APPELLANTS APPENDIX INDEX

[FDCA No. 10-22-00513-CV - Petition for Writ of Mandamus Page

TAB 4

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS,	§	
	§	
Plaintiff,	§	
VS.	§	CIVIL ACTION NO. 4:12-CV-592
	§	
ANITA KAY BRUNSTING, *et al*,	§	
	§	
Defendants.	§	

MEMORANDUM AND ORDER
PRELIMINARY INJUNCTION

I. INTRODUCTION

Before the Court is the *pro se* plaintiff's, Candace Louise Curtis, renewed application for an *ex parte* temporary restraining order, asset freeze, and preliminary and permanent injunction [Dkt. No. 35]. Also before the Court is the defendants', Anita Kay Brunsting and Amy Ruth Brunsting, memorandum and response to the plaintiff's renewed motion [Dkt. No. 39]. The Court has reviewed the documents presented, including the pleadings, response and exhibits, received testimony and arguments, and determines that the plaintiff's motion for a temporary injunction should be granted.

II. BACKGROUND

A. Procedural Background

The plaintiff filed her original petition on February 27, 2012, alleging that the defendants had breached their fiduciary obligations under the Brunsting Family Living Trust ("the Trust"). Additionally, the plaintiff claimed extrinsic fraud, constructive fraud, intentional infliction of emotional distress, and sought an accounting, as well as a

recovery of legal fees and damages. The Court denied the plaintiff's request for a temporary restraining order and for injunctive relief. However, concurrent with the Court's order denying the relief sought by the plaintiff, the defendants filed an emergency motion for the removal of a *lis pendens* notice that had been filed by the plaintiff on February 11, 2012, prior to filing her suit.

The defendants sought, by their motion, to have the *lis pendens* notice removed in order that they, as the Trustees of the Trust might sell the family residence and invest the sale proceeds in accordance with Trust instructions. After a telephone conference and consideration of the defendants' argument that the Court lacked jurisdiction, the Court concluded that it lacked jurisdiction, cancelled the *lis pendens* notice, and dismissed the plaintiff's case.

The plaintiff gave notice and appealed the Court's dismissal order. The United States Court of Appeals for the Fifth Circuit determined that the Court's dismissal constituted error. Therefore, the Fifth Circuit reversed the dismissal and remanded the case to this Court for further proceedings. This reversal gave rise to the plaintiff's renewed motion for injunctive relief that is now before the Court.

B. Contentions of the Parties

The plaintiff contends that she is a beneficiary of the Trust that the defendants, her sisters, serve as co-trustees. She asserts that, as co-trustees, the defendants owe a fiduciary duty to her to "provide [her] with information concerning trust administration, copies of trust documents and [a] semi-annual accounting." According to the plaintiff,

the defendants have failed to meet their obligation and have wrongfully rebuffed her efforts to obtain the information requested and that she is entitled.

The defendants deny any wrongdoing and assert that the plaintiff's request for injunctive relief should be denied. The defendants admit that a preliminary injunction may be entered by the Court to protect the plaintiff from irreparable harm and to preserve the Court's power to render a meaningful decision after a trial on the merits. *See Canal Auth. of State of Fla. V. Calloway*, 489, F.2d 567, 572 (5th Cir. 1974). Rather, the defendants argue that the plaintiff had not met her burden.

III. STANDARD OF REVIEW

The prerequisites for the granting of a preliminary injunction require a plaintiff to establish that: (a) a substantial likelihood exists that the plaintiff will prevail on the merits; (b) a substantial threat exists that the plaintiff will suffer irreparable injury if the injunction is not granted; (c) the threatened injury to the plaintiff outweighs the threatened harm that the injunction may do to the defendants; and, (d) granting the injunction will not disserve the public interest. *See Calloway,* 489 F.2d at 572-73.

IV. DISCUSSION AND ANALYSIS

The evidence and pleadings before the Court establish that Elmer Henry Brunsting and Nelva Erleen Brunsting created the Brunsting Family Living Trust on October 10, 1996. The copy of the Trust presented to the Court as Exhibit 1, however, reflects an effective date of January 12, 2005. As well, the Trust reveals a total of 14 articles, yet Articles 13 and part of Article 14 are missing from the Trust document. Nevertheless, the Court will assume, for purposes of this Memorandum and Order, that the document

presented as the Trust is, in fact, part of the original Trust created by the Brunstings in 1996.

The Trust states that the Brunstings are parents of five children, all of whom are now adults: Candace Louise Curtis, Carol Ann Brunsting; Carl Henry Brunsting; Amy Ruth Tschirhart; and Anita Kay Brunsting Riley. The Trust reflects that Anita Kay Brunsting Riley was appointed as the initial Trustee and that she was so designated on February 12, 1997, when the Trust was amended. The record does not reflect that any change has since been made.

The plaintiff complains that the Trustee has failed to fulfill the duties of Trustee since her appointment. Moreover, the Court finds that there are unexplained conflicts in the Trust document presented by the defendants. For example, The Trust document [Exhibit 1] shows an execution date of January 12, 2005.[1] At that time, the defendants claim that Anita Kay served as the Trustee. Yet, other records also reflect that Anita Kay accepted the duties of Trustee on December 21, 2010, when her mother, Nelva Erleen resigned as Trustee. Nelva Erleen claimed in her resignation in December that she, not Anita Kay, was the original Trustee.

The record also reflects that the defendants have failed to provide the records requested by the plaintiff as required by Article IX-(E) of the Trust. Nor is there evidence that the Trustee has established separate trusts for each beneficiary, as required under the Trust, even though more than two years has expired since her appointment.

[1] It appears that Nelva Erleen Brunsting was the original Trustee and on January 12, 2005, she resigned and appointed Anita Brunsting as the sole Trustee.

In light of what appears to be irregularities in the documents and the failure of the Trustee to act in accordance with the duties required by the Trust, the Court ENJOINS the Trustee(s) and all assigns from disbursing any funds from any Trust accounts without prior permission of the Court. However, any income received for the benefit of the Trust beneficiary is to be deposited appropriately in an account. However, the Trustee shall not borrow funds, engage in new business ventures, or sell real property or other assets without the prior approval of the Court. In essence, all transactions of a financial nature shall require pre-approval of the Court, pending a resolution of disputes between the parties in this case.

The Court shall appoint an independent firm or accountant to gather the financial records of the Trust(s) and provide an accounting of the income and expenses of the Trust(s) since December 21, 2010. The defendants are directed to cooperate with the accountant in this process.

It is so Ordered

SIGNED on this 19th day of April, 2013.

Kenneth M. Hoyt
United States District Judge

TRUE COPY I CERTIFY ATTEST:
DAVID J. BRADLEY, Clerk of Court
By _____ 4/26/13
Deputy Clerk

TAB 12

LAST WILL
OF
ELMER H. BRUNSTING

412248

I, ELMER HENRY BRUNSTING, also known as ELMER H. BRUNSTING, of Harris County, Texas, make this Will and revoke all of my prior wills and codicils.

Article I

My Family

I am married and my spouse's name is NELVA E. BRUNSTING.

All references to "my spouse" in my Will are to NELVA E. BRUNSTING.

The names and birth dates of my children are:

Name	Birth Date
CANDACE LOUISE CURTIS	March 12, 1953
CAROL ANN BRUNSTING	October 16, 1954
CARL HENRY BRUNSTING	July 31, 1957
AMY RUTH TSCHIRHART	October 7, 1961
ANITA KAY RILEY	August 7, 1963

All references to my children in my will are to these children, as well as any children subsequently born to me, or legally adopted by me.

Article II

Testamentary Gifts

I give, devise and bequeath all of my property and estate, real, personal or mixed, wherever situated, to my revocable living trust; the name of my revocable living trust is:

ELMER H. BRUNSTING or NELVA E. BRUNSTING, Trustees, or the successor Trustees, under the BRUNSTING FAMILY LIVING TRUST dated October 10, 1996, as amended.

All of such property and estate shall be held, managed, and distributed as directed in such trust. The exact terms of the BRUNSTING FAMILY LIVING TRUST will govern the administration of my estate and the distribution of income and principal during administration. It is my intent and purpose that the tax planning provisions of the BRUNSTING FAMILY LIVING TRUST apply, and that my estate pass for the benefit of my family with the least possible amount of death taxes.

If my revocable living trust is not in effect at my death for any reason whatsoever, then all of my property shall be disposed of under the terms of my revocable living trust as if it were in full force and effect on the date of my death, and such terms are hereby incorporated herein for all purposes.

Article III

Appointment of Personal Representative

I appoint NELVA E. BRUNSTING as my Personal Representative. In the event NELVA E. BRUNSTING fails or ceases to serve for any reason, I appoint the following individuals as my Personal Representative to serve in the following order:

First, CARL HENRY BRUNSTING

Second, AMY RUTH TSCHIRHART

Third, CANDACE LOUISE CURTIS

The term "Personal Representative" will mean and refer to the office of Independent Executor and Trustee collectively. Reference to Personal Representative in the singular will include the plural, the masculine will include the feminine, and the term is to be construed in context. A Personal Representative will not be required to furnish a fiduciary bond or other security. 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.

Article IV

Payment of Debts, Taxes, Settlement Costs and Exercise of Elections

The following directions concern the payment of debts, taxes, estate settlement costs, and the exercise of any election permitted by Texas law or by the Internal Revenue Code. The Personal Representative of my estate and the Trustee of the BRUNSTING FAMILY LIVING TRUST may act jointly and may treat the property of my estate subject to probate and the property of the BRUNSTING FAMILY LIVING TRUST as one fund for the purpose of paying debts, taxes, estate settlement costs, and making of elections.

Section A. Payment of Indebtedness and Settlement Costs

The Personal Representative will have the discretionary authority to pay from my estate subject to probate the costs reasonably and lawfully required to settle my estate.

Section B. Special Bequests

If property given as a special bequest or gift is subject to a mortgage or other security interest, the designated recipient of the property will take the asset subject to the obligation and the recipient's assumption of the indebtedness upon distribution of the asset to the recipient. The obligation to be assumed shall be the principal balance of the indebtedness on date of death, and the Personal Representative shall be entitled to reimbursement or offset for principal and interest payments paid by my estate to date of distribution.

Section C. Estate, Generation Skipping, or Other Death Tax

Unless otherwise provided in this will or by the terms of the BRUNSTING FAMILY LIVING TRUST, estate, inheritance, succession, or other similar tax shall be charged to and apportioned among those whose gifts or distributive share generate a death tax liability by reason of my death or by reason of a taxable termination or a taxable distribution under the generation skipping provisions of the Internal Revenue Code. To the extent I may lawfully provide, the Personal Representative may pay and deduct from a beneficiary's distributive share (whether the distribution is to be paid outright or is to be continued in trust) the increment in taxes payable by reason of a required distribution or termination of interest

(i.e., estate, gift, inheritance, or generation skipping taxes) to the extent that the total of such taxes payable by reason of a distribution or termination is greater than the tax which would have been imposed if the property or interest subject to the distribution or termination of interest has not been taken into account in determining the amount of such tax. To the extent a tax liability results from the distribution of property to a beneficiary other than under this will or under the BRUNSTING FAMILY LIVING TRUST, the Personal Representative will have the authority to reduce any distribution to the beneficiary from my estate by the amount of the tax liability apportioned to the beneficiary, or if the distribution is insufficient, the Personal Representative will have the authority to proceed against the beneficiary for his, her, or its share of the tax liability. In making an allocation, my Personal Representative may consider all property included in my gross estate for federal estate tax purposes, including all amounts paid or payable to another as the result of my death, including life insurance proceeds, proceeds from a qualified retirement plan or account, proceeds from a joint and survivorship account with a financial institution or brokerage company, proceeds from a buy-sell or redemption contract, and/or any other plan or policy which provides for a payment of death benefits. This provision further contemplates and includes any tax which results from the inclusion of a prior transfer in my federal gross estate even though possession of the property previously transferred is vested in someone other than my Personal Representative. This provision does not include a reduction in the unified credit by reason of taxable gifts made by me. If the Personal Representative determines that collection of an apportioned tax liability against another is not economically feasible or probable, the tax liability will be paid by my estate and will reduce the amount distributable to the residuary beneficiaries. The Personal Representative's judgment with regard to the feasibility of collection is to be conclusive.

Section D. Election, Qualified Terminable Interest Property

The Personal Representative may, without liability for doing so or the failure to do so, elect to treat all or a part of my estate which passes in trust for NELVA E. BRUNSTING under the BRUNSTING FAMILY LIVING TRUST, in which NELVA E. BRUNSTING has an income right for life, as Qualified Terminable Interest Property pursuant to the requirements of Section 2056(b)(7) of the Internal Revenue Code. To the extent that an election is made, and unless NELVA E. BRUNSTING shall issue a direction to the contrary, the Trustee of the BRUNSTING FAMILY LIVING TRUST will pay from the irrevocable share the entire increment in the taxes payable by reason of the death of NELVA E. BRUNSTING to the extent that the total of such taxes is greater than would have been imposed if the property treated as qualified terminable interest property has not been taken into account in determining such taxes. It is my intent and purpose to provide my Personal Representative with the greatest latitude in making this election so that the least amount of federal estate tax will be payable upon my death and upon the death of NELVA E. BRUNSTING, and this

provision is to be applied and construed to accomplish this objective. The Personal Representative is to make distributions of income and principal to the Trustee of the BRUNSTING FAMILY LIVING TRUST until my total estate subject to probate and administration is distributed to the Trustee of the BRUNSTING FAMILY LIVING TRUST.

Section E. Special Election for Qualified Terminable Interest Property

For the purpose of identifying the "transferor" in allocating a GST exemption, my estate may elect to treat all of the property which passes in trust to a surviving spouse for which a marital deduction is allowed, by reason of Section 2056(b)(7) of the Internal Revenue Code, as if the election to be treated as Qualified Terminable Interest Property had not been made. Reference to the "Special Election For Qualified Terminable Interest Property" will mean and identify the election provided by Section 2652(a)(2) of the Internal Revenue Code. The term "GST Exemption" or "GST Exemption Amount" is the dollar amount of property which may pass as generation skipping transfers under Subtitle B, Chapter 13, of the Internal Revenue Code of 1986 (entitled "Tax on Generation Skipping Transfers") which is exempt from the generation-skipping tax.

Section F. Elective Deductions

The Personal Representative will have the discretionary authority to claim any obligation, expense, cost or loss as a deduction against either estate tax or income tax, or to make any election provided by Texas law, the Internal Revenue Code, or other applicable law, and the Personal Representative's decision will be conclusive and binding upon all interested parties and shall be effective without obligation to make an equitable adjustment or apportionment between or among the beneficiaries of my estate or the estate of a deceased beneficiary.

Article V

Service of the Personal Representative

A Personal Representative may exercise, without court supervision (or the least supervision permitted by law), all powers and authority given to executors and trustees by the laws of the State of Texas and by this will.

Section A. Possession, Assets, Records

My Personal Representative will have the authority to take possession of the property of my estate and the right to obtain and possess as custodian any and all documents and records relating to the ownership of property.

Section B. Retain Property in Form Received, Sale

My Personal Representative will have authority to retain, without liability, any and all property in the form in which it is received by the Personal Representative without regard to its productivity or the proportion that any one asset or class of assets may bear to the whole. My Personal Representative will not have liability nor responsibility for loss of income from or depreciation in the value of property which was retained in the form which the Personal Representative received them. My Personal Representative will have the authority to acquire, hold, and sell undivided interests in property, both real and personal, including undivided interests in business or investment property.

Section C. Investment Authority

My Personal Representative will have discretionary investment authority, and will not be liable for loss of income or depreciation on the value of an investment if, at the time the investment was made and under the facts and circumstances then existing, the investment was reasonable.

Section D. Power of Sale, Other Disposition

My Personal Representative will have the authority at any time and from time to time to sell, exchange, lease and/or otherwise dispose of legal and equitable title to any property upon such terms and conditions, and for such consideration, as my representative will consider reasonable. The execution of any document of conveyance, or lease by the Personal Representative will be sufficient to transfer complete title to the interest conveyed without the joinder, ratification, or consent of any person beneficially interested in the property, the estate, or trust. No purchaser, tenant, transferee or obligor will have any obligation whatsoever to see to the application of payments made to my Personal Representative. My Personal Representative will also have the authority to borrow or lend money, secured or unsecured, upon such terms and conditions and for such reasons as may be perceived as reasonable at the time the loan was made or obtained.

Section E. Partial, Final Distributions

My Personal Representative, in making or preparing to make a partial or final distribution from the estate or a trust, will prepare an accounting and may require, as a condition to payment, a written and acknowledged statement from each distributee that the accounting has been thoroughly examined and accepted as correct; a discharge of the Personal Representative; a release from any loss, liability, claim or question concerning the exercise of due care, skill, and prudence of the Personal Representative in the management, investment, retention, and distribution of property during the representative's term of service, except for any undisclosed error or omission having basis in fraud or bad faith; and an indemnity of the Personal Representative, to include the payment of attorneys' fees, from any asserted claim of any taxing agency, governmental authority, or other claimant. Any beneficiary having a question or potential claim may require an audit of the estate or trust as an expense of administration. Failure to require the audit prior to written acceptance of the Personal Representative's report, or the acceptance of payment, will operate as a final release and discharge of the Personal Representative except as to any error or omission having basis in fraud or bad faith.

Section F. Partition, Undivided Interests

My Personal Representative, in making or preparing to make a partial or final distribution from the estate or a trust, will have the authority (1) to partition any asset or class of assets and deliver divided and segregated interests to beneficiaries; (2) to sell any asset or class of assets (whether or not susceptible to partition in kind), and deliver to the beneficiaries a divided interest in the proceeds of sale and/or a divided or undivided interest in any note and security arrangement taken as part of the purchase price; and/or (3) to deliver undivided interests in an asset or class of assets of the beneficiaries subject to any indebtedness which may be secured by the property.

Section G. Accounting

My Personal Representative will render at least annually a statement of account showing receipts, disbursements, and distributions of both principal and income during the period of accounting and a statement of the invested and uninvested principal and the undistributed income at the time of such statement.

Section H. Protection of Beneficiaries

No beneficiary will have the power to anticipate, encumber or transfer any interest in my estate. No part of my estate or any trust will be liable for or charged with any debts,

contracts, liabilities or torts of a beneficiary or be subject to seizure or other process by any creditor of a beneficiary.

Section I. Consultants, Professional Assistance

My Personal Representative will have the authority to employ such consultants and professional help as needed to assist with the prudent administration of the estate and any trust. Any representative, other than a corporate fiduciary, may delegate, by an agency agreement or otherwise, to any state or national banking corporation with trust powers any one or more of the following administrative functions: custody and safekeeping of assets; record keeping and accounting, including accounting reports to beneficiaries; and/or investment authority. The expense of the agency, or other arrangement, will be paid as an expense of administration.

Section J. Compensation

Any person who serves as Personal Representative may elect to receive a reasonable compensation, reasonable compensation to be measured by the time required in the administration of the estate or a trust and the responsibility assumed in the discharge of the duties of office. The fee schedules of area trust departments prescribing fees for the same or similar services may be used to establish reasonable compensation. A corporate or banking trustee will be entitled to receive as its compensation such fees as are then prescribed by its published schedule of charges for estates or trusts of similar size and nature and additional compensation for extraordinary services performed by the corporate representative. My Personal Representative will be entitled to full reimbursement for expenses, costs, or other obligations incurred as the result of service, including attorney's, accountant's and other professional fees.

Section K. Documenting Succession

A person serving as Personal Representative may fail or cease to serve by reason of death, resignation or legal disability. Succession may be documented by an affidavit of fact prepared by the successor, filed of record in the probate or deed records of the county in which this will is admitted to probate. The public and all persons interested in or dealing with my Personal Representative may rely upon the evidence of succession provided by a certified copy of the recorded affidavit, and I bind my estate and those who are its beneficial owners to indemnify and hold harmless any person, firm, or agency from any loss sustained in relying upon the recorded affidavit.

Article VI

No-Contest Requirements

I vest in my Personal Representative the authority to construe this will and to resolve all matters pertaining to disputed issues or controverted claims. I do not want to burden my estate with the cost of a litigated proceeding to resolve questions of law or fact unless that proceeding is originated by my Personal Representative or with the Personal Representative's written permission. Any other person, agency or organization who originates (or who shall cause to be instituted) a judicial proceeding to construe or contest this will or to resolve any claim or controversy in the nature of reimbursement, constructive or resulting trust or other theory which, if assumed as true, would enlarge (or originate) the claimant's interest in my estate, will forfeit any amount to which that person, agency or organization is or may be entitled, and the interest of any such litigant or contestant will pass as if he or she or it had predeceased me.

These directions will apply even though the person, agency or organization shall be found by a court of law to have originated the judicial proceeding in good faith and with probable cause, and even though the proceeding may seek nothing more than to construe the application of this no-contest provision. However, the no-contest provision is to be limited in application as to any claim filed by NELVA E. BRUNSTING, to the exclusion thereof if necessary, to the extent it may deny my estate the benefit of the federal estate tax marital deduction.

THIS WILL is signed by me in the presence of two (2) witnesses, and signed by the witnesses in my presence on January 12, 2005.

Elmer H Brunsting

ELMER H. BRUNSTING

The foregoing Will was, on the day and year written above, published and declared by ELMER H. BRUNSTING in our presence to be his Will. We, in his presence and at his request, and in the presence of each other, have attested the same and have signed our names as attesting witnesses.

