

Tilting the Litigation Playing Field under the Uniform Trust Code: The Availability of Temporary Injunctive Relief in Trustee Removal Actions

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As Minnesota trust and estate litigators (and long-suffering football fans), please briefly indulge the authors as we attempt to apply a sports metaphor to the context of 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 tilting the playing field in his team's favor. Moss was simply faster, taller, and quicker than any defender assigned to cover him. What the football world saw was that, even among the 21 other players on the field, Moss was so important that he could single-handedly disrupt the competitive balance of the entire game.

Lawyers who handle trust litigation matters may know the feeling. Not because they can identify with Moss's immense physical talents, but instead because they understand that, fundamentally, trust litigation is played on a field tilted, to a certain extent, in the trustee's favor. In particular, there is one factor in trust litigation so important that it, like an amazing athlete, can tilt the field and disrupt the adversarial balance: the presumption that the trustee's attorney 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), Moss's team that first year did not win a championship, even with his game-changing talent and record-setting performance. Nor did Moss's teams ever win 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.) Eventually, defenses developed tactics that, though not always effective, worked often enough that Moss's talent was not as game-changing as it once was, and the field was leveled.

The Uniform Trust Code (UTC) 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 fees from the trust, even in circumstances where the trustee is not alleged to have breached the trust. Even though the UTC has been largely adopted in more than 30 states, the relative dearth of case law on the subject suggests that, like defenses in Moss's first year, which had not yet determined how to slow him down, perhaps not many trust litigators have used the tactic. This article explores the availability of such injunctive 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 Attorneys' Fees Tilts the Litigation Field

Generally, two different standards apply as to whose attorney fees may be reimbursed from the trust. On the one hand, the trustee may be reimbursed from the trust for its attorneys' fees so long as those fees

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were “properly incurred in the administration of the trust.” Unif. Trust Code § 709. On the other hand, a beneficiary challenging the trustee’s actions may be reimbursed for attorneys’ fees only if the beneficiary also demonstrates to the court that “justice and equity” require an award of costs and expenses including reasonable attorneys’ fees. Unif. Trust Code § 1004. These standards are not the same. *See, e.g., Lund as Trustee of Revocable Tr. of Kim A. Lund v. Lund*, 924 N.W.2d 274, 286 (Minn. Ct. App. 2019), *review denied* (Mar. 27, 2019). As a practical matter, the standard for a beneficiary challenging the trustee’s actions to be reimbursed from the trust can be difficult to meet, while the trustee enjoys a presumption that its attorney fees will be reimbursed from the trust as a matter of course.

In fact, it is not really a presumption that the trustee must meet in order for the court to order reimbursement of fiduciary attorney fees. Rather, the trustee is “entitled” to use trust funds to pay the trustee’s attorney, because doing so is incidental to the trustee’s “authority to expend trust funds as necessary in the administration of the trust.” Unif. Trust Code § 709; *Rudd v. Branch Banking & Tr. Co.*, 2:13-CV-02016-JEO, 2016 WL 7209727, at *3 (N.D. Ala. Aug. 8, 2016). In other words, because the trustee is authorized to spend trust monies to administer the trust, and because the trustee is authorized to defend the trust and select an attorney for the purpose of doing so, the trustee is authorized to use the trust assets to pay the attorney defending the trustee’s administration of the trust. Meanwhile, the beneficiary can only be reimbursed if the trustee approves reimbursement (unlikely if the trustee is the object of the lawsuit) or by a court order after showing that “justice and equity” require an award of attorney fees. *See, e.g., Deborah Dereede Living Tr. dated December 18, 2013 v. Karp*, 831 S.E.2d 435, 441 (S.C. Ct. App. 2019) (ordering trust to reimburse attorney fees of beneficiaries who had successfully shown that trustee had failed to distribute trust assets in a timely fashion, contrary to clear directive in trust agreement).

In trust litigation, this reality can, and often does, impact strategic and tactical thinking. Motion practice is labor-intensive and, therefore, costly. Perhaps the party adverse to the trustee is more apt to concede issues in a meet and confer, slightly discouraged from taking up an issue in motion practice because of the knowledge that those attorney fees are not likely to be recovered, or is more likely to seek an early mediation or settlement before doing so. The field tilts. As all litigators know, discovery can be long and arduous, from ESI protocols to depositions to expert reports. Perhaps the party adverse to the trustee is just that much less likely to seek an additional deposition or to hire a consultant. The field tilts again. Of course, these are generalizations. A litigator’s strategic thinking is influenced by the facts of each given case, and a lawyer will make reasoned recommendations based on the facts and law as applied to the unique situation. But in those tough calls, when the recommendation could go either way, the tilt of the field toward the trustee may be a deciding factor, particularly with respect to a beneficiary client who views herself as paying more than her fair share of the associated expense of the litigation.

