden.

Compensation and Practical Engagement

Compensation clauses typically allow reasonable fees and expense reimbursement for trust protectors. Serving as protector does not preclude the same professional from also providing legal, investment, or accounting services, with separate fees for each role if permitted by the instrument. This clarity supports engagement models where the protector adds ongoing value to the plan's administration.

Practice Tips for New York Attorneys

- Draft with precision. Because New York relies on case law rather than statute, courts will enforce specific language as written. Clarity around appointment, removal, amendment boundaries, and standards of conduct is essential.
- Preserve public benefits. Avoid powers that could make trust assets "available resources," particularly in MAPT and SNT planning. This is a recurring theme in New York cases and a central drafting caution.
- Separate functions and avoid conflicts. Use protectors to resolve trustee conflicts of interest, such as voting business interests, determining income versus principal, or blessing discretionary distributions, rather than burdening the trustee with conflicted decisions.
- Plan for continuity. Provide mechanisms for later appointment, straightforward removal, resignation and incapacity determinations so the protector role remains effective over the trust's life.
- Consider client engagement programs. Some practices integrate the protector role with maintenance platforms that track planning data, promote regular reviews, and provide technology-enabled communication, creating recurring value and improved outcomes for clients over time.

Conclusion

Trust protectors and advisors give New York planners a powerful tool to future-proof irrevocable trusts, adapt to legal and personal change, and keep the grantor's aims central without reflexive court involvement. With careful drafting, especially around eligibility-sensitive powers, appointment and removal mechanics, and standards of conduct, protectors can add meaningful flexibility and governance to elder law, special needs, and multigenerational plans alike.

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