We declare that at the time of our attestation of this Will, ELMER H. BRUNSTING was, according to our best knowledge and belief, of sound mind and memory and under no undue duress or constraint.

Krysti Brull
11511 Katy Freeway, Suite 520
Houston, Texas 77079

WITNESS

April Driskell
11511 Katy Freeway, Suite 520
Houston, Texas 77079

WITNESS

04032012:1010:G0036

08162012:1012:G0016

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SELF-PROVING AFFIDAVIT

STATE OF TEXAS
COUNTY OF HARRIS

BEFORE ME, the undersigned authority, on this day personally appeared ELMER H. BRUNSTING, Kristi Brun and April Driskell, known to me to be the Testator and the witnesses, respectively, whose names are subscribed to the annexed or foregoing instrument in their respective capacities, and, all of said persons being by me duly sworn, the said ELMER H. BRUNSTING, Testator, declared to me and to the said witnesses in my presence that said instrument is his Last Will and Testament, and that he had willingly made and executed it as his free act and deed; and the said witnesses, each on his or her oath stated to me, in the presence and hearing of the said Testator that the said Testator had declared to them that the said instrument is his Last Will and Testament, and that he executed same as such and wanted each of them to sign it as a witness; and upon their oaths each witness stated further that they did sign the same as witnesses in the presence of the said Testator and at his request; that he was at that time eighteen years of age or over (or being under such age, was or had been lawfully married, or was then a member of the armed forces of the United States or of an auxiliary thereof or of the Maritime Service) and was of sound mind; and that each of said witnesses was then at least fourteen years of age.

Elmer H. Brunsting
ELMER H. BRUNSTING

Kristi Brun
WITNESS

April Driskell
WITNESS

Subscribed and sworn to before me by the said ELMER H. BRUNSTING, the Testator, and by the said Kristi Brun and April Driskell, witnesses, on January 12, 2005.

Charlotte Allman
Notary Public, State of Texas

CHARLOTTE ALLMAN
NOTARY PUBLIC, STATE OF TEXAS
MY COMMISSION EXPIRES
AUG. 1, 2006

412248

08162012 JJZ :G0018

04032012 JDD :G0038

The Vacek Law Firm, PLLC
11511 Katy Freeway, Suite 520
Houston, Texas 77079
(281) 531-5800

I, Teneshia Hudspeth, County Clerk of Harris County, Texas certify that these pages are a true and correct copy of the original record filed and recorded in my office, electronically or hard copy, as it appears on this date.

Witness my official hand and seal of office
This June 20, 2022

Teneshia Hudspeth, County Clerk
Harris County, Texas

Confidential information may have been redacted from the document in compliance with the Public Information Act.

TAB 13

PROBATE COURT #4

NO. 412.248

ESTATE OF	§	**IN PROBATE COURT**
	§	
ELMER H. BRUNSTING,	§	**NUMBER FOUR (4) OF**
	§	
DECEASED	§	**HARRIS COUNTY, TEXAS**

PROOF OF DEATH AND OTHER FACTS

On this day, DRINA BRUNSTING ("Affiant"), personally appeared in Open Court, and after being duly sworn, stated the following:

1. Elmer H. Brunsting ("Decedent") died on April 1, 2009, in Houston, Harris County, Texas, at the age of 87 years and four years have not elapsed since the date of Decedent's death.

2. Decedent was domiciled and had a fixed place of residence in this County at the date of death.

3. The document dated January 12, 2005, now shown to me and which purports to be Decedent's Will was never revoked so far as I know.

4. A necessity exists for the administration of this Estate.

5. No child or children were born of or adopted by Decedent after the date of the Will.

6. Decedent was never divorced.

7. The Independent Executor named in the Will is Nelva E. Brunsting, but she is now deceased. The alternate or successor Independent Executor named in the Will is CARL HENRY BRUNSTING, who is not disqualified by law from accepting Letters Testamentary or from serving as Independent Executor, and is entitled to such Letters.

8. Decedent's Will did not name either the State of Texas, a governmental agency of the State of Texas, or a charitable organization as a devisee.

SIGNED this 28th day of August, 2012.

DRINA BRUNSTING

SUBSCRIBED AND SWORN TO BEFORE ME by DRINA BRUNSTING, this 28th day of August, 2012, to certify which, witness my hand and seal of office.

STAN STANART County Clerk

Clerk of Probate Court No. 4
of Harris County, Texas

By: _____
Deputy

FILED
2012 AUG 28 AM 10:08
STAN STANART
COUNTY CLERK
HARRIS COUNTY, TEXAS

I, Teneshia Hudspeth, County Clerk of Harris County, Texas certify that these pages are a true and correct copy of the original record filed and recorded in my office, electronically or hard copy, as it appears on this date.

Witness my official hand and seal of office
This June 20, 2022

Teneshia Hudspeth, County Clerk
Harris County, Texas

Confidential information may have been redacted from the document in compliance with the Public Information Act.

TAB 14

PROBATE COURT #4

NO. 412.248

ESTATE OF	§	**IN PROBATE COURT**
	§	
ELMER H. BRUNSTING,	§	**NUMBER FOUR (4) OF**
	§	
DECEASED	§	**HARRIS COUNTY, TEXAS**

ORDER ADMITTING WILL TO PROBATE AND AUTHORIZING LETTERS TESTAMENTARY

On this day came on to be heard the Application for Probate of Will and For Issuance of Letters Testamentary filed by CARL HENRY BRUNSTING ("Applicant") in the Estate of Elmer H. Brunsting, Deceased ("Decedent").

The Court, having heard the evidence and having reviewed the Will, and other documents filed herein, finds that the allegations contained in the Application are true; that notice and citation have been given in the manner and for the length of time required by law; that Decedent is dead and that four (4) years have not elapsed since the date of Decedent's death; that this Court has jurisdiction and venue of the Decedent's estate; that Decedent left a Will dated January 12, 2005, executed with the formalities and solemnities and under the circumstances required by law to make a valid Will; that on such date Decedent had attained the age of eighteen (18) years and was of sound mind; that such Will was not revoked by Decedent; that no objection to or contest of the probate of such Will has been filed; that all of the necessary proof required for the probate of such Will has been made; that in such Will, Decedent named Nelva E. Brunsting to serve as Executor, but she is now deceased; that in such Will, Decedent named CARL HENRY BRUNSTING to serve as alternate or successor Independent Executor, without bond; that CARL HENRY BRUNSTING is duly qualified and not disqualified by law to act as such and to receive Letters Testamentary; that a necessity exists for the administration of this estate; that Decedent's Will did not name either the State of Texas, a governmental agency of the State of Texas, or a charitable organization as a devisee; and that no

interested person has applied for the appointment of appraisers and none are deemed necessary by the Court.

It is therefore ORDERED that such Will is admitted to probate, and the Clerk of this Court is ORDERED to record the Will, together with the Application, in the Minutes of this Court.

It is further ORDERED that no bond or other security is required and that upon the taking and filing of the Oath required by law, Letters Testamentary shall be issued to CARL HENRY BRUNSTING, who is appointed as Independent Executor of Decedent's Will and Estate, and no other action shall be necessary in this Court other than the filing of an Inventory, Appraisement, and List of Claims or an Affidavit in Lieu of Inventory, Appraisement and List of Claims and Probate Code Section 128A Notice, as required by law.

SIGNED this 28 day of August, 2012.

Christine Butts
JUDGE PRESIDING

APPROVED:

BAYLESS & STOKES

By: Dalia B. Stokes

Bobbie G. Bayless
State Bar No. 01940600
Dalia B. Stokes
State Bar No. 19267900
2931 Ferndale Street
Houston, Texas 77098
Telephone: (713) 522-2224
Telecopier: (713) 522-2218

Attorneys for Applicant

FILED
2012 AUG 28 AM 10: 08
Stan Stanart
COUNTY CLERK
HARRIS COUNTY, TEXAS

I, Teneshia Hudspeth, County Clerk of Harris County, Texas certify that these pages are a true and correct copy of the original record filed and recorded in my office, electronically or hard copy, as it appears on this date.

Witness my official hand and seal of office
This June 20, 2022

Teneshia Hudspeth, County Clerk
Harris County, Texas

Confidential information may have been redacted from the document in compliance with the Public Information Act.

TAB 15

NO. 412.248

ESTATE OF	§	IN PROBATE COURT
	§	
ELMER H. BRUNSTING,	§	NUMBER FOUR (4) OF
	§	
DECEASED	§	HARRIS COUNTY, TEXAS

INVENTORY, APPRAISEMENT AND LIST OF CLAIMS

Date of Death: April 1, 2009

The following is a full, true, and complete Inventory and Appraisement of all personal property and of all real property situated in the State of Texas, together with a List of Claims due and owing to this Estate as of the date of death, which have come to the possession or knowledge of the undersigned.

INVENTORY AND APPRAISEMENT

ASSETS	VALUE	ESTATE INTEREST

1. **Real Estate:**

   See List of Claims

2. **Stocks and Bonds**

   See List of Claims

3. **Mortgages, Notes and Cash:**

   See List of Claims

4. **Insurance Payable to Estate**

   See List of Claims

5. **Jointly Owned Property**

   See List of Claims

ASSETS	VALUE	ESTATE INTEREST

6. Miscellaneous Property

6a. See List of Claims

6b. 2000 Buick LeSabre....................... $6915.00
VIN--1G4HR54K3YU229418

DECEDENT'S COMMUNITY ONE-HALF OF Buick Vehicle..................... $3457.50

TOTAL VALUE OF ESTATE.................................. Yet to be determined

LIST OF CLAIMS

1. Based upon the information currently available to the personal representative of the estate, it is not possible to determine with certainty what assets were in the estate at the Decedent's death. That determination will have to be made the subject of further judicial proceedings. After that judicial determination is made, to the extent it becomes necessary, this Inventory, Appraisement and List of Claims will be amended to reflect the descriptions and values of assets later determined to have been estate assets at the time of Decedent's death.

2. The estate has asserted a claim against Candace L. Kunz-Freed and Vacek & Freed, PLLC f/k/a The Vacek Law Firm, PLLC relating to actions taken and omissions made in the course of their representation of decedent and his wife which may result in additional estate assets. That case is pending under Cause No. 2013-05455, styled *Carl Henry Brunsting, Independent Executor of the Estates of Elmer H. Brunsting and Nelva E. Brunsting v. Candace L. Kunz-Freed and Vacek & Freed, PLLC f/k/a The Vacek Law Firm, PLLC,* in the 164th Judicial District Court of Harris County, Texas.

3. The Brunsting Family Living Trust was signed by Decedent and his wife on October 10, 1996 and was restated on January 12, 2005 (the "Family Trust"). The Family Trust purported by its terms to provide for the creation of successor and/or subsequent trusts. The Family Trust also described other documents which, if created in compliance with the terms of the Family Trust, could impact the assets and status of the Family Trust. Attempts were made by various parties to change the terms and control of the Family Trust through later instruments which have been or will be challenged. The estate also asserts claims against Anita Brunsting and Amy Brunsting, the current purported trustees of the successor trusts or trusts arising from the Family Trust or documents

allegedly created pursuant to the terms of the Family Trust. Those claims will be the subject of separate proceedings and may result in additional estate assets.

4. The estate also asserts a claim against Anita Brunsting, Amy Brunsting, and Carole Brunsting in their individual capacities for amounts paid and assets believed to also include, among other things, stocks and bonds which were removed from the Family Trust and/or the estate. This was accomplished either through the use of a power of attorney for Decedent's wife, through their position as trustees, through their position as joint signatories on accounts and safe deposit boxes, or because they otherwise had access to the assets. Those claims will also be the subject of a separate proceeding and may result in additional estate assets.

There are no known claims due or owing to the Estate other than those shown on the foregoing Inventory and Appraisement.

The foregoing Inventory, Appraisement and List of Claims should be approved and ordered entered of record.

CARL HENRY BRUNSTING,
Independent Executor of the Estate of
Elmer H. Brunsting

BAYLESS & STOKES

By: _____
Bobbie G. Bayless
State Bar No. 01940600
Dalia B. Stokes
State Bar No. 19267900
2931 Ferndale
Houston, Texas 77098
Telephone: (713) 522-2224
Telecopier: (713) 522-2218

Attorneys for Independent Executor

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing instrument was forwarded to the following interested parties as specified below on the 26th day of March, 2013, as follows:

Maureen Kuzik McCutchen
Mills Shirley, LLP
2228 Mechanic, Suite 400
P.O. Box 1943
Galveston, Texas 77553-1943
Houston, Texas 77056
sent via Telecopier

Carole Ann Brunsting
5822 Jason St.
Houston, Texas 77074
sent via U.S. First Class Mail

Candace Louise Curtis
1215 Ulfinian Way
Martinez, California 94553
sent via U.S. First Class Mail

BOBBIE G. BAYLESS

THE STATE OF TEXAS §
§
COUNTY OF HARRIS §

I, CARL HENRY BRUNSTING, having been duly sworn, hereby state on oath that the foregoing Inventory, Appraisement and List of Claims is a true and complete statement of all the property and claims of the Estate that have come to my knowledge.

Carl Henry Brunsting
CARL HENRY BRUNSTING
Independent Executor of the Estate of
Elmer H. Brunsting, Deceased

SWORN TO and SUBSCRIBED BEFORE ME by the said CARL HENRY BRUNSTING, on this 26th day of March, 2013, to certify which witness my hand and seal of office.

SHAWN M. TEAGUE
MY COMMISSION EXPIRES
April 3, 2015

Shawn M. Teague
Notary Public in and for the
State of TEXAS
Printed Name: Shawn M. Teague
My Commission Expires: 4-3-2015

NO. 412.248

ESTATE OF	§	**IN PROBATE COURT**
	§	
ELMER H. BRUNSTING,	§	**NUMBER FOUR (4) OF**
	§	
DECEASED	§	**HARRIS COUNTY, TEXAS**

ORDER APPROVING INVENTORY,
APPRAISEMENT AND LIST OF CLAIMS

The foregoing Inventory, Appraisement and List of Claims of the above Estate, having been filed and presented, and the Court, having considered and examined the same and being satisfied that it should be approved and there having been no objections made thereto, it is in all respects APPROVED and ORDERED entered of record.

SIGNED on this _____ day of ______________________, 2013.

____
JUDGE PRESIDING

APPROVED:

BAYLESS & STOKES

By: ______________________
Bobbie G. Bayless
State Bar No. 01940600
Dalia B. Stokes
State Bar No. 19267900
2931 Ferndale
Houston, Texas 77098
Telephone: (713) 522-2224
Telecopier: (713) 522-2218

Attorneys for Independent Executor

I, Teneshia Hudspeth, County Clerk of Harris County, Texas certify that these pages are a true and correct copy of the original record filed and recorded in my office, electronically or hard copy, as it appears on this date.

Witness my official hand and seal of office
This June 20, 2022

Teneshia Hudspeth, County Clerk
Harris County, Texas

Confidential information may have been redacted from the document in compliance with the Public Information Act.

NO. 412.249

ESTATE OF	§	**IN PROBATE COURT**
	§	
NELVA E. BRUNSTING,	§	**NUMBER FOUR (4) OF**
	§	
DECEASED	§	**HARRIS COUNTY, TEXAS**

ORDER APPROVING INVENTORY, APPRAISEMENT AND LIST OF CLAIMS

3930 (b)
EFF 9-1-83

The foregoing Inventory, Appraisement and List of Claims of the above Estate, having been filed and presented, and the Court, having considered and examined the same and being satisfied that it should be approved and there having been no objections made thereto, it is in all respects APPROVED and ORDERED entered of record.

SIGNED on this 4 day of April, 2013.

Christine Butts
JUDGE PRESIDING

APPROVED:

BAYLESS & STOKES

By: Bobbie G. Bayless
Bobbie G. Bayless
State Bar No. 01940600
Dalia B. Stokes
State Bar No. 19267900
2931 Ferndale
Houston, Texas 77098
Telephone: (713) 522-2224
Telecopier: (713) 522-2218

Attorneys for Independent Executor

FILED
2013 APR -5 AM 10:01
STAN STANART
COUNTY CLERK
HARRIS COUNTY, TEXAS

APR 05 2013

I, Teneshia Hudspeth, County Clerk of Harris County, Texas certify that these pages are a true and correct copy of the original record filed and recorded in my office, electronically or hard copy, as it appears on this date.

Witness my official hand and seal of office
This June 20, 2022

Teneshia Hudspeth, County Clerk
Harris County, Texas

Confidential information may have been redacted from the document in compliance with the Public Information Act.

TAB 18

LAST WILL
OF
NELVA E. BRUNSTING

I, NELVA ERLEEN BRUNSTING, also known as NELVA E. BRUNSTING, of Harris County, Texas, make this Will and revoke all of my prior wills and codicils.

Article I

My Family

I am married and my spouse's name is ELMER H. BRUNSTING.

All references to "my spouse" in my Will are to ELMER H. BRUNSTING.

The names and birth dates of my children are:

Name	Birth Date
CANDACE LOUISE CURTIS	March 12, 1953
CAROL ANN BRUNSTING	October 16, 1954
CARL HENRY BRUNSTING	July 31, 1957
AMY RUTH TSCHIRHART	October 7, 1961
ANITA KAY RILEY	August 7, 1963

All references to my children in my will are to these children, as well as any children subsequently born to me, or legally adopted by me.

Article II

Testamentary Gifts

I give, devise and bequeath all of my property and estate, real, personal or mixed, wherever situated, to my revocable living trust; the name of my revocable living trust is:

ELMER H. BRUNSTING or NELVA E. BRUNSTING, Trustees, or the successor Trustees, under the BRUNSTING FAMILY LIVING TRUST dated October 10, 1996, as amended.

04032012:1010:G0041

All of such property and estate shall be held, managed, and distributed as directed in such trust. The exact terms of the BRUNSTING FAMILY LIVING TRUST will govern the administration of my estate and the distribution of income and principal during administration. It is my intent and purpose that the tax planning provisions of the BRUNSTING FAMILY LIVING TRUST apply, and that my estate pass for the benefit of my family with the least possible amount of death taxes.

If my revocable living trust is not in effect at my death for any reason whatsoever, then all of my property shall be disposed of under the terms of my revocable living trust as if it were in full force and effect on the date of my death, and such terms are hereby incorporated herein for all purposes.

Article III

Appointment of Personal Representative

I appoint ELMER H. BRUNSTING as my Personal Representative. In the event ELMER H. BRUNSTING fails or ceases to serve for any reason, I appoint the following individuals as my Personal Representative to serve in the following order:

First, CARL HENRY BRUNSTING

Second, AMY RUTH TSCHIRHART

Third, CANDACE LOUISE CURTIS

The term "Personal Representative" will mean and refer to the office of Independent Executor and Trustee collectively. Reference to Personal Representative in the singular will include the plural, the masculine will include the feminine, and the term is to be construed in context. A Personal Representative will not be required to furnish a fiduciary bond or other security. I direct that no action be required in the county or probate court in relation

PURPORTED WILL

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.

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Article IV

Payment of Debts, Taxes, Settlement Costs and Exercise of Elections

The following directions concern the payment of debts, taxes, estate settlement costs, and the exercise of any election permitted by Texas law or by the Internal Revenue Code. The Personal Representative of my estate and the Trustee of the BRUNSTING FAMILY LIVING TRUST may act jointly and may treat the property of my estate subject to probate and the property of the BRUNSTING FAMILY LIVING TRUST as one fund for the purpose of paying debts, taxes, estate settlement costs, and making of elections.

Section A. Payment of Indebtedness and Settlement Costs

The Personal Representative will have the discretionary authority to pay from my estate subject to probate the costs reasonably and lawfully required to settle my estate.

Section B. Special Bequests

If property given as a special bequest or gift is subject to a mortgage or other security interest, the designated recipient of the property will take the asset subject to the obligation and the recipient's assumption of the indebtedness upon distribution of the asset to the recipient. The obligation to be assumed shall be the principal balance of the indebtedness on date of death, and the Personal Representative shall be entitled to reimbursement or offset for principal and interest payments paid by my estate to date of distribution.

Section C. Estate, Generation Skipping, or Other Death Tax

Unless otherwise provided in this will or by the terms of the BRUNSTING FAMILY LIVING TRUST, estate, inheritance, succession, or other similar tax shall be charged to and apportioned among those whose gifts or distributive share generate a death tax liability by reason of my death or by reason of a taxable termination or a taxable distribution under the generation skipping provisions of the Internal Revenue Code. To the extent I may lawfully provide, the Personal Representative may pay and deduct from a beneficiary's distributive share (whether the distribution is to be paid outright or is to be continued in trust) the increment in taxes payable by reason of a required distribution or termination of interest

(i.e., estate, gift, inheritance, or generation skipping taxes) to the extent that the total of such taxes payable by reason of a distribution or termination is greater than the tax which would have been imposed if the property or interest subject to the distribution or termination of interest has not been taken into account in determining the amount of such tax. To the extent a tax liability results from the distribution of property to a beneficiary other than under this will or under the BRUNSTING FAMILY LIVING TRUST, the Personal Representative will have the authority to reduce any distribution to the beneficiary from my estate by the amount of the tax liability apportioned to the beneficiary, or if the distribution is insufficient, the Personal Representative will have the authority to proceed against the beneficiary for his, her, or its share of the tax liability. In making an allocation, my Personal Representative may consider all property included in my gross estate for federal estate tax purposes, including all amounts paid or payable to another as the result of my death, including life insurance proceeds, proceeds from a qualified retirement plan or account, proceeds from a joint and survivorship account with a financial institution or brokerage company, proceeds from a buy-sell or redemption contract, and/or any other plan or policy which provides for a payment of death benefits. This provision further contemplates and includes any tax which results from the inclusion of a prior transfer in my federal gross estate even though possession of the property previously transferred is vested in someone other than my Personal Representative. This provision does not include a reduction in the unified credit by reason of taxable gifts made by me. If the Personal Representative determines that collection of an apportioned tax liability against another is not economically feasible or probable, the tax liability will be paid by my estate and will reduce the amount distributable to the residuary beneficiaries. The Personal Representative's judgment with regard to the feasibility of collection is to be conclusive.

