# TRUST PROTECTORS

Southern Arizona Estate Planning Council
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**List of References**

Note: Will Conway and Elizabeth Friman give special acknowledgement to Kathleen Sherby (Bryan Cave, LLP) for her research and writing on Trust Protectors. Kathleen authored a comprehensive article: "It's a Whole New Ballgame" Trust Directors with Power to Advise/Consent/Direct and with Power of Protection. She presented her work at the ACTEC Summer Meeting in June 2016.

*Other references:*

Gregory S. Alexander, Trust Protectors: Who Will Watch the Watchmen?, 27 Cardozo L. Rev. 2807 (2006).

Richard C. Ausness, When is a Trust Protector a Fiduciary?, 27 Quinnipiac Probate Law Journal, (Issue 3, 2014)

Alexander A. Bove, Jr., The Case Against the Trust Protector, 37 ACTEC L.J. 77 (Summer, 2011).

Charles D. Fox IV, How "Revocable" Is "Irrevocable"? Obtaining Flexibility in Irrevocable Trusts, 33 Ohio N.U.L. Rev. 943 (2007).

Alan Newman, Trust Law in the Twenty-First Century: Challenges to Fiduciary Accountability, 29 Quinnipiac Prob. L.J. 261 (2016)

Philip J. Ruce, The Trustee and the Trust Protector: A Question of Fiduciary Power. Should a Trust Protector Be Held to a Fiduciary Standard?, 59 Drake L. Rev. 67 (2010).

Thomas E. Simmons, Decanting and Its Alternatives: Remodeling and Revamping Irrevocable Trusts, 55 S.D.L. Rev. 253 (2010).

Jeffrey Evans Stake, A Brief Comment on Trust Protectors, 27 Cardozo L. Rev. 2813 (2006).

Stewart E. Sterk, Trust Protectors, Agency Costs, and Fiduciary Duty, 27 Cardozo L. Rev. 2763 (2006).

*Appendix of Arizona Statutes, Case Law, Sample Language - see next page*

# Arizona Statues, Case Law, Sample Trust Protector Language

**A.R.S. § 14-10703. Cotrustees**

**A.** Cotrustees who are unable to reach a unanimous decision may act by majority decision.

**B.** If a vacancy occurs in a cotrusteeship, the remaining cotrustees may act for the trust.

**C.** A cotrustee must participate in the performance of a trustee's function unless the cotrustee is unavailable to perform the function because of absence, illness, disqualification under other law or other temporary incapacity or the cotrustee has properly delegated the performance of the function to another trustee.

**D.** If a cotrustee is unavailable to perform duties because of absence, illness, disqualification under other law or other temporary incapacity, and prompt action is necessary to achieve the purposes of the trust or to avoid injury to the trust property, the remaining cotrustee or a majority of the remaining cotrustees may act for the trust.

**E.** A trustee may delegate to a cotrustee the performance of a function unless the terms of the trust provide that the trustees perform jointly. Unless a delegation was irrevocable, a trustee may revoke a delegation previously made.

**F.** Except as otherwise provided in subsection G, a trustee who does not join in an action of another trustee is not liable for the action.

**G.** Each trustee shall exercise reasonable care to:

1. Prevent a cotrustee from committing a material breach of trust.

2. Compel a cotrustee to redress a material breach of trust.

**H.** A dissenting trustee who joins in an action at the direction of the majority of the trustees and who notified any cotrustee of the dissent at or before the time of the action is not liable for the action unless the action is a material breach of trust.

Credits: Added by Laws 2008, Ch. 247, § 16, eff. Jan. 1, 2009.

**A.R.S. § 14-10801. Duty to administer trust**

On acceptance of a trusteeship, the trustee shall administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries and in accordance with this chapter.

Credits: Added by Laws 2008, Ch. 247, § 16, eff. Jan. 1, 2009.

**A.R.S. § 14-10808. Powers to direct**

**A.** While a trust is revocable, the trustee may follow a direction of the settlor that is contrary to the terms of the trust.

**B.** If the trust provides that the assets in the trust are subject to the direction of the settlor or a cotrustee, beneficiary or third party, the trustee has no duty to review the directions it is directed to make or to notify the beneficiaries regarding any investment action taken pursuant to the direction. The trustee is not responsible for the purchase, monitoring, retention or sale of assets that are subject to the direction of the settlor or a cotrustee, beneficiary or third party. The trustee is not subject to liability if the trustee acts pursuant to the direction, even if the actions constitute a breach of fiduciary duty, unless the trustee acts in bad faith or with reckless indifference.

**C.** The terms of a trust may confer on a trustee or other person a power to direct the modification or termination of the trust.

**D.** Unless the trust instrument provides otherwise, 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 a fiduciary duty.

Credits: Added by Laws 2008, Ch. 247, § 16, eff. Jan. 1, 2009.

**A.R.S. § 14-10818. Trust protector**

**A.** A trust instrument may provide for the appointment of a trust protector. For the purposes of this section, a person designated in the instrument with a status or title, other than that of a beneficiary, with powers similar to those specified in subsection B of this section, or designated in the instrument as a trust protector, is a trust protector, except to the extent otherwise provided in the trust instrument.

**B.** A trust protector appointed by the trust instrument has the powers, delegations and functions conferred on the trust protector by the trust instrument. These powers, delegations and functions may include the following, which do not limit what powers, delegations and functions may be granted to the trust protector:

1. Remove and appoint a trustee.
2. Modify or amend the trust instrument for any valid purpose or reason, including, without limitation, to achieve favorable tax status or to respond to changes in the internal revenue code[1] or state law, or the rulings and regulations under that code or law.
3. Increase, decrease, modify or restrict the interests of any beneficiary of the trust.
4. Modify the terms of a power of appointment granted by the trust.
5. Change the applicable law governing the trust.

**C.** Except to the extent otherwise specifically provided in the trust instrument, a modification authorized under subsection B of this section may not:

1. Grant a beneficial interest to an individual or a class of individuals unless the individual or class of individuals is specifically provided for under the trust instrument.
2. Modify the beneficial interest of a governmental unit in a special needs trust.

**D.** Any provision of this title to the contrary, but except to the extent otherwise provided by the trust instrument, a trust protector is not a trustee or fiduciary and is not liable or accountable as a trustee or fiduciary because of an act or omission of the trust protector when performing or failing to perform the duties of a trust protector under the trust instrument. This subsection does not apply to trusts that become irrevocable before January 1, 2009 if the trust instrument allows the settlor to remove and replace the trust protector.

**E.** The exercise of the power pursuant to subsection B of this section is the exercise of a special power of appointment.

Credits: Added by Laws 2008, Ch. 247, § 16, eff. Jan. 1, 2009. Amended by Laws 2009, Ch. 85, § 16; Laws 2013, Ch. 112, § 10.

**A.R.S. § 14-10105. Default and mandatory rules**

**A.** Except as otherwise provided in the terms of the trust, this chapter governs:

1. The duties, powers, exercise of powers resignation, and appointment of a trustee.
2. Conflicts of interest of a trustee.
3. Relations among trustees.
4. Mergers or divisions of trusts.
5. The rights and interests of a beneficiary.

**B.** The terms of a trust prevail over any provision of this chapter except:

1. The requirements for creating a trust.
2. The duty of a trustee to act in good faith and in accordance with the purposes of the trust.
3. The requirement that a trust and its terms be for the benefit of its beneficiaries and that the trust have a purpose that is lawful, not contrary to public policy and possible to achieve.
4. The power of the court to modify or terminate a trust under §§ 14-10410, 14-10411, 14-10412, 14-10413, 14-10414, 14-10415 and 14-10416.
5. The effect of a spendthrift provision and the rights of certain creditors and assignees to reach a trust as provided in article 5 of this chapter.[1]
6. The power of the court under § 14-10702 to require, dispense with, modify or terminate a bond.
7. The power of the court under § 14-10708, subsection B to adjust a trustee's compensation specified in the terms of the trust that is unreasonably low or high.
8. The duty to respond to the request of a qualified beneficiary of an irrevocable trust for trustee's reports and other information reasonably related to the administration of a trust.
9. The effect of an exculpatory term under § 14-11008.
10. The rights under §§ 14-11010, 14-11011, 14-11012 and 14-11013 of a person other than a trustee or beneficiary.
11. Periods of limitation for commencing a judicial proceeding.
12. The power of the court to take action consistent with the settlor's intent and exercise jurisdiction as may be necessary in the interests of justice.
13. The subject matter jurisdiction of the court and venue for commencing a proceeding as provided in §§ 14-10203 and 14-10204.
14. The notice provisions of § 14-10110, subsection B.

Credits: Added by Laws 2008, Ch. 247, § 16, eff. Jan. 1, 2009. Amended by Laws 2009, Ch. 85, § 8.

**A.R.S. § 14-11008. Exculpation of trustee**

**A.** A term of a trust relieving a trustee of liability for breach of trust is unenforceable to the extent that it either:

1. Relieves the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries.
2. Was inserted as the result of an abuse by the trustee of a fiduciary or confidential relationship to the settlor.

**B.** An exculpatory term drafted or caused to be drafted by the trustee is invalid as an abuse of a fiduciary or confidential relationship unless the trustee proves that the exculpatory term is fair under the circumstances and that its existence and contents were adequately communicated to the settlor.

**C.** Subsection B does not apply to an irrevocable trust created before January 1, 2009 or to a revocable trust created before January 1, 2009 that is not amended on or after January 1, 2009.

Credits: Added by Laws 2008, Ch. 247, § 16, eff. Jan. 1, 2009.

**In re Eleanor Pierce (Marshall) Stevens Living Trust, 159 So.3d 1101 (2015)**

159 So.3d 1101
Court of Appeal of Louisiana,
Third Circuit.

In re ELEANOR PIERCE (MARSHALL) STEVENS LIVING TRUST.
In re Eleanor Pierce (Marshall) Stevens Living Trust
and
Eleanor Pierce Stevens Revocable Gift Trust.

Nos. CW 14–697, CA 14–827, CA 14–828.
|
Feb. 18, 2015.

**Synopsis**

**Background:** Following trustee's conditional resignation and subsequent federal court litigation regarding breach of priority statute through actions of trustee and settlor's executor, trustee filed ex parte petition for instructions and approval of withdrawal of trustee's conditional resignation. The 14th Judicial District Court, Parish of Calcasieu, No. 2007–6723 C/W 2009–3827, G. Michael Canaday, J., entered judgment finding that trustee's resignation was effective. Trustee appealed and moved for supervisory writ.

**Holdings:** After first appeal was dismissed to allow trial court to dispose of motion for new trial, 153 So.3d 1094, the Court of Appeal, Saunders, J., held that:

[1] separate action giving rise to judgment modifying terms of trust and permitting withdrawal of trustee was not a contested case, and thus notice of judgment was not required for time period for appeal of that judgment to begin to run;

[2] enforcement of trust providing for appointment of a trust protector did not violate public policy; and

[3] trial court acted within its discretion in admitting evidence that trust protector removed trustee from position as trustee.

Affirmed in part and appeal dismissed in part; writ denied.

See also 121 So.3d 1289.

**Attorneys and Law Firms**

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Court composed of JOHN D. SAUNDERS, ELIZABETH A. PICKETT, and JOHN E. CONERY, Judges.

**Opinion**

SAUNDERS, Judge.

****1** This case is before us on appeal from three separate judgments against Finley Hilliard (hereafter "Appellant") relative to his status as co-trustee of the Eleanor Pierce (Marshall) Stevens Living Trust (hereafter "the Trust") and an application for supervisory writ relative to a denial of Appellant's motion for new trial. For the following reasons, we dismiss the appeals in

part, affirm the 2013 judgment, and deny the relief sought by the writ application relative to the denial of Appellant's motion for new trial.

## *FACTS AND PROCEDURAL HISTORY*

Eleanor Pierce (Marshall) Stevens established the Trust in 1979. In 2000, Appellant began serving as trustee. The terms of the Trust have been amended several times over the years. In 2006, the Trust was amended to appoint Preston Marshall (hereafter "Preston") to the office Trust Protector. In 2007, Article XI, Paragraph B of the Trust was amended to provide:

> should the Trust Protector determine, in his or her sole discretion, that the individual then serving [as trustee] cannot properly represent the interest of the beneficiaries, the Trust Protector may remove the trustee, with or without cause, and designate one or more residents of the State of Louisiana to succeed to the office of trustee.

### Appellant's Withdrawal as Trustee

On July 29, 2009, Appellant executed an affidavit stating, in pertinent part:

> NOW THEREFORE, [Appellant] does hereby resign as Trustee of [the Trust] and the Eleanor Pierce Stevens Revocable Gift Trust effective upon the appointment and acceptance of one or more successor trustees being appointed and confirmed and taking the oath of office to serve as trustee or co-trustees of said trust in accordance with the provisions of said trust.

Thereafter, on August 5, 2009, Appellant filed a Petition for Modification of Trust. In his Petition, Appellant requested several modifications to the terms of the trust. ****2** One of the requests for modification was to again modify Article XI, Paragraph B to read:

> B. *Successor Trustee.* Following Settlor's death, should the Trustee resign or cease to serve as trustee or the office of Trustee otherwise becomes vacant for any reason whatsoever, the Trust Protector shall succeed as a co-trustee and shall designate one or more other individuals to succeed to serve as co-trustees; provided, however, that at least one of the trustees shall at all times be a resident of the State of Louisiana. Following Settlor's death, should the Trust Protector determine, in his or her sole discretion, that the individual or individuals then serving in that capacity cannot properly represent the interests ***1104** of the beneficiaries, the Trust Protector may remove the trustee or trustees, with or without cause, and designate one or more individuals to succeed to the office of

> trustee; provided, however, that at least one of the trustees shall be a resident of the State of Louisiana.

He further requested that the trial court:

> permit and authorize the resignation of [Appellant] as trustee of [the Trust] subject to the Trust Protector, [Preston], accepting the appointment as a co-trustee and taking the oath of office and designating one or more additional co-trustees pursuant to the modification and amended provisions of [the Trust]....

On the same day, judgment was rendered modifying the terms of the trust and "permitting and authorizing" the withdrawal of Appellant as trustee. Preston took the oath of office on August 28, 2009.

**The Federal Litigation**

J. Howard Marshall, II ("J.Howard") and Eleanor Pierce (Marshall) Stevens (hereafter "Stevens") were married from 1931 to 1960. As part of her divorce settlement with J. Howard, Stevens received shares of Marshall Petroleum, Inc. (hereafter "MPI") stock. In 1984, Stevens transferred all of her shares of MPI to the Trust and then into four additional trusts. In 1995, J. Howard sold his MPI stock back to the company. Because it was sold below market value, it increased the value of the other shareholders' stock. The IRS later determined the sale to be ****3** an indirect gift of MPI stock to MPI's other shareholders, including Stevens and the Trust.

At the time of the stock sale, J. Howard did not pay gift taxes. He died shortly after the sale. When his estate did not pay the gift taxes, in 2010, the Government brought suit against the donees, seeking to recover the unpaid gift taxes and to collect interest from the beneficiaries. The Government also sought to recover from Appellant and E. Pierce Marshall, Jr. (hereafter "E. Pierce Jr."), who is Appellant's brother and executor of Stevens' Estate. The Government asserted that Appellant used funds from the Trust to pay accounting and legal fees for charitable organizations other than the Trust and, with E. Pierce Jr., filed joint tax returns for the Trust and Stevens' Estate and permanently set aside $1,119,127 of the Trust's funds for charitable purposes. The Government asserted that these actions were violations of the federal priority statute, 31 U.S.C. § 3713.

On the Government's motion for summary judgment against E. Pierce Jr. and Appellant for violations of the federal priority statute, the federal district court found Appellant individually liable for paying accounting and legal services out of the Living Trust for other charitable organizations. The federal district court also found Appellant and E. Pierce Jr. jointly liable for the $1,119,127 they had set aside in the Trust for charitable purposes, for which they claimed charitable deductions.

On appeal from the federal district court, Appellant asserted that the district court erred in holding him liable under the federal priority statute, arguing that the knowledge requirement had not been proven, as the Government had not yet made an actual claim at the time the distributions and payments were made by the Trust and he had received erroneous legal advice pertaining to the distributions and payments. In its November 10, 2014 judgment, the Fifth Circuit explained: ****4** "Actual knowledge is not required; '[t]he knowledge requirement of [31 U.S.C. § 3713] may be

satisfied by either actual knowledge of the liability or notice of such ***1105** facts as would put a reasonably prudent person on inquiry as to the existence of the unpaid claim of the United States.' " *U.S. v. Marshall,* 771 F.3d 854, 875 (5th Cir.2014) (quoting *Leigh v. Comm'r,* 72 T.C. 1105, 1110 (1979)). The court noted that Appellant admitted in deposition that he had knowledge of the potential claims. Thus, the federal appellate court "[held Appellant] ... knew of the potential liability to the Government, and thus, the Federal Priority Statute applies." *Id.*

**The Current Litigation**

In a letter dated December 13, 2012, following the judgment of the federal district court against Appellant and E. Pierce Jr. becoming final, E. Pierce Jr. sent a letter to Preston and Appellant demanding that the Trust pay the bond premiums and legal fees for the appeal of the federal district court judgment. The demand letter included a request for the Trust to pay the costs of the appeal for the judgments rendered against Appellant and E. Pierce Jr., personally. By a second letter dated January 2, 2013, E. Pierce Jr. reiterated the demand for the Trust to pay the costs of the appeal of the personal judgments against Appellant and E. Pierce Jr.

On January 14, 2013, Appellant filed an ex parte petition for instructions and approval of withdrawal of the trustee's conditional resignation, containing the following:

> On or about August 5, 2009, there was a further filing with this Court entitled "Petition for Modification of Trust" which was assigned to Division "E", No. 2009–3927, in which the then current trustee, [Appellant], purportedly resigned the office of Trustee by affidavit dated July 29, 2009, on the conditions that [Preston], who was the Trust Protector, succeed [Appellant] as a co-trustee, take the oath of office of co-trustee, and designate "one or more additional co-trustees pursuant to the modification and amended provisions of [the Trust]", which did require, at Article XI B., for at least one additional co-trustee to be named, and to be a Louisiana resident.[ ]
>
> ****5** The conditions contained in the Court's Order accepting the modification and amendment of the Trust required that the then Trust Protector, [Preston], assume the office of co-trustee, and take the oath of office, and name a co-trustee who is a resident of Louisiana, but there is no indication that [Preston] has ever taken the oath of office, or named a Louisiana domiciliary to replace Trustee [Appellant], and [Appellant] has in fact acted in the capacity of Trustee on several occasions up to the date of the filing of this Motion.
>
> [Appellant] hereby formally withdraws his resignation and will continue in the office of Trustee [ ].

In the petition for instructions, Appellant alleged:

> [Appellant] and [E. Pierce Jr.] have sought to appeal the district court's Judgment against them in their individual and representative capacities....
>
> in accordance with the Trust's provisions, [E. Pierce Jr.] made written demand upon the Trust, by correspondence ... to [Appellant], Trustee, and [Preston], Trust Protector/Trustee, to have the Trust pay [for] appellate counsel, and also to fund the filing and posting of supersedeas bonds in order to stave off any possible execution of the Federal Action judgment until after all appeals have been decided.

....

Additionally, [Preston] has not responded to the demand of [E. Pierce Jr.] and the Estate, for the funds to pay the attorney fees and supersedeas bond premiums for the appeal....

....

***1106** [Appellant] thus seeks Court approval for the withdrawal of his conditional resignation, and instructions from the Court as to the authority to pay both the attorney fees to prosecute the above referenced appeal ... and the bond premiums to pay for the supersedeas bonds....

The trial court granted Appellant's ex parte request on January 14, 2013, as modified on January 17, 2013. Thereafter, the Trust filed a motion to vacate, alleging that Preston, as co-trustee of the Trust, had no notice of Appellant's petition.

On January 23, 2013, Preston contacted the attorney for the IRS, inquiring whether the Government would consider the payment of the individual bond ****6** premiums and attorney fees for Appellant and E. Pierce Jr. as further violation of the federal priority statute. The attorney for the IRS was unequivocally clear; the Government would view payment of the bond premiums and attorney fees on behalf of Appellant and E. Pierce Jr. to be a further violation of the federal priority statute.

