

# ***MSBA Probate & Trust Law Section Newsletter***

*A Publication of the Minnesota State Bar Association Probate & Trust Law Section*

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If you have any questions about the publication or would like to submit an article for a future issue, please contact Catherine Clifford or Chad Bigalke.

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## **Message from the Chair**

I am pleased that the Probate & Trust Section Newsletter is being published again and we hope to provide you with timely and helpful information. As the new year begins I recall someone once telling me that estate planners will be put out of business if the estate tax was ever eliminated. That person must have been a comedian. It seems the turmoil caused by the elimination of the federal estate tax has resulted in more client inquiries than ever before and we are all looking for ideas and insights to handle this time of change. As members of the Section, we encourage you to submit articles and other helpful insights to the editor of this newsletter and we will pass those insights on to your colleagues through this newsletter. Our hope is to publish this newsletter at least 3 times a year or on a more frequent basis if the opportunity arises. Please send all submissions to Catherine Clifford at [clif3256@stthomas.edu](mailto:clif3256@stthomas.edu) or Chad Bigalke at [chad.bigalke@securian.com](mailto:chad.bigalke@securian.com).

**Robert McLeod**  
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## **Wills for Heroes**

Congratulations and great job volunteers!! After only three years, the Wills for Heroes Program and its volunteers have provided over 2,700 first responders and their spouses/partners with Wills, Health Care Directives, and Powers of Attorney. With events now booked every Monday night through 2012 (!), MN Wills for Heroes will continue to help those who, everyday, make it their profession to keep Minnesota and its citizens safe.

If you are interested in becoming a volunteer attorney or volunteer data entry personnel, please visit the program website

at <http://www2.mnbar.org/willsforheroes/index.asp>, contact Susan Link at [susan.link@maslon.com](mailto:susan.link@maslon.com) or Andrea Bischoff at [andrea.bischoff@maslon.com](mailto:andrea.bischoff@maslon.com), or you can call the Wills for Heroes number at 612-672-3493.

## **Litigation Committee**

Alan Silver and Bridget Logstrom Koci are co-chairs of the Litigation Committee. In addition to sponsoring one or more presentations each year on trust and estate litigation topics, Al and Bridget would like to expand the membership of the Litigation Committee. Their goal is for the Litigation Committee to become more of a working committee in order to provide assistance and advice to other Probate and Trust Law Section committees, including the Legislation Committee. If you are interested in becoming a Litigation Committee member, please contact Ashley Hacker at the MSBA ([ahacker@statebar.gen.mn.us](mailto:ahacker@statebar.gen.mn.us)).

In addition, if you have any noteworthy trust and estate litigation matters that you feel would be helpful to highlight in future newsletters, please contact either co-chair.

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## **Tips and Traps**

If a disclaimer is delivered via U.S. Mail, it is deemed delivered upon mailing. If a disclaimer is delivered via any other method, such as a commercial delivery service, it is not delivered until it is actually delivered. Thus, if you are trying to do a tax qualified disclaimer and you are nearing the deadline for delivery, use U.S. Mail and obtain proof of mailing.

**Marya P. Robben**  
[mrobben@lindquist.com](mailto:mrobben@lindquist.com)

## **Gene Daly Award**

The Gene Daly Award is periodically awarded to Section members who have made a strong and positive impact on the estate planning practice in Minnesota.

If you would like to nominate someone for the award, please contact Andrea Breckner at (612) 455-1002 or [abreckner@olsonbreckner.com](mailto:abreckner@olsonbreckner.com).

## **Greater Minnesota Study Group**

The Greater Minnesota Study Group meets by phone once each month to discuss estate planning, trust and estate topics of interest to the members. The members are lawyers from outstate communities. Usually five to eight members of the Probate and Trust Law Section participate in the calls. Bradley Hanson, of the Quinlivan firm in St. Cloud, sets up the monthly call and leads the discussion. This study group provides both the opportunity for mentoring as well as the challenge of analyzing complex legal issues.

**JoEllen Doebbert**  
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## **36th Annual Minnesota Probate & Trust Law Section Conference**

Mark your calendars! The 2010/36th Annual MN Probate and Trust Law Section Conference will be held on June 7 & 8 at the St. Paul River Center. Stay tuned for more information.

## **Probate & Trust Law Section Council Meeting Dates**

The Council is scheduled to meet on the following dates:

January 21, 2010  
February 18, 2010  
March 18, 2010  
April 15, 2010  
May 20, 2010

All meetings begin at 3:30 and are held at the Minnesota State Bar Association Offices President's Room at 600 Nicollet Mall in Minneapolis.

