

No. A18-0120

STATE OF MINNESOTA
IN COURT OF APPEALS

Kim A. Lund, as trustee and beneficiary of the Revocable Trust of Kim A. Lund, as co-trustee and beneficiary of the Trusts created by the Trust Agreement of Russell T. Lund, Jr. dated February 14, 1990 for the benefit of Kim Lund; as beneficiary of the Trusts created by the Irrevocable Trust Agreement of Russell T. Lund dated July 8, 1969; and as beneficiary of the Qualified Marital Trust under Complete Amendment to Trust of Russell T. Lund dated September 21, 1984,

Respondent.

vs.

Russell T. Lund III, Gene Gerke, Mitch Avery, and Stanley Rein, individuals; Lunds, Inc. and Lund Food Holdings, Inc., Minnesota corporations; and Lund Real Estate Holdings, LLC, a Minnesota limited liability company,

Appellants,

**BRIEF OF AMICUS CURIAE THE
PROBATE AND TRUST LAW SECTION OF
THE MINNESOTA STATE BAR ASSOCIATION**

BALLARD SPAHR LLP
Jonathan M. Bye #148830
Kim M. Ruckdaschel-Haley #0221831
Mavis J. Van Sambeek #206763
2000 IDS Center
80 South 8th Street
Minneapolis, MN 55402
Telephone: (612) 371-3211
byej@ballardspahr.com
ruckdaschelhaleyk@ballardspahr.com
vansambeekm@ballardspahr.com

**ATTORNEYS FOR AMICUS CURIAE THE
PROBATE AND TRUST LAW SECTION OF
THE MINNESOTA STATE BAR ASSOCIATION**

DORSEY & WHITNEY LLP

Steven J. Wells #163508
Jaime Stilson #392913
Timothy J. Droske #388687
50 South Sixth Street, Suite 1500
Minneapolis, MN 55402
(612) 340-2600
wells.steve@dorsey.com
stilson.jaime@dorsey.com
droske.tim@dorsey.com

ATTORNEYS FOR APPELLANTS

**ANTHONY OSTLUND BAER &
LOUWAGIE P.A.**

Richard T. Ostlund #144277
Janel M. Dressen #0302818
Shannon M. Awsumb #343389
90 South Seventh Street, Suite 3600
Minneapolis, MN 55402
(612) 349-6969
rostlund@anthyostlund.com
jdressen@anthonyostlund.com
sawsumb@anthonyostlund.com

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

INTRODUCTION 1

DISCUSSION..... 2

 A. Having Been Instrumental in the Passage of the Minnesota Trust Code, the Section Has a Strong Public Interest in Assuring that the Minnesota Trust Code Is Properly Interpreted and Applied. 2

 B. Relevant Proceedings Below..... 3

 C. The Minnesota Trust Code Did Not Alter Minnesota’s Longstanding Common Law that Trustees Are Entitled to Reasonable Attorneys’ Fees, to Be Paid out of the Trust Estate, Incurred in Good Faith in Defending their Administration of the Trust..... 4

 D. Unless Corrected, the Holding that the Minnesota Trust Code Alters Longstanding Minnesota Common Law Entitling Trustees to Recover Litigation Expenses Incurred in Good Faith Will Have Adverse Public Policy Consequences. 11

CONCLUSION 12

TABLE OF AUTHORITIES

| | Page(s) |
|---|----------------|
| Cases | |
| <i>In re Freemans' Trust</i> , 75 N.W.2d 906 (Minn. 1956)..... | 4 |
| <i>Matter of Great Northern Ore Properties</i> , 311 N.W.2d 488 (Minn. 1981)..... | 9 |
| <i>Hoch v. Duluth Brewing & Malting Co.</i> , 173 Minn. 374, 217 N.W. 503 (1928)..... | 5 |
| <i>Klinkerfuss v. Cronin</i> , 199 S.W.3d 831 (Mo. App. 2006) | 5 |
| <i>In re Margolis Rev. Trust</i> , 765 N.W.2d 919 (Minn. Ct. App. 2009)..... | 5 |
| <i>Savig v. First National Bank of Omaha</i> , 781 N.W.2d 335 (Minn. 2010)..... | 7 |
| <i>Skyline Potato Co., Inc., v. Hi-Land Potato Co., Inc.</i> , 188 F. Supp. 3d 1097 (D.N.M. 2016) | 8, 9 |
| <i>In re Trust Created by Hill</i> , 499 N.W.2d 475 (Minn. Ct. App. 1993)..... | 5 |
| Statutes | |
| Minn. Stat. § 501C.0106..... | 10 |
| Minn. Stat. § 501C.0709..... | <i>passim</i> |
| Minn. Stat. § 501C.0811(b)..... | 5 |
| Minn. Stat. § 501C.0816..... | 6 |
| Minn. Stat. § 501C.1004..... | <i>passim</i> |
| Other Authorities | |
| II Jairus Ware Perry, <u>A Treatise on the Law of Trusts and Trustees</u> , section 894 (7th ed. 1929) | 5 |