By oral judgment on January 25, 2013 and signed on January 30, 2013, the trial court vacated its judgment on Appellant's ex parte petition for instructions, "except to the extent the parties stipulated that the assets of the Eleanor Pierce Stevens Living Trust can be used to pay the premium of the supersedeas bond on behalf of [the Trust] and to collateralize the supersedeas bond."

Shortly after the district court vacated its judgment, Appellant filed an emergency motion, praying for an order "allowing [Appellant] to withdraw his previous conditional resignation as Trustee, that such withdrawal is recognized ... and [that Appellant] is still a Trustee of [the Trust]." On February 1, 2013, Patrick Wright took the oath of the office of trustee. On February 15, 2013, after a contradictory hearing, the trial court ruled:

IT IS ORDERED, ADJUDGED AND DECREED that the act of resignation of [Appellant] as co-trustee of [the Trust] will be effective as of 3:15 P.M., February 4, 2013.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that through the same actions of attempting to accept the resignation of [Appellant] as co-trustee of [the Trust] that[Preston], as Trust Protector of [the Trust] has effectively removed [Appellant] as co-trustee of [the Trust] as of 3:15 P.M., February 4, 2013.

At the conclusion of the February 4, 2013 hearing, the trial court explained its ruling, stating:

Review of the Trust document as it has been amended one or more times clearly allows significant discretion with the trust protector. It is apparent that the intent of the document is that the trust protector have the authority to make many of the decisions ultimately with regard to those who will serve as trustee, as well as oversight of ****7** action of trustees. Historically, it would appear that there has been same significant lack of communication, possibly between Trust Protector [Preston] and Trustee [Appellant].

As of today, this Court has also received notice in conjunction with the request that the resignation be withdrawn, that the resignation has been acted upon by the trust protector; in fact, has named a new co-trustee, taken the

> appropriate oaths, and the Court appears to have documents designated as Marshall–1 demonstrating the same. That notice has not yet formally been received by [Appellant].

Appellant filed a motion for new trial with the trial court on March 8, 2013 and a ***1107** motion for devolutive appeal on March 18, 2013, moving to appeal the February 15, 2013 judgment removing Appellant as trustee. An order of appeal was signed the same day. In response to the motion for appeal, this court issued a rule to show cause as to why the appeal should not be dismissed as being taken from a partial judgment which had not been designated as appealable pursuant to La.Code Civ.P. art. 1915(B). *In Re: Eleanor Pierce (Marshall) Stevens Living Trust,* 13–939 (La.App. 3 Cir. 9/25/13), 121 So.3d 1289. The rule to show cause was recalled, pursuant to La.R.S. 9:1791, and the appeal was maintained. *Id.*

On October 7, 2013, Appellant filed a motion to remand, requesting the matter "be remanded so that a full and complete record can be created following discovery and ordinary proceedings." A panel of this court explained "[t]he record before us does not reflect that the trial court ruled on [Appellant's] Motion for New Trial; therefore, the jurisdictional defect of prematurity exists" and dismissed the appeal and remanded the matter to the trial court. *In re Eleanor Pierce (Marshall) Stevens Living Trust,* 13–939, p. 3 (La.App. 3 Cir. 2/12/14), 153 So.3d 1094, 1096. Following a contradictory hearing, by judgment rendered on April 1, 2014 and signed on April 21, 2014, the trial court denied Appellant's motion for new trial.

In his second motion for devolutive appeal, Appellant moved for appeal of the February 15, 2013 judgment, removing him as trustee; the April 21, 2014 ****8** judgment, denying his motion for new trial; and "any and all other judgments ... including but not limited to the August 9, 2009 Conditional Judgment[.]"[1] An order for appeal was signed on April 30, 2014. On June 30, 2014, Appellant filed an application for supervisory writ, seeking review of the trial court's denial of his motion for new trial. A panel of this court granted the writ application for the purpose of consolidation with the pending appeals bearing docket numbers 14–827 and 14–828. On August 25, 2014, the Trust filed a motion to amend the order for devolutive appeal, asserting Appellant's appeals were untimely. It is from this complicated entanglement of facts that the matter is before us again.

## *ASSIGNMENTS OF ERROR*

In his appeal, Appellant asserts the trial court erred in:

> 1. finding that Preston, as the Trust Protector, had authority to remove Appellant as trustee because the position of Trust Protector is not recognized by the Trust Code, violates public policy, and cannot be recognized until the position and its duties are defined by the Legislature;
>
> 2. finding that Appellant's 2009 offer to resign could be accepted by Preston after the offer to resign was revoked and an unreasonable amount of time had elapsed before Preston's acceptance;
>
> 3. allowing Preston to expand the scope of the pleadings to raise new issues over the repeated and timely objection by Appellant; and
>
> 4. failing to grant Appellant's motion for new trial.

****9 *STANDARD OF REVIEW***

Findings of fact are subject to review for manifest error. ***1108** *Rosell v. ESCO,* 549 So.2d 840 (La.1989). To warrant reversal of a trial court's findings of fact, after reviewing the record in its entirety, an appellate court must first find that a reasonable factual basis does not exist for the finding, and, second, determine that the record establishes that the finding is clearly wrong or manifestly erroneous. *Stobart v. State,* DOTD, 617 So.2d 880 (La.1993). An appellate review of a question of law "is simply a review of whether the trial court was legally correct or legally incorrect," with "no special weight to the findings of the trial court." *Hebert v. La. Licensed Prof'l Vocational Rehab. Counselors,* 07–610, p. 10 (La.App. 3 Cir. 3/4/09), 4 So.3d 1002, 1010, *writs denied,* 09–0750, 09–0753 (La.5/22/09), 9 So.3d 144.

***TIMELINESS OF THE APPEAL OF THE 2009 JUDGMENT***

[1] Preliminarily, we must address the timeliness of the appeal of the 2009 judgment. On August 25, 2014, the Trust filed a motion to amend the order for devolutive appeal, asserting the appeals of the 2009 judgment and "all other properly appealable rulings in this matter" are untimely. For the reasons below, we find the appeal of the 2009 judgment to be untimely; therefore, we dismiss it.

[2] In his response to the Trust's motion and in briefing his second assignment of error, Appellant asserts there is no evidence in the record that a Notice of Judgment was served after the 2009 judgment was rendered; thus, the appeal of the 2009 judgment was timely. Louisiana Code of Civil Procedure art. 1913 defines the circumstances under which a notice of judgment is required. "If notice of judgment is not furnished as required, the delay for seeking an appeal does not ordinarily begin to run." *Ouachita Equip. Rental, Inc. v. Dyer,* 386 So.2d 193, 194 (La.App. 3 Cir.1980). Paragraphs B and C of La.Code Civ.P. art. 1913 describe ****10** the specific method of providing the required notice of judgment following a default judgment, which are inapplicable here. However, Paragraph A of La.Code Civ.P. art. 1913 provides: "[N]otice of the signing of a final judgment ... is required in all contested cases."

Clearly, the case giving rise to the August 5, 2009 order was not a "contested case." La.Code Civ.P. art. 1913. There was no defendant and no answer or exception was filed. Instead, the order was granted pursuant to Appellant's own Petition for Modification of Trust, and, in brief, he notes that "Preston oversaw the drafting and filing of [the petition]" giving rise to the August 5, 2009 judgment. Moreover, notice of judgment was not requested. Because the case was uncontested and Appellant did not request notice of judgment, Appellant was not entitled to notice of judgment. Thus, the delay for appeal began to run.

[3] Appellant further asserts that the 2009 judgment was conditional and, therefore, not appealable until "Preston finally attempted to effectuate it using the February 15, 2013 judgment." As the first circuit explained in *In re Succession of Faget,* 06–2159 (La.App. 1 Cir. 9/19/07), 984 So.2d 7, 9:

> Under Louisiana law, a final judgment is one that determines the merits of a controversy, in whole or in part. In contrast, an interlocutory judgment does not determine the merits, but only preliminary matters in the course of an action. LSA–

> C.C.P. art. 1841. An interlocutory judgment is appealable only when expressly provided by law. LSA–C.C.P. art. 2083 C.

The August 5, 2009 judgment does not address merely "preliminary matters." Instead, it clearly determined the merits of ***1109** the case and disposed of all issues presented. In no less than certain language, the judgment granted each of Appellant's requests to modify the Trust, authorized Appellant to withdraw, authorized Preston to take the oath of the office of trustee and to appoint a co-trustee, and ordered Appellant's continued indemnity. All for which Appellant ****11** prayed was granted; nothing was left to be done in the suit. Having addressed all of the substantive requests, the judgment rendered on August 5, 2009 was a final judgment, from which an appeal could have been taken. Appellant did not file a motion for appeal until April 30, 2014, clearly beyond the delay allowed for appeal. Absent a timely filed motion for appeal, an appellate court lacks jurisdiction to hear the appeal. *Rozas v. Montero,* 05–484 (La.App. 3 Cir. 11/2/05), 916 So.2d 444. Accordingly, because Appellant's motion for devolutive appeal was untimely, this court is without jurisdiction to consider this appeal.

For the foregoing reasons, the appeal of the 2009 judgment is dismissed.

### *ASSIGNMENT OF ERROR NUMBER ONE*

[4] In his first assignment of error, Appellant contends the February 15, 2013 judgment was rendered in error, asserting that the trial court erred in finding that Preston, as Trust Protector, had authority to remove Appellant as trustee of the Trust. For the reasons below, we find this assignment of error lacks merit.

[5] "A trust instrument shall be given an interpretation that will sustain the effectiveness of its provisions if the trust instrument is susceptible of such an interpretation." La.R.S. 9:1753. "In construing a trust, the settlor's intention controls and is to be ascertained and given effect, unless opposed to law or public policy." *In re James C. Atkinson Clifford Trust,* 00–0253, p. 3 (La.App. 1 Cir. 6/23/00), 762 So.2d 775, 776, *writ denied,* 00–2262 (La.10/27/00), 772 So.2d 655. "A trustee shall be removed in accordance with the provisions of the trust instrument or by the proper court for sufficient cause shown." *Martin v. Martin,* 95–0466, p. 4 (La.App. 4 Cir. 10/26/95), 663 So.2d 519, 521, *writ denied,* 95–2806 (La.1/29/96), 666 So.2d 682 (citing La.R.S. 9:1789(A)).

In this case, in Article XI, Paragraph B (emphasis added), the trust instrument provides:

> ****12** B. *Successor Trustee.* Following Settlor's death, should the Trustee resign or cease to serve as trustee or the office of Trustee otherwise becomes vacant for any reason whatsoever, the Trust Protector shall succeed as a co-trustee and shall designate one or more other individuals to succeed to serve as co-trustees; provided, however, that at least one of the trustees shall at all times be a resident of the State of Louisiana. Following Settlor's death, *should the Trust Protector determine, in his or her sole discretion,* that the individual or individuals then serving in that capacity cannot properly represent the interests of the beneficiaries, *the Trust Protector may remove the trustee or trustees, with or without cause,* and designate one or more individuals to succeed to the office of trustee; provided, however, that at least one of the trustees shall be a resident of the State of Louisiana.

The settlor's intent is clear and unambiguous with respect to removal of the trustee of the Trust. The instrument allows the person occupying the office of Trust Protector to remove the trustee "in his or her sole discretion ... with or without cause." Considering "there is a strong public policy in effectuating and protecting the settlor's intent as set forth in the trust ***1110** document," *Albritton v. Albritton,* 622 So.2d 709, 714 (La.App. 1 Cir.1993) (*quoting Albritton v. Albritton,* 600 So.2d 1328, 1331 (La.1992)), the provision will be "given effect, unless opposed to law or public policy," *In re James C. Atkinson Clifford Trust,* 762 So.2d at 776. Although the office of Trust Protector is not expressly provided for by the Trust Code, Appellant cites, and we find, no law that expressly forbids such a provision. We also find no provision in the Trust Code incompatible with recognition of such an office such that would prohibit its coexistence. Therefore, the provision will be given effect unless it is "opposed to public policy."

Appellant urges this panel to conclude that recognizing the office of trust protector is incompatible with the public policy of Louisiana. In support of this argument, he notes (citing Sterk, *Trust Protectors, Agency Costs, and Fiduciary Duty,* 27 Cardozo L.Rev. 2761, 2777 (2006)):

> ****13** once a protector is appointed, the trustees become, to varying degrees, accountable to the protector. That accountability may lead the trustee to be responsive to the protector's wishes even when the trustee believes that the protector's preferences diverge from the interests of the beneficiaries (and the settlor).
>
> ....
>
> .... The trustee might be especially inclined to follow the protector's directions in cases where the protector has power to replace the trustee.

In additional support of his argument, he asserts that the office of trust protector is a "foreign concept" in Louisiana and is only "authorized by a few common-law states." For the reasons below, we decline to find that the appointment of a person to the office of trust protector runs contrary to public policy. Moreover, we note also that the office of trust protector is not a foreign concept in Louisiana and has been recognized in our Louisiana Civil Law Treatise.

"A trustee shall administer the trust solely in the interest of the beneficiary." La.R.S. 9:2082. When there is more than one beneficiary, the trustee must administer the trust for the benefit of all the beneficiaries. *Id.* In *Albritton,* 622 So.2d at 713, the first circuit aptly explained:

> the statutory provisions relative to the responsibilities of a trustee are rigid and hold the trustee to an even higher fiduciary responsibility to his beneficiary than that owed by a succession representative to heirs. The very word "trustee" implies the strongest obligation on the part of the trustee to be chaste in all dealings with the beneficiary.

"The duty of loyalty is the fundamental duty owed by a trustee as a fiduciary." *Thomas v. Kneipp,* 43,228, p. 7 (La.App. 2 Cir. 5/28/08), 986 So.2d 175, 181 (citing *Albritton,* 622 So.2d 709). "A provision of the trust instrument that purports to limit a trustee's duty of loyalty to the beneficiary is ineffective." La.R.S. 9:2062.

Although a trustee may, to an extent, become accountable to the trust protector, a trust protector can serve important functions in the administration of a ****14** trust. Inherent in the

trust concept is that the settlor does not intend the trustee to treat the property as his own, despite the fact that title was conferred to the trustee. Instead, the settlor intends that the trustee manage the assets for the benefit of the beneficiaries. However, the trust settlor has often been deceased for many years during the existence of the trust. This makes it "impossible to determine whether the trustee is faithfully representing the wishes of the dead settlor." Sterk, *Trust Protectors, Agency Costs, and Fiduciary Duty,* 27 Cardozo L.Rev. 2761, 2777 (2006).

***1111** Traditionally, the beneficiaries have been responsible for ensuring the trustee manages the assets in accordance with the wishes of the settlor, that is, for the benefit of the beneficiaries, through an action for breach of fiduciary duty. However, the action for breach of fiduciary duty is not foolproof. Beneficiaries may not have the expertise to determine whether there has been a breach. Additionally, beneficiaries may be reluctant to take action for any breach detected, as they are, often, dependent on the trustee. Finally, in an action for breach, the trust beneficiaries will bear much of the litigation cost.

By designating a trust protector, the settlor's interest in managing the assets for the benefit of the beneficiaries is better protected, as the trust protector is someone whom the settlor has selected "to represent the settlor's interests in making specified trust decisions that the settlor will be unable to make." Sterk, *Trust Protectors, Agency Costs, and Fiduciary Duty*, 27 Cardozo L.Rev. 2761, 2777 (2006). It has even been said that the trust protector is "the living embodiment of the dead settlor," that is, "a person whose primary function is to exercise judgment on behalf of the trust settlor." By appointing a trust protector, the beneficiaries are no longer saddled with the responsibility of monitoring the trustee for a breach of fiduciary duty and costs of litigation may be avoided as the ****15** settlor "could even give the protector power to remove the trustee without judicial approval."

The office of trust protector is recognized, to some extent, in Louisiana. The Louisiana Civil Law Treatise on Trusts states: "A *trust protector* is usually a person to whom the settlor gives the power to modify or terminate the trust or *to remove and replace a trustee.*" 11 La.Civ.L. Treatise, Trusts § 5:11 (2d ed.) (emphasis added). Moreover, "[r]ecent amendments to the Trust Code .... allow the settlor in Louisiana to nominate 'trust protectors.' " 11 La.Civ.L. Treatise, Trusts, § 5:11 (2d ed.). As further explained in the Louisiana Civil Law Treatise: "The settlor might reserve the power to remove the trustee *or grant the authority to* another trustee or a beneficiary *or an outsider* (for example, settlor's brother)." 11 La.Civ.L. Treatise, Trusts § 16:5 (2d ed.)(emphasis added). The "outsider" may be the person appointed to the office of Trust Protector.

Although we decline to conclude that there will never be circumstances where a specific provision of a trust allowing for appointment of a trust protector may infringe on trustee's fiduciary duty to the beneficiaries, having recognized some of the benefits of appointing a trust protector, we find that recognition of such an office does not violate the public policy of Louisiana. Moreover, we find that the instant case is particularly well-suited to such an appointment. In the instant matter, the Government informed Preston, as Trust Protector, that the IRS would view the payment of the expenses of appeal on behalf of Appellant as an additional violation of the federal priority statute. This could potentially lead to another suit against the Trust and further liability, all of which threatens to deplete the trust corpus.

Having found no barrier to the recognition of

the office of Trust Protector, we find that the trial court committed no legal error in recognizing Preston's **16 authority to remove Appellant as trustee; therefore, we conclude that the provision should be given full effect in accordance with the intent of the settlor as expressed in the amended trust instrument. Thus, the "trustee shall be removed in accordance with the provisions of the trust instrument," La. R.S. 9:1789, which gives "the Trust Protector [the authority] remove the *1112 trustee or trustees, with or without cause." The trial judge concluded that Preston, did, in fact, remove Appellant as trustee of the Trust pursuant to the terms of the Trust, and that factual determination is not now on appeal.

### *ASSIGNMENT OF ERROR NUMBER TWO*

In his second assignment of error, Appellant asserts that:

> the trial court erred in finding that [Appellant's] conditional 2009 offer to resign as Co–Trustee could legally be accepted by Preston on February 4, 2013, after (1) [Appellant] had unambiguously revoked his conditional offer to resign; and (2) an unreasonable amount of time had lapsed before Preston's attempted acceptance, during which [Appellant's] circumstances had materially changed by virtue of the judgment rendered against him.

The trial court ruled "that through the same actions of attempting to accept the resignation of [Appellant] as co-trustee of [the Trust] that [Preston], as Trust Protector of [the Trust] has effectively removed [Appellant] as co-trustee of [the Trust] as of 3:15 P.M., February 4, 2013." The factual determination made by the trial court relative to whether Preston removed Appellant from the position of trustee is not now on appeal; the trial court concluded Preston had removed Appellee. In light of our conclusion that the provision in the Trust authorizing the Trust Protector to remove the trustee "in his or her sole discretion" does not run afoul of Louisiana public policy, we need not address whether Preston, in 2013, could legally accept Appellant's 2009 offer to resign as trustee.

### **17 *ASSIGNMENT OF ERROR NUMBER THREE*

[6] In his third assignment of error, Appellant asserts the trial court erred in allowing the expansion of the pleadings over his objection. At trial, the district court allowed Preston to introduce evidence that he removed Appellant as trustee. Appellant objected. The trial court overruled Appellant's objection on this point and, finding no abuse of discretion, we affirm.

A trial court's determination that an issue is encompassed within the scope of the pleadings is subject to a review for abuse of discretion. *Metoyer v. Roy O. Martin, Inc.,* 03–1540 (La.App. 3 Cir. 12/1/04), 895 So.2d 552, *on reh'g* (3/23/05), *writ denied,* 05–1027 (La.6/3/05), 903 So.2d 467.

A panel of this court explained in *Johnson v. Louisiana Container Co.,* 02–382, p. 16 (La.App. 3 Cir. 10/2/02), 834 So.2d 1052, 1062, *writ denied,* 02–3099 (La.5/9/03), 843 So.2d 394 (citing *Brannon v. Boe,* 569 So.2d 1086 (La.App. 3 Cir.1990)), that "it is within the trial court's discretion to admit or disallow evidence subject to an objection based upon the scope of

the issues and pleadings. Furthermore, it is within the trial court's discretion to determine whether evidence is encompassed by the general issues raised in the pleadings."

On Appellant's objection, the trial court stated:

> for judicial economy I do find that the nexus of facts is such that it would be appropriate for the document to be received and also to allow the Court to hopefully resolve and complete the issue [regarding whether Appellant is trustee] without any further disagreement as to what the status of the various parties are since it's been in a state of flux for apparently two years or more.

