

STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT
CASE TYPE: CIVIL

Destiny Dusosky,

Court File No. 62-CV-18-254

Plaintiff,

v.

Michelle Fischbach,

Defendant.

**PLAINTIFF’S MEMORANDUM OF LAW
IN SUPPORT OF MOTION FOR
INJUNCTION AND RULE 65.02(c)
CONSOLIDATION WITH A HEARING
ON THE MERITS**

I. INTRODUCTION

The Minnesota Constitution requires that “[t]he powers of government shall be divided into three distinct departments legislative, executive, and judicial” and provides: “[n]o person or persons belonging to or constituting one of those departments shall exercise any of the powers properly belonging to either of the others except in the instances expressly provided in this constitution.” Minn. Const. art III, § 1. With respect to those serving in the legislature, the Constitution is even clearer, providing: “[n]o senator or representative shall hold any other office under the authority of the United States or the state of Minnesota, except that of postmaster or of notary public.” Minn. Const. art. IV, § 5. Notwithstanding the clear and unequivocal language of the Minnesota Constitution, now-Lieutenant Governor Michelle Fischbach seeks to do what is expressly forbidden: to simultaneously exercise the powers of the executive office of lieutenant governor and the legislative office of state senator.

Plaintiff Destiny Dusosky—a resident of Senate District 13 where Defendant Fischbach was elected to the Senate—brings this action to uphold the express requirements of the Minnesota Constitution and to enjoin now-Lieutenant Governor Fischbach from continuing to exercise the

powers of the office of state senator for Senate District 13. Time is of the essence. This matter must be resolved before the legislature convenes on February 20, 2018 in order to avoid the chaos and confusion that would result from now-Lieutenant Governor Fischbach casting votes or taking other actions to conduct senate business which are later invalidated.

II. BACKGROUND

On January 2, 2018, United States Senator Al Franken resigned from the Office of United States Senator for Minnesota, which created a vacancy in that office. Minnesota Statutes Section 204D.28, subdivision 11 provides that, in the event of a vacancy in the Office of United States Senator for Minnesota, the Governor may appoint a successor to fill the vacancy until a special election is held to fill the office for the remainder of the term. In accordance with that section, on January 3, 2018, Governor Mark Dayton appointed then-Lieutenant Governor Tina Smith to fill the vacancy created by Senator Franken's resignation. Prior to that appointment, now-United States Senator Tina Smith resigned from the office of lieutenant governor effective at 11:59 p.m. on January 2, 2018, which created a vacancy in that office.

Minnesota Constitution Article V, Section 5 states that the "last elected presiding officer of the senate shall become lieutenant governor in case a vacancy occurs in that office." At the time of now-United States Senator Smith's resignation from the office of lieutenant governor, state Senator Michelle Fischbach was the President of the Minnesota Senate and, thus, the "last elected presiding officer of the senate." Pursuant to Minnesota Constitution Article V, Section 5, on January 3, 2018, state Senator Fischbach became lieutenant governor to fill the vacancy in the office created by now-United States Senator Tina Smith's resignation.

The Minnesota Constitution ensures the separation of powers by providing that "[n]o person ... belonging to ... one of these departments shall exercise any of the powers properly belonging to either of the others except in the instances expressly provided in this constitution"

and further prohibits legislators from “hold[ing] any other office under authority of the United States or the state of Minnesota, except that of postmaster or of notary public.” Minn. Const. art. III, § 1; art. IV, § 5. Notwithstanding the Constitution’s clear and unequivocal language, now-Lieutenant Governor Michelle Fischbach has stated her intent to hold and exercise the powers of both the executive office of lieutenant governor and the legislative office of state senator. Exhibit A to the Affidavit of Charles N. Nauen (“Nauen Aff.”).¹

III. ARGUMENT

A. This Court Should Grant a Temporary Injunction Prohibiting now-Lieutenant Governor Fischbach From Continuing to Hold the Office of State Senator.

