

Case No. 20-20566

**In the United States Court of Appeals
For the Fifth Circuit**

CANDACE LOUISE CURTIS,

Plaintiff - Appellant

v.

ANITA KAY BRUNSTING; AMY RUTH BRUNSTING,

Defendants - Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BRIEF OF PLAINTIFF - APPELLANT

Candace Louise Curtis
218 Landana St.
American Canyon,
California 94503
(925) 759-9020
occurtis@sbcglobal.net
Appellant pro se

CERTIFICATE OF INTERESTED PERSONS

NO. 20-20566 Candace Louise Curtis v. Anita Brunsting, et al.

The undersigned Plaintiff-Appellant pro se, certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made so that the judges of this court may evaluate possible disqualification or recusal.

- (1) Candace Louise Curtis, Trust Beneficiary, Plaintiff-Appellant, de jure co-trustee for the Elmer Brunsting Irrevocable Decedent's Trust
- (2) Anita Kay Brunsting, Beneficiary, de facto trustee, Defendant/Appellee
- (3) Amy Ruth Brunsting, Beneficiary, de facto trustee, Defendant/Appellee
- (4) Carl Henry Brunsting, Beneficiary, former Independent Executor, de jure Co-Trustee for the Elmer Brunsting Irrevocable Decedent's Trust
- (5) Carole Ann Brunsting, Beneficiary
- (6) Bernard Lisle Mathews, III original Counsel for Defendants Anita Kay Brunsting and Amy Ruth Brunsting in the United States District Court for the Southern District of Texas
- (7) George W. Vie III, Counsel for Defendants Anita Kay Brunsting and Amy Ruth Brunsting in the Circuit Court. ROA.12-20164. (2013-2014) and subsequently in the United States District Court for the Southern District of Texas.

- (8) Jason Bradley Ostrom, Counsel for Plaintiff / Appellant Candace Curtis in the Southern District of Texas.
- (9) Stephen A. Mendel, THE MENDEL LAW FIRM, Counsel for Anita Brunsting in the probate court and in the Southern District of Texas.
- (10) Neal E. Spielman, THE GRIFFIN & MATTHEWS LAW FIRM Counsel for Amy Brunsting in the probate court.
- (11) Candice Lee Schwager, Counsel for Defendant Candace Curtis in the probate court and counsel for Plaintiff Candace in the Southern District of Texas.
- (12) Parties and counsel in Curtis et al. vs. Kunz-Freed et al., Southern District of Texas Cause No. 4:16-cv-1969 ROA.17-20360.1-4. List of interested parties and counsel Fed.R. APP. P. 26.1 / 5TH Cir. R. 28.2.1.

/s/ Candace Louise Curtis
Candace Louise Curtis
218 Landana Street
American Canyon, CA 94503
(925) 759-9020
Plaintiff-Appellant pro se

STATEMENT REGARDING ORAL ARGUMENT

Appellant requests oral argument pursuant to Federal Rule of Appellate Procedure 34(a)(1) and Fifth Circuit Rule 28.2.3, only to the extent it would aid the Court in understanding the factual background of this case and/or clarify the legal issues presented.

Appellant suggests that the issues of law are clear and that fact questions can be determined on the record, pursuant to Fed. R. App. P. 34(a)(3), and that oral argument would not benefit the panel.

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STATEMENT OF JURISDICTION

This Appeal is from an Order¹ dismissing a Motion for Vacature² of an order remanding the federal tort action to a state probate court³ (Federal Rule of Civil Procedure 60, Fed. R. Civ. P. 60). Hearing was had on the motion September 10, 2020⁴ and the order denying the relief requested⁵ was entered September 23, 2020.

Notice of Appeal⁶ was timely filed October 3, 2020 pursuant to Fed. R. App. P. 4(a)(1), per 28 U.S.C. § 2107. See Bowles v. Russell, 551 U.S. 205 (2007). This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 with consideration to 28 U.S.C. § 1292(a)(1).

In Cohens v. Virginia 19 U.S. 264, 6 Wheat. 264, 404, 5 L. Ed. 257 (1821).

Chief Justice Marshall famously cautioned:

"It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction, if it should . . . We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given".

¹ ROA.20-20566.2902-2903.

² ROA.20-20566.2672-2683.

³ ROA.20-20566.1000-1001. **TAB-7**

⁴ ROA.20-20566.3023-3059.

⁵ ROA.20-20566.2902-2903

⁶ ROA.20-20566.2904.

PROBATE EXCEPTION

This Court has already unanimously held subject matter jurisdiction proper in the Southern District of Texas and Plaintiff / Appellant's cause to be outside the probate exception to federal diversity jurisdiction,⁷ published *Curtis v Brunsting* 704 F.3d 406 (Jan 9, 2013).

ROOKER-FELDMAN

In *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280, 291-294 (2005) the United States Supreme Court revisited the Rooker-Feldman doctrine after only applying the doctrine in two previous cases.

Held: the Rooker-Feldman doctrine is confined to cases of the kind from which it acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the federal district court proceedings commenced and inviting district court review and rejection of those judgments. Rooker-Feldman does not otherwise override or supplant preclusion doctrine or augment the circumscribed doctrines allowing federal courts to stay or dismiss proceedings in deference to state-court actions.

It is clear from the facts that this case, having been filed in a United States District Court eleven months prior to any “related” state court suits⁸ and having been held outside the probate exception by this Court before any state court actions were filed, clearly falls outside the scope of Rooker-Feldman as well.

⁷ ROA.12-20164.

