

TRUST AND ESTATE LITIGATION: WHAT TRUST AND ESTATE LITIGATORS THINK NON-LITIGATORS NEED TO KNOW

**Twin Cities Financial and Estate Planning Councils
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Topic Overview

- Top 10 Most Common Trust and Estate Disputes.
- Tips For Drafting Attorneys and Planners.
- How the new Minnesota UTC will Impact Estate Planning.

The Most Common Trust and Estate Disputes

1. Claims of Lack of Capacity.
2. Claims of Undue Influence.
3. Step Parent vs. Children of First Marriage.
4. Trustee Selection – Which Family Member Controls.
5. Misuse of Power of Attorney.
6. Disputes Over Discretionary Distributions.
7. Lack of Investment Return.
8. Failure to Diversify.
9. Failure to Minimize Taxes.
10. Failure to Communicate.



The Most Common Trust and Estate Disputes



Knowing the risks is the first step to managing litigation risk. The most common types of disputes should be considered throughout the estate planning process.

Tips For Drafting Attorneys: Keep Relationships in Mind

Remember, many trust and estate actions are caused more by tension between income and remainder beneficiaries, children of first marriages vs. second marriages, and sibling rivalry – than by any specific action or inaction.

“MOM ALWAYS LIKED YOU BEST!”





Tips For Drafting Attorneys: Topic Overview

1. Paper Your File
2. Should you Videotape Execution of Trusts and Wills?
3. Should you Have Your Client Examined by a Physician?
4. What Can you do to Avoid Undue Influence Claims?
5. Preserve the Attorney Client Privilege.
6. Will Your Firm be Disqualified if Your Partner Becomes a Witness?
7. Consider the Underlying Reasons Disputes Arise.



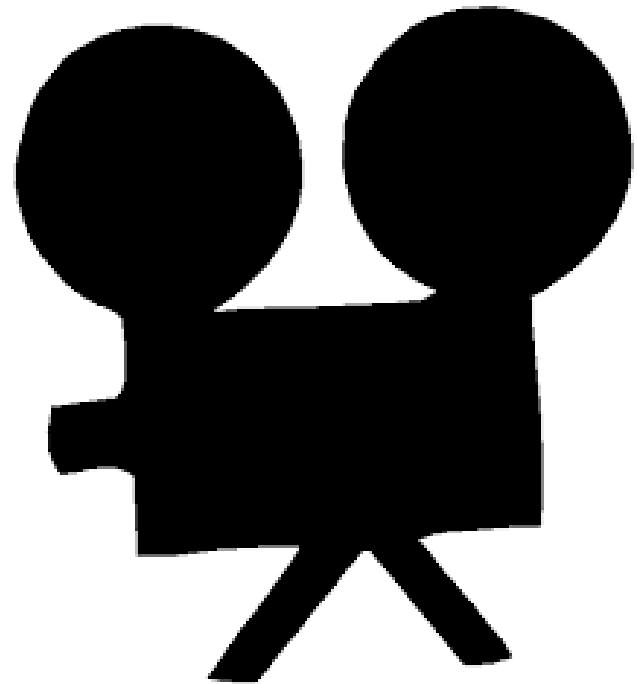
Tips For Drafting Attorneys: Paper Your File.

Proper Documentation Can Make Wills and Trusts More Difficult to Challenge. Remember:

- The Drafting Attorney is a Key Witness.
- You Can “Create” Evidence by Papering Your File.
- Keep Competency in Mind.
- Choose Witnesses with Care.

Tips For Drafting Attorneys: Videotaped Signings?

There is No
Right Answer



Tips For Drafting Attorneys: Physician Exam?

Should You Have Your Client Examined by a Physician?





Tips For Drafting Attorneys: Avoiding Undue Influence Claims

- Make Sure of Your Client's Wishes.
- Speak to the Client Outside of the Presence of Others.
- Ask About Unusual Dispositions.
- Document Your Observations.



Tips For Drafting Attorneys: Preserve Attorney-Client Privilege

1. Fiduciary Exception

2. Testamentary Exception



Tips For Drafting Attorneys

Will Your Firm be Disqualified if You or
Your Partner Becomes a Witness?

The Minnesota UTC





The Minnesota Uniform Trust Code

- Current Statute – Section 501B, enacted in 1989.
- New Code – Product of a 4-Year Effort by an 18 Member Committee of the MSBA Probate and Trust Law Section.
- 2 New Chapters
 - i. Minn. Stat. § 501C.
 - ii. Minn. Stat. § 502.



Goals of the Minnesota UTC

- 1) Update Trust Law to Reflect Modern Trends;
- 2) Provide Consistency With Other Jurisdictions;
- 3) Fill the Gaps and Resolve Ambiguity in the Current Law;
- 4) Retain Certain Policies and Practices Unique to Minnesota Trust Law.