The decision of whether to grant a temporary injunction is within the district court’s broad discretion. *Eakman v. Brutger*, 285 N.W.2d 95, 97 (Minn. 1979). For temporary injunctive relief, the plaintiff is required to show that she faces “irreparable harm and has no adequate remedy at law.” *See Metro. Sports Facilities Comm’n v. Minn. Twins P’ship*, 638 N.W.2d 214, 221-22 (Minn. Ct. App. 2002), *review denied* (Minn. Feb. 4, 2002). A temporary injunction will be granted where a party will be irreparably injured before a trial on the merits can be held. *Webb Publ’g Co. v. Fosshage*, 426 N.W.2d 445, 448 (Minn. Ct. App. 1988).

In addressing a motion for temporary injunctive relief, the court applies the five-factor test set forth in *Dahlberg Bros., Inc. v. Ford Motor Co.*, 137 N.W.2d 314, 321-22 (Minn. 1965) which includes:

- (1) The nature and background of the relationship between the parties before the dispute;
- (2) The harm to be suffered by the moving party if the TRO is denied compared to that inflicted on the non-moving party if the TRO is granted;

¹ The exhibits to the Nauen Affidavit were attached as exhibits to the Complaint and are provided here for the convenience of the Court.

- (3) The moving party's likelihood of success on the merits;
- (4) The public policy interests involved; and
- (5) The administrative burdens imposed on the court in supervising and enforcing the order.

The *Dahlberg* factors support granting Plaintiff Destiny Dusosky's request for injunctive relief.

1. The Plaintiff Is Likely to Succeed on the Merits Because the Minnesota Constitution Prohibits the Lieutenant Governor From Also Holding the Office of State Senator.

Of the five *Dahlberg* factors, the likelihood of success on the merits is a primary consideration. See *Minneapolis Fed'n of Teachers, AFL-CIO, Local 59 v. Minneapolis Public Schools, Special School District. No. 1*, 512 N.W.2d 107, 110 (Minn. Ct. App. 1994). The Minnesota Constitution clearly and unequivocally prohibits any person from exercising the powers of two branches of government. Now-Lieutenant Governor Fischbach's assertion that this prohibition does not apply to her rests upon a century old Minnesota Supreme Court case that was decided at a time when the lieutenant governor's duties were legislative, not executive, in nature. See *State ex rel. Marr v. Stearns*, 75 N.W. 210 (Minn. 1898), *rev'd on other grounds sub nom., Stearns v. State of Minn.*, 179 U.S. 223 (1900). The reasoning of the *Marr* decision no longer applies in light of substantive changes made to the Minnesota Constitution and now-Lieutenant Governor Fischbach is precluded from continuing to hold the office of state senator. See *Honeymead Products Co. v. Aetna Cas. & Sur. Co.*, 132 N.W.2d 741, 743 (Minn. 1965) ("The adoption of an amendment raises a presumption that the legislature intended to make some change in the existing law."); *VanWagner v. Mattison*, 533 N.W.2d 75, 80 (Minn. Ct. App. 1995) (changes to the relevant statute compelled a different conclusion than had been reached in a prior Supreme Court decision); *England v. England*, 337 N.W.2d 681, 684-85 (Minn. 1983) (decisions in prior

cases did not compel a different result where the “force of such decisions has been eroded by subsequent legislation”).

a) *The Lieutenant Governor’s Responsibilities Are No Longer Legislative in Nature.*

At the time of the 1898 *Marr* decision, the position of lieutenant governor had no executive branch responsibilities. *Marr*, 75 N.W. at 213. Rather, as ex officio president of the senate, the lieutenant governor’s sole constitutional duties were “to preside over the senate” and “to authenticate by his signature the bills passed by the senate.” *Id.* at 211, 213. Thus, at the time, there was nothing incompatible about a member of the senate exercising the duties of the lieutenant governor.

In 1972, a constitutional amendment took the lieutenant governor out of the senate chamber and the lieutenant governor is no longer the “ex-officio president of the senate.” See Minn. Const., art. V, § 5. Instead, the Constitution defines the lieutenant governor’s role, first and foremost, as being responsible for exercising the governor’s executive powers in the event the governor is unable to do so. Minn. Const., art. V, § 5 (the powers and duties of the governor devolve on the lieutenant governor in the event “the governor is unable to discharge the powers and duties of his office.”). The office of lieutenant governor is plainly an executive office and the Minnesota Constitution no longer supports the conclusion that the lieutenant governor “belongs” to the legislative branch. See *Marr*, 75 N.W. at 214.

