

MSBA PROBATE & TRUST LAW SECTION E-NEWSLETTER

October 2020

Call for Submissions

We are always looking for attorneys to write brief articles for this newsletter. Articles can focus on any issues relevant to probate and trust law. This newsletter is distributed to the Probate and Trust Law Section membership, which consists of approximately 1,158 practitioners. Writing for the newsletter is a great way to share your knowledge and expertise with your colleagues.

If you are interested in submitting an article, please contact Kiley Henry (KEH1@ntrs.com) or Jennifer Colich (colich.jennifer@dorsey.com) with your idea.

Please visit the Section's website for ideas and to see the various articles that have been written in the past.

Best Regards,
Kiley Henry & Jennifer Colich
Probate & Trust Newsletter Editors

Upcoming Events and CLE Programs

- **Greater MN Probate & Trust Study Group Conference Call**
 - October 21, 2020 at 9:00 a.m.; November 11, 2020, 9:00 a.m.; December 16, 2020, 9:00 a.m.
 - Call-in Number: (877) 226-9607; Passcode: 9295091072
 - Contact Bradley W. Hanson (bhanson@quinlivan.com; (320) 251-1414) with any questions or to join the group
- **MSBA Probate & Trust Law Section Meeting**
 - Thursday, October 15, 2020 at 3:30 p.m.
 - Location: Due to Covid-19, the meetings will be held virtually until further notice
 - Call-in Number: (312) 626-6799; Meeting ID: 912 9374 6813; Passcode: 450147
- **CLEs**
 - MSA, October 14, 2020: [RCBA, October 15, 2020: WEBINAR | Practical Insights to Unique Probate Problems](#)
 - RCBA, October 15, 2020: [WEBINAR | Practical Insights to Unique Probate Problems](#)

- RCBA, October 15, 2020: [Virtual Happy Hour Hosted by the RCBA New Lawyers Section](#)
- MSBA, October 20, 2020: [Family Business Transitions | Valuation & Planning Considerations](#)

2020 Probate & Trust Law Section Conference

As a reminder, the 2020 Probate & Trust Law Section Conference has been rescheduled to Friday, October 16th and Saturday, October 17th, which will be held live online (no in-person attendance): <https://www.minncle.org/seminar/1030622001>.

Don't Get "Mossed": The Use of Injunctive Relief in Trust Litigation

By: Julian C. Zebot and Evan A. Nelson¹

As trust and estate litigators (and long-suffering football fans), please briefly indulge us as we apply a sports metaphor to trust litigation. In 1998, Randy Moss joined the Minnesota Vikings, immediately dominating play to the point that commentators, coaches, and fans saw him as almost single-handedly disrupting the competitive balance of the entire game. Because Moss was faster, taller, and quicker than any defender assigned to cover him, he could tilt the playing field in his team's favor.

Trust litigators may know the feeling. Not because we identify with Moss's amazing athletic talent, but instead because we understand that trust litigation is played on a field tilted, to a certain extent, in the trustee's favor. In particular, one important factor in trust litigation, like an amazing athlete, can tilt the field and disrupt the adversarial balance: the presumption that the trustee's attorney's fees may be reimbursed from the trust corpus itself.

But as any Vikings fan will tell you (likely in more detail than you asked for), even with Moss's game-changing talent, the Vikings never won the Super Bowl. In part, this was because opposing defenses began to understand how to counterbalance Moss. (Another reason has to do with a specific missed field goal.) Defenses developed tactics that, though not always effective, worked often enough that Moss's talent was not as game changing, and the field was leveled.

The Minnesota Trust Code (the "Trust Code") offers its own mechanism to counterbalance the trustee's relative advantage in trustee removal actions—namely, a beneficiary may obtain temporary injunctive relief suspending or removing the trustee's ability to reimburse his or her attorney's fees from the trust even in circumstances where the trustee is not alleged to have breached the trust. But the relative dearth of case law on the subject suggests that, just as defenses in Moss's first year had not yet determined how to slow him down, perhaps not many trust litigators have utilized the tactic. This article explores the availability of such injunctive

¹ Julian C. Zebot and Evan A. Nelson are attorneys practicing in the area of probate, fiduciary, and trust litigation at Maslon LLP, in Minneapolis, Minnesota. A portion of the text of this article was originally published as Julian C. Zebot & Evan A. Nelson, *Tilting the Litigation Playing Field under the Uniform Trust Code: The Availability of Temporary Injunctive Relief in Trustee Removal Actions*, PROBATE AND PROPERTY, (Vol. 34, No.3 May/June 2020).

relief in broad terms, so that attorneys who represent fiduciaries, beneficiaries, or both may consider whether it may have application in a given matter.