We find the trial court did not abuse its discretion. Evidence that Preston removed Appellant as trustee of the Trust was directly relevant to the question of ***1113** whether Appellant was still trustee. This was the primary issue raised in Appellant's pleadings. The evidence that Appellant was removed by Preston did ****18** not expand the pleadings but rather was offered as proof that Appellant was no longer trustee. The evidence presented at the February 4, 2013 hearing concerning Preston's removal of Appellant as trustee of the Trust arose from issues raised in Appellant's pleadings, so it was properly admitted for that hearing. Accordingly, we find that the trial court did not abuse its discretion in admitting such evidence.

***ASSIGNMENT OF ERROR NUMBER FOUR***

[7] In his fourth assignment of error, Appellant asserts the trial court erred in failing to grant his motion for new trial, asserting that the trial court did not comply with the mandate of this court that "a full and complete record ... be created[,]" that the judgment denying the motion for new trial was contrary to the law and the evidence, and that good grounds existed for a new trial. He asserts the same in a writ application.

[8] [9] [10] Generally, an order denying a motion for new trial is a judgment not subject to appeal. *Wallace v. Geo Grp., Inc.*, 11–863 (La.App. 3 Cir. 10/5/11), 76 So.3d 600. Instead, an order denying a motion for new trial may only be reviewed in a request for supervisory relief for abuse of discretion, absent a showing of irreparable injury. *Cormier v. McDonough,* 96–305 (La.App. 3 Cir. 10/23/96), 682 So.2d 814 (citing *Miller v. Chicago Ins. Co.,* 320 So.2d 134, 136 (La.1975)). There has been no showing of irreparable injury in this case. However, "[w]hen an appeal is taken from a final judgment, the appellant is entitled to a review of all adverse interlocutory rulings in addition to review of the final judgment." *Housing Authority for City of Ferriday v. Parker,* 629 So.2d 475 (1993) (citing *Bielkiewicz v. Insurance Company of North America,* 201 So.2d 130 (La.App. 3rd Cir.1967)).

Louisiana Code Civ.P. art. 1972 provides peremptory grounds for granting a new trial and provides that, upon contradictory motion, a new trial must be granted:

> ****19** (1) When the verdict or judgment appears clearly contrary to the law and the evidence.
>
> (2) When the party has discovered, since the trial, evidence important to the cause, which he could not, with due diligence, have obtained before or during the trial.
>
> (3) When the jury was bribed or has behaved improperly so that impartial justice has not

been done.

Second, La.Code Civ.P. art. 1973 provides: "A new trial may be granted in any case if there is good ground therefor, except as otherwise provided by law." "The standard of review for the grant or denial of a new trial under art. 1972 and art. 1973 is the same-abuse of discretion." *Davis v. Coregis Ins. Co.,* 00–475, p. 8 (La.App. 3 Cir. 12/27/00), 789 So.2d 7, 14, *writ denied,* 788 So.2d 1192 (La.2001) (citing *Zatarain v. WDSU Television, Inc.,* 95–2600 (La.App. 4 Cir. 4/24/96); 673 So.2d 1181).

In brief, Appellant first asserts that, at the time of his first appeal, which was dismissed because the trial court had not yet disposed of his motion for new trial, this court gave the trial court a "mandate to grant [a] new trial." In support of this argument, he cites the following from this court's 2014 opinion, *In re Eleanor Pierce (Marshall) Stevens Living Trust,* 13–939, p. 3 (La.App. 3 Cir. 2/12/14), 153 So.3d 1094, 1096:

> [Appellant's] motion [for new trial] reiterated his request for this matter "to be remanded so that a full and complete ***1114** record can be created following discovery and ordinary proceedings." [Appellant] contends that even though La.R.S. 9:1791 required him to appeal the February 15, 2013 judgment within thirty days, a remand of this matter is still necessary. We agree.

He asserts that the last sentence "strongly suggests this Court gave a mandate to grant a new trial."

****20** Appellant's reliance on the last sentence in support of his argument is misplaced. The rest of the opinion clearly reveals that this court did not consider the merits of any of Appellant's arguments. As a panel of this court explained:

> The record before us does not reflect that the trial court ruled on [Appellant's] Motion for New Trial; therefore, the jurisdictional defect of prematurity exists, and a remand to the trial court to address [Appellant's] Motion for New Trial is warranted. This court cannot rule upon the validity of the trial court's removal of [Appellant] as a co-trustee unless and until the trial court renders a final judgment in the matter pursuant to its decision on [Appellant's] Motion for New Trial.

Nothing in the opinion suggests that this court considered the merits of any of Appellant's arguments regarding his motion for new trial, including his assertion that a "full and complete record" should be developed. Instead, the matter was remanded for the very purpose of having the trial court consider the merits of the motion.

In brief, Appellant also asserts the judgment of the trial court denying his motion for new trial was in error because the judgment was "against the law and the evidence" on the grounds that it was "clearly contrary to Louisiana's Trust Code." Because we have concluded that a provision in a trust providing for the appointment of a trust protector does not run afoul of Louisiana public policy, we find this argument to lack merit.

**[11]** Finally, Appellant asserts the trial court erred in "failing to allow [Appellant] to put on evidence" that "good grounds exist[ed] for a new trial." The trial court does not abuse its discretion in refusing to consider evidence which could have been presented at the original trial of the matter. *Gauthier v. Gauthier,* 04–198 (La.App. 3 Cir. 11/10/04), 886 So.2d 681, *writ not considered,* 04–3019 (La.2/18/05), 896

So.2d 15 (citing *Warner v. Carimi Law Firm,* 98–613 (La.App. 5 Cir. 12/16/98), 725 So.2d 592, *writ denied,* 99–466 (La.4/1/99), 742 So.2d 560). ****21** Moreover, in brief, Appellant makes only conclusory allegations that there were "good grounds" for new trial, such as "good grounds for new trial can best be seen by looking at how [Appellant] was treated."

Considering the foregoing, we find that Appellant has not shown the trial court abused its discretion in denying Appellant's motion for new trial. Therefore, we deny Appellant's request for supervisory relief.

### *THE TRUST'S MOTION TO AMEND ORDER OF APPEAL*

On August 25, 2014, the Trust filed a motion to amend the order for devolutive appeal, asserting Appellant's appeals were untimely. In the motion, the Trust "prays that the Court amend the Order for Devolutive Appeal signed by the trial court on April 30, 2014, dismiss those portions of the appeal that are not properly before the Court, and award all costs, attorneys' fees, and any other relief to which the Trust is entitled."

The Trust cites and we find no authority for the proposition that this court may amend an order of the trial court or may impose a sanction of payment of costs and ***1115** attorney's fees for the costs of filing such a motion. Although we have dismissed the appeals of the judgments not properly appealable, we deny the request for attorney fees and costs.

### *CONCLUSION*

Considering the foregoing, we dismiss the appeal of the 2009 judgment, affirm the 2013 judgment, do not consider the appeal of the 2014 judgment, and deny the relief sought by the writ application relative to the denial of Appellant's motion for new trial. All costs are assessed to Appellant.

**APPEALS DISMISSED IN PART; JUDGMENT AFFIRMED; WRIT DENIED.**

**All Citations**

159 So.3d 1101, 2014-697 (La.App. 3 Cir. 2/18/15)

Footnotes

[1] Appellant's Motion and Order for Devolutive Appeal both state that Appellant seeks to appeal the trial court's August 9, 2009 judgment. We have reviewed the record and can find no judgment rendered on August 9, 2009. Appellant's Motion and Order likely refer to the August 5, 2009 and our analysis will address the August 5, 2009 judgment.

**Minassian v. Rachins, 152 So.3d 719 (2014)**

152 So.3d 719
District Court of Appeal of Florida,
Fourth District.

Paula MINASSIAN, Appellant,
v.
Rebecca RACHINS and Rick Minassian,
Appellees.

No. 4D13–2241.
|
Dec. 3, 2014.

**Synopsis**
**Background:** Children of trust settlor brought action against trustee, who was settlor's wife, claiming breach of fiduciary duty. After trustee appointed a trust protector to amend trust, children filed supplemental complaint challenging validity of amendments made by trust protector, and trustee and children each moved for summary judgment as to validity of amendments. The Circuit Court, Broward County, Charles M. Greene, J., granted partial summary judgment in children's favor. Trustee appealed.

**Holdings:** The District Court of Appeal, Warner, J., held that:

[1] Trust Code section allowing trust to confer power to modify its terms permitted trust provision authorizing appointment of trust protector to modify terms of trust, and

[2] trust agreement was ambiguous, so as to empower trust protector to exercise his authority to correct the ambiguity by modifying the terms of the trust.

Reversed and remanded with directions.

**Attorneys and Law Firms**

***720** Thomas F. Luken of The Andersen Firm, Fort Lauderdale, for appellant.

James A. Herb and Jennifer Fulton of Herb Law Firm, Boca Raton, for appellees.

**Opinion**

WARNER, J.

****1** In the midst of litigation in which the trustee of a family trust was being sued for accountings and breach of fiduciary duty, the trustee appointed a "trust protector," as allowed by the terms of the trust, to modify the trust's provisions. These modifications were unfavorable to the litigation position of the beneficiaries, and they filed a supplemental complaint to declare the trust protector's modifications invalid. The trial court found that, because the trust was unambiguous, the trust protector had no authority to change the terms of the trust. We conclude, however, that the trust provisions were ambiguous, that the settlor allowed for the trust protector to act to effectuate his intent, and that the amendment was not invalid. We therefore reverse.[1]

Zaven Minassian ("husband") executed a statement of trust in 1999 and executed a re-statement of trust in 2008. The restatement created a revocable trust, which became irrevocable upon his death. He named himself and his wife as the sole trustees. After his death in 2010, his children filed a complaint against his wife alleging that she was improperly administering the trust. They claimed she had ***721** breached her fiduciary duties, sought a surcharge against her, and demanded an

accounting of the trust.

### *The Restatement of Trust Document*

The husband established the trust for the primary purpose of taking care of himself and his wife. Both he and his wife remained trustees of the trust during the life of the husband, the settlor. Article 8 of the restatement of trust provides that, if the wife survived the husband, the trustee should divide the trust property into two separate trusts: the Marital Trust and the Family Trust. However, if the federal estate tax was not in effect at the time of the husband's death, the trust directed creation of only the Family Trust. The parties agree the latter circumstance occurred, and only the Family Trust was created.

Article 10, which created the Family Trust, empowers the trustee to distribute net income and principal of the Family Trust to the wife "as my Trustee, in its sole and absolute discretion, shall consider advisable for my spouse's health, education, and maintenance." The trustee is directed to "be mindful that my primary concern and objective is to provide for the health, education, and maintenance of my spouse, and that the preservation of principal is not as important as the accomplishment of these objectives." One of the provisions regarding investments empowers the trustee to purchase life insurance on the wife's life "as an investment for the Family Trust."

Article 10 also provides that "The Family Trust shall *terminate* at the death of my spouse. The remainder of the Family Trust, including any accrued and undistributed net income, shall be administered as provided in the Articles that follow." (Emphasis added). Article 11, which immediately follows, provides:

> *It is not my desire to create a Common Trust for the benefit of my beneficiaries.* Upon the death of my spouse, or if my spouse predeceases me, all of the trust property which has not been distributed under prior provisions of this agreement shall be divided, administered, and distributed under the provisions of the Articles that follow.

****2** The provisions for administration after the death of the settlor's wife are contained in Article 12, which is entitled "The Distribution of My Trust Property." Section 1 is entitled, "Creation of Separate Shares," and provides: "All trust property not previously distributed under the terms of my trust shall be divided into a separate *trust share* for each of" the children. (Emphasis added). It directs the trustee to "create a *trust share* for each beneficiary...." (Emphasis added). Article 15 names "Comerica Bank and Trust, National Association" as "Trustee for any trust share created under Article Twelve ... or any other trust share created after the deaths of both me and my spouse...."

### *Proceedings in the Trial Court*

The wife moved to dismiss the children's complaint against her, arguing they lacked standing because they were not beneficiaries of the trust. She pointed to the trust provisions in Articles 10–12, indicating that the Family Trust would terminate upon her death, and thus argued the children could not be beneficiaries of this trust. Instead, she argued, new trusts were to be created upon her death, of which the children would be the beneficiaries. The children claimed they had standing because the trust provisions did not create a new trust, but instead created separate shares in the existing Family Trust for each child upon the wife's death.

After reviewing the trust, the court denied the motion to dismiss, finding that Article 12's use of the word "shares," to ***722** describe the interest the children would receive after the death of the wife, prevented the court from concluding that new trusts were created. The court found "the wording simply [was not] clear" and decided it "would be inappropriate on the standing grounds to deny a forum for [the children] to seek relief."

After the trial court denied the motion, the wife appointed a "trust protector" pursuant to Article 16, Section 18 of the trust. This section authorizes the wife, after the husband's death, to appoint a trust protector "to protect ... the interests of the beneficiaries as the Trust Protector deems, in its sole and absolute discretion, to be in accordance with my intentions...." The trust protector is empowered to modify or amend the trust provisions to, *inter alia:* (1) "correct ambiguities that might otherwise require court construction"; or (2) "correct a drafting error that defeats my intent, as determined by the Trust Protector in its sole and absolute discretion, following the guidelines provided in this Agreement[.]" The trust protector can act without court authorization under certain circumstances. The trust directs the trust protector, prior to amending the trust, to "determine my intent and consider the interests of current and future beneficiaries as a whole," and to amend "only if the amendment will either benefit the beneficiaries as a group (even though particular beneficiaries may thereby be disadvantaged), or further my probable wishes in an appropriate way." The trust provided that "any exercise ... of the powers and discretions granted to the Trust Protector shall be in the sole and absolute discretion of the Trust Protector, and shall be binding and conclusive on all persons."

****3** The wife filed an affidavit from her appointed trust protector stating he had "amend[ed], clarif[ied], and correct[ed] ambiguities to the Trust" to effectuate the settlor's intent. He purported to amend Article 12 to clarify that it was meant to create a new trust after the wife's death, and grant the children shares in the new trust. The new Article 12 was entitled, "The Distribution of the Remaining, if any, Trust Property Upon the Death of [the Wife]," and Section 1 was entitled, "Creation of a Trust With Separate Shares." The new Section 1 provided, "Upon the death of [the wife] and the termination of the Family Trust as provided in Article Ten, Section 7, if there is any property remaining, it shall be disbursed to a *new* trust to be created upon the death of [the wife] with a separate share for each of" the children. (Emphasis added).

The children filed a supplemental complaint challenging the validity of the provisions amended by the trust protector. Both parties then moved for summary judgment as to the validity of the trust protector amendments.

The court entered an order granting the children's motion for partial summary judgment and denying the wife's motion. The court found the trust protector's amendment was improper because it did not benefit the beneficiaries as a group or further the settlor's probable wishes, as required under the trust. The court found the amendment did not benefit all the beneficiaries because it would leave the children without the ability to challenge the actions of the wife as trustee, leaving her "to do as she wishes without having to annually account to the children...." The court found the trust protector's amendment also did not further the settlor's probable wishes in an appropriate way because the settlor "clearly intended to provide for his children from the Family Trust at the time of his wife's death[.] The children were to share in whatever remained."

***723** The court did not rely on the testimony of

the trust protector in determining the husband's intent, instead finding that, "by examining the four corners of the document, and also examining the plain language he used, the meaning of the document is clear." The court relied on the original Article 12's reference to "trust shares." The court also noted that, in the provisions regarding the trust protector, the trust restatement referred to "my spouse and beneficiaries." The court found this indicated "the entire trust was intended not only to benefit his wife, but also his children," because it "shows that when he speaks of his 'beneficiaries' he is referring to individuals other than his wife."

The court relied on several provisions it saw as establishing "[t]he continuity of the trust beyond the life or remarriage of the wife[.]" It cited the trustee's authority to purchase life insurance on the settlor's wife "as an investment for the Family Trust," reasoning, "[t]here would be no need for such an investment if the Family Trust ceased to exist upon the wife's death." The court rejected the literal language of Article 10, Section 7—which provides the Family Trust terminates on the death of the wife and the remainder shall be administered as provided in the articles following Article 10—because "there would be no 'remainder' if the trust actually terminated, and the '[a]rticles that follow' create 'separate trust shares' not trusts."

****4** As further proof that Article 12 did not create a new trust for the children upon the wife's death, the court relied on Article 12, Section 2, which noted that the trust shares of the husband's children, if passed down by inheritance, would be "administered as a separate trust[.]" The court reasoned that this "shows [the husband] knew how to create new trusts, and only does so after his children die[.]" The court concluded, "If the Trust Protector wished to amend a drafting error to effectuate the settlor's intent or benefit all the beneficiaries, he should have amended Article 10, Section 7, which speaks of termination of the trust[.]"

The court entered partial summary judgment for the children, invalidating the amended provisions, and the wife timely appealed.

### *Analysis*

**[1]** We first address the validity of the trust protector provision in the trust, because if it is invalid under Florida law, then any amendments created by the trust protector would likewise be invalid. On the other hand, if those provisions are valid, then the trust provides that the trust protector can exercise his powers in his sole and absolute discretion, and his actions are binding and conclusive on all persons.

The Florida Trust Code provides: "The terms of a trust may confer on a trustee *or other person a power to direct the modification or termination of the trust.*" § 736.0808(3), Fla. Stat. (2008) (emphasis added). This section was adopted from the Uniform Trust Code, which contains identical language in section 808(c). See Unif. Trust Code § 808 (2000). The commentary to this section states:

> Subsections (b)-(d) ratify the use of *trust protectors* and advisers.... Subsection (c) is similar to Restatement (Third) of Trusts Section 64(2) (Tentative Draft No. 3, approved 2001).... "Trust protector," a term largely associated with offshore trust practice, is more recent and usually connotes the grant of greater powers, sometimes including the power to amend or terminate the trust. Subsection (c) [as enacted in section 736.0808(3), Florida Statutes] ratifies the recent trend to grant third persons such broader powers....

> ***724** The provisions of this section may be altered in the terms of the trust. *See* Section 105. A settlor can provide that the trustee must accept the decision of the power holder without question. Or a settler could provide that the holder of the power is not to be held to the standards of a fiduciary....

*Id.* at Editors' Notes (emphasis supplied). *See generally* Peter B. Tiernan, *Evaluate and Draft Helpful Trust Protector Provisions,* 38 ESTATE PLANNING 24 (July 2011).

The children make two arguments as to the inapplicability of section 736.0808(3). First, they contend that this provision conflicts with "the black letter common law rule ... that a trustee may not delegate discretionary powers to another." Second, they argue that sections 736.0410–736.04115 and 736.0412, Florida Statutes, provide the exclusive means of modifying a trust under the Florida Trust Code. We reject both arguments.

****5** As to the conflict with the common law, which precludes non-delegation of a trustee's discretionary powers, this argument fails for two reasons. First, it is not the trustee that is delegating a duty in this case, but the settlor of the trust, who delegates his power to modify to a third person for specific reasons. Second, "The common law of trusts and principles of equity supplement [the Florida Trust Code], *except to the extent modified by this code* or another law of this state." § 736.0106, Fla. Stat. (2008) (emphasis added); *see also* Abraham Mora, et al., 12 FLA. PRAC., ESTATE PLANNING § 6:1 (2013–14 ed.) ("The common law of trusts supplements the Florida Trust Code unless it contradicts the Florida Trust Code or any other Florida law."). Thus, section 736.0808, Florida Statutes, supplements common law, and to the extent the common law conflicts with it, it overrides common law principles.

Sections 736.0410–736.04115 and 736.0412, Florida Statutes, provide means of modifying a trust under the Florida Trust Code. The children argue the terms of the trust cannot prevail over these provisions, so as to add a method of modification via trust protector, because section 736.0105 provides, "The terms of a trust prevail over any provision of this code except ... [t]he ability to modify a trust under s. 736.0412, except as provided in s. 736.0412(4)(b)." § 736.0105(2)(k), Fla. Stat. (2008). Yet section 736.0808(3), Florida Statutes, expressly allows a trust to confer the power to direct modification of the trust on persons other than trustees. "[A] court must consider the plain language of the statute, give effect to all statutory provisions, and construe related provisions in harmony with one another." *Hechtman v. Nations Title Ins. of New York,* 840 So.2d 993, 996 (Fla.2003). These provisions of Chapter 736 can be harmonized by concluding that the sections on modifying trusts do not provide the exclusive means to do so, at least insofar as a trust document grants a trust protector the power to do so. Otherwise, section 736.0808(3) would have no effect. Therefore, we conclude that the Florida Statutes do permit the appointment of a trust protector to modify the terms of the trust.

