

**UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE**

**KENT H. KEATINGE, Co-Trustee** )  
**and Sole Beneficiary of the** )  
**Keatinge Family Trust,** )

**PLAINTIFF** )

v. )

**Civil No. 98-387-P-H**

**MURRAY KEATINGE, Individually,** )  
**and as Co-Trustee of the Keatinge** )  
**Revocable Trust of December 4,** )  
**1990, and The Keatinge Family** )  
**Trust and Trustee of the Keatinge** )  
**Marital Trust,** )

**DEFENDANT** )

**ORDER**

I conducted an evidentiary hearing on the plaintiff's motion for preliminary injunction on November 18 and 19, 1998. Based upon the testimony presented there, the exhibits that were admitted, and the filings that had previously taken place, I have concluded that a preliminary injunction should issue.

The standards for a preliminary injunction in this circuit are clear (although this is a diversity case, the parties have not argued that any different standards apply: likelihood of success on the merits; irreparable injury; favorable balance of the equities; and effects on the public interest. See

Ocean Spray Cranberries, Inc. v. Pepsico, Inc., \_\_\_ F.3d \_\_\_, 1998 WL 777475 at \*2 (1st Cir. Nov. 12, 1998).<sup>1</sup>

### LIKELIHOOD OF SUCCESS ON THE MERITS

The plaintiff, a Family Trust beneficiary, has provided substantial proof that the defendant trustee, his father, has failed—or perhaps even refused—to act in accordance with his duties under the Trust document. The evidence that the defendant trustee has offered in rebuttal is unpersuasive.

First of all, most of the defendant’s evidence depends on the credibility of Trustee Murray Keatinge himself as to his intent in managing the family assets. I have some doubt as to the defendant’s credibility, at least in this matter. Specifically, I am impressed by the direct conflict between two of his sworn statements. In separate affidavits offered to this court, the defendant claims that he appointed his son as co-trustee of the Keatinge Family Trust and the Revocable Trust,” see Aff. of Murray Keatinge in Supp. of Mot. to Dissolve Ex Parte Attachment and Attachment on Trustee Process and in Opp. to Mot. for Prelim. Injunction, dated Nov. 13, 1998, at ¶ 6, and later claims that he has “no recollection” of such appointments, “vehemently contest[s] the authenticity” of such appointments and “strongly doubt[s]” whether he ever executed such documents. Aff. of Murray Keatinge, dated Nov. 19, 1998, at ¶¶ 5, 6. This does little to dispel suspicion about the various transactions in which the defendant has engaged as trustee.

Even leaving the defendant’s credibility to one side, there is a strong likelihood that the plaintiff will be able to prove at trial that the defendant did not fund the Family Trust at all within

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<sup>1</sup> The plaintiff previously obtained an *ex parte* Temporary Restraining Order in state court before the defendant removed the case to federal court. The burden remains at all times with the plaintiff to support the request for injunctive relief.

six months of his wife's death, although the parties agree that he had a duty to fund it in an amount of \$600,000 at that time. The first mention—in any of the record evidence—of any funding of the Family Trust is the claim in the filing for federal estate tax purposes (Form 706) that the Family Trust received \$600,000. Inexplicably, the defendant filed that form in 1996, a little over five years after his wife's death. The schedule of assets on which defendant relies to show how exactly he funded the Family Trust is quite suspect. For example, the schedule claims that the Family Trust was funded with over \$200,000 of stock representing 80% of the shares of Pacific Mailing Equipment (PME). PME's stock book shows 225 outstanding shares, none of which are held in the name of the Family Trust; 100 shares are in the name of the Revocable Trust, but these were placed in the trust on the day the trust was created. Another 100 shares are in the name of Murray Keatinge personally. The defendant suggests that the failure to perform the "mere ministerial act" of transferring the shares does not mean that the shares were not in the Family Trust. However that may be, the shares certainly were not placed in the Family Trust in such a way as to protect the beneficiary's interest in them.

Even if the defendant trustee proves at trial that he initially funded the Family Trust as required, there is a likelihood that the plaintiff will succeed in proving that the defendant trustee did not make the first two scheduled payments of principal to the plaintiff and that the defendant did not make required income distributions from the Family Trust. The defendant claims that he made the practical equivalent of such distributions by making gifts to his son or permitting his son to take title to certain pieces of tangible property that belonged to the defendant personally. Even assuming that the defendant had the power as trustee to fulfill his duties through such "practically equivalent" transactions, there is no evidence that is what happened. There is some proof that the son took

possession of various antiques and home furnishings; and the evidence clearly establishes that this property belonged to Murray Keatinge personally, having passed to him under Mrs. Keatinge's will. But there is no evidence that these transactions were intended as distributions or substitutes for distributions from the Family Trust.