Section D. Election, Qualified Terminable Interest Property

The Personal Representative may, without liability for doing so or the failure to do so, elect to treat all or a part of my estate which passes in trust for ELMER H. BRUNSTING under the BRUNSTING FAMILY LIVING TRUST, in which ELMER H. BRUNSTING has an income right for life, as Qualified Terminable Interest Property pursuant to the requirements of Section 2056(b)(7) of the Internal Revenue Code. To the extent that an election is made, and unless ELMER H. BRUNSTING shall issue a direction to the contrary, the Trustee of the BRUNSTING FAMILY LIVING TRUST will pay from the irrevocable share the entire increment in the taxes payable by reason of the death of ELMER H. BRUNSTING to the extent that the total of such taxes is greater than would have been imposed if the property treated as qualified terminable interest property has not been taken into account in determining such taxes. It is my intent and purpose to provide my Personal Representative with the greatest latitude in making this election so that the least amount of federal estate tax will be payable upon my death and upon the death of ELMER H. BRUNSTING, and this

provision is to be applied and construed to accomplish this objective. The Personal Representative is to make distributions of income and principal to the Trustee of the BRUNSTING FAMILY LIVING TRUST until my total estate subject to probate and administration is distributed to the Trustee of the BRUNSTING FAMILY LIVING TRUST.

Section E. Special Election for Qualified Terminable Interest Property

For the purpose of identifying the "transferor" in allocating a GST exemption, my estate may elect to treat all of the property which passes in trust to a surviving spouse for which a marital deduction is allowed, by reason of Section 2056(b)(7) of the Internal Revenue Code, as if the election to be treated as Qualified Terminable Interest Property had not been made. Reference to the "Special Election For Qualified Terminable Interest Property" will mean and identify the election provided by Section 2652(a)(2) of the Internal Revenue Code. The term "GST Exemption" or "GST Exemption Amount" is the dollar amount of property which may pass as generation skipping transfers under Subtitle B, Chapter 13, of the Internal Revenue Code of 1986 (entitled "Tax on Generation Skipping Transfers") which is exempt from the generation-skipping tax.

Section F. Elective Deductions

The Personal Representative will have the discretionary authority to claim any obligation, expense, cost or loss as a deduction against either estate tax or income tax, or to make any election provided by Texas law, the Internal Revenue Code, or other applicable law, and the Personal Representative's decision will be conclusive and binding upon all interested parties and shall be effective without obligation to make an equitable adjustment or apportionment between or among the beneficiaries of my estate or the estate of a deceased beneficiary.

Article V

Service of the Personal Representative

A Personal Representative may exercise, without court supervision (or the least supervision permitted by law), all powers and authority given to executors and trustees by the laws of the State of Texas and by this will.

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Section A. Possession, Assets, Records

My Personal Representative will have the authority to take possession of the property of my estate and the right to obtain and possess as custodian any and all documents and records relating to the ownership of property.

Section B. Retain Property in Form Received, Sale

My Personal Representative will have authority to retain, without liability, any and all property in the form in which it is received by the Personal Representative without regard to its productivity or the proportion that any one asset or class of assets may bear to the whole. My Personal Representative will not have liability nor responsibility for loss of income from or depreciation in the value of property which was retained in the form which the Personal Representative received them. My Personal Representative will have the authority to acquire, hold, and sell undivided interests in property, both real and personal, including undivided interests in business or investment property.

Section C. Investment Authority

My Personal Representative will have discretionary investment authority, and will not be liable for loss of income or depreciation on the value of an investment if, at the time the investment was made and under the facts and circumstances then existing, the investment was reasonable.

Section D. Power of Sale, Other Disposition

My Personal Representative will have the authority at any time and from time to time to sell, exchange, lease and/or otherwise dispose of legal and equitable title to any property upon such terms and conditions, and for such consideration, as my representative will consider reasonable. The execution of any document of conveyance, or lease by the Personal Representative will be sufficient to transfer complete title to the interest conveyed without the joinder, ratification, or consent of any person beneficially interested in the property, the estate, or trust. No purchaser, tenant, transferee or obligor will have any obligation whatsoever to see to the application of payments made to my Personal Representative. My Personal Representative will also have the authority to borrow or lend money, secured or unsecured, upon such terms and conditions and for such reasons as may be perceived as reasonable at the time the loan was made or obtained.

PURPORTED WILL

Section E. Partial, Final Distributions

My Personal Representative, in making or preparing to make a partial or final distribution from the estate or a trust, will prepare an accounting and may require, as a condition to payment, a written and acknowledged statement from each distributee that the accounting has been thoroughly examined and accepted as correct; a discharge of the Personal Representative; a release from any loss, liability, claim or question concerning the exercise of due care, skill, and prudence of the Personal Representative in the management, investment, retention, and distribution of property during the representative's term of service, except for any undisclosed error or omission having basis in fraud or bad faith; and an indemnity of the Personal Representative, to include the payment of attorneys' fees, from any asserted claim of any taxing agency, governmental authority, or other claimant. Any beneficiary having a question or potential claim may require an audit of the estate or trust as an expense of administration. Failure to require the audit prior to written acceptance of the Personal Representative's report, or the acceptance of payment, will operate as a final release and discharge of the Personal Representative except as to any error or omission having basis in fraud or bad faith.

Section F. Partition, Undivided Interests

My Personal Representative, in making or preparing to make a partial or final distribution from the estate or a trust, will have the authority (1) to partition any asset or class of assets and deliver divided and segregated interests to beneficiaries; (2) to sell any asset or class of assets (whether or not susceptible to partition in kind), and deliver to the beneficiaries a divided interest in the proceeds of sale and/or a divided or undivided interest in any note and security arrangement taken as part of the purchase price; and/or (3) to deliver undivided interests in an asset or class of assets of the beneficiaries subject to any indebtedness which may be secured by the property.

Section G. Accounting

My Personal Representative will render at least annually a statement of account showing receipts, disbursements, and distributions of both principal and income during the period of accounting and a statement of the invested and uninvested principal and the undistributed income at the time of such statement.

Section H. Protection of Beneficiaries

No beneficiary will have the power to anticipate, encumber or transfer any interest in my estate. No part of my estate or any trust will be liable for or charged with any debts,

contracts, liabilities or torts of a beneficiary or be subject to seizure or other process by any creditor of a beneficiary.

Section I. Consultants, Professional Assistance

My Personal Representative will have the authority to employ such consultants and professional help as needed to assist with the prudent administration of the estate and any trust. Any representative, other than a corporate fiduciary, may delegate, by an agency agreement or otherwise, to any state or national banking corporation with trust powers any one or more of the following administrative functions: custody and safekeeping of assets; record keeping and accounting, including accounting reports to beneficiaries; and/or investment authority. The expense of the agency, or other arrangement, will be paid as an expense of administration.

Section J. Compensation

Any person who serves as Personal Representative may elect to receive a reasonable compensation, reasonable compensation to be measured by the time required in the administration of the estate or a trust and the responsibility assumed in the discharge of the duties of office. The fee schedules of area trust departments prescribing fees for the same or similar services may be used to establish reasonable compensation. A corporate or banking trustee will be entitled to receive as its compensation such fees as are then prescribed by its published schedule of charges for estates or trusts of similar size and nature and additional compensation for extraordinary services performed by the corporate representative. My Personal Representative will be entitled to full reimbursement for expenses, costs, or other obligations incurred as the result of service, including attorney's, accountant's and other professional fees.

Section K. Documenting Succession

A person serving as Personal Representative may fail or cease to serve by reason of death, resignation or legal disability. Succession may be documented by an affidavit of fact prepared by the successor, filed of record in the probate or deed records of the county in which this will is admitted to probate. The public and all persons interested in or dealing with my Personal Representative may rely upon the evidence of succession provided by a certified copy of the recorded affidavit, and I bind my estate and those who are its beneficial owners to indemnify and hold harmless any person, firm, or agency from any loss sustained in relying upon the recorded affidavit.

Article VI

No-Contest Requirements

I vest in my Personal Representative the authority to construe this will and to resolve all matters pertaining to disputed issues or controverted claims. I do not want to burden my estate with the cost of a litigated proceeding to resolve questions of law or fact unless that proceeding is originated by my Personal Representative or with the Personal Representative's written permission. Any other person, agency or organization who originates (or who shall cause to be instituted) a judicial proceeding to construe or contest this will or to resolve any claim or controversy in the nature of reimbursement, constructive or resulting trust or other theory which, if assumed as true, would enlarge (or originate) the claimant's interest in my estate, will forfeit any amount to which that person, agency or organization is or may be entitled, and the interest of any such litigant or contestant will pass as if he or she or it had predeceased me.

These directions will apply even though the person, agency or organization shall be found by a court of law to have originated the judicial proceeding in good faith and with probable cause, and even though the proceeding may seek nothing more than to construe the application of this no-contest provision. However, the no-contest provision is to be limited in application as to any claim filed by ELMER H. BRUNSTING, to the exclusion thereof if necessary, to the extent it may deny my estate the benefit of the federal estate tax marital deduction.

THIS WILL is signed by me in the presence of two (2) witnesses, and signed by the witnesses in my presence on January 12, 2005.

Nelva E. Brunsting

NELVA E. BRUNSTING

The foregoing Will was, on the day and year written above, published and declared by NELVA E. BRUNSTING in our presence to be her Will. We, in her presence and at her request, and in the presence of each other, have attested the same and have signed our names as attesting witnesses.

We declare that at the time of our attestation of this Will, NELVA E. BRUNSTING was, according to our best knowledge and belief, of sound mind and memory and under no undue duress or constraint.

WITNESS	**Krysti Brull** 11511 Katy Freeway, Suite 520 Houston, Texas 77079
WITNESS	**April Driskell** 11511 Katy Freeway, Suite 520 Houston, Texas 77079

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PURPORTED WILL

SELF-PROVING AFFIDAVIT

04032012: 10(0 :G0050

STATE OF TEXAS
COUNTY OF HARRIS

BEFORE ME, the undersigned authority, on this day personally appeared NELVA E. BRUNSTING, Kristi Brun and April Prisvell, known to me to be the Testatrix and the witnesses, respectively, whose names are subscribed to the annexed or foregoing instrument in their respective capacities, and, all of said persons being by me duly sworn, the said NELVA E. BRUNSTING, Testatrix, declared to me and to the said witnesses in my presence that said instrument is her Last Will and Testament, and that she had willingly made and executed it as her free act and deed; and the said witnesses, each on his or her oath stated to me, in the presence and hearing of the said Testatrix that the said Testatrix had declared to them that the said instrument is her Last Will and Testament, and that she executed same as such and wanted each of them to sign it as a witness; and upon their oaths each witness stated further that they did sign the same as witnesses in the presence of the said Testatrix and at her request; that she was at that time eighteen years of age or over (or being under such age, was or had been lawfully married, or was then a member of the armed forces of the United States or of an auxiliary thereof or of the Maritime Service) and was of sound mind; and that each of said witnesses was then at least fourteen years of age.

Nelva E. Brunsting
NELVA E. BRUNSTING

Kristi Brun
WITNESS

April Prisvell
WITNESS

FILED
2012 APR -2 AM 8:36
Stan Stanart
COUNTY CLERK
HARRIS COUNTY, TEXAS

Subscribed and sworn to before me by the said NELVA E. BRUNSTING, the Testatrix, and by the said Kristi Brun and April Prisvell, witnesses, on January 12, 2005.

Charlotte Allman
Notary Public, State of Texas

CHARLOTTE ALLMAN
NOTARY PUBLIC, STATE OF TEXAS
MY COMMISSION EXPIRES
AUG. 1, 2006

PURPORTED WILL

PURPORTED WILL

412249

The Vacek Law Firm, PLLC
11511 Katy Freeway, Suite 520
Houston, Texas 77079
(281) 531-5800

04032012 hold G0051

TAB 20

NO. 412.249

ESTATE OF	§	IN PROBATE COURT
	§	
NELVA E. BRUNSTING,	§	NUMBER FOUR (4) OF
	§	
DECEASED	§	HARRIS COUNTY, TEXAS

ORDER ADMITTING WILL TO PROBATE AND AUTHORIZING LETTERS TESTAMENTARY

On this day came on to be heard the Application for Probate of Will and For Issuance of Letters Testamentary filed by CARL HENRY BRUNSTING ("Applicant") in the Estate of Nelva E. Brunsting, Deceased ("Decedent").

The Court, having heard the evidence and having reviewed the Will, and other documents filed herein, finds that the allegations contained in the Application are true; that notice and citation have been given in the manner and for the length of time required by law; that Decedent is dead and that four (4) years have not elapsed since the date of Decedent's death; that this Court has jurisdiction and venue of the Decedent's estate; that Decedent left a Will dated January 12, 2005, executed with the formalities and solemnities and under the circumstances required by law to make a valid Will; that on such date Decedent had attained the age of eighteen (18) years and was of sound mind; that such Will was not revoked by Decedent; that no objection to or contest of the probate of such Will has been filed; that all of the necessary proof required for the probate of such Will has been made; that in such Will, Decedent named Elmer H. Brunsting to serve as Executor, but he predeceased Decedent in 2009; that in such Will, Decedent named CARL HENRY BRUNSTING to serve as alternate or successor Independent Executor, without bond; that CARL HENRY BRUNSTING is duly qualified and not disqualified by law to act as such and to receive Letters Testamentary; that a necessity exists for the administration of this estate; that Decedent's Will did not name either the State of Texas, a governmental agency of the State of Texas, or a charitable organization as a

devisee; and that no interested person has applied for the appointment of appraisers and none are deemed necessary by the Court.

It is therefore ORDERED that such Will is admitted to probate, and the Clerk of this Court is ORDERED to record the Will, together with the Application, in the Minutes of this Court.

It is further ORDERED that no bond or other security is required and that upon the taking and filing of the Oath required by law, Letters Testamentary shall be issued to CARL HENRY BRUNSTING, who is appointed as Independent Executor of Decedent's Will and Estate, and no other action shall be necessary in this Court other than the filing of an Inventory, Appraisement, and List of Claims or an Affidavit in Lieu of Inventory, Appraisement and List of Claims and Probate Code Section 128A Notice, as required by law.

SIGNED this 28 day of August, 2012.

Christine Butts
JUDGE PRESIDING

APPROVED:

BAYLESS & STOKES

By: Dalia B. Stokes

Bobbie G. Bayless
State Bar No. 01940600
Dalia B. Stokes
State Bar No. 19267900
2931 Ferndale Street
Houston, Texas 77098
Telephone: (713) 522-2224
Telecopier: (713) 522-2218

Attorneys for Applicant

FILED
2012 AUG 28 AM 10:09
Stan Stanart
COUNTY CLERK
HARRIS COUNTY, TEXAS

TAB 53

412249-403

3/1/2019 12:07:49 PM
Marilyn Burgess - District Clerk
Harris County
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Nelva Brunsting Decd.

NO. 2013-05455

PROBATE COURT 4

2J

CARL HENRY BRUNSTING, INDEPENDENT EXECUTOR OF THE ESTATES OF ELMER H. BRUNSTING AND NELVA E. BRUNSTING	§	IN THE DISTRICT COURT OF
vs.	§	HARRIS COUNTY, T E X A S
CANDACE L. KUNZ-FREED AND VACEK & FREED, PLLC f/k/a THE VACEK LAW FIRM, PLLC	§	164th JUDICIAL DISTRICT

ORDER TRANSFERRING DISTRICT COURT CASE

On February 14, 2019, the Order on Motion to Transfer District Court Proceedings to Probate Court No. 4 was signed in Cause No. 412,249-401, styled *In the Estate of Nelva E. Brunsting, Deceased*, in Probate Court Number Four of Harris County, Texas. It is therefore

ORDERED that Cause No. 2013-05455, styled *Carl Henry Brunsting, Independent Executor of the Estates of Elmer H. Brunsting and Nelva E. Brunsting v. Candace L. Kunz-Freed and Vacek & Freed, PLLC f/k/a The Vacek Law Firm, PLLC*, is transferred to Harris County Probate Court Four and assigned Cause No. 412.249-403.

Signed this _____ day of _____, 2019.

Signed: 4/4/2019

JUDGE PRESIDING

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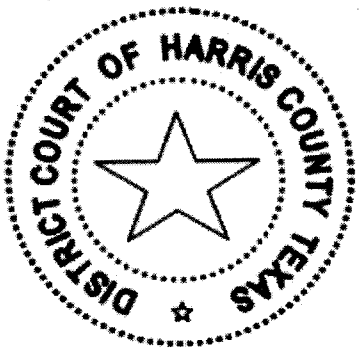
COUNTY CLERK
HARRIS COUNTY, TEXAS



I, Marilyn Burgess, District Clerk of Harris County, Texas certify that this is a true and correct copy of the original record filed and or recorded in my office, electronically or hard copy, as it appears on this date.
Witness my official hand and seal of office this April 8, 2019

Certified Document Number: 84655908

Marilyn Burgess, DISTRICT CLERK
HARRIS COUNTY, TEXAS

In accordance with Texas Government Code 406.013 electronically transmitted authenticated documents are valid. If there is a question regarding the validity of this document and or seal please e-mail support@hcdistrictclerk.com

No. 14-14-00126-CV
Court of Appeals of Texas, Houston (14th Dist.).

In re Hannah

431 S.W.3d 801 (Tex. App. 2014)
Decided May 13, 2014

No. 14–14–00126–CV.

2014-05-13

In re Julie HANNAH, Relator.

Bobbie G. Bayless, Houston, for Relator. Odean L. Volker, Houston, for Real Party in Interest.

PER CURIAM.

804 *804

Bobbie G. Bayless, Houston, for Relator. Odean L. Volker, Houston, for Real Party in Interest.
Panel consists of Justices McCALLY, BUSBY, and DONOVAN.

OPINION

PER CURIAM.

On February 11, 2014, relator Julie Hannah filed a petition for writ of mandamus in this Court. *See*Tex. Gov't Code § 22.221; *see also* Tex.R.App. P. 52. In the petition, relator asks this Court to compel the Honorable Kyle Carter, presiding judge of the 125th District Court of Harris County, to vacate two companion orders transferring venue of the underlying litigation to the County Court at Law of Aransas County. We granted a stay of the litigation on February 20, 2014 to allow for further consideration. Having considered relator's petition and the real parties' response, we conditionally grant relator's petition for writ of mandamus.

I. Background

Relator formed a personal relationship with an individual named David Burnell Hatcher (hereinafter, the "decedent"). The decedent owned a home in Aransas County, and relator claims she moved into that home to care for him. Relator and decedent apparently lived together at the decedent's home for 12 years.

Relator claims that the decedent had executed wills in 2009 and 2010 bequeathing to relator upon the decedent's death property including $200,000 in cash and a choice of vehicles. In 2012, the decedent's health apparently began to deteriorate. Also in 2012, the decedent executed a new will that did not include any bequests to relator. Instead, the vehicle identified in the decedent's earlier wills was bequeathed to Marjorie Cordes, a family friend who performed occasional work for the decedent, and the $200,000 in cash was divided between the decedent's sons, David Hatcher and Robert Hatcher.

805 Following the decedent's death in January 2013, David filed an application with *805 the County Court at Law of Aransas County to probate the decedent's 2012 will. On February 5, 2013, the Aransas County court signed an order admitting the decedent's will to probate as a muniment of title. Relator did not contest the probate of the decedent's will.

On August 15, 2013, relator filed suit against David, Robert, and Marjorie in Harris County district court for tortious interference with inheritance, slander, and conspiracy. Relator claims that during the time the decedent was in failing health in 2012, the defendants engaged in a concerted campaign to interfere with the bequest to relator, including making false statements to the decedent about relator. Specifically, relator alleges that "[t]hrough duress, false statements, manipulation, and outright deception, Defendants turned Decedent against Plaintiff and caused Decedent to withdraw the bequest to Plaintiff which would have otherwise passed to Plaintiff by inheritance, thus preventing Plaintiff from receiving what she was to have received from Decedent's estate." Relator likewise alleges that "Plaintiff's bequest had been excluded only because Decedent had been mislead and manipulated into signing a new and changed Will." Relator is seeking monetary damages between $200,000 and $1 million.

David is the only party to the underlying litigation that is a resident of Harris County. Relator is a resident of Travis County, Marjorie is a resident of Aransas County, and Robert is a resident of Caldwell County. In her original petition, relator claimed venue was proper in Harris County pursuant to the mandatory venue provision applicable to slander claims in Section 15.017 of the Texas Civil Practice and Remedies Code, citing the fact that David is a resident of Harris County. Relator also relied on the general venue provision in Section 15.002 and the provision concerning multiple defendants in Section 15.005.