This conclusion is consistent with the analysis of an Executive Branch Committee Report in November 1972, which stated that if the constitutional amendment was adopted (and it was), “the lieutenant governor would become *a purely executive officer* without legislative functions.” Minnesota Constitutional Study Commission, Executive Branch Committee Report at 3, <https://www.leg.state.mn.us/docs/2012/mandated/120607.pdf> (emphasis added). The Report

further stated that “[t]he lieutenant governor would then be in a position to be a full-time member of the executive branch of state government” and “the duties of the office could be substantially increased by the legislature or by the governor through executive order.” *Id.* at 5.

Numerous laws now also assign executive branch powers and duties to the lieutenant governor. In 1973, the lieutenant governor was designated as a member of the Executive Council. 1973 Minn. Laws ch. 394, § 1, at 858 (codified as Minn. Stat. § 9.011). The other members of the Executive Council are public officials in the executive branch of government: the Governor, Attorney General, Secretary of State, and State Auditor. Minn. Stat. § 9.011, subd. 1. In 1974, the lieutenant governor was made the chair of the Capital Area Architectural and Planning Board. 1974 Minn. Laws ch. 580, § 4m at 1442 (codified as Minn. Stat. § 15B.03).

The role of the lieutenant governor in the executive branch is further evidenced in a law enacted by the Legislature in 1971 which states that “[t]he governor may delegate to the lieutenant governor such powers, duties, responsibilities and functions as are prescribed by law to be performed by the governor” as long as they are not specifically imposed upon the governor by the Constitution. 1971 Minn. Laws ch. 949, § 1m at 1981 (codified as Minn. Stat. § 4.04, subd. 2). Moreover, although the lieutenant governor still calls the senate to order at the beginning of each session, Minn. Stat. § 3.05, the senate now elects its own presiding officer. Minn. Const. art. IV, § 15.

Finally, in reaching its conclusion, the *Marr* court found persuasive a provision in the Minnesota Constitution which prohibited the lieutenant governor from serving “as a member of the court” during an impeachment trial against the governor. *See* Minn. Const. of 1898, art. XIII, § 4. The *Marr* court reasoned that only senators can act as members of the court in an impeachment

trial and that the provision would be wholly unnecessary unless the lieutenant governor could also serve as a state senator.² This provision was removed from the Minnesota Constitution in 1974.

There is no longer support for the argument that the lieutenant governor is not a member of the executive branch. The constitutionally mandated separation of powers prohibits now-Lieutenant Governor Fischbach from continuing to hold office of state senator.

b) *The Situation Does Not Involve a “Temporary” Vacancy.*

In the *Marr* decision, the Court reasoned that a vacancy is “necessarily permanent or temporary” according to the facts of each case, and that a “temporary” vacancy would require that the lieutenant governor be able to return to his office as a senator. *Marr*, 75 N.W. at 213. The Constitution now distinguishes between a permanent “vacancy” (in which case the lieutenant governor becomes the governor and the last elected presiding officer of the senate becomes the lieutenant governor) and a temporary situation where the governor is unable to discharge the duties of the office (in which case the governor’s powers and duties devolve on the lieutenant governor, but the lieutenant governor *does not* assume the office of governor). Minn. Const. art. V, § 5. Any “vacancy” under Article V, Section 5 is a permanent situation that does not require that the lieutenant governor be able to return to her office as a state senator.

This case involves a permanent vacancy. Governor Dayton appointed Lieutenant Governor Tina Smith to the United States Senate and now-United States Senator Smith resigned her position as lieutenant governor effective at 11:59 p.m., January 2, 2018. Her resignation created a permanent vacancy in the office of lieutenant governor for the remainder of the term, which

² It would have been equally reasonable for the *Marr* court to conclude that this provision was intended to make clear that the lieutenant governor’s ex officio role in the Senate did not entitle the lieutenant governor to sit as a member of the court in an impeachment trial against the governor.

includes the entirety of the 2018 legislative session, and the Constitution mandates that the vacancy is filled by last elected presiding officer of the Senate.