| | |
|--|----------|
| Christopher Hunt, <i>A New Day in Minnesota Trust Law</i> , Bench & B. Minn. (July 10, 2015), http://mnbenchbar.com/2015/07/trustlaw (last accessed 5/3/18) | 3 |
| George Gleason Bogert, George Taylor Bogert, and Amy Morris Hess, <u>The Law of Trusts and Trustees</u> §§ 581, 801 (2017) | 5 |
| Minnesota Rules of Civil Appellate Procedure Rule 129.03 | 1 |
| Restatement (Third) of Trusts, § 88 | 6 |
| Uniform Trust Code § 106 | 10 |
| Uniform Trust Code § 709 | 6, 7, 10 |
| Uniform Trust Code § 1004 | 7, 9, 10 |

INTRODUCTION

Amicus curiae, the Probate and Trust Law Section of the Minnesota State Bar Association (the “Section”), addresses one issue in this appeal—the denial of the motion of the two defendant/appellants who served as trustees, Russell T. Lund III (“Tres”) and Stanley Rein (“Rein”) (collectively, the “Trustee Defendants”), for an award of their attorneys’ fees and costs incurred in defending their administration of the trusts, to be charged back to the trusts. (*See* discussion at Appellants’ Brief at 52-55.) In denying the motion, the District Court applied the wrong standard for determining when trustees are entitled to have their attorneys’ fees paid out of the trust estate. Specifically, the District Court erred in holding that Minn. Stat. § 501C.1004, adopted in 2016 as part of the Minnesota Trust Code, replaced longstanding Minnesota common law governing when trustees are entitled to have their attorneys’ fees paid out of the trust estate with a new standard, one applicable to beneficiaries’ ability to have their fees paid, which expanded a court’s discretionary authority to deny trustees acting in good faith the right to have their fees paid out of the trust estate. The Section takes no position as to what attorneys’ fees, if any, the Trustee Defendants would be entitled to have paid out of the trust estate under the correct common law standard, which is codified in Section 501C.0709 of the Minnesota Trust Code, or as to any other issues in the appeal.¹

¹ Pursuant to Rule 129.03 of the Minnesota Rules of Civil Appellate Procedure, the Section certifies that no counsel for any party to this appeal authored or was involved in the preparation of this brief and that no person or entity, other than the Section and its undersigned counsel, made any monetary contribution to the preparation or submission of this brief.

DISCUSSION

A. Having Been Instrumental in the Passage of the Minnesota Trust Code, the Section Has a Strong Public Interest in Assuring that the Minnesota Trust Code Is Properly Interpreted and Applied.

With 1,087 members as of March 2, 2018, the Section is the third largest section of the Minnesota State Bar Association (“MSBA”). Founded in 1883, the MSBA is the oldest professional association for attorneys in Minnesota and its membership is open to any attorney licensed to practice law in any state, and to law students, paralegals, and law management associates. *See* <https://www.mnbar.org/about-msba#.Wudbt9H9MkI> (last accessed 5/3/2018). All members of the MSBA in good standing are eligible for membership in the Section. *See* <https://www.mnbar.org/members/committees-sections/msba-sections/probate-and-trust-law-section#.Ws92VdFdMkI> (last accessed 5/3/2018). As the Section’s website explains, it “[w]orks on behalf of its members and the public to assist with and improve the practice of estate planning, probate and trust law in Minnesota.” *Id.*

In the spring of 2010, the Section established a committee that undertook a comprehensive study of the Uniform Trust Code (“UTC”), originally promulgated in 2000 by the Uniform Law Commission, as well as then-existing Minnesota trust law, both common and statutory, to consider the extent to which the UTC should be proposed for

enactment by the Minnesota Legislature.² *See* Christopher Hunt, *A New Day in Minnesota Trust Law*, Bench & B. Minn. (July 10, 2015), <http://mnbenchbar.com/2015/07/trustlaw> (last accessed 5/3/18). After five years of work, the committee's recommendations were adopted by the Section. *Id.* The Section then proposed legislation crafted for Minnesota based on the UTC and existing Minnesota trust law. *Id.* The Section's draft bill was introduced in the Legislature, approved as written, and passed as the Minnesota Trust Code, Minnesota Statutes Chapter 501C, effective January 1, 2016. *Id.* Having been instrumental in the passage of the Minnesota Trust Code, the Section has a strong public interest in assuring it is properly interpreted and applied.