In October 2013, Marjorie filed a plea in abatement, motion to stay, and motion to transfer venue to Aransas County, arguing that relator's lawsuit is a probate proceeding over which the County Court at Law of Aransas County has continuing jurisdiction and proper venue. David then filed a plea to the jurisdiction and motion to transfer venue to Aransas County, raising similar arguments as Marjorie.[1] On January 14, 2014, the trial court signed two companion orders, one granting Marjorie's plea in abatement and motion to transfer venue, and the other granting David's motion to transfer. The trial court accordingly transferred venue of the underlying litigation to the County Court at Law of Aransas County.

[1] Robert filed a special appearance and plea to the jurisdiction, but did not move to transfer venue. Robert is not a party to this original proceeding.

Relator filed a petition for writ of mandamus pursuant to Section 15.0642 of the Texas Civil Practice and Remedies Code, presenting as her sole issue whether the trial court violated the mandatory venue provision in Section 15.017 of the Civil Practice and Remedies Code by transferring relator's suit to the County Court at Law of Aransas County. In support of her petition, relator presents several arguments. For example, relator argues that the real parties did not follow the proper procedures under Texas Rules of Civil Procedure 86 and 87 for challenging venue, because they did not provide a basis for a claim of improper venue or explicitly deny relator's venue facts pled in her petition. Relator also challenges the real parties' assertion that relator's lawsuit
806 is a probate proceeding under applicable statute. Relator further argues that her suit is not *806 "related to" a probate proceeding, and thus not subject to the statutory provisions applicable to such related matters.

In their response, the real parties argue almost exclusively that relator's suit qualifies as a probate proceeding, and therefore is subject to the jurisdictional and venue requirements applicable to such matters. The real parties downplay any assertion that relator's suit is merely "related to" a probate proceeding, although they state that

the suit easily would qualify as such. The real parties further argue that the district court correctly transferred venue to Aransas County because relator's suit is a probate proceeding, and regardless, their venue motions complied with Texas Rules of Civil Procedure 86 and 87.

II. The Mandamus Standard

Generally, mandamus relief is appropriate only when the trial court clearly abused its discretion and the relator has no adequate remedy by appeal. *In re Reece,* 341 S.W.3d 360, 364 (Tex.2011) (orig. proceeding). A trial court abuses its discretion if it: (1) reaches a decision so arbitrary and unreasonable as to constitute a clear and prejudicial error of law; (2) clearly fails to analyze or apply the law correctly; or (3) acts without reference to any guiding rules or principles. *In re Park Mem'l Condo. Ass'n, Inc.,* 322 S.W.3d 447, 449–50 (Tex.App.-Houston [14th Dist.] 2010, orig. proceeding). An appellate remedy is adequate when any benefits to mandamus review are outweighed by the detriments. *In re Prudential Ins. Co. of Am.,* 148 S.W.3d 124, 136 (Tex.2004) (orig. proceeding). As the party seeking relief, the relator bears the burden of demonstrating entitlement to mandamus relief. *See In re Ford Motor Co.,* 165 S.W.3d 315, 317 (Tex.2005) (per curiam) (orig. proceeding); *Walker v. Packer,* 827 S.W.2d 833, 837 (Tex.1992) (orig. proceeding).

"[V]enue determinations generally are incidental trial rulings that are correctable on appeal." *Bridgestone/Firestone, Inc. v. Thirteenth Court of Appeals,* 929 S.W.2d 440, 441 (Tex.1996) (per curiam) (orig. proceeding). However, "Section 15.0642 of the Texas Civil Practice and Remedies Code ... provides that a party may apply for a writ of mandamus with an appellate court to enforce mandatory venue provisions." *In re San Jacinto Cnty.,* 416 S.W.3d 639, 641 (Tex.App.-Houston [14th Dist.] 2013, orig. proceeding) (per curiam). "The focus of a mandamus proceeding under section 15.0642 is whether the trial court abused its discretion." *Id.* "A party seeking to enforce a mandatory venue provision is not required to prove the lack of an adequate appellate remedy, but is required only to show that the trial court abused its discretion." *Id.*

III. Analysis

A. General Rules Concerning Venue

"Venue concerns the geographic location within the forum where the case may be tried." *Cantu v. Howard S. Grossman, P.A.,* 251 S.W.3d 731, 734 (Tex.App.-Houston [14th Dist.] 2008, pet. denied). "Generally, chapter 15 of the Texas Civil Practice and Remedies Code governs venue of actions." *In re Tex. Dep't of Transp.,* 218 S.W.3d 74, 76 (Tex.2007) (per curiam) (orig. proceeding). "If a mandatory venue provision in Chapter 15 applies, suit must be brought in the county required by the mandatory venue provision." *In re Sosa,* 370 S.W.3d 79, 81 (Tex.App.-Houston [14th Dist.] 2012, orig. proceeding); *see also*Tex. Civ. Prac. & Rem.Code § 15.004. However, "[i]f a suit is governed by a mandatory venue provision outside of Chapter 15, that suit must be
807 brought in the county required by that *807 mandatory venue provision." *Sosa,* 370 S.W.3d at 81; *see also*Tex. Civ. Prac. & Rem.Code § 15.016.

"Venue may be proper in more than one county under the venue rules." *Hiles v. Arnie & Co.,* 402 S.W.3d 820, 825 (Tex.App.-Houston [14th Dist.] 2013, pet. denied). "In general, plaintiffs are allowed to choose venue first, and when the county in which the plaintiff files suit is at least a permissive venue and no mandatory provision applies, the plaintiff's venue choice should not be disturbed." *Id.* Also, if a mandatory venue provision permits suit in one of several counties, the plaintiff may choose from among the permissible counties. *Sosa,* 370 S.W.3d at 81 n. 1.

Although the plaintiff is entitled to the first choice of venue, a defendant may challenge the plaintiff's venue selection, "and a court must 'transfer an action to another county of proper venue if ... the county in which the action is pending is not a proper county.' " *In re Team Rocket, L.P.,* 256 S.W.3d 257, 259 (Tex.2008) (orig. proceeding) (quoting Tex. Civ. Prac. & Rem.Code § 15.063(1)). Where a defendant objects to the plaintiff's venue choice through a motion to change venue, "the plaintiff must present prima facie proof that venue is proper" in the county of suit. *Moveforfree.com, Inc. v. David Hetrick, Inc.,* 288 S.W.3d 539, 541 (Tex.App.-Houston [14th Dist.] 2009, no pet.). "The trial court is to evaluate venue based on the pleadings and affidavits." *Id.; see also*Tex. Civ. Prac. & Rem.Code § 15.064(a). Properly pleaded venue facts "shall be taken as true unless specifically denied by the adverse party." Tex.R. Civ. P. 87(3)(a). "If the plaintiff fails to establish proper venue, the trial court must transfer venue to the county specified in the defendant's motion to transfer, provided that the defendant has requested transfer to another county of proper venue," an issue for which "the defendant has the burden to provide prima facie proof." *Cantu,* 251 S.W.3d at 735. However, if the plaintiff does provide prima facie proof that the chosen venue is proper, the plaintiff's choice controls, unless a mandatory venue provision applies or the defendant brings forth conclusive evidence that destroys the plaintiff's prima facie proof. *Moveforfree.com,* 288 S.W.3d at 541.

B. Application of the Texas Estates Code to Relator's Suit

The central basis for the real parties' respective motions to transfer the underlying litigation is their assertion that relator's suit is a "probate proceeding" and, consequently, must be heard in the County Court at Law of Aransas County by application of the jurisdiction and venue provisions of the Texas Estates Code.[2] As relator relies on a mandatory venue provision within Chapter 15 of the Texas Civil Practice and Remedies Code in support of venue in Harris County, we begin our analysis with the Texas Estates Code because, in the event any mandatory jurisdiction or venue provision in the Estates Code applies to the underlying suit, such provision would control. *See Sosa,* 370 S.W.3d at 81; Tex. Civ. Prac. & Rem.Code § 15.016.

[2] As of January 1, 2014, the former Texas Probate Code has been repealed and replaced with the Texas Estates Code. *See In re Estate of Aguilar,* No. 04–13–00038–CV, 2014 WL 667516, *1 n. 1 (Tex.App.-San Antonio Feb. 19, 2014, pet. filed) (mem. op.); *In re Estate of Dixon,* No. 14–12–01052–CV, 2014 WL 261020, *1 n. 1 (Tex.App.-Houston [14th Dist.] Jan. 23, 2014, pet. filed). All citations herein will be to the Texas Estates Code.

For relator's suit to be subject to the jurisdiction and venue provisions of the Texas Estates Code, it must
808 qualify either as a "probate proceeding" or a "matter related to a probate proceeding" as defined*808 by the Estates Code. *See, e.g.,* Tex. Est.Code §§ 32.001(a), 33.002, 33.052, 33.101; *see also* Tex. Est.Code § 21.006 (stating procedure in Title 2 of the Estates Code "governs all probate proceedings"). Thus, we turn to the definitional provisions of the Estates Code.

Section 31.001 of the Texas Estates Code provides:

The term "probate proceeding," as used in this code, includes:

(1) the probate of a will, with or without administration of the estate;

(2) the issuance of letters testamentary and of administration;

(3) an heirship determination or small estate affidavit, community property administration, and homestead and family allowances;

(4) an application, petition, motion, or action regarding the probate of a will or an estate administration, including a claim for money owed by the decedent;

(5) a claim arising from an estate administration and any action brought on the claim;

(6) the settling of a personal representative's account of an estate and other matter related to the settlement, partition, or distribution of an estate; and

(7) a will construction suit.
See also Tex. Est.Code § 22.029 ("The terms 'probate matter,' 'probate proceedings,' 'proceedings in probate,' and 'proceedings for probate' are synonymous and include a matter or proceeding relating to a decedent's estate.").

The real parties argue that relator's suit qualifies as a probate proceeding because it is related to the decedent's estate, *see* Tex. Est.Code § 22.029, it is a "petition ... or action regarding the probate of a will," Tex. Est.Code § 31.001(4), it "a claim for money owed by the decedent," *id.,* and it is a "matter related to the ... distribution of an estate," Tex. Est.Code § 31.001(6). We disagree. Relator's suit is a claim for money damages against Marjorie, David, and Robert based on the defendants' alleged conduct in slandering relator and tortiously interfering with the bequests to relator in the decedent's prior wills. Relator does not contest the validity or interpretation of the decedent's 2012 will, claim herself as a rightful heir of the decedent, assert a claim for money owed by the decedent or the decedent's estate, or challenge the distribution of the decedent's property pursuant to the terms of his will. In sum, none of the specific actions listed in Section 31.001 of the Estates Code matches the claims made by relator in her suit.

Although the gravamen of relator's suit is that relator was disinherited as a result of the defendants' alleged actions, that fact alone is insufficient to make her suit a probate proceeding. The decedent's will was admitted to probate as a muniment of title in proceedings in the County Court at Law of Aransas County. Absent a bill of review, those proceedings are concluded. The prosecution of relator's suit would not attack, impact, or otherwise alter the probate judgment of the Aransas County court. In other words, the decedent's testamentary wishes have been determined and fulfilled through the probate proceedings in Aransas County. Whatever potential liability the defendants may face subsequently based on their alleged individual actions vis-à-vis relator is a distinct matter. Resolution of that matter will be determined, not by application of probate law, but rather by the law pertaining to the specific tort claims. Furthermore, any judgment against the defendants would
809 be satisfied not from the decedent's estate, but from the individual assets of the defendants.*809 The only connection between relator's suit and the decedent's estate is the measure of damages—i.e., what, if anything, relator would have received through probate proceedings were it not for the defendants' alleged actions.

The only case the real parties cite in support of their assertion that relator's suit is a probate proceeding is *McMennamy v. McMennamy,* No. 05–06–01566–CV, 2007 WL 2938264 (Tex.App.-Dallas Oct. 10, 2007, pet. denied) (mem. op.). In that case, the decedent bequeathed real property to her nephew and the will was admitted to probate as a muniment of title. *McMennamy,* 2007 WL 2938264 at *1. After the probate judgment was final, another individual filed suit in district court claiming ownership of the same real property. In affirming the dismissal of the suit for lack of jurisdiction, the court of appeals concluded the claims were probate matters, reasoning: "[I]n her petition, appellant challenged the construction and validity of [the decedent's] will and the contents and administration of her estate. She did not, as she suggests in her brief, merely attempt to settle a title dispute." *Id.* at *2.

McMennamy, however, provides no support to the real parties' position here. As an initial matter, the court did not even cite, let alone provide any analysis of, the statutory provision defining a probate proceeding. *See id.* at *1–3. Next, the plaintiff in that case was directly claiming ownership of real property bequeathed in the will, in contrast to relator's claim here for damages against a devisee for having been disinherited as a result of the devisee's allegedly tortious conduct. *See id.* at *1. And finally, the nature of the plaintiff's claims in *McMennamy* placed them within the scope of the probate statutes. *Id.* at *2 (noting plaintiff's suit sought "construction of the will"); see also Tex. Est.Code § 31.001(7) (including within the scope of probate proceedings "a will construction suit"). For these reasons, *McMennamy* does not alter our conclusion that relator's suit is not a "probate proceeding" under the plain language of the Estates Code.

The Estates Code includes a distinct definition of "a matter related to a probate proceeding," *see* Tex. Est.Code § 31.002, and has jurisdiction and venue provisions specific to such matters, *see, e.g.,* Tex. Est.Code § 32.001(a), 33.002. Thus, the Estates Code still may be relevant to the question raised in this original proceeding if relator's suit, although not a probate proceeding, qualifies as a matter related to a probate proceeding. [3] The real parties downplay any reliance on this aspect of the Estates Code, but do make a passing assertion that relator's suit "easily" qualifies as a matter related to a probate proceeding. We again disagree with the real parties' position.

[3] It is not clear that the jurisdiction and venue provisions of the Estates Code would mandate that a matter relating to a probate proceeding be heard in the County Court at Law of Aransas County. *See* Tex. Est.Code §§ 32.001(a) ("All probate proceedings *must be filed and heard in* a court exercising original probate jurisdiction. The court exercising original probate jurisdiction *also has* jurisdiction of all matters related to the probate proceeding as specified in Section 31.002 for that type of court." (emphasis added)), 33.002 (providing that with one exception not relevant here, "venue for any cause of action related to a probate proceeding pending in a statutory probate court *is proper* in the statutory probate court in which the decedent's estate is pending" (emphasis added)). Because we conclude relator's suit is not a matter related to a probate proceeding, however, we need not address whether those provisions are mandatory or permissive.

"A matter related to a probate proceeding" is defined based on whether a county has a statutory probate court
810 or *810 county court at law exercising probate jurisdiction. Considering the definition applicable to Aransas County, the following actions qualify as a matter related to a probate proceeding:

• an action against a personal representative or former personal representative arising out of the representative's performance of the duties of a personal representative;

• an action against a surety of a personal representative or former personal representative;

• a claim brought by a personal representative on behalf of an estate;

• an action brought against a personal representative in the representative's capacity as personal representative;

• an action for trial of title to real property that is estate property, including the enforcement of a lien against the property;

• an action for trial of the right of property that is estate property;

• the interpretation and administration of a testamentary trust if the will creating the trust has been admitted to probate in the court; and

• the interpretation and administration of an inter vivos trust created by a decedent whose will has be admitted to probate in the court.
Tex. Est.Code § 31.002(a), (b).

Of the actions listed in Section 31.002, the only one identified by the real parties as being applicable to relator's lawsuit is the provision concerning "an action for trial of the right of property that is estate property." Tex. Est.Code § 31.002(a)(6). The real parties' assert that relator's suit seeks $200,000 and a vehicle that relator claims should have been received from the decedent's estate, and thus is an action about relator's right to decedent's estate property. This characterization of relator's suit is incorrect. First, relator's original petition does not indicate she is seeking title to any vehicle. Her suit is for monetary damages exclusively. Second, relator is not seeking title to "property that is estate property." As noted above, she is seeking damages that, if awarded, would be satisfied from the defendants' individual assets—not from the decedent's estate. *See* Tex. Est.Code §§ 22.012 (defining "estate" as being "a decedent's property"); 101.001(a)(1) (providing generally that estate property vests immediately in devisees if there is a valid will); 256.001 (providing wills generally not effective until admitted to probate); 257.102(b) (providing person entitled to property under will admitted to probate as muniment of title may treat the property as if title was vested in that person's name). Moreover, none of the other provisions in Section 31.002 apply to relator's suit.

For these reasons, relator's suit is not a matter related to a probate proceeding. Having also concluded that the suit is not a probate proceeding, we hold that jurisdiction and venue are not mandatory in the County Court at Law of Aransas County under the Estates Code.

C. Venue under the Civil Practice and Remedies Code

Because relator's lawsuit does not qualify as either a probate proceeding or a matter related to a probate proceeding under the Estates Code, we turn our attention back to Chapter 15 of the Civil Practice and Remedies Code. Among the claims asserted by relator against the defendants is a claim for slander. "A suit for damages for ... slander ... shall be brought and can only be maintained in the county in which the plaintiff resided at the time of the accrual of the cause of action, ... or in the county of the residence of *811 defendants, or any of them, ... at the election of the plaintiff." Tex. Civ. Prac. & Rem.Code § 15.017. Under this provision, relator's claim for slander could be brought and maintained only in Aransas, Caldwell, Harris, or Travis Counties. From these limited options, relator elected Harris County—David's county of residence—which is relator's choice to make. *Id.; see also Sosa,* 370 S.W.3d at 81 n. 1.

Moreover, because relator's slander claim could be brought only in a select number of venues and she elected Harris County from that list, relator's venue election controls over the remaining claims and other defendants. *See*Tex. Civ. Prac. & Rem.Code § 15.004 ("In a suit in which a plaintiff properly joins two or more claims or causes of action arising from the same transaction, occurrence, or series of transactions or occurrences, and one of the claims or causes of action is governed by the mandatory venue provisions of Subchapter B, the suit shall be brought in the county required by the mandatory venue provision."); *see also*Tex. Civ. Prac. & Rem.Code § 15.005 ("In a suit in which the plaintiff has established proper venue against a defendant, the court also has venue of all the defendants in all claims or actions arising out of the same transaction, occurrence, or series of transactions or occurrences.").

A trial court "is to evaluate venue based on the pleadings and affidavits," *Moveforfree.com,* 288 S.W.3d at 541, and properly pleaded venue facts "shall be taken as true unless specifically denied by the adverse party," Tex.R. Civ. P. 87(3)(a). In her original petition, relator alleged the respective county of residence of each defendant, and explicitly elected venue in Harris County as David's county of residence. In their pleadings, none of the

defendants specifically denied that David is a resident of Harris County. The defendants' general denial of relator's allegations is insufficient to serve as a specific denial of her pleaded venue facts. *See Maranatha Temple, Inc. v. Enter. Prods. Co.,* 833 S.W.2d 736, 740 (Tex.App.-Houston [1st Dist.] 1992, writ denied). Therefore, based on relator's pleading of a claim for slander, as well as her allegation that David resides in Harris County, relator has provided prima facie proof that venue of the underlying litigation is both proper and mandatory in Harris County.

Under these circumstances, transfer of the litigation would be appropriate only if the real parties demonstrated that an overriding mandatory venue provision applies or brought forward conclusive evidence that destroys the plaintiff's prima facie proof. *See Moveforfree.com,* 288 S.W.3d at 541. The real parties, however, brought forth no such conclusive evidence, and their assertion of an overriding mandatory venue provision was grounded in the application of the jurisdiction and venue provisions of the Texas Estates Code, which we have held are not applicable. Accordingly, we hold that the trial court abused its discretion by disregarding relator's election of venue in Harris County pursuant to the mandatory venue provision in Section 15.017 of the Texas Civil Practice and Remedies Code.

IV. Conclusion

Relator's lawsuit is not a probate proceeding. Therefore, the mandatory venue provision in Section 15.017 of the Texas Civil Practice and Remedies Code controls. Under that provision, relator elected Harris County among the limited venue options based on David's residence in Harris County. The trial court had no legal basis upon which to order the transfer of the underlying litigation to Aransas County. Thus, the trial court abused its
812 discretion in ordering the transfer of relator's suit.*812

Accordingly, we conditionally grant relator's petition for writ of mandamus, and direct the trial court to vacate its orders dated January 14, 2014 transferring venue of the underlying litigation to the County Court at Law of Aransas County. We are confident that respondent will act in accordance with this opinion. The writ will issue only if the trial court fails to do so.

We also lift our stay granted on February 20, 2014.

NO. 14-16-00258-CV
Court of Appeals of Texas, Houston (14th Dist.).

Lee v. Ronald E. Lee Jr., Katherine Lee Stacy, & Legacy Trust Co.

528 S.W.3d 201 (Tex. App. 2017)
Decided Aug 1, 2017

NO. 14-16-00258-CV.

08-01-2017

Susan Camille LEE, Appellant v. Ronald E. LEE Jr., Katherine Lee Stacy, and Legacy Trust Company, Receiver, Appellees

Keri Brown, John William Porter, W. Cameron McCulloch, Adrianne Graves, Eric English, Neil Kenton Alexander Jr., Jonna Summers, Houston, for Appellees. Daniel J. Sheehan, John M. Phalen JR., Dallas, for Appellant.