The trial court found that the trust protector acted outside his powers, because he amended a trust instrument that the trial court found to be unambiguous. Thus, the trial court concluded, the trust protector's amendment was contrary to the husband's intent, as expressed in the unambiguous trust document. We, however, conclude that the instrument was indeed ambiguous.

**[2]** The trial court's interpretation of the trust documents is reviewed *de novo. See Vetrick v. Keating,* 877 So.2d 54, 56 (Fla. 4th DCA 2004) (reviewing summary judgment interpreting trust document, ***725** noting review was *de novo* ); *see also Wells Fargo Bank, N.A. v. Morcom,*

125 So.3d 320, 321 (Fla. 5th DCA 2013) ("The standard of review governing the ruling of a trial court on a motion for summary judgment posing a pure question of law is *de novo.*").

****6** [3] [4] [5] Generally, "[t]he polestar of trust or will interpretation is the settlor's intent," which should be "ascertained from the four corners of the document through consideration of 'all the provisions of the will [or trust] taken together....' " *Bryan v. Dethlefs,* 959 So.2d 314, 317 (Fla. 3d DCA 2007) (quoting *Sorrels v. McNally,* 89 Fla. 457, 105 So. 106, 109 (1925)). Where the terms of a trust agreement are unambiguous, the court should not refer to parol evidence to interpret its meaning. *In re Estate of Barry,* 689 So.2d 1186, 1187–88 (Fla. 4th DCA 1997). "The fact that both sides ascribe different meanings to the language does not mean the language is ambiguous so as to allow the admission of extrinsic evidence." *Bryan,* 959 So.2d at 317 n. 2 (quoting *Kipp v. Kipp,* 844 So.2d 691, 693 (Fla. 4th DCA 2003)).

[6] The provisions of the trust at issue here are conflicting. Article 10 provides that on the death of the trustee, the trust shall terminate. Article 11 states that it is *not* the intent of the settlor to create a common trust for his wife and other beneficiaries. However, Article 12 then directs that upon the death of the wife the trust assets shall be distributed into separate trust "shares" for the beneficiaries. The term "share" makes these trust provisions ambiguous, as it is unclear whether the term share constitutes a new trust.

Other provisions in the trust document support the interpretation, contrary to the trial court's one-trust interpretation, that the husband intended to create separate trusts for the wife and children. Article 11 contains his specific admonition that he did not intend to create a common trust. In the trust protector provisions, the document several times refers to the creation of multiple trusts: a trust protector "may be appointed for *any* trust created in this agreement"; "*All trusts* created under this instrument need not have or continue to have the same Trust Protector"; and "the Trust Protector may, with respect to *any* trust as to which the Trust Protector is acting...." (Emphasis added). Article 15 of the trust also includes provisions for appointing a trustee for "My Beneficiaries' Separate Trusts," i.e., "any trust share created under Article Twelve ... or any other trust share created after the deaths of both me and my spouse...." Article 15, Section 3(f) provides that a beneficiary who attains the age of 35 shall serve as the trustee of his or her respective trust share. These are but some of the provisions which refer to both trusts and trust shares, even though the overall structure of the trust contemplates something separate and apart from the Family Trust.

Moreover, the provisions relied upon by the trial court in determining that there was only one trust (the Family Trust) do not unambiguously support its conclusion. First, the court believed that the reference to multiple " 'beneficiaries' in the plural" showed that the Family Trust was to benefit the children, but that language is also consistent with the existence of multiple trusts.

****7** Second, the court pointed to Article 10, Section 7—that the wife shall not receive any benefits from the trust should she remarry, but could again receive benefits under the Family Trust if her re-marriage ends—as indicating the continuity of the trust beyond the life or remarriage of the wife. This, however, does not defeat the argument that the Family Trust terminates on her death, because Article 10, Section 7 covers only her remarriage. ***726** Thus, the family trust would continue until her death, but the wife could not draw from it after remarriage. This is not at all inconsistent with termination at the death of the wife.

Third, while the court thought that the ability to

purchase life insurance on the wife showed that only one trust was intended, that provision was simply an investment provision and the trustee could not use trust income for such purchase. The trustee might wish to purchase life insurance on the settlor's wife as an investment for the Family Trust or to pay last expenses for the wife, even if the Family Trust terminates on her death, because the remaining property in the trust will be used to fund the children's trusts.

The trial court also relied on its conclusion that "there would be no 'remainder' if the [Family] [T]rust actually terminated[.]" Although it may not be proper to refer to such an interest as a "remainder," distributees are entitled to the trust property upon the termination of a trust, as directed in the trust document. *See* § 736.0410, Fla. Stat. (2008) ("[A] trust terminates to the extent the trust ... is properly distributed pursuant to the terms of the trust."); § 736.0817, Fla. Stat. (2008) ("Upon the occurrence of an event terminating or partially terminating a trust, the trustee shall proceed expeditiously to distribute the trust property to the persons entitled to the property...."); *see, e.g., Yates v. Wessel,* 775 So.2d 993, 994 (Fla. 4th DCA 2000) (noting "[t]he duration of a trust is governed by the trust instrument," and interpreting the trust as terminating on death of settlors, "at which time, under the trust, the property was to be distributed to" their daughter). In fact, Article 12 is titled "The Distribution of My Trust Property" and uses the term "distribution" throughout that section.

In sum, the single-trust interpretation reached by the trial court does not appear to be unambiguously supported by the trust document. We therefore reject the trial court's conclusion that the trust is unambiguous. In fact, we find that it is patently ambiguous on the issue of whether a new trust is created, where the language in the trust instrument dictates that the Family Trust terminates on the death of the wife.

Although the trial court did not consider it, there was uncontradicted evidence in the record as to the husband's intent, including an affidavit and deposition from the trust protector, who was the original drafter of the trust instrument. "Where as here ... there is a patent ambiguity as to the testator's intent, the court below was free to consider extrinsic evidence on the subject." *First Union Nat'l Bank of Fla., N.A. v. Frumkin,* 659 So.2d 463, 464 (Fla. 3d DCA 1995).

****8** The trust protector testified in a deposition that he met with the husband twice, first in person to discuss his estate planning desires, and second over the phone to discuss and execute the documents he had drafted. During the husband's life, the husband and wife's "lives revolved around horse racing and legal gambling," and, in the trust, the husband wanted "to provide for [the wife] in the way they had lived in the past...." The plan was "to create a separate Trust for the benefit of his children" which "would be created only if the Family Trust described in Article 10 ... was not exhausted during [the wife's] lifetime[.]" The purpose of Article 10, Section 7 and Article 11 was "to assure that the Family Trust was not in any way associated to a new Trust that might be created for his children." The trust protector also stated, "This challenge by the children is exactly what [the husband] expected." The trust protector noted that ***727** the husband referred to his daughter in derogatory terms, and that the daughter had not seen her father in years.

From the trust protector's affidavit, it appears that the husband settled on the multiple-trust scheme for the very purpose of preventing the children from challenging the manner in which the wife spent the money in the Family Trust during her lifetime. The trust protector also testified that his law firm always recommends this split-trust approach, rather than what he

referred to as a "pot trust ... where everything goes into the pot for the beneficiaries." He testified, "We have never done it the other way you're talking about, about keeping the same trust." On that basis, he prepared the amendments to the trust to reflect this intent of the testator.

Based upon our conclusion that the trust agreement was ambiguous and the trust protector's amendments were made to effectuate the settlor's intent, the amendments that he made to the trust are within his powers. The amendments may have disadvantaged the children, but the trust protector was authorized the correct ambiguities with the limitation that he act *either* to benefit a group of beneficiaries *or* to further the husband's probable wishes. He acted to correct ambiguities in a way to further the husband's probable wishes. As the drafting agent, he was privy to what the husband intended.

It was the settlor's intent that, where his trust was ambiguous or imperfectly drafted, the use of a trust protector would be his preferred method of resolving those issues. Removing that authority from the trust protector and assigning it to a court violates the intent of the settlor.

We therefore reverse the partial final judgment of the trial court and remand with directions that the trust protector's amendments are valid. We reject all other arguments made by the children against the validity of these provisions, although not ruling on any matters beyond that issue.

CONNER and KLINGENSMITH, JJ., concur.

**All Citations**

152 So.3d 719, 2014 WL 6775269, 39 Fla. L. Weekly D2502

Footnotes

[1] We conclude that we have jurisdiction pursuant to Florida Rule of Appellate Procedure 9.110(k), as the issue regarding the amendment of the trust by the trust protector is separate from the initial issues in the case and arose after the filing of the original complaint. This is the only issue for which this court has jurisdiction at this time.

418 S.W.3d 482
Missouri Court of Appeals,
Southern District,
Division One.

ROBERT T. McLEAN IRREVOCABLE TRUST U/A/D MARCH 31, 1999, by Linda McLEAN, as Trustee, Plaintiff/Appellant,
v.
J. Michael PONDER, Defendant/Respondent.

No. SD 31767.
|
Oct. 24, 2013.
|
Motion for Rehearing and/or Transfer to Supreme Court Denied Nov. 15, 2013.
|
Application for Transfer Denied Feb. 25, 2014.

**Synopsis**

**Background:** Trust brought breach of fiduciary duty action against successor trustees and "trust protector." The trial court dismissed action. Trust appealed. The Court of Appeals, 283 S.W.3d 786,reversed and remanded. Following jury trial on remand, the Circuit Court, Butler County, Michael M. Pritchett, J., granted directed verdict in favor of trust protector. Trust appealed.

**Holdings:** The Court of Appeals, William W. Francis, Jr., C.J., held that:

[1] there was no evidence of any damages to trust as result of alleged breach of fiduciary duty by "trust protector," as would be required for trust to make submissible case on breach of fiduciary duty claim, and

[2] trial court acted within its discretion in excluding evidence of trustees' alleged refusal to allow trust beneficiary access to his residence.

Affirmed.

**Attorneys and Law Firms**

***483** Edward F. Luby, of St. Louis, MO, and Kenneth Blumenthal and Lopa Blumenthal of Hazelwood, MO, for appellant.

Joseph C. Blanton, Jr., of Sikeston, MO, for respondent.

**Opinion**

***484** WILLIAM W. FRANCIS, JR., C.J.

The Robert T. McLean Irrevocable Trust U/A/D March 31, 1999, by Linda McLean, as Trustee ("the Trust"), appeals from the "Judgment" sustaining J. Michael Ponder's ("Ponder") "Motion ... for Directed Verdict at the Close of Plaintiff's Evidence" and granting judgment in favor of Ponder. The Trust asserts eleven points of trial court error. We affirm the Judgment of the trial court.

## Factual[1] and Procedural Background [2]

Robert McLean ("Robert")[3] was involved in an automobile accident in 1996 that left him a quadriplegic. Robert originally hired attorney Patrick Davis to represent him in a product liability suit arising out of the accident. Davis then referred Robert to Ponder, who successfully prosecuted the suit for Robert by settling the case for a large sum of money. The net settlement proceeds were placed in the Trust. Due to significant medical expenses paid

by Medicaid and the need to continue Robert's eligibility for all available government assistance, the Trust contained "Supplemental Needs Provisions" under "Article II" of the Trust. Lettie May Brewer, Robert's grandmother, was named as "Trustor"; Merrill Lynch Trust Company, FSB and David Potashnick, were named as "Trustee[s]"; and Ponder was named as "Trust Protector." The Trust provided for three specific powers for the Trust Protector in subparagraphs 5.4.1, 5.4.2, and 5.4.3. The Trust Protector could: (1) remove a Trustee; (2) appoint a Successor Trustee; and (3) resign as Trust Protector.

Section 5.4 of the Trust described the role and duties of the "Trust Protector" as follows:

**5.4 *Trust Protector.*** The "Trust Protector" of such trust shall be **[Ponder].** The Trust Protector's authority hereunder is 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.

**5.4.1 Removal of Trustee.** The Trust Protector shall have the right to remove any Trustee of the trust under this Agreement. If the Trust Protector removes a Trustee, any successor Trustee appointed by the removed Trustee shall not take office. The Trust Protector may, by written instrument, release the Trust Protector's power to remove a particular Trustee and such release may be limited to the releasing Trust Protector or made binding upon any successor Trust Protector.

**5.4.2 Appointment of Successor Trustee.** The Trust Protector shall also have the right to appoint an individual or corporation with fiduciary powers to replace the removed Trustee or whenever the office of Trustee of a trust becomes vacant.

**5.4.3 Resignation of Trust Protector; Successor.** Any person serving as ***485** Trust Protector may resign. The Trust Protector may appoint one or more persons to be successor Trust Protector to take office upon the death, resignation, or incapacity of the Trust Protector or any person serving as protector. The Trust Protector may be one or more persons, whether individuals or corporations. If more than one person is serving as Trust Protector, they shall act by majority.

(Bold in original).

The Trust did not provide Ponder with any powers or duties to supervise the Trustees or to direct their activities, but did outline the rights, duties, directives, and powers of the Trustees.

In May 1999, when the original Trustees resigned, Ponder exercised his power under the Trust and appointed Patrick Davis and his law firm, Patrick Davis, P.C. (collectively "Davis"), and Daniel Rau, as Successor Trustees. The Successor Trustees had referred legal clients to Ponder over the years and those referrals netted Ponder fees, a portion of which were then shared with Davis and his firm.

In July 2001, Davis resigned as a Successor Trustee. At that same time, Ponder resigned as Trust Protector, but not before appointing Tim Gilmore ("Gilmore") as Successor Trust Protector and Brian Menz ("Menz") to take Davis's place as a Successor Trustee.

In July 2002, Menz resigned as a Successor Trustee, and Linda McLean ("Linda"), Robert's Mother, was appointed as Successor Trustee.

In 2001, Robert was determined to be incompetent by the Circuit Court of Scott County, and Linda and Paul McLean were appointed Robert's guardians.

In August 2004, the Trust brought suit against all persons who had served either as a Successor

Trustee or as Trust Protector under the Trust, including Ponder. The Trust's "First Amended Petition" was filed on April 6, 2005. The petition alleged Ponder had breached his fiduciary duties to Robert and acted in "bad faith" in one or more of the following respects: (1) failed to monitor and report expenditures; (2) failed to stop Trustees when they were acting against the interests of Robert; and (3) placing his loyalty to the Trustees and their interests above those of Robert. The petition also claimed that in the summer of 2000, Robert and his attorney informed Ponder that the Successor Trustees were inappropriately spending Trust funds. While Ponder's firm was a named defendant in the petition, its registered agent was never served, no mention of the firm was made anywhere in the petition, and no relief was requested against the firm.

On May 10, 2005, Ponder filed a "Motion to Dismiss or, in the Alternative, for Summary Judgment." Attached to that motion were copies of the Trust, a memorandum in support of the motion, and a statement of uncontroverted facts with accompanying affidavit.

On July 27, 2005, the trial court sustained Ponder's Motion to Dismiss or, in the Alternative, for Summary Judgment.[4] The trial court's order also struck Ponder's law firm from the caption. The claims against the other defendants were ultimately settled and a "Judgment of Dismissal" was entered by the trial court on January 25, 2007.[5] Several months later, ***486** the Trust requested leave to file an appeal out of time, which was granted by this Court on July 25, 2007. The "Notice of Appeal" listed "Linda McLean, as Trustee of Robert T. McLean Irrevocable Trust U/A/D March 31, 1999" as "Plaintiff/Petitioner," and no other appellants were listed.

The matter proceeded on appeal with the Trust as the only appellant. The function and duties of a "Trust Protector" was a question of first impression before this Court in *Robert McLean Irrevocable Trust v. Patrick Davis, P.C.,* 283 S.W.3d 786 (Mo.App. S.D.2009), on appeal.[6] This Court issued its opinion finding that the Trust stated a claim for breach of fiduciary duty and that a genuine issue of material fact existed as to whether Ponder breached a fiduciary duty.[7] *Id.* at 794–95. This Court remanded the case to the trial court to determine the duties owed by Ponder as Trust Protector and to whom he owed those duties.[8] *Id.* at 795. Specifically, this Court ordered the cause "remanded for further proceedings consistent with [the] opinion." *Id.*

Following remand, the Trust sought leave to amend the petition. The trial court denied this request on August 6, 2009. The Trust then filed a "Writ of Prohibition and/or Mandamus" in this Court seeking to overrule the trial court's denial of leave to amend. This Court denied the Trust's writ on August 25, 2009.

On November 16, 2009, Ponder filed a "Motion for Summary Judgment"; the Trust filed its response on January 15, 2010. The trial court denied Ponder's Motion ***487** for Summary Judgment and later set the case for trial on November 29, 2010.

On July 21, 2010, the Trust filed a motion for default judgment or in the alternative to compel, and requesting leave to amend the petition. The trial court allowed the Trust to file its "Fourth (Substituted) Amended Petition" and removed the case from the November 2010 trial setting. This petition alleged Ponder ignored information he received regarding the Trustees, did not investigate the depletion of the Trust assets, did not question the actions of the Trustees or take any action, and as a result the Trust was damaged. Following the filing of the Fourth (Substituted) Amended Petition, Ponder filed a motion to dismiss Counts I, III, IV, V and VI, and all personal claims of Robert.

Following additional briefing on all pending motions, the trial court entered its order dismissing Counts I, III, IV, V and VI, as well as Robert's personal claim as set forth in Count II, as being "barred by applicable statutes of limitations." The trial court denied Ponder's motion to dismiss Count II as to the Trust; i.e., "Linda McLean, Trustee."

Following this ruling, multiple motions were filed by both parties, including motions for summary judgment. The trial court heard argument on all pending motions, and denied all pending motions, including both motions for summary judgment.[9] The case was later set for jury trial on October 26, 2011.

On October 20, 2011, shortly before the jury trial, the trial court issued its legal findings as to Ponder's duties. The trial court deferred to the language of the Trust for direction in determining the duties of the Trust Protector, which included section 5.4 (5.4.1–5.4.3) cited above, and noted those provisions gave the Trust Protector "the authority to remove a Trustee." The trial court further found the terms of the Trust evidence "the independence of the Trustee from control or supervision of the Trust Protector." The trial court further found the Trust Protector's authority "is limited to the power to remove[,]" and "under the terms of the trust agreement, the Trust Protector had no obligation to monitor the activities of the Trustee." The trial court went on to note that it was

not of the opinion that the Trust Protector could simply ignore conduct of a Trustee which threatened the purposes of the trust.

To the extent that any conduct took place, and to the extent that the Trust Protector was made aware of such conduct, a duty may have arisen by the Trust Protector in his fiduciary capacity to remove a trustee.

On October 25, 2011, the trial court entered its order excluding any testimony by the Trust's expert witnesses, Alexander A. Bove, Jr. ("Bove"), and Hardy Menees ("Menees"), relating to the duties Ponder owed as Trust Protector, because those duties were for determination by the trial court, and excluding any opinions those experts might offer as to whether expenditures from the Trust were appropriate or inappropriate as the Trust failed to disclose such opinions prior to trial.

Trial commenced on October 26, 2011, and the Trust rested on October 28, 2011. Ponder filed his "Motion ... for Directed Verdict at the Close of Plaintiff's Evidence" ("Motion") contending that the Trust had failed to set forth evidence of: ***488** (1) duty; (2) breach of duty; (3) liability; (4) causation; (5) damages suffered as a result of Ponder allegedly failing to remove the Trustees; (6) bad faith on the part of Ponder; or (7) conduct supporting punitive damages. The trial court, after hearing argument of the parties, granted Ponder's Motion. This appeal followed.

