

STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT
CASE TYPE: CIVIL

Destiny Dusosky,

Court File No. _____

Plaintiff,

COMPLAINT

v.

Michelle Fischbach,

Defendant.

Plaintiff Destiny Dusosky (“Plaintiff”) for her complaint states and alleges as follows:

INTRODUCTION

At 11:59 p.m. on January 2, 2018, Lieutenant Governor Tina Smith resigned her position in order to assume the office of United States Senator on January 3, 2018. Smith’s resignation created a vacancy in the office of lieutenant governor. The Minnesota Constitution provides that “[t]he last elected presiding officer of the senate shall become lieutenant governor in case a vacancy occurs in that office.” Minn. Const. Art. V, § 5. Accordingly, upon Smith’s resignation, Michelle Fischbach, the last elected presiding officer of the Minnesota Senate, became lieutenant governor. The Minnesota Constitution further provides that “[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. Therefore, upon assuming the office of lieutenant governor, the Minnesota Constitution prohibits Fischbach from holding the office of state senator and continuing to exercise the powers of such office including voting on matters before the Minnesota Senate.

Notwithstanding the requirements of the Minnesota Constitution, now-Lieutenant Governor Fischbach has stated that she intends to continue to hold the office of state senator for Senate District 13. Plaintiff Destiny Dusosky brings this action seeking an order declaring that now-Lieutenant Governor Fischbach is prohibited from holding the office of state senator and enjoining her from continuing to exercise the powers and duties of such office.

PARTIES AND VENUE

1. Plaintiff Destiny Dusosky resides at 1413 Second Avenue South, Sauk Rapids, MN 56376, is a Minnesota resident, and is an eligible voter residing in Minnesota Senate District 13.

2. Defendant Michelle Fischbach is a Minnesota resident, was elected to the office of Senator for Minnesota Senate District 13, is the last elected presiding officer of the Minnesota Senate, and, on January 3, 2018, assumed the office of lieutenant governor as required by the Minnesota Constitution.

3. This Court has subject matter jurisdiction over Plaintiff's claims pursuant to Minn. Stat. §§ 484.01 & 555.01, et. seq.

4. Venue is proper in Ramsey County, Minnesota, pursuant to Minn. Stat. § 542.09, because the cause of action arose in this County.

FACTS

5. On January 2, 2018, United States Senator Al Franken resigned from the Office of United States Senator for Minnesota thus creating a vacancy in that office.

6. 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.

7. On January 3, 2018, Governor Mark Dayton appointed Lieutenant Governor Tina Smith to fill the vacancy created by Senator Franken's resignation. Now-United States Senator Tina Smith resigned from the office of lieutenant governor effective at 11:59 p.m. on January 2, 2018 thus creating a vacancy in that office.

8. 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."

9. 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.

10. Pursuant to Minnesota Constitution Article V, Section 5, state Senator Fischbach became lieutenant governor to fill the vacancy in the office created by now-United States Senator Tina Smith's resignation.

11. Now-Lieutenant Governor Fischbach assumed the office of lieutenant governor upon the resignation of now-United States Senator Tina Smith.

12. Article IV, Section 5 of the Minnesota Constitution states that "No senator or representative shall hold any other office under authority of the United States or the state of Minnesota, except that of postmaster or of notary public."

13. Accordingly, now-Lieutenant Governor Michelle Fischbach is prohibited from holding the office of state senator for Senate District 13.

14. Notwithstanding the requirements of the Minnesota Constitution, now-Lieutenant Governor Fischbach has stated her intention to retain the office of state senator for Senate District 13. *See Exhibit A.*

15. Now-Lieutenant Governor Fischbach relies primarily upon a recent letter opinion by the Senate Counsel Tom Bottern (“Bottern Letter”), which relies on an 1898 decision of the Minnesota Supreme Court – *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) – to support her claim that she is entitled to retain her senate seat. *See* Exhibit B.

16. The Bottern Letter fails to address substantive changes to the Minnesota Constitution since the *Marr* decision and ignores a 1976 letter opinion by prior Senate Counsel Peter Watson (“Watson Letter”) and a 1976 opinion by the Minnesota Attorney General (“1976 AG Opinion”) both of which concluded that the Minnesota Constitution *does not* allow an individual to hold the offices of lieutenant governor and state senator simultaneously. *See* Exhibits C & D.

17. The Minnesota Attorney General issued an opinion on December 21, 2017 (“2017 AG Opinion”) which, like the Watson Letter and 1976 AG Opinion, addresses the changes to the Minnesota Constitution since the *Marr* decision and similarly concludes that now-Lieutenant Governor Fischbach may not continue to hold the office of state senator for Senate District 13. *See* Exhibit E.

18. Plaintiff Destiny Dusosky will be deprived of representation in the Minnesota Senate due to now-Lieutenant Governor Fischbach’s attempt to continue to hold the office of state senator for Senate District 13 notwithstanding that she is prohibited from doing so by the Minnesota Constitution, the incompatibility doctrine, and separation of powers.