B. Relevant Proceedings Below.

The Trustee Defendants served as trustees of various Lund family trusts. Plaintiff/Respondent commenced this action asserting, among other things, claims against the Defendant Trustees for breach of fiduciary duty, civil conspiracy, and for their removal as trustees. (Doc. 1.) The District Court granted summary judgment dismissing the breach of fiduciary duty and civil conspiracy claims. (Add. 5-51.) After a bench trial, the District Court determined, among other things, that Tres should be removed as trustee but that Rein should not be. (Add. 124-178.) The Trustee Defendants then moved, based on common

² The Uniform Law Commission, also known as the National Conference of Commissioners on Uniform State Laws, established in 1892, consists of lawyers and others licensed to practice law who have been appointed by state governments, the District of Columbia, Puerto Rico and the U.S. Virgin Islands to research, draft and promote enactment of uniform state laws in areas of state law where uniformity is desirable and practical. *See* [http://www.uniformlaws.org/Narrative.aspx?title=About the ULC](http://www.uniformlaws.org/Narrative.aspx?title=About%20the%20ULC) (last accessed 5/3/18).

law and Minn. Stat. § 501C.1004, for an award of their attorneys’ fees and costs related to their defense of the trustee-related claims, to be charged back to the trusts. (*See* Docs. 281, 282, and 296 and Transcript of 8/21/2017 hearing.)

The District Court denied that motion by Order on Defendants’ Motion for Trustees’ Attorneys’ Fees and Costs dated October 18, 2017 (the “Fees Order”). (Add. 204-210.) In doing so, the District Court held that Section 501C.1004 of the Minnesota Trust Code alters the “longstanding common law” governing payment of “trustees’ attorneys’ fees that was in place prior to the Minnesota Trust Code’s enactment” and applied the “new standard” of Section 501C.1004, which it found “expands the discretionary authority of the court.” (Add. 205-206.)

C. The Minnesota Trust Code Did Not Alter Minnesota’s Longstanding Common Law that Trustees Are Entitled to Reasonable Attorneys’ Fees, to Be Paid out of the Trust Estate, Incurred in Good Faith in Defending their Administration of the Trust.

As the District Court correctly noted, under longstanding Minnesota common law principles, even when unsuccessful, trustees have been entitled to reasonable attorneys’ fees, to be paid out of the trust estate, incurred in good faith in defending their administration of the trust:

[T]he approach to trustees’ attorneys’ fees that was in place prior to the Minnesota Trust Code’s enactment ... was based on longstanding common law principles. Under these principles, while the trial court was still afforded some discretion in its determination of whether attorneys’ fees were chargeable to a trust, the general rule was that a trustee was “entitled to reasonable attorneys’ fees, to be paid out of the trust estate, incurred in good faith in defending administration of the trust.” *In re Freemans’ Trust*, 75 N.W.2d 906, 910 (Minn. 1956).

(Add 206-207.) *See also In re Trust Created by Hill*, 499 N.W.2d 475, 494 (Minn. Ct. App. 1993) (“A trustee is entitled to reasonable attorney fees incurred in good faith in defending its administration of the trust instructions, defending a proceeding for the benefit of the trust, and defending a beneficiary’s challenge to the trust administration”); *In re Margolis Rev. Trust*, 765 N.W.2d 919, 928 (Minn. Ct. App. 2009) (“A trustee defending in good faith a challenge to his administration of the trust is entitled to reasonable attorney fees paid out of the trust”); *Hoch v. Duluth Brewing & Malting Co.*, 173 Minn. 374, 377, 217 N.W. 503, 504 (1928) (“Of course, [a] ... trustee is entitled to reimbursement for expenses incurred in the proper performance of ... the execution of the trust”).

