No. 01-23-00362-CV

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IN THE COURT OF APPEALS

FOR THE FIRST DISTRICT OF TEXAS

HOUSTON, TEXAS

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Candace Louise Curtis v. Carl Henry Brunsting, Individually and as Independent

Executor of the Estates of Elmer H. Brunsting and Nelva E. Brunsting

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Original Proceeding from Harris County Probate Court No. 4

Cause No. 412,249-401

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APPELLANTS REPLY TO APPELLEES ANSWER

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Candice Schwager

Texas State Bar No. 240056

Schwager Law Firm

16807 Pinemoor Way

Houston, Texas 77058

832.857.7173

candiceschwager@outlook.com

FOR APPELLANT CANDACE CURTIS

# IDENTITY OF PARTIES AND COUNSEL

APPELLANT

Candace Louise Curtis

## APPELLANTS' ATTORNEY ON APPEAL

Candice Leonard Schwager

Texas Bar No. 24005603

The Schwager Law Firm

16807 Pinemoor Way

Houston, Texas 77058

832.857.7173

candiceschwager@outlook.com

## APPELLEES

Carl Henry Brunsting

Bobbie G. Bayless Attorney for Drina Brunsting,

Bayless & Stokes Alleged Attorney in Fact for Plaintiff Carl Brunsting

2931 Ferndale in his individual capacity

Houston, Texas 77098

O: 713-522-2224

F: 713-522-2218

bayless@baylessstokes.com

*ATTORNEY FOR* CARL *BRUNSTING* IN THE TRIAL COURT

Anita Brunsting

*Stephen A. Mendel* Attorney for Co-Trustee Defendant, Anita Brunsting

Texas State Bar No. 13930650 in the Trial Court

1155 Dairy Ashford, Suite 300

Houston, Texas 77079

O: 281-759-3213

F: 281-759-3214

E: steve@mendellawfirm.com

Amy Brunsting

NEAL E. SPIELMAN Attorney for Co-Trustee Defendant, Amy Brunsting

Texas State Bar No. 00794678 in the Trial Court

nspielman@grifmatlaw.com

1155 Dairy Ashford, Suite 300

Houston, Texas 77079

281.870.1124 - Phone

281.870.1647 - Facsimile

APPELLEE

Carole Ann Brunsting

John Bruster Loyd Attorney for Carole Ann Brunsting

Jones, Gillaspia & Loyd, L.L.P. in the Trial Court

4400 Post Oak Pkwy, Suite 2360

Houston, TX 77027

O: 713-225-9000

F: 713-225-6126

E: ***bruse@jgl-law.com***

## TRIAL JUDGE

The Honorable James Horwitz

Presiding Judge, Harris County Probate Court No. 4

# STATEMENT REGARDING ORAL ARGUMENT

This matter raises a fundamental question of law regarding the boundaries of probate court jurisdiction over trust disputes that turns on analysis of legislative intent. There are two diametrically opposing views in the case law suggesting that if one is correct the other cannot be. This is a conflict among courts of appeal that needs to be resolved. Because the proponent of the dominant view, advanced here by Appellant, is also counsel for Appellee Carl Brunsting, Appellant is of the opinion that the decisional process would be significantly aided by oral argument.

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Judicial Notice

Carl Henry Brunsting, Independent Executor Of The Estates Of Elmer H. Brunsting And Nelva E. Brunsting Harris County District Court Civil Case No. 2013-05455 4

Estate of Elmer Brunsting No. 412248 6

Estate of Nelva Brunsting No. 412249 6

First District Court of Appeals Number: 01-22-00378-CV 1

*Petition for Writ of Mandamus, Texas First District Court of Appeal No. 10-22-00513-CV* passim

# Appellants Reply to Appellees Answer

Appellant objects to the Appellees ad hominem attacks; misuse and intermingling of legally defined terms; misstatements of the record; misstatement of appellants arguments; hearsay statements and those that would have the court assuming facts not in evidence. Appellant further objects to the Appellees supporting exhibits as irrelevant, prejudicial and non-probative. The only content relevant to the first jurisdictional question under review is the plaintiff's pleadings and the evidence pertinent to the jurisdictional inquiry.

## The Appellees Object to this Appeal as Untimely

The period to file a notice of appeal, according to the rules of appellate procedure, is within 30 days after the challenged judgment is signed. TEX. R. APP. P. 26.1. The only issues not time barred by the rules of appellate procedure are orders issued in want or excess of jurisdiction. A void judgment does not improve over time. Appellant withdrew her initial Notice of Appeal [First District Court of Appeals Number: 01-22-00378-CV] and thus, the issues before this court are extremely narrow and do not involve the merits of any claims. A void judgment is a 'nullity' that can be attacked at any time." *see Masa Custom Homes, LLC v. Shahin*, [547 S.W.3d 332, 338](https://casetext.com/case/masa-custom-homes-llc-v-shahin-2#p338) (Tex. App.-Dallas 2018, no pet.). Nix v. State, 65 S.W.3d 664, 667-68 (Tex. Crim. App. 2001)

## Appellees Object to the Record as Insufficient

Although Rule of Appellate Procedure 34.5(c) authorizes any party to request supplementation to the clerk’s record, Appellees claim[[1]](#footnote-1) that Appellant “*failed to provide a record sufficient for a review by this Court and, therefore, waived her right to complain on those issues for which a more complete record is required”,* citing to Fredonia State Bank v. General Am. Life Ins., 881 S.W.2d 279, 283 (Tex. 1994). Here is the correct quote from *Fredonia St. Bank v. General American Life Ins. Co.*, [881 S.W.2d 279](https://casetext.com/case/fredonia-st-bank-v-general-american-life-ins?tab=keyword&jxs=txcode,txregs,txrules,txsct,txapp,txappciv,txsecsrcs), 283-84 (Tex. 1994):