⁸ ROA.20-20566.610; **TAB-12**

THE TENSION BETWEEN COMITY AND FEDERALISM

Whether to Protect Federal Jurisdiction and Effectuate Federal Court Judgments or Engage an Abstention:

“Where the federal case is filed substantially prior to the state case, and significant proceedings have taken place in the federal case, we perceive little, if any, threat to our traditions of comity and federalism. See Moses H. Cone Hosp., 460 U.S. at 21-22, 103 S.Ct. at 940 (fact that substantial proceedings have occurred is a relevant factor to consider in deciding whether to abstain). In fact, by filing a state suit after a federal action has been filed, the state plaintiff can be viewed as attempting to use the state courts to interfere with the jurisdiction of the federal courts. We agree with Royal that if we were to hold that Jackson applied in this scenario, litigants could use Jackson as a sword, rather than a shield, defeating federal jurisdiction merely by filing a state court action. Neither Jackson nor the concerns underlying it mandate such a result.” Royal Ins. Co. of America v. Quinn-L Cap. Corp., 3 F.3d 877, 886 (5th Cir. 1993).⁹

STATEMENT OF THE ISSUES

Appellant is asking this Court to review the denial of a Rule 60 Motion for Vacature of a bundle of unopposed motions and unopposed orders,¹⁰ submitted by Appellant’s prior counsel, that were processed into the record without further inquiry.

The primary issues are whether diversity was polluted by the addition of an “involuntary plaintiff”, in which the court will be called upon to review the

⁹ Texas Employers' Ins. Ass'n v. Jackson, 862 F.2d 491, 506 (5th Cir. 1988) (en banc)

¹⁰ ROA.20-20566.976-1001.

standards and procedures applied to define the scope of the "proper case" qualification exception under Federal Rule of Civil Procedure 19(a) and;

Whether a fraud providing for relief under Rule 60(b)(3) was committed upon the district court by officers of the court and whether the methods used and the results obtained present the kind of “extraordinary circumstances” that come within the purview of Rule 60(b)(6), rise to the level of fraud required for relief under Rule 60(d)(3), and/or, whether equity requires relief under any other applicable rule or doctrine and whether the trial court erred or abused its discretion in denying the relief requested for the reasons given¹¹ and whether those are the proper standards for review given the peculiar novelties and nuances presented by this case.

STATEMENT OF FACTS

USDC SDTX 4:12-cv-592 – Lawsuit Filed

Subsequent to their Mother’s death November 11, 2011, Appellant sent demand letters to de facto co-trustees, Anita Brunsting and Amy Brunsting, formally requesting an accounting and copies of trust documents and records.¹² On February 27, 2012, after ninety days had passed without the required response,

¹¹ ROA.20-20566.2902-2903.

¹² ROA.20-20566.79-80.

Appellant filed suit in the Southern District of Texas.¹³ Candace Louise Curtis vs Anita Brunsting, Amy Brunsting and Does 1-100 No. 4:12-cv-592.

On March 8, 2012 the District Court dismissed sua sponte under the probate exception to federal diversity jurisdiction¹⁴ and Plaintiff promptly filed notice of appeal.¹⁵

United States Court of Appeal for the Fifth Circuit ROA.12-20164

“Plaintiff, the beneficiary of a trust, sued defendant co-trustees of the trust, for breach of fiduciary duty, extrinsic fraud, constructive fraud, and intentional infliction of emotional distress. The United States District Court for the Southern District of Texas dismissed the case for lack of subject matter jurisdiction, concluding that the case fell within the probate exception to federal diversity jurisdiction. The beneficiary appealed.”

“The circuit court found that the case was outside the scope of the probate exception under the first step of the inquiry because the trust was not property within the custody of the probate court. Because the assets in a living or inter vivos trust were not property of the estate at the time of decedent's death, having been transferred to the trust years before, the trust was not in the custody of the probate court and as such the probate exception was inapplicable to disputes concerning administration of the trust...”

“...The record also indicated that there would be no probate of the trust's assets upon the death of the surviving spouse. Finding no evidence that the trust was subject to the ongoing probate proceedings, the case fell outside the scope of the probate exception. The district court below erred in dismissing the case for lack of subject-matter jurisdiction.” Curtis v Brunsting 704 F.3d 406, 412 (Jan 9, 2013)

¹³ ROA.20-20566.17-44.

¹⁴ ROA.20-20566.512-513.

¹⁵ ROA.20-20566.514.

Harris County Texas Judicial District Court 164

On January 29, 2013, while the federal tort suit was in transit back to the Southern District of Texas, Appellant's brother, Carl Brunsting, filed legal malpractice claims against his parents' estate planning attorneys in Harris County Texas Judicial District Court 164 No. 2013-05455, as "Executor for the estates of Elmer and Nelva Brunsting".¹⁶ No findings of fact or conclusions of law have ever been entered in that matter.

USDC SDTX 4:12-cv-592 - Preliminary Injunction

Having established the law of the case in this Court, Appellant returned to the Southern District of Texas and reapplied for a preliminary injunction.¹⁷ Hearing was had April 9, 2013¹⁸ and injunction issued.¹⁹

Harris County Texas Probate Court No. 4

On April 10, 2013 Defendants' Counsel, George Vie III, filed notice of a lawsuit brought in the state probate court²⁰ by Bobbie G. Bayless, attorney for Carl Brunsting, in which Carl names all of his sisters defendants, including federal Plaintiff Candace Curtis.²¹

¹⁶ ROA.20-20566.2205-2206; **TAB-8**

¹⁷ ROA.20-20566.577-586

¹⁸ ROA.17-20360.1044-1097.

¹⁹ ROA.20-20566.1038-1042.

²⁰ ROA.20-20566.610; **TAB-12**

²¹ ROA.20-20566.613-633.

Memorandum of the federal preliminary injunction was published April 19, 2013.²² A Special Master was appointed May 9, 2013.²³ The Report of Special Master was filed Aug. 8, 2013.²⁴

Appellant appeared before the Honorable Kenneth Hoyt for a scheduled hearing on or about October 3, 2013, without Rik Munson, her domestic partner / paralegal, due to a sudden medical emergency²⁵ and was ordered to retain the assistance of counsel²⁶ “*within 60 days so that the case may proceed according to the rules of discovery and evidence.*”

Having limited funds, but needing to avoid sua sponte dismissal under Federal Rule of Civil Procedure 41(b) for failure to obey the Court’s order and with great difficulty, Appellant was able to obtain the assistance of Houston attorney Jason Bradley Ostrom, (**Ostrom**). Ostrom filed his appearance January 6, 2014.²⁷

²² ROA.20-20566.639-643, 1103-1107. Memorandum of preliminary injunction, **TAB-6**

²³ ROA.20-20566.744-746.