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## With Congress Failing to Act, Federal Estate Tax is Repealed in 2010

*The following is a portion of an "Alert: Estate Planning", which we are re-publishing with the permission of our gracious colleagues at Leonard, Street and Deinard. The information contained in this publication is neither designed nor intended to be relied upon as specific legal advice to any individual or organization.*

The turn of the calendar year always raises questions about estate planning. This year, with the uncertainty surrounding current federal estate tax laws, those questions are even more relevant. Below we've answered several of the most important questions about estate tax at both the federal and state levels, as it stands right now.

### **Is There Still a Federal Estate Tax in 2010?**

No. In 2009 the federal estate tax applied to the value of a decedent's estate in excess of \$3.5 million at a 45% tax rate. The Economic Growth and Tax Relief Act of 2001 (EGTRA) provided that the federal estate tax would be repealed in 2010 unless Congress affirmatively enacted legislation on or before December 31, 2009, to keep it. Congress failed to act. Therefore, as of January 1, 2010, there is no longer a federal estate tax for 2010.

### **Is There Still a Federal Generation Skipping Tax in 2010?**

No. In 2009, in addition to the federal estate tax, there was a separate generation skipping tax (GST tax) imposed on lifetime gifts and transfers at death to grandchildren and more remote descendants in excess of \$3.5 million. Again, Congress failed to act. So, as of January 1, 2010, there is no longer a federal GST tax for 2010.

### **Is There Still a Federal Gift Tax in 2010?**

Yes. Even though the federal estate and GST tax are gone in 2010, there is still a tax on lifetime gifts. A gift tax is imposed on lifetime gifts that exceed the annual exclusion amount (\$13,000 per donee per year) and the lifetime gift exclusion amount (\$1 million). However, the 2010 gift tax rate is 35%, down from 45% in 2009.

### **Is There Still a Minnesota Estate Tax in 2010?**

Yes. Minnesota has a "look and see" approach

to new tax legislation. Changes in the federal tax law are not automatically adopted by the State of Minnesota. Minnesota first reviews the federal tax law changes and then decides whether or not to adopt them. Because of budgetary concerns, it is unlikely that Minnesota will eliminate its estate tax in 2010. Therefore, even though there is no federal estate or GST tax in 2010, there is still a Minnesota estate tax on decedent's estates exceeding \$1 million in value at rates ranging from about 10% to 16% (Minnesota estate tax rates are much higher for the first \$1 million, and then graduate from about 10% to 16% after \$2 million). Minnesota has no gift tax on lifetime transfers.

### **Will Congress Bring Back the Federal Estate and GST Tax in 2010?**

Maybe. Just because Congress failed to timely act to keep the federal estate and GST tax does not mean that Congress will not pass legislation in 2010 to bring these taxes back. Congress may even try to make the tax law retroactive to January 1, 2010. Whether or not they can constitutionally do this is an open question. Many commentators predict that Congress will bring back the federal estate and GST tax similar to its 2009 form, and make the law retroactive to January 1, 2010. However, if Congress does not act in 2010, the estate tax and GST tax will automatically come back on January 1, 2011, but with a lower exemption level of \$1 million and an estate and gift tax rate as high as 55%.

### **How Does This Impact My Estate Plan?**

Most estate planning documents (e.g., wills and revocable trusts) contain provisions designed to minimize estate and GST taxes. Some of these provisions may need to be reviewed and changed because there is no longer a federal estate or GST tax in 2010.

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## Legislative Update

The Probate & Trust Section has made three proposals to be considered by the Legislature this spring. The Legislation Committee also has several projects in progress for the 2011 session. The changes being considered this year include:

A revision of Minn. Stat. § 501B.64, subd. 3 which would define short-term and long-term capital gains distributions from regulated investment companies and real estate investment trusts as distributions of principal (and not income) for trust accounting purposes.

A new Minn. Stat. § 524.5-409A would be added to allow appointment of a conservator on a temporary or emergency basis. The procedure is similar to the existing procedure available for temporary or emergency appointment of a guardian, which currently is provided in Minn. Stat. § 524.5-311. The provision would allow the Court to respond to cases in which temporary or emergency conservator is needed to maintain appropriate custody of the Ward's assets, for instance when a conservator is removed or resigns suddenly, and there is no successor conservator that can immediately act on behalf of the Ward.

Amendments to the Uniform Probate Code in Minn. Stat. § 524 that define the parent-child relationship for intestate succession purposes. The changes will be helpful in clarifying the parent-child relationship in cases involving non-traditional relationships arising because of adoption or when a child's born as a result of assisted reproduction technology.