 (“If under Rule 74(f) an appellee can prevent the court of appeals from relying on an appellant's statement of facts without offering any contrary factual assertions or citations to the record, the court would be forced to either search the record for evidence itself or order rebriefing under Rule 74(p). TEX.R.APP.P. 74(p). The first option has never been considered part of an appellate court's duties in conducting judicial review. See Saldana v. Garcia, [285 S.W.2d 197, 201](https://casetext.com/case/saldana-v-garcia#p201) (Tex. 1955) (holding that it is "not the duty of the Court of Civil Appeals to make an independent search of the statement of facts"); Most Worshipful Prince Hall v. Jackson, [732 S.W.2d 407, 412](https://casetext.com/case/worshipful-prince-hall-ldg-v-jackson#p412) (Tex.App. — Dallas 1987, writ ref'd n.r.e.) (same); Hercules, [458 S.W.2d at 228](https://casetext.com/case/hercules-inc-v-eilers#p228) n. 8 (holding that construing the appellees' broad statement as a challenge "would render meaningless Rule 419 and thrust a burden upon the court which properly should be assumed by the appellees"); Rubenstein Son Produce, Inc. v. State, [272 S.W.2d 613, 621](https://casetext.com/case/rubensteinssson-produce-v-state#p621) (Tex.Civ.App. — Dallas 1954, writ ref'd n.r.e.) (holding that "it is not ordinarily our duty to search the record for supporting evidence")”)

## Adoption and Incorporation by Reference

Texas Rule of Appellate Procedure 9.7 states that any party may join in, or adopt by reference, all or any part of a brief, petition, response, motion, or other document filed in an appellate court by another party in the same case. Appellants Opening brief at page 16 requests the court take judicial notice of the attachments to the *Petition for Writ of Mandamus, Texas First District Court of Appeal No. 10-22-00513-CV* filed by Relator Candace Louise Curtis. Those records were filed with the First District Court of Appeals and served upon all of the Appellees at the time filed. Whether by adoption, incorporation by reference or judicial notice, the mandamus records are part of this record on appeal and relevant portions are included as exhibits with this reply.

None-the-less Appellant will ask the clerk to supplement the record from base case 412248 and 412249 with (1) the dockets. The status of both settlors’ probate dockets say “Closed”[[2]](#footnote-2). (2) the settlors’ pour-over wills[[3]](#footnote-3); (3) statements of death and other facts; (4) letters for independent administrations[[4]](#footnote-4); (5) the inventories; (6) the orders approving the inventories and (7) the drop orders (8) the Original Petition for the case transferred from the district court to the probate court.[[5]](#footnote-5)

## Probate Case, Probate Matter, Probate Proceeding

Appellees insist the matter under review is incident to a pending probate. It is not the Appellants burden to prove the non-existence of a fact. It is the appellees burden to support their own fact claims with exhibits and citations to the record. They have not and they will not, because they cannot. There is no evidence of an ongoing probate case, probate matter or probate proceeding, as those terms are defined by Estates Code Section 22.029 and there is no evidence before this court of any personal property of a decedent subject to in rem proceedings.

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 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).

## Relevant Evidence

The only evidence relevant to probate jurisdiction is the Local Rules and the following records from base cases (Estate of Elmer Brunsting No. 412248) and (Estate of Nelva Brunsting No. 412249): (1) the dockets; (2) the settlors’ pour-over wills; (3) the statements of death and other facts; (4) the letters for independent administrations; (5) the inventories; (6) the orders approving the inventories (7) the drop orders and (8) the resignation of the independent executor and (9) independent executor Carl Brunsting’s original petition in 412249-401 [ROA 5-24].

## Closing Independent Administration

An independent administration does not require formal closing procedures. See Texas Comm. Bk. v. Correa 28 S.W.3d 723, 727-28 (Tex. App. 2000) (emphasis mine)

“A court empowered with probate jurisdiction may only exercise its probate jurisdiction over matters incident to an estate when a probate matter proceeding related to such matter is already pending." Bailey, [862 S.W.2d at 585](https://casetext.com/case/bailey-v-cherokee-county-appraisal-dist#p585); Estate of Hanau, [806 S.W.2d 900, 904](https://casetext.com/case/estate-of-hanau-in-re#p904) (Tex.App.-Corpus Christi 1991, writ denied). Where the record does not reveal that a probate proceeding was taking place or was pending when suit was filed, section 5 of the probate code dealing with matters incident to an estate is not triggered. Schuld v. Dembrinski, [12 S.W.3d 485, 487](https://casetext.com/case/schuld-v-dembrinski#p487) (Tex.App.-Dallas 2000, no pet.); Qualia v. Qualia, [878 S.W.2d 339, 341](https://casetext.com/case/qualia-v-qualia-1#p341) (Tex.App.-San Antonio 1994, writ denied); Sumaruk v. Todd, [560 S.W.2d 141, 144](https://casetext.com/case/sumaruk-v-todd#p144) (Tex.Civ.App.-Tyler 1977, no writ). Hence, because no probate proceeding was ongoing or pending when TCB filed its foreclosure proceeding, the county court at law did not have exclusive jurisdiction over matters incident to Shwery's estate.

B. Closing of the Independent Administration

An independent executor may formally close an independent administration by filing a final account verified by affidavit. [Tex. Prob. Code Ann. § 151](https://casetext.com/statute/texas-codes/probate-code/chapter-vi-special-types-of-administration/part-1-temporary-administration-in-the-interest-of-estates-of-dependents/section-151-repealed) (Vernon Supp. 1999); Estate of McGarr, [10 S.W.3d 373, 376](https://casetext.com/case/in-re-estate-of-mcgarr#p376) (Tex.App.-Corpus Christi 1999, no pet.). Section 151 of the probate code provides that:

When all of the debts known to exist against the estate have been paid, or when they have been paid so far as the assets in the hands of the independent executor will permit, when there is no pending litigation, and when the independent executor has distributed to the persons entitled thereto all assets of the estate, if any, remaining after payment of debts, the independent executor may file with the court:

(1) a closing report verified by affidavit that shows:

(i) The property of the estate which came into the hands of the independent executor;

(ii) The debts that have been paid;

(iii) The debts, if any, still owing by the estate;

(iv) The property of the estate, if any, remaining on hand after payment of debts; and

(v) The names and residences of the persons to whom the property of the estate, if any, remaining on hand after payment of debts has been distributed; and

(2) signed receipts or other proof of delivery of property to the distributees named in the closing report if the closing report reflects that there was property remaining on hand after payment of debts.

[Tex. Prob. Code Ann. § 151(a)](https://casetext.com/statute/texas-codes/probate-code/chapter-vi-special-types-of-administration/part-1-temporary-administration-in-the-interest-of-estates-of-dependents/section-151-repealed) (Vernon Supp. 2000).