Tracy Christopher, Justice

Keri Brown, John William Porter, W. Cameron McCulloch, Adrianne Graves, Eric English, Neil Kenton Alexander Jr., Jonna Summers, Houston, for Appellees.

Daniel J. Sheehan, John M. Phalen JR., Dallas, for Appellant.

Panel consists of Chief Justice Frost and Justices Christopher and Donovan.

OPINION

Tracy Christopher, Justice

In this dispute between siblings concerning the administration of their mother's testamentary trust, a sister appeals trial court rulings (1) removing her as trustee, (2) appointing a receiver, (3) approving the receiver's application for approval of a settlement agreement with the sister's brother, and (4) denying the sister's motion to continue the hearing on the receiver's application. We conclude that the statutory probate court's orders are not void for lack of jurisdiction, and that the court did not abuse its discretion in approving the settlement agreement or in denying the motion for a continuance. We accordingly affirm the trial court's judgment.

I. BACKGROUND

Katherine Pillot Lee Barnhart died in 1975, and under the terms of her will, most of her estate passed into a testamentary trust ("the Trust"). Barnhart's children Ronald E. Lee Jr. ("Ronald") and Susan Camille Lee ("Susan") are beneficiaries of the Trust, as are Ronald's daughter Katherine Lee Stacy ("Stacy") and Susan's daughter Susan Gibson ("Gibson"). The trustee is required to make quarterly distributions of one-sixth of the Trust's current net income to Ronald and one-sixth to Susan. If this amount, together with funds available from other sources, is insufficient to provide for either Ronald's or Susan's health, maintenance, and support, then the Trust must distribute additional amounts to that person from the remaining two-thirds of the Trust's current net

income. The remainder of the Trust's current net income must be distributed at least semi-annually to Stacy and Gibson. On the death of Ronald and Susan, the remainder of the Trust estate is to be transferred to new,
206 separate trusts for Stacy and Gibson.*206 **A. The First Lawsuit: Susan's Suit Against Ronald**

Thirteen years after Barnhart's death, Ronald, the executor of his mother's estate and original trustee of the Trust, had made no distributions and had not responded to Susan's repeated demands for an accounting. Susan, individually and on behalf of the Trust, sued Ronald in a statutory probate court for breach of fiduciary duty and asked the trial court to remove him as executor and as trustee.

The jury found that Ronald breached his fiduciary duties to the Trust by expending large amounts on a later-abandoned real estate development project, unreasonable office expenses, and excessive executor's fees. The trial court reduced the amount of the damages assessed by the jury for excessive fees and declined to remove Ronald as executor or trustee. The parties agreed that each side's reasonable and necessary attorney's fees were $1.5 million for attorney's fees through trial, an additional $300,000 in the event of an appeal to an intermediate appellate court, and a further $100,000 in the event of an appeal to the Texas Supreme Court. The trial court ordered the Trust to pay for each side's attorney's fees.

Susan appealed. *See Lee v. Lee* , 47 S.W.3d 767 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (corr. op. on reh'g) (" *Lee I* "). We concluded that the trial court erred in reducing the damages assessed by the jury; in failing to remove Ronald as trustee; and in refusing to require Ronald to reimburse the Trust for Susan's attorney's fees. *See id.* at 801. Although Ronald had paid the judgment rendered by the trial court, the decision in *Lee I* left Ronald owing the Trust—of which Susan was now the trustee—more than $1.5 million as reimbursement for his excessive executor's fees and $1.9 million as reimbursement for Susan's attorney's fees. The parties agree that as of February 28, 2002, pre-and post-judgment interest brought this amount to $6,128,326.99.

B. This Lawsuit: Ronald's Suit Against Susan

Fourteen years after Susan became trustee, she too had failed to make any distributions to Ronald or his daughter; however, there is evidence that Susan made distributions to herself and her own daughter. In the summer of 2014, Ronald sued and requested a Trust accounting so he could calculate the extent to which his outstanding debt to the Trust was offset by the Trust's withholding of the required distributions to him. Susan refused to respond. Six months later, Ronald received notice of the impending foreclosure of one of the Trust's real properties for nonpayment of taxes. Susan allowed a default judgment to be taken against the Trust, but redeemed the property before it was sold.

Ronald sued Susan, individually and in her capacity as trustee, in the same statutory probate court in which the earlier case was tried. He asserted claims for breach of fiduciary duty, violations of the Trust's terms and of the Texas Trust Code, and asked for an accounting, Susan's removal as trustee, and attorney's fees. Stacy intervened in the action, seeking the same relief on the same grounds.

After finding that Susan had breached the terms of the Trust and of the Texas Trust Code, and that the Trust was at risk of further imminent harm from Susan's failure to pay taxes on Trust real property, the trial court removed Susan as trustee on June 18, 2015 and appointed Legacy Trust Company, N.A. ("Legacy") as the Trust's receiver. The trial court directed Legacy to, among other things, pay Ronald's attorney's fees; "[c]ollect,
207 compromise, or settle all debts owed to the *207 Trust"; "[p]rosecute, defend, and/or settle all legal proceedings ... brought by or against the Trustee of the Trust"; and "[i]nstitute such legal proceedings as the Receiver deems necessary or advisable to obtain constructive or actual possession of assets of the Trust or to recover damages

suffered by the Trust." The trial court also granted the receiver "discretion not to pursue litigation against [Susan] that is undertaken by beneficiaries of the Trust for the benefit of the Trust." The trial court ordered Susan to provide to Legacy, within seven days, copies of all records in her possession, custody, and control sufficient to identify (1) all real and personal property owned by the Trust, or by Susan as trustee, at any time while Susan was trustee; and (2) all of the Trust's distributions and expenditures during that time. Susan did none of these things.

After Susan was removed as trustee, Ronald paid Legacy $8 million toward his debt to the Trust and asked to negotiate a settlement. Legacy informed Susan's attorney Thomas Zabel that it was negotiating a settlement with Ronald. Legacy also attempted to contact Susan directly by phone, email, letter, and finally by having a Legacy employee fly with Zabel to Florida, where Susan resides, but Susan refused to respond.

After months of negotiation, Legacy and Ronald reached a settlement agreement and Legacy filed an application for the trial court's approval. Susan filed a response and objections to the application. A week before the hearing on the application, Susan moved for a continuance of at least ninety days to conduct discovery. At the hearing on both matters, the trial court stated that it would hear the description of the settlement first, and that Susan could move for a continuance afterward if she still believed discovery was needed.

Legacy's president and chief executive officer Edward "Ned" Naumes testified in support of the settlement agreement, as did Ronald. At the close of the evidence on the application for approval of the settlement, the parties presented their arguments on Susan's motion for a continuance to perform discovery. The trial court denied the motion, approved the settlement, and informed counsel that the court would hold another hearing on the application in two weeks if Susan moved for a rehearing. Susan did not do so.

Two days after Susan filed her notice of appeal, Legacy and Ronald closed on the settlement agreement. In accordance with the agreement's terms, Ronald deeded his interest in certain property to Legacy, in its capacity as the Trust's receiver. Ronald also executed and delivered a promissory note and other agreements and made the first payment toward the cash portion of the settlement. In exchange for this and other consideration, Legacy sold to Ronald the Trust's judgment against him.

II. ISSUES PRESENTED

In her first issue, Susan asserts that the statutory probate court could exercise jurisdiction over the claims and requests raised in this case only if there were a pending probate proceeding. She asserts that there was no pending probate proceeding when the trial court removed her as trustee and appointed a receiver in June 2015, or when the trial court approved Legacy's settlement agreement with Ronald in March 2016. She therefore reasons that these rulings are void for want of jurisdiction. In her second issue, Susan contends that if the trial court had jurisdiction, then the trial court abused its discretion in approving the settlement agreement. She argues in her third issue that the trial court abused its discretion in denying her motion to continue the hearing
208 *208 on Legacy's application for approval of the settlement agreement.

III. THIS COURT'S JURISDICTION

A judgment or order by a court without the power or jurisdiction to render it is void. *See Urbish v. 127th Judicial Dist. Court* , 708 S.W.2d 429, 431 (Tex. 1986) (orig. proceeding). All courts accordingly are obliged "to ascertain that subject matter jurisdiction exists regardless of whether the parties have questioned it." *City of Houston v. Rhule* , 417 S.W.3d 440, 442 (Tex. 2013) (per curiam) (quoting *In re United Servs. Auto. Ass'n,* 307 S.W.3d 299, 306 (Tex. 2010) (orig. proceeding)). The requirement that a court must determine whether it has

subject-matter jurisdiction applies to appellate courts just as it does to trial courts. *See Pidgeon v. Turner* , No. 15-0688, —— S.W.3d ——, ——, 2017 WL 2829350, *6 (Tex. June 30, 2017) ; *Thai Xuan Vill. Condo. Ass'n, Inc. v. Hien Luu* , No. 14-15-00873-CV, 2016 WL 6887344, *2 (Tex. App.—Houston [14th Dist.] Nov. 22, 2016, no pet.) (mem. op.). Thus, before we can reach the merits of the trial court's challenged rulings, we first must determine whether we have jurisdiction to do so.

A. Finality of the Trial Court's Order Approving the Settlement

As part of Susan's first issue, she challenges the trial court's March 2, 2016 order approving the settlement—or more precisely, Legacy's sale of the judgment against Ronald—both on the merits and on the ground that the trial court lacked jurisdiction over the case. We have appellate jurisdiction only over final judgments and over statutorily authorized interlocutory appeals. *See Ogletree v. Matthews* , 262 S.W.3d 316, 318 n.1 (Tex. 2007). This is not a statutorily authorized interlocutory appeal, nor do the parties contend otherwise. We therefore lack jurisdiction to review the March 2, 2016 order unless it is a final order.

Ordinarily, there is only one final judgment in a case. *See Ventling v. Johnson* , 466 S.W.3d 143, 149 (Tex. 2015) (citing TEX. R. CIV. P. 301). As a rule, a judgment must dispose of all legal issues between or among all parties to be a final judgment. *See Jack B. Anglin Co. v. Tipps* , 842 S.W.2d 266, 272 (Tex. 1992) (orig. proceeding), *superseded by statute on other grounds as stated in In re Santander Consumer USA, Inc.* , 445 S.W.3d 216, 218 (Tex. App.—Houston [1st Dist.] 2013, orig. proceeding). Because Ronald's and Stacy's claims against Susan remain pending, the trial court's order approving the settlement of the Trust's judgment against Ronald does not constitute a final order by this definition. There are, however, exceptions to the general rule that a final, appealable judgment must dispose of all issues and all parties.

As the Texas Supreme Court held in *Huston v. F.D.I.C.* , "a trial court's order that resolves a discrete issue in connection with any receivership has the same force and effect as any other final adjudication of a court, and thus, is appealable." 800 S.W.2d 845, 847 (Tex. 1990) (op. on reh'g). Because the trial court's order approving the receiver's sale to Ronald of the Trust's judgment against him resolved this discrete issue, the order is a final, appealable judgment. *See id.* at 848 (discussing the policy reasons for concluding that a trial court's approval and confirmation of a receiver's sale of property is a final appealable judgment).

In the remainder of Susan's first issue, she argues that the trial court lacked jurisdiction to render its June 2015 order removing her as trustee and appointing a receiver. Ronald states that Susan's attempted appeal of that
209 ruling is untimely, *209 and thus, we lack jurisdiction to review it.[1] *See Gibson v. Cuellar* , 440 S.W.3d 150, 155 (Tex. App.—Houston [14th Dist.] 2013, no pet.). However, Susan's only complaint about the June 2015 order is that the trial court lacks jurisdiction over the entire case, which is the same jurisdictional argument she makes in her timely appeal of the trial court's March 2016 order. If Susan is correct and the trial court lacked jurisdiction over the case, then all of the trial court's actions are void. Thus, if we can reach Susan's argument that the March 2016 order is void for lack of jurisdiction, then our disposition of that argument applies equally to the trial court's June 2015 order. First, however, we must address Ronald's and Legacy's remaining challenges to our own subject-matter jurisdiction.

[1] Because Stacy adopted Ronald's appellate brief, she joins in the arguments we attribute to Ronald.

B. Lack of Mootness

Ronald and Legacy next contend that we lack subject-matter jurisdiction to review the order approving the settlement because the issue was rendered moot when the settlement closed. *See Matthews ex rel. M.M. v. Kountze Indep. Sch. Dist.* , 484 S.W.3d 416, 418 (Tex. 2016) ("The mootness doctrine applies to cases in which

a justiciable controversy exists between the parties at the time the case arose, but the live controversy ceases because of subsequent events."); *Kessling v. Friendswood Indep. Sch. Dist.* , 302 S.W.3d 373, 384 n.9 (Tex. App.—Houston [14th Dist.] 2009, pet. denied) (explaining that courts lack subject-matter jurisdiction over a moot claim). Ronald further contends that because Susan's appeal of the order approving the settlement is moot, her challenge to the trial court's denial of her motion to continue the hearing on the application for approval similarly is moot.

According to Ronald, Susan's appeal of the order approving the settlement became moot when the settlement agreement closed because he conveyed to the Trust his interests in two properties, one of which has been leased to a third party. Ronald also signed a promissory note and made the first payment of the cash portion of the settlement. Finally, the receiver filed a satisfaction of judgment. These facts, however, do not indicate that the appeal is moot.[2]

> 2 In determining whether the appeal is moot, we have considered Legacy's affidavit concerning events that have transpired while this appeal has been pending. *See* Tex. Gov't Code Ann. § 22.220(c) (West Supp. 2016).

An appeal is rendered moot when there ceases to be a live controversy between the parties such that appellate relief would be futile. *See Marshall v. Hous. Auth. of City of San Antonio* , 198 S.W.3d 782, 787 (Tex. 2006). The conveyance of property can moot an appeal. For example, in *Mitchell v. Turbine Resources Unlimited, Inc.* , No. 14-15-00417-CV, 523 S.W.3d 189, 195–96, 2017 WL 1181228, at *5 (Tex. App.—Houston [14th Dist.] Mar. 30, 2017, pet. filed), the appellant sought reversal of the trial court's order authorizing a receiver to sell vehicles in which the appellant claimed an ownership interest. The appeal became moot when the appellant herself sold the vehicles and thereby eliminated her claim that she owned them. *See id.*

Unlike the facts in *Mitchell* , however, the parties in this case continue to have a live controversy for which appellate relief potentially is available. The promissory note can be rescinded; money paid can be refunded;
210 and a "satisfaction of judgment" can be set aside. *Cf.* *210 *Brown v. Enter. Recovery Sys., Inc.* , No. 02-11-00436-CV, 2013 WL 4506582, *1 (Tex. App.—Fort Worth Aug. 22, 2013, pet. denied) (mem. op.) (reversing in part and remanding, despite the filing of a notice of satisfaction of judgment). As for the conveyance of real property, the settlement resulted in conveyances only from Ronald to Legacy, in its capacity as the Trust's receiver, and if Susan should prevail, these transactions can be reversed. Although Ronald implies that the property was leased after he conveyed it, the record shows that the opposite is true: the lease was effective on July 1, 2015, nearly nine months before Ronald conveyed the property.

Because the evidence before us does not indicate that anything has been done that cannot be undone, or that the parties' dispute about the settlement has ceased to be a live controversy, we conclude that Susan's appeal of the order approving the settlement is not moot.

C. The Denial of Susan's Motion for a Continuance

In addition to asserting the mootness argument addressed above, Ronald contends that we lack jurisdiction to review the denial of Susan's motion to continue the hearing on Legacy's application for approval of the settlement agreement because Susan (1) failed to reduce the trial court's ruling to writing, and (2) failed to list the denial of her motion for a continuance in her notice of appeal.

1. Susan's Failure to Reduce the Trial Court's Ruling to Writing

Ronald contends that we lack jurisdiction to address this issue because Susan did not have the denial reduced to a written order, and he asserts that "[c]ourts dismiss for lack of jurisdiction appeals of oral orders." In support of this position, Ronald cites *Archer v. Tunnell* , No. 05-15-00459-CV, 2016 WL 519632, at *3 (Tex. App.—

Dallas Feb. 9, 2016, no pet.) (mem. op.). We are not bound by *Archer* , but even if we were, we would consider Ronald's reliance on *Archer* misplaced.

In *Archer* , the Fifth Court of Appeals held that it lacked jurisdiction to review the denial of a summary-judgment motion and a motion to dismiss or abate. *See id.* at *2. The trial court orally denied one of the appellant's summary-judgment grounds, but did not rule, orally or in writing, on the appellant's other summary-judgment grounds or the motion to dismiss or abate. *See id.* Our sister court held that it lacked jurisdiction to review the trial court's alleged denial of the summary-judgment motion and the motion to dismiss or abate because "an interlocutory appeal may be perfected only from a written order, not an oral ruling." *Id.* at *3.

We need not decide whether we agree with the *Archer* court's reasoning, because the facts in this case are distinguishable. Here, the trial court announced on the record that it denied Susan's motion to continue the hearing on Legacy's application for approval of the settlement. The ruling was not required to be reduced to writing; the oral pronouncement was sufficient. *See Dunn v. Dunn* , 439 S.W.2d 830, 832 (Tex. 1969) ; *see also* TEX. R. CIV. P. 306a(2) ("Judges, attorneys and clerks are directed to *use their best efforts* to cause all judgments, decisions and orders of any kind to be reduced to writing and signed by the trial judge with the date of signing stated therein." (emphasis added)). The interlocutory ruling denying Susan's motion for continuance was merged into the written final judgment approving the settlement. *See Roccaforte v. Jefferson County* , 341 S.W.3d 919, 924 (Tex. 2011) ("The final judgment necessarily replaced the interlocutory order, which merged into the judgment...."); *211 *In re Newsome* , Nos. 14-12-01083-CV and 14-12-01084-CV, 2012 WL 6163124, at *1 (Tex. App.—Houston [14th Dist.] Dec. 11, 2012, orig. proceeding) (per curiam) (mem. op.) ("An interlocutory order is appealable when it has merged into a subsequent final, appealable order.").

2. Susan's Failure to List the Denial of the Motion for Continuance in Her Notice of Appeal

Ronald also asserts that we lack jurisdiction to review the denial of Susan's motion for continuance because it is not listed in her notice of appeal. This argument is contrary to the Texas Rules of Appellate Procedure and to binding precedent from both the Texas Supreme Court and our own court.

A party is not required to describe in a notice of appeal each interlocutory ruling to be challenged in the appellate court, but need only "state the date of the judgment or order appealed from." *See* TEX. R. APP. P. 25.1(d)(2) ; *see also Perry v. Cohen* , 272 S.W.3d 585, 587 (Tex. 2008) ("We initially note that the shareholders were not required to state in their notice of appeal that they were challenging the interlocutory order granting special exceptions. They were required only to state the date of the judgment or order appealed from—in this instance the order dismissing their suit."); *Valls v. Johanson & Fairless, L.L.P.* , 314 S.W.3d 624, 631 n.7 (Tex. App.—Houston [14th Dist.] 2010, no pet.) ("A notice of appeal need not identify every adverse interlocutory ruling the appellant intends to challenge; instead, the notice must state only the date of the judgment or order from which he appeals—in this case, the order granting summary judgment.").

Because Susan complied with Texas Rule of Appellate Procedure 25.1(d)(2) by stating in her notice of appeal her intent to appeal the trial court's final order signed on March 2, 2016, she invoked our jurisdiction not only to review that order but also to address interlocutory rulings that were merged into it.

In sum, we have jurisdiction to consider Susan's appeal of the trial court's written order granting Legacy's application for approval of the settlement agreement and the trial court's oral ruling denying Susan's motion for a continuance of the hearing on that application. We now turn to Susan's first issue, in which she argues that the

statutory probate court's order approving the settlement agreement is void because the trial court lacked jurisdiction over the case.

IV. THE STATUTORY PROBATE COURT'S JURISDICTION

The existence of subject-matter jurisdiction is a question of law, which we review de novo. *See Rhule* , 417 S.W.3d at 442. Susan's argument that the trial court lacked jurisdiction turns on a question of statutory construction, which likewise presents a question of law subject to de novo review. *See In re M.G.N.* , 441 S.W.3d 246, 248 (Tex. 2014) (per curiam).

Susan contends that the statutory probate court lacked jurisdiction over these proceedings because the pleadings show that Ronald and Stacy sued to remove Susan as trustee and hold her liable for breach of fiduciary. Citing section 115.001 of the Texas Trust Code, she argues that the district court has original, exclusive jurisdiction over all proceedings to remove a trustee or to determine a trustee's liability. *See* TEX. PROP. CODE ANN. § 115.001(a)(3) (West 2014) (district court's jurisdiction over actions to appoint or remove a trustee); *id.* § 115.001 (a)(4) (district court's jurisdiction over actions to determine a trustee's "powers, responsibilities, duties, and liability"). Susan acknowledges that statutory probate courts have concurrent jurisdiction with district courts over actions by or against a trustee and *212 actions involving testamentary trusts, *see* TEX. EST. CODE ANN. § 32.007(2), (3) (West 2014), but she maintains that a statutory probate court can exercise that jurisdiction only when a probate proceeding is actually pending. She contends that no probate proceeding was pending when the statutory probate court granted Legacy's application to approve the Trust's settlement agreement with Ronald, and thus, the order is void for lack of jurisdiction. 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.