This rule is rooted in the fiduciary duty principles that a trustee has a duty to protect the trust and if the beneficiaries of the trust are to get the benefit of the trustee’s good faith management and administration, the trust must bear the trustee’s costs. As one court explained, after quoting the rule from *Freeman*:

The reason involved in the rule is this: trustees have no beneficial interest in the trust property. They hold it for the accommodation and benefit of others. If they perform their duties faithfully, and are guilty of no unjust, improper, or oppressive conduct, they ought not in justice and good conscience to be put to any expense out of their own moneys. If, therefore, they are brought before the court without blame on their part, they should be reimbursed all the expenses that they incur, and allowed their costs as between solicitor and client for this purpose.

Klinkerfuss v. Cronin, 199 S.W.3d 831, 845 (Mo. App. 2006) (quoting II Jairus Ware Perry, A Treatise on the Law of Trusts and Trustees, section 894, pp. 1515–16 (7th ed. 1929)). *See also* George Gleason Bogert, George Taylor Bogert, and Amy Morris Hess, The Law of Trusts and Trustees §§ 581, 801 (2017); Minn. Stat. §§ 501C.0811(b)

(requiring a trustee to take reasonable steps to defend claims against the trust), 501C.0816(14) (authorizing a trustee to contest claims against the trust), 501C.0816(15) (authorizing a trustee to pay agents of the trust, and other expenses incurred in the administration of the trust), 501C.0816(23) (authorizing a trustee to defend actions to protect the trust and the trustee in the performance of the trustee's duties); Restatement (Third) of Trusts, § 88 (discussing a trustee's power to incur and pay expenses), Comment d thereto (stating that a trustee's right of indemnification for reasonable counsel fees in defending litigation applies "even though the trustee is unsuccessful in the action, as long as the trustee's conduct was not imprudent or otherwise in violation of a fiduciary duty"), and Reporter's Notes to Comment a thereto (equity takes pains to hold the trustee harmless from personal liability for obligations properly incurred; a trustee has the right to pay directly from the estate all of the expenses properly incurred as an owner).

The longstanding Minnesota common law that trustees are entitled to reasonable attorneys' fees, to be paid out of the trust estate, incurred in good faith in defending their administration of the trust was codified in the Minnesota Trust Code in Section 501C.0709, contained within the Article entitled "Office of Trustee." Section 501C.0709, entitled "Reimbursement of Expenses" is identical to Section 709 of the UTC. In relevant part, it provides:

A trustee is *entitled* to be reimbursed out of the trust property, with interest as appropriate, for ... expenses that were properly incurred in the administration of the trust.

Minn. Stat. § 501C.0709(a)(1); UTC Section 709(a)(1) (emphasis added). The Comment to UTC Section 709 states in relevant part:

A trustee has the authority to expend trust funds as necessary in the administration of the trust, including expenses incurred in the hiring of agents. *See* Sections 807 (delegation by trustee) and 816(5) (trustee to pay expenses of administration from trust). ... Subsection (a)(1) clarifies that a trustee is entitled to reimbursement from the trust for incurring expenses within the trustee's authority. ... Reimbursement under this section may include attorney's fees and expenses incurred by the trustee in defending an action. However, a trustee is not ordinarily entitled to attorney's fees and expenses if it is determined that the trustees breached the trust. *See* 3A Austin W. Scott & William F. Fratcher, *The Law of Trusts* § 245 (4th ed. 1988).

Uniform Trust Code § 709 Cmt. (Uniform Law Comm'n 2000).³ Thus, the Uniform Law Commissioners made clear that Section 709 entitles trustees to be reimbursed for their attorneys' fees incurred in litigation, absent a breach of trust.

Although the District Court recognized the longstanding Minnesota common law entitling trustees to pay their reasonable attorneys' fees incurred in good faith in defending the administration of the trust out of the trust estate, the District Court did not address its codification in Section 501C.0709.⁴ Instead, the District Court exclusively focused on

³ When a uniform act is adopted in Minnesota, the intent of the drafters of the uniform act, as expressed in their official commentary, "becomes the legislative intent upon enactment." *Savig v. First National Bank of Omaha*, 781 N.W.2d 335, 343 (Minn. 2010) (relying upon the official commentary to the Uniform Probate Code to interpret Minnesota's version of the Uniform Probate Code.)