## Tax Update

### New Regs. Issued Relating to Deductible Claims Against Estates Under IRC § 2053.

The final regulations were issued, in part, to resolve inconsistencies among courts. Generally, the new regulations limit the deductibility of expenses and claims against an estate to amounts actually paid, unless conditions for a deduction based on "ascertainable amounts" are satisfied. The regulations generally eliminate the need to provide a value for a claim as of the date of death. Instead, the regulations provide that post-death events are to be considered in determining deductible amounts on the estate tax return. If a claim is not resolved before the expiration of the statute of limitations for refund claims, a protective claim for a refund may be made. Treas. Reg. § 20.2053.

### Single Member LLC Not Disregarded for Gift Tax Purposes.

The Tax Court recently held that a single member LLC is not a disregarded entity for federal gift tax purposes. As a result, discounts for gifts of interests in the LLC to trusts set-up by the taxpayer were allowed. The IRS unsuccessfully argued that the LLC should have been disregarded and that the transfers should have been treated as transfers of the underlying LLC assets instead. Pierre v. Commissioner, 133 T.C. No. 2, 2009 WL 2591625 (2009).

### Roth IRA is Not an Eligible Subchapter S Shareholder.

In a recent Tax Court decision, the court concluded that a Roth IRA is not an eligible Subchapter S shareholder. As a result, the corporation will be taxed as a C corporation.

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Taproot Admin. Servs., Inc. v Commissioner, 133 T.C. No. 9, 2009 WL 3098090 (2009).

Final Regulations Issued for Declaratory Judgment to Resolve Gift Tax Valuation Disputes.

The IRS has issued final regulations under I.R.C. § 7477, which allows a donor to bring a declaratory judgment proceeding in the Tax Court to determine the value of a gift when an actual controversy exists between the IRS and the donor. However, the donor must first exhaust all available administrative remedies and the transfer must be disclosed on a gift tax return. Treas. Reg. § 301.7477-1.

IRS Issues Guidance on Treatment of Sales of Existing Life Insurance Policies.

In Revenue Ruling 2009-13, the IRS has provided guidance on the taxation of the surrender and sales of existing life insurance policies. The IRS ruled that the surrender of a cash value life insurance policy generates ordinary income to the extent the amount realized exceeds the investment in the contract (generally the aggregate premiums paid).

If a cash value policy is sold to a third-party, the taxable gain is the amount realized that exceeds the adjusted basis in the contract (generally the aggregate premiums paid – cost of insurance protection). This gain is treated as ordinary income to the extent of the inside build-up of the contract (generally the contract's surrender value – the investment in the contract). Any gain in excess of the inside build-up amount is treated as capital gain. In the case of a term policy, the proceeds received that exceed the aggregate premiums paid minus the cost of insurance protection is taxed entirely as capital gain.

IRS Issues Guidance on Requirements for Employer Owned Life Insurance.

The IRS has issued Notice 2009-48 providing guidance for complying with the employer owned life insurance rules under I.R.C. §§ 101(j) and 6039I. The death benefit of employer owned life insurance policies will be subject to income tax if the notice, consent, and filing requirements are not met for employer owned life insurance contracts issued or materially changed after August 17, 2006. Some examples of such contracts include key-person insurance, policies issued for buy-sell agreements, split-dollar life insurance contracts, and life insurance contracts issued to informally fund nonqualified deferred compensation arrangements.

Automatic Extensions Enacted for Minnesota Estate Tax Returns.

The Minnesota Legislature has amended Minn. Stat. § 289A.19, subd. 4 to remove the requirement that an extension must be requested. The amendment now provides for an automatic extension of either six months or an extension period granted by the IRS, whichever is longer. This amendment is effective for estates of decedents dying after December 31, 2008.

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# Ten Things You Must Know About the New Disclaimer Law

