CAUSE NO. 412249-401

Candace Louise Curtis § IN THE STATUTORY PROBATE

Nominal Defendant § COURT

vs §

Amy Brunsting, Anita Brunsting § Of Harris County, Texas

Brunsting, Individually and as §

Trustee of the Nelva and Elmer §

Decedent’s and Survivor’s Trust, § PROBATE COURT NO.4

Defendants §

**MOTION TO VACATE AND DISMISS FOR WANT OF SUBJECT MATTER JURISDICRTION**

TO THIS HONORABLE COURT:

Comes now CANDACE CURTIS, De Jure Trustee for the Brunsting Trust, and files this motion to dismiss the above titled action and to vacate all judgments therein as void ab initio for want of subject matter jurisdiction.

# STATEMENT OF THE FACTS

The record will show that the Decedents, Elmer H. and Nelva E. Brunsting, had identical pour-over wills [Exhibits 1 & 2][[1]](#footnote-1), with a family living trust designated sole devisee and that both wills called for independent administration. The record will further show that letters testamentary for independent administration were issued August 28, 2012 [Exhibits 3 & 4][[2]](#footnote-2); that the inventory, appraisement, and list of claims had been filed by the independent executor Match 27, 2013 and approved by the probate court April 5, 2013 [Exhibits 5 & 6][[3]](#footnote-3) and, that Carl Henry Brunsting filed his civil tort suit in the statutory probate court April 9, 2013 [Exhibits 7 & 8][[4]](#footnote-4).

## The law on independent administration is clear

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.

## Failure to State a Claim

After the inventory, appraisement, and list of claims has been filed by the independent executor and approved by the probate court **no further action of any nature** could be had in the probate court except where Title II of the Estates Code specifically and explicitly provides such action. The Action filed by Carl Henry Brunsting, Individually and as Independent Executor of the Estates of Elmer H. Brunsting and Nelva E. Brunsting on April 9, 2013 [Exhibit 9] was filed five days after the inventory had been approved. The Action was brought under the Texas Civil Practices and Remedies Code as ancillary to a closed probate administration [Exhibits 10 & 11][[5]](#footnote-5). Not only does the initial pleading filed by Carl Brunsting fail to cite to any provision in Title II of the Estates Code that specifically and explicitly authorizes such action in an independent administration after the inventory had been approved, it fails to even mention the estates code and thus failed to invoke the jurisdiction of the statutory probate court from the onset.

The 412249-401 action was brought by Carl Brunsting both individually and as independent executor for the estates of Elmer H. Brunsting (No. 412248) and Nelva E. Brunsting (No. 412249) but was given a cause number ancillary to the estate of Nelva Brunsting.

# LACHES AND LIMITATIONS

The statement of facts in Estate of Elmer H. Brunsting No. 412248 [Exhibit 12] will show that Elmer passed April 1, 2009 and that Carl’s April 9, 2013 tort action missed the statute of limitations for bringing claims on behalf of the Estate of Elmer Brunsting by eight days and thus, the statutory probate court never acquired jurisdiction over any claims brought on behalf of the Estate of Elmer Brunsting.

The Brunsting Trust does not contain any assets belonging to a decedent’s estate Curtis v. Brunsting 704 F.3d 406. According to Local Rule 2.6.5 the probate court only has jurisdiction over Intervivos Trust Actions when the Settlors estate administration is pending. The Approval of the inventory Issued April 4, 2013 and the drop orders issued the same day terminated the pour-over administration. There has been no probate administration pending in Estate of Elmer H. Brunsting No. 412248 or Estate of Nelva E. Brunsting No. 412249 since the closing of the independent administration of the pour-over estates April 4, 2012. Carl’s 412249-401 action was filed ancillary to nothing.

## Want of Prosecution

Local Rule 7.1 of the Harris County Probate Court reads as follows:

All contested cases which are not set for trial and which have been on file for more than three (3) years are subject to dismissal. Upon request of the court, the court staff shall furnish notice to all parties and their counsel that any contested case will be dismissed for want of prosecution pursuant to the provisions of Rule 165a of the Texas Rules of Civil Procedure. The procedures for notice of dismissal and retention shall be in compliance with Rules l65a and 306a of the Texas Rules of Civil Procedure.

## Want of Ancillary Jurisdiction over Cause NO. 412249-402

Candace 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 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 (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 etseq. See, e.g., Edward Hansen, Inc. v. Kearny Post OfficeAssocs., 166 N.J. Super. 161 (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) 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)

## Want of Ancillary Jurisdiction over Cause NO. 412249-403

### State probate courts authority to transfer an action to itself requires a pending probate.

Texas Estates Code § 34.001 only allows a probate court to transfer an action to itself when the action to be transferred is incident to a pending probate. The Brunsting estate closed April 4, 2013 and the purported transfer of the federal case occurred in 2014

## Tex. Est. Code § 34.001

**(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.**(b)** Notwithstanding any other provision of this subtitle, Title 1, Chapter 51, 52, 53, 54, 55, or 151, or Section 351.001, 351.002, 351.053, 351.352, 351.353, 351.354, or 351.355, the proper venue for an action by or against a personal representative for personal injury, death, or property damages is determined under Section 15.007, Civil Practice and Remedies Code.

