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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TRIAL JUDGE

The Honorable James Horwitz

Presiding Judge, Harris County Probate Court No. 4

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# Appellants Reply to Appellees Answer

## Appellant’s arguments are:

1. Carl Henry Brunsting lacked standing to file tort claims in the probate court either individually or as Independent Executor and thus, the statutory probate court has no subject matter jurisdiction over Carl’s ancillary 412,249-401 claims. Carl also missed the statute of limitations for bringing claims on behalf of the estate of Elmer H. Brunsting No. 412248.
2. Appellant was never a “plaintiff” in the 412,249-401 action as her federal claims were not and could not be filed in that court and she could not be consolidated as a co-plaintiff with Carl under the conditions then existing. The agreed order to consolidate estate of Nelva Brunsting with estate of Nelva Brunsting [ROA 288-293] did not make Appellant a co-plaintiff with Carl Brunsting.
3. The summary judgment order challenged is void for failure to render. It was also nested upon untimely counter claims to a non-existent complaint, along with other systemic defects noted infra.
4. There is an appearance of a conflict of law regarding the question of statutory probate court jurisdiction over intervivos trusts that must be settled as there is clearly confusion over this issue in the case law. Statutory probate court jurisdiction over intervivos trusts is ancillary and not independent from its statutory jurisdiction as those boundaries are defined in the controlling statute. [Tex. Gov’t Code § 25.0021]

## Appellate Jurisdiction

*Our jurisdiction over the merits of an appeal extends no further than that of the court from which the appeal is taken*. Ward v. Malone, 115 S.W.3d 267, 268 (Tex.App.-Corpus Christi 2003, pet. denied); Dallas County Appraisal Dist. v. Funds Recovery, Inc.,887 S.W.2d 465, 468 (Tex.App.-Dallas 1994, writ denied). Shell Cortez Pipeline v. Shores, 127 S.W.3d 286, 291-92 (Tex. App. 2004)

## Subject matter jurisdiction is a question of law

Parties cannot create subject matter jurisdiction by waiver, agreement, consent or participation or otherwise, where it is not strictly authorized by operation of law. “*It is well established law that jurisdiction cannot be created by waiver or by agreement”* Puente v. State, 71 S.W.3d 340, 343 (Tex.Crim.App.2002); Garcia v. Dial, 596 S.W.2d 524, 527 (Tex.Crim.App.1980) (orig. proceeding). Gaddy v. State, 433 S.W.3d 128, 142 (Tex. App. 2014).

Moreover, a trial court's subject matter jurisdiction is never presumed and cannot be waived. Tex. Ass'n of Bus. v. Tex. Air Control Bd., 852 S.W.2d 440, 443-44 (Tex. 1993).

## This Appeal is Timely

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.). A void judgment may be attacked either directly or collaterally. PNS Stores, 379 S.W.3d at 271. A void judgment is an absolute nullity and has no legal force or effect, while a voidable judgment is capable of being voided or confirmed. See In re Sensitive Care, Inc., 28 S.W.3d 35, 39 (Tex.App.-Ft. Worth 2000, no pet.); Easterline v. Bean, 49 S.W.2d 427, 429 (Tex. 1932). A judgment is void when the court had no jurisdiction to issue it. Browning v. Placke, 698 S.W.2d 362, 363 (Tex. 1985). Other defects merely render the judgment voidable. Peacock v. Wave Tec Pools, Inc., 107 S.W.3d 631, 636 (Tex. App. 2003)

## Appellees misrepresent law, fact and misstate Appellants arguments

While Appellees argue contrary facts to those established by Appellant, Appellees cannot prevent the court of appeals from relying on an appellant's statement of facts without offering evidence to support their contrary factual assertions. See Fredonia St. Bank v. General American Life Ins. Co., 881 S.W.2d 279, 283-84 (Tex. 1994) Appellees do not offer evidence to support their contrary factual assertions.

## Appellant was never a bonafide plaintiff in the probate court

### CURTIS’ federal claims were not filed in, transferred to or remanded to Harris County Probate Court as a matter of law.

There is nothing in the appellate record to support a contrary view. The law involves both substance and procedure and while some substantive and procedural defects can be cured, others will be fatal. The only path from state court to a federal court is removal. Removal can only be obtained where specifically authorized and not barred by an abstention doctrine. The only path from federal to state court is remand but remand is only authorized when a case has first been removed and it can only be returned to the court it was removed from.

### Federal district courts lack the power to remand a case to a court from which it had not been removed.

“A case may be remanded only to the court from which it was removed and the federal district court does not have the authority to remand a case originally brought in federal court.” See First National Bank of Pulaski v. Curry, 301 F.3d 456, 467 (6th Cir. 2002).

### Federal district courts lack the power to remand or transfer an action originally filed in federal court to state court.