The filing of such an affidavit and proof of its delivery terminates the independent administration and the power and authority of the independent executor. Id. at [§ 151(b)](https://casetext.com/statute/texas-codes/probate-code/chapter-vi-special-types-of-administration/part-1-temporary-administration-in-the-interest-of-estates-of-dependents/section-151-repealed). **At that point, persons dealing with properties of the estate or claims against the estate shall deal directly with the distributees of the estate.** Id. The affidavit closing the independent administration gives the persons described in the will as entitled to receive particular assets the power to enforce their right to payment or transfer by suit. Id. at [§ 151(c)](https://casetext.com/statute/texas-codes/probate-code/chapter-vi-special-types-of-administration/part-1-temporary-administration-in-the-interest-of-estates-of-dependents/section-151-repealed); Hanau, 800 S.W.2d at 373. It does not, however, relieve the executor of liability for any mismanagement of the estate or from liability for any false statements in the affidavit. [Tex. Prob. Code Ann. § 151(c)](https://casetext.com/statute/texas-codes/probate-code/chapter-vi-special-types-of-administration/part-1-temporary-administration-in-the-interest-of-estates-of-dependents/section-151-repealed); Hanau, 800 S.W.2d at 373.

An independent administration also can be closed without filing an affidavit. Even in the absence of such an affidavit, an independent administration is considered closed when debts have been paid so far as the assets will permit and all property has been distributed. [Tex. Prob. Code Ann. § 151](https://casetext.com/statute/texas-codes/probate-code/chapter-vi-special-types-of-administration/part-1-temporary-administration-in-the-interest-of-estates-of-dependents/section-151-repealed); Hanau, [806 S.W.2d at 903](https://casetext.com/case/estate-of-hanau-in-re#p903). This court has explained:

An independent administration of an estate is considered closed when the debts have been paid and the property has been distributed and there is no more need for administration. The filing of a verified final account with the probate court pursuant to [section 151](https://casetext.com/statute/texas-codes/probate-code/chapter-vi-special-types-of-administration/part-1-temporary-administration-in-the-interest-of-estates-of-dependents/section-151-repealed) merely formally closes an independent administration.

Hanau, [806 S.W.2d at 903](https://casetext.com/case/estate-of-hanau-in-re#p903); see also McGarr, [10 S.W.3d at 376](https://casetext.com/case/in-re-estate-of-mcgarr#p376).

This Court has noted that we must look beyond the title of the final accounting to its contents to determine if the document is in fact a [Section 151](https://casetext.com/statute/texas-codes/probate-code/chapter-vi-special-types-of-administration/part-1-temporary-administration-in-the-interest-of-estates-of-dependents/section-151-repealed) affidavit. Hanau, [806 S.W.2d at 903](https://casetext.com/case/estate-of-hanau-in-re#p903). "If the instrument before the court is filed as the final accounting but is in reality only a presentation of the status of the estate and if it is apparent from the instrument that the estate is not ready to be closed, then, to close the estate would ignore the purpose of the statute." Id.; accord Estate of Canales, [837 S.W.2d 662, 669](https://casetext.com/case/estate-of-canales-in-re#p669) (Tex.App.-San Antonio 1992, no writ). Still, where, as here, the affidavit generally comports with the requirements of [section 151](https://casetext.com/statute/texas-codes/probate-code/chapter-vi-special-types-of-administration/part-1-temporary-administration-in-the-interest-of-estates-of-dependents/section-151-repealed), **the Estate appears to need no further administration, the probate court has both approved the affidavit and allowed resignation of the administrators without appointing successors, the verified account is sufficient to close the administration. Even the probate court has no power to "disapprove" a final account.**”Texas Comm. Bk. v. Correa, 28 S.W.3d 723, 727-28 (Tex. App. 2000) (emphasis mine)

Although courts generally do not lose subject matter jurisdiction once it attaches, a probate court is a specialized court that can lose jurisdiction over matters incident to an estate if it loses jurisdiction over the probate matters. Id. (citing In re Estate of Hanau, 806 S.W.2d 900, 904 (Tex.App.-Corpus Christi 1991, writ denied)). **In other words, once an estate closes, incident claims are pendent or ancillary to nothing, and the probate court loses jurisdiction**. Id.; see also Schuld v. Dembrinski, 12 S.W.3d 485, 487 (Tex.App.-Dallas 2000, no pet.) ("the pendency of a probate proceeding is a requisite for a court's exercise of jurisdiction over matters related to it"); Garza v. Rodriguez, 18 S.W.3d 694, 698 (Tex.App.-San Antonio 2000, no pet.) ("before a matter can be regarded as incident to an estate . . . a probate proceeding must actually be pending").

## The Plaintiff's Pleadings Fail to State a Claim

Whether reviewing Plaintiff/Appellee Carl Brunsting’s original petition or the Original Counter Claims filed by Co-trustee Defendant Appellees Anita Brunsting and Amy Brunsting, the pleadings fail to state a claim on numerous grounds. When filing a claim “*the pleader is required to allege facts that affirmatively demonstrate the court's jurisdiction to hear a case.*” See Tex. Ass'n of Bus., 852 S.W.2d at 446. James v. Underwood, 438 S.W.3d 704 (Tex. App. 2014) “*As a general matter, the pleader must allege facts that affirmatively demonstrate the court's jurisdiction to hear the case*.” See Tex. Ass'n of Bus. v. Tex. Air Control Bd., 852 S.W.2d 440, 446 (Tex. 1…” In re Forlenza 140 S.W.3d 373.

Co-Trustee Defendant/Appellees Original Counterclaims filed November 4, 2019 [ROA 304-311], were untimely, vague, disloyal[[6]](#footnote-6) and compulsory counter claims waived under Tex. R. Civ. P. Rule 97(a) that fails to contain any jurisdictional statements affirmatively declaring that the probate court, in which the action was brought, had the jurisdiction to hear and decide the claims and, impliedly relies upon Plaintiff Carl Brunsting’s jurisdictional statements, which appellant covered in her opening brief beginning on page 27.

