

NO. 412,248
NO. 412,249
NO. 412,249-401

ESTATE OF	§	
ELMER H. BRUNSTING,	§	
DECEASED	§	
_____	§	
ESTATE OF	§	IN PROBATE COURT
NELVA E. BRUNSTING,	§	NUMBER FOUR (4) OF
DECEASED	§	HARRIS COUNTY, TEXAS
_____	§	
CARL HENRY BRUNSTING, et al	§	
v.	§	
ANITA KAY BRUNSTING, et al	§	

**AMY BRUNSTING’S MOTION FOR CLARIFICATION
AND/OR MOTION TO DISMISS**

TO THE HONORABLE JUDGES HORWITZ AND COMSTOCK:

AMY BRUNSTING (“Amy”) files this Motion for Clarification and/or Motion to Dismiss (the “Motion”). For reasons discussed herein, Amy seeks clarification and/or rulings on the following issues:

- (a) The consolidation of the 402-Proceeding into the 401-Proceeding;
- (b) The transfer of the District Court Proceeding to Probate Court;
- (c) Amy’s replacement of Carl as independent executor of the Estates of Elmer and Nelva Brunsting;
- (d) The assignment of a trial date and entry of a Docket Control Order; and
- (e) The status of and/or dismissal of Curtis’ claims.

This is a time sensitive matter that must be resolved prior to March 8, 2019.

PARTIAL PROCEDURAL HISTORY

Elmer H. Brunsting (“Elmer”) died on **April 1, 2009**. He was 87 years old.

Nelva E. Brunsting (“Nelva”) died on **November 11, 2011**. She was 85 years old.

Three (3) months later, on or around **February 27, 2012**, Candace Louise Curtis (“Curtis”) filed her Plaintiff’s Original Petition, Complaint and Application for Ex Parte Temporary Order, Asset Freeze, Temporary and Permanent Injunction in the United States District Court for the Southern District of Texas (Case No. 4:12-cv-00592; *Candace Louise Curtis vs. Anita Kay Brunsting, and Amy Ruth Brunsting, and Does 1-100*)(the “2012 Federal Proceeding”). **As originally stated, the subject matter of Curtis’ claims involved the Brunsting Family Living Trust and asserted causes of action including:**

- (1) Breach of Fiduciary Obligation;**
- (2) Extrinsic Fraud;**
- (3) Constructive Fraud; and**
- (4) Intentional Infliction of Emotional Distress.**

On or around **April 3, 2012**, the *Last Will of Elmer H. Brunsting* was filed with Probate Court Number Four, and on or around **August 15, 2012**, Carl Henry Brunsting (“Carl”) filed his Application for Probate of Will and for Issuance of Letters Testamentary (Cause No. 412,248; *Estate of Elmer H. Brunsting, Deceased*).

On or around **April 3, 2012**, the *Last Will of Nelva E. Brunsting* was filed with Probate Court Number Four, and on or around **August 15, 2012**, Carl filed his Application for Probate of Will and for Issuance of Letters Testamentary (Cause No. 412,249; *Estate of Nelva E. Brunsting, Deceased*).

On or around **January 29, 2013**, Carl as independent executor of the Estates of Nelva E. Brunsting and of Elmer H. Brunsting filed Plaintiff’s Original Petition and Request for Disclosure *Amy Brunsting – Motion for Clarification*

in the 164th Judicial District Court of Harris County, Texas (Cause No. 2013-05455; *Carl Henry Brunsting, Independent Executor of the Estates of Elmer H. Brunsting and Nelva E. Brunsting vs. Candace L. Kunz-Freed and Vacek & Freed, PLLC f/k/a, PLLC* (the “District Court Proceeding”).