- c) *Letters and Opinions Shortly After the Constitutional Changes Concluded that the Lieutenant Governor Cannot Continue to Hold the Office of State Senator.*

The question of whether the presiding officer of the senate could retain his seat after becoming lieutenant governor was addressed in 1976 when Lieutenant Governor Rudy Perpich filled a vacancy in the office of the governor and then-presiding officer of the senate Alec Olson became lieutenant governor. A 1976 opinion letter by prior Senate Counsel Peter Wattson (“Wattson Letter”) concluded that the Minnesota Constitution *does not* allow an individual to hold the offices of lieutenant governor and state senator simultaneously. *Nauen Aff. Ex. C.* Wattson advised Mr. Olson to resign from the Senate upon taking the oath of office as lieutenant governor, noting that “[i]n view of this change in the character of the lieutenant governor’s duties, the Minnesota Supreme Court, if again faced with the question, would have some justification for ruling that the presiding officer of the Senate can no longer retain his Senate seat upon the occurrence of a vacancy in the office of lieutenant governor.” *Nauen Aff. Ex. C* at 4. The Minnesota Attorney General’s Office reached the same conclusion: “the rationale of [*Marr*] is sufficiently weak to raise serious doubts as to whether it would be adopted by the Court if the issue were presented to it again.” *Nauen Aff. Ex. D* at 4. Ultimately, Mr. Olson resigned from his position as a state senator upon becoming lieutenant governor. *See Minnesota Legislative Reference Library, Minnesota Lieutenant Governors, 1858-present, <https://www.leg.state.mn.us/lrl/mngov/ltgov>.*

Recently, the Attorney General’s Office was asked to offer an opinion regarding whether now-Lieutenant Governor Fischbach could continue to hold the office of state senator. In a December 21, 2017 letter, the Attorney General, like both of the 1976 opinions, observed that

[t]he current responsibilities of the lieutenant governor are therefore materially different than they were in 1898 and involve powers observed that “[t]he current responsibilities of the lieutenant governor are therefore materially different than they were in 1898 and involve powers exercised by the executive branch of government” and concluded that “a strong argument can be made that the 1898 decision of the Minnesota Supreme Court in *Marr* does not control the outcome of this dispute in light of the subsequent changes to the duties of the lieutenant governor.” Nauen Aff. Ex. E at 5-6. Indeed, the only post-1972 opinion to reach a different conclusion is the December 13, 2017 letter by current Senate Counsel Tom Bottern. Nauen Aff. Ex. B. However, unlike each of the others, this opinion fails to address the substantive changes in the role of the lieutenant governor after the 1972 amendment or acknowledge the 1976 opinions by the Senate Counsel and Attorney General and, instead, cites two examples from the 1930s to support its conclusion. *Id.* at 2.

In summary, the reasoning of the *Marr* decision no longer applies. The lieutenant governor is no longer the ex officio presiding officer of the state senate. The duties of the office are no longer legislative in nature. The provision in the Minnesota Constitution prohibiting the lieutenant governor from serving on the court for any impeachment proceedings against the governor has been removed. And the Minnesota Constitution now distinguishes between a permanent vacancy and a temporary situation where the governor is unable to carry out the duties of the office. There is no basis for now-Lieutenant Governor Fischbach’s assertion that she can continue to hold the office of state senator. Plaintiff Destiny Dusosky is likely to prevail on the merits.

2. Plaintiff Will Be Irreparably Harmed If Injunctive Relief Is Not Granted.

The “irreparable harm” factor from *Dahlberg* weighs in favor of granting the injunction. “The party seeking an injunction must establish that legal remedies are inadequate and that an injunction must issue to prevent great and irreparable injury.” *Metro. Sports Facilities Comm’n*,

638 N.W.2d at 222 (citation omitted). “Irreparable harm” is harm that is not fully compensable by money damages. *Morse v. City of Waterville*, 458 N.W.2d 728, 729-730 (Minn. Ct. App. 1990). The Minnesota Constitution prohibits a person belonging to one branch of the government from exercising the powers belonging to another. Minn. Const., art. III, § 1. Plaintiff Destiny Dusosky will be irreparably harmed if now-Lieutenant Governor Fischbach is allowed to continue to hold the office of state senator, and to exercise the powers of such office, even though she is constitutionally prohibited from doing so. There is no adequate legal remedy for unconstitutional conduct which serves only to deprive the residents of Senate District 13 of valid representation in the Minnesota Senate. The potential harm suffered by Lieutenant Governor Fischbach if she is barred from continuing to hold, and exercise the powers of, the office of state senator, if any, would be insignificant in comparison to that suffered by Plaintiff Destiny Dusosky and other Minnesotans.