“The general rule is that the allegations of the plaintiff's petition must state facts which affirmatively show the jurisdiction of the court in which the action is brought. Brown v. Peters, [127 Tex. 300](https://casetext.com/case/brown-v-peters), [94 S.W.2d 129](https://casetext.com/case/brown-v-peters) (1936); Smith v. Horton, [92 Tex. 21](https://casetext.com/case/smith-v-horton), [46 S.W. 627](https://casetext.com/case/smith-v-horton) (1898); Texas N.O.R.R. Co. v. Farrington (Tex.Com.App., 1905), [40 Tex. Civ. App. 205](https://casetext.com/case/t-n-o-ry-co-v-farrington), [88 S.W. 889](https://casetext.com/case/t-n-o-ry-co-v-farrington). Richardson v. First Nat. Life Ins. Co., 419 S.W.2d 836, 839 (Tex. 1967)”

“(“The pleader is required to allege facts that affirmatively demonstrate the court's jurisdiction to hear a case. See Tex. Ass'n of Bus., [852 S.W.2d at 446](https://casetext.com/case/texas-assn-of-business-v-texas-air-control-bd#p446).” It was not Fidelity's burden to plead specific facts that would disprove subject matter jurisdiction. James, as the plaintiff, had the initial burden of alleging facts and framing legal arguments that would affirmatively demonstrate the trial court's jurisdiction to hear her claims. Miranda, [133 S.W.3d at 225–26](https://casetext.com/case/texas-dept-parks-wildlife-v-miranda#p225) (citing Texas Ass'n of Bus., [852 S.W.2d at 446](https://casetext.com/case/texas-assn-of-business-v-texas-air-control-bd#p446)). Unsupported legal conclusions do not suffice. See Creedmoor–Maha Water Supply Corp. v. Tex. Comm'n on Envt'l Quality, [307 S.W.3d 505, 515–16](https://casetext.com/case/creedmoor-maha-water-supply-v-tceq#p515) & nn. 7 & 8 (Tex.App.-Austin 2010, no pet.). James v. Underwood, 438 S.W.3d 704, 716 (Tex. App. 2014))”

## Subject Matter Jurisdiction

The existence of subject-matter jurisdiction is a question of law. State ex rel. State Dep't of Highways Pub. Transp. v. Gonzalez, [82 S.W.3d 322, 327](https://casetext.com/case/state-v-gonzalez-7#p327) (Tex. 2002); Mayhew v. Town of Sunnyvale, [964 S.W.2d 922, 928](https://casetext.com/case/mayhew-v-town-of-sunnyvale-1#p928) (Tex. 1998). Therefore, we review de novo the trial court's ruling on a plea to the jurisdiction. Id. In deciding a plea to the jurisdiction, a court may not consider the merits of the case, but only the plaintiff's pleadings and the evidence pertinent to the jurisdictional inquiry. County of Cameron v. Brown, [80 S.W.3d 549, 555](https://casetext.com/case/county-of-cameron-v-brown#p555) (Tex. 2002). Harris County v. Cabazos, 177 S.W.3d 105, 108 (Tex. App. 2005)

"*'Subject matter jurisdiction cannot be waived or conferred by agreement' and 'can be raised at any time,' including in an interlocutory appeal." Anderson v. Truelove, 446 S.W.3d 87, 91 (Tex App-Houston [1st Dist] 2014, no pet) (quoting Rusk State Hosp v. Black,* [*392 S.W.3d 88, 103*](https://casetext.com/case/rusk-state-hosp-v-black#p103) *(Tex 2012) (Lehrmann, J, concurring in part and dissenting in part)). We review the existence of subject matter jurisdiction de novo. State v. Holland,* [*221 S.W.3d 639, 642*](https://casetext.com/case/state-v-holland-6#p642) *(Tex. 2007); Tex. Dep't of Parks & Wildlife v. Miranda,* [*133 S.W.3d 217, 226*](https://casetext.com/case/texas-dept-parks-wildlife-v-miranda#p226) *(Tex. 2004). The pleader must allege facts that affirmatively demonstrate the trial court's jurisdiction to hear the cause. Dall. Cnty. Appraisal Dist. v. Funds Recovery, Inc.,* [*887 S.W.2d 465, 469*](https://casetext.com/case/dallas-cnty-appr-v-funds-recovery#p469) *(Tex. App.-Dallas 1994, writ denied) (citing Tex. Ass'n of Bus. v. Tex. Air Control Bd., 852 S.W.2d 440, 446 (Tex. 1993)). When reviewing subject matter jurisdiction, we must construe the petition in favor of the pleader and, if necessary, review the entire record to determine if any evidence supports jurisdiction. Id. (citing Tex. Ass'n of Bus., 852 S.W.2d at 446); see Wise Reg'l Health Sys. v. Brittain,* [*268 S.W.3d 799, 804*](https://casetext.com/case/wise-regional-v-brittain#p804) *(Tex. App.-Fort Worth 2008, no pet.).*

## Statutory Probate Jurisdiction

Appellees are correct when they say that “in a county with a statutory probate court the statutory probate court has exclusive jurisdiction over all probate matters and matters incident to the estate”. [Texas Estates Code § 32.005]

However, Appellees’ appear to be completely confused as to what a “probate matter” is and what “incident to an estate” means. Rather than argue with Appellees opinion over the meaning of probate and matters ancillary, pendant or incident to an estate, Appellant will simply contrast the appellees arguments with the opinions of learned jurists in the various courts of appeal. Matters incident to an estate" apply only to those matters in which the "controlling issue" is the settlement, partition or distribution of an estate.

### Sumaruk v. Todd, 560 S.W.2d 141, 144 (Tex. Civ. App. 1977)

We are not in accord with defendant's interpretation. The motivation behind the enactment of this section was to increase the powers of the probate court so that it could more fully and ably settle decedent's estates in the one proceeding. See Schwartzel Wilshusen, Texas Probate Jurisdiction: New Patches for the Texas Probate Code, 54 Texas L.Rev. 372, 382-3 (1976). Therefore, we interpret this section dealing with "matters incident to an estate" to apply only to those matters in which the "controlling issue" is the settlement, partition or distribution of an estate. Schwartzel Wilshusen, 54 Texas L.Rev. 372 at 383, supra. If a probate proceeding, such as the administration of the estate, were pending in the statutory probate court at the time this suit was filed, section 5 of the Probate Code would apply to allow the claim by the estate to be filed in the statutory probate court in which such probate proceeding was pending. The record does not reveal that any probate proceeding was taking place or pending at the time the instant suit was filed. Since no administration of the estate was taking place, sec. 5 of the Probate Code dealing with matters incident to an estate does not come into play. Boyd v. Ratliff, [541 S.W.2d 223](https://casetext.com/case/boyd-v-ratliff) (Tex.Civ.App. Dallas 1976, no writ). See also Cowgill v. White, [543 S.W.2d 437](https://casetext.com/case/cowgill-v-white) (Tex.Civ.App. Corpus Christi 1976, writ ref'd n. r. e.); Parr v. White, [543 S.W.2d 440](https://casetext.com/case/white-v-parr) (Tex.Civ.App. Corpus Christi 1976, writ ref'd n. r. e.).

