

No. 01-23-00362-CV

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IN THE COURT OF APPEALS  
FOR THE FIRST DISTRICT OF TEXAS  
HOUSTON, TEXAS

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

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

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Original Proceeding from Harris County Probate Court No. 4

Cause No. 412,249-401

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APPEAL FROM ORDERS AND JUDGMENTS

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**TRIAL JUDGE**

The Honorable James Horwitz  
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## **STATEMENT REGARDING ORAL ARGUMENT**

This matter raises a fundamental question of law regarding the boundaries of probate court jurisdiction over trust disputes that turn on statutory construction and analysis of legislative intent. There are two diametrically opposing views in the case law suggesting that if one is correct the other cannot be. This appears to present an appellate court conflict that should be resolved, or at least clarified and distinguished, in order to avoid inconsistent rulings.

The progenitor for the dominant case law view is also counsel for Appellee Carl Brunsting and because the dominant case law authority is the view relied upon by Appellant, Appellant is of the opinion that the decisional process would be significantly aided by oral argument.

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## **STATEMENT OF THE CASE**

Appellant, CANDACE LOUISE CURTIS, filed suit against trustees, Amy and Anita Brunsting, based on diversity jurisdiction, in the Southern District of Texas, seeking an accounting, disclosures, injunctive relief, and damages for the trustees' breach of fiduciary duty in their failure to account and distribute the proceeds of the Brunsting Family Survivor's and Decedent's Trusts. [ROA 219-247]. The Trustees unsuccessfully challenged the court's jurisdiction, alleging the probate exception to diversity jurisdiction. The Fifth Circuit Court of Appeals held that the probate exception to diversity jurisdiction did not apply. The Fifth Circuit remanded the case to the Southern District of Texas for further proceedings. District Judge Kenneth Hoyt granted Appellant's motion for preliminary injunction and ordered the preparation of a special master's report.

Although Curtis never filed any claims against the trustees in any Texas court, the parties erroneously attempted to remand the case to Harris County probate court. The Harris County probate court entered an order of transfer of the federal case to itself, with no legal authority to do so. Curtis' claims were never filed in, transferred to or remanded to Harris County probate court. Curtis' federal lawsuit was not even properly dismissed from the Southern District of Texas, but administratively closed, subject to a preliminary injunction that remains in effect.

Appellees engaged in a series of convoluted procedural maneuvers to create the appearance of jurisdiction in Harris County probate court, when there was none. Appellant appeals the denials of the plea to the jurisdiction and granting of summary judgment on Appellees purported counter claims and all other orders entered in Harris County Probate Court No. 4, Ancillary Cause No. 412249-401, for want of subject matter jurisdiction.

### **APPELLATE JURISDICTION**

The filing of a notice of appeal invokes the court of appeals jurisdiction. A document is considered filed when delivered to the clerk for filing. *See Biffle v. Morton Rubber Industries, Inc.* 785 S.W.2d 143, 144 (Tex. 1990). Therefore, when a notice of appeal, timely or untimely, is delivered to the clerk for filing, any further determination concerning appellate jurisdiction must be made by the appellate court. The appellate court has the jurisdiction to determine whether or not it has jurisdiction. *See Olivo*, 918 S.W.2d at 523.

The standard for determining appellate jurisdiction is whether the appeal is authorized by law. "Appellate courts must determine, even sua sponte, the question of jurisdiction, and the lack of jurisdiction may not be ignored simply because the parties do not raise the issue. When an appellate court concludes it does not have jurisdiction, it can only dismiss the appeal." *Walker Sand, Inc. v. Baytown Asphalt*

Materials, Ltd., 95 S.W.3d 511, 514 (Tex. App.-Houston [1st Dist.] 2002, pet. denied) (internal citations omitted); see *M.O. Dental Lab v. Rape*, 139 S.W.3d 671, 673 (Tex. 2004)

