

Removing a Trustee Triggers Fiduciary Duties

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Take-Away: Sometimes we need to remember that ‘once a fiduciary, always a fiduciary’ when it comes to exercising powers delegated under a Trust instrument which in turn invites a *bad faith* analysis by the courts.

Background: Some activities of a trustee can be taken without being subject to a fiduciary duty, but only if the trust instrument expressly relieves the trustee of those fiduciary duties. [MCL 700.7105(1).] Then again, some fiduciary duties cannot be eliminated by the terms of the Trust instrument, such as the trustee’s duty to administer the Trust in accordance with the overarching duty to administer the Trust in good faith, expeditiously, in accordance with its purposes and terms, and for the benefit of the trust beneficiaries, or the duty to timely provide beneficiaries with the terms of the Trust and information about the Trust’s property and to notify qualified trust beneficiaries of the Trust’s existence. [MCL 700.7105(2)]. However, with the recent adoption in Michigan of *quiet* Trusts, apparently the trustee’s fiduciary duty to report to trust beneficiaries can now be modified, at least upwards to 25 years. What about the power to remove of a Trustee? Is that power subject to the limitation of fiduciary duties? A recent Minnesota court decision says ‘yes’ when the Trust instrument is silent if the removal power appears to have been conferred in a nonfiduciary capacity.

In the Matter of the Trust Agreement of Geneieve M. Rossow, Westlaw at 2023 WL 7293812, November 6, 2023

Facts: Mrs. Rossow died in 2014. After her death her husband, LeRoy, and their two sons were named as successor co-trustees of Mrs. Rossow’s Trust. An independent trustee was also to be appointed by the two sons. The Trust instrument also gave LeRoy the independent power to remove any trustee, but with no reference to whether this removal power was to be in a fiduciary or nonfiduciary capacity. In 2018 the two sons sued LeRoy with respect to their concerns about his administration of the Trust, which at that time had no

independent trustee then serving. The trial court approved a settlement to end the lawsuit with the parties [LeRoy and his two sons] agreement to cooperate in good faith and to find a mutually acceptable independent trustee for the Trust. However, by 2021 the co-trustees had failed to agree on an independent trustee. At this point LeRoy then exercised his Trust power; he filed a petition with the district (probate) court to remove his two sons as co-trustees and enable him to appoint an independent trustee of his own choice.

District Court: The District Court judge denied LeRoy's petition to remove his sons as co-trustees. The judge found that LeRoy's petition of removal of his sons as co-trustees was filed in *bad faith*, a standard that arises from his role as co-trustee of the Trust.

Court of Appeals: The District Court's denial of LeRoy's petition of removal was affirmed by the Minnesota Court of Appeals.

Instrument Needs to Expressly Relieve the Fiduciary Duty: The Court focused generally on fiduciary duties that are owed by a trustee. It noted that the duties imposed by Minnesota's Trust Code {much like Michigan's} are not released or limited when a powerholder is described in the Trust instrument as holding the power in a capacity other than as a trustee. Although the Trust instrument stated that “[LeRoy] shall have power to remove any trustee” and was silent as to whether that removal power was held in a fiduciary capacity, that bare reference to the power was insufficient to release LeRoy from the fiduciary requirement that he always act in the best interests of the trust beneficiaries.

Existing Fiduciary Duty: Going even a bit further, the Court concluded that even if the Trust instrument gave the one trustee broad powers, such as the ability to remove a co-trustee, that trustee is still not permitted to disregard his fiduciary duties even if that ‘other’ power is not qualified as being a *fiduciary* power. Accordingly, if LeRoy's exercise of his removal power would constitute a violation of his ‘other’ fiduciary duties, then his ‘other’ removal power was non-exercisable by him. Restated, his fiduciary

powers (and duties) negated the nonfiduciary powers also given to him under the same Trust instrument.

Bad Faith: In sum, LeRoy's trustee removal power was subject to a fiduciary standard that could not be exercised in *bad faith*.

Trust Director: In Michigan, there would be yet another reason to prevent LeRoy's exercise of the trustee removal power conferred on him when which was not expressly 'coupled' with a fiduciary duty. Under the Michigan Trust Code, any individual who possesses the power to remove a trustee is automatically deemed to be a *trust director*. Under the Michigan Trust Code, a *trust director* acts as a fiduciary, and thus is he/she statutorily obligated to exercise that power as a fiduciary and the exercise of that power will be subject to the *bad faith* standard. [MCL 700.7703a; MCL 700.7105(2)(h), (k), (l).]

Conclusion: Sometimes Trust instruments appear to give the same individual both fiduciary and nonfiduciary powers. It is pretty safe to say that the delegated fiduciary duties given to the individual will 'color' the individual's exercise of the nonfiduciary power(s).