### Bell v. Hinkle 562 S.W.2d 35 (Tex. Civ. App. 1978)

Matters incident to an estate which give the statutory probate courts exclusive jurisdiction apply only to those matters in which the controlling issues are the settlement, partition or distribution of an estate. Sumaruk v. Todd, supra; Schwartzel Wilshusen, supra at 383; see Cowgill v. White, 543 S.W.2d 437 (Tex.Civ.App. Corpus Christi 1976, no writ); Elliott v. Elliott, 208 S.W.2d 709 (Tex.Civ.App. Fort Worth 1948, writ ref'd); Zamora v. Gonzalez, 128 S.W.2d 166 (Tex.Civ.App. San Antonio 1939, writ ref'd).

### Nolan v. Bettis 562 S.W.2d 520 (Tex. Civ. App. 1978)

The Tyler Court of Civil Appeals held that matters or proceedings "incident to an estate," under § 5, apply to those matters or proceedings in which the controlling issue is the settlement, partition, or distribution of an estate. Sumaruk v. Todd, 560 S.W.2d 141 (Tex.Civ.App. 1977); see Schwartzel Wilshusen, Texas Probate Jurisdiction: New Patches for the Texas Probate Code, 54 Texas L.Rev. 372, 382-83 (1976).

There is no evidence of an ongoing probate proceeding in the trial court as those proceedings closed long ago, as explained infra, and while adamantly arguing there is a probate proceeding actively pending, Appellees’ fail to provide any evidentiary support for their assertions. In fact, appellees unified answer never mentions the pour-over wills; the independent administration; the verified inventories or the orders accepting the verified inventories.

## *Lee Stacy, & Legacy Trust Co.*, 528 S.W.3d 201, 212 (Tex. App. 2017)

“Our review of the legislative framework for a statutory probate court's jurisdiction shows that the court's trust jurisdiction is independent of its probate jurisdiction.” Lee v. Ronald E. Lee Jr., Katherine Lee Stacy, & Legacy Trust Co., 528 S.W.3d 201, 212 (Tex. App. 2017)

A case on point with Lee, *In re J7S Inc.*, 979 S.W.2d 374, 377 n.2 (Tex. App. 1998), provides the following analysis under the former probate court:

We note that [section 607 of the Probate Code](https://casetext.com/statute/texas-codes/probate-code/chapter-xiii-guardianship/part-2-guardianship-proceedings-and-matters/subpart-a-jurisdiction/section-607-repealed) also provides that a statutory probate court has concurrent jurisdiction with a district court in all actions by or against a person in the person's capacity as a guardian, "whether or not the matter is appertaining to or incident to a guardianship estate. TEX.PROB. CODE ANN [§ 607 (c)](https://casetext.com/statute/texas-codes/probate-code/chapter-xiii-guardianship/part-2-guardianship-proceedings-and-matters/subpart-a-jurisdiction/section-607-repealed), (e) (Vernon Supp. 1998). Likewise, [section 25.1034 (a) of the Government Code](https://casetext.com/statute/texas-codes/government-code/title-2-judicial-branch/subtitle-a-courts/chapter-25-statutory-county-courts/subchapter-c-provisions-relating-to-particular-counties/section-251034-harris-county-probate-court-provisions) provides that the statutory probate courts of Harris County have concurrent jurisdiction with the district courts in all actions by or against a personal representative, whether or not the matter is appertaining to or incident to an estate. See [TEX. GOV'T CODE ANN. § 25.1034 (a)](https://casetext.com/statute/texas-codes/government-code/title-2-judicial-branch/subtitle-a-courts/chapter-25-statutory-county-courts/subchapter-c-provisions-relating-to-particular-counties/section-251034-harris-county-probate-court-provisions) (Vernon Supp. 1998).

This theory applied to the present case raises the issue of dominant jurisdiction and presents a conflict with the intentions of the Testators in directing independent administration. It should also be noted that this section of the Government Code has been repealed and is not the controlling statute. [[7]](#footnote-7)

## Independent Administration

[Baker v. Hammett](https://casetext.com/case/baker-v-hammett?jxs=txrules,txsct,txapp,txappciv,txsecsrcs&p=1&q=402.001%20estates%20code&sort=relevance&type=case&ssr=false&scrollTo=true&resultsNav=false#p683) 789 S.W.2d 682 (Tex. App. 1990)

The application of the Probate Code to independent administrations is limited; deference is allowed in order to free the independent executor from judicial supervision and to effect the distribution of the estate with a minimum of costs and delays. Burke v. Satterfield, 525 S.W.2d 950 (Tex. 1975); Sweeney v. Sweeney, 668 S.W.2d 909 (Tex.App. — Houston [14th Dist.] 1984, no writ. The Probate Code provides that as long as the estate is represented by an independent executor, further action of any nature should not be had in the court except where the Code specifically and explicitly provides for some action in the county court. Tex.Prob. Code Ann. § 145(h) (Vernon 1980).

## **Independent Administration under the Estates Code**

The estates code is a topic-by-topic revision of the state's general and permanent statute law without substantive change Tex. Est. Code § 21.001. A person capable of making a will may provide in the will that no other action shall be had in the probate court in relation to the settlement of the estate other than the probating and recording of the will, and the return of an inventory, appraisement, and list of claims of his or her estate. TEX. EST. CODE ANN. § 401.001(a). This is known as independent administration. *See id.* The purpose of independent administration is to free the independent executor from judicial supervision by the probate court and to effect the distribution of an estate with minimal costs and delays. *Sweeney v. Sweeney,* [668 S.W.2d 909, 910](https://casetext.com/case/sweeney-v-sweeney-9#p910) (Tex. App.—Houston [14th Dist.] 1984, no writ); *Burke v. Satterfield,* 525 S.W.2d 950, 955 (Tex. 1975). The Estates Code codifies this purpose by directing that after an independent executor is appointed and the inventory has been approved, "further action of any nature may not be had in the probate court except where this title specifically and explicitly provides for some action in the court." [TEX. EST. CODE ANN. § 402.001](https://casetext.com/statute/texas-codes/estates-code/title-2-estates-of-decedents-durable-powers-of-attorney/subtitle-i-independent-administration/chapter-402-administration/subchapter-a-general-provisions/section-402001-general-scope-and-exercise-of-powers). The record reflects that the Brunsting wills provided for independent administration of their estates.