### **Appellate Jurisdiction over Probate Court Orders and Judgments**

A final order issued by a probate court is appealable to the court of appeals, Texas Estates Code § 1022.001 (West 2015). Probate cases are an exception to the "one final judgment" rule for purposes of appellate jurisdiction. *De Ayala v. Mackie*, 193 S.W.3d 575, 578 (Tex.2006). In a probate proceeding, a final or appealable order need not be one which fully and finally disposes of the entire probate proceeding, *Crowson v. Wakeham*, 897 S.W.2d 779, 781-82 (Tex. 1995). In probate cases, an order is final and appealable before the entire proceeding is concluded if the order disposes of all parties or issues in a particular phase of the proceeding. *Id.* at 579; *Crowson v. Wakeham* , 897 S.W.2d 779, 783 (Tex.1995). If not authorized expressly by statute, a probate order is immediately appealable when it disposes of all parties or issues in a particular phase of the proceedings. *De Ayala v. Mackie*, 193 S.W.3d 575, 578 (Tex. 2006)).

### **Alternate Request for Consideration as Petition for Writ of Mandamus**

If the court determines that it does not have appellate jurisdiction, Appellant asks that the appeal be treated as a petition for writ of mandamus and hereby

adopts and incorporates Appellant's previously filed *Petition for Writ of Mandamus* by reference as if fully set forth herein, *Texas First District Court of Appeal Houston, Texas No. 10-22-00513-CV*". [FDCA No. 10-22-00513-CV]

### **Request for Judicial Notice**

Because the matter appealed from was filed in a statutory probate court as ancillary to a pour-over estate under independent administration, and Appellant's law suit was filed in the Southern District of Texas prior to any related matters having been filed in any state court, and was held to be outside the probate exception before Carl Brunsting filed his tort suit, Appellant requests the Court take judicial notice of these facts via the public record and the appendix of exhibits filed with Appellant/Relator's *Petition for Writ of Mandamus, Texas First District Court of Appeal No. 10-22-00513-CV*.

*See 1 STEVEN GOODE ET AL., GUIDE TO THE TEXAS RULES OF EVIDENCE § 201.1 (3d ed. 2002); see also In re Graves, 217 S.W.3d 744, 750 (Tex.App.-Waco 2007, orig. proceeding). "Legislative facts . . . are not normally the objects of evidentiary proof. As to them, judicial notice instead of record evidence is the rule rather than the exception, and indisputability is not required to justify judicial notice." Graves, 217 S.W.3d at 750 (quoting GOODE § 201.2). In re Sigmar, 270 S.W.3d 289, 302 (Tex. App. 2008)*

*Under Texas Rule of Evidence 202, this Court must take judicial notice of a federal court's order if requested by a party and if this Court is supplied with the necessary information, such as by attaching the order. See TEX. R. EVID. 202(b)(2) . Ex parte Leachman, 554 S.W.3d 730 (Tex. App. 2018)*

## **STATEMENT OF THE ISSUES PRESENTED**

The issues raised in this appeal are jurisdiction and standing. Subject-matter jurisdiction is essential to the authority of a court to decide a case. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 443 (Tex. 1993). It is never presumed and cannot be waived. *Id.* at 443-44, and can be raised at any time. *Alfonso v. Skadden*, 251 S.W.3d 52, 55 (Tex. 2008); *City of Fort Worth v. Shilling*, 266 S.W.3d 97, 105 n.6 (Tex. App.-Fort Worth 2008, pet. denied). An appellate court is obligated, even sua sponte, to determine the threshold question of jurisdiction. See *Walker Sand, Inc. v. Baytown Asphalt Materials, Ltd.*, 95 S.W.3d 511, 514 (Tex. App.—Houston [1st Dist.] 2002, no pet.).

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),

Mortensen v. Villegas 630 S.W.3d 355, 361 (Tex. App. 2021).