The Trustee's presumed entitlement to attorney's fees tilts the litigation field

Generally, two different standards apply as to who can get attorney's fees reimbursed from the trust. On the one hand, the trustee may be reimbursed from the trust for its attorney's fees so long as those fees were "properly incurred in the administration of the trust." Minn. Stat. § 501C.0709. On the other hand, a beneficiary challenging the trustee's actions may be reimbursed for attorney's fees only if the beneficiary also demonstrates to the court that "justice and equity" require an award of costs and expenses including reasonable attorney's fees. *Id.* at § 501C.1004. Thus, while the trustee enjoys a presumption that its attorney's fees can be reimbursed, the beneficiary must either convince the trustee (unlikely as a practical matter, if the trustee is the object of the lawsuit) or the court that its attorney's fees should be reimbursed.

In litigation, this reality can, and often does, impact strategic and tactical thinking. Motion practice and other litigation activities are labor-intensive and, therefore, costly. Perhaps the party adverse to the trustee is more apt to concede issues in a meet and confer or discouraged from bringing a motion due to the knowledge that attorney's fees are less likely to be recovered. The field tilts. Of course, these are generalizations. A lawyer will make reasoned recommendations based on the facts and law as applied to each unique situation. But for tough calls, when the recommendation could go either way, the tilt of the field may be a deciding factor.

Injunctive relief provisions offer a way to balance the field

Under the Trust Code, the "settlor, a cotrustee, or a beneficiary" may petition to remove a trustee. *Id.* at § 501C.0706(a). The court can remove a trustee based on any one of five separate statutory grounds, including where the trustee has committed a "serious breach of trust" ("Trustee's Breach"). *Id.* at § 501C.0706(b)(1); *see also In re Revocable Tr. Agreement of Avis V. Cordes under agreement dated February 12, 2015*, A19-1872, 2020 WL 5107287, at *3-5 (Minn. Ct. App. Aug. 31, 2020) (affirming trustee removal for a serious breach of trust when trustee refused to close a sale of trust property without adding a right of first refusal in trustee's individual favor). But there are four other statutory bases to remove a trustee that do not require a showing that the trustee has breached the trust: where a lack of cooperation exists among cotrustees ("Trustees' Deadlock"); in the event of "unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively" ("Trustee's Failures"); in the event there has been a "substantial change in circumstances," such that removing the trustee is in the interest of all beneficiaries and is not inconsistent with a material purpose of the trust, and the court can appoint a successor trustee ("Substantial Change"); or where all beneficiaries agree with removal, removal is not inconsistent with a material purpose of the trust, and the court can appoint a successor trustee ("Beneficiaries' Consent"). Minn. Stat. § 501C.0706(b)(2)-(4).

The court *may also* order a broad range of injunctive relief "[p]ending a final decision on a request to remove a trustee, or in lieu of or in addition to removing a trustee." *Id.* at § 501C.0706(c) (referencing Section 1001(b)). Here, three forms of relief are key: the court may "appoint a special fiduciary to take possession of the trust property and administer the trust";

“suspend the trustee”; or “void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds” *Id.* at § 501C.1001(b)(5), (6), (9). There is no express limitation in Section 706 that would limit the availability of injunctive relief only to a Trustee’s Breach. Hypotheticals are, therefore, not difficult to imagine. For example, in a removal action based on Trustees’ Deadlock, even if two co-trustees had a good-faith but irreconcilable disagreement as to matters of trust administration, a beneficiary could seek removal *as well as* injunctive relief against the co-trustees. The practical and tactical effect of temporary injunctive relief would be to remove the trustee’s ready access to trust funds for its attorney’s fees while the litigation continues to pend.

The interplay of Sections 706 and 1001 introduce an as-of-yet unresolved ambiguity

A potential ambiguity lies within the Trust Code with respect to the availability of such relief—an ambiguity that has yet to be clearly addressed by the courts. On the one hand, Section 706 allows for temporary injunctive relief during the pendency of a trustee removal proceeding, which, as discussed above, can be based upon something other than a breach of trust. In doing so, Section 706(c) specifically references the remedies available under Section 1001(b). This would seemingly indicate that all of Section 1001(b)’s remedies are available in a trustee removal proceeding, regardless of whether the petitioners have alleged a breach of trust on the part of the trustee. On the other hand, Section 1001(b) itself limits injunctive relief “[t]o remedy a breach of trust that has occurred or may occur. . . .” This would seemingly indicate that injunctive relief is only available when petitioners have alleged a breach of trust as grounds for the trustee’s removal. For the time being, there does not appear to be an answer to this ambiguity within the case law interpreting the Trust Code (or interpretations of similar provisions in other states that have adopted versions of the Uniform Trust Code).