*James T. McNary  
Watson & Speight, P.A.*

1. *Minn. Stat. §§ 501B. 86 and 525.532 are repealed.* The new disclaimer law, to be cited as the “Uniform Disclaimer of Property Interests Act”, is codified at Minn. Stat. §§ 524.2-1101 to 524.2-1116.
2. *There are five requirements of a valid disclaimer.* The disclaimer (a) must be in writing; (b) declare the writing as a disclaimer; (c) describe the interest or power disclaimed; (d) be signed by the person making the disclaimer and be acknowledged in the manner provided for deeds; and (e) be delivered (or filed) in the manner prescribed by Minn. Stat. §524.2-1114.3.
3. *State law disclaimers are “de-coupled” from qualified disclaimers under I.R.C. § 2518.* State law no longer includes a nine month time limit for a disclaimer. A disclaimer may be made at any time unless it is barred under Minn. Stat. §524.2-1106. This can be a trap for the unwary. Tax qualified disclaimers still must be made within 9 months. Remember the requirements for a tax qualified disclaimer are set by a different law.
4. *A tax “qualified” disclaimer is sufficient under the Act.* A disclaimer that satisfies the requirements of Code §2518 will be valid under the Act even if it does not otherwise meet the specific requirements of the Act. (But a disclaimer valid under the Act will not necessarily be qualified under the Code).
5. *Disclaimers no longer need to be filed with the court.* An original of the disclaimer is to be delivered to the person or entity with the duty to dispose of the disclaimed property. The disclaimer need be filed with the court only if such a person or entity cannot be found.
6. *Partial disclaimers are valid.* The Act specifically authorizes a partial disclaimer of an interest in property and gives the disclaimant wide latitude in describing the portion disclaimed. Take care, however, if the disclaimer is intended to be a tax qualified disclaimer because the Act permits partial disclaimers that would not be qualified under §2518. E.g. the Act would authorize a disclaimant to disclaim a remainder interest in property and keep a life estate. Such a division of temporal interests would not be a qualified disclaimer under §2518.
7. *One can disclaim rights of survivorship in jointly held property.* Minn. Stat. §524.2-1109 creates two rules for the disclaimer of jointly held property. One rule is applicable primarily to jointly held bank and brokerage accounts and allows the disclaimer of the portion of the property contributed by the deceased joint owner. The other rule authorizes the disclaimer of a fractional portion of the property and applies to all other joint interests in property.

8. *A disclaimer is barred under five circumstances.* A disclaimer is ineffective if: (a) the disclaimant waives her right to disclaim in writing; (b) the disclaimant accepts an interest in the property; (c) the disclaimant assigns or conveys an interest in the property; (d) the disclaimant is insolvent; or (e) the disclaimed interest is sold pursuant to judicial sale.

9. *Disclaimers may be recorded.* A disclaimer of an interest in real property

must be recorded in order to establish a chain of title.

10. *The Act applies to interests and powers existing on January 1, 2010.* The Act will not apply to interests or powers that could no longer be disclaimed under the former law. The Act insures that disclaimers barred by the running of the 9 month period under former law will not be revived.

## **New Reporting Requirements For Special Needs & Pooled Trusts**

*Laurie Hanson & Laura Zdychnec  
Long, Reher & Hanson, P.A.*

Minnesota law has imposed new responsibilities on trustees of special needs and pooled trusts. Effective July 1, 2009, subdivision 4 of Minnesota Statute § 501B.89 requires initial and annual reporting to the Department of Human Services by trustees when the trust beneficiary applies for, or is a recipient of, Medical Assistance.

Initially, it is important to distinguish special needs trusts and supplemental needs trusts. Minnesota law refers to both as “supplemental needs trusts.” In practice, however, “supplemental needs trust” refers to a trust funded by a third party (for example, a trust funded by a parent for the benefit of a disabled adult child is a “supplemental” needs trust). A “special needs” trust is a first-party trust funded with the assets of the disabled individual. A pooled trust can be funded with either the assets of the individual or a third party. Only special needs trusts and pooled trusts are subject to the new reporting requirements.

Minnesota Statute § 501B.89 governs trusts with provisions linked to public assistance. The new subdivision 4 imposes reporting requirements on trustees of special needs trusts and pooled trusts when the trust beneficiary applies for Medical Assistance (or at the time of the annual renewal for beneficiaries already receiving Medical Assistance). At the time of application or first renewal after enactment, the trustee must submit a copy of the trust instrument, an inventory of the trust’s assets, and the value of those assets to the Department of Human Services Special Recovery Unit (“DHS SRU”). Thereafter, the trustee must submit an annual accounting for the trust that includes the following information:

- (1) identification of trust assets and the value of those assets at the beginning of the accounting period;
- (2) additions to the trust during the accounting period and the source of those additions;

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- (3) itemized distributions from the trust during the accounting period, including the purpose of the distributions and to whom the distributions were made;
  - (4) identification of trust assets and the value of those assets at the end of the accounting period; and
  - (5) changes to the trust instrument during the accounting period.

Despite this legislation, DHS has no specific authority over a trustee. DHS Bulletin #09-21-11 states that a trustee's failure to comply does not impact the beneficiary's application or renewal for Medical Assistance. However, the bulletin goes on to say, however, that the beneficiary's failure to provide mandatory verifications to county human services to evaluate a trust may cause the trust beneficiary to be ineligible for Medical Assistance.

Accountings are due on the anniversary of the execution date of the trust unless another annual date is established by the trust's terms. Annual accountings are to cover a 12 month period unless a different accounting period is approved by the Commissioner. The first step for a trustee currently administering a special needs trust is to review the trust language carefully to determine whether an annual accounting date is specified. If not, the Special Recovery Unit will allow a 30-day grace period after the anniversary date of the trust's establishment so that accountings can verify a full 12-month period.