In the present case, the United States District Court never had jurisdiction of the action, and even if that court had jurisdiction, it did not have the power to transfer the action to the state courts. No statute authorizes a federal court to transfer such an action to state courts. See White v. CommercialStd. Fire Marine Co., [450 F.2d 785, 786](https://casetext.com/case/white-v-commercial-standard-fire-marine-co#p786) (5th Cir. 1971). A federal court may not transfer an action commenced in that court to a state court. A federal court may remand an action to a state court only if the action was commenced in the state court and then removed to a federal court. See [28 U.S.C. §§ 1447](https://casetext.com/statute/united-states-code/title-28-judiciary-and-judicial-procedure/part-iv-jurisdiction-and-venue/chapter-89-district-courts-removal-of-cases-from-state-courts/section-1447-procedure-after-removal-generally) etseq. See, e.g., Edward Hansen, Inc. v. Kearny Post OfficeAssocs., [166 N.J. Super. 161](https://casetext.com/case/edward-hansen-v-kearny-post-office-assocs) (Ch.Div. 1979). Galligan v. Westfield Centre Service, Inc., 82 N.J. 188, 198 (N.J. 1980)

### State courts lack the power to transfer an action originally filed in federal court to state court.

[Texas Rule of Civil Procedure 174(a)](https://casetext.com/rule/texas-court-rules/texas-rules-of-civil-procedure/part-ii-rules-of-practice-in-district-and-county-courts/section-8-pre-trial-procedure/rule-174-consolidation-separate-trials) allows any court in the state to transfer a case from another court to itself for purposes of consolidating that case with another case pending in the first court. However, “*Rule 174(a) by its own language allows consolidation only of actions or cases that are then "pending before the court." Neither the rule itself, nor any cases interpreting it, suggests that it may be used to extend the court's authority to transfer and consolidate cases pending before other courts.”* Flores v. Peschel, 927 S.W.2d 209, 212-13 (Tex. App. 1996)

## There is no Pending Probate Case, Matter, or Proceeding

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. “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.”

Furthermore, “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).

## 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.

## Loss of Subject Matter Jurisdiction

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").

## Failure to State a Claim

Whether reviewing Plaintiff/Appellee Carl Brunsting’s original petition [ROA 5-24] or the Original Counter Claims filed by Co-trustee Defendant Appellees Anita Brunsting and Amy Brunsting, [ROA 304-311] the pleadings fail to state a claim on numerous grounds.

Relevant to summary judgment, the Co-Trustee Defendant/Appellees Original Counterclaims, filed November 4, 2019 [ROA 304-311], were untimely, vague, overbroad, disloyal[[1]](#footnote-1) 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))”

“*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.

## Summary Judgment Void for Failure to Render

As clearly stated on the pretrial conference record, [Reporters Record Vol 3 of 3 pg. 5 ln. 14-18] Visiting Judge Stone stated that she had been in contact with Judge Horwitz and had signed the proposed summary judgment order. There was never a substantive hearing and there is no evidence in the record to the contrary.

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.”

The Co-Trustee Defendants counter-claims are a breach of trust and conduct specifically foreclosed of trustees by Article XII Section B [ROA 147] of the 2005 Restatement. [ROA 86-173]

“Section B. Powers to Be Exercised in the Best Interests of **the** Beneficiaries The Trustee shall exercise the following administrative a1;1d investment powers without the order of any court, as the Trustee determines in its sole and absolute discretion to be in the best interests of the beneficiaries.

Notwithstanding anything to the contrary in this agreement, the Trustee shall not exercise any power in a manner inconsistent with the beneficiaries' right to the beneficial enjoyment of the trust property in accordance with the general principles of the law of trusts.”

## Statutory Probate Court Jurisdiction

### Gov’t Code §25.1034(a) REPEALED

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 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), (e) (Vernon Supp. 1998). Likewise, section 25.1034 (a) of the Government Code 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) (Vernon Supp. 1998).

The Lee court holding is in direct conflict with the Texas Supreme Court and the controlling jurisdictional statute which is Tex. Gov’t Code § 25.0021 as stated in In re United Services Auto. Ass'n, 307 S.W.3d 299, 302-303 (Tex. 2010) and cited in Mortensen v. Villegas 630 S.W.3d 355, 361 (Tex. App. 2021). The court in J7S Inc., cites to Tex. Gov’t Code § 25.1034(a) as providing “*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*”.

However, a plain reading of Tex. Gov’t Code § 25.0021 clearly shows that section 25.0021 prevails over any specific provisions for a particular statutory probate court or county that attempts to create jurisdiction in a statutory probate court other than jurisdiction over probate, guardianship, mental health, or eminent domain proceedings.