3. Public Interest Favors Granting the Plaintiff’s Motion.

The “public interest” factor from *Dahlberg* looks to whether “there have been legislative expressions which manifest a public policy on the subject.” *Dahlberg*, 137 N.W.2d at 324. The relevant public policy is manifest in the plain language of the Minnesota Constitution: “[t]he powers of government shall be divided into three distinct departments legislative, executive, and judicial.” There is a significant, indeed paramount, public interest in maintaining the separation of powers. Enjoining now-Lieutenant Governor Fischbach from continuing to hold, and exercise the powers of, the office of state senator is necessary to preserve the system of checks and balances contemplated in the Minnesota Constitution. This is particularly important in light of the chaos and confusion which would result if now-Lieutenant Governor Fischbach were allowed to vote on

matters before the Minnesota Senate which were latter deemed to have been unauthorized. The public interest strongly favors granting Plaintiff's motion.

4. The Nature of the Parties' Relationship Neither Supports Nor Opposes Granting the Plaintiff's Motion.

The relationship of the parties neither favors granting the injunctive relief nor does it suggest that the injunctive relief should be denied. Unlike *Dahlberg*, where the parties' long-standing business relationship supported the issuance of a temporary injunction, *Dahlberg*, 137 N.W.2d at 322, the relationship between now-Lieutenant Governor Fischbach and Plaintiff Destiny Dusosky does not strongly favor either granting or denying the motion for temporary injunctive relief.

5. There Will Be Minimal Administrative Burdens Imposed on the Court in Supervising and Enforcing the Order.

Finally, the court considers whether it will face administrative burdens, in the form of judicial supervision and enforcement, if the injunction is issued. *Dahlberg*, 137 N.W.2d at 322. Enforcing the injunction would impose minimal administrative burdens on the court. There would be no need for continued oversight of the injunctive relief. The lack of administrative burden on the court favors granting the motion for temporary injunctive relief.

B. The Court Should Consolidate and Decide the Merits Under Rule 65.02(c).

Rule 65.02(c) provides that “[b]efore or after the commencement of the hearing on a motion for injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing on the motion.” Consolidation is appropriate here. There is no need for discovery in this matter. The Complaint presents a pure question of law: whether the Minnesota Constitution allows now-Lieutenant Governor Fischbach to continue to hold, and exercise the powers of, the office of state senator while also serving as lieutenant governor. Multiple hearings would be a waste of the Court's resources and would needlessly prolong

resolution of this dispute. The public interest strongly favors a prompt resolution of this dispute and the Court should consolidate the hearing on the motion for temporary injunctive relief and the action on the merits.

IV. CONCLUSION

For the foregoing reasons, the Plaintiff respectfully requests that the Court: (1) enjoin and restrain Lieutenant Governor Fischbach from continuing to hold her former position as senator; and (2) consolidate this motion for a temporary injunction with a hearing on the merits of Plaintiff's declaratory judgment claim under Rule 65.02(c)

Dated: January 19, 2018

Respectfully submitted,

LOCKRIDGE GRINDAL NAUEN P.L.L.P.

s/Charles N. Nauen

Charles N. Nauen (#121216)

David J. Zoll (#0330681)

Arielle S. Wagner (#0398332)

100 Washington Avenue South, Suite 2200

Minneapolis, MN 55401

Tel: (612) 339-6900

Fax: (612) 339-0981

cnnauen@locklaw.com

djzoll@locklaw.com

aswagner@locklaw.com

**ATTORNEYS FOR PLAINTIFF
DESTINY DUSOSKY**