The Trust raises eleven claims of trial court error on appeal: (1) dismissing claims of Robert individually and Linda as Trustee, as barred by the statute of limitations, or if barred, the statute of limitations was tolled due to Robert's incapacity; (2) failing to articulate the proper standard of care for fiduciaries; (3) granting Ponder's Motion because the Trust "presented a submissible case"; (4) granting Ponder's Motion because the trial court "failed to acknowledge [Ponder's] involvement in the creation and administration of the Trust and their attorney client relationship"; (5) requiring the Trust to prove bad faith; (6) excluding expert testimony of Menees; (7) excluding expert testimony of Bove; (8) issuing a "withdrawel [sic] instruction" regarding the testimony of James McClellan ("McClellan");[10] (9) excluding and disregarding testimony of Linda as to the

"wrongful exclusion of [Robert] from the trust property"; (10) substituting "its own judgment for that of the fact finder finding against the weight of the evidence on facts based on erroneous legal reasoning as Respondents [sic] affirmative defenses were legally inapplicable and should have been stricken"; and (11) "entering a judgment for Ponder because the verdict is only against the weight of the evidence but as made without the evidence and the cumulative affect [sic] of the courts [sic] rulings were against the weight of the evidence and indicate a judicial bias and deprived [the Trust] of a fair trial."

Ponder contends that: (1) Robert's individual claims and Linda's claims as Trustee were barred by the statute of limitations or doctrine of law of the case; (2) the duties of Ponder as Trust Protector were "specifically limited by the terms of the Trust and significantly differed from those of the trustee"; (3) Ponder had no power under the Trust to order Trustees to take or refrain from taking any action; (4) no attorney-client relationship existed between Ponder and the Trust; (5) the Trust was "obligated to show bad faith" and failed to introduce evidence Ponder acted in bad faith; (6) the trial court properly excluded testimony from Menees because the testimony constituted a legal opinion; (7) the trial court properly excluded testimony of Bove because the testimony related to questions of law; (8) a withdrawal instruction regarding McClellan's testimony was proper because the testimony related to claims not before the trial court or regarding damages to the Trust; (9) Linda's testimony regarding the exclusion of Robert from the Trust property was properly excluded because it was not related to any pending claim or damages; (10) and the Trust failed to present evidence to establish the element of damages and failed to "show where in the record [the Trust] presented evidence of damages or identif[ied] any error on the part of the trial court."

***489 The Trust's Points Relied On and Argument**

Rule 84.04(c) and (e) require all statements of fact and all factual assertions in the argument have "specific page references to the relevant portion of the record on appeal, i.e., legal file, transcript, or exhibits." The Trust failed to consistently provide such references in both its Statement of Facts and Argument sections; oftentimes the Trust's references were unclear, incorrect, or simply did not support the statement or assertion.

The points relied on in the Trust's brief are also deficient in that some points are multifarious and in certain cases, fail to state the legal reasons for a claim of reversible error. While it is within our authority to dismiss this appeal as a whole for these violations of briefing requirements, we are reluctant to do so because Ponder's brief does address some points directly. As a result, we choose to review some, but not all of the Trust's points relied on *ex gratia, In re C.A.M.,* 282 S.W.3d 398, 405 n. 5 (Mo.App. S.D.2009), as opposed to a dismissal.

Because of our disposition of the issues, the Trust's points will be addressed out of order and some points will be addressed together.

***Point X: Damages—the Trust Failed to Prove Damages***

We begin our analysis with Point X:

THE COURT ERRED IN GRANTING A JUDGMENT IN FAVOR OF RESPONDENTS AND DIRECTING THE VERDICT HEREIN AND

FAILING TO SET ASIDE ITS VERDICT BECAUSE APPELLANT SUBMITTED A SUBMISSIBLE CASE TO THE TRIER OF FACT AND THE COURT IN ERROR SUBSTITUTED ITS OWN JUDGMENT FOR THAT OF THE FACT FINDER FINDING AGAINST THE WEIGHT OF THE EVIDENCE ON FACTS BASED ON ERRONEOUS LEGAL REASONING AS RESPONDENTS AFFIRMATIVE DEFENSES WERE LEGALLY INAPPLICABLE AND SHOULD HAVE BEEN STRICKEN AND AMPLE EVIDENCE OF DAMAGES AND CAUSATION WAS SUBMITTED TO THE COURT.[11]

Ponder's Motion filed at the close of the Trust's evidence included a claim that the Trust failed to set forth evidence of damages suffered as a result of Ponder allegedly failing to remove the Trustees—"the one power he had." The trial court found the "positions presented in [Ponder's] [M]otion and the argument in support thereof" were well taken, sustained the Motion, and entered judgment in favor of Ponder. On appeal, the Trust argues "[t]he [trial c]ourt disregards the weight of the evidence and invaded the province of the fact finder by entering a directed verdict as [the Trust] presented substantial evidence to which reasonable minds can differ." Because we find the Trust failed to present evidence that the alleged breach of fiduciary duty caused harm or damage to the Trust, we find the Trust did *not* make a submissible case and the trial court did not err in granting Ponder's Motion.

**Standard of Review**

[1] [2] [3] [4] [5] [6] In reviewing the grant of a motion for directed verdict, this Court 'must determine whether the plaintiff made a submissible case....' ***490** *Dunn v. Enterprise Rent–A–Car Co.,* 170 S.W.3d 1, 3 (Mo.App.2005). 'A case may not be submitted unless each and every fact essential to liability is predicated upon legal and substantial evidence.' *Investors Title Co. v. Hammonds,* 217 S.W.3d 288, 299 (Mo. banc 2007). 'An appellate court views the evidence in the light most favorable to the plaintiff to determine whether a submissible case was made.' *Tune v. Synergy Gas Corp.,* 883 S.W.2d 10, 13 (Mo. banc 1994). 'The plaintiff may prove essential facts by circumstantial evidence as long as the facts proved and the conclusions to be drawn are of such a nature and are so related to each other that the conclusions may be fairly inferred.' *Morrison v. St. Luke's Health Corp.,* 929 S.W.2d 898, 900 (Mo.App.1996). 'Whether the plaintiff made a submissible case is a question of law subject to de novo review.' *D.R. Sherry Const., Ltd. v. Am. Family Mut. Ins. Co.,* 316 S.W.3d 899, 905 (Mo. banc 2010). Further, with respect to evidentiary rulings, the trial court 'enjoys considerable discretion in the admission or exclusion of evidence, and, absent clear abuse of discretion, its action will not be grounds for reversal.' *State v. Mayes,* 63 S.W.3d 615, 629 (Mo. banc 2001).
*Moore v. Ford Motor Co.,* 332 S.W.3d 749, 756 (Mo. banc 2011).
[7] When reviewing, we must view the evidence and reasonable inferences from the evidence "in the light most favorable to the plaintiff, giving him or her the benefit of all reasonable inferences[.]" *Englezos v. The Newspress and Gazette Co.,* 980 S.W.2d 25, 30 (Mo.App. W.D.1998). While the granting of a direct verdict is a drastic measure by the trial court, "liability cannot rest upon guesswork, conjecture, or speculation beyond inferences that can reasonably decide the case[.] For this reason, direction of a verdict will be affirmed if any one of the elements of the plaintiff's case is

not supported by substantial evidence." *Id.* (internal quotations and citations omitted).

## Analysis

[8] At trial, the Trust alleged Ponder breached his fiduciary duty owed to the Trust. The Trust's breach-of-duty claim was based on the Trust's contention that Ponder was made aware in the summer of 2000 that Trustees were spending Trust money inappropriately and depleting Trust assets, but he took no action. The Trust further alleged Ponder ignored the information, did not investigate further into the depletion of Trust assets, and did not question the Trustees' actions. The Trust's Fourth (Substituted) Amended Petition alleged at that time "substantial financial assets of the Trust existed upon information and belief this amount exceeded Five Hundred Thousand dollars ($500,000)." The Trust's petition claimed it was damaged as a direct result of Ponder's breach of fiduciary duty in that: "The Special Needs Trust has been wasted, depleted, and diminished to essentially nothing."

At trial, Menees testified that Ponder should have removed Trustee Davis "in December ... of 1999 at or around year-end December of 1999."[12]

[9] To prevail on a breach of fiduciary duty, a plaintiff must show: (1) the existence of a fiduciary duty; (2) a breach of that fiduciary duty; (3) causation; and (4) harm. *Koger v. Hartford Life Ins. Co.,* 28 S.W.3d 405, 411 (Mo.App. W.D.2000). Here, the parties agreed the "harm" to the ***491** Trust would be depletion of assets of the Trust; obvious losses dollar wise. *See Zakibe v. Ahrens & McCarron, Inc.,* 28 S.W.3d 373, 383 (Mo.App. E.D.2000) (finding harm to defendant because there was substantial evidence that plaintiff's action resulted in the creation of a large receivable on behalf of American Showcase which over time amounted to $455,184; this amount was never paid to defendant by American Showcase; defendant had to bear the cost of carrying this receivable, which testimony showed was $50,000 per year; and defendant suffered cash flow problems due to this large receivable).

Ponder's Motion alleged there was "absolutely no evidence of any damages ... that were caused as a result of the alleged failure by [Ponder] to remove Mr. Davis[,]" and Ponder's counsel orally argued the same. The trial court allowed the Trust's counsel to respond to the oral argument of Ponder's counsel in support of Motion. With respect to evidence of damages, the Trust alleged Ponder "blew" the Trust's money because "he was contacted on numerous occasions about expenditures.... [H]e was contacted about some of the most egregious expenditures[.]" The trial court asked the Trust's counsel "what testimony did I hear about damages?" and Trust responded "Lots." When questioned for a more specific response, the following discussion took place:

THE COURT: Well, you're going—

[TRUST COUNSEL]: Well, we talked—

THE COURT:—to have to be a—

[TRUST COUNSEL]: Okay.

THE COURT:—little more specific if you want—

[TRUST COUNSEL]: We talked about depreciation—

THE COURT:—me to consider it.

[TRUST COUNSEL]: We talked about depreciation and [Ponder] admitted that the stereo system was a diminished asset.

THE COURT: What was the evidence that it

was depreciated?

[TRUST COUNSEL]: Well, he testified that it was, he said—

THE COURT: How much?

[TRUST COUNSEL]: I don't know. He didn't give a precise exact value and I don't believe that the case law requires that we give a precise exact value of the damages. I don't know of any case, it certainly doesn't for punitive damages because that's impossible.

THE COURT: I'm not worried about punitive right now.

[TRUST COUNSEL]: Well, okay, but you know that is what we believe is a submissible position in the case. It would be impossible for us, to precisely calculate damages in an exact amount, it's impossible.

THE COURT: Let me ask you this, we are dealing with a trust and the damages to the trust would be the depletion of the assets.

[TRUST COUNSEL]: Uh-huh.

THE COURT: Okay, this is not a personal injury case where we are talking about pain and suffering—

[TRUST COUNSEL]: No, right.

THE COURT:—and trying to figure out what it might be down the road.

[TRUST COUNSEL]: No.

THE COURT: The trust would have obvious losses.

[TRUST COUNSEL]: Right.

THE COURT: My question to you is, what testimony was there of obvious losses to the trust today dollar wise?

[TRUST COUNSEL]: Well, that's—

***492** THE COURT: I mean there have to be.

[TRUST COUNSEL]: The Merrill Lynch documents, it's obvious the Merrill Lynch documents speak for themselves.

THE COURT: The Merrill Lynch documents show there was a depletion of the trust assets—

[TRUST COUNSEL]: Of almost a million dollars ($1,000,000.00).

THE COURT:—but those documents don't say why.

[TRUST COUNSEL]: I don't believe that they have to say why.

THE COURT: You just think that if the trust depletes that's enough to show bad faith on the part of a Trust Protector who is not a Trustee?

[TRUST COUNSEL]: I think that if a trust is depleted almost in its entirety in a sixteen month period roughly that is absolutely, that is absolutely not only bad faith I'm going to say this I think it's immoral, I think it's—

THE COURT: Well, you didn't have any testimony about immorality today.

[TRUST COUNSEL]: Well,—

THE COURT: I'm not asking you to just make stuff up. Did you have any testimony today of anybody saying that it was immoral?

[TRUST COUNSEL]: Well, it's definitely bad faith. A man who sits by and watches a trust, it's wrong, slowly be depleted almost in its entirety—

THE COURT: You know the problem you have with this is you don't have any evidence as to how it was depleted.

[TRUST COUNSEL]: Well—

THE COURT: You don't have any evidence today—

[TRUST COUNSEL]: Okay.

THE COURT: Excuse me.

[TRUST COUNSEL]: All right.

THE COURT:—of what happened after the correspondence involving Mr. McClellan, whenever that was, and the testimony that we had up to that point was that over a three month period of time there had been a diminution of the trust in the approximate amount of maybe four hundred fifty thousand dollars ($450,000.00), okay.

[TRUST COUNSEL]: Right.

THE COURT: The testimony was that [Ponder] didn't know about anything before that, do you agree with that?

[TRUST COUNSEL]: No, I don't agree with that and—

THE COURT: Okay. I'll just tell you what, that's what the evidence was.

[TRUST COUNSEL]: Okay.

THE COURT: You may not agree, but that's what the evidence was.

[TRUST COUNSEL]: Okay.

THE COURT: Thereafter there was absolutely no evidence of any expenditures made by the Trustees, none.

[TRUST COUNSEL]: Okay.

THE COURT: All that you have is you are saying that the amount of the trust decreased. That's all that you have.

[TRUST COUNSEL]: Okay. Well, I mean I disagree with that.

THE COURT: Tell me what's different. Tell me what you presented in front of the jury—

[TRUST COUNSEL]: Well, we presented—

THE COURT: Let me finish. Not what you think, but what they heard.

[TRUST COUNSEL]: We presented evidence of waste, absolute waste. They spent money; they spent his money on things that were not—

***493** THE COURT: What were they?

[TRUST COUNSEL]:—absolutely necessary. The [sic] hired his own personal friend and ripped my client off.

THE COURT: What testimony was there—

[TRUST COUNSEL]: He hired—There was testimony about Mark Gill. That it was totally unnecessary for his security. Huh—

THE COURT: Now, you have a house out there that you are saying was broken into and you are saying that Mr. Gill's security purpose weren't needed?

[TRUST COUNSEL]: He was there while it happened and they continued to have him on it.

THE COURT: Okay. So what was the value that was assigned—

[TRUST COUNSEL]: Well, they—

THE COURT: Wait a minute, let me ask you a question. Through the testimony today what was the value that was assigned that due to the failure to remove or get rid of Mark Gill that the trust diminished?

[TRUST COUNSEL]: They wasted money. Okay, I will go through their documents, using their documents is the prima facie evidence of the depletion of the trust.

THE COURT: Using their documents—

[TRUST COUNSEL]: Yeah, right.

THE COURT:—do those show checks written?

[TRUST COUNSEL]: They show the check register.

THE COURT: Are you saying that each and every check written was in bad faith and diminution of the trust?

[TRUST COUNSEL]: Well, first of all I want to articulate that's a bad thing. I don't believe that is the standard. I talked to [Menees] and—

THE COURT: We're not talking to [Menees] right now. We're having argument about [Ponder]'s motion.

[TRUST COUNSEL]: Okay.

THE COURT: My question to you is, are you saying that each and every expenditure in that check register—

[TRUST COUNSEL]: Uh-huh.

THE COURT:—is evidence of bad faith on the part of [Ponder]? That's my understanding of what you're saying.

[TRUST COUNSEL]: I don't believe that we have to sit there and specifically say numerically which item—That is almost impossible to do. Huh, Mark Gill, they spent, I mean if I'm reading correctly, it comes out to roughly from three hundred, roughly over forty thousand dollars ($40,000.00) and, I mean, there are other calculations. It also referred to Ronnie Wallace beginning 2/26 to 12/27. These expenditures are completely unnecessary. We think that Mark Gill was an unnecessary expense. Huh—

THE COURT: I'm still trying to figure out any dollar amount.

[TRUST COUNSEL]: I don't believe that we are required—

THE COURT: My understanding of what your argument is to me today is that you don't have to present evidence of damages.

[TRUST COUNSEL]: No, that is not my argument here today, Your Honor. What I'm saying is I don't believe that we have to precisely quantify a precise numerical amount. That would be impossible for us to do. But we can prove that there was waste. Mark Gill for example is one. I think the waste is obvious to anybody that takes a look at it. And we have had several—I mean anybody who looks at this knows it's a total mess; it's a disaster.

***494** THE COURT: Oh this is a disaster I agree with you on that.

[TRUST COUNSEL]: Uh-huh.

THE COURT: But the thing about it is the only thing I can deal with is what's been presented to this jury—

[TRUST COUNSEL]: Right.

THE COURT:—the last three days.

[TRUST COUNSEL]: Right.

The trial court found the Trust "never put anything in front of [the] jury where they could make a determination of any damages caused by [Ponder]." The trial court further noted the Trust had no testimony of applying a dollar figure to any conduct the Trust alleged Ponder performed in bad faith, and the Trust's experts both testified they were not experts on damages. The trial court concluded the court saw "nothing ... which would allow [the trial court] to do anything other than grant the [M]otion."

On appeal, Ponder maintains his position that the Trust failed to "adduce evidence that the breach of fiduciary duty caused damage to [the

Trust.]" We agree.

There was no expert testimony presented by the Trust linking Ponder's alleged breach of fiduciary duty with harm or damages to the Trust. Menees testified Ponder should have removed the Trustees in December 1999 for several reasons, but the reason relevant to this appeal was the depletion of the Trust assets through spending twenty-two percent of the whole trust corpus during the last quarter of 1999. However, Menees acknowledged this money was spent *prior to* Ponder being approached by anyone on behalf of the Trust or Robert to remove the Trustees. There was no evidence presented that a new successor trustee, if timely appointed by Ponder in December 1999, could have recouped any of the previously dissipated Trust assets. As a result, the twenty-two percent depletion of the Trust assets cannot, by the Trust's own expert testimony, be a damage the Trust incurred due to Ponder's alleged breach.

Furthermore, Menees never testified (nor did any other witness) as to what would have happened if Ponder had appointed different trustees in December 1999.[13] With respect to damages, Menees specifically testified:

[PONDER'S COUNSEL]: All right. And so you are not here to testify about what damage occurred to the trust by virtue of what you believe was Mr. Ponder's failure to properly remove the Trustee, correct?

[MENEES]: Yes, sir.

Menees gave his expert opinion on Ponder's alleged breach of duty and when that breach of duty took place. However, Menees did not testify as to what damage occurred because Ponder did not remove the Trustees in December 1999, nor did he identify any inappropriate expenditures of the Trust funds after December 1999.

The Trust's argument is that because the Trust decreased in value as shown in the exhibits, the Trust proved damages due to Ponder's alleged breach. In its brief, the Trust argues:

Here, The Trust funds were squandered. Then fiduciaries made no attempt to preserve the trust corpus. On August 31, 1999 the Robert McLean Irrevocable Trust had a value of *at least* 1,022.051.00 In 1999 Respondent Michael Ponder was Trust Protector and owed a fiduciary duty to his beneficiary. ***495** The fiduciaries owed duties to preserve the trust.

The Trust contained roughly (180,000) thousand Dollars in 2002 when Michael Ponder was Trust Protector. The Trust was also in debt to nursing staff. The Trust property was damaged The trust corpus had dwindled so to the point where the beneficiary could not maintain his living expenses. Considering the debt this could be considered a total loss. Because of Respondents refusal to insist that the fiduciaries perform their legally required tasks of maintaining, protecting, preserving, and making the trust property the trust purpose was destroyed.

Tim Gilmore's warning to Ponder sadly proved to be true: Pat Davis is going to run this thing into the ground. Robert Mclean, Ronnie Wallace, Johnny Martin James McClellan, and others warned Michael Ponder numerous times begging him to exercise ***his fiduciary power.*** "You need to appoint somebody.

The trust was destroyed. The record reveals the co-fiduciaries practice of purchasing inappropriate wasteful items such as: Electronics, $147,808.66 was Pets, ($19,655.17.819.) The Trust made $291,767.33 in unnecessary adaptations to the home. $50,000.00 was spent on a fence that should have cost a maximum of $18,000.00. Money was spent on attorney's fees. spent on a Satellite System and expenses. $13,209.64 was spent on

household supplies and maintenance. The Trust had one beneficiary.

The fiduciaries made no effort to preserve the trust corpus. Even the most elementary investor could have realized a gain with a trust corpus from which Ponder and Davis started out. Gilmore testified even the most basic returns could yield four or five percent. And the money should have lasted more than year and a half. The Trustee and the Protector completely ignored their own financial data they acquired in the Life Care Plan. Respondents gave no consideration to the inflationary projections of economist Bruce Domazlicky.

The beneficiary was left without adequate funds left to be cared for by his mother. The evidence is that this trust was left without sustainable funds to care for the beneficiary and keep of the house. The house, which never should have been purchased, ultimately foreclosed upon is a result of the mismanagement of funds.