No specific form is required for reporting, but all information must be contained in the accounting. Trustees should be encouraged to use consistent categories for identifying the purpose of a distribution. Verification of the information included in the accounting may be made by affidavit of the trustee. Nevertheless, trustees should be advised to

retain detailed records verifying asset values and expenditures.

The trustee should submit initial and annual accountings to:

MN DHS  
Attn: SRU  
P.O. Box 64995  
St. Paul, MN 55164-0995

The new legislation will require cooperation between all parties involved – the trust beneficiary, the authorized representative responsible for communicating with county human services, the guardian/conservator, and the trustee. Because trustees owe a fiduciary duty to their beneficiary, they should first obtain written consent from the beneficiary or legal representative before submitting any information to the Department of Human Services.

Special needs trusts and pooled trusts were subject to scrutiny by county human service agencies and DHS before the 2009 legislation became effective. The new reporting requirements will help DHS determine potential sources of revenue upon the death of the beneficiary. In reviewing the accountings, DHS can also ensure that the trust is being administered for the sole benefit of the beneficiary and for purposes that supplement (and do not supplant) government benefits. If you are working with a trustee who is administering a special needs trust, you should immediately educate them on their new responsibilities, assure they are retaining detailed records, and reporting to the Special Recovery Unit in a timely manner. You should also watch for future DHS Bulletins which may provide further information or clarification of the reporting requirements.

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## Getting Engaged: Start Your Relationship With a Good Letter

*John B. Gordon & David A. Snieg  
Faegre & Benson LLP*

It takes some time to write. It may seem too formal. And you can't just yank it out of your book of forms. But whether you are representing a fiduciary, a beneficiary in a contested matter, or a couple planning their estate, your carefully-crafted engagement letter might be the most important communication you have with your client.

Why? Because your engagement letter sets the tone for your relationship, lets your client know what to expect from you and what you expect from your client, helps you comply with ethical rules, and often makes it easier to get paid.

Try to send the engagement letter promptly after the initial conversation in which an attorney-client relationship is formed—ideally, before you do any work on the file. But, even if a month or more has gone by, remember: better late than never.

And, when you do send the letter, don't forget that it is a communication from one human being to another. There's no rule that says your tone has to be the same for corporate CEO as it is for an antediluvian client. It takes practice to be able to provide the necessary information while not conveying the impression that the letter was drafted by a computer. But you can do it. And you should.

Although every client's situation is unique, the list of crucial elements may not be; so consider the following for each engagement letter:

1. **Identify the Client.** Sometimes this may not be obvious to your client, third parties, or even you. For instance, if you are going to represent a trustee but anticipate a lot of interaction with beneficiaries, you may need to make it clear in the engagement letter (and perhaps in separate communications to the beneficiaries) that you represent only the trustee and not the beneficiaries.

If your fees are to be paid by a non-client or by another client (such as a parent paying for a son's or daughter's estate planning), you need to be especially careful to assure what responsibilities you have, and to whom. Everyone needs to know the ground rules.

Likewise, if you represent more than one client, each of them needs to know the benefits and risks of joint representation, as well as what to expect by way of confidentiality. Ideally, each should explicitly consent to your sharing with the other all information relating to the representation. Just because the two clients are happily married or have been in business together for decades doesn't mean that you can skip this part. As they say in the investment business, past performance does not guarantee future results.

2. **Define the Scope of Representation.** If you describe your engagement too narrowly, you may find yourself accused

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of doing unnecessary or unauthorized work. If you describe it too broadly, you may be unable to deliver what you have promised. Using grand terms to define simple or limited tasks is never a good idea. In fact, it can lead to dashed expectations, grumpy clients, and even malpractice claims. For example, don't say you are taking responsibility for a family's estate planning if you are doing nothing more than drafting a single document for an individual.

It's up to you to define the scope of the representation. According to Minnesota Rule of Professional Conduct 1.2, you may limit the scope of your representation if the limitation is reasonable, and if you get your client's informed consent. If you represent someone only in their fiduciary capacity, it's always a good idea to make that clear. For example, "We will represent you in your capacity as trustee of the XYZ Trust." Sometimes it's useful to explain the functions that others may play in the estate planning context, such as another lawyer, an accountant, a family office, a personal representative, or others.

Defining the scope of the relationship in the engagement letter is not setting it in stone, however. The scope may change as you work with your client. Consider sending confirming letters or emails expanding or contracting the scope of the engagement as appropriate. One way to do this, at least as to expanding the scope, is with "to-do" lists or short status reports.