Carl’s claims in the District Court Proceeding have evolved over time. On information and belief, Plaintiff’s Third Amended Petition is Carl’s live pleading. The subject matter of the District Court Proceeding is the Brunsting Family Living Trust and other documents prepared at a time “*when it is believed Nelva was either misled about what she was signing, unduly influenced to sign it, or did not have the capacity to sign it.*”¹ Via Plaintiff’s Third Amended Petition, Carl has asserted the following claims/causes of action:

- (1) Negligence;
- (2) Negligent Misrepresentation;
- (3) Breach of Fiduciary Duty;
- (4) Aiding & Abetting Current Trustees’ Breaches of Fiduciary Duty;
- (5) Fraud;
- (6) Conspiracy (with Current Trustees): and
- (7) Deceptive Trade Practices.

On or around **April 10, 2013**, Carl, individually **and** as independent executor of the Estates of Nelva E. Brunsting and of Elmer H. Brunsting filed his Petition for Declaratory Judgment, for an Accounting, for Damages, for Imposition of a Constructive Trust, and for Injunctive Relief, Together with Request for Disclosures in Probate Court Number Four (Cause No. 412,249-401)(the “401-Proceeding”). Amy, Anita Brunsting (“Anita”), Carole Brunsting (“Carole”) **and Curtis were named as defendants in various capacities.** **As originally stated, the subject matter of**

¹See Exhibit A-1 at Page 2; Paragraph 5.

Carl's claims involved the Brunsting Family Living Trust (created on October 10, 1996 and restated on January 12, 2005) as well as various successor and/or personal asset trusts and other related documents (collectively, the "Brunsting Trust Documents").



Carl has alleged that one or more of the Brunsting Trust Documents were executed as the result of undue influence, was done when Nelva lacked capacity and/or was created by deception so that Nelva did not understand or consent to the document.² Since originally initiating the 401- Proceeding, Carl has supplemented his pleadings on various occasions. Taken as a whole, Carl's original and supplemental claims/causes of action/requests for relief in the 401- Proceeding are identified by Carl as:

- (1) Construction of Trust and Suit for Declaratory Judgment;
- (2) Demand for Trust Accounting;
- (3) Breach of Fiduciary Duties;
- (4) Conversion;
- (5) Negligence;
- (6) Tortious Interference with Inheritance;
- (7) Constructive Trust;
- (8) Civil Conspiracy;
- (9) Fraudulent Concealment;
- (10) Liability of Beneficiaries;
- (11) Removal of Trustees;
- (12) Receivership Over Trust;
- (13) Self-Dealing;

²See generally, Exhibit A-1.

- (14) Criminal Wiretap Claim;
- (15) Civil Wiretap Act;
- (16) Invasion of Privacy and Intrusion on Seclusion; and
- (17) Request for Injunctive Relief.

On or about **May 9, 2014**, Curtis filed a Motion to Remand in the 2012 Federal Proceeding. Via the Motion to Remand, Curtis requested that Judge Hoyt “(a) *remand this cause of action to Harris County Probate Court Number Four to be consolidated into Cause Number 412,249...*” because “*diversity jurisdiction will be destroyed via the First Amended Petition and because similar issues of fact and law are pending before Harris County Probate Court Number Four.*”

On or about **May 15, 2014**, Judge Hoyt signed an Order Granting Plaintiff's Motion to Remand.

On or about **May 28, 2014**, Curtis filed her Motion to Enter Transfer Order and on or about **June 3, 2014**, this Court signed an Order of Transfer accepting Judge Hoyt's Order. In doing so, this Court ordered that the pleadings and orders filed and entered in the 2012 Federal Proceeding are “*transferred to this Court to be held under Cause Number 412,249-401.*”

On or about **January 27, 2015**, seemingly consistent with the Order of Transfer, Curtis filed Plaintiff's Second Amended Petition, which appears to be her live pleading. Via Plaintiff's Second Amended Petition, the subject matter of which is the Brunsting Trust Documents, Curtis has asserted the following claims/causes of action/requests for relief against Amy, Anita and Carole:

- (1) Breach of Fiduciary Duty;
- (2) Fraud;
- (3) Constructive Fraud;
- (4) Money Had and Received;

- (5) Conversion;
- (6) Tortious Interference with Inheritance Rights;
- (7) Declaratory Judgment Action;
- (8) Unjust Enrichment;
- (9) Conspiracy; and
- (10) Demand for Accounting.