²⁴ ROA.20-20566.775-812.

²⁵ ROA.20-20566.2658:9 , ROA.17-20360.3422: 13,

²⁶ ROA.20-20566.922-923. **TAB-13**

²⁷ ROA.20-20566.944.



On May 9, 2014 Ostrom presented the court with a bundle of unopposed motions.²⁸ In reliance upon the candor of its officers to operate efficiently the district court approved the bundle of motions May 15, 2014 and the federal docket was administratively closed, showing the case to have been remanded to Harris County Probate Court Number 4.

The case never arrived in Probate Court No. 4.

USDC SDTX 4:12-cv-1969

On July 5, 2016 Plaintiff / Appellant and Rik Munson filed claims for damages naming all of the participants in the probate court as defendants in their individual capacities.²⁹

Southern District of Texas Cause No. 4:16-cv-1969 was a separate action, but it did not arise from any probate case, probate matter or probate proceeding, as defendants claimed, but from this case SDTX No. 4:12-cv-592. There is only one set of operative facts common to both 4:12-cv-592 and 4:16-cv-1969. Therefore, ROA.17-20360 is incorporated by this reference as if fully set forth herein.

On July 17, 2020 Plaintiff / Appellant, represented by new counsel, filed a second Rule 60 motion for vacature of the order for remand to the state probate

²⁸ Docket entries 107-112 ROA.20-20566.976-1001.

²⁹ ROA.20-20566.2804.

court.³⁰ Hearing was had September 10, 2020³¹ and the order denying the relief requested was issued September 23, 2020.³²

STANDARD OF REVIEW

This court reviews a district court's legal conclusions, including the decision whether to grant a summary judgment motion, de novo. Garcia v. Luma-Corp., Inc., 429 F.3d 549, 553 (5th Cir.2005). Jurisdictional issues such as ripeness and standing, as well as questions of statutory interpretation, are also legal questions for which review is de novo. See Bonds v. Tandy, 457 F.3d 409, 411 (5th Cir.2006) (standing); Groome Res. Ltd., L.L.C., v. Parish of Jefferson, 234 F.3d 192, 198-99 (5th Cir.2000) (ripeness); In re Reed, 405 F.3d 338, 340 (5th Cir.2005) (statutory interpretation). A district court's factual findings, including those on which the court based its legal conclusions, are reviewed for clear error. See Rivera v. Wyeth-Ayerst Labs., 283 F.3d 315, 319 (5th Cir.2002). Texas v. U.S., 497 F.3d 491, 495 (5th Cir. 2007)

“This court reviews the denial of a Rule 60(d)(3) motion for abuse of discretion. Rodriguez v. Bank of Am., N.A., 693 F. App'x 376, 377 (5th Cir. 2017).

Riley v. Wells Fargo Bank, N.A., No. 19-20275, at *3 (5th Cir. Aug. 14, 2020)

“[a] trial court abuses its discretion when it bases its decision on an erroneous view of the law or a clearly erroneous assessment of the evidence.”

United States v. Caldwell, 586 F.3d 338, 341 (5th Cir. 2009).

Federal Rule of Civil Procedure 60(b) provides that "on motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding...." Federal Rule of Civil

³⁰ ROA.20-20566.2672.

³¹ ROA.20-20566.3023-3059.

³² ROA.20-20566.2902-2903.

*Procedure 60(d)(3) states that Rule 60 does not limit a court's power to "set aside a judgment for fraud on the court." A motion under Rule 60(d)(3), however, requires a higher level of misconduct, such as "an unconscionable plan or scheme which is designed to improperly influence the court in its decision." The narrow concept should "embrace only the species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication." Because Rule 60(d)(3) is without time limitation, "only the most egregious misconduct ... will constitute fraud on the court." Dixon v. Gen. Motors Fin. Corp., CIVIL ACTION No. 17-4492 SECTION: "G"(3), at *12 (E.D. La. Oct. 25, 2018)*

Rule 60(b) sets out five specific bases for granting relief from a final judgment. The sixth clause, Rule 60(b)(6), provides that a court may relieve a party from a final judgment for "any other reason justifying relief", which has generally been held to require the presence of "extraordinary circumstances" Batts v. Tow-Motor Forklift Co., 66 F.3d 743, 747 (5th Cir. 1995). However, under Rule 60(b)(4) extraordinary circumstances are unnecessary when the order or judgement is void.

*We generally review the denial of a Rule 60(b) motion for abuse of discretion. FDIC v. SLE, Inc., 722 F.3d 264, 267 (5th Cir. 2013). But when the motion is based on a void judgment under rule 60(b)(4), "the district court has no discretion—the judgment is either void or it is not." Jackson, 302 F.3d at 522 (internal quotation marks and citation omitted). "If the judgment is void, the district court must set it aside." Id. (internal quotation marks and citation omitted). Our review of a denial of a Rule 60(b)(4) motion thus is effectively de novo. SLE, Inc., 722 F.3d at 267. Novoa v. Minjarez (In re Novoa), No. 16-50955, at *3 (5th Cir. June 5, 2017)*

Conclusions of law are reviewed de novo, findings of fact are reviewed for clear error, and mixed questions of fact and law are reviewed de novo. See Traina v. Whitney National Bank, 109 F.3d 244, 246 (5th Cir. 1997).