Tex. Gov’t Code § 25.1034(a) was a provision applicable to a particular statutory probate court or county that sought to extend the jurisdiction of the statutory probate courts of Harris County beyond the boundaries set by the controlling statute, Tex. Gov’t Code § 25.0021, which would explain why section (a) of Tex. Gov’t Code § 25.1034 was repealed[[2]](#footnote-2). The Texas Supreme Court has confirmed that Tex. Gov’t Code § 25.0021 is the statute that defines the boundaries of statutory probate court jurisdiction.

“Texas has some 3, 241 trial courts within its 268, 580 square miles. Jurisdiction is limited in many of the courts; it is general in others. Compare [TEX. GOV'T CODE § 25.0021](https://casetext.com/statute/texas-codes/government-code/title-2-judicial-branch/subtitle-a-courts/chapter-25-statutory-county-courts/subchapter-b-general-provisions-relating-to-statutory-probate-courts/section-250021-jurisdiction) (describing jurisdiction of statutory probate court), with § 24.007-.008 (outlining district court jurisdiction); Thomas v. Long, [207 S.W.3d 334, 340](https://casetext.com/case/thomas-v-long#p340) (Tex. 2006)” In re United Services Auto. Ass'n, 307 S.W.3d 299, 302-303 (Tex. 2010)

Even if the court could find the statutory probate court's trust jurisdiction independent of its probate jurisdiction, without a pending probate, it would still be confronted in this case with independent administration of pour-over wills and the question of dominant jurisdiction.

# 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. [ROA 219-247]

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 [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.”

It should be noted that the word "pending" is not defined in the probate code. See Tex. Prob. Code Ann. § 3 (Vernon 2003). Black's Law Dictionary defines "pending" as:

Begun, but not yet completed; during; before the conclusion of; prior to the completion of; unsettled; undetermined; in process of settlement or adjustment. Awaiting an occurrence or conclusion of action, period of continuance or indeterminacy. Thus, an action or suit is 'pending' from its inception until the rendition of a final judgment. BLACK'S LAW DICTIONARY 1134 (6th ed. 1990); see Alba, 89 S.W.3d at 134 (utilizing Black's Law Dictionary's definition of "suspension" in construing statute). In re John G. Kenedy Memorial Found, 159 S.W.3d 133, 143-44 (Tex. App. 2004)

# Absence of a Controversy

Appellees, the original plaintiff and his original defendants in the probate court, have made their solidarity abundantly clear by filing a unified 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?

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).

After Carl Brunsting’s (Drina Brunsting’s) March 18, 2022 non-suit of Appellant Candace Curtis [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 in this appeal. See also [Reporters Record Vol 2 of 3 p.13 Ln.5 through p.16 Ln.11]

## 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, the appointment of a Special Master [ROA 264-267], a Report from the Special Master establishing a basic accounting, a Hearing on the Report of Special Master and a preliminary Injunction [ROA 258-263]. All the Appellees have managed to supplement the record with is evidence of their failed attempts at intimidation.

# Conclusion

Elmer and Nelva Brunsting had five children. Their plan for an equal generational asset transfer included a living trust, pour-over wills and independent administration. Their intentions were to spare their progeny the experience and expense suffered by this decade long menagerie, that has produced nothing but attorney fees while resolving nothing in the trust controversy itself. The federal injunction [ROA 258-263] found anomalies with the trust documents submitted by the Defendant Co-Trustees and that Anita Brunsting, acting as sole trustee from December 21, 2010, had failed to account to the beneficiary as required, failed to disclose unprotected trust instruments and failed to begin distribution of the assets into separate shares as required by the trust.

Nothing in Appellees answer addresses the Settlor/Testators intentions nor do they provide supplements to the record showing that any of these issues have been resolved since. They did not, because they cannot.

The federal injunction [ROA 258-263] remains in full force and Appellees have nowhere to go to seek permission for any of the acts enjoined therein. The preliminary injunction established the fiduciary relationship and the trustee’s failure to perform. The only elements remaining are damage to the beneficiary and/or benefit to the trustee. The Brunsting Family Living Trust, the sole devisee to the settlor’s estates, is either an active trust with affirmative commands for the trustee to perform and they are in breach or, the trust is passive and the Defendant Co-Trustees are in wrongful possession. Either way, they are at fault and the injuries to the beneficiaries have been nothing but multiplied by the Appellees.

Appellant would like to resolve this controversy according to the settlor’s intentions and the general law of trusts but that will require a court of competent jurisdiction and not the statutory probate court, a forum the settlor’s estate plan was designed to avoid.

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 8,157 words and that the countable content is 6,974 words, including footnotes, and is thus in compliance with TEX. R. APP. P. 9.4(i)(2)(B).

Respectfully submitted,

1. Such conduct by trustees is prohibited by Article XII B of the restatement. [ROA 86-173] and constitutes a challenge to the settlors intentions. [↑](#footnote-ref-1)
2. 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-2)