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MEMBER



### INSIDE THIS ISSUE

- Trust Protectors and Fiduciary Duty
- Announcement
- Disribution of this Newsletter

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## TRUST PROTECTORS AND FIDUCIARY DUTY

A recent Missouri Court of Appeals case highlights the potential liability trust protectors may have for breach of fiduciary duties.

In *Robert T. McLean Irrevocable Trust v. Davis* (Mo. Ct. App., No. SD28613, Jan. 26, 2009), Robert McLean (Robert) was left a quadriplegic as the result of an automobile accident. He hired J. Michael Ponder (Ponder), a respondent in the current case, to represent him in the resulting personal injury lawsuit. Robert's grandmother established the special needs trust at issue, and the trust was funded with proceeds from the personal injury settlement. The trust named Ponder as the "Trust Protector." The trust described the duties and role of the trust protector, including the right to remove the trustee and appoint a successor trustee. The first paragraph of the trust protector section states, "The 'Trust Protector' of such Trust shall be [Ponder]. The Trust Protector's authority is hereunder conferred in a fiduciary capacity and shall be so exercised, but the Trust Protector shall not be liable for any action taken in good faith."

The original trustees resigned and Ponder appointed the law firm of Patrick Davis, P.C., Patrick Davis, and Daniel Rau as successor trustees. Robert and his attorney informed Ponder that the successor trustees were inappropriately spending trust funds. Davis resigned as successor trustee, and Ponder appointed Tim Gilmore as successor trust protector and Brian Menz to take Davis's place as a successor trustee. Ponder then resigned as trust protector. Menz later resigned as successor trustee, and Robert's mother, Ms. McLean, was appointed as a successor trustee. In April of 2005, Ms. McLean brought suit against former trustees Davis, Rau, and Menz, and former trust protectors Gilmore and Ponder. She claimed that Ponder "breached his fiduciary duties to [Beneficiary] and acted in bad faith in one or more of the following respects: a. He failed to monitor and report expenditures; b. He failed to stop Trustee [sic] when they were acting against the interests of the Beneficiary; and c. By placing his loyalty to the Trustees and their interests

above those of [Beneficiary] to whom he had a fiduciary obligation.” The trial court granted Ponder’s motion to dismiss or alternative motion for summary judgment, and Ms. McLean appealed.

On appeal, Ponder asserted that neither Missouri law nor the trust agreement created a duty for [Ponder] to monitor or supervise the trustees. He did not dispute that the trust agreement appointed him as trust protector or that the trust designated him as a fiduciary in that role. He contended that Missouri law did not impose specific duties on a trust protector, and that the trust agreement did not include the specific duty to “supervise the trustees or direct them to act in any specific manner.” No Missouri case had dealt with the function or duties of a trust protector, and Missouri law does not specifically address trust protectors. Missouri has, however, adopted section 808 of the Uniform Trust Code as its section 456.8-808, which states, “A person, other than a beneficiary, who holds a power to direct is presumptively a fiduciary who, as such, is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. The holder of a power to direct is liable for any loss that results from breach of fiduciary duty.” (Editor’s note: This provision is identical to Virginia Code Section 55-548.08(D), although that provision should be read in context with the rest of that Virginia Code section.)

After a lengthy analysis, the appellate court said that the “duties and responsibilities the grantor intended the Trust Protector to have are not clearly set forth in the language of the trust, and that intent is a significant and contested issue of material fact.” The court then held that Ponder’s statement of facts did not establish, as a matter of law, that Ms. McLean would be unable to prove one of the elements of her case. The appellate court reversed the trial court’s judgment and remanded the case for further proceedings. Oast & Hook will monitor further developments in this case.

Elder law attorneys often provide for trust protectors or trust advisors in trusts for their clients. Drafters should research their own state laws regarding fiduciary responsibilities for persons other than trustees in order to avoid potential breaches of fiduciary duty for those appointees.

The attorneys at Oast & Hook can assist clients with their estate, financial, insurance, investment, veterans’ benefits, and special needs planning needs.

### **Ask Allie**

O&H: Allie, thank you for your lead article last week on pet trusts. What news do you have for us this week?

Allie: Well, *Cat Fancy* magazine recently published an article discussing how cats benefit from bonding with their human families. New studies show that some cats benefit from the bond more than others, and the extent to which the cats benefit has a lot to do with the humans in their lives. As we saw during Hurricane Katrina, some pet families risked their own lives to rescue their pets. The resulting outcry resulted in Congress’s passing of the Pets Evacuation and Transportation Standards

Act (PETS), allowing pet owners to bring their pets with them when they evacuate. We've often heard that humans benefit from petting their cats, but we now know that this also lowers the cat's blood pressure. Playtime is also important for both cats and families. Interestingly enough, cats living with older people appear to be less stressed and have a higher quality of life. Cats in homes that have many people caring for them receive more veterinary care. I can testify to that; I have so many folks at Oast & Hook looking out for me, and they whisk me off to the vet at the first sign of a problem .... Hmm. I really don't like those trips to the vet, but I'm glad so many people care about me. Time to go show some appreciation and find a staff member to meow thanks!



Please feel free to e-mail your pet- and animal-related questions to Allie at: [allie@oasthook.com](mailto:allie@oasthook.com).

### **Announcement**

The Adult Protective Services Unit of the Hampton Division of Social Services and Riverside PACE will be hosting its first "Interagency Community Resource Expo" from 8:30 a.m. to 2:00 p.m., Friday, April 17th at the Y. H. Thomas Community Center in Hampton, Virginia. Oast & Hook is pleased to announce that it will be an exhibitor at this expo. This expo is geared toward senior citizens, individuals with disabilities, children of seniors, children of disabled individuals, and other relatives, neighbors and advocates of seniors and those with disabilities. To register for this expo, please phone the reservation hotline at 757-727-1949.

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