(Emphasis in original) (Taken from Appellant's brief verbatim).

The Trust further argues the trial court "made no analysis of the financial records show [sic] almost a total loss to the trust."[14] However, the Trust fails to specifically state or identify how these records show loss to the Trust due to Ponder's alleged breach of duty, nor did the Trust identify at trial, or even now, what unnecessary spending or purchases were made after December 1999 that would not have been made if Ponder had replaced the Trustees in December 1999.

Although the Trust's brief lists dollar amounts spent by the Trust on various items, this listing amounts to nothing more than a mere recital of the amount spent with no explanation as to why the purchases were inappropriate and how Ponder's alleged breach caused the inappropriate ***496** purchases.[15] In addition, the exhibits cited by the Trust include purchases made during the twelve months ending December 31, 1999. Any purchases prior to December 31, 1999, cannot be claimed as harm or damage to the Trust in light of Menees' testimony that Ponder should have removed the Trustees in December 1999.[16]

While the Trust maintains it presented "substantial evidence of damages," we find the Trust failed to point us to any evidence of damage and harm to the Trust *due to* Ponder's alleged breach that was before the jury. Rule 84.04(e) requires all factual assertions in arguments supporting the Trust's points include "specific page references to the relevant portion of the record on appeal, i.e., legal file, transcript, or exhibits." The Trust provided no such references *pointing to damage or harm caused by Ponder's alleged breach,* which are our tools to verify factual assertions made in support of appellate arguments and are essential to effective functioning of appellate courts. *See Demore v. Demore Enterprises, Inc.,* ___ S.W.3d ____, ____, 2013 WL 3509386, at *4 (Mo.App. S.D. July 15, 2013).

A party's mandated compliance with Rule 84.04(e) "provides [this Court] with the tools with which to verify the accuracy of the factual assertions in the argument upon which a party relies to support its argument." *Pattie v. French Quarter Resorts,* 213 S.W.3d 237, 240 (Mo.App. S.D.2007) (internal quotation and citation omitted). " '[W]ithout such compliance, this [C]ourt would effectively act as an advocate of the non-complying party, which we cannot do. This court cannot spend time perusing the record to determine if the statements are factually supportable.' " *Lombardo v. Lombardo,* 120 S.W.3d 232, 247 (Mo.App. W.D.2003) (quoting *McCormack v. Carmen Schell Constr. Co.,* 97 S.W.3d 497, 509 (Mo.App. W.D.2002)).

The Trust points this Court to the *whole* record of expenditures, but fails to specifically identify the evidence before the jury showing which expenditures would not have happened but for Ponder's negligence. Only by doing the Trust's work could we know if the 875–page transcript and 9 volumes of exhibits (containing more than 475 pages) support its argument in Point X. *Lombardo,* 120 S.W.3d at 247. "We cannot seine this record for that purpose or to remedy this rule violation without becoming a *de facto* advocate...." *Demore,* —— S.W.3d at ——, 2013 WL 3509386, at *3; *see also Shaw v. Raymond,* 196 S.W.3d 655, 659 n. 2 (Mo.App. S.D.2006).

[10] The element of harm or damages cannot "rest upon guesswork, conjecture, or speculation beyond inferences that can reasonably decide the case[.]" *Englezos,* 980 S.W.2d at 30 (internal quotation and citation omitted). Here, the Trust failed to prove Ponder's alleged breach of fiduciary duty caused harm or damage to the Trust. For that reason, the Trust's Point X is denied.

### *497 *Points II, III, IV and V are Moot Since the Trust Failed to Prove Damages*

In Points II through V, the Trust argues the trial court erred in granting the directed verdict and judgment in favor of Ponder because the Trust presented a submissible case of Ponder's breach of duty laid out in each point. These points are moot in light of our finding that the Trust failed to present the jury with evidence of damages or harm to the Trust due to the alleged breach of duty. The Trust's Points II through V are therefore denied.

### *Point I: Trial Court's Dismissal of Counts I, II, III, IV and V*

For its first point, the Trust contends the trial court erred in dismissing the individual claims of Robert, and Linda as Trustee, in Counts I, II, III, IV and V of the Trust's Fourth (Substituted) Amended Petition on February 10, 2011. The Trust argues that the trial court "gave no legal reasons for its determinations as to when statute purportedly expired or legal rationale as to its order. The Court is in error by not applying the doctrine of relation back, or the disability provisions of § 516.170 or § 516.290. to a disabled individual. Because of relation back or disability the statute none Appellants claims are barred." (Taken from Appellant's brief verbatim). We disagree.

### Standard of Review

"Our review of a trial court's decision to grant a motion to dismiss is *de novo.*" *Atkins v. Jester,* 309 S.W.3d 418, 422 (Mo.App. S.D.2010). The trial court's order dismissing the counts relating to the individual claims of Robert and Linda provides the counts were "barred by applicable statutes of limitation." However, we will not disturb a *correct* decision of the trial court simply because the trial court gave a wrong or insufficient reason for the decision. *See Edgar v. Fitzpatrick,* 377 S.W.2d 314, 318 (Mo. banc 1964).

### Analysis

The original petition in this matter was filed on August 6, 2004, and listed only one plaintiff: "LINDA McLEAN, as Trustee of the Robert T. McLean Irrevocable Trust U/A/D March 31, 1999." A First Amended Petition was filed on April 6, 2005, with the same listed plaintiff.

On July 27, 2005, the trial court sustained

Ponder's Motion to Dismiss or, in the Alternative, for Summary Judgment, and judgment was entered in favor of Ponder and against the Trust.[17] The claims against the other defendants were ultimately settled and a "Judgment of Dismissal" was entered by the trial court on January 25, 2007. Several months later, the Trust requested leave to file an appeal out of time, which was granted by this Court on July 25, 2007. The Trust, and only the Trust, appealed the trial court's decision to grant Ponder's motion to dismiss and summary judgment. *McLean,* 283 S.W.3d at 786.

On July 27, 2007, a Notice of Appeal was filed listing "Linda McLean, as Trustee" as the only appealing appellant. *See id.* Neither Robert (either individually or through his guardians) nor Linda individually, appealed the trial court's judgment in favor of Ponder. In fact, it was not until this matter was remanded for further proceedings by this Court in *McLean,* that Linda was added "individually" as a plaintiff in the Fourth (Substituted) Amended Petition on September 14, 2010.

***498** Rule 81.01(a) provides the "notice of appeal *shall* specify the parties taking the appeal." (Emphasis added). The only party appealing the trial court's previous order granting Ponder's motion to dismiss and summary judgment was the Trust. Following review of the appeal, we ordered the case remanded for further proceedings *consistent with that opinion,* to include *only* the Trust as plaintiff. *McLean,* 283 S.W.3d at 795. For that reason, the individual claims of Linda and Robert were properly dismissed by the trial court.

As to the claims of the Trust dismissed in the counts in issue, we need not address the Trust's alleged error in light of our finding of no damages or harm to the Trust. To prevail in actions for legal malpractice, breach of fiduciary duty, negligent misrepresentation, negligent infliction of emotional distress, and negligent retention as contained in the Trust's counts in issue, a party must show injury, harm or damage. *See Klemme v. Best,* 941 S.W.2d 493, 495 (Mo. banc 1997); *Koger,* 28 S.W.3d at 411; *Renaissance Leasing, LLC v. Vermeer Mfg. Co.,* 322 S.W.3d 112, 134 (Mo. banc 2010); *Thornburg v. Federal Express Corp.,* 62 S.W.3d 421, 427 (Mo.App. W.D.2001); *Gibson v. Brewer,* 952 S.W.2d 239, 246 (Mo. banc 1997). In light of our finding that the Trust failed to present substantial evidence of harm or damage to the Trust, we need not address the Trust's claims as to the dismissed counts.

The Trust's Point I is denied.

### *Points VIII and IX: Testimony Regarding Refusal to Allow Robert to Return to Trust Property*

**[11]** In Points VIII and IX, the Trust argues the trial court erred in excluding testimony regarding the refusal to allow Robert to return to his residence, owned by the Trust, and giving a withdrawal instruction regarding that testimony.

### Standard of Review

"Trial courts have broad discretion over the admissibility of evidence and appellate courts will not interfere with their decisions unless there is a clear showing of abuse of discretion." *Pittman v. Ripley County Memorial Hosp.,* 318 S.W.3d 289, 294 (Mo.App. S.D.2010). Abuse of discretion is when the trial court's ruling is clearly against the logic of the circumstances and is so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful, deliberate consideration. *Hancock v.*

*Shook,* 100 S.W.3d 786, 795 (Mo. banc 2003).

Similarly, deciding whether to give a withdrawal instruction is within the trial court's discretion. *Haffey v. Generac Portable Products, LLC,* 171 S.W.3d 805, 810 (Mo.App. S.D.2005).

> 'Withdrawal instructions may be given when evidence on an issue has been received, but there is inadequate proof for submission of the issue to the jury; when there is evidence presented which might mislead the jury in its consideration of the case as pleaded and submitted; when there is evidence presented directed to an issue that is abandoned; or when there is evidence of such character that might easily raise a false issue.'

*Id.* (quoting *Stevens v. Craft,* 956 S.W.2d 351, 355 (Mo.App. S.D.1997)). "There is no abuse of discretion if reasonable persons could differ about the propriety of the trial court's decision." *Stevens,* 956 S.W.2d at 355.

**Analysis**

Both points argue testimony from Linda and McClellan regarding the refusal to allow Robert access to his residence should ***499** have been admitted. The record shows when the issue surrounding this testimony came up, the trial court allowed the parties to present their respective arguments on the matter, and carefully considered the admissibility of this evidence. The basis of the trial court's ruling was that the testimony of Linda and McClellan was not relevant to damage to the Trust. The only plaintiff in the lawsuit was the Trust;[18] and the only claim pending at trial was that Ponder breached the fiduciary duty he owed to the Trust. The trial court found the exclusion of Robert from the property was not relevant to any damages because it would only qualify as non-economic damages to the Trust,[19] and "it's an impossibility for a trust to suffer the [non-economic] damages as defined by Missouri Statutes."

The ruling of the trial court was within its sound discretion, it was not clearly against the logic of the circumstances, and it was not so unreasonable and arbitrary as to shock the sense of justice and indicate a lack of careful, deliberate consideration. The Trust's Points VIII and IX are denied.

***Points VI and VII: Expert Testimony Excluded***

The Trust's Points VI and VII involve the exclusion of expert testimony from Menees and Bove regarding Ponder's duties as Trust Protector. The Trust's position regarding the exclusion of expert testimony was not clearly set out in the Trust's brief. The points relied on claim error in entering judgment for Ponder and refusing to set aside Ponder's Motion. However, in the argument sections, the Trust argues "[t]he Order 25, 2011[sic] [excluding expert testimony regarding Ponder's duties,] is legally and factually inaccurate [,]" and the trial court erred "by refusing to allow [the Trust] to read the deposition of [Bove] into evidence." The Trust then sets forth the proffered testimony from the witnesses. Finally, the Trust closes by arguing the trial court erred in "anointing itself the decider of all disregarding the experience and learned. This is prejudicial and reversible error.... [T]he [trial c]ourt undeniably erred by refusing to allow [the Trust] to read the deposition of [Bove]."

**[12] [13]** The Trust failed to mention, much less develop, the trial court's alleged error of

"entering judgment" for Ponder and "refusing to set aside [Ponder's] motion for directed verdict disregarding and excluding" expert testimony in the Trust's argument section. *See Citizens for Ground Water Protection v. Porter*, 275 S.W.3d 329, 348 (Mo.App. S.D.2008). The Trust leaves this Court with no choice but to find these claimed legal errors abandoned:

> An argument must explain why, in the context of the case, the law supports the claim of reversible error. It should advise the appellate court how principles of law and the facts of the case interact. A claim of legal error in a point relied on which is not supported by any argument is considered abandoned. Plaintiffs' failure to provide the factual context of these alleged errors in either their point relied on or their argument leave this court with nothing more than Plaintiffs' bare assertions of legal error. In this vacuum, any effort by this court to address these claimed legal errors would ***500** require us to act as an advocate for Plaintiffs by scouring the record for factual support of these claims. This we cannot and will not do.

*Id.* (internal quotations and citations omitted).

Here, the Trust provided nothing more than bare assertions of legal error; i.e., error in entering judgment, with no factual and legal basis for the claimed error. We cannot and will not attempt to piece together the Trust's argument and what the Trust meant because to do so, would require this Court to act as the Trust's advocate.[20]

The Trust's Points VI and VII are denied.

***Point XI***

**[14]** The Trust's final point relied on is that:

> THE COURT ERRED IN FAILING TO GRANT APPELLANTS MOTION FOR SET ASIDE THE VERDICT AND ENTERING A JUDGMENT FOR RESPONDENT BECAUSE THE VERDICT IS ONLY AGAINST THE WEIGHT OF THE EVIDENCE BUT AS MADE WITHOUT THE EVIDENCE AND THE CUMULATIVE AFFECT OF THE COURTS RULINGS WERE AGAINST THE WEIGHT OF THE EVIDENCE AND INDICATE A JUDICIAL BIAS AND DEPRIVED APPELLANT OF A FAIR TRIAL.

(Taken from Appellant's brief verbatim).

Point XI and the corresponding argument, do not comply with Rule 84.04. First, the point relied on presents multifarious claims—it claims error in failing to grant the Trust's motion to set aside the verdict and entering judgment for Ponder because: (1) the verdict is "only against the weight of the evidence but as made without the evidence"; and (2) the cumulative "affect" of the trial court's rulings were against the weight of the evidence, ***501** show judicial bias, and deprived the Trust of a fair trial. A point relied on that combines allegations of error not related to a single issue violates Rule 84.04. Improper points relied on, including multifarious points, preserve nothing for appellate review. *Martin v. Reed,* 147 S.W.3d 860, 863 (Mo.App. S.D.2004).

In addition, the Trust failed to fully develop the argument and explain why, in the context of the Trust's case, the law supports the claims of error in the Trust's Point XI. *See Osthus v. Countrylane Woods II Homeowners Ass'n,* 389 S.W.3d 712, 716 (Mo.App. E.D.2012) (holding an argument section should advise the court how the facts of the case and principles of law

interact).

Finally, the Trust's argument contains claimed errors not included in the point relied on. For example, the Trust argued:

> The Court error entered its judgment disregarding Appellants motion in limine. Appellant in error allowed Respondent to propound hearsay evidence regarding Tim Gilmore's addiction. Respondents excuse he was aware of Gilmore's habit is the product of Gilmore having the integrity and forthright nature to admit this in testimony. The Court further improperly allowed Respondent to attribute fault to non-parties.

(Taken from Appellant's brief verbatim).

There is no mention of trial court error in ruling on the Trust's motion in limine in the Trust's Point XI, nor mention of error in allowing Ponder to attribute fault to non-parties. Rule 84.04(e) provides the "argument shall be limited to those errors included in the 'Points Relied On.' " *See Osthus,* 389 S.W.3d at 716 (holding "an appellant's brief also must contain an argument section that substantially follows each "Point Relied On[.]"). The argument section of Point XI fails to follow the corresponding point relied on, defeating the very purpose of a point relied on: "to provide the opposing party with notice as to the precise matters that must be contended with and to inform the court of the legal issues presented for review." *Id.* at 715; Rule 84.04(d).

Therefore, because the Trust's Point XI fails to comply with Rule 84.04, it preserves nothing for our review. *Osthus,* 389 S.W.3d at 717. "This court should not be expected either to decide the case on the basis of inadequate briefing or to undertake additional research and a search of the record to cure the deficiency." *Id.* All of these reasons justify our dismissal of Trust's Point XI.

The trial court's Judgment is affirmed.

NANCY STEFFEN RAHMEYER and P.J., DANIEL E. SCOTT, J., CONCUR.

**All Citations**

418 S.W.3d 482

Footnotes

1 We note the Trust's brief violates Rule 84.04(c) in that portions of the Statement of Facts fail to include specific, accurate, or clear references to the record on appeal. In addition, the Trust's brief is full of typographical errors, incomplete sentences, and sentences that appear to have missing words. Many of these errors make it difficult to determine the Trust's argument.
All rule references are to Missouri Court Rules (2013).

2 We borrow freely from this Court's recitation of the facts in *Robert McLean Irrevocable Trust v. Patrick Davis, P.C.,* 283 S.W.3d 786 (Mo.App. S.D.2009), without further attribution.

[3] For clarity and ease of analysis, we have chosen to refer to some of the parties by their first names. We mean no disrespect in doing so.

[4] The trial court's order was later amended to reflect that Ponder's motion to dismiss and motion for summary judgment were both sustained.

[5] In the body of the Judgment of Dismissal the date is denoted as January 25, 2006, which we assume is a typographical error as the document is file-stamped by the circuit clerk as January 25, 2007.

[6] As we pointed out previously,

> no recorded Missouri case has ever dealt with the function or duties of a 'Trust Protector.' The term 'trust protector' does appear in the official comment to section 808 of the Uniform Trust Code and states that section 808 "ratif[ies] the use of trust protectors and advisers.... 'Advisers' have long been used for certain trustee functions, such as the power to direct investments or manage a closely-held business. 'Trust protector,' a term largely associated with offshore trust practice, is more recent and usually connotes the grant of greater powers, sometimes including the power to amend or terminate the trust." UNIFORM TRUST CODE Section 808 (2005). Missouri has adopted section 808 of the Uniform Trust Code as section 456.8–808, RSMo Cum.Supp.2006. The statute itself does not use the term 'trust protector' but more generically states, in pertinent part: "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 a fiduciary duty."

*McLean,* 283 S.W.3d at 789 n. 3.

[7] The entirety of Ponder's statement of uncontroverted facts consisted of the following six paragraphs:

> (1) [Robert] was seriously injured in an automobile accident in 1996 causing him to become a quadriplegic....
> (2) As a result of the injury, [Robert] hired Patrick Davis and Patrick Davis, P.C. to assist him with a products liability suit who then referred the case to [Ponder] for further handling....
> (3) Ponder successfully prosecuted the suit for [Robert], achieving a large settlement....
> (3) [sic] Due to significant medical expenses which had been paid by Medicare and the need to continue [Robert]'s eligibility for all available government programs, the proceeds of the settlement were placed in a Special Needs Trust known as the 'Robert T. McLean Irrevocable Trust U/A/D March 31, 1999.['] ...
> (4) Exhibit A is a true and accurate copy of the [Trust]....
> (4) [sic] [Ponder] was designated as 'Trust Protector' under the terms of the [Trust]....

[8] *McLean* noted "[w]hether [the Trust] will be able to prove the scope of [Ponder]'s duties of care and loyalty and a breach thereof is not the issue before us." 283 S.W.3d at 795.

[9] Due to a conflict in the trial court's schedule, the case was removed from the May 2011 trial setting.

[10] McClellan offered testimony that Robert was denied access to his residence on Kevin Lane, which was owned by the Trust, and suffered damages as a result. With respect to this testimony, the trial court issued the following withdrawal instruction:

INSTRUCTION NO. 2

The evidence of the Trustee's refusal to allow [Robert] to return to the Trust property on Kevin Lane in Sikeston, Missouri, and any damages [Robert] personally suffered as a result is withdrawn from the case and you are not to consider such evidence in arriving at your verdict.

[11] This point relied on is one example of the multifarious nature of the Trust's points relied on. The point relied appears as written.

[12] In support, Menees cited correspondence involving Ponder in which he talks "about the possibility of removal ... [s]o removal is at least in the air and [Ponder] is aware of the possibility and certainly aware of his power to do so."

[13] Menees did acknowledge Robert would have had expenses after December 1999 even if Ponder had replaced the Trustees.

[14] The Trust cites Exhibits 26 through 29 in support: Exhibit 26 is Stereo One documents showing purchases made in November 1999; Exhibit 27 is an affidavit by Merrill Lynch; Exhibit 28 is documents from the lawsuit foreclosing on the real estate owned by the Trust due to default; also labeled as Exhibit 28 is Mark Gill's criminal records/history; and Exhibit 29 is records from accountants regarding the Trust.

[15] For example, the Trust cites $13,209.64 spent on household supplies and maintenance, but does not explain why these expenditures were inappropriate or cite trial testimony as to why these expenditures were inappropriate. Surely, it was necessary to spend some money on household supplies and maintenance of the home for over a one-year time period. Without further explanation as to what portion of the expenditures were inappropriate, the Trust fails to establish harm or damage to the Trust.