- 3. Identify Who Will Be Working On the Matter.** By describing in advance who is likely to work on the matter, you may be able to reduce the client's complaints about the number of timekeepers who

show up on the bill. Inform your clients at the outset of your intentions to involve others with expertise, or that you will use lower-cost associates or paralegals whenever possible. Doing so touts your commitment to cost-consciousness.

- 4. Define the Basis for Both Fees and Expenses.** Unless you regularly represent your client, you must establish a mutual understanding of fees and expenses before or within a reasonable time after you have begun the representation. Explain your hourly rates, frequency of billing, and your expectation of prompt payment. Also, inform your client if you expect to increase your rates during your representation. Finally, be as explicit as you can about expenses you may incur for which you expect to be reimbursed, including any which you expect the client to pay directly to vendors.
- 5. Describe How Communications Will Occur.** Especially if you are hired by another law firm on behalf of the client, you may need to clarify with both the client and the firm who can give you instructions and receive communications on key issues. You may also want to discuss how you will communicate, especially for clients with multiple homes. You may even want to specify that you will be relying on email as opposed to paper.
- 6. Discuss How the Relationship May be Ended.** Let your client know that either of you can terminate the relationship with or without cause, except for your obligation to return your client's file and any unearned portion of a retainer, and any other responsibilities you may have under court rules and rules of professional responsibility. Also, consider a provision that states whether your lawyer-client

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relationship will be terminated upon the happening of a specific event (like executing a will). Sometimes you may not want to encourage the client to view the representation as over because you want the client to continuously view you as their lawyer. In other cases, however, you may wish to make it clear that your representation is over when the work is completed. This leaves you free to take on matters adverse to your former client, so long as they are not substantially related to the work that you did.

7. **Deal with Conflicts.** If you have determined that the client's interests are directly adverse to another client, or if there is a significant risk that the representation will be materially limited by your responsibilities to another client or by your own personal interest, deal with it. Confirm in the letter that you believe you can provide competent and diligent

representation, that the representation is not prohibited, and that each affected client has given informed consent.

Finally, you are permitted to inform a client that a situation could arise in which their interests might conflict with those of some other client, and to obtain their agreement that you may represent another client in any matter that is not substantially related to your work for them, even if the other client's interests are directly adverse to their interests or your representation results in litigation against them.

A well-drafted engagement letter doesn't guarantee harmony or client satisfaction. But, as they say, "good fences make good neighbors." By analogy, good engagement letters help make good clients.

*John Gordon is a partner and David Snieg is an associate at Faegre & Benson LLP.*

## Appealing Trust and Probate Orders

*David A. Turner*

*Bassford Remele, A Professional Association*

Appealing orders in probate and trust proceedings can be tricky. Minnesota's trust and probate statutes contain appeal provisions that seem to require appeal of orders that might not be appealable in normal civil litigation. Furthermore, in trust and probate proceedings there are sometimes multiple petitions being heard simultaneously, and it is not clear when the litigation is final for appeal purposes. Thus, trust and probate proceedings give rise to some unique issues and pose some special problems not present in a run-of-the-mill civil appeal.

### A. Appealing Trust Orders – In General

Minnesota Statutes<sup>1</sup> section 501B.16 authorizes numerous petitions for court orders concerning a trust, such as a petition to compel an accounting or to remove a trustee. Section 501B.21 provides that an order on a § 501B.16 petition is appealable as of right. *See also* Minn. R. Civ. App. P. 103.03(j) (making appealable "such other orders or decisions as may be appealable by statute or under the decisions of the Minnesota appellate courts"). A trust proceeding is also a "special

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proceeding,” and a “final order, decision or judgment affecting a substantial right” made therein is appealable under Minn. R. Civ. App. P. 103.03(g). *See In re Trust of Tufford*, 145 N.W.2d n.1 (Minn. 1966).

Take note of the use of the word “order” in § 501B.21. As opposed to the entry of a “judgment” by a court administrator, the time to appeal an *appealable* order does begin until 60 days after service by any party of written notice of its filing. *See* Minn. R. Civ. App. P. 104.01 subdiv. 1. While the order is appealable as soon as it’s file-stamped by the district court, the 60-day appeal clock does not start ticking until somebody serves a notice of filing. But what if nobody does that, is there an indefinite time to appeal the order? No. The last sentence of § 501B.21 states that if no notice of filing is served, any appeal must be commenced within *six months* of the date the district court filed the order. Thus, the most you have is six months to appeal the order, and that time may be shortened to 60 days if there is a notice of filing.

Section 501B.21 also states that once the time to appeal the order has expired, “the order is final as to all matters determined by it and binding *in rem* upon the trust estate and upon the interests of all beneficiaries, vested or contingent, even though unascertained or not in being.” This means that a question of fact settled by an order in a trust case has preclusive effect on both the trust and its beneficiaries. *See In re Estate and Trust of Anderson*, 654 N.W.2d 682 (Minn. Ct. App. 2002). Therefore, it’s important for parties and counsel in trust proceedings to (1) determine when an order becomes final and non-appealable and (2) exercise the right to appeal, if necessary, at the correct time. (But see Part C, below.)