SUMMARY OF ARGUMENT

The record shows that the Court relied on the candor of its officers to operate effectively and that a fraud was perpetrated on the Court and upon Plaintiff / Appellant by Plaintiff's own attorney, Jason Ostrom, who assumed a contrary legal position to that already established by Appellant in this Court.³³

By filing a bundle of unopposed motions and unopposed proposed orders³⁴ Ostrom obtained an order under false pretexts, giving the appearance that diversity had been polluted by the addition of an "involuntary plaintiff" and that the case had been closed due to remand to Harris County Probate Court No. 4. However, Ostrom's "involuntary plaintiff", Carl Brunsting, was a cross plaintiff³⁵ who, as a Harris County resident, was not outside the jurisdiction of the court and did not meet the 'proper case' qualification for addition as an "involuntary plaintiff" under Federal Rule of Civil Procedure 19(a).

The record will further show that this case was not removed from a state court, there were no related "probate proceedings" (Tex. Est. Code § 22.029);

³³ Raising res judicata – Curtis v Brunsting 704 F.3d 406; judicial and equitable estoppel

³⁴ ROA.20-20566.976-1001.

³⁵ ROA.20-20566.610; **TAB-12**

There is no decedent's "estate" (Tex. Est. Code § 22.012)³⁶ to subject to "in rem" (Tex. Est. Code § 32.001) "claims" (Tex. Est. Code § 22.005) and there is no date certain set for trial.³⁷

The Brunsting wills are pour-over-wills (Tex. Est. Code § 254.001). The sole devisee is the family trust.³⁸ There is no probate court, case, matter or proceeding. There is no executor.³⁹ There is no docket control order. There are no probate proceedings and there have been no fully litigated state court determinations. Where there is a complete absence of competent jurisdiction there is no court, there are no court officers, there is no litigation and there is no immunity.⁴⁰ Mirales v. Waco, 502 U.S. 9, 112 S. Ct. 286, 116 L. Ed. 2d 9 (1991) (citing Forrester v. White, 484 U.S. 219, 227-29, 108 S. Ct. 538, 98 L. Ed. 2d 555 (1988); Stump v. Sparkman, 435 U.S. 349, 360, 98 S. Ct. 1099, 55 L. Ed. 2d 331 (1978); Bradley, 13 Wall. at 351, 80 U.S. 335).

³⁶ See Order Approving Inventory ROA.17-20360.2404-2405.

³⁷ LOCAL RULES OF THE PROBATE COURTS OF HARRIS COUNTY, TEXAS, Rule 11.3 "Date of Setting". Contested cases shall be set for trial for a date certain. ROA.17-20360.212.

³⁸ See Elmer's will ROA.17-20360.2384-2393; Nelva's will ROA.17-20360.2372-2382;

³⁹ ROA.17-20360.212. Carl Brunsting resigned as "**Independent Executor**" February 2015 due to want of capacity. The "estate" has remained empty and the office of Independent Executor" has remained vacant.

⁴⁰ ROA.17-20360.3422-3423.

ARGUMENT

Rule 19 – “Involuntary Plaintiff” and the “Proper Case” Qualification

The law generally disfavors forced joinder of a party as a plaintiff with whatever procedural handicaps that normally entails. Under our adversary system the general rule is that only the party who initiates the lawsuit should be saddled with the procedural burdens of a plaintiff. For that reason, absent the "proper case" exception, where there is an obligation to join as a plaintiff, the preferred method is to designate and serve involuntary parties as defendants, regardless of their appropriate interest alignment. See generally Wright Miller, 7 Federal Practice and Procedure § 1605 and cases cited therein. Eikel v. States Marine Lines, Inc., 473 F.2d 959, 962 (5th Cir. 1973)

Improper Joinder

Traditionally, a 'proper case' is one in which the involuntary plaintiff is outside the court's jurisdiction and is under some obligation to join the plaintiff's lawsuit but has refused to do so. Otherwise, the absent party must be joined and served as a defendant and then realigned if necessary. 4 Moore's Federal Practice § 19.04[4.[a] (3d ed. 2010).

The record shows Carl Brunsting, as a cross-plaintiff in a later filed action,⁴¹ could not have polluted 28 U.S.C. § 1367(a) diversity in any event. See State Nat'l Ins. Co. v. Yates, 391 F.3d 577, 579 (5th Cir. 2004). Moreover, at 4:14 P.M. on March 9, 2012 Carl Brunsting filed a “VERIFIED PETITION TO TAKE

⁴¹ ROA.20-20566.610 ; **TAB-12**, ROA.20-20566.613-633; Tort suit filed in the probate court

DEPOSITIONS BEFORE SUIT” in the 80th Judicial District Court of Harris County, Texas No 2012-14538 in which he states at page 1, ¶ 1:

“1. Petitioner is a resident of Harris County, Texas and is one of the heirs of the estates of his parents, Elmer and Nelva Brunsting, who both resided in Harris County, Texas until their deaths. Petitioner is also one of the beneficiaries of the Brunsting Family Living Trust (the "Family Trust") and other trusts arising therefrom, ...”

With the absence of Rooker-Feldman or any other applicable abstention, this Court is entitled to take judicial notice that, by his own verification, Carl Brunsting is and was at all times herein a Houston resident who was not outside the court's jurisdiction and not a 'proper case' for joinder as an “involuntary plaintiff” under Rule 19(a). The record also shows that the sole devisee of the Brunsting wills⁴² is the family trust and Carl is not an heir to his parent’s estate, as his attorney Bobbie G. Bayless claimed in Carl’s petition.

This case, having been originally filed in a federal court and not having been removed from a state court, was never a proper case for remand⁴³ and, with diversity not having been polluted, this case was not a proper case for dismissal.

THERE IS NO PROBATE CASE, MATTER OR PROCEEDING

“Courts” are not constructed of the brick and mortar of court rooms but composed of a substance incorporeal known as competent jurisdiction.

⁴² ROA.17-20360.2372-2382, 2384-2393.

⁴³ ROA.20-20566.3044: 21-25,

“Competent Jurisdiction”

"Competent jurisdiction" is defined as follows: "The term is susceptible of two meanings; it may signify that the court must acquire and exercise jurisdiction competent to grant an application, through and by reason of a strict conformity to the requirements of a statute, or it may signify jurisdiction over the subject matter, a sort of authority in the abstract, to hear and determine a case. In its usual signification, however, the term embraces the person as well as the cause. A court of competent jurisdiction is one having power and authority of law at the time of acting to do the particular act." 12 C.J. p. 236. Lubbock Oil Ref. Co. v. Bourn, 96 S.W.2d 569, 571 (Tex. Civ. App. 1936)

Texas Property Code § 115.001 (d) places primary jurisdiction over disputes involving the administration of a trust in the state District Court.