# CONCLUSION

The statutory probate court was never capable of composing a court of competent jurisdiction over the subject matter of Independent Executor Carl Brunsting’s April 9, 2013 non-probate related tort action and consequently, all orders and judgments in Cause No. 412249-401, are void ab initio for want of subject matter jurisdiction.

412249-402

and 412249-403

# AUTHORITIES

"A judgment void upon its face is subject to an attack at any time, regardless of the statute of limitation." Newsom v. State, 236 S.W. 228 (Tex. Civ. App. 1922). A collateral attack is used to attack a void order and has no set procedure or statute of limitations. *Roman Catholic Diocese of Dallas v. County of Dallas Tax Collector*, 228 S.W.3d 475, 480 (Tex.App. 2007, no pet.); *Zarate v. Sun Operating Ltd.*, 40 S.W.3d 617, 620-21 (Tex.App. 2001, pet. denied). "A trial court has jurisdiction over a collateral attack seeking a declaration that a challenged order is void." *Dynavest*, 253 S.W.3d at 404.

Shackelford v. Barton 156 S.W.3d 604 (Tex. App. 2004)

A collateral attack is any proceeding to avoid the effect of a judgment that does not meet all the requirements of a valid direct attack, i.e., a motion for new trial or a bill of review. Toles v. Toles, 113 S.W.3d 899, 914 (Tex.App.-Dallas 2003, no pet.); Zarate v. Sun Operating Ltd., Inc., 40 S.W.3d 617, 620 (Tex.App.-San Antonio 2001, pet. denied); Glunz v. Hernandez, 908 S.W.2d 253, 255 n. 3 (Tex.App.-San Antonio 1995, writ denied). For a collateral attack, there is neither a set procedure nor a statute of limitations. Zarate, 40 S.W.3d at 620-21; Glunz, 908 S.W.2d at 255. Collateral attacks may only be used to set aside a judgment that is void or involves fundamental error. Zarate, 40 S.W.3d at 621; Glunz, 908 S.W.2d at 255. A judgment is void if it is shown that the court lacked jurisdiction (1) over a party or the property; (2) over the subject matter; (3) to enter a particular judgment; or (4) to act as a court. Zarate, 40 S.W.3d at 621; Glunz, 908 S.W.2d at 255 (citing Cook v. Cameron, 733 S.W.2d 137, 140 (Tex. 1987)); see also Browning v. Placke, 698 S.W.2d 362, 363 (Tex. 1985). Shackelford v. Barton 156 S.W.3d 604 (Tex. App. 2004)

### Zarate v. Sun Operating Ltd., Inc., 40 S.W.3d 617

(For a collateral attack, there is neither a set procedure nor a statute of limitations. Zarate v. Sun Operating Ltd., Inc., 40 S.W.3d 617, 620-21 (Tex.App. 2001, pet. denied); Glunz v. Hernandez, 908 S.W.2d 253, 255 (Tex.App. 1995, writ denied). Collateral attacks may only be used to set aside a judgment that is void or involves fundamental error. Zarate, 40 S.W.3d at 621; Glunz, 908 S.W.2d at 255. A judgment is void if it is shown that the court lacked jurisdiction (1) over a party or the property, (2) over the subject matter, (3) to enter a particular judgment, or (4) to act as a court. Zarate, 40 S.W.3d at 621; Glunz, 908 S.W.2d at 255 (citing Cook v. Cameron, 733 S.W.2d 137, 140 (Tex. 1987)); see also Browning v. Placke, 698 S.W.2d 362, 363 (Tex. 1985). Zarate v. Sun Operating Ltd., Inc., 40 S.W.3d 617)

### In re A.G.G 267 S.W.3d 165 (Tex. App. 2008)

(A party making a collateral attack on a judgment does not need to meet the requirements of a bill of review. Zarate v. Sun Operating Ltd., Inc., 40 S.W.3d 617, 620 (Tex.App.-San Antonio 2001, pet. denied). There is no set procedure for a collateral attack and no statute of limitations. Id. at 620-21. A collateral attack may be used to set aside a judgment that is void or involves fundamental error. Id. at 621. However, the ability to collaterally attack a judgment is limited because we presume the validity of the judgment under attack, and extrinsic evidence may not be used to establish a lack of jurisdiction. Toles v. Toles, 113 S.W.3d 899, 914 (Tex.App.-Dallas 2003, no pet.); Davis v. Boone, 786 S.W.2d 85, 87, n. 3 (Tex.App.-San Antonio 1990, no writ). To prevail on a collateral attack, the challenger must show that the judgment is void on its face. Sotelo v. Scherr, 242 S.W.3d 823, 830 (Tex.App.-El Paso 2007, no pet.). A collateral attack fails if the judgment contains jurisdictional recitals, even if other parts of the record show a lack of jurisdiction. Toles, 113 S.W.3d at 914. In re A.G.G 267 S.W.3d 165 (Tex. App. 2008))