Regardless, the availability of temporary injunctive relief would likely still be limited by the familiar *Dahlberg* factors governing the propriety of such relief, including a showing that there is “no adequate remedy at law and that an injunction is necessary to prevent great and irreparable injury.” *In re Estate of Nelson*, 936 N.W.2d 897, 909 (Minn. Ct. App. 2019) (finding district court erred in not applying *Dahlberg* factors to probate litigation); *see also e.g., Dowdy v. Dowdy*, 182 So. 3d 807, 809 (Fla. Dist. Ct. App. 2016) (applying Florida injunctive relief factors to trust litigation); *McHenry v. McHenry*, 88 N.E.3d 1222, 1227 (Ohio. Ct. App. 2017) (applying Ohio injunctive relief factors to trust litigation). Given that many trust litigation actions involve distribution-related issues, it may be rare to find that there is “no adequate remedy at law” for the threatened harm—such that a subsequent monetary award of damages would not provide an adequate remedy. That said, exceptions exist. For example, a trustee’s threatened self-dealing with respect to real property, such as seeking to transfer real estate owned by the trust to the trustee’s individual account and then encumbering it with a mortgage, has been found to constitute a sufficiently irreparable harm to support the grant of temporary injunctive relief. *McHenry*, 88 N.E.3d at 1228.

Conclusion

To briefly return to the initial metaphor, Randy Moss was ultimately elected to the Pro Football Hall of Fame in 2018—his first year of eligibility. Defenses could never completely

stop him. Similarly, trustees will often enjoy the relative advantage of having access to trust funds to pay their own attorney's fees in litigation, and trust litigation will often play out on a tilted field. But, just as some defenses could contain Moss, so too can certain circumstances allow counsel for beneficiaries to disrupt the trustee's advantage by way of the potential availability of injunctive relief in removal actions. At the very least, the interim remedies recognized by Section 706 and 1001 provide an option that Minnesota trust litigators would be wise to keep in mind.

Summary of Relevant Rules Relating to Service of Notice in Probate and Trust Matters

By: Michael Sampson, Maslon LLP

Estate/Probate Matters (Minn. Stat. Section 524.1-401(a)(3)):

Notices in estate proceedings must be published "*once a week for two consecutive weeks . . . in a legal newspaper in the county where the hearing is to be held, the last publication of which is to be at least 10 days before the time set for the hearing.*"

Notices in estate proceedings must also be mailed to all interested parties "*at least 14 days before the time set for the hearing* by certified, registered or ordinary first class mail addressed to the person being notified at the post office address given in the demand for notice, if any, or at the demander's office or place of residence, if known."

In formal estate proceedings, an Affidavit of Mailing Notice and an Affidavit of Publication must be filed with the Court on or before the date of the hearing. In informal estate proceedings, letters testamentary/letters of general administration will not be issued until both affidavits have been filed.

Trust Matters (Minn. Stat. Section 501C.0203, subd. 1):

For *in rem* trust proceedings (which ours almost always are), a copy of the order for hearing must be published "*at least 20 days before the date of the hearing . . . one time* in a legal newspaper for the county in which the petition is filed."

Notices in trust proceedings must also be mailed "*at least 15 days before the date of the hearing . . . to those current trustees and qualified beneficiaries of the trust whose identity is known and whose location is known or reasonably ascertainable to the petitioner after making reasonable efforts to locate such persons.*"

An Affidavit of Mailing Notice and an Affidavit of Publication must be filed with the Court on or before the date of the hearing.

Legal Newspaper:

Here's the current listing of the [Legal Newspapers](#) from the MN Secretary of State's website, along with their contact information.

When publishing probate & trust notices:

In Hennepin County, use Finance & Commerce. publicnotice@finance-commerce.com

In Ramsey County, use the St. Paul Legal Ledger. publicnotice@legalledger.com

In other counties, use your best judgment.

Counting Days:

When counting days, exclude the date of publication, but include the date of the hearing.

Minn. Stat. Section 331A.08, subd. 1, provides:

331A.08 COMPUTATION OF TIME.

Subdivision 1. Time for publication. The time for publication of public notices shall be computed to exclude the first day of publication and include the day on which the act or event, of which notice is given, is to happen or which completes the full period required for publication.

Rule 354(a) of the Minnesota General Rules of Practice provides:

Rule 354.01 Generally:

The following rules apply in computing any time period specified in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time.

(a) Period Stated in Days or a Longer Unit of Time.

When the period is stated in days or a longer unit of time:

(1) exclude the day of the event that triggers the period;

(2) count every day, including intermediate Saturdays, Sundays, and legal holidays;

and

(3) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

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