212

We begin, as Susan does, with section 115.001 of the Texas Trust Code. Although Susan is correct in stating that section 115.001 gives a district court original, exclusive jurisdiction over proceedings to remove a trustee or to determine a trustee's liability, section 115.001 also provides that statutory probate courts are an exception to this general rule. Section 115.001(a) states, "*Except as provided by Subsection (d) of this section* , a district court has original and exclusive jurisdiction over all proceedings by or against a trustee and all proceedings concerning trusts...." (emphasis added). Turning to subsection (d), we note the provision reads, "[t]he jurisdiction of the district court is exclusive *except for jurisdiction conferred by law on ... a statutory probate court* ...." *Id.* § 115.001(d)(1) (emphasis added). The trial court in this case was Harris County Probate Court No. 2, which is a statutory probate court. *See* TEX. GOV'T CODE ANN. § 25.1031 (West Supp. 2016). Thus, if the law confers jurisdiction on a statutory probate court to hear actions against a trustee or actions involving testamentary trusts, then Harris County Probate Court No. 2 had jurisdiction over the case.

In section 32.006 of the Texas Estates Code, the legislature expressly conferred on statutory probate courts the jurisdiction to hear actions involving testamentary trusts and actions in which a trustee is a party:

> In a county in which there is a statutory probate court, the statutory probate court has jurisdiction of:
>
> (1) an action by or against a trustee;
>
> (2) an action involving an inter vivos trust, testamentary trust, or charitable trust....

TEX. EST. CODE ANN. § 32.006 (West 2014). *See also id.* § 32.007 (stating that a statutory probate court and a district court have concurrent jurisdiction over such actions). Thus, under the unambiguous language of these statutes, Harris County Probate Court No. 2 had jurisdiction over this suit.

Susan nevertheless contends a statutory probate court's jurisdiction over trust matters "is limited." As support for this proposition, she relies on Texas Estates Code section 32.001 :

> (a) All probate proceedings must be filed and heard in a court exercising original probate jurisdiction. The court exercising original probate jurisdiction *also* has jurisdiction of all matters related to the probate proceeding as specified in Section 31.002 for that type of court.
>
> (b) A probate court may exercise *pendent and ancillary jurisdiction* as necessary to promote judicial efficiency and economy....

Id. § 32.001(a), (b) (emphasis added). Section 31.002, referenced above, describes the types of actions constituting "a matter relating to a probate proceeding," and those actions differ depending on whether the court exercising jurisdiction is a statutory probate court, a county court at law exercising original probate jurisdiction, or neither. *See id.* § 31.002. Regarding a statutory *213 probate court, which is the "type of court" at issue here, section 31.002 provides that "a matter related to a probate proceeding" includes the "administration of a testamentary trust if the will creating the trust has been admitted to probate in the court." *See id.* § 31.002(b)(2), (c)(1).

A plain reading of these sections reveals that they do not limit a probate court's jurisdiction. To the contrary, section 32.001 expands the jurisdiction of a court that is exercising original probate jurisdiction over a probate proceeding, so that the same court in which the probate proceeding is pending also has jurisdiction over matters related to the probate proceeding. But, if no probate proceeding is pending, then section 32.001 (with its incorporation of section 31.002) does not apply.

Susan contends that the probate proceeding concerning her mother's estate closed many years ago, and although we assume, without deciding, that Susan is correct, the absence of a pending probate proceeding does not deprive a statutory probate court of its independent jurisdiction over testamentary-trust actions. In actions concerning testamentary trusts, the statute's text does not limit the statutory probate court's jurisdiction. *See id.* § 32.006.

Our conclusion that a statutory probate court has jurisdiction over "an action involving an inter vivos trust, testamentary trust, or charitable trust" as unambiguously stated in Texas Estates Code section 32.006, is unaffected by the authorities Susan cites concerning proceedings "appertaining to or incident to an estate." The authorities on which Susan relies deal with the conditions in which a court exercising original probate jurisdiction can exercise jurisdiction over related or ancillary matters; they do not address a statutory probate court's independent jurisdiction over trust actions.[3] Indeed, Susan herself maintains that the case before us is not a proceeding "appertaining to or incident to an estate"; thus, her reliance on case law addressing a statutory probate court's jurisdiction over proceedings "appertaining to or incident to an estate" is misplaced.

[3] *See, e.g.*, Tex. Est. Code Ann. § 36.001 (defining the term "probate proceeding"); *Valdez v. Hollenbeck*, 465 S.W.3d 217, 224 n.8 (Tex. 2015) (explaining that "[t]he heirs initially filed their lawsuit in the original probate proceeding as a suit appertaining and incident to a probate estate under [the predecessor statute] section 5A of the Probate Code," under which "a probate proceeding must be pending for a probate court to exercise jurisdiction over matters related to that proceeding"); *Frost Nat'l Bank v. Fernandez*, 315 S.W.3d 494, 506 (Tex. 2010) (holding that a probate court lacked jurisdiction over a proceeding to declare heirship because a "court empowered with probate jurisdiction may only

exercise its *probate* jurisdiction over matters incident to an estate when a probate proceeding related to such matters is already pending in that court" (emphasis added) (quoting *Bailey v. Cherokee Cty. Appraisal Dist.*, 862 S.W.2d 581, 585 (Tex. 1993))); *In re John G. & Marie Stella Kenedy Mem'l Found.*, 315 S.W.3d 519, 522 (Tex. 2010) (orig. proceeding) (quoting the same language from *Bailey*); *Goodman v. Summit at W. Rim, Ltd.*, 952 S.W.2d 930, 933 (Tex. App.—Austin 1997, no pet.) (citing *Bailey*); *In re Estate of Hanau*, 806 S.W.2d 900, 904 (Tex. App.—Corpus Christi 1991, writ denied) ("The trial court has power to hear all matters *incident to an estate* only in those instances where a probate proceeding, such as the administration of an estate, is actually pending in the court in which the suit is filed, relating to a matter incident to that estate." (emphasis added) (citing *Interfirst Bank–Hous. v. Quintana Petroleum Corp.*, 699 S.W.2d 864, 873 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.))); *Pullen v. Swanson*, 667 S.W.2d 359, 363 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.) (stating that a statutory probate court's jurisdiction "to hear all matters *incident to an estate* necessarily presupposes that a probate proceeding is already pending in that court" (emphasis added)).

214 We overrule Susan's first issue.*214 **V. CHALLENGE TO THE MERITS OF THE ORDER APPROVING THE SETTLEMENT**

In an appeal from a trial court's grant of a receiver's application for approval of a settlement, we review the ruling for abuse of discretion. *See Ace Prop. & Cas. Ins. Co. v. Prime Tempus, Inc.* , No. 03-06-00236-CV, 2009 WL 2902713, at *2 (Tex. App.—Austin Aug. 26, 2009, no pet.) (mem. op.). The challenged ruling constitutes an abuse of discretion if it was made arbitrarily, unreasonably, or without reference to any guiding rules and principles. *See Crawford v. XTO Energy, Inc.* , 509 S.W.3d 906, 911 (Tex. 2017). A trial court does not abuse its discretion if it based its decision on conflicting evidence, some of which supports its decision. *See Unifund CCR Partners v. Villa* , 299 S.W.3d 92, 97 (Tex. 2009) (per curiam). On the other hand, the trial court abuses its discretion if its ruling is contrary to the only permissible view of the probative, properly admitted evidence. *Id.*

A. The Incomplete Record

Before reaching the merits of the argument, we must settle an issue Ronald raises concerning the state of the reporter's record. According to Ronald, the reporter's record before us is incomplete, and we therefore must presume that the omitted material supports the trial court's ruling and summarily affirm. *See In re J.A.T.* , 502 S.W.3d 834, 836 (Tex. App.—Houston [14th Dist.] 2016, no pet.) ("[I]n the absence of an agreement between the parties or a statement of the appellant's issues to be presented on appeal, 'we must presume that the omitted portions of the record are relevant and would support the judgment.' " (quoting *Mason v. Our Lady Star of the Sea Catholic Church* , 154 S.W.3d 816, 822 (Tex. App.—Houston [14th Dist.] 2005, no pet.))).

Ronald contends that the reporter's record is incomplete because Susan did not ask that the court reporter include in the appellate record a transcript of a hearing that took place on June 18, 2015. Ronald maintains that a transcript of that proceeding was necessary because during the March 2, 2016 hearing on the application to approve the settlement, his attorney said, "I'll ask the Court to take judicial notice of the proceeding in this Court on June 18, 2015 and the evidence that was offered," and the trial court responded, "So noted." Because a transcript of that proceeding is not in the record, Ronald argues that we must presume the evidence offered during the June 18, 2015 hearing is relevant and supports the judgment. Although Susan filed a reply brief after Ronald pointed out this omission, she did not respond to this argument.

We agree that the presumption applies. *See id.* But, even if it did not, we still would conclude that the record before us supports the trial court's approval of the settlement agreement.

B. The Terms of the Settlement Agreement

At the hearing, the parties agreed that as of February 26, 2002, the amount of the outstanding judgment and post-judgment interest Ronald owed the Trust was $6,128,326.99, and that if interest had continued to accrue without interruption up to the time of the hearing, the amount of Ronald's outstanding debt would have been about $24 million. It is undisputed, however, that Ronald paid the Trust $8 million in the summer of 2015, so
215 that the $24 million figure overstates the amount owed by at least 50%.[4] The value that the *215 Trust received in exchange for the judgment against Ronald included (1) money; (2) interests in real property; (3) the release of various claims; and (4) Ronald's execution of an "Agreement Respecting Certain Prospective Real Estate Acquisitions" and an "Agreement Respecting Conduct of the Litigation."

[4] Because post-judgment interest compounds annually, one cannot arrive at the total amount owed simply by subtracting from $24 million the amounts that have been paid or that otherwise should have been credited. *See* Tex. Fin. Code Ann. § 304.006 (West 2016).

1. The Monetary Part of the Settlement Agreement

Ronald agreed to pay the Trust $4 million at 4% interest over two years. As Susan admits in her brief, Ronald made the first payment 90 days before it was due.

2. Conveyance of Ronald's Interests in Real Property

The settlement agreement called for Ronald to convey to the Trust his undivided 25% interest in two properties, River Bend Farm and Cap Rock Ranch.

River Bend Farm's appraised value is $3.5 million, and Naumes testified that Ronald's interest in the property could be worth as much as a million dollars. Although Susan asserts that the conveyance of Ronald's interest in River Bend Farm "was of little or no value because the Trust already owned the interest," she does not support this statement. The evidence instead shows that Susan and Ronald each owned an undivided 25% interest in the farm, and the Trust owned the remaining undivided 50% interest. While Susan was trustee, the taxes on the property became delinquent, and the taxing authorities sued Susan, individually and in her capacity as trustee of the Trust, and Ronald. No one answered the suit, and the taxing authorities foreclosed on Ronald's interest to satisfy the default judgment against him for $11,334.63. After the sale, Susan, in her capacity as trustee, redeemed it, and the Trust received the excess proceeds from the sale. At the hearing for approval of the settlement agreement, Ronald's counsel stated, "When you redeem the property of a co-tenant under the Texas statute, you restore the title to the parties prior to the tax sale." The trial court responded, "I know the law. That's a correct statement of it."[5] Although Susan states in her brief that "[t]he legal effect of the redemption by the Trust of Ronald's 25% in the River Bend Farm is in dispute," she presents no grounds for disputing the trial court's implied finding that Ronald owned a 25% undivided interest in the property at the time of the settlement agreement.

[5] *See Poenisch v. Quarnstrom*, 361 S.W.2d 367, 372 (Tex. 1962) ("The general rule is that when a cotenant redeems property from a tax foreclosure sale, such action is considered as being for the benefit of all co-owners..... The redemption of the property could at most give rise to some claim for contribution.... (citations omitted)).

The settlement agreement also requires Ronald to convey to the Trust his undivided 25% interest in the 6,431-acre Cap Rock Ranch. Legacy had Cap Rock Ranch appraised during the settlement negotiations, but did not state its appraised value on the record.

3. Released Claims

A third component of Ronald's consideration for his purchase of the Trust's judgment against him concerned the release of the following claims against the Trust.

(a) Claims for damages, interest, or other expenses due to the untimely distribution of his share of the Trust's net income actually collected before December 31, 2013

216 Ronald's claims against the Trust for damages due to the delay in distributing *216 his share of the Trust's net income include at least two elements.

The first element is represented by the taxes that Ronald was required to pay on income that was attributed to him, but not paid. According to the evidence presented at the hearing, Susan, in her capacity as trustee, reported that the Trust made distributions to Ronald, when in fact, he received nothing. Ronald nevertheless was required to pay taxes on the income attributed to him. Naumes stated at the hearing that he believed the amount Ronald paid was under $500,000.

The second element of the claim consists of damages from delayed distributions of income that should have been made to Ronald, but that were not reported even as fictitious distributions. According to Naumes, this component of the claim could run into the millions of dollars. The amount cannot be definitely ascertained because Susan—in violation of a court order—has refused to provide Trust records. There is, however, some circumstantial evidence. For example, records that Legacy has been able to obtain from financial institutions show that while Susan was trustee she made distributions to herself and her daughter of at least $2.3 million, but made no distributions to Ronald or his daughter. Susan and Ronald hold identical interests in Trust income, as do Stacy and Gibson, so if Susan were entitled to distributions, then Ronald would have been entitled to distributions at the same time and in the same amount.

Due to Susan's refusal to cooperate in reconstructing fourteen years' worth of Trust financial information, Naumes estimates the costs of forensic accounting and legal fees to definitively determine the amount due to Ronald would run into the millions. This is supported by the $3 million in trial-level legal fees incurred by the parties in *Lee I* and the further $800,000 in legal fees assessed by the trial court in the event of an appeal.[6] Moreover, Naumes testified that in the years since *Lee I* was tried, both the rates charged by the attorneys and the number of attorneys involved in this litigation have increased.

6 *See Lee I*, 47 S.W.3d at 775, 797.

(b) Claims regarding the calculation of the Judgment and interest

Ronald claims that the post-judgment interest of "the Judgment" (defined in the settlement agreement as the 1996 judgment in *Lee I* , as modified by the 2001 decision in the appeal of that case and reflected in the appellate court's 2002 mandate and in the trial court's 2012 order reviving the dormant judgment) has been calculated incorrectly. The record shows that in 2002, Ronald contacted Susan's attorney Zabel with a plan to pay the judgment in full by assigning to the Trust (1) his interests in the same two properties he conveyed as part of the settlement agreement; and (2) his beneficial interest in income distributions from the Trust until the judgment was satisfied. Ronald's counsel believed that the distributions due to Ronald upon the sale of the properties would substantially satisfy the judgment, but if a balance remained after the sale, the difference would be satisfied by cash loaned from Stacy's separate trust. Neither Zabel nor Susan ever responded. Ronald claims that, given his offer to temporarily assign his interest in income distributions to the Trust, and the Trust's failure to distribute any income to him, the accrual of post-judgment interest should have been suspended, or at least reduced by the amount of income that should have been distributed to him. Naumes testified that settling
217 such claims would be more *217 beneficial to the Trust than incurring the costs of litigating them.

(c) Claims related to the allocation of Trust receipts and expenses between principal and income prior to December 31, 2013

Ronald was entitled to distributions of the Trust's current net income, and he claims Susan reduced the Trust's net income by the way in which she allocated Trust receipts and expenses between principal and income. This is another area in which Naumes was concerned about the costs to the Trust of accurately reconstructing its financial history during the time Susan was the trustee. According to Naumes, "[W]e would do forensic accounting for the rest of our lives to determine whether or not the allocation of principal [and] income was right."

(d) Claims for trustee's fees and Trust expenses due to Ronald, or incurred and paid by him, before June 30, 2015

Naumes testified that Ronald paid for all of a property's costs while he owned an interest in it; however, no evidence was introduced about the amount of those costs.[7]

[7] From the tax suit, we also know that Ronald did not always timely pay the taxes on his interest in River Bend Farm.

(e) Additional released claims

There is less evidence about other claims that Ronald released as part of the settlement agreement. These additional claims, some of which appear to duplicate claims already mentioned, are as follows:

- Claims for payment of income from revenue collected by the Trust before December 31, 2014, to the extent that amounts payable for his health, maintenance, and support exceeded his one-third share of the Trust's net income;

- Claims for attorney's fees Ronald incurred before June 30, 2015, to the extent that such claims had not already been reimbursed by Legacy;

- Claims for attorney's fees Ronald incurred in connection with the settlement agreement or the Judgment;

- Claims that the Judgment is dormant or unenforceable;

- Claims to equitably reform the Judgment based on the inequitable or improper accrual of interest; and

- Claims "for damages suffered on account of [Ronald's undivided 25% interest] in River Bend Farm."

4. Additional Agreements

The settlement also included two additional agreements.

In the "Agreement Respecting Certain Prospective Real Estate Acquisitions," Ronald agreed to the Trust's proposed purchase of Susan's undivided 25% interests in the Cap Rock Ranch and Rim Rock Ranch properties for not more than $3.4 million, and to the Trust's proposed purchase of Susan's undivided 25% share of the River Bend Farm for a price not to exceed its appraised value. Naumes explained that obtaining Ronald's approval of these proposed purchases was intended to eliminate the risk of suit if Legacy converted "an earning asset into what may become an un-earning asset." Naumes also stated that it would be of great value to the

Trust if Legacy could unite the undivided interests in the property, and that the Trust would benefit if Ronald
218 were not able to "blackball" those acquisitions. There is no evidence about whether Susan *218 would agree to sell her share of the properties to the Trust.

In the "Agreement Respecting Conduct of the Litigation" in this case, Legacy, Ronald, and Stacy agreed that at least a portion of Ronald's and Stacy's claims against Susan would benefit the Trust. To avoid duplicating their efforts and multiplying its own attorney's fees, Legacy agreed that (a) Ronald's counsel would take the lead in pursuing those claims; (b) Stacy's counsel would take secondary responsibility for pursuing their claims while avoiding duplication of the work of Ronald's counsel; (c) Legacy would reimburse Ronald $500,000 and Stacy $100,000 for their reasonable and necessary attorney's fees and litigation expenses; and (d) if Ronald or Stacy believe that additional reasonable and necessary attorney's fees and litigation expenses should be incurred, then that person can request advance approval for the additional expenditures, which approval Legacy will not unreasonably withhold. In return, Ronald and Stacy agreed that Legacy was not obliged to them to prosecute the Trust's claims against Susan for breaches of her obligations to the Trust while serving as its trustee.[8]

[8] As previously mentioned, the trial court authorized Legacy to sue to recover Trust assets or to recover damages suffered by the Trust, "provided, however, that the Receiver shall have discretion not to pursue litigation against [Susan] that is undertaken by beneficiaries of the Trust for the benefit of the Trust."

C. Ronald's and Legacy's Evaluation of the Settlement Agreement

According to Naumes, Legacy believes that the settlement is in the best interest of the Trust and the Trust's four beneficiaries, and is "absolutely" a better deal for the Trust than attempting to collect the full amount of the judgment and accrued interest in an adversarial proceeding. Naumes testified that in evaluating the settlement, Legacy did not assign specific dollar values to each of Ronald's claims, but instead evaluated the settlement agreement as a whole and concluded that the exchange was fair and equitable. Naumes further stated that after reviewing Ronald's tax returns and extensively interviewing him about his assets, holdings, separate property, and community property, Naumes believes that the settlement represents the most that Legacy can expect to obtain from Ronald. Ronald similarly testified that the full amount of the Trust's judgment against him, including post-judgment interest, exceeds his net worth.

D. Susan's Arguments on the Merits of the Settlement Agreement

Susan contends that the trial court abused its discretion in approving the settlement because the trial court (a) applied the wrong standard by relying "on its own view of continued litigation," (b) lacked sufficient evidence to determine the merits of Ronald's released claims or of the Trust's best interests, and (c) approved the settlement for only half of the judgment's value without determining the merits of the claims Ronald released. We examine each of these arguments in turn.

1. The Trial Court's Reliance "Upon Its Own View of Continued Litigation"

Susan argues that the trial court "abused its discretion by approving the settlement based upon its own view of continued litigation." In support of this argument, Susan relies on *Webre v. Black* , 458 S.W.3d 113 (Tex. App.—Houston [1st Dist.] 2015, no pet.). In that case, the First Court of Appeals reversed a trial court's approval of
219 a settlement between the court-appointed guardian of a ward's estate *219 and the ward's former attorney-in-fact, who allegedly had engaged in transactions that were presumptively unfair to the estate. *See id.* at 118–19. The trial court approved the settlement based on the stated view that it was not in the interest of the 87-year-old incompetent ward to continue litigating a dispute that would not personally benefit the ward, regardless of whether the litigation would benefit the ward's estate. *See id.* at 114, 116–18. The appellate court reversed

because the trial court was required by statute to consider whether the settlement was in the best interest of the ward's estate, but instead excluded evidence on that issue and considered only whether the settlement was in the best interest of the ward himself. *See id.* at 119–20 (citing former TEX. PROB. CODE § 774(a)(4)).

Webre is distinguishable from the case at hand. Here, the trial court excluded no evidence, and there is no evidence that the trial court failed to consider whether the settlement was in the best interests of the Trust or its beneficiaries.