[16] For example, the Trust cites $147,808.66 spent on electronics and cites pages 380–82 from the legal file in support thereof. Upon review of those pages, more than two-thirds of the money spent on electronics was spent on or before December 31, 1999.

[17] The judgment was entered in favor of Ponder and against the Trust by the trial court's amendment of its order on October 6, 2005.

[18] As noted in response to the Trust's Point I, Robert's individual claims were properly dismissed by the trial court prior to trial.

[19] Any economic damage to Robert, individually, due to his exclusion from the property, was irrelevant because he was not a party to the lawsuit.

[20] If we were to examine any further, the advocate requirement would become even more apparent. "It is within the sound discretion of the trial court to determine the admissibility of expert testimony and we will not reverse unless there is a clear abuse of that discretion." *Hobbs v. Harken,* 969 S.W.2d 318, 321 (Mo.App. W.D.1998).
Whether a duty exists is "purely a question of law." *Lopez v. Three Rivers Elec. Co–op., Inc.,* 26 S.W.3d 151, 155 (Mo. banc 2000). *See also McLean,* 283 S.W.3d at 794 (noting it is "universally agreed (or at least held) that the question of whether a duty exists is a question of law and, therefore, a question for the court alone. Similarly, it is agreed that whether the duty that exists has been breached is a question of fact for exclusive resolution by the jury.") (internal quotation and citation omitted). The opinion of an expert on issues of law is generally not admissible because such testimony "encroaches upon the duty of the court to instruct on the law." *Howard v. City of Kansas City,* 332 S.W.3d 772, 785 (Mo. banc 2011) (internal quotation and citation omitted).
It is clear that to the extent the testimony of Menees and Bove involved questions of law, the trial court properly excluded the evidence. However, for our purposes, it is unclear which portions of expert testimony the Trust alleges should have been admitted or how the exclusion of testimony was an abuse of discretion. It appears that the Trust's true complaint with respect to expert testimony is with the trial court's October 25, 2011 order sustaining Ponder's motion in limine "excluding expert testimony of either Bove or Menees as to the duties of [Ponder] under the terms of the trust[.]" However, the Trust randomly cites testimony and/or argument with no further explanation. It is not this Court's role to attempt to develop arguments not raised by the Trust, because to do so would be to become an advocate for the Trust "by speculating on facts and arguments that have not been asserted." *Law Offices of Gary Green, P.C. v. Morrissey,* 210 S.W.3d 421, 424 (Mo.App. S.D.2006) (internal quotation and citation omitted).

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United States District Court,
D. South Carolina,
Charleston Division.

Lester S. SCHWARTZ, as Trust Protector of the Wellin Family 2009 Irrevocable Trust, Plaintiff,
v.
Peter J. WELLIN, et. al., Defendants.

No. 2:13–cv–3595–DCN.
|
Signed April 17, 2014.

**Attorneys and Law Firms**

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**Opinion**

**ORDER**

DAVID C. NORTON, District Judge.

***1** This matter is before the court on two motions. The first is a motion to dismiss filed by defendants Peter J. Wellin, Cynthia Wellin Plum, Marjorie Wellin King, and Friendship Management LLC (collectively, "the Wellin Defendants").[1] The second is a motion to appoint a guardian ad l item filed by plaintiff Lester S. Schwartz. For the reasons stated below, the court denies Schwartz's motion to appoint a guardian ad litem and grants the Wellin Defendants' motion to dismiss.

## *I. BACKGROUND*

These facts are drawn almost exclusively from plaintiff's complaint. On November 20, 2013, Keith Wellin appointed attorney Lester S. Schwartz as the trust protector for the Wellin Family 2009 Irrevocable Trust ("the Trust"). On the same day, Schwartz notified all of the Trust's trustees that he was unilaterally making a number of changes to the Trust's governing document pursuant to his trust protector powers. Schwartz also unilaterally removed South Dakota Trust Company as the Trust's corporate trustee and appointed Brown Brothers Harriman Trust Company of Delaware, N.A. as corporate trustee.

On December 1, 2013, Cynthia Wellin Plum, the manager of Friendship Management, LLC, directed the liquidation of Friendship Partners, LP based upon the written consent of all three Wellin children.

On December 5, 2013, Brown Brothers Harriman, the newly-installed corporate trustee for the Wellin Family 2009 Irrevocable Trust ("the Trust"), resigned its position as corporate trustee.

On December 6, 2013, Friendship Partners sold all its assets, including the 896 Class A Berkshire Hathaway common shares that Keith Wellin had contributed to Friendship Partners. About $50 million in proceeds was set aside to pay the balance of the note held by Keith

Wellin. The remaining $95 million was split into three equal parts and distributed to the Wellin children.

On December 17, 2013, Schwartz filed the instant complaint in Charleston County Probate Court against Keith Well in, his three children, Friendship Management, and Friendship Partners. In his complaint, Schwartz asserts that Peter Wellin, Cynthia

Plum, and Marjorie King ("the Wellin children") have "frustrated the intent and purposes of the Trust," which was to provide for Keith's grandchildren as well as his children, by liquidating Friendship Partners' assets and putting $95 million of the proceeds into their own bank accounts. Schwartz's complaint asserts the following six causes of action:

(i) Breach of fiduciary duty (as to the Wellin children);

(ii) Conversion (as to the Wellin children);

(iii) Removal of trustees (as to the Wellin children);

(iv) Restitution (as to all defendants);

(v) Recovery of attorneys' fees (as to the Wellin children);

(vi) Temporary restraining order, and temporary and permanent injunction (as to all defendants).

On December 27, 2013, the Wellin Defendants removed the case to this court. On December 30, 2013, Schwartz filed an emergency motion to extend the state court's TRO and for a preliminary injunction. The Wellin Defendants responded on December 30, 2013 and the court held an emergency hearing on New Year's Eve. In an order issued on January 7, 2014, the court denied Schwartz's motion.

***2** On January 17, 2014, the Wel lin Defendants filed the present motion to dismiss. Schwartz opposed that motion on February 3, 2014, the Wellin Defendants filed a reply on February 13, 2014, and the court had the benefit of the parties' oral argument at a hearing held on February 28, 2014.

On February 12, 2014, Schwartz filed a motion to appoint a guardian or trustee ad l item[2] ("GAL") to represent the interests of Keith's grandchildren and other unborn lineal descendants. The Wellin Defendants opposed the motion on February 21, 2014 and Schwartz replied on February 27, 2013. The motion has been fully briefed and the court again had the benefit of the parties' oral argument at a hearing held on March 25, 2014.

In short, these matters have been fully briefed and are ripe for the court's review.

## *II. STANDARDS*

### A. Schwartz's Motion to Appoint a Guardian Ad Litem

Rule 17(c) (2) of the Federal Rules of Civil Procedure explains that A minor or an incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court must appoint a guardian ad litem-or issue another appropriate order-to protect a minor or incompetent person who is unrepresented in an action.

Some courts have found it appropriate to appoint a GAL "to represent interests of unborn and/or otherwise unascertainable beneficiaries...." *Hatch v. Riggs Nat. 'l Bank,* 361 F.2d 559, 566 (D.C.Cir.1966). The appointment of a GAL is discretionary with the court. *See Fonner v. Fairfax,* 415 F.3d

325, 330 (4th Cir.2005).

**B. The Wellin Defendants' Motion to Dismiss**

Under Federal Rule of Civil Procedure 12(b)(6), a party may move to dismiss for "failure to state a claim upon which relief can be granted." When considering a Rule 12(b)(6) motion to dismiss, the court must accept the plaintiff's factual allegations as true and draw all reasonable inferences in the plaintiff's favor. *See E.I. du Pont de Nemours & Co. v. Kolon Indus.,* 637 F.3d 435, 440 (4th Cir.2011). But "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Ashcroft v. Iqbal,* 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009).

On a motion to dismiss, the court's task is limited to determining whether the complaint states a "plausible claim for relief." *Id.* at 679. A complaint must contain sufficient factual allegations in addition to legal conclusions. Although Rule 8(a)(2) requires only a "short and plain statement of the claim showing that the pleader is entitled to relief," "a formulaic recitation of the elements of a cause of action will not do." Bell *Atl. Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). The "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Iqbal,* 556 U.S. at 678 (quoting *Twombly,* 550 U.S. at 570).

## *III. DISCUSSION*

***3** The court addresses Schwartz's motion to appoint a guardian ad litem before turning to the Wellin Defendants' motion to dismiss.

**A. Schwartz's Motion to Appoint a Guardian Ad Litem**

Schwartz seeks to have a GAL appointed "to represent the interests of the unrepresented Trust beneficiaries (including the grandchildren of Keith Wel l i n, the Trust's Grantor) and the Grantor's other 'lineal descendants,' including persons not yet born or ascertained." Pl.'s Mot. to Appoint a Guardian Ad Litem 1. The court addresses Schwartz's arguments in turn.

**1. South Dakota Law Authorizes the Appointment of a GAL to Represent the Interests of Unborn Beneficiaries Only When There Is No Existing Living Person Who Shares Their Interest.**

Schwartz first contends that South Dakota law expressly authorizes the appointment of a GAL to represent the interest of unborn trust beneficiaries.

The only portion of the South Dakota code that addresses the appointment of a GAL in trust matters relates primarily to service of process. It states that

> If an interest in the estate or trust has been limited [to unborn or unascertained persons,] it is not necessary to serve ... such persons, but if it appears that there is no person in being or ascertained, having the same interest, the court shall appoint a guardian ad l item to represent or protect the persons who eventually may become entitled to the interest.

S.D. Codified Laws § 55–3–32(3).

The Wel lin Defendants argue that Section 55–3–32(3) does not apply in this case because there are living, ascertainable people—Keith's adult grandchildren ("the grandchildren")—who have the same interest as Keith's unborn lineal descendants ("the unborn descendants"). Because the grandchildren have the same interest as the unborn descendants, the Wellin Defendants argue, the appointment of a GAL is neither necessary nor authorized by South Dakota law. Schwartz responds that the grandchildren must not have the same interests as the unborn descendants because the grandchildren have not objected to the Wellin Defendants' conduct. Schwartz's response assumes that the unborn descendants would object to the Wellin Defendants' actions. That is a bridge too far. Neither the court nor the parties can predict what the unborn descendants' opinions and actions would be.

As an initial matter, defendants Peter Wellin, Marjorie Wellin King, and Cynthia Wellin Plum are living, ascertained persons who have interest in the Trust. As a result, Section 55–3–32 may be inapplicable to this case, since the provision only applies "[i]f an interest in the estate or trust has been limited [to unborn or unascertai ned persons]." S.D. Codified Laws § 55–3–32(3). Nevertheless, in an abundance of caution, the court considers whether the grandchildren can be considered proper representatives of the unborn descendants' interests.

Neither the grandchildren nor the unborn descendants are named as beneficiaries of the Trust, but both are the lineal descendants of the Grantor and the named beneficiaries. As such, both the grandchildren and the unborn descendants could be awarded money by the Trust, could be entitled to receive distributions from the Trust if the named beneficiaries were deceased at the time the distributions were made, or could inherit money from the Trust's named beneficiaries. *See* Trust Art. IV.B.1.ac, C.1.ac. As a result, the court finds that the grandchildren and the unborn descendants have the same interests in the Trust.

***4** The grandchildren are competent adults for whom appointment of a GAL would be inappropriate. Because the grandchildren are ascertainable, existing persons who have the same interest in the Trust as the unborn descendants, South Dakota law does not authorize the appointment of a GAL to represent the unborn descendants.

The grandchildren are competent adults who have chosen not to sue their own parents. That choice is theirs to make. Schwartz's disagreement with that choice is not enough to warrant the appointment of a GAL for the unborn descendants.

**2. The Grandchildren & Unborn Descendants May Be Considered Beneficiaries of the Trust under South Dakota Law.**

Schwartz next argues that a GAL must be appointed because the unborn descendants are Trust beneficiaries who are otherwise unrepresented in this dispute. The Wellin Defendants respond that they are the Trust's only beneficiaries.

South Dakota trust law defines a "beneficiary" as a person that has a present or future beneficial interest in a trust, vested or contingent. S.D. Codified Laws § 55–1–24(2). The Trust uses the term "beneficiary" more narrowly. For example, the Trust states:

> I[, Keith Wellinj currently have three (3) children: PETER J. WELLIN, MARJORIE W. KING, and CYNTHIA W. PLUM (each

> hereinafter referred to as the "beneficiary"). I direct the Trustee at the time of the making of the first discretionary distribution ... to divide the trust property into as many equal shares as shall be necessary to provide one such equal share as a separate trust with respect to each beneficiary who is then living and one such equal share for the lineal descendants (collectively) who are then living of each beneficiary who is not then living but of whom there are lineal descendants then living. After making such division the Trustee shall hold, manage, and invest each share as a separate trust for each beneficiary and his or her lineal descendants....

Trust Art. IV.B.1. Elsewhere, the Trust distinguishes "beneficiaries" from "lineal descendants." *See, e.g.,* Trust Art. IV.B. 1.a ("The Trustee shall first pay to the beneficiary, or his or her lineal descendants, such amounts from the trust income...."); Trust Art. IV. C.1.c ("Upon the last to die of the beneficiary and all of his or her lineal descendants, such trust shall terminate...."). The Trust also explains that the trust protector has "no authority, however to amend the trust with regard to the identities of the beneficiaries." Trust. Art. VI.A.3.

While the Trust only lists three express beneficiaries, the grandchildren and unborn descendants may very well qualify as beneficiaries under South Dakota law because they have contingent interests in the Trust. Nevertheless, for the reasons described in Section III.A. 1, appointment of a GAL is inappropriate.

**3. Any Conflict of Interest Between Wellin Defendants & Other Contingent Trust Beneficiaries Does Not Merit Appointment of a GAL.**

***5** Schwartz also argues that the Wellin Defendants have an irreconcilable conflict of interest with the grandchildren and unborn descendants such that the Wellin Defendants cannot represent their interests. Specifically, Schwartz contends that the Wellin Defendants have an interest in taking all of the money for themselves, leaving nothing for future generations.

Neither party cites to South Dakota law regarding trustee conflicts of interest. However, the South Dakota Supreme Court appears to have spoken on the subject. *In re Betty A. Luhrs Trust,* 443 N.W.2d 646 (S.D.1989) addressed conflicts of interest that arise when a co-trustee is also a beneficiary. In *L uhrs,* the plaintiff and her sister were co-trustees of a trust containing many of the plaintiff's assets. 443 N.W.2d at 649. After a falling out, the plaintiff attempted to have her sister removed as a trustee so that the plaintiff could revoke the trust and transfer its assets to other family members. *Id.* at 650–651. The trial court refused to remove the sister from her trusteeship, and South Dakota's high court affirmed, explaining:

> When the settlor of a trust has named a trustee, fully aware of possible conflicts inherent in his appointment, only rarely will the court remove the trustee, and it will never remove her for potential conflict of interest but only for demonstrated abuse of power detrimental to the trust.

*In re Betty A. Luhrs Trust,* 443 N.W.2d at 651; *see also Favalle v. Burns,* 355 Ill.Dec. 656, 960 N.E.2d 99, 109 (Ill.Ct.App.2011) ("[A] trustee may not engage in any form of self-dealing with the trust or place himself in a position where his interests conflict with those of the trust beneficiaries. However, a well-recognized exception to this rule exists where the instrument creating the trust expressly contemplates, creates and sanctions such a conflict of interest." (quotation omitted)). The Luhrs court did not explain what constitutes a "demonstrated abuse of power."

In this case, Keith Wellin, a highly successful and sophisticated investor who had the advice of his long-time tax attorney, was surely aware of the potential conflicts that might arise from naming his children both trustees and beneficiaries of the Trust. It is true that Keith's children have divided the Trust's assets among themselves, leaving only $50 million to pay off the note owed to Keith. However, they contend that this maneuver was the only responsible course of action available because the Trust otherwise would have incurred a $40 million tax liability when Keith turned off his grantor status. It is an open question whether these actions were improper self-dealing or whether they were the actions of responsible trustees. As a result, the court cannot find that the Wellin Defendants' actions rise to the level of "demonstrated abuse of power" that would indicate an impermissible conflict of interest.

Any conflicts of interest that may exist between the Wellin children's dual roles as trustees and beneficiaries of the Trust do not necessitate the appointment of a GAL to protect the interests of the unborn beneficiaries.

***6** For all these reasons, the court denies Schwartz's motion to appoint a guardian ad l item. The court cannot appoint a GAL to represent the interests of competent adults such as the grandchildren. Because the grandchildren have interests identical to the unborn descendants, South Dakota law prevents the court from appointing a GAL to represent those unborn descendants' interests.

**B. The Wellin Defendants' Motion to Dismiss**

The Wellin Defendants make several arguments in support of their motion to dismiss. For the purposes of the present motion, they assume that Schwartz is the legitimate trust protector for the Trust, though they reserve the right to contest that in the future.

**1. Schwartz Is Not a Real Party in Interest.**

The Wellin Defendants first contend that this case should be dismissed because Schwartz is not a real party in interest. Schwartz responds that the amended Trust provisions expressly authorize this litigation because those amendments give the trust protector "the power to represent the Trust with respect to any litigation brought by or against the Trust if any Trustee is a party to such litigation" and "to prosecute or defend such litigation for the protection of trust assets." Pl.'s Opp'n to Mot. to Dismiss 14 (internal quotations omitted).

> Rule 17(a) (1) of the Federal Rules of Civil Procedure states, An action must be prosecuted in the name of the real party in interest. The following may sue in their own names without joining the person for whose benefit the action is brought:
>
> (A) an executor;
>
> (B) an administrator;
>
> (C) a guardian;
>
> (D) a bailee;

(E) a trustee of an express trust;

(F) a party with whom or in whose name a contract has been made for another's benefit; and

(G) a party authorized by statute.

Fed.R.Civ.P. 17(a)(1). "The meaning and object of the real party in interest principle embodied in Rule 17 is that the action must be brought by a person who possesses the right to enforce the claim and who has a significant interest in the litigation." *Va. Elec. & Power Co. v. Westinghouse Elec. Corp.,* 485 F.2d 78, 83 (4th Cir.1973). In a diversity action such as this one, "whether a plaintiff is entitled to enforce the asserted right is determined according to the ... underlying substantive law of the state." *Id.* Because South Dakota law applies to the Trust,[3] the court must look to South Dakota law when determining whether a trust protector can qualify as a real party in interest in this case.

South Dakota law states:

> Every action shall be prosecuted in the name of the real party in interest. A personal representative, guardian, conservator, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought....

S.D. Codified Laws § 15–6–17(a). The South Dakota Supreme Court has explained that "[t] he real party in interest requirement for standing is satisfied if the litigant can show that he *personally* has suffered some actual or threatened injury as a result of the putatively illegal conduct of the Defendant." *Agar Sch. Dist. No. 58–1 Bd. of Educ., Agar, S.D. v. McGee,* 527 N.W.2d 282, 284 (S.D.1995) (quotation omitted) (emphasis added). Put another way, "[t] he real party in interest rule is satisfied if the one who brings the suit has a real, actual, material, or substantial interest in the subject matter of the action." *Ellingson v. Ammann,* 830 N.W.2d 99, 101 (S.D.2013) (quotations omitted).

***7** Schwartz argues that he qualifies as a real party in interest because the amended Trust provisions empower him to represent the Trust in litigation. However, whether Schwartz qualifies as a real party in interest is a matter for the court to determine, not one for private parties to decide. *See, e.g., Biegler v. Am. Family Mut. Ins. Co.,* 621 N.W.2d 592, 600 (S.D.2001) (holding that trial court properly evaluated whether plaintiff was proper party in interest); *Smolnikar v. Robinson,* 479 N.W.2d 516, 519 (S.D.1992) (same).

South Dakota courts have not addressed the issue of whether a trust protector qualifies as a real party in interest when he brings a lawsuit on behalf of an express trust. The South Dakota Code lists trustees, but not trust protectors, as real parties in interest. Neither party has cited any law that supports the proposition that a trust protector can qualify as a real party in i nterest.[4] Finally, Schwartz has not explained how he has *personally* suffered some actual or threatened injury as the result of defendants' conduct.