The exception to the exclusive jurisdiction of the District Court provided by subsection § 115.001 (d) is limited to matters “incident to an estate” and apply only when a probate proceeding relating to such estate is actually “pending” in the probate court. See: Baker v. Baker NO. 02-18-00051-CV (Tex. App. Sep. 6, 2018).

Harris County Probate Court No. 4 cannot compose itself a court of competent jurisdiction on the subject matter of the Brunsting trust, nor in strict conformity to the requirements of the enabling statutes, without an “estate” to administer. Without primary probate jurisdiction there can be no proceedings ancillary.

“A pleading, by definition, determines the issues to be tried. Tex.R.Civ.P. 301; Erisman v. Thompson, 167 S.W.2d 731, 733 (Tex. 1943). Where there is no pleading invoking a probate court's jurisdiction, there can be no judgment. Parkdale Bank, 660 S.W.2d at

813. ” Ramsay v. Morris, No. 13-02-045-CV, at *1 (Tex. App. Apr. 24, 2003)

“The pendency of a probate proceeding is a requisite for a court's exercise of jurisdiction over matters related to it.” Herring v. Welborn 27 S.W.3d 132 (Tex. App. 2000)

An action incident to an estate is one in which the outcome will have direct bearing on collecting, assimilating, or distributing the decedent's estate. English v. Cobb, 593 S.W.2d 674, 676 (Tex. 1979); Falderbaum v. Lowe, 964 S.W.2d 744, 747 (Tex.App.-Austin 1998, no writ)

“Frost Nat'l Bank v. Fernandez, 315 S.W.3d 494, 506 (Tex. 2010) (acknowledging that a court may exercise its probate jurisdiction over “matters incident to an estate” only when a probate proceeding is already pending in that court.)” Valdez v. Hollenbeck 465 S.W.3d 217 (Tex. 2015)

“In order for a probate court to assert jurisdiction over matters incident to an estate, a probate proceeding must be pending in the court.” See Frost National Bank, 315 S.W.3d at 506.” Narvaez v. Powell 564 S.W.3d 49 (Tex. App. 2018)

Admitting the Will Binds the Entire World.

“A judgment admitting an instrument to probate as a will fixes and confirms the rights of those who are named as devisees and legatees and for those who take under them.” Stovall v. Mohler, 100 S.W.3d 424, 428 (Tex. App.—San Antonio 2002, writ denied).

The Brunsting wills are pour-over-wills devising solely to the family living trust. The estate pour-over procedure was complete⁴⁴ and the “independent administration” was closed before exclusively trust related “tort claims”⁴⁵ were even filed in the probate court. (Tex. Est. Code § 402.001)

⁴⁴ ROA.17-20360.2396-2397; ROA.17-20360.2404-2405;

⁴⁵ ROA.20-20566.613-633.

There are no decedents' estates. There are no matters "incident to an estate" and there are no probate proceedings. There is only a living trust to administer. Appellant has never participated in any probate case, probate matter, probate proceedings or proceedings for probate in Harris County Texas, as the relevant terms are defined by the Texas Estates Codes.

Tex. Est. Code § 22.029 PROBATE MATTER; PROBATE PROCEEDINGS; PROCEEDING IN PROBATE; PROCEEDINGS FOR PROBATE. The terms "probate matter," "probate proceedings," "proceeding in probate," and "proceedings for probate" are synonymous and include a matter or proceeding relating to a decedent's estate.

Probate Courts are courts of limited jurisdiction. Without a decedent's estate there is nothing to "probate".

Estate Means "Stuff"

"Estate" means a decedent's property (Tex. Est. Code § 22.012). "Personal property" (Tex. Est. Code § 22.028) includes an interest in: (1) goods; (2) money; (3) a chose in action; (4) an evidence of debt; and (5) a real chattel.

"the estate is an "indispensable party" to any proceeding in the probate court. The estate's presence is required for the determination of any proceeding that is ancillary or pendent to an estate." Goodman v. Summit at West Rim, Ltd., 952 S.W.2d 930, 933 (Tex. App. 1997) Smith's Inc. v. Sheffield No. 03-02-00109-CV (Tex. App. Jan. 30, 2003), Johnson v. Johnson, No. 04-19-00500-CV (Tex. App. Jan. 15, 2020)

A decedent's stuff forms a testamentary trust (estate) by operation of law. (Tex. Est. Code § 101.003) The executor is trustee for a testamentary trust "estate".

Under Texas law, during the period of administration, the decedent's estate in the hands of the executor or administrator constitutes a trust estate. The executor or administrator is more than a stake-holder, or the mere agent as a donee of a naked power of the heirs, legatees, and devisees. He has exclusive possession and control of the entire estate. He is charged with active and positive duties. He is an active trustee of a trust estate. Jones v. Whittington, 194 F.2d 812, 817 (10th Cir. 1952); see also Morrell v. Hamlett, 24 S.W.2d 531, 534 (Tex.Civ.App. — Waco 1929, writ ref'd) (estate property under administration is held in trust), Bailey v. Cherokee County Appraisal Dist, 862 S.W.2d 581, 584 (Tex. 1993) Craig v. U.S. 89 F. Supp. 2d 858 (S.D. Tex. 1999), Dyer v. Eckols 808 S.W.2d 531 (Tex. App. 1991), National Bank v. Bell, Executrix 71 S.W. 570 (Tex. Civ. App. 1902).

Pour-over

Assets devised to an inter vivos trust are not held in a testamentary trust of the testator, but 'immediately' (Tex. Est. Code § 101.001) become part of the corpus of the trust to which they are devised (Tex. Est. Code § 254.001).