⁴ Although Section 709 of the UTC was referred to in a partial quote of the Comment to UTC Section 1004 in the Order (Add. 207, n. 3), neither the District Court nor any party discussed Section 709 or Minn. Stat. § 501C.0709 in connection with Defendants' Motion for Trustees' Attorneys' Fees and Costs. (*See* Docs. 281, 282, 288, and 296; Transcript of 8/21/2017 hearing; Add. 204-210.) Whatever effect this has on the appeal, the Section believes it is important, for the reasons stated herein, that the District Court's incorrect holding that Section 501C.1004 alters longstanding Minnesota common law that trustees are entitled to their attorneys' fees incurred in good faith be corrected.

Section 501C.1004, concluding that it replaced the common law as to trustees' entitlement to reimbursement of their attorneys' fee with a new standard:

The Minnesota Trust Code specifies a new standard for attorneys' fees in the context of trust litigation, stated as follows:

In a judicial proceeding involving the administration of a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney fees, to any party from the trust that is the subject of the judicial proceeding.

Minn. Stat. Ann. § 501C.1004 ("Attorney Fees and Costs"). This standard alters the approach to trustees' attorneys' fees that was in place prior to the Minnesota Trust Code's enactment.

(Add. 206.) Applying this "new standard" to the Trustee Defendants' request that their fees be paid out of the trusts, the District Court found that "it need not consider whether [the Trustee Defendants] defended their administration of the trust in good faith," stating that instead "the Court's emphasis must be on 'justice and equity.'" (Add. 208.) The District Court then went on to consider various factors considered in a Perishable Agricultural and Commodities Act statutory trust case in which one beneficiary sought fees from another beneficiary, including such factors as "the relative ability to bear the financial burden" and "prevailing party concepts." (Add. 209, quoting *Skyline Potato Co., Inc., v. Hi-Land Potato Co., Inc.*, 188 F. Supp. 3d 1097, 1152 (D.N.M. 2016) (internal citations omitted).)

The District Court's holding that Section 501C.1004 replaced Minnesota's longstanding common law that a trustee is entitled to pay its attorneys' fees incurred in good faith out of the trust assets with a new "justice and equity" standard that gives a trial court greater discretion to deny the payment of trustees' fees is incorrect.

Section 501C.1004 is nearly identical to Section 1004 of the UTC. It is in Article 10 of the Trust Code entitled “Liability of Trustees and Rights of Persons Dealing with a Trustee.” As such, Article 10, including Section 501C.1004, addresses the rights of beneficiaries and other third parties dealing with trustees, rather than the rights, duties, and powers of trustees, which are governed by other Articles, including Article 7, of the Trust Code. The official commentary to Section 1004 notes that, pursuant to that section, the “court may award a beneficiary litigation costs if the litigation is deemed beneficial to the trust.” UTC § 1004 Cmt. (Uniform Law Comm’n 2000). Thus, Section 501C.1004 did not alter common law as the District Court held—rather, it codified the common law as to when beneficiaries and third parties may recover attorneys’ fees from the trust assets.⁵ *See, e.g., Matter of Great Northern Ore Properties*, 311 N.W.2d 488 (Minn. 1981) (affirming award of attorneys’ fees from trust principal to beneficiaries who conducted litigation in good faith for the primary benefit of the trust.)

⁵ The Minnesota Trust Code did not include the clause of UTC Section 1004 that would have resulted in a change from Minnesota common law by providing that beneficiaries’ fees could be ordered to be paid by another party, as opposed to just from the trust. Section 1004 of the UTC provides:

In a judicial proceeding involving the administration of a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney’s fees, to any party, *to be paid by another party or* from the trust that is the subject of the controversy.

(Emphasis added.) As a result, the factors the District Court applied, which were the factors applied by *Skyline Potato* based on New Mexico’s version of the UTC which included the above-italicized language in determining whether one beneficiary should have to pay another beneficiaries’ attorneys’ fees, were inapposite in any event.

As to a trustee's entitlement to recover litigation costs, the Comment to Section 1004 refers to Section 709, stating that "Section 709 authorizes a trustee to recover expenditures properly incurred in the administration of the trust." *Id.* Thus, in their official commentary to Section 1004, the Uniform Law Commissioners emphasized that while beneficiaries and third parties, in the discretion of the court, may recover their fees under that Section, an earlier section of the UTC, Section 709, grants trustees the right to recover their own litigation fees.