## B. Appealing Probate Orders – In General

Most of the rules for appealing trust orders have analogs in the Minnesota probate code. There are two different probate statutes in Minnesota. The first is Minnesota’s version of the Uniform Probate Code, Minnesota Statutes chapter 524, and the other is the statute governing probate proceedings and appeals, chapter 525.

Section 525.71(a) provides a long list of appealable probate orders. The list is non-exclusive to the extent an order may also be appealable under Minn. R. Civ. App. P. 103.03. The time to appeal an *appealable* probate order does not begin to run until 60 days after service of a written notice of filing. *See* Minn. R. Civ. App. P. 104.01 subdiv. 1. Like its counterpart in the trust statute, § 525.712 states that if no notice of filing is served, any appeal of a probate order must be commenced within six months after the date the court filed the order.

Do findings of fact in an appealable probate order also have preclusive effect? The answer isn’t as clear as in the trust arena because § 525.712 lacks the “binding *in rem* . . . upon the interests of all beneficiaries” language of § 501B.21. The supreme court held in *In re Kelly’s Will*, 266 N.W.2d 700 (Minn. 1976), that a “decree of partial or final distribution” – which is an appealable probate order under § 525.71(a)(12) – cannot be collaterally attacked more than six months after the order is filed, pursuant to § 525.712. The common-law doctrines of preclusion and law-of-the-case may also serve to bar re-litigation of findings of fact in probate orders that become final.

## C. “Must I appeal this order now?” – The Problem Posed by Complex Cases

It’s not unduly difficult to determine whether

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a trust or probate order is appealable under either § 501B.21, § 525.712, or the rules of appellate procedure. The trap for the unwary is whether you *have to* appeal a particular trust or probate order immediately and what the consequences are if you don't.

One significant difference between general civil litigation and trust and probate litigation is the relative lack of finality in the trust and probate field. This is especially true in the case of trusts. In civil litigation and appeals (namely, all litigation other than proceedings under chapter 524 or chapter 501B), the proceedings move inexorably toward the entry of a final judgment, which is appealable as of right. Piecemeal appeals are strongly disfavored, and the court of appeals rarely allows discretionary review of an otherwise non-appealable order. But court-supervised trust administration can go on for a long time – decades, even – and might not result in an entry of judgment per se. By comparison, a supervised administration of a probate estate will have to, sooner or later, end with a final decree of distribution and a discharge of the personal representative.

Some trust and probate cases – such as a hotly litigated trustee surcharge matter or a will contest – are more akin to complex civil litigation than they are to garden-variety trust and probate cases. The garden-variety cases – such as a petition to confirm a successor trustee or a petition to approve the final accounting in a simple estate -- usually entail simple pleadings (a petition and objection), minimal briefing (if any), a short evidentiary hearing, and an order. But the more complex cases can involve extensive motion practice and multiple interim orders and hearings before anything resembling a “final” order is issued. In complex cases, numerous dispositive and non-dispositive interim orders may be issued, such as an order compelling discovery or an order denying partial

summary judgment. In fact, the only thing a complex trust or probate case may have in common with a garden-variety case is that it was commenced by the filing of a trust or probate petition, followed by statutory notice to interested persons, instead of by personal service of a formal summons and complaint.

In trust cases – which can sometimes continue indefinitely until the trust terminates – it might be necessary to seek appellate review of an order that appears to be appealable under § 501B.21 instead of re-urging the district court judge to grant the requested relief at some point down the road. This is what happened in *In re Estate and Trust of Anderson*, 654 N.W.2d 682 (Minn. Ct. App. 2002). There, the beneficiary petitioned in 1998 and 1999 to remove the trustee, alleging mismanagement of the trust's assets. In 2000, the district court denied the petition and found that the trustee's handling of assets was consistent with the decedent's will and trust instrument. The beneficiary did not appeal the 2000 finding. In 2001, the district court heard the trustee's petition for approval of his final account, at which time the beneficiary again argued the trustee had mismanaged assets. The district court rejected the beneficiary's argument and the Minnesota Court of Appeals affirmed, holding that the beneficiary was trying to mount an impermissible collateral attack on an earlier finding of fact that could have been, but was not, appealed.

We don't know why the beneficiary in *Anderson* chose not to appeal the earlier ruling on her trust petition, but she may have thought her claim of asset mismanagement was appropriate to raise one more time in connection with the trustee's petition for approval of a final account. That makes some sense, but her strategy was foreclosed by the preclusive effect of the earlier order.