The void judgment exception recognizes that there are some rare situations in which a trial court's judgment is accorded no respect due to a complete lack of power to render the judgment in question. A void judgment is a “nullity” that can be ignored. It can be attacked at any time, either directly or collaterally. Gaddy v. State, 433 S.W.3d 128, 142 (Tex. App. 2014). A judgment is void only when the court rendering judgment "had no jurisdiction of the parties or property, no jurisdiction of the subject matter, no jurisdiction to enter the particular judgment, or no capacity to act." Browning v. Prostok, 165 S.W.3d 336, 346 (Tex. 2005). A judgment that violates a party's right to due process may also be void. See, e.g., PNS Stores, Inc. v. Rivera, 379 S.W.3d 267, 274-75 (Tex. 2012).

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), Mortensen v. Villegas 630 S.W.3d 355, 361 (Tex. App. 2021).

### **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). *State ex rel. State Dep't of Hwys. & Pub. Transp. v. Gonzalez*, 82 S.W.3d 322, 327 (Tex.2002), *Archer Group, LLC v. City of Anahuac*, 472 S.W.3d 370 (Tex. App. 2015)

### **SUMMARY OF THE ARGUMENT**

The primary question presented regards the boundaries to statutory probate court jurisdiction over inter vivos trust disputes and whether or not there are any. This is a fundamental question of statutory construction that turns on whether the nature of the claims, the rights asserted and the relief sought in a Plaintiff's original petition, invoked the subject matter jurisdiction of a statutory probate court. The action in question was filed as ancillary to two estates and was filed by Carl Brunsting in both his individual capacity and in his capacity as independent executor and thus, standing must be determined in relation to each persona.

### **PERSONA**

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

## **PROBATE JURISDICTION**

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 those terms are defined by the Estates Code. *In re Hannah*, 431 S.W.3d 801 (Tex. App. 2014).<sup>1</sup>

According to the case law authorities affirmatively citing to *In re Hannah*,<sup>2</sup> the Original Petition filed in Harris County Probate Court No. 4 on April 9, 2013 by Plaintiff Carl Brunsting, Individually and as Independent Executor of the Estates of Elmer H. Brunsting and Nelva E. Brunsting, does not raise a cause of action that qualifies as a "*probate proceeding*," or "*matter related to a probate proceeding*" and does not come within the jurisdictional provisions of the Texas Estates Code.

### **The Appearance of a Conflict among the Courts of Appeal**

There is another case from the 14th Court of Appeals that stands for the

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<sup>1</sup> Attorney Bobbie G. Bayless for Realtor Julie Hannah, 14th Court of Appeals Houston, Texas, No 14-14-00126-CV; Attorney Bobbie G. Bayless for Plaintiff/Appellee Carl Henry Brunsting.

<sup>2</sup> *Mortensen v. Villegas* 630 S.W.3d 355 (Tex. App. 2021) Decided Feb 1, 2021 Court of Appeals of Texas (8th District) El Paso, *Narvaez v. Powell* 564 S.W.3d 49 (Tex. App. 2018) Decided Jul 13, 2018 No. 08-17-00157-CV Court of Appeals of Texas (8th District) El Paso and *In re Davidson* 485 S.W.3d 927 (Tex. App. 2016) Decided Apr 6, 2016 NO. 12-15-00058-CV Court of Appeals (12th District) Tyler, Texas

proposition that a statutory probate court's trust jurisdiction is independent of its probate jurisdiction. See Lee v. Ronald E. Lee Jr., Katherine Lee Stacy, & Legac... 528 S.W.3d 201 (Tex. App. 2017) Court of Appeals of Texas, Houston (14th Dist.)<sup>3</sup> This conclusion appears to presents an appellate court conflict that should be resolved, or at least clarified and distinguished in order to avoid inconsistent rulings.

### **STATEMENT OF FACTS**

#### **Appeal from Harris County Probate Court No. 4 Cause No. 412,249-401**

The record will show that Elmer H. Brunsting and Nelva E. Brunsting created an estate plan that included independent administration of pour-over wills<sup>4</sup> with a family living trust as the sole devisee. Elmer H. Brunsting passed April 1, 2009 and Nelva E. Brunsting passed November 11, 2011.<sup>5</sup> Carl Brunsting's tort claims were filed in the probate court April 9, 2013 which is eight days beyond the four year limitation for bringing claims on behalf of the estate of Elmer H.