Section 501C.0106 of the Minnesota Trust Code, like UTC Section 106, provides that "[t]he common law of trusts and principles of equity supplement [the Minnesota Trust Code], except to the extent modified by [the Minnesota Trust Code] or another law of this state." Nothing in Section 501C.1004 or any other law of this state modifies Minnesota common law granting trustees the right to recover their litigation expenses, absent a breach of trust, or Section 501C.0709's codification of that law. Accordingly, the District Court's holding that Section 501C.1004 altered what it acknowledged as the "longstanding common law principles" applicable to trustees' entitlement to attorneys' fees was incorrect.⁶

⁶ In the concluding sentence of its Memorandum, the District Court stated that "[t]here are not grounds here to deviate from the 'American Rule' on attorneys' fees, and so the parties to this action should each pay their own fees." (Add. 210.) To the extent the District Court applied the American Rule to deny the Trustee Defendants' motion, that was also in error. The American Rule addresses whether one party to a lawsuit can be required to pay another party's fees. It has no application to the Trustee Defendants' motion because they were not seeking to have their fees paid by another party—they were seeking approval under longstanding common law trust principles to reimburse themselves from the trusts of which they were the trustees of fees they claim to have incurred in good faith in defending their administration of the trusts.

D. Unless Corrected, the Holding that the Minnesota Trust Code Alters Longstanding Minnesota Common Law Entitling Trustees to Recover Litigation Expenses Incurred in Good Faith Will Have Adverse Public Policy Consequences.

As described above, trustees have fiduciary duties, including an obligation to defend the administration of the trust. Thus, under the common law, the UTC, and the Minnesota Trust Code, trustees are entitled to have their reasonable attorneys' fees paid out of the trust unless they act in bad faith. Beneficiaries, on the other hand, have no duties, including no obligation to challenge the administration of a trust. Thus, under the common law, the UTC, and the Minnesota Trust Code, beneficiaries may only have their reasonable attorneys' fees paid out of the trust if it is just and equitable to do so. If the rule for trustees and beneficiaries were the same, as the District Court held, qualified individuals and entities would be discouraged from serving as trustees. This would be particularly true following a challenge to a trustee's administration because trustees would face a greater likelihood of being personally responsible for their attorneys' fees even where it is determined they acted in good faith and even when there has been no breach of duty. Corporate trustees would be particularly discouraged from serving as trustees if one of the factors to determine their entitlement to attorneys' fees for defending the trust was, as the District Court held, their "relative ability to bear the financial burden." In addition, beneficiaries would be encouraged to challenge trustees' actions they do not like even though taken in good faith because trustees, despite their obligation to take reasonable steps to defend claims against the trust, would be more likely to accede to the challenge rather than defend the trust and incur attorneys' fees for which they may be personally

responsible. Unless this Court affirmatively corrects the District Court's holding that the longstanding common law rule entitling trustees to have their fees paid out of the trust estate was overridden by Section 501C.1004, these adverse consequences will result.

CONCLUSION

For the reasons set forth above, the Probate and Trust Law Section of the Minnesota State Bar Association respectfully requests that this Court correct the District Court's holding that Section 501C.1004 of the Minnesota Trust Code alters the longstanding common law, as codified in Section 501C.0709, that trustees are entitled to their reasonable attorneys' fees, to be paid out of the trust estate, incurred in good faith in defending their administration of the trust.

Dated: May 3, 2018

BALLARD SPAHR LLP

s/Jonathan M. Bye

Jonathan M. Bye (148830)
Kim M. Ruckdaschel-Haley (0221831)
Mavis J. Van Sambeek (206763)
2000 IDS Center
80 South 8th Street
Minneapolis, MN 55402
Telephone: (612) 371-3211
byej@ballardspahr.com
ruckdaschelhaleyk@ballardspahr.com
vansambeekm@ballardspahr.com

*Attorneys for Amicus Curiae The Probate
and Trust Law Section of the Minnesota
State Bar Association*

CERTIFICATE OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subd. 3(c), for an amicus brief produced with the proportional font. By automatic word count, this length of this brief is 3,461 words. This brief was prepared using Microsoft Word 2013.

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BALLARD SPAHR LLP

s/Jonathan M. Bye

Jonathan M. Bye (148830)
Kim M. Ruckdaschel-Haley (0221831)
Mavis J. Van Sambeek (206763)
2000 IDS Center
80 South 8th Street
Minneapolis, MN 55402
Telephone: (612) 371-3211
byej@ballardspahr.com
ruckdaschelhaleyk@ballardspahr.com
vansambeekm@ballardspahr.com

*Attorneys for Amicus Curiae The
Probate and Trust Law Section of the
Minnesota State Bar Association*