The core facts are simple: (1) wills pouring-over into living trust are recorded and approved and letters for independent administration are issued (2) Independent executor files verified inventory accounting and list of claims[[8]](#footnote-8) (3) verified inventory accounting and list of claims accepted and drop orders issued (4) Independent executor files tort claims in the probate court relating solely to the administration of the sole devisee trust.

The first two questions that follow are: Independent from What, When? Both of these questions are answered by the Decedent’s wills and reinforced by Texas Estates Code § 402.001.

### Will of Nelva Brunsting Page 2, Article III

I direct that no action be required in the county or probate court in relation to the settlement of my estate other than the probate and recording of my Will and the return of an inventory, appraisement and list of claims as required by law.

Was the independent executor foreclosed from filing his trust related tort suit in the probate court by the Decedents Will? How can the beneficiaries of the sole devisee be required to defend their trust property interest in the county or probate court when forcing them to do so violates the express directives in the will?

### Tex. Est. Code § 402.001

“When an independent administration has been created, and the order appointing an independent executor has been entered by the probate court, and the inventory, appraisement, and list of claims has been filed by the independent executor and approved by the court or an affidavit in lieu of the inventory, appraisement, and list of claims has been filed by the independent executor, as long as the estate is represented by an independent executor, further action of any nature may not be had in the probate court except where this title specifically and explicitly provides for some action in the court.”

Estates Code Section § 402.001 is in ordinary language that is unequivocal. Once the verified inventory has been filed by the independent executor “*Further action of any nature may not be had in the probate court*.” The only exception is when Title II of the estates code specifically and explicitly provides for some action in the court regarding independent administration. Texas Estates Code §32.006 does not specifically and explicitly provide authority to the independent executor to file any non-probate related tort claims in the probate court after the verified inventory has been filed and accepted by the probate court.

## Probate Jurisdiction over Living Trusts is ancillary not Independent

Appellees leave the word “pending” out of their representation of Harris County Probate Court Local Rule 2.6.5.[[9]](#footnote-9)Appellant’s [Exhibit 1] is the actual rules and not a redacted rendition. Local Rule 2.6.5 [LR 2.6.5] identifies the ancillary nature of statutory probate jurisdiction over inter vivos trusts as dependent upon a pending probate:

“*2.6.5 Intervivos Trust Actions (settlor is decedent in probate pending in subject court);”*

The local rules for the Harris County Probate Courts define matters that constitute a probate proceeding as “Core Matters” and related matters as “Ancillary Matters. Carl Brunsting’s April 9, 2013 Petition [No. 412249-401] was filed as ancillary to the Estate of Nelva Brunsting [No. 412249] and we know this by the style “*CARL HENRY BRUNSTING, individually and as independent executor of the estates of Elmer H. Brunsting and Nelva E. Brunsting”,* Local Rule 2.4[[10]](#footnote-10) [L.R. 2.4] and the ancillary case number -401. The case was also filed in the last year the Probate code was in effect.

# Dominant Jurisdiction

The court in which the first case is filed has dominant jurisdiction to the exclusion of all other courts. In re J.B. Hunt Transp., Inc. 492 S.W.3d 287 (Tex. 2016). The first filed case integrally related to this trust dispute was filed February 27, 2012 by Appellant Candace Louise Curtis in the Southern District of Texas No 4:12-cv-592[[11]](#footnote-11).

The second action integrally related to this dispute was filed January 29, 2013 in Harris County’s 164th District Court, against the estate planning attorneys, by independent executor Carl Brunsting[[12]](#footnote-12) [ROA 348 entry 07/14/2015] [ROA 355 entry 04/04/2019] The third action integrally related to this dispute, the matter under review, was filed in Harris County Probate Court No. 4 on April 9, 2013 by Carl Brunsting individually and as independent executor of the estates of Elmer and Nelva Brunsting. [ROA 5-34]

The professional negligence action (#2) filed in the district court has been transferred to the probate court by order of the probate court and continues to linger without a plaintiff. Whether or not the matter is properly in the probate court will be determined by this court when it decides this appeal. It should be noted that “pending” is also a key term in Texas Estates Code § 34.001, commonly referred to as the snatching statute.

## Texas Estates Code Section 34.001

“Sec. 34.001. TRANSFER TO STATUTORY PROBATE COURT OF PROCEEDING RELATED TO PROBATE PROCEEDING. (a) A judge of a statutory probate court, on the motion of a party to the action or on the motion of a person interested in an estate, may transfer to the judge's court from a district, county, or statutory court a cause of action related to a probate proceeding pending in the statutory probate court or a cause of action in which a personal representative of an estate pending in the statutory probate court is a party and may consolidate the transferred cause of action with the other proceedings in the statutory probate court relating to that estate.”

## Failure to Render Summary Judgment

In re Catapult Realty Capital, L.L.C.), No. 05-19-01056-CV, at \*9 (Tex. App. Feb. 20, 2020) and authorities cited therein: (***emphasis mine***)

“Jurisdiction is something possessed by courts, not judges. Davis, [956 S.W.2d at 557](https://casetext.com/case/davis-v-state-627#p557). A judge is an officer of the court, not the court itself. Id. at 557-58. However, "[a]lthough a judge is not a court, and jurisdiction is ordinarily vested in the court and not in its judges, the act of a judge within his jurisdiction may constitute the act of the court." Davis, [956 S.W.2d at 557](https://casetext.com/case/davis-v-state-627#p557).