There was never any standing to bring tort claims in the name of an estate when it is the cestui que of a living trust who are the injured.

Proceedings in rem

"Probate proceedings" are in rem (Tex. Est. Code § 32.001) involving "claims" against a decedent's property (Tex. Est. Code § 22.012). "Claims" are defined (Tex. Est. Code § 22.005) to include:

“(1) liabilities of a decedent that survive the decedent's death, including taxes, regardless of whether the liabilities arise in contract or tort or otherwise; (2) funeral expenses;(3) the expense of a tombstone; (4) expenses of administration; (5) estate and inheritance taxes; and (6) debts due such estates.”

As the federal courts well know, “in rem” is a term applied to proceedings or actions instituted against the thing, that is, an action taken directly against property or brought to enforce a right in the thing itself. Stephenson v. Walker, 593 S.W.2d 846, 849 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ)

In an action in rem the thing proceeded against is itself seized and impleaded as the defendant. No person is a defendant in such a suit. (Tex. Est. Code § 32.001(d)) and (Tex. Est. Code § 1022.002(d)); see also Mooney v. Harlin, 622 S.W.2d 83, 85 (Tex. 1981). Breach of fiduciary in the administration of an inter vivos trust is an action in tort, Curtis v Brunsting 704 F.3d 406 (5th Cir. 2013).

Custodia Legis and the Law of Comity

In Bodine v. Webb, 992 S.W.2d 672, 675 (Tex. App. 1999) the court provides a very good discussion relevant to numerous aspects of the matter before this court including, but not limited to, the doctrine of custodia legis, dominant jurisdiction, the distinctions between in rem, quasi in rem and in personam actions, and touching peripherally on the tension between comity and federalism and state/federal anti-suit injunctions:

*“The parties concur that this appeal turns on whether the federal action is classified as in rem, quasi in rem, or in personam. The classification of the federal suit determines whether the state court *676 may enjoin the parties from pursuing it. When federal and state courts have pending before them actions whose subject is the same res which each court must control and dispose of in order to make its relief effective, the court first assuming jurisdiction over the property may maintain and exercise that jurisdiction to the exclusion of the other. See Penn Gen. Cas. Co. v. Pennsylvania, 294 U.S. 189, 195-96 (1935). Thus, a state court can enjoin parties from pursuing in rem or quasi in rem proceedings in federal court. See Donovan v. City of Dallas, 377 U.S. 408, 412 (1964) . A state court cannot, however, enjoin a federal in personam action. See id. at 413; Ex parte Evans, 939 S.W.2d 142, 143 (Tex. 1997); see generally Ralph E. Clark, A Treatise on the Law and Practice of Receivers § 625.3 (3d ed. 1959).”*

Certain features distinguish actions in rem from actions in personam. An in rem action is a proceeding or action instituted directly against a thing, an action taken directly against property, or an action that is brought to enforce a right in the thing itself. See Stephenson v. Walker, 593 S.W.2d 846, 849 (Tex.Civ.App. — Houston [1st Dist.] 1980, no writ). A quasi in rem proceeding is an action between parties where the object is to reach and dispose of property owned by them or of some interest therein. See Citizens Nat'l Bank v. Cattleman's Prod. Credit Ass'n, 617 S.W.2d 731, 737 (Tex.Civ.App. — Waco 1981, no writ). While an in rem action affects the interests of all persons in the world in the thing, a quasi in rem action affects only the interests of particular persons in the thing. See Green Oak Apts., Ltd. v. Cannan, 696 S.W.2d 415, 418 (Tex. App. — San Antonio 1985, no writ). The effect of a judgment in both cases, though, is limited to the property that supports jurisdiction and does not impose a personal liability on the property owner. See Shaffer v. Heitner, 433 U.S. 186, 199 (1976). An action in personam is sometimes defined as a proceeding brought against a person to enforce personal rights or obligations. See Cannan, 696 S.W.2d at 418. The object of an in personam action is a judgment against the person, rather than a judgment against property to determine its status. Id. Bodine v. Webb, 992 S.W.2d 672, 676 (Tex. App. 1999)

Intrinsic to the notion of comity is mutual respect and, thus, custodia legis embraces the principal of first come first served, a.k.a. dominant jurisdiction. The Southern District Court's acquisition of jurisdiction over the de facto trustee defendants also gave that court jurisdiction over the trust assets to the exclusion of all other courts.

Conversion

The probate court docket⁴⁶ shows that Ostrom did not even bother to file an appearance in Harris County Probate Court No. 4, but simply filed a motion to enter a transfer order⁴⁷ and then entered into agreements culminating in a merger⁴⁸ so complete,⁴⁹ that it deprived Appellant of her separate legal identity⁵⁰ and substantial rights. In this manner Appellant's own counsel, in concert with other attorneys, robbed Appellant of her right to due process, her right to equal protection of the law, her legal work product and access to the benefit of the unanimous opinion of this circuit Court, in the very cause in which it was obtained.⁵¹ (Curtis v Brunsting 704 F.3d 406) Plaintiff / Appellant Curtis

⁴⁶ ROA.20-20566.2869; **TAB 14**

⁴⁷ ROA.20-20566.2684-2690; **TAB 9**

⁴⁸ Conversion Agreement ROA.20-20566.2873-2876. March 9, 2015 by Bobbie G. Bayless as Attorney for "Drina Brunsting", alleged Attorney in Fact for Carl Brunsting **TAB-10**

⁴⁹ ROA.20-20566.2693-2696;

⁵⁰ Contrast with the style of this case ROA.20-20566.539.

⁵¹ The Supreme Court has interpreted the crime of "stealing" to cover all felonious takings with intent to deprive the owner of the rights and benefits of ownership. See U.S. v. Turley, 352 U.S. 407, 77 S.Ct. 397, 1 L.Ed.2d 430 (1957).

immediately terminated Ostrom as counsel and the conversion agreement⁵² disappeared from the docket and the -402 file was closed leaving Appellant without a plaintiff's cause to file into.