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Therefore, it's important for litigants to remember that the orders may be appealable as of right and that, unless the order goes up on appeal, they might be collaterally estopped from challenging the finding later in the district court.

That said, imagine a complex trust case in which multiple § 501B.16 trust petitions are pending at the same time in a consolidated case. Does an order denying a motion for summary judgment – which would *not* ordinarily be appealable in a non-trust action – still qualify as an appealable order thanks to § 501B.21? Do you have to bring an interlocutory appeal of that order to preserve your client's appeal rights or risk an adverse preclusive effect, as in *Estate and Trust of Anderson*? Interestingly, the court of appeals addressed this very issue in a special term order in October 2009. See *In re Pamela Andreas Stisser Grantor Trust*, No. A09-1631, order (Minn. Ct. App. Oct. 27, 2009) (available from author or from clerk of appellate courts). The court of appeals dismissed an appeal of an order denying summary judgment taken under § 501B.21. The court of appeals ruled that in a trust case in which multiple § 501B.16 petitions were pending simultaneously, an order denying summary judgment was not an appealable order under § 501B.21 because it did not “end[ ] the proceeding as far as the [district] court is concerned” and did not “finally determine appellant's claimed rights under certain trust petitions.” See *Stisser Trust*, order at 2 (citing *In re Estate of Janecek*, 610 N.W.2d 638, 642 (Minn. 2000)). The court of appeals ruled in the *Stisser Trust* order that the case at bar differed from *Anderson*, which the court viewed as a series of petitions, involving the same trust and estate, that were filed and disposed of in order. In contrast, *Stisser* involved numerous petitions pending at the same time, some of which had been decided and some of which had not.

The recent order in *Stisser Trust*, which is not published and not available on the internet, provides a little guidance, but not much, as to when a party should appeal. To determine whether an order should be appealed, even if only to avoid a waiver of appellate rights, consider (1) whether the order completely disposes of and addresses all the relief requested by the petition and (2) whether there are *no other* petitions pending in the same case that are not the subject of the order. If the answer to both questions is “yes,” the order is likely appealable.

#### D. Who are the parties to the appeal?

One feature of probate and trust litigation is the requirement of giving notice to “interested persons” – beneficiaries, contingent beneficiaries, charitable institutions, claimants, or anyone else who has filed a written demand for notice. While these persons (or institutions) may be entitled to notice of what goes on in the district court, it is not uncommon for them to be unrepresented by counsel or have little involvement in the litigation. In comparison, in a traditional civil suit, the demarcation between adversaries is clearer and the parties tend to be more actively involved in case.

This poses a unique problem for probate and trust appeals. Assume there is a trust proceeding with a trustee and 15 different “interested persons” entitled to notice in the district court. Perhaps only a few interested persons entered appearances or actively participated in the district court. If one of these parties appeals from an order, does the notice of appeal have to be served on all interested persons? Will they all have standing as respondents in the appeal? If a transcript is ordered, does the appellant have to purchase a copy for each interested person? Will the appellant have to produce and serve appeal briefs on every such person?

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Thus, an appeal in a probate or trust case could be a far more expensive undertaking than in a typical lawsuit.

Case law does not provide a clear answer to this problem. But, as with most problems in lawyering, this might be solved by effective communication with counsel and the other parties before or shortly after the appeal is commenced. Service of the notice of appeal on each party entitled to notice in the district court is a good idea and might head off any problems as to whether the appeal is properly, or timely, commenced. Thereafter, contact the other parties and see whether they will likely participate in the appeal. Discuss whether they actually have an interest in the outcome of the appeal. The supreme court has held that any party whose interest would be adversely affected by reversal of an order should be made party to an appeal from the order. *See Rendahl v. Hall*, 200 N.W. 744 (Minn. 1924). It follows, then, that someone who would not be affected by a reversal might not need to be involved in an appeal. It's also helpful, in the statement of the case that all appellants must file with the clerk of appellate courts, to differentiate between those parties who actually have an interest in whether the order is affirmed or reversed – they will become the “respondents” in the appeal – and those parties who do not and might not be expected to participate. The court of appeals’ staff attorneys are also an excellent resource on questions such as this.

#### E. Conclusion

If a critical order is handed down in a probate or trust case, stop to consider whether it's appealable and, if so, whether you must appeal now to seek review of a particular finding. Before filing your appeal, take a moment to think about who the parties to the appeal will be and what you will have to provide them with. While these steps do not

guarantee appellate success, they can avoid some of the problems inherent in appealing probate and trust orders.

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#### *Notes*

<sup>1</sup>All section references are to the Minnesota Statutes and unless otherwise indicated.

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