A. Applicable Law

The rules of practice and procedure in civil district court allow district judges to exchange courts and transfer cases from one court to another. See [Tex. R. Civ. P. 330(e)](https://casetext.com/rule/texas-court-rules/texas-rules-of-civil-procedure/part-ii-rules-of-practice-in-district-and-county-courts/section-11-trial-of-causes/certain-district-courts/rule-330-rules-of-practice-and-procedure-in-certain-district-courts); see also Tex. Const. art. V, § 11 ("And the District Judges may exchange districts, or hold courts for each other when they may deem it expedient . . . ."); In re Catapult Realty Cap., L.L.C., No. 05-19-01056-CV, 2020 WL 831611, at \*5 (Tex. App.-Dallas Feb. 20, 2020, orig. proceeding) (mem. op.). Further, the rules allow district judges to "hear any part of any case or proceeding pending . . . and determine the same" and "to hear and determine any question in any case, and any other judge may complete the hearing and render judgment in the case." [Tex.R.Civ.P. 330(g)](https://casetext.com/rule/texas-court-rules/texas-rules-of-civil-procedure/part-ii-rules-of-practice-in-district-and-county-courts/section-11-trial-of-causes/certain-district-courts/rule-330-rules-of-practice-and-procedure-in-certain-district-courts); see also In re Catapult, 2020 WL 831611, at \*5. However, the rules of civil procedure do not authorize a judge to render a decision following a hearing unless she personally heard the evidence on which the order or judgment is based. In re Catapult, 2020 WL 831611, at \*5. Fischer v. Clifford Fischer & Co., No. 05-20-00196-CV, at \*6-7 (Tex. App. Aug. 16, 2022)

The rules of civil procedure do not authorize a judge to render a decision following a hearing unless she personally heard the evidence on which the order or judgment is based. See Masa Custom Homes, [547 S.W.3d at 335](https://casetext.com/case/masa-custom-homes-llc-v-shahin-2#p335); W.C. Bank, Inc. v. Team, Inc., [783 S.W.2d 783, 785](https://casetext.com/case/wc-banks-inc-v-team-inc#p785) (Tex. App.—Houston [1st Dist.] 1990, no writ).When a judge has no authority to render an order or judgment, that order or judgment is void. See Masa Custom Homes, [547 S.W.3d at 338](https://casetext.com/case/masa-custom-homes-llc-v-shahin-2#p338). An appellate court has no jurisdiction to consider the merits of an appeal of a void order or judgment. See id. Catapult Realty Capital, L.L.C. v. Johnson (In re Catapult Realty Capital, L.L.C.), No. 05-19-01056-CV, at \*9 (Tex. App. Feb. 20, 2020) and authorities cited therein.”

## Void Judgments

A void judgment is a nullity that can be ignored. It can be challenged either directly or collaterally at any time. Defendant Appellees Summary Judgement was not rendered by a judge that personally heard the evidence on which the order or judgment is based. [Reporters Record Vol 3 of 3] The order is void ab initio as a matter of law.

## Limitations

There is no 412248-401 ancillary matter. Elmer H. Brunsting passed April 1, 2009[[13]](#footnote-13). Carl’s April 9, 2013 Petition [ROA 5-24] missed the statute of limitations for bringing claims on behalf of the estate of Elmer H. Brunsting by eight days and nearly all of the trust assets remaining, including the family farm, are in the corpus of the Elmer H. Brunsting resulting trust portion of the family trust.[[14]](#footnote-14) Harris County probate Court could not acquire jurisdiction over Carl’s claims relating to Elmer H. Brunsting’s share of the family trust as there was no pending probate proceeding and the limitations period had expired.

## Absence of a Controversy

Appellees, the original plaintiff and original defendants in the probate court, have made their solidarity abundantly clear by filing a joint Answer. Their “Second Joint Motion for Extension of Time to File the Appellees Brief of Defendant Co-Trustee Anita K. Brunsting, Defendant Cotrustee Amy R. Brunsting, & Plaintiff Carl H. Brunsting” clearly states that Appellees’ counsel required a coordinated effort due to the “*aligned and complementary interest among the Appellees*”. Prior to this admission the Appellees filed a Rule 11 Agreement in which they make their aligned and complementary interest in not prosecuting their claims official [ROA 314-317]. A proper question here is when did the interests of state court plaintiff Carl Brunsting become aligned with those of his defendants?

## Failure to Prosecute

A case becomes moot if a controversy ceases to exist between the parties at any stage of the legal proceedings, including the appeal. Allstate Ins. Co. v. Hallman, 159 S.W.3d 640, 642 (Tex. 2005); Bd. of Adjustment of San Antonio v. Wende, 92 S.W.3d 424, 427 (Tex. 2002); Williams v. Lara, 52 S.W.3d 171, 184 (Tex. 2001).

A case becomes moot if a controversy ceases to exist between the parties at any stage of the legal proceedings. See In re Kellogg Brown & Root, Inc., 166 S.W.3d 732, 737 (Tex. 2005). Appellate courts lack jurisdiction over moot controversies. See Olley v. HCM, LLC, 449 S.W.3d 572, 575 (Tex. App.-Houston [14th Dist.] 2014, pet. denied).

## Want of Prosecution

Under Harris County Probate Court Local Rule 7.1 of the contested cases which are not set for trial and which have been on file for more than three (3) years are subject to dismissal. This case has malingered in the probate court for more than ten years without a single evidentiary hearing. This case went without a docket control order for six and one half years and should have been dismissed for non-prosecution. It is not the nominal defendant’s burden to bring someone else case to trial and the Appellees solidarity should be seen as evidence of collusion. This collusion has been obvious to Appellant for the entire duration of this case and all of Appellees counsel pled probate case, probate matter and probate proceeding in the federal courts in effort to obtain their unholy results but that is an issue for another courts consideration.

## STANDING

Carl Brunsting in his individual capacity is not a devisee and had no standing in the probate of the estate of Nelva Brunsting. After the recording of the Decedents Will, and the filing of the verified inventory, the Decedents Will foreclosed independent executor Carl Brunsting from taking any further action in the probate court. Tex. Est. Code § 402.001, *supra*.

Carl resigned the office of independent executor in February 2015[[15]](#footnote-15) leaving the case without a plaintiff. Assuming Carl had individual standing, as of his alleged attorney in fact’s March 18, 2022 notice of nonsuit [ROA 327-329] there is officially no dispute between Carl and Candace and no evidence that there ever was and yet Carl’s counsel has clearly assumed an oppositional posture on appeal.

Does Carl have Appellee standing? What is Carl’s legally cognizable interest in the outcome of this appeal if he has no controversy with Appellant? What is the pour-over estates tangible interest in the outcome of this controversy among the beneficiaries of the sole devisee?