Carl Brunsting resigned the office of independent executor due to lack of capacity February 19, 2015 and the office remains vacant to this day. (see ROA.17-20360.212: 37.⁵³

Who was representing the "estate" when this agreement to convert the federal Plaintiff's suit⁵⁴ into "Estate of Nelva Brunsting 412249-401" was being signed on March 9, 2015?

No one has the right to take possession of the property of an estate as executor without the authority of a court. An executor de son tort does not exist under Texas law. Ansley v. Baker, 14 Tex. 607, 65 Am.Dec. 136; Vela v. Guerra, 75 Tex. 595, 12 S.W. 1127. Warne v. Jackson, 230 S.W. 242, 244 (Tex. Civ. App. 1921)

In entering into this agreement,⁵⁵ participants acted as trespassers in their individual capacities and cooperatively engaged in obstruction and theft when they agreed to convert the federal plaintiff into a defendant, agreed to convert the family living trust into an alleged decedent's estate and agreed to convert the federal

⁵² ROA.20-20566.2693-2696;

⁵³ "A person who sues or is sued in his official capacity is, in contemplation of the law, regarded as a person distinct from the same person in his individual capacity and is a stranger to his rights or liabilities as an individual. It is equally true that a person in his individual capacity is a stranger to his rights and liabilities as a fiduciary or in a representative capacity." Elizondo v. Nat. Res.'s Conservation Comm'n, 974 S.W.2d 928, 931 (Tex. App.—Austin 1998, no pet.), quoting Alexander v. Todman, 361 F.2d 744, 746 (3d Cir. 1966).

⁵⁴ ROA.20-20566.2873-2876.

⁵⁵ ROA.20-20566.2693-2696.

Plaintiff/Appellant's in personam breach of fiduciary tort suit into a nonexistent proceeding in rem, in effect, dissolving Curtis v Brunsting altogether.⁵⁶

AGENT / PRINCIPAL PRESUMPTIONS

When subjecting any challenges to the tests of Agent / Principal Doctrine, fiduciary obligations are esteemed in equity to be of the highest order. Ostrom's acts impugned his client's cause in a fatal contradiction with the decision his client, appellant Candace Curtis, obtained pro se through the unanimous agreement of this Court.

Appellant views any inference that Ostrom's acts of betrayal can be attributed to her as not only unjustified but irrational. Attorney/Agent Ostrom's wrongful attempt to contaminate his client's standing in diversity can only be viewed in the context of this record as an unconscionable scheme or plan designed to taint the course of justice and disrupt the judicial process, with the intent to hold the Brunsting Trust beneficiaries hostage in a non-judicial theater until they surrender to demands for the payment of attorney fees that do not appear on any trust accounting ledger. (see reference to "incurred debt")⁵⁷

⁵⁶ Conversion requires "intent to exercise dominion or control over goods which is inconsistent with the true owner's right." First Investors Corp. v. Rayner, 738 So.2d 228, 234 (Miss. 1999). Further, The Supreme Court has interpreted the crime of "stealing" to cover all felonious takings with intent to deprive the owner of the rights and benefits of ownership. See U.S. v. Turley, 352 U.S. 407, 77 S.Ct. 397, 1 L.Ed.2d 430 (1957).

⁵⁷ ROA.20-20566.2886;

Having stated in her original complaint that Does 1-100 were yet to be identified and that the facts were, at that juncture, uniquely in the possession of the defendants, Appellant eventually arrived at a more complete conceptual grasp of the devices and artifices employed to frustrate and defeat her parents' estate plan and her non-probate related causes of action. Those schemes involve multiple overlapping conflicts of interest and breaches of fiduciary by various participants.

At the hearing September 10, 2020, Judge Hoyt asked attorney Spielman a very simple question:⁵⁸ *“let me ask it this way. Is it your view that there's any matter to be probated?”*

Mr. Spielman chose to prevaricate on the question. A “yes” answer would require qualification and a “no” answer would require an explanation. The order approving the inventory, appraisal and list of “claims”⁵⁹ settles the notion of “stuff” in rem and the claims in the “approved” inventory⁶⁰ are tort claims, not in rem claims against an estate, or claims in pursuit of a sum certain owed to or by the decedent.

Appellant's claim for “breach of fiduciary” was ripe for summary judgement on everything but damages when attorney Jason Bradley Ostrom filed his appearance.

⁵⁸ ROA.20-20566.3042-3043: 25

⁵⁹ ROA.17-20360.2404-2405.

⁶⁰ ROA.20-20566.613-633.

*Under Texas law, the elements of breach of fiduciary duty are: (1) a fiduciary relationship between the plaintiff and defendant; (2) a breach by the defendant of his fiduciary duty to the plaintiff; and (3) an injury to the plaintiff or benefit to the defendant as a result of the defendant's breach to the plaintiff. Lundy v. Masson, 260 S.W.3d 482, 501 (Tex. App.-Hous. [14th Dist.] 2008, no pet.) Tow v. Yu, CIVIL ACTION No. H-14-3103, at *10-11 (S.D. Tex. Jan. 30, 2017)*

The elements of a breach of fiduciary duty claim are: (1) a fiduciary relationship between the plaintiff and defendant; (2) the defendant must have breached his fiduciary duty to the plaintiff; and (3) the defendant's breach must result in injury to the plaintiff or benefit to the defendant. See Puntis v. Wilson, 137 S.W.3d 889, 891 (Tex.App.-Texarkana 2004, no pet.) Jones v. Blume, 196 S.W.3d 440, 447 (Tex. App. 2006)

The first two elements were established by the preliminary injunction⁶¹ and both aspects of the third element were established by the Report of Special Master,⁶² and have never been rebutted by the Defendants.

Due Process and Equal Protection Guarantees

"The Fourteenth Amendment provides that no person shall be deprived of life, liberty, or property, without due process of law." Stokes v. Gann, 498 F.3d 483, 485 (5th Cir. 2007) (quotations omitted); see U.S. CONST. AMEND. XIV, § 1, cl. 3.