Because Schwartz has not demonstrated that he has personally suffered an actual or threatened injury in this case, the court finds that he is not a real party in interest. As a result, the court must dismiss the case.

**2. The Trust Amendment Pursuant to Which Schwartz Brings this Lawsuit Is Invalid.**

The Wellin Defendants next argue that Schwartz has no authority to bring this law suit. On November 20, 2013, Schwartz made a number of unilateral changes to the Trust's governing document. Among other things, he added a paragraph that states:

> Notwithstanding any other provision of this Agreement, with respect to any litigation brought by or against any Trust created under this Agreement, if any Trustee of such is a party to such litigation in both an individual or corporate capacity and his or her capacity as a Trustee, then the Trust Protector shall represent such Trust with respect to such litigation, and shall have the power to pay, compromise, contest, submit to arbitration, or otherwise settle such litigation in favor of or against the trust, and may prosecute or defend such litigation for the protection of trust assets. The provisions of this Paragraph (H) shall apply notwithstanding the fact that there may be one or more co-Trustees then serving who are not parties to the litigation in an individual or corporate capacity.

Schwartz Trust Am. ¶ 7. This provision ("the Litigation Provision") does not replace or modify any provision found in the original Trust document. Rather, it is an entirely new paragraph that Schwartz added to Article X I I—Financial Powers. The Wel l i n Defendants argue that the Litigation Provision must be invalid because the Trust only allows the trust protector to decrease or suspend his powers, not expand them.[5] Schwartz responds that the Litigation Provision is a permissible amendment to the administrative provisions of the Trust.

***8** The South Dakota Supreme Court has explained that, as with contracts, courts must interpret a trust instrument as written in order to attempt to ascertain and give effect to the settlor's intention. *In re Estate of Stevenson,* 605 N.W.2d 818, 821 (S.D.2000); *see also In re Florence Y. Wallbaum Revocable Living Tr. Agreement,* 813 N.W.2d 111, 117 (S.D.2012). If it can be accomplished consistently and reasonably, "[t]he entire contract and all its provisions must be given meaning." *Hot Stuff Foods, L L C v. Mean Gene's Enters., Inc.,* 468 F.Supp.2d 1078, 1096 (D.S.D.2006) (citing *Dail v. Vodicka,* 89 S.D. 600, 237 N.W.2d 7, 9 (S.D.1975)); *Spiska Eng'g, Inc. v. SPM Thermo–Shield, Inc.,* 730 N.W.2d 638, 645 (S.D.2007) ("An interpretation which gives a reasonable and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable or of no effect."). "When provisions conflict, however, and full weight cannot be given to each, the more specific clauses are deemed to reflect the parties' intentions-a specific provision controls a general one." *Bunkers v. Jacobson,* 653 N.W.2d 732, 738 (S.D.2002) (quotations omitted).

Article VI, the section of the Trust that describes the purpose and powers of the trust protector, states:

> 3. During [Keith Wellin's] lifetime, *the Trust Protector has the authority* to amend the provisions of the trust with regard to how the beneficiaries will benefit from the trust, and *to amend the trust administrative provisions.* The Trust Protector has no authority,

> however, to amend the trust with regard to the identities of the beneficiaries.
>
> ...
>
> 6.... Any exercise or non-exercise of the powers and discretions granted to the Trust Protector shall be in the sole and absolute discretion of the Trust Protector, and shall be binding and conclusive on all persons. The Trust Protector is not required to exercise any power or discretion granted under this instrument....
>
> ...
>
> 8. *The Trust Protector* acting from time to time, if any, on his or her own behalf and on behalf of all successor Trust Protectors, *may at any time irrevocably release, renounce, suspend, or modify to a lesser extent any or all powers and discretions conferred under this instrument* by a written instrument delivered to the Trustee.

Trust Art. VI, § A.3, 6, 8 (emphasis added).

The Litigation Provision is an administrative provision that expands the trust protector's powers by granting him or her "the power to pay, compromise, contest, submit to arbitration, or otherwise settle such litigation in favor of or against the trust, and [the power to] prosecute or defend such litigation for the protection of trust assets." Schwartz Trust Am. ¶ 7. Keeping in mind that all of the Trust's terms should be given meaning if possible, and that specific clauses trump general ones, the court finds that Art. V I, § A.8 does not allow the trust protector to unilaterally expand his powers. As a result, the Litigation Provision, which increases rather than decreases the trust protector's powers, must be invalid. Because the Litigation Provision is invalid, Schwartz has no authority to bring this lawsuit.

***9** In summary, the court will dismiss this case because Schwartz is not a real party in interest and because the Litigation Provision upon which he relies is invalid. South Dakota Code § 15–6–17(a) states:

> No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest....

Additionally, Federal Rule of Civil Procedure 17(a)(3) states that "The court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action." To provide the "reasonable time" required by both South Dakota law and the Federal Rules of Civil Procedure, this order shall serve as the court's notice that it will dismiss Schwartz from the case on the basis that he is not a real party in interest.

## *III. CONCLUSION*

For these reasons, the court **DENIES** plaintiff's motion to
appoint a guardian or trustee ad l item, ECF No. 30, and **GRANTS** defendants' motion to dismiss. The court **WILL DISMISS** this case **WITH PREJUDICE** unless a real party in interest ratifies, joins, or substitutes itself as plaintiff within fifteen (15) days of the date of this order.

**AND IT IS SO ORDERED.**

Footnotes

[1] Schwartz also initially named Friendship Partners, LP as a defendant in this case. On January 3, 2014, Schwartz voluntarily dismissed Friendship Partners from the case. Notice of Voluntary Dismissal, ECF No. 12.

[2] Since the parties both use the terms "trustee ad litem" and "guardian ad litem" interchangeably, the court uses only the terms "guardian ad litem" or "GAL."

[3] *See* Trust Art. III ("Unless changed by the Trustee, the situs of this trust is in the State of South Dakota and its laws shall govern the interpretation and validity of the provisions of this instrument...."); Schwartz Trust Am. 1 ("[T]he Trust shall continue to be administered pursuant to the laws of the State of South Dakota....").

[4] Schwartz does cite *Shelden v. Trust Co. of the Virgin Is.,* Ltd., 535 F.Supp. 667 (D.P.R.1982) for the proposition that a trust protector is a real party in interest. His reliance on *Shelden* is misplaced. In *Shel den,* the terms of an inter *vivos* revocable trust granted a trust protector

> the authority to perform every act and to exercise every power vested in or reserved to the Settlor in his place and stead as fully as settlor might do, including the removal of the Trustee and the designation of a successor trustee, except that he could not revoke, amend or otherwise modify the provisions of the trust.

535 F.Supp. at 668. Settlor and sole beneficiary Francis Shelden and trust protector L. Bennett Young brought suit against the trust's corporate trustee, then, during the litigation, moved to drop Shelden as a plaintiff and to allow Young to proceed as a plaintiff in his alternate capacity as successor trustee. *Id.* at 671–72. The court concluded first that Young, in his role as trust protector, was a party with real interest in the trust because the trust granted the trust protector all of the powers held by the settlor/sole beneficiary of the trust. *Id.* at 671. The court also found that Young and a corporate successor trustee both had "a legitimate and real interest in the trust" and admitted them as plaintiffs *"in their roles as successor trustees." Id.* at 672 (emphasis added). *Shelden* is not particularly informative because Schwartz's powers as trust protector are much more limited than the powers granted to the *Shelden* trust protector, and because the *Shelden* court ultimately admitted Young as a plaintiff in his role as successor trustee, not in his role as trust protector.

[5] Because this argument succeeds, the court need not consider the Wellin Defendants' other arguments regarding the invalidity of the Litigation Provision.

# Sample Trust Protector Language

Option 1:

Trust Protector. The Trust Protector is to assist, if needed, in protecting the interests of the Beneficiary and in achieving the objectives and intent of this trust agreement.

A. Designation of Trust Protector. [NAME] shall serve as Trust Protector of this trust agreement.
B. Power to Remove Trustee. The Trust Protector shall have the power to remove a Trustee as provided in [SECTION].
C. Power to Select Successor Trustee. The Trust Protector shall have the power to select a successor Trustee as provided in [SECTION]
D. Power to Amend Trust Agreement. The Trust Protector may amend any provision of this agreement to:
    i. Add or modify terms of the trust so that the trust will protect the financial resources governed by this agreement and to comply with the intent of this trust that trust assets shall not be considered income or resources for all needs-based and entitlement benefits from any agency, such as Regional Center benefits, Social Security Disability Insurance (SSDI), Medicare, Medicaid, Supplemental Security Income (SSI), In-Home Supportive Service (IHSS), Section 8 housing assistance, and any other special purpose benefits for which the Beneficiary is eligible or would be eligible if the terms of this trust were modified or supplemented;
    ii. Alter the administrative and investment powers of the Trustee to comply with any changes in the law;
    iii. Reflect tax or other legal changes that affect trust administration; and
    iv. Correct ambiguities, including scrivener errors, that might otherwise require court construction or reformation.

Notwithstanding the foregoing, the Trust Protector shall not amend this agreement in any manner that would limit or alter the rights of the Beneficiary in any trust assets held by the trust before the amendment, unless the purpose of the amendment is to modify an existing provision in the trust that defeats the trust's intent of preserving public benefits.

An amendment to this agreement shall be made in a written instrument signed by the Trust Protector. The Trust Protector shall deliver a copy of the amendment to the Beneficiary, the Beneficiary's legal representative, and the currently serving Trustee.

E. Resignation of Trust Protector. A Trust Protector may resign by giving notice to the Beneficiary, and to the Trustee then serving. Such resignation shall take effect on the date set forth in the notice, which shall not be earlier than thirty (30) days after the date of delivery of the notice of

resignation, unless an earlier effective date shall be agreed to by the Trustee.

F. Authority of Trust Protector to Appoint a Successor Trust Protector. Any Trust Protector (including successors) shall have the right to appoint a successor Trust Protector. Such appointment shall be in writing and take effect on the death, resignation, or incapacity of the appointing Trust Protector. If there are successor Trust Protectors named in this agreement, then appointment of a successor Trust Protector under this subsection shall take effect only if and when all Trust Protectors named fail to qualify or cease to act.

G. Default of Designated Trust Protector. If the office of Trust Protector is vacant and there is no effectively named successor Trust Protector, any interested party except for the Beneficiary, may petition a court of competent jurisdiction to appoint a successor Trust Protector.

H. Rights of Successor Trust Protectors. Any successor Trust Protector shall have all of the authority of the Trust Protector by original appointment but will not be responsible for the acts or failures to act of his or her predecessor(s).

I. Good Faith Standard Imposed. The Trust Protector shall not be liable for any act or omission to act and shall be reimbursed promptly for any costs incurred in defending or settling any claim brought against him or her in his or her capacity as Trust Protector unless it is conclusively established that the act or omission to act was motivated by an actual intent to harm the Beneficiary of the trust or was an act of self-dealing for personal pecuniary benefit.

J. No Duty to Monitor. The Trust Protector shall have no duty to monitor the administration of this trust in order to determine whether any of the powers and discretions conferred by this agreement on the Trust Protector should be exercised. Further, the Trust Protector shall have no duty to keep informed as to the acts or omissions of others or to take any action to prevent or minimize loss.

K. No Duty to Exercise Authority. The Trust Protector is not required to exercise any power or discretion granted under this agreement. Any exercise or nonexercise of the powers and discretions granted to the Trust Protector shall be in the sole and absolute discretion of the Trust Protector and shall be binding and conclusive on all persons.

L. Not a General Power of Appointment. It is the Settlors' intention that the Trust Protector's authority not be a general power of appointment under Internal Revenue Code §§2041, 2514. Accordingly, the Trust Protector's powers cannot be exercised in favor of the Trust Protector, the estate of the Trust Protector, or any creditor of the Trust Protector. Nor may the power be exercised to discharge an obligation of the Trust Protector to support another person.

M. Release of Powers. The Trust Protector, acting on its own behalf and on behalf of all successor Trust Protectors, may at any time, by a written

instrument delivered to the Trustee, irrevocably release, renounce, suspend, or reduce any or all powers and discretions conferred on the Trust Protector by this agreement.

N. Compensation. The Trust Protector shall be entitled to reasonable compensation for services rendered in this capacity as determined in the Trustee's sole discretion. The Trust Protector shall be entitled to reimbursement for all expenses incurred in the performance of its duties as Trust Protector, including travel expenses. Serving in the capacity of Trust Protector shall not prevent the Trust Protector from also providing legal, investment, or accounting services on behalf of the trust or the Beneficiary. If the Trust Protector is providing professional services, the Trust Protector is entitled to charge its normal and customary fees for legal services rendered or to be rendered and in addition is entitled to be compensated for its services as Trust Protector.

O. Right to Accountings and Examine Records. The Trustee's books and records concerning the administration of this trust, (including but not limited to all trust financial records, Trustee records, property inventories, and accountings), shall be open and available for inspection by the Trust Protector at all reasonable times.

Option 2:

The Trust Protector: The functions of the Trust Protector shall be those described in this Section and as may be specifically granted elsewhere in this agreement. Any actions taken or refrained from being taken by the Trust Protector shall be at Trust Protector's absolute discretion.

1. Trust Protector: The functions of the Trust Protector shall be those described in this Section and as may be specifically granted elsewhere in this agreement. Any actions taken or refrained from being taken by the Trust Protector shall be at Trust Protector's absolute discretion
   1.1 Designation of Trust Protector. [Trust Protector] shall serve as the initial Trust Protector. [Alt: No Trust Protector is being appointed at the time of establishment of the Trust. The Settlor is authorized to appoint as Trust Protector an independent person, not related or subordinate to the Settlor, by written notice to the Trustee and to the Beneficiary or Beneficiary's Legal Representative.]
   1.2 Resignation of Trust Protector. A Trust Protector may resign upon 30 days' written notice to the Settlor, the Trustee, and to the Beneficiary or Beneficiary's Legal Representative.
   1.3 Authority of Trust Protector to Appoint Successor Trust Protector. Each Trust Protector shall have the authority to appoint a successor Trust Protector, such appointment to take effect upon the death, resignation or incapacity of the then-serving Trust Protector. The Trust Protector shall have the authority to revoke its appointment of a Successor Trust Protector

at any time prior to the Successor Trust Protector's assuming its duties.

1.4 Appointment by Court. In the event the Trust Protector ceases to serve for any reason and no other successor Trust Protector is appointed pursuant to this [SECTION], any interested person is authorized to petition the court having jurisdiction over the Trust or the person of the Beneficiary to appoint a successor Trust Protector.

1.5 Power of Successor Trust Protector. Each Successor Trust Protector shall have the rights, powers, privileges, discretions, and duties conferred upon or vested in the Trust Protector by the provisions of this agreement.

1.6 Notice to Trust Protector. The Trustee shall cooperate with the Trust Protector by keeping the Trust Protector informed about important Trust matters. In particular, the Trustee shall provide, upon request, the Trust Protector with copies of the reports described in [SECTION].

1.7 Power to Remove and Appoint Trustees. The Trust Protector shall have the power to remove any Trustee, including an Independent Special Trustee, with or without legal cause. After a Trustee has been removed, or whenever the office of Trustee of a trust is vacant and no successor Trustee is effectively named under other provisions of this agreement, the Trust Protector is authorized to appoint as Trustee an individual or corporate fiduciary who is an "independent trustee" as defined in [SECTION]. A Trust Protector may not appoint itself as Trustee. Any such Trustee appointment shall be by written instrument delivered to the Trustee(s) and to the Beneficiary or Beneficiary's Legal Representative, as appropriate.

1.8 Good Faith Standard Imposed. The Trust Protector shall not be liable for any action or failure to act taken in good faith pursuant to the authority granted herein, and shall be reimbursed promptly for any costs incurred in defending or settling any claim brought against it in its capacity as Trust Protector unless it is conclusively established that the action or failure to act was motivated by an intent to harm the Beneficiary or was an act of self-dealing for personal pecuniary benefit. Any exercise or non-exercise of the powers and discretions granted to the Trust Protector shall be in the sole and absolute discretion of the Trust Protector and shall be binding and conclusive on all persons. The Trust Protector should investigate any credible complaints it may receive from the Beneficiary or others regarding the administration of the Trust by the Trustee, and should review any notices or documentation provided by the Trustee, but the Trust Protector shall have no duty to independently monitor the Trustee's actions in order to determine whether any action should be taken, and shall not be liable for a failure to do so.

1.9 Release of Powers. The Trust Protector, acting on his or her own behalf and on behalf of all successor Trust Protectors, may at any time, by a written instrument delivered to the Trustee, with notice to the Beneficiary or the Beneficiary's Legal Representative, suspend or irrevocably release, renounce, or reduce any or all powers and discretions conferred on the

Trust Protector by this agreement.

1.10 Limitation of Powers. The Trust Protector shall not participate in the exercise of a power or discretion conferred under this section that would cause the Trust Protector or Trustee to possess a general power of appointment within the meaning of Sections 2041 and 2514 of the Internal Revenue Code. Specifically, the Trust Protector may not use this authority for his or her personal benefit, or for the discharge of his or her legal or financial obligations, including an obligation to support or educate the Beneficiary. In no event shall the Trust Protector have any right to direct or control distributions of Trust assets to anyone.

1.11 Trust Protector Compensation. The Trust Protector is entitled to receive reasonable compensation for services rendered and to reimbursement for all expenses incurred in the performance of its duties as Trust Protector, including the cost of attorney fees, as appropriate. Serving in the capacity of Trust Protector does not prevent the Trust Protector from also providing legal, investment, or accounting services on behalf of the Trust or the trust beneficiaries. If the Trust Protector is providing professional services, the Trust Protector is entitled to charge its normal and customary fees for services rendered or to be rendered.

Option 3:

Powers and Duties of Trust Protector. The Trust Protector named herein shall have the power to remove any Trustee (except a Trustor acting as Trustee), for any reason, including but not limited to a Trustee's failure to act, and a Trustee's failure to attend to Trust business in a timely or responsible manner. Upon removal of the Trustee, the successor named herein shall assume the powers and duties of Trustee hereunder. In the event that no successor is provided for, or if the Trust Protector shall have removed all named Trustees and successors, or if all named Trustees and successors shall have ceased or failed to serve for any reason, the Trust Protector may name a suitable successor Trustee (including himself). The Trust Protector shall also have the power to name a successor Trust Protector by a writing making reference to this Trust, including by a writing which by its terms takes effect only upon the death or disability of the Trust Protector. Any Successor Co-Trustee shall provide to the acting Trust Protector hereunder an annual accounting of trust activity in writing or in person.

Option 4:

Trust Protector. The Grantors appoint [NAME] as the Trust Protector. The Trust Protector is authorized, in the exercise of sole and absolute discretion, to remove any and all Trustees acting hereunder, to designate successor Trustees in the place and stead of any Trustee appointed herein and to appoint co-Trustees; provided, however, no Trust Protector may appoint as Trustee himself or herself, the Grantors, or any other person who has contributed property to the trust, any person who is married to the Trust Protector or who is related to the Trust Protector or the Trust Protector's spouse within

the third degree of consanguinity, or any person who is a partner or fellow shareholder of the Trust Protector in any enterprise in which the Trust Protector holds a substantial interest within the meaning of Section 2036(c) of the Internal Revenue Code or to which the Trust Protector devotes an average of more than 10 hours per week. The Trust Protector is also authorized, in the exercise of sole and absolute discretion, to designate by instrument in writing delivered to the Trustee s successor Trust Protector to act if there is no Trust Protector otherwise appointed hereunder who is willing and capable of serving and to revoke any such designation before it becomes effective; provided, however, neither the Grantors, any other person who has contributed property to the trust, any descendant of the Grantors, nor a spouse of any descendant of the Grantors may serve as Trust Protector. Any successor Trust Protector shall have all the powers of the initial Trust Protector. The Grantors are not imposing any fiduciary responsibility on the Trust Protector to monitor the actions of the Trustee. Except for any matter involving the Trust Protector's own individual willful misconduct or negligence proved by clear and convincing evidence, no Trust Protector shall incur any liability by reason of any error of judgment, mistake of law, or action of any kind taken or omitted to be taken hereunder if in good faith reasonably believed by such Trust Protector to be in accordance with the provisions and intent hereof. The Trust Protector shall not be liable for failure to remove any Trustee even if such Trustee may be guilty of a gross violation of his or her fiduciary duties hereunder.