Does Defendant Co-Trustee Appellees Summary Judgment Motion not place disabled beneficiary Carl Brunsting under the same threat of forfeiture of trust property if he objects to the Co-Trustee defendant appellees self-dealing, misapplication of fiduciary assets, failure to account, or other failures to honor their fiduciary duties? [ROA 31-34]

## Was there a Remand?

There was never a removal and as a matter of law there could be no return of a case not first removed. That is not a complex legal theory but whether or not the remand was valid at the federal end is not before this court. There is no state law authority for a probate court to transfer a federal case to itself. That is a dispositive fact for de novo review before this court. Appellees brief argues Appellants federal claims were filed in the base probate case while at the same time exhibiting select parts of the Local Rules[[16]](#footnote-16) of the Harris County Probate Courts that clearly dictates what does and does not belong in the base case.

## Was there a Severance?

March 11, 2022 an Order Granting Motion to Sever Carl from Candace Curtis was entered, creating ancillary cause No. 412,249-405 as a place for Drina Brunsting and the Defendant Co-Trustees to move their no longer being prosecuted tort claims. ***[ROA 321-326]*** Whether or not the order to sever is valid is dependent upon the validity of the remand, transfer and consolidation orders and whether or not there was anything to consolidate or sever. ***[ROA 327-329]***

## Cui Bono?

The thing that screams the loudest in the probate record is silence. In a period of eighteen month as a pro se in the federal court Appellant Candace Curtis acquired a unanimous opinion from the Fifth Circuit Court of Appeals [ROA 248-255], fiduciary disclosures[[17]](#footnote-17), the appointment of a Special Master [ROA 264-267], a Report from the Special Master establishing a basic accounting,[[18]](#footnote-18) a Hearing on the Report of Special Master[[19]](#footnote-19) and a preliminary Injunction [ROA 258-263]. Nothing has been accomplished in this case since it was removed from the federal court.[[20]](#footnote-20)

Appellees argue that a proper determination from this court, that Probate Court No. 4 lacks subject matter jurisdiction, will wipe out a host of negative rulings (properly) entered against her. However, the only things they supplement the record with are their attempts to intimidate Appellant using threats and motions for sanctions. Where is this host of negative rulings in the probate court record? Where are there any substantive rulings with findings of fact and conclusions of law in the probate court record? Where is the first step in the direction of remedy? The Causes of Action claimed by Plaintiff Appellee Carl Brunsting [ROA 5-24] were filed under Chapter 37 of the Texas Civil Practice and Remedies Code (commonly referred to as the Uniform Declaratory Judgments Act). Where is the declaratory judgment determining what purported “change instruments” are valid and what instruments define “the trust” relationship?

**After ten years** of what Appellees call “litigation” in the probate court, Appellees cannot even point to an evidentiary hearing had for purposes of taking the very first step in the direction of remedy. This cannot be called “litigation” but would be better described as a hostage for ransom situation in which the kidnappers, under threat of forfeiture, demand the victims launder the ransom with a “settlement contract” that would label their ill-gotten extractions as “fees for legal services”. This is the only thing a proper determination on jurisdiction will wipe away.

Respectfully submitted,

# CERTIFICATE OF SERVICE

I, Candice Schwager, hereby certify that the foregoing document, along with the Clerk and Reporters records, were served on all counsel of record through the state electronic filing system and via email on the \_\_\_\_\_ day of October 2023

# CERTIFICATE OF COMPLIANCE

I, Candice Schwager, hereby certify that this document was generated by a computer using Microsoft Word which indicates that the total word count of this document is 8,116 words and that the countable content is 6,939 words, including footnotes, and is thus in compliance with TEX. R. APP. P. 9.4(i)(2)(B).

Respectfully submitted,

1. [Appellees Answer p.9] [↑](#footnote-ref-1)
2. [FDCA No. 10-22-00513-CV- Tab 11 p.231-235; Tab 17 p.272-286] [↑](#footnote-ref-2)
3. [FDCA No. 10-22-00513-CV- Tab 12: the will of Elmer H. Brunsting- Tab 18 the will of Nelva E. Brunsting p.287 [↑](#footnote-ref-3)
4. [FDCA No. 10-22-00513-CV- Tab 14 p.250 Elmer; Tab 20 p.303 [↑](#footnote-ref-4)
5. Carl Henry Brunsting, Independent Executor Of The Estates Of Elmer H. Brunsting And Nelva E. Brunsting Harris County District Court Civil Case No. 2013-05455 [↑](#footnote-ref-5)
6. Such conduct by trustees is prohibited by Article XII B of the restatement. [ROA 86-173] [↑](#footnote-ref-6)
7. Tex. Gov. Code § 25.1034 (a) Repealed by Acts 2001, 77th Leg., ch. 635, Sec. 3(2), eff. Sept. 1, 2001. Tex. Gov't Code § 25.0021 is controlling. [↑](#footnote-ref-7)
8. The -401 claims are tort claims against trustees of a living trust not claims by or against an estate [↑](#footnote-ref-8)
9. See Appellees Tab 23, Probate Court Local Rules, Relevant text of 2.5 and 2.6 and page 30 para 2 of their reply where they claim to recite local rule 2.6.5 but omit the word “pending”. [↑](#footnote-ref-9)
10. Appellees Tab 23 is not a proper representation of the local rules and thus, Appellant attaches those rules as [Exhibit 4] and asks the court to take judicial notice. [↑](#footnote-ref-10)
11. [FDCA No. 10-22-00513-CV- Tab 1, p.5-34] [↑](#footnote-ref-11)
12. [FDCA No. 10-22-00513-CV- Tab 25 p.344-364] [↑](#footnote-ref-12)
13. [FDCA No. 10-22-00513-CV- Tab 13 p.250-253] [↑](#footnote-ref-13)
14. [see Reporters Record 2 of 3 discussing the farm] [↑](#footnote-ref-14)
15. [FDCA No. 10-22-00513-CV- Tab 27: Order approving Carl's Resignation p.372-378] [↑](#footnote-ref-15)
16. Appellee brief at page 231 [See Appellants Exhibit 1 for the actual rules] [↑](#footnote-ref-16)
17. [FDCA No. 10-22-00513-CV- Tab 03: 2013-04-09 Case 4-12-cv-592 Injunction Hearing p.42-96] [↑](#footnote-ref-17)
18. [FDCA No. 10-22-00513-CV- Tab 6 Report of Special Master p.107-145] [↑](#footnote-ref-18)
19. [FDCA No. 10-22-00513-CV- Tab 7 Hearing on Masters Report p.146-207] [↑](#footnote-ref-19)
20. [FDCA No. 10-22-00513-CV- Tab 10 Ostrom Unopposed Motion for Remand p.225-230; Tab 26 P.364-371] [↑](#footnote-ref-20)