UTC’s Injunctive Relief Provisions Offer a Way to Balance the Field

The UTC allows for injunctive relief not only in proceedings to remedy an actual or prospective breach of trust, but also in proceedings to remove a trustee. In turn, injunctive relief may be used to prevent a trustee’s use of trust funds to pay or reimburse its attorneys’ fees.

Section 706 of the UTC allows the “settlor, a cotrustee, or a beneficiary” to petition to remove a trustee. Unif. Trust Code § 706(a). The court can remove a trustee based on any one of five separate statutory grounds: if the trustee has committed a “serious breach of trust” (Trustee’s Breach); if the petitioners show a lack of cooperation 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

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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 if 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). Unif. Trust Code § 706(b).

The UTC allows a court to remove a trustee if the trustee has not committed a breach of trust, but the trust may nonetheless be better served by removing the trustee. For instance, cotrustees may disagree as to how to manage trust assets, thereby paralyzing the trust's administration. *Winter v. Winter*, D070847, 2018 WL 1045169, at *2 (Cal. Ct. App. Feb. 26, 2018), *review denied* (May 23, 2018) (ordering removal of cotrustee, in part for having a "dysfunctional" relationship with the other cotrustee). Or, because of age or senility, a trustee may, despite making every good faith effort, be unable to administer the trust. *Mesker v. Mesker*, 389 P.3d 227 (Kan. 2017). Additionally, trustee removal can be accomplished through either the Substantial Change or Beneficiaries' Consent options, notwithstanding the trustee's complete and total good faith and diligent exercise of its duties.

This same section of the UTC goes on to allow the court to order a potentially 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." Unif. Trust Code § 706(c) (referencing §1001(b)). There is no express limitation in section 706 that would only allow injunctive relief to remedy a trustee's breach of trust. Hypotheticals are, therefore, not difficult to imagine. In a removal action based on Trustee's Deadlock, even if two cotrustees 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 cotrustees. In a removal action citing Trustee's Failures, the court need not find a breach of trust to remove the trustee and also order injunctive relief against the trustee.

The available forms of relief under section 1001(b) include nine specifically enumerated remedies and one catch-all remedy. Unif. Trust Code § 1001(b). Here, three 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." Unif. Trust Code § 1001(b)(5), (6), (9). Under these provisions, the court is imbued with a range of options: it can order that a court-appointed special fiduciary (and not the trustee) decide whether attorneys' fees should be reimbursed in the first place, or the court may order that any attorneys' fees already reimbursed be paid back into the trust. It can also suspend the trustee, thereby removing the trustee from all trust administration activities, including the incidental ability to pay his or her attorneys' fees directly from the trust. The practical and tactical effect of these different forms of temporary injunctive relief would be to remove the trustee's ready access to trust funds for payment of its attorneys' fees while the litigation continues.

The Interplay of Sections 706 and 1001 Introduce an Ambiguity

Litigators should be aware that there is a potential ambiguity within the UTC 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 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 available only when petitioners have alleged,

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in fact, 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 UTC, and, if the question were to be litigated, results could potentially vary depending on the jurisdiction's applicable canons of statutory construction. To simplify, the result may be that injunctive relief is available only when the petitioner has alleged that the trustee has breached or may breach the trust because, by referencing section 1001(b), section 706(c) adopts the limitation of the referenced statute. Or, by contrast, the result may be that temporary injunctive relief is available even where there is no allegation of an actual or threatened breach, so long as the relief is in the interests of the trust or its beneficiaries.

Regardless, the availability of temporary injunctive relief may still be limited by the common law factors governing the propriety of such relief in a particular jurisdiction. *See, e.g., Dowdy v. Dowdy*, 182 So. 3d 807, 809 (Fla. Dist. Ct. App. 2016) (“movant must demonstrate that he will suffer irreparable harm without an injunction, that he has no adequate remedy at law, that he enjoys a substantial likelihood of success on the merits, and that an injunction would be in furtherance of the public interest”); *McHenry v. McHenry*, 88 N.E.3d 1222, 1227 (Ohio Ct. App. 2017) (applying Ohio law injunctive relief factors to trust litigation). Given that many trust litigation actions involve distribution-related issues, it may be rare to find circumstances in which 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—to justify immediate injunctive relief. But exceptions exist. For example, a trustee's threatened self-dealing with respect to real property—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

Randy Moss was ultimately elected to the Pro Football Hall of Fame in 2018—his first year of eligibility. Defenses could never completely stop his talent. Similarly, under the UTC, trustees will often enjoy the relative advantage of having access to trust funds to pay their own attorneys' fees in litigation, and trust litigation will often play out on a tilted playing field as a result. 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 sections 706 and 1001 provide a tactical option that all trust litigators should be aware of when practicing in UTC jurisdictions.