General Comments

- Minn. UTC Generally Conforms to Prior Minn. Law – Except When it Doesn't.
- Less Change Than it Might Appear.
- Statutory Instead of Common Law.
- Settlor Intent v. Beneficiary Wishes
- To Interpret the Minn. UTC: Look at 501B, the UTC, UTC Comments, and Legislative History.

Overview of Changes



There are many changes that are likely to create and affect litigation. Among the most important are:

1. Non-Judicial Settlement
2. Trust Modifications
3. Dual Track Jurisdiction
4. Statute of Limitations



Non-Judicial Settlement

(Section 501C.0111)

3 Primary Changes

1. Who can enter a non-judicial settlement.
2. Expands the issues that can be settled.
3. Allows settlement in court supervised cases.



Non-Judicial Settlement: Who Can Settle?

Old: Trustee and All Beneficiaries.

New: “Interested Persons” – persons whose consent would be required in order to achieve a binding settlement were the settlement to be approved by the court.



Non-Judicial Settlement: When Can It Be Used?

Minnesota UTC: “Any Matter Involving a Trust”

Prior Minnesota Statute: Allowed only in Non-Supervised Actions.



Non-Judicial Settlement: What Can Be Settled?

Examples:

- Trust Interpretation or Construction;
- Approval of Trustee Report or Accounting;
- Grant Trustee Powers or Direct Trustee to Refrain From Particular Acts;
- Trustee Resignation, Appointment, or Compensation;
- Trustee Liability.

Dual-Track Jurisdiction



Provides a Choice
Between:

1. *In Rem*

2. *In Personam*

- *Different Notice Requirements*



Dual Track Jurisdiction

- Minnesota UTC: 501C.0203 allows the person filing a petition to choose between *in rem* and *in personam* jurisdiction.
- Prior MN Code: Under 501B.24, jurisdiction over trust cases was *in rem* only, so the court only had jurisdiction over trust property.
- UTC: Creates *in personam* jurisdiction without specific discussion.

Trust Modifications, Terminations and Reformation

(Minn. Stat. §501C.0411-0416)

Allows Modification or Termination of an Irrevocable Trust



"At first I wanted a brother, but I've changed my mind... I want a puppy now."



Trust Modifications: When?

- a) With consent of settlor and all beneficiaries, even if inconsistent with a material purpose.
 - b) With consent of all beneficiaries, court approval, and not inconsistent with a material purpose.
 - e) Without consent of all beneficiaries if court finds all beneficiaries are protected.
- ❖ If a trust is terminated under (a) or (b) the beneficiaries decide how property is distributed.



Trust Modifications

Other Modification Provisions

- Section 412 – Allows reformation: (1) based on unanticipated circumstances, to further purpose of trust; or (2) based on the inability to administer the trust effectively.
- Section 415-16 – Allows modification: (1) to fix mistakes based on the settlor's intent; or (2) to achieve settlor's tax objectives.

Decanting

Minn. Stat § 502.851



Decanting is the Process of Removing the Assets From One Trust Into a New Trust With More Favorable Provisions.



Decanting: Dual Track System

Track 1: Trustee with “**Unlimited Discretion**” to invade principal can decant some or all of the trust assets from the “Invaded Trust” into an “Appointed Trust”:

- For any number of the current beneficiaries – even to the exclusion of current beneficiaries.
- Successor and remainder beneficiaries do not need to be the same as the original trust.
- Words like best “interests,” “welfare,” “comfort,” or “happiness” are not limits on discretion.



Decanting: Dual Track System

Track 2: Trustee with the power to invade principal but **Without Unlimited Discretion** can decant some of all of the trust assets into an “Appointed Trust”:

- With all the same beneficiaries, successor beneficiaries, and remainder beneficiaries.
- The appointed trust must contain the same language authorizing distributions.



Decanting: Limitations

- Cannot Alter Mandatory Distributions or Current Right To Withdraw Funds.
- Cannot Use to Decrease or Indemnify Against Trustee Liability.
- Cannot Use to Fix Distribution Values.
- Cannot Jeopardize Certain Tax Benefits.



Statute of Limitations

(Minn. Stat. § 501C.1005)

- Minnesota UTC: 501C.1005 establishes a 6-year SOL and clarifies when the 6-year period begins to run. SOL can be shortened to 3 years by providing the beneficiaries with a report that adequately discloses the existence of a potential claim.
- Prior MN Code: No prior statutory provision. *In re Trust Created by Hill*, 499 N.W.2d 475 (Minn. App. 1993) (6-year statute runs from date of alleged breach); *Toombs v. Daniels*, 361 N.W.2d 801 (Minn. 1985) (6-year statute runs from distribution of corpus).
- UTC: Section 1005 is the same as the Minnesota UTC but with 5 years and 1 year as the relative periods.

QUESTIONS??





For additional information ...

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