### Metro Transit v. Jackson, 212 S.W.3d 797 (Tex. App. 2007)

“ "Because subject-matter jurisdiction is a power that exists by operation of law only, and cannot be conferred upon any court by consent or waiver, a judgment will never be considered final if the court lacked subject-matter jurisdiction." Id.”

We have already held that the July judgment in this case was void for want of subject-matter jurisdiction. As such, an appeal or bill of review is not the only mechanism for setting such void judgment aside. See Middleton, 689 S.W.2d at 213 (recognizing that if trial court lacks jurisdictional power, bill of review not required to challenge void judgment). In this case, Jackson challenged the void July judgment by requesting the trial court to enter a second judgment, which it did. The question is thus: Did the trial court have the power to enter the July judgment after discovering that its earlier July judgment was void because of a lack of subject-matter jurisdiction? We answer the question in the affirmative.

A trial court has "not only the power but the duty to vacate the inadverent entry of a void judgment at any time, either during the term or after the term, with or without a motion therefore." Thomas v. Miller, 906 S.W.2d 260, 262 (Tex.App.-Texarkana 1995, no writ) (quoting Bridgman v. Moore, 183 S.W.2d 705, 707 (Tex. 1944). A trial court has no discretion to refuse to set aside a void judgment, but has the duty to do so at any time that such matter is brought to its attention. Id. "A judgment which is absolutely void is, in the language of some courts, mere waste paper, and the court in which such judgment is rendered does not lose jurisdiction over the subject-matter after the term of the court at which the judgment was entered has expired. There is an inherent continuing power in such court to set aside its void judgment." Barton v. Montex Corp., 295 S.W. 950, 953 (Tex.Civ.App.-Austin 1927, writ dism'd) (citing Milam County v. Robertson, 47 Tex. 222, 1877 WL 8602 at \*8 (1877). Metro Transit v. Jackson, 212 S.W.3d 797 (Tex. App. 2007)

### Mccamant v. Mccamant, 187 S.W. 1096 (Tex. Civ. App. 1916)

"If the want of jurisdiction over either the subject or the person appears by the record, there is no doubt the judgment is void." "The general rule, as stated, is that every presumption will be indulged in favor of the records of superior courts. An important corollary to this rule is that there can be no presumption against the record. For if the record imports absolute verity, its recitals must be equally conclusive when they make against the jurisdiction as when for it. If the record is silent as to jurisdictional facts, it will be aided by presumptions. But if it recites such facts, and the facts recited are not sufficient to confer jurisdiction, there can be no presumption that the recital is incorrect or incomplete." 2 Black on Judgments, §§ 276-278.

Nor will lapse of time nor laches affect the right to vacate a Judgment void on its face. Black on Judgments, § 313; Cunningham v. Taylor, 20 Tex. 126-130. Mccamant v. Mccamant, 187 S.W. 1096, 1099 (Tex. Civ. App. 1916)

For the foregoing reasons, DEFENDANTS’ Motion to Exclude Evidence, for Sanctions and/or Contempt should be denied and attorneys’ fees granted to PLAINTIFF for having to respond to DEFENANTS’ bad faith harassing motion.

Respectfully submitted,

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Candice Schwager

Schwager Law Firm

SBN 24005603

16807 Pinemoor Way

Houston, TX 77058

832-857-77173

[candiceschwager@icloud.com](mailto:candiceschwager@icloud.com)

**CERTIFICATE OF SERVICE**

I, Candice Schwager, certify that this response and motion was served on all counsel of record this 23rd day of February 2022.

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Candice Schwager

1. Tabs 12 & 18 Accepted 01-22-00514-CV First Court of Appeals Houston, Texas 7/12/2022 [↑](#footnote-ref-1)
2. Tabs 14 & 20 Accepted 01-22-00514-CV First Court of Appeals Houston, Texas 7/12/2022 [↑](#footnote-ref-2)
3. Tabs 15 & 22 Accepted 01-22-00514-CV First Court of Appeals Houston, Texas 7/12/2022 [↑](#footnote-ref-3)
4. Tab 25 Accepted 01-22-00514-CV First Court of Appeals Houston, Texas 7/12/2022 [↑](#footnote-ref-4)
5. Drop Orders Tabs 16 & 23 Accepted 01-22-00514-CV First Court of Appeals Houston, Texas 7/12/2022 [↑](#footnote-ref-5)