We also disagree with Susan's implication that avoiding the costs of litigation can never be a valid consideration in evaluating a settlement agreement. Here, the evidence presented at the hearing showed that, in light of Susan's stonewalling of efforts to reconstruct the Trust's financial history, attempting to exactly quantify the amount that Ronald owes would increase the Trust's expenses, which would reduce its current net income to the prejudice of all of its beneficiaries. While the delay in litigating that issue could allow post-judgment interest to continue accruing at Ronald's expense, neither the Trust nor its beneficiaries would benefit from such delay if—as Ronald and Naumes testified—the full amount of post-judgment that has accrued (if no credits are applied toward it) already exceeds Ronald's net worth.

2. The Sufficiency of the Evidence on Which to Decide Whether the Settlement Is in the Trust's Best Interest

Susan next contends that the trial court lacked sufficient evidence on which to exercise its discretion. We disagree. Although we will not repeat our summary of the major points of the evidence drawn from our review of the approximately 600-page reporter's record, we are confident that the information we have summarized was sufficient to allow the trial court to evaluate the settlement agreement.

In arguing that this evidence was inadequate to permit the trial court to evaluate the settlement agreement, Susan relies on *In re Rains* , 473 S.W.3d 461 (Tex. App.—Amarillo 2015, no pet.). *Rains* concerned a settlement under the Structured Settlement Protection Act. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 141.001 –.007. The Act requires a factoring company to obtain court approval before it can purchase a person's right to receive tax-free payments of a structured settlement. *See id.* § 141.004. No such purchase is at issue here.

Susan nevertheless contends that the factors the *Rains* court considered in reviewing a trial court's approval of the transfer of structured-settlement payment rights applies by analogy to our review of the trial court's ruling approving the settlement at issue here. But, even in the context of the Structured Settlement Protection Act, we expressly declined to follow *Rains* because its eighteen-factor analysis "take[s] the court's analysis well beyond the scope of the inquiry authorized." *Metro. Life Ins. Co. v. Structured Asset Funding, LLC* , 501 S.W.3d 706, 720 (Tex. App.—Houston [14th Dist.] 2016, no pet.). That conclusion applies with even more force here,
220 where some of the factors considered in *Rains* are plainly inapplicable. *220 For example, it is not possible to consider the Trust's "future yet reasonably foreseeable domestic, economic, physical, medical, and educational needs," its "age, education, and acumen," or its "business or financial acumen." *See Rains* , 473 S.W.3d at 464.

3. The Trial Court's Failure to Determine the Merits of Ronald's Released Claims

In her last challenge to the merits of the trial court's decision, Susan contends that the trial court failed to determine the merits of Ronald's released claims and that the court approved the settlement of the judgment against Ronald "for only one-half its value." Some of the problems with these arguments are self-evident.

First, to obtain a trial court's determination of the merits of a claim is to litigate that claim, which is the very object that a settlement is intended to avoid. The record nevertheless is sufficient to allow the trial court to conclude that the Trust had net income that should have been distributed to Ronald while Susan was trustee, and that if the issue were litigated, Ronald's debt to the Trust would be offset to some degree by the Trust's debt to Ronald. The delay required to determine the extent of the offset (1) would prejudice Ronald because post-judgment interest of 10% per annum, compounded annually, would continue to accrue during that time;[9] and (2) would not benefit the Trust, because even if Ronald were entitled to no offset, he still could not pay the full amount of the judgment. Naumes not only testified that Ronald does not have the financial ability to pay the judgment, but also stated, "I don't believe that I could have gotten another nickel out of him." Obtaining a release of the claims, however, saves the Trust the expense of litigating them.

[9] *See* Tex. Fin. Code Ann. § 304.006. The post-judgment interest Ronald owed to the Trust would outstrip the pre-judgment interest accruing on any debt that the Trust owed to him, because pre-judgment does not compound. *See id.* § 304.104.

Second, the trial court does not have a "line-item veto" of the claims released in the settlement agreement, but must approve or reject the settlement agreement as a whole. Moreover, even if some of Ronald's claims are valueless, the Trust is not harmed by their release.

Third, although Susan characterizes the settlement as a sale of the judgment against Ronald for less than half of its value, this is not supported by the record. The Trust received an $8 million payment; an additional $4 million payable over two years; the conveyance of a 25% interest in a property appraised for $3.5 million, and for which Ronald's share may be worth as much as $1 million; and the release of a claim for around $500,000 for taxes he was required to pay on income previously attributed to him but which he never received. Based on Susan's distributions to herself and her daughter of about $2.3 million and the fact that both Susan and Ronald each are entitled to a distribution of the 1/6th of the Trust's current net income, Ronald also may be entitled to delay damages from past-due multi-million-dollar distributions. These amounts total more than $15 million, which is considerably more than half of the value of the Trust's judgment against Ronald. Moreover, the judgment's post-judgment interest is compounded annually, so if any of the amounts that the Trust owed Ronald should have been credited against the accrual of post-judgment interest, then those amounts would further reduce the amount of post-judgment interest that continued to compound. Consequently, the value of the Trust's
221 judgment against Ronald after any offsets cannot be precisely determined *221 without knowing what amounts should have been distributed, and when Ronald should have been paid. Thus, the inability to more exactly quantify the value of Ronald's released claims is due in part to Susan's failure to provide Legacy with the Trust's financial information as she was ordered to do.

On this record, we cannot say that the trial court abused its discretion in approving the settlement. We overrule Susan's second issue.

VI. DENIAL OF SUSAN'S MOTION FOR A CONTINUANCE

When a party moves for a continuance to conduct discovery, we review the denial of the motion for a clear abuse of discretion. *See Joe v. Two Thirty Nine Joint Venture* , 145 S.W.3d 150, 161 (Tex. 2004). The Texas Rules of Civil Procedure specify that no motion for a continuance shall be granted "except for sufficient cause supported by affidavit, or by consent of the parties, or by operation of law. TEX. R. CIV. P. 251. When reviewing the ruling on the merits, some of the factors we consider include "the length of time the case has been on file, the materiality and purpose of the discovery sought, and whether the party seeking the

continuance has exercised due diligence to obtain the discovery sought." *See id.* First, however, the record must show that the complainant complied with the rules governing a motion for continuance. *See Brown v. Gage* , 519 S.W.2d 190, 192 (Tex. Civ. App.—Fort Worth 1975, no writ).

If a first motion for continuance is sought to obtain testimony, then

> [the movant] shall make affidavit that such testimony is material, showing the materiality thereof, and that he has used due diligence to procure such testimony, stating such diligence, and the cause of failure, if known; ... and, if it be for the absence of a witness, he shall state the name and residence of the witness, and what he expects to prove by him; and also state that the continuance is not sought for delay only, but that justice may be done....

TEX. R. CIV. P. 252.

Susan's motion did not meet these requirements. She asked for a continuance of "at least 90 days" to "conduct discovery to determine" the following:

> (i) Legacy's valuation of the Judgment;
>
> (ii) what, if any, credits Ronald Lee claims he is entitled to;
>
> (iii) Ronald Lee's ability to pay the Judgment in full;
>
> (iv) what, if any, other consideration Ronald Lee is providing under the terms of the settlement;
>
> (v) what claims are the subject of the releases given by Ronald Lee to Legacy under the settlement; and
>
> (vi) why the settlement is in the best interest of the Trust as alleged by Legacy.

Susan attached to the motion only the verification of her attorney Daniel J. Sheehan, who attested that he had read the motion and that the statements it contained were true and correct.

Susan did not identify in her motion the discovery she planned to conduct, or indeed, why discovery was necessary at all. All of the information she identified in her motion was either incorporated in Legacy's application for approval of the settlement or was presented at the hearing. At the close of the evidence, the trial court asked Sheehan what discovery Susan needed and whom the attorney wished to depose. Sheehan responded, "[O]bviously, we have a pretty good record on Mr. Naumes. But I think that Tom Zabel should have
222 an *222 opportunity to testify in some capacity." Zabel, however, is one of Susan's attorneys. As her agent, not only is he subject to Susan's control, but he also was served with Legacy's application for approval of the settlement agreement. If his testimony was wanted, he had only to attend the hearing, without need of a continuance.

We overrule this issue.

VII. CONCLUSION

The statutory probate court properly exercised its trust jurisdiction over this suit, and thus, none of its challenged orders are void for lack of jurisdiction. Moreover, the record does not show that the trial court abused its discretion in approving the Trust's receiver's application for approval of its settlement agreement with Ronald Lee Jr. or in denying Susan Lee's motion for a continuance.

We affirm the trial court's judgment.

No. 08-19-00080-CV
COURT OF APPEALS EIGHTH DISTRICT OF TEXAS EL PASO, TEXAS

Mortensen v. Villegas

630 S.W.3d 355 (Tex. App. 2021)
Decided Feb 1, 2021

No. 08-19-00080-CV

02-01-2021

George L. MORTENSEN, Appellant, v. Daniel VILLEGAS and Elvia L. Ramirez, Appellees.

APPELLANT: George L. Mortensen, 3668 Bishop Way, El Paso, TX 79903. ATTORNEYS FOR APPELLEES: Daniel Anchondo, Anchondo & Anchondo, 2509 Montana Ave., El Paso, TX 79903, Frank J. Guzman, Frank J. Guzman, P.C., 521 Texas Ave, El Paso, TX 79901.

GINA M. PALAFOX, Justice

APPELLANT: George L. Mortensen, 3668 Bishop Way, El Paso, TX 79903.

ATTORNEYS FOR APPELLEES: Daniel Anchondo, Anchondo & Anchondo, 2509 Montana Ave., El Paso, TX 79903, Frank J. Guzman, Frank J. Guzman, P.C., 521 Texas Ave, El Paso, TX 79901.

Before Rodriguez, C.J., Palafox, and Alley, JJ.

OPINION

GINA M. PALAFOX, Justice

This is the second *pro se* appeal by Appellant George L. Mortensen in which he contests the dismissal of claims asserted in an heirship proceeding pending in a statutory probate court. Following dismissal of prior claims based on lack of standing, Mortensen returned to the same cause and forum below to assert claims against Daniel Villegas and Elvia L. Ramirez (Appellees, collectively), as well as against other defendants who
359 are not parties to this appeal.[1] For a second time, the probate *359 court dismissed Mortensen's claims for want of jurisdiction, and in doing so, granted relief sought by Appellees to include awards of attorney's fees. Mortensen raises six issues challenging the court's dismissal of his claims and the sufficiency of the evidence supporting the fee awards. We affirm in part and reverse and remand in part.

[1] Mortensen's original petition named five defendants, Daniel Villegas, Elvia L. Ramirez, Crystal Dianne Ortiz, Steven Joseph Casares, and State Farm Fire and Casualty Company. By notice of appeal, however, Mortensen only challenged final orders of the probate court that pertain to three of the originally named defendants, Villegas, Ramirez and Ortiz. Even still, only Villegas and Ramirez were served with process, and later, obtained favorable relief from the court below. As to Ortiz, she was never served with legal process and Mortensen merely challenged the probate court's denial of his motion for alternative service. Texas courts lack personal jurisdiction over a party if service of citation is not accomplished on that party. *See Robb v. Horizon Communities Improvement Ass'n, Inc.* , 417 S.W.3d 585, 590 (Tex. App.—El Paso 2013, no pet.) (citing *In re E.R.* , 385 S.W.3d 552, 563 (Tex. 2012)). By Order issued August 6, 2019,

we rejected Mortensen's attempt to appeal the interlocutory order pertaining to Ortiz. Thus, only Villegas and Ramirez remain as appellees to this appeal. For brevity, we will refer to Villegas and Ramirez collectively as Appellees unless there is a need to identify either one individually.

I. BACKGROUND

A. Mortensen's first appeal

In 2010, Crystal Dianne Ortiz filed an application for the appointment of a dependent administration of the estate of her father, Jose Casares (Decedent), in Probate Court No. 1 of El Paso County. For several years, little activity transpired in the case until Ortiz retained new counsel. In 2015, Ortiz filed a motion to dismiss her application for dependent administration asserting that she and her brother, Steven Joseph Casares, were the only heirs and that an administration of an estate was not necessary. Ortiz included an application to determine heirship with her dismissal motion. On December 1, 2015, the court granted Ortiz's motion to dismiss the application for dependent administration but made no determination of the Decedent's heirs.

On May 6, 2016, Mortensen filed a *pro se* pleading characterizing himself as an interested person asserting an "authenticated claim" against the estate. Mortensen described that he owned real property located next door to a property owned by Decedent. Alleging that Decedent's property had been abandoned for several years, Mortensen claimed his neighboring property had been encroached upon and adversely affected by the circumstance. Mortensen sought recovery of $30,000 against Decedent's estate for diminishment of the value of his property, for the labor he had expended to pull weeds and pick-up trash from Decedent's property, and for time he spent researching and pursuing his claim.

On February 15, 2017, the probate court entered a judgment declaring that Ortiz and her brother, Steven Joseph Casares, were the heirs of Decedent and each shared a one-half interest in Decedent's real and personal property. Ortiz later filed a motion to declare Mortensen a vexatious litigant who filed an unsubstantiated and unfounded claim. Ortiz further asserted that Mortensen lacked standing to bring his suit. Thereafter, the court rendered an order denying Mortensen's claim based on his lack of standing and his failure of proof of appropriation over the subject property. The court also denied the motion to declare him a vexatious litigant. Although Mortensen appealed to this Court, we affirmed the probate court's judgment. *See Matter of Estate of Casares* , 556 S.W.3d 913, 915-16 (Tex. App.—El Paso 2018, no pet.). Like the court below, we held that Mortensen lacked standing to challenge the heirship claims or to otherwise present a claim for damages in the heirship proceeding. *Id.*

B. Mortensen files new claims

360 Following the first appeal, Mortensen returned to the same heirship proceeding *360 and filed an original petition in which he asserted new claims against Decedent's heirs, Ortiz and Casares; against Appellee Elvia L. Ramirez, a notary public employed by Ortiz's attorney; against State Farm Fire and Casualty Company (State Farm), the notary surety of Ramirez; and against Appellee Daniel Villegas, a friend of Decedent's family. The petition describes that Ortiz resides in San Antonio, and Casares is believed to be homeless but he maintains a mailing address in Colorado Springs, Colorado. By his petition, Mortensen alleged the following as his causes of action: (1) that Ramirez improperly refused to give him access to her notary records; (2) that State Farm failed to pay a bond claim on behalf of Ramirez pertaining to her refusal; (3) that Ortiz committed slander by filing a police report that alleged that Mortensen had committed a burglary of the Decedent's home; (4) that Ortiz committed libel by filing the police report; and (5) that Ortiz, Casares, and Villegas, committed a "Nuisance Tort[ ]" against Mortensen who had expended time and expenses repairing Decedent's property.[2]

2 Regarding defendant State Farm, Mortensen dismissed his sole claim against it pursuant to a settlement agreement. As to heir Steven Casares, our record includes a citation showing a signed return asserting that service was effected on him by certified mail, restricted delivery, return receipt. The record also includes a green card reflecting delivery of an article addressed to Casares at an address in Colorado Springs, CO, which purportedly contains a signature of Casares on the delivery receipt. But Casares made no appearance or filed any pleading in the record below.

Relevant to this appeal, Ramirez and Villegas each filed a combined motion which sought protection from discovery and dismissal of all claims asserted. By their motions, Ramirez and Villegas asserted that Mortensen had brought frivolous, groundless claims in bad faith and for the purpose to cause unnecessary and needless costs of litigation. Relying on this Court's prior ruling, Appellees pointedly claimed that Mortensen did not qualify as an interested person of the heirship proceeding. Along with dismissal, Ramirez and Villegas sought attorney's fees of $5,000 and $10,000, respectively. Responding to Villegas's motion, Mortensen contended that "$10,000 in ‘reasonable attorney fees’ is not based on the realities in this case and is simply [ ] designed to intimidate the Plaintiff and attempt to prevent further discovery that would support Plaintiff's causes of action." In responding to Ramirez's motion, he argued against dismissal but included no specific response to the claim for attorney's fees.

At the hearing that followed, Ramirez and Villegas urged dismissal asserting the court had already determined that Mortensen lacked standing to assert claims in the proceeding and that ruling had been affirmed on appeal by this Court. Mortensen continued to urge that he had standing with the court and he opposed dismissal. As the hearing concluded, the trial court reiterated that it had already determined that Mortensen lacked standing in the estate, and he had improperly brought claims for which the court lacked jurisdiction. Before concluding, the court announced its willingness to allow the attorneys representing Ramirez and Villegas to submit bills for having "to defend this again." Subsequently, the trial court rendered the following written orders: (1) an order denying Mortensen's motion for alternative service on Ortiz; (2) an order granting Villegas's motion for a protective order; and (3) an order dismissing Mortensen's petition in its entirety which included orders awarding attorney's fees of $4,500 to Ramirez and $3,375 to Villegas. Invoices from both attorneys were
361 attached to the *361 court's order reflecting itemized charges for legal services which corresponded to the respective amounts of fee awarded.

This appeal followed.

II. ISSUES ON APPEAL

In six issues, Mortensen challenges the probate court's order dismissing his original petition, the court's grant of protective orders and awards of attorney's fees to Villegas and Ramirez, and the denial of his motion for alternative service on Ortiz. Responding, Appellees assert a series of arguments. First, that the probate court lacked subject-matter jurisdiction over claims asserted by Mortensen urging that he lacked standing to litigate matters involving the estate. Second, Appellees further argue that the probate court did not abuse its discretion in granting protective order relief. Third, as to the awards of attorney's fees, Appellees contend that Mortensen waived error by failing to object in the probate court and by failing to adequately brief his challenge in this Court. Fourth, regarding a specific portion of the fees awarded to Villegas, Mortensen waived any complaint about Villegas's failure to segregate recoverable fees from those that were nonrecoverable. Fifth, if no waiver occurred, Appellees alternatively argue that this Court should imply findings of fact and conclusions of law in support of such fee awards.

III. DISCUSSION

A. Issues One, Two, Three, and Six: Whether the probate court lacked subject-matter jurisdiction over Mortensen's original petition

1. Standard of Review

Whether a trial court has subject-matter jurisdiction is a question of law subject to de novo review. *Frost Nat'l Bank v. Fernandez* , 315 S.W.3d 494, 502 (Tex. 2010). Standing is a component of subject-matter jurisdiction, *State v. Naylor* , 466 S.W.3d 783, 787 (Tex. 2015), and a constitutional prerequisite to maintaining suit. *Tex. Dep't of Transp. v. City of Sunset Valley* , 146 S.W.3d 637, 646 (Tex. 2004). We always have jurisdiction to resolve questions of standing and jurisdiction. *Naylor* , 466 S.W.3d at 787. The existence of subject-matter jurisdiction and standing are rigid questions of law that are not negotiable and cannot be waived. *See Naylor* , 466 S.W.3d at 792 ; *Tex. Ass'n of Bus. v. Tex. Air Control Bd.* , 852 S.W.2d 440, 444-45 (Tex. 1993). Both are essential to a court's power to decide a case. *Bland Indep. Sch. Dist. v. Blue* , 34 S.W.3d 547, 553-54 (Tex. 2000).

A motion to dismiss based on the court's lack of subject-matter jurisdiction is the functional equivalent of a plea to the jurisdiction. *Narvaez v. Powell* , 564 S.W.3d 49, 53 (Tex. App.—El Paso 2018, no pet.). A plaintiff has the burden of pleading facts which affirmatively show that the trial court has jurisdiction. *Tex. Ass'n of Bus.* , 852 S.W.2d at 446. In deciding a plea to the jurisdiction, the trial court must determine if the plaintiff has alleged facts that affirmatively demonstrate its jurisdiction to hear the case. *Tex. Dep't of Parks & Wildlife v. Miranda* , 133 S.W.3d 217, 226 (Tex. 2004).

2. Applicable Law

The Probate Court No. 1 of El Paso County is a statutory probate court. A statutory probate court has the general jurisdiction of a probate court as provided by the Texas Estates Code, and the jurisdiction provided by law for a county court to hear certain matters under the Health and Safety Code. *See* TEX. GOV'T CODE ANN. § 25.0021. It is a court of limited jurisdiction. *Narvaez* , 564 S.W.3d at 54.*362 For a suit to be subject to the jurisdiction provisions of the Texas Estates Code, it must qualify as either a "probate proceeding," or a "matter related to a probate proceeding," as defined by the Estates Code. *In re Hannah* , 431 S.W.3d 801, 807-08 (Tex. App.—Houston [14th Dist.] 2014, orig. proceeding) (citing TEX. EST. CODE ANN. §§ 21.006, 32.001(a), 33.002, 33.052, 33.101).

362

Section 31.001 of the Texas Estates Code provides:

The term "probate proceeding," as used in this code, includes:

> (1) the probate of a will, with or without administration of the estate;
>
> (2) the issuance of letters testamentary and of administration;
>
> (3) an heirship determination or small estate affidavit, community property administration, and homestead and family allowances;
>
> (4) an application, petition, motion, or action regarding the probate of a will or an estate administration, including a claim for money owed by the decedent;
>
> (5) a claim arising from an estate administration and any action brought on the claim;
>
> (6) the settling of a personal representative's account of an estate and any other matter related to the settlement, partition, or distribution of an estate;
>
> (7) a will construction suit; and
>
> (8) a will modification or reformation proceeding under Subchapter J, Chapter 255.

TEX. EST. CODE ANN. § 31.001.