Everything in substantive dispute in Plaintiff / Appellant's original suit remains exactly as it was on May 15, 2014 when Judge Hoyt signed the order for remand in 4:12-cv-592,⁶³ which is exactly as it was on July 5, 2016 when Southern

⁶¹ ROA.20-20566.639-643.

⁶² ROA.20-20566.775-812.

⁶³ ROA.20-20566.1000-1001.

District of Texas Case No. 4:16-cv-1969 was filed⁶⁴ and exactly as it was on June 6, 2018 when “No. 17-20360 Candace Curtis, et al v. Candace Kunz-Freed, et al USDC No. 4:16-CV-1969” was decided. See “Stasis by Design”.⁶⁵ Appellant has suffered violations of rights and privileges secured by the Constitution of the United States and federal law. See Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981)

42 U.S.C. § 1983 provides that "every person," (including a municipality, see Monell, 436 U.S. at 700-01, 98 S.Ct. at 2040-41),

"who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress 42 U.S.C. § 1983." Hernandez v. City of Lafayette, 643 F.2d 1188, 1200 (5th Cir. 1981)

Res ipsa loquitur

The complete and total absence of any determination on so much as a single substantive issue in either state court in more than seven years,⁶⁶ is prima facie evidence of the use of the state courts to interfere with the federal courts’

⁶⁴ ROA.20-20566.2804.

⁶⁵ ROA.17-20360.212.

⁶⁶ ROA.20-20566.2679-2681.

administration of the law and the intent to foreclose remedy⁶⁷, as these are the only things that have been accomplished in the state court actions ab initio.

CONCLUSION

With no probate exception or Rooker-Feldman shield in play, the deprivation of due process and denial of equal protection guarantees and other rights, privileges and immunities secured and protected by the United States Constitution and federal law raised by Appellant here, remain at issue.

The federal courts not only have the authority to examine the state court proceedings for interference with the dignity and authority of the United States Courts, but where the state fails in its oversight of those holding positions of public trust, charged with the preservation of public justice, the obligation falls to the federal courts to restore that trust which, as shown here, has been honored more in the breach.

Where an officer of the court abuses his privilege as an officer of the court and betrays the fiduciary duty he owes his client and the fiduciary duty he owes to the court and to justice, we not only have the kind of fraud that rises to a level justifying relief under Rule 60(d)(3) and Rule 60(b)(4), but the means and methods used and the results thus far achieved exemplifies the kind of “extraordinary

⁶⁷ ROA.20-20566.2847-2849.

circumstances” that come within the scope of Rule 60(b)(6), and falling squarely within the four corners of the meaning of “*for any other reason justifying relief*”.

Is there abuse of discretion where the court acts in reliance on the candor of its officers for the efficient administration of justice?

Is there any need to find error or abuse of discretion where the courts below were not presented with the entire corpus of facts that are now before this Court for de novo review or, would it be more fitting to find intentional interference with the federal court’s process in view of the facts now before this Court?

If there is a need to find error or abuse of discretion, it would be in denying the relief requested on the basis of the time that has passed, as denial of due process and access to justice cannot be justified by the length of time due process and access to justice have been deprived.

If there is a need to find error or abuse of discretion, it would be in concluding the issues raised under Rule 60 had been resolved in some other cause or in concluding that jurisdiction over this non-probate matter had been ceded to a probate court or, in concluding that the preliminary injunction would or even could be enforced by a court that cannot compose itself and has absolutely declined to adjudicate.

At the first level of inquiry an involuntary plaintiff was not added by way of an amendment, diversity has not been polluted, and Rule 60 does not limit a court's

power to set aside an order or judgment for the kind of fraud upon the court, resulting in the obstruction of justice and denial of remedy, shown here.

REMEDY

Appellant is asking this Court to review the cited cases and court records in para materia; to reverse the dismissal of her Rule 60 Motion under whatever standard the court finds appropriate and to remand to the trial court with findings of fact, conclusions of law and instructions to vacate Ostrom's fraudulent bundle of unopposed motions,⁶⁸ including the order of remand, to reopen the docket and to adjudicate the claims that this Court has already determined to properly reside in the Southern District of Texas. Appellant prays for any additional relief to which she may be entitled.

Respectfully submitted,

/s/ Candace Louise Curtis
Candace Louise Curtis
218 Landana Street
American Canyon, CA 94503
(925) 759-9020
Plaintiff-Appellant pro se

⁶⁸ ROA.20-20566.976-1001.

CERTIFICATE OF SERVICE

I certify that a copy of the above and foregoing brief for the Appellant Candace Louise Curtis and the Record Excerpts have been served by the 5th Circuit electronic filing system upon STEPHEN A. MENDEL and NEAL E. SPIELMAN, counsel for Defendants on this 9th day of February 2021.

/s/ Candace Louise Curtis
Candace Louise Curtis
218 Landana Street
American Canyon, CA 94503
(925) 759-9020
Plaintiff-Appellant pro se

CERTIFICATE OF COMPLIANCE

Pursuant to 5TH CIR. R. 32.2.7 (c), undersigned pro se Plaintiff-Appellant certifies that this brief complies with the type-volume limitations of 5TH CIR. R. 32.2.7 (b).

1. Exclusive of the portions exempted by 5TH CIR. R. 32.2.7 (b)(3), this brief contains 7,524 words printed in a proportionally spaced typeface.
2. This brief is printed in a proportionally spaced, serif typeface using Times New Roman 14 point font in text and Times New Roman 12 point font in footnotes produced by Microsoft Word 2010 software.
3. Upon request, undersigned will provide an electronic version of this brief and/or a copy of the word printout to the Court.
4. Undersigned understands that a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in 5TH CIR. R. 32.2.7, may result in the Court's striking this brief and, imposing sanctions against the person who signed it.

/s/ Candace Louise Curtis
Candace Louise Curtis
218 Landana Street
American Canyon, CA 94503
(925) 759-9020
Plaintiff-Appellant pro se
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