Finally, even if the defendant trustee proves at trial that—for practical purposes—he fulfilled his duties to his son regarding funding the trust and making distributions, there is a substantial likelihood that the plaintiff will succeed in proving serious breaches of the defendant's duty to render an accounting. Assuming that the defendant subjectively intended to be fulfilling his duties (a fact about which I have some doubt), he never provided his son or the world with proper documentation of that intent. Not only does this leave the beneficiary with uncertainty as to whether his rights have been protected, but it may also expose the beneficiary to the risk of being unable to document his rights. The defendant never provided his son or the IRS with documentation of the administration of the Family Trust (Form K-1). Nor did the defendant apparently ever make any record that property that he held in his individual name was actually the property of the Family Trust. Whether the defendant's creditors, or a probate court in the event of the defendant's sudden death, would honor the Family Trust's claim is uncertain to say the least. Exposing the beneficiary to that level of risk is most likely a serious breach of fiduciary duty.

#### **IRREPARABLE INJURY**

The defendant's failure to live up to his fiduciary obligations as a trustee are flagrant, according to the record as it now stands. He has failed properly to fund the Family Trust, failed to account to the Family Trust beneficiary, and failed to make required distributions of principal.

Whether or not a damage remedy could make the beneficiary whole for these past defaults, there remain exceedingly important fiduciary obligations in the future, including accountings, allocations among the trusts if the current “allocations” are indeed spurious, and preservation of assets to fund both the missed distributions and future required distributions (although the next required distribution will not occur before a likely trial in this matter). A trustee is selected by a grantor to act in a fiduciary manner and a trust is a creation of equity. Almost by definition, then, a damage remedy will not suffice; a trustee who cannot be trusted to comply with the trust instrument presents the overwhelming likelihood of irreparable injury to a beneficiary, and here the past conduct of the trustee raises a great risk that any assets the trust now has will not properly be preserved for the Family Trust beneficiary’s benefit.

#### **FAVORABLE BALANCE OF THE EQUITIES**

The preliminary injunctive relief that I issue here is to remove the current trustee pending the trial on the merits. The result will be that the successor trustees previously chosen by the grantors under section 5.9.1 will become trustee(s), and will have to comply fully with the terms of the trust documents, performing allocations, accountings and distributions. This has very little downside effect on the defendant, the current trustee. The trust will be administered properly; he simply will not be trustee for a time, but if he succeeds at trial, he can be reinstated. A neutral third party administering the trust(s) should serve both parties’ interests in seeing that the documents are fully complied with, and that neither of them obtains an economic or strategic advantage in the meantime. It does not grant the specific relief the plaintiff (the Family Trust beneficiary) originally requested, of enjoining Murray Keatinge from having any involvement in Norumbega (a bed and breakfast in

Camden), and it does not leave the plaintiff Kent Keatinge in place as manager of Norumbega. Instead, the successor trustee(s) will have to determine in their fiduciary capacity how and by whom Norumbega should best be managed or if it should be sold (as well as to which trust it is properly allocated). I recognize that Murray Keatinge currently owns one-half of Norumbega as tenant in common. The trustees will, therefore, have to determine whether Norumbega can be operated in a fiduciarily prudent manner that is also satisfactory to Murray Keatinge. If that turns out to be impossible before trial occurs, and if the trustee(s) choose to return to this court for relief rather than simply seek a partition of the asset, I will have to deal with any such subsequent request from the trustee(s) for any further relief that might be in the nature of a constructive trust, if justified.

#### **PUBLIC INTEREST**

This is a private dispute between two family members and the public interest does not have a bearing on whether or not the preliminary injunction should issue.

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According to the defendant's lawyer, the defendant believed he was being called into court to defeat an order that would enjoin him from managing Norumbega, not a challenge to his role as trustee over the Revocable Trust, of which he is a beneficiary as well as a trustee. But the defendant has been on notice from the outset that the likelihood of plaintiff's success on the merits was at issue. Under the plaintiff's complaint, those merits clearly involve the breach of fiduciary duties with respect to the management of the Trust; indeed that is the very gravamen of the plaintiff's complaint. Moreover, the defendant consistently has taken the position that if there was a breach of fiduciary duty by failing to fund the Family Trust, it does not necessarily follow that Norumbega must be used

to fund that trust. Since the defendant has pressed upon the court the adequacy of alternative remedies, he should not be surprised if the plaintiff then adjusts his attack or if the court chooses an alternate remedy for whatever violation is preliminarily proven. There is no unfair surprise.

### **CONCLUSION**

I conclude, therefore, that analysis of the First Circuit's factors calls for the issuance of a preliminary injunction in favor of the plaintiff and against the defendant, as follows:

The defendant Murray Keatinge is hereby **ORDERED** removed as Trustee of the Revocable Trust and any trusts created pursuant to that document pending trial on the merits of this matter and a successor trustee or trustees shall take office in accordance with section 5.9.1; he is further **ORDERED** to cooperate with and not interfere with the administration of the trust or trusts by successor trustees.

The previously issued Temporary Restraining Order shall expire, as agreed, at midnight, Friday, November 20, 1998.

A Scheduling Order shall issue promptly to prepare this matter for an early trial.

**SO ORDERED.**

**DATED THIS 19<sup>TH</sup> DAY OF NOVEMBER, 1998.**

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**D. BROCK HORNBY**  
**UNITED STATES CHIEF DISTRICT JUDGE**