On or around **February 9, 2015**, Probate Court Number Four created a folder addressing Curtis' claims, **designating same under Cause No. 412249-402** (the "402-Proceeding").

On or about **March 16, 2015**, the Court signed an Agreed Order to Consolidate Cases, the scope of which involved the 401-Proceeding and the 402-Proceeding, consolidating the latter into the former.

On or about **July 5, 2016**, Curtis and her self-described "domestic partner", Rik Munson ("Munson"), filed their Verified Complaint for Damages in the United States District Court for the Southern District of Texas. (Case No. 4:16-cv-01969) (the "2016 Federal Proceeding").

Defendants identified by Curtis and Munson in the 2016 Federal Proceeding included:

1. Amy and her current and former attorneys;
2. Anita and her current and former attorneys;
3. Carl's attorney (but not Carl);
4. Carole's former attorney (but not Carole);
5. Curtis' former attorney, Jason Ostrom;
6. Candace L. Kunz-Freed and Albert Vacek, Jr.;
7. The Court appointed Temporary Administrator Pending Contest, Greg Lester;
8. The Temporary Administrator's attorney;
9. The Honorable Christine Riddle Butts;



10. The Honorable Clarinda Comstock; and

11. A temporary court reporter for Probate Court Number Four.

Curtis and Munson accused these defendants of being part of a “*secret society of persons*” known as the “*Harris County Tomb Raiders*” and asserted a variety of claims against them supposedly based upon the Racketeer Influenced Corrupt Organization Act and other federal statutes.

On **May 16, 2017**, Curtis and Munson’s claims were dismissed by the District Court via an order cautioning them against additional meritless filings. They nevertheless appealed the dismissal, and on **June 6, 2018**, the United States Court of Appeals for the Fifth Circuit affirmed the dismissal, noting that Curtis and Munson’s claims were “*fantastical and often nonsensical*,” were “*frivolous and certainly [did] not rise to the level of plausibility that the law requires.*”³

ARGUMENT AND REQUESTED RELIEF

1. Request for Clarification.

Based on commentary and communications between and among some or all of the parties, as well as recent filings by Curtis (in Probate Court) and by Freed (in the District Court Proceeding), it is necessary that the Court clarify and address the following issues:

- (a) The consolidation of the 402-Proceeding into the 401-Proceeding;
- (b) The transfer/consolidation of the District Court Proceeding to Probate Court;
- (c) Amy’s replacement of Carl as independent executor of the Estates of Elmer and Nelva Brunsting; and
- (d) The assignment of a trial date and entry of a Docket Control Order.

2. Why are Clarification and/or rulings necessary?

Following the Fifth Circuit’s final resolution of the 2016 Federal Proceeding on June 6,

³See Exhibit A-2.

2018, the focus shifted back to the 401-Proceeding, leading to the recent hearing of January 24, 2019 and the Court's subsequently issued Order Granting Motion to Compel Deposition of Non-Party Witness Candace Kunz-Freed.

(a) Actions by Freed in the District Court require clarification and/or rulings by the Court.

Since the issuance of that Order, Freed has filed a Motion to Dismiss for Want of Prosecution in the District Court Proceeding. Freed bases her arguments on the fact that a replacement executor for Carl has not been named. However, she somewhat incorrectly states "*no one has taken any action to prosecute the malpractice claims against V&F. There is no explanation for the long periods of inactivity.*"⁴ As the procedural history described above (and below) confirms, action has been taken and there are multiple explanations for the perceived delay.

Freed has set her motion for oral hearing on March 8, 2019. Freed's initial round of proposed deposition dates occur after the hearing on her Motion to Dismiss.