"A matter related to a probate proceeding" is defined based on whether a county has a statutory probate court or county court at law exercising probate jurisdiction. *Hannah* , 431 S.W.3d at 809-10. As we have a statutory probate court in this case, Section 31.002(c) governs the scope of matters considered "related to a probate proceeding...." That provision states as follows:

> (c) For purposes of this code, in a county in which there is a statutory probate court, a matter related to a probate proceeding includes:
>
> (1) all matters and actions described in Subsections (a) and (b); and
>
> (2) any cause of action in which a personal representative of an estate pending in the statutory probate court is a party in the representative's capacity as personal representative.

TEX. EST. CODE ANN. § 31.002(c).

As referenced within that provision, subparts (a) and (b) provides as follows:

> (a) For purposes of this code, in a county in which there is no statutory probate court or county court at law exercising original probate jurisdiction, a matter related to a probate proceeding includes:
>
> (1) an action against a personal representative or former personal representative arising out of the representative's performance of the duties of a personal representative;
>
> (2) an action against a surety of a personal representative or former personal representative;
>
> (3) a claim brought by a personal representative on behalf of an estate;
>
> (4) an action brought against a personal representative in the representative's capacity as personal representative;
>
> (5) an action for trial of title to real property that is estate property, including the enforcement of a lien against the property; and
>
> (6) an action for trial of the right of property that is estate property.
>
> (b) For purposes of this code, in a county in which there is no statutory probate

363 *363

> court, but in which there is a county court at law exercising original probate jurisdiction, a matter related to a probate proceeding includes:
>
> (1) all matters and actions described in Subsection (a);
>
> (2) the interpretation and administration of a testamentary trust if the will creating the trust has been admitted to probate in the court; and
>
> (3) the interpretation and administration of an inter vivos trust created by a decedent whose will has been admitted to probate in the court.

TEX. EST. CODE ANN. § 31.002(a), (b).

Finally, a probate court may also exercise pendent and ancillary jurisdiction as necessary to promote judicial efficiency and economy. TEX. EST. CODE ANN. § 32.001(b). Yet for a probate court to have such authority to exercise jurisdiction over matters incident to an estate, it is axiomatic that there must necessarily be a probate proceeding then pending in such court. *Frost Nat'l Bank* , 315 S.W.3d at 506 ; *Narvaez* , 564 S.W.3d at 57.

3. Application

First, we observe that none of Mortensen's causes of action in his original petition qualify as a recognized "probate proceeding" pursuant to statutory terms. *See* TEX. EST. CODE ANN. § 31.001. Excluding the cause of action no longer pending against State Farm for its alleged failure to pay a bond claim, all remaining claims alleged in the petition were all based on the following acts or omissions: (1) failure of a notary public to afford access to her notary records; (2) slander based on a police complaint made against Mortensen; (3) libel for the same; and (4) a "Nuisance Tort[ ]" attributed to the cost for repair and maintenance of the property. Plainly,

none of these acts or omissions fall within any of the eight categories recognized as comprising probate proceedings under Texas Estates Code section 31.001. *See* TEX. EST. CODE ANN. § 31.001. Said differently, the prosecution of these claims fail to attack, impact, or otherwise alter the heirship judgment. While these purported claims do implicate certain parties who had some relation to a probate proceeding, their identity alone or the role played by each cannot bring the claims within the jurisdiction of the probate court. *See Hannah* , 431 S.W.3d at 808-09 (holding that relator's suit—consisting of a claim for money damages against multiple parties based on defendants' alleged conduct in slandering relator and tortuously interfering with the bequests to her in a decedent's prior wills—was not a "probate proceeding," despite the gravamen of the suit being that she was disinherited as a result of the defendants' alleged actions, where: (1) the suit did not fall within any of the categories listed within Texas Estates Code section 31.001 ; (2) the prosecution of relator's suit would not attack, impact, or otherwise alter the probate judgment; and (3) whatever potential liability the defendants may face based on their alleged individual actions vis-à-vis relator was a distinct matter to be determined, not by application of probate law, but rather by the law pertaining to her specific claims).

Moreover, for like reasons, we note that none of Mortensen's causes of action brought by his original petition qualify as "matter[s] related to a probate proceeding," even though he asserts purported causes that implicate individuals who were involved in some manner with the prior probate proceeding. *See* TEX. EST. CODE ANN. § 31.002(a), (b), (c).

Finally, we further find that the probate court no longer had pendent and ancillary jurisdiction to exercise over
364 Mortensen's newly raised causes of action because *364 the probate proceeding had already concluded—having resulted in a judgment declaring heirship—and no longer remained pending in the probate court. *See Frost Nat'l Bank* , 315 S.W.3d at 506 ; *Narvaez* , 564 S.W.3d at 57. Thus, this third and last avenue through which Mortensen might have established jurisdiction was no longer viable to otherwise support the court's ancillary jurisdiction.

In sum, we conclude that Mortensen failed to raise a cause of action in which the probate court had subject-matter jurisdiction given his failure to allege a single claim that qualified as either a "probate proceeding," as a "matter related to a probate proceeding," or as one that triggered the probate court's pendent and ancillary jurisdiction. *See Hannah* , 431 S.W.3d at 807-08. Consequently, the statutory probate court here had no power nor constitutional authority to decide Mortensen's claims or any of the motions stemming therefrom. *See Bland* , 34 S.W.3d at 553-54 (instructing that subject-matter jurisdiction is essential to a court's power to decide a case). Accordingly, because we have concluded there is a want of subject-matter jurisdiction as to all claims asserted by Mortensen's petition, we will not address on their merits the arguments raised in Mortensen's Issues One, Two, Three, and Six, which challenge the probate court's order dismissing his petition, the order granting protective orders, and the order denying Mortensen's motion for alternative service of Ortiz, and we overrule these four issues.[3]

[3] Appellees also contend that Mortensen does not have standing to advance his claims under the probate court cause number of this case for the same reasons we articulated in his previous appeal. *See Casares* , 556 S.W.3d at 915-16. As we previously observed, in a probate proceeding the burden is on the person whose standing is challenged to prove that he is an "interested person." *Id.* at 915. The Texas Estates Code defines an "interested person" as "an heir, devisee, spouse, creditor, or any other having a property right in or claim against an estate being administered...." Tex. Est. Code Ann. § 22.018(1). We also observed in the prior appeal that the probate court was not administering an estate. *Casares* , 556 S.W.3d at 915. Thus, we held that Mortensen did not have a "claim against an estate being administered." *Id.* And for this additional reason, we would hold that Mortensen has no standing to raise his Issues One, Two, Three, and Six here and overrule them.

Although we overrule these issues based on the probate court's lack of subject-matter jurisdiction to hear them, we nonetheless retain the ability to consider whether the awards of attorney's fees by that court was proper, and we proceed to address Mortensen's remaining issues contesting those fees. *See Marcus v. Smith* , 313 S.W.3d 408, 415 (Tex. App.—Houston [1st Dist.] 2009, no pet.) (holding that the court had jurisdiction to address Appellant's complaint about trial attorney fees even though the court did not have jurisdiction to address the merits of the underlying proceeding from which those fees arose).

B. Issues Four and Five: The awards of attorney's fees

In Issues Four and Five, Mortensen generally contends that the probate court abused its discretion in awarding attorney's fees of $4,500 to Ramirez and $3,375 to Villegas. In both issues, Mortensen broadly contends that the award of fees to each movant was unsupported by evidence. As to each award, however, he further includes a separate and distinct complaint. In Issue Four, he contends the fees to Ramirez were not reasonable; whereas in Issue Five, he contends the fees to Villegas were not incurred. Responding, Ramirez and Villegas present a
365 two-part argument: (1) that Mortensen waived error *365 regarding the fees awarded to their respective attorneys; and (2) if error was not waived, that this Court should imply that the probate court made all findings necessary to support the fee awards including findings that the respective awards were reasonable and necessary.

Addressing Issues Four and Five together, we begin with the waiver arguments.

1. Whether Mortensen Waived Error with Respective to the Fee Awards

Ramirez and Villegas contend that Mortensen waived error: (1) by failing to lodge any objection to the award of attorney's fees in the probate court; and (2) by inadequately briefing on appeal his complaint against such fees. We agree in part and disagree in part.

a. Probate Court Proceedings

"Parties are restricted on appeal to the theory on which the case was tried." *Wells Fargo Bank, N.A. v. Murphy* , 458 S.W.3d 912, 916 (Tex. 2015). Moreover, if no objection was made that matches the complaint on appeal, then the issue has not been preserved for appellate review. *See* TEX. R. APP. P. 33.1(a) ; *Martinez Jardon v. Pfister* , 593 S.W.3d 810, 831 (Tex. App.—El Paso 2019, no pet.). Complaints that attorney's fees were not recoverable either by statute or by other basis may be waived on appeal if no such objection was properly made in the trial court. *See, e.g., Snowden v. Artesia Wells Ranch 1994, Ltd.* , No. 13-19-00157-CV, 2020 WL 2610924, at *2 (Tex. App.—Corpus Christi May 21, 2020, no pet.) (mem. op.) (holding claim about lack of statutory authority for attorney's fees was waived by failure to appropriately object); *In re Baby Boy R.* , 191 S.W.3d 916, 921 (Tex. App.—Dallas 2006, pet. denied) (holding the same for constitutional claims in general); *Gipson-Jelks v. Gipson* , 468 S.W.3d 600, 604 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (stating that preservation of error regarding attorney's fees requires a complaint to the trial court by timely request, objection, or motion with sufficient specificity to bring awareness of complaint to the trial court).

Nevertheless, despite these restrictions on appellate review, it is further recognized that a complaint about the legal or factual sufficiency of the evidence to support an award of fees may be raised for the first time on appeal in a civil nonjury case. *See* TEX. R. CIV. P. 324(a), (b) ; TEX. R. APP. P. 33.1(d) ; *see also Interest of D.Z.* , 583 S.W.3d 284, 292 (Tex. App.—Houston [14th Dist.] 2019, no pet.) ; *WPS, Inc. v. Enervest Operating, L.L.C.* , No. 01-06-00759-CV, 2010 WL 2244077, at *16 (Tex. App.—Houston [1st Dist.] May 28, 2010, pet. denied) (mem. op. on reh'g); *O'Farrill Avila v. Gonzalez* , 974 S.W.2d 237, 249 (Tex. App.—San Antonio 1998, pet. denied).

Here, the record shows that Ramirez and Villegas each filed a combined motion in the probate court in which they sought a protective order from discovery and a dismissal of all claims brought against them. By their motions, Ramirez and Villegas asserted that Mortensen had filed claims that were frivolous, groundless, brought in bad faith, and for the purpose of harassment. And, as a basis for dismissal of the suit, both motions referenced this Court's prior opinion and judgment which had affirmed the probate court's prior ruling that Mortensen was not an interested person in the pending probate proceeding. While Ramirez sought a fee award of $5,000 by his motion, Villegas's fee claim sought $10,000.

In his responsive pleading filed with the court below, Mortensen opposed the fee request of Villegas but not
366 that of Ramirez. And, in doing so, his pleading simply *366 argued that "$10,000 in 'reasonable attorney fees' is not based on the realities in this case...." As the hearing below nearly concluded, the probate court indicated it had no jurisdiction over the claims asserted given that Mortensen lacked standing in the estate. Thereafter, the court indicated it would allow the attorneys representing Ramirez and Villegas to submit their bills for having to, once again, defend the suit brought in that court. At this point, Mortensen lodged no objection to the award of fees. The court then granted both motions to dismiss. Shortly thereafter, as reflected by the dismissal order dated February 19, 2019, invoices were submitted from movants' attorneys which reflected fees of $4,500 billed to Ramirez, and $3,375 billed to Villegas. The probate court's dismissal order includes a separate award of fees to each movant corresponding to the invoices submitted. Mortensen filed no post-hearing motion for new trial.

In his appellate briefing, Mortensen advances a variety of arguments challenging the probate court's award of fees to Ramirez and Villegas. In general terms, he contends the fees were not recoverable pursuant to any statutory authority based on the type of suit at issue and further argues the fees awarded were "an excessive fine" in violation of the U.S. and Texas Constitutions. More pointedly, he further asserts that the probate court erred by awarding fees to Ramirez and Villegas given that the fees sought by their respective motions were not of the kind or type permitted by section 38.001 of the Texas Civil Practice and Remedies Code. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 38.001 (listing what types of claims are allowed for the recovery of attorney's fees). Because Mortensen failed to properly and timely object in the probate court that the fees lacked a legal basis, he failed to preserve error on that basis and we do not otherwise decide that issue.[4] *See* TEX. R. APP. P. 33.1(a) ; *Gipson-Jelks* , 468 S.W.3d at 604 (appellant did not preserve complaint regarding trial court's lack of statutory or contractual basis for attorney's fee award in trial court); *Snowden* , 2020 WL 2610924, at *2 ; *Baby Boy R.* , 191 S.W.3d at 921.

[4] We note here that Tex. R. Civ. P. 13 permits a court, upon motion or upon its own initiative, to impose an appropriate sanction upon either a party, or his or her attorney, if the court finds that a pleading, motion, or other paper is groundless and brought in bad faith or for the purpose of harassment. *See* Tex. R. Civ. P. 13. However, the Supreme Court recently clarified that when a court exercises its discretion to shift attorney's fees as a sanction, there must be some evidence of reasonableness to establish that the sanction is " 'no more severe than necessary' to fairly compensate the prevailing party." *Nath v. Texas Children's Hospital* , 576 S.W.3d 707, 709 (Tex. 2019). "Consequently, when a party seeks attorney's fees as sanctions, the burden is on that party to put forth some affirmative evidence of attorney's fees incurred and how those fees resulted from or were caused by the sanctionable conduct." *Id.* (citing *CHRISTUS Health Gulf Coast v. Carswell* , 505 S.W.3d 528, 540 (Tex. 2016)).

Accordingly, we overrule Issues Four and Five in part.

Next, we consider the remainder of arguments raised by Mortensen's briefing.

b. Briefing Objections

When a party appears *pro se* , he or she is held to the same standards as a licensed attorney and must comply with all applicable laws and rules of procedure. *Robb* , 417 S.W.3d at 590. If *pro se* litigants were not required to comply with applicable rules of procedure, they would be given an unfair advantage over parties represented by counsel. *Id.* When reviewing a brief, whether filed by counsel or by *pro se* parties, we are required to
367 construe it reasonably, yet liberally, so that the right *367 to appellate review is not lost by waiver. *Id.* Moreover, substantial compliance with the rules is sufficient. *See* TEX. R. APP. P. 38.9. Simply said, a party's brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record. TEX. R. APP. P. 38.1(i).

Beyond the argument asserting there is no legal basis for the fee awards, Mortensen's briefing also argues that the attorney's fees were "unsupported and unreasonable" or "not incurred," and "provide no proof of the reasonableness or necessity of the fees...." We construe these complaints as arguing that the evidence presented was legally insufficient. *See Brownhawk, L.P. v. Monterrey Homes, Inc.* , 327 S.W.3d 342, 346 (Tex. App.—El Paso 2010, no pet.) (instructing that a "no evidence" challenge is a legal sufficiency challenge). Remaining mindful of our duty to construe briefing reasonably, yet liberally, we find that Mortensen adequately established the right to an appellate review of the legal sufficiency of the fee awards. *See Robb* , 417 S.W.3d at 590. We thus hold that Mortensen's legal sufficiency argument was not waived by a failure to adequately brief it to this Court. *See* TEX. R. APP. P. 38.1(i), 38.9.

Although Mortensen waived error as to the legal basis of the awards, he preserved error as to his challenge of the legal sufficiency of the evidence to support those awards. *See* TEX. R. CIV. P. 324(a), (b) ; TEX. R. APP. P. 33.1(d) ; *see also D.Z.* , 583 S.W.3d at 292 ; *WPS* , 2010 WL 2244077, at *16 ; *O'Farrill Avila* , 974 S.W.2d at 249.

2. Legal Sufficiency of the Evidence to Support the Fee Awards

a. Standard of Review

In general, the trial court's determination of what constitutes a reasonable and necessary attorney's fee is subject to an abuse of discretion standard on appeal. *Gerges v. Gerges* , 601 S.W.3d 46, 65 (Tex. App.—El Paso 2020, no pet.). An award of fees which is not supported by legally sufficient evidence is arbitrary and constitutes an abuse of discretion. *Brownhawk* , 327 S.W.3d at 348. The party seeking an award of attorney's fees bears the burden of establishing entitlement to an award. *Sullivan v. Abraham* , 488 S.W.3d 294, 299 (Tex. 2016). "Sufficient evidence includes, at a minimum, evidence of (1) particular services performed, (2) who performed those services, (3) approximately when the services were performed, (4) the reasonable amount of time required to perform the services, and (5) the reasonable hourly rate for each person performing such services." *Rohrmoos Venture v. UTSW DVA Healthcare, LLP* , 578 S.W.3d 469, 498 (Tex. 2019). In determining whether there is legally sufficient evidence to support such award, we consider the evidence presented in the light most favorable to the findings necessary to support the court's decision and disregard evidence contrary to the findings unless a reasonable fact finder could not. *See City of Keller v. Wilson* , 168 S.W.3d 802, 807 (Tex. 2005).

b. Application

Before we assess the sufficiency of the evidence presented to the probate court, we next address Ramirez's and Villegas's remaining argument that this Court "should imply that the Probate Court made all findings that were necessary to support the attorney's fee awards it made" where neither party requested findings of fact and conclusions of law and that this Court should affirm for this reason alone. Generally, judgments are presumed

valid. *Anderson Mill Mun. Util. Dist. v. Robbins* , 584 S.W.3d 463, 473 (Tex. App.—Austin 2005, no pet.).
368 When neither *368 party requests findings of fact and conclusions of law, it is implied that the trial court made all fact findings necessary to support its judgment. *Id.* However, when the appellate record includes the reporter's and clerk's record, these implied findings are not conclusive and may be challenged for legal and factual sufficiency. *Id.* As Appellees appear to contend that such implied findings should be conclusive without regard to the evidence presented in support of the fees awarded, we reject this contention, and instead, we proceed to consider whether the evidence was legally sufficient in light of the applicable standard of review. *See id.*

Mortensen argues that the invoices provided were insufficient to support the two fee awards. As to this argument, we agree. Although we find the invoices themselves provide sufficient detail as to the legal services performed, the date of those services, and the amount of time spent for each service, nonetheless, we further conclude that these invoices fail to satisfy all required elements to support a fee award. *See Rohrmoos* , 578 S.W.3d at 498. Standing alone the invoices fail to establish the reasonableness of the time spent on legal services and the reasonableness of the rates charged. *Id.* ("the fact finder's starting point for calculating an attorney's fee award is determining the reasonable hours worked multiplied by a reasonable hourly rate"). Notably, no testimony was presented by affidavit or otherwise establishing the reasonableness of the time spent or of the rate charged. *Id.* Thus, we hold in this instance that the evidence was legally insufficient to support the probate court's award of attorney's fees where no evidence was presented as to all required elements. *See Robles v. Nichols* , 610 S.W.3d 528, 538 (Tex. App.—El Paso 2020, no pet. h.) (holding the evidence was insufficient to support an award of attorney's fees where there was no evidence on two of the *Rohrmoos* considerations, namely, the particular services performed and the reasonable amount of time required to perform the services); *compare Gerges* , 601 S.W.3d at 66-67 (holding that the award of attorney's fees was supported by legally sufficient evidence where: (1) the prevailing party's attorney testified about her experience and opined that her billing rate was a reasonable fee in the area; and (2) the prevailing party submitted billing records that detailed the work performed, who performed it, when the services were performed, the amount of time spent for each service, and the hourly rate for each person performing the service). Accordingly, we conclude that the probate court abused its discretion by awarding fees unsupported by legally sufficient evidence. *See Brownhawk* , 327 S.W.3d at 348.

Therefore, we sustain the remaining part of Issues Four and Five and reverse the probate court's award of $4,500 to Ramirez, and $3,375 to Villegas, for their respective attorney's fees. But in light of *Rohrmoos's* recent clarification of the sufficiency requirements of such awards—and such clarification having been issued while this appeal remained pending—we remand the matter to the court below in the interest of justice for further proceedings limited to Appellees' attorney's fee claims.[5] *See* TEX. R. APP. P. 43.3(b) ; *see also Robles* , 610
369 S.W.3d at 538.*369 **IV. CONCLUSION**

5 Appellees also raise a contention on appeal that Mortensen waived some portion of his legal sufficiency argument on the attorney's fees awarded to Villegas by failing to object that the requested fees had not been properly segregated. A party seeking recovery of attorney's fees must "segregate fees between claims for which they are recoverable and claims for which they are not." *Tony Gullo Motors I, L.P. v. Chapa* , 212 S.W.3d 299, 311 (Tex. 2006). Yet, we need not address this additional contention relating to any failure to segregate fees because we have already held that Mortensen waived any challenges to the attorney's fees—aside from, and solely, a nonwaivable sufficiency challenge.

Having overruled Issues One, Two, Three, and Six, we affirm the portion of the probate court's judgment dismissing Mortensen's petition, the order denying Mortensen's motion for alternative service of Ortiz, and the granting of protective orders to Villegas and Ramirez. Having overruled in part and sustained in part Issues Four and Five, we affirm the award of attorney's fees to Appellees but reverse that portion of the probate court's judgment awarding fees in the amount of $4,500 to Ramirez and $3,375 to Villegas, and remand for further proceedings to determine the reasonable amount of fees to be awarded.