**THE MINNESOTA CONSTITUTION PROHIBITS THE LIEUTENANT GOVERNOR
FROM ALSO HOLDING THE OFFICES OF STATE SENATOR**

19. The *Marr* decision relied upon by Fischbach involved the question of whether an elected senator could continue to act as a senator after becoming the lieutenant governor, where

the former lieutenant governor became governor due to a vacancy in that office. The Minnesota Supreme Court, relying on the language of the Minnesota Constitution at the time, held that the senator could hold both offices simultaneously. *Id.* at 209. The reasoning behind the decision in *Marr* is no longer supported by the text of the Minnesota Constitution.

The Lieutenant Governor’s Responsibilities are no longer Legislative in Nature.

20. In the 1898 *Marr* decision, the Court stated that the language in the Minnesota Constitution separates the three branches of government, except where expressly allowed:

The powers of the government shall be divided into three distinct departments, the legislative, executive and judicial; and no person or persons belonging to or constituting 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.***¹ Minn. Const. of 1898, art. III, § 1 (emphasis added).

21. In 1898, the position of lieutenant governor had no executive branch responsibilities. *Id.* 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.

22. In 1972, a constitutional amendment took the lieutenant governor out of the senate chamber. Under the current language, the lieutenant governor is no longer the “ex-officio president of the senate.” *See* Minn. Const., art. V, § 5. Instead, the Constitution provides that 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.” Minn. Const., art. V, § 5. The Constitution no longer supports the conclusion that the lieutenant governor “belongs” to the legislative department. *See Marr* at 214. Rather, the lieutenant governor’s responsibilities—to exercise the powers and

duties of the office of the governor where the governor is unable to do so—now lie within the executive branch.

23. An Executive Branch Committee Report in November, 1972 stated that if the constitutional amendment was adopted (which 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>. 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.

24. Numerous laws 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).

25. 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).

26. 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. The lieutenant governor no longer serves as the ex officio presiding officer of the Senate.

27. The *Marr* court also 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. This provision was removed from the Minnesota Constitution in 1974.

28. The Constitution’s prohibition on holding both the offices of lieutenant governor and state senator led to the 1976 resignation of the then-presiding officer of the Minnesota Senate. In 1976, Lieutenant Governor Rudy Perpich filled a vacancy in the office of the governor, and in turn, the then-presiding officer of the senate, Alec Olson, became lieutenant governor. In a memorandum dated December 17, 1976, Senate Counsel Peter Watson advised Mr. Olson to resign from the Senate upon taking the oath of office as lieutenant governor, noting that 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.” *See* Exhibit C. The Minnesota Attorney General reached a similar conclusion. *See* Exhibit D. Mr. Olson then resigned from his position as a state senator upon becoming lieutenant governor. Minnesota Legislative Reference Library, Minnesota Lieutenant Governors, 1858-present, <https://www.leg.state.mn.us/lrl/mngov/lrgov>.

The Minnesota Constitution Does Not Contemplate a “Temporary” Vacancy

29. In the 1898 *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. *Id.* at 213.

30. Here, the vacancy in the office of lieutenant governor is not “temporary.” 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 includes the entirety of the 2018 legislative session.

31. Additionally, the Constitution now distinguishes between a “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.

32. 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. The Bottern Letter upon which now-Lieutenant Governor Fischbach relies fails to

address any of these changes and ignores the Watson Letter and the 1976 AG Opinion which led to Alec Olson resigning from the office of state senator after assuming the office of lieutenant governor.

COUNT I – DECLARATORY RELIEF

33. Plaintiff re-alleges and incorporates by reference all preceding paragraphs of this Complaint as if fully set forth herein.

34. Plaintiff is adversely affected by now-Lieutenant Governor Fischbach's unconstitutional attempt to hold the offices of state senator and lieutenant governor simultaneously and is entitled under Minn. Stat. § 555.02 to request the Court to enter a declaration that now-Lieutenant Governor Fischbach is prohibited from continuing to hold the office of state senator for Senate District 13 and continuing to exercise the powers of such office.

35. The parties disagree whether now-Lieutenant Governor Fischbach can hold both offices simultaneously. This Court should resolve the controversy and afford the parties relief from the uncertainty regarding continued valid representation of Senate District 13 in the Minnesota Senate by declaring that now-Lieutenant Governor Fischbach is prohibited from continuing to hold the office of state senator and continuing to exercise the powers of such office.

COUNT II – INJUNCTIVE RELIEF

36. Plaintiff re-alleges and incorporates by reference all preceding paragraphs of this Complaint as if fully set forth herein.

37. Now-Lieutenant Governor Fischbach is prohibited by the Minnesota Constitution from continuing to hold the office of state senator for Senate District 13 and continuing to exercise the powers of such office. Plaintiff requests that the Court enter an order enjoining now-Lieutenant Governor Fischbach from doing the same.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff requests the following relief:

1. Declaratory judgment that now-Lieutenant Governor Fischbach's intention to hold both the position of senator and lieutenant governor is unconstitutional;
2. An order enjoining now-Lieutenant Governor Fischbach from continuing to hold the office of state senator for Senate District 13 and continuing to exercise the powers of such office, including voting on matters before the Minnesota Senate; and
3. Such other relief as the Court deems just and equitable.

Dated: January 12, 2018

Respectfully submitted,

LOCKRIDGE GRINDAL NAUEN P.L.L.P.

s/Charles N. Nauen

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