(b) Inaction and/or misinformation by or about Curtis require clarification and/or rulings by the Court.

Since June 6, 2018, Curtis has continued to file pleadings in the 401-Proceeding (and, for some reason, the 402-Proceeding), but Curtis has not appeared in Court during any of the hearings that have been held since June 2018, nor otherwise meaningfully participated in the prosecution or defense of claims by or against her.

Based on undersigned counsel's interpretation of what Carole seems to be expressing to the Court and/or in e-mail communications with counsel, Curtis either does not believe that she has any claims pending before the Court, no longer wishes to pursue those claims, and/or that the 402-Proceeding was never consolidated with the 401-Proceeding.⁵

⁴See Exhibit A-3 at Page 1; Paragraph 3.

⁵See Exhibit A-4.

3. The consolidation of the 402-Proceeding into the 401-Proceeding.

While it is Amy's position that the Court's Order of March 16, 2015 confirms the consolidation, out of an abundance of caution and to avoid any further or future confusion and/or misfilings by Curtis, Amy requests that the Court clarify that the 402-Proceeding has been consolidated into the 401-Proceeding, and that the 402-Proceeding is now closed.

4. Amy's replacement of Carl as independent executor of the Estates of Elmer and Nelva Brunsting.

In or around February 2015, Carl initiated efforts to resign as the executor of the Estates. In March 2015, Amy filed her applications to be named Carl's replacement consistent with Elmer and Nelva's Wills. Carl and Curtis opposed Amy's appointment, with Curtis filing applications of her own. The competing applications and related objections were considered by the Court in or around July 2015. Neither Amy nor Curtis were appointed as Carl's replacement.

On **July 23, 2015**, the Court signed an Order Appointing Temporary Administrator Pending Contest Pursuant to Texas Estates Code 452.051, naming Greg Lester to serve in that role. Pursuant to and consistent with that appointment, Mr. Lester was afforded 180 days to pursue his duties.

On or about **January 14, 2016**, Mr. Lester issued and filed the Report of Temporary Administrator Pending Contest (the "Lester Report"), and pursuant to the Court's Order, his appointment expired on **January 20, 2016**. The Court has not since considered the pending and competing applications, but as reflected in the procedural history above, between July 2016 and June 2018, the parties (including Freed and this Court), were forced to deal with Curtis' fantastical, nonsensical and frivolous 2016 Federal Proceeding.

Because of the issues raised by Freed in her Motion to Dismiss for Want of Prosecution, as well as the specter of her asserting privileges in response to questions likely to be asked during

her deposition, it is necessary that Amy be named as Carl's replacement.

5. The transfer of the District Court Proceeding to Probate Court.

Both Carl and Candy have independently sought to transfer the District Court Proceeding to Probate Court. Freed opposes the transfer. One or both of the transfer motions have been presented to the Court. However, the Court has never formally ruled (or at least does not appear to have signed an order granting or denying them). **Based on undersigned counsel's best recollection, there have been multiple discussions before the Court about the transfer, one of which, on information and belief, occurred in March 2016.**

One reason, among others, that the Court *may* not have ruled at that time is because the parties, including Freed, had agreed to mediate. In fact, a mediation with Judge Davidson was scheduled for July 12, 2016. However, ***eight (8) days before mediation***, Curtis filed the 2016 Federal Proceeding, which as stated above, remained active in some form or fashion until June 2018.

Undersigned counsel's belief is that but for the agreement to mediate, the Court would have transferred the District Court Proceeding into Probate Court, either as part of the 401-Proceeding, or as its own ancillary proceeding having a -403 designation. In fact, this was exactly what was recommended in the Lester Report so as to avoid different results for the same or similar issues. Considering that the legality, enforceability and propriety of the Brunsting Trust Documents are at the heart of both the District Court Proceeding and the 401-Proceeding, it must be noted that Freed and Carl have filed what amount to competing summary judgment motions regarding these documents...**in different courts.**

Though first in time, in virtually all respects, the District Court Proceeding is subordinate to the 401-Proceeding. Issues regarding Freed's alleged malpractice, conspiracy, etc. cannot be properly adjudicated until the claims pending in the 401-Proceeding have been resolved. If this

Court, like Mr. Lester before it, determines that “*all of the legal actions taken by Nelva were within her authority under the broad provisions of [the Brunsting Trust Documents]*” then the claims pending in the 401-Proceeding fail, as then, presumably, would the claims against Freed.

In light of Freed’s efforts to obtain a dismissal of the District Court Proceeding, due to allegations of inaction, its prematurity, and concerns about multiple, contradictory rulings, it is necessary and proper for the Court to issue a formal ruling, transferring the District Court Proceeding into Probate Court.

6. The assignment of a trial date and entry of a docket control order.

This case has been, and remains, without a trial date or a docket control order. This was addressed with the Court in September 2018. The Court asked the parties to cooperate in reaching an agreement, but cooperation from Curtis and Carole was not forthcoming. Ultimately, Amy, Anita and Carl submitted a proposed docket control order for approval and entry.⁶ Neither the submitted, proposed docket control order (which is now partially expired), nor any other was entered.

Since September 2018, there were additional communications regarding the need for discovery and a docket control order. Those communications did not prove fruitful, resulting in Anita’s issuance of the Freed deposition notice, and the filing of related pleadings by Freed, Anita and Amy. These deposition-related filings culminated in the hearing of January 24, 2019, and the Court’s subsequent Order allowing the Freed deposition to proceed. However, the case remains burdened by the absence of a trial date and a docket control order.

7. Request for Dismissal

As reflected in the procedural history presented above (and the Court’s file), Curtis brought

⁶See Exhibit A-5.

her claims into Probate Court voluntarily, acting through her then attorney-of-record. Her request for remand was granted by Judge Hoyt. At her request, her claims were accepted into the 401- Proceeding by this Court. Thereafter, the 402- Proceeding was opened, and then consolidated into the 401- Proceeding. Despite this, what we hear from Carole (on Curtis' behalf) is that Curtis "*has nothing active in Probate at this time.*"⁷

If Carole is accurately describing Curtis' position regarding her claims, and it is true that Curtis no longer wishes to pursue those claims, then she should be instructed to formally dismiss them via a Notice of Non-Suit, Motion to Dismiss or similar dispositive filing.

Alternatively, as Curtis despite her role in bring them into Probate Court mystifyingly believes that this Court does not have jurisdiction over her claims; has failed to appear for hearings; does not meaningfully communicate with the parties/counsel on matters pertaining to the development of this lawsuit; and has generally failed to prosecute her claims since June 2018, Amy asks this Court, whether based on her request or on its own accord, to enter an order dismissing Curtis' claims for want of prosecution.

8. Evidence in Support of this Motion.

In support of this Motion, Amy asks that the Court take judicial notice of its file. This judicial notice should include (1) communications between the Court and the parties; (2) docket sheets and file notes; and (3) pleadings, notices, and orders (both granted, denied, and unsigned), whether associated with the 401- Proceeding, the 402- Proceeding, Cause No. 412,248, and/or Cause No. 412,249.

As to other referenced materials about which the Court may not be able to take judicial notice, Amy asks the Court to refer to the Affidavit of Neal E. Spielman (and its exhibits) attached

⁷See Exhibit A-4.

hereto as Exhibit A and incorporated by reference as if fully restated herein.

PRAYER

For these reasons addressed above, Amy Brunsting requests that the Court set this Motion for hearing, and enter all necessary and proper relief related to the issues addressed herein. Additionally, Amy Brunsting prays for such other and further relief (general and special, legal and equitable) to which she may be entitled, collectively, individually or in any of her representative capacities.

Respectfully submitted,

GRIFFIN & MATTHEWS

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been sent on this 29th day of January 2019, to all counsel of record/pro se parties via E-file and/or direct e-mail.

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