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<sup>3</sup> The Lee Court was dealing with the question of continuing jurisdiction over a testamentary trust after a dependent administration had closed. There are 19 cases citing to Lee but only one opinion citing to Lee for this proposition. See Goepp v. Comerica Bank & Trust, N.A. Decided Jul 9, 2021, No. 03-19-00485-CV Court of Appeals of Texas, (3rd) District, Austin. Although Goepp was not published, it is cited here for reference purposes.

<sup>4</sup> [FDCA No. 10-22-00513-CV- Tab 12, P.236-249] & [Tab 18, P.287-299] Trust Settlor's Pour-over Wills

<sup>5</sup> [FDCA No. 10-22-00513-CV- Tab 13, P.250-253] Statement of Death and other facts by Drina Brunsting

Brunsting and four days after the inventory, appraisal and list of claims had been approved.<sup>6</sup>

### **Southern District of Texas**

Litigation involving this family trust began in the Southern District of Texas, Houston Division, and that is where Appellant will begin the chronology of events. At the passing of the last Settlor, Nelva Brunsting, Appellant, a California resident, made written requests to Trustee Anita Brunsting, asking for a required accounting and fiduciary disclosures. On February 27, 2012, Appellant filed a breach of fiduciary action in the Southern District of Texas against Anita Brunsting and Amy Brunsting as Co-Trustees of the family living trust, seeking a mandatory trust accounting and fiduciary disclosures, *[ROA 219-247] Candace Louise Curtis vs Anita Brunsting, Amy Brunsting and Does 1-100 SDTX No. 4:12-cv-592*. The federal case was dismissed under the probate exception to federal jurisdiction March 8, 2012 and Candace Curtis filed timely notice of appeal.

### **Fifth Circuit Court of Appeal**

On January 9, 2013, in a unanimous opinion, the Fifth Circuit Court of Appeal reversed dismissal under the probate exception and remanded to the

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<sup>6</sup> [FDCA No. 10-22-00513-CV- Tab 15, P.257-269] Inventory and orders approving inventory

Southern District of Texas for further proceedings, *Curtis v Brunsting* 704 F.3d 406 (5<sup>th</sup> Cir. Jan 2013), [ROA 248-255]. Candace Curtis vs. Anita Brunsting et al. is not a probate matter, Tex. Est. Code § 22.029. It is an action in personam, not an action in rem. Tex. Est. Code § 32.001(d).

On April 19, 2013 the Honorable Kenneth Hoyt Jr. District Court Judge for the Southern District of Texas Houston Division, issued a memorandum of injunction<sup>7</sup> with findings of fact and conclusions of law. In the Memorandum the Court found that Plaintiff had met her burden on all four requisite elements: (1) a substantial likelihood of plaintiff's success on the merits, (2) a substantial threat of irreparable injury if the injunction was not issued, (3) that the threatened injury if the injunction was denied, outweighed any harm that would result if the injunction was granted, and (4) that the grant of an injunction would not disserve the public interest. Judge Hoyt also found that Defendants were acting as trustees for the family trust and owe fiduciary duties to Plaintiff Candace Curtis as a beneficiary, that Defendants had failed to account, failed to disclose unprotected trust instruments and failed to divide the assets into separate shares, as required by instruments submitted by Defendant Co-Trustees as "the trust". Defendant Co-

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<sup>7</sup> [ROA 258-263], SDTX No. 4:12-cv-592 Dkt 45] – [FDCA No. 10-22-00513-CV- Tab 4, P.97-102]

Trustees did not appeal the injunction.

The Court also found that after two and one half years as trustee, Anita Brunsting was unable to provide the court with an accounting of the trust assets and on May 9, 2013, the Southern District Court appointed a Special Master<sup>8</sup> to conduct a limited accounting. The accounting Report of Special Master<sup>9</sup> was filed Aug. 8, 2013 and hearing was had September 3, 2013. Although certain monetary issues and document inconsistencies were made evident, at this juncture the improprieties were of relatively small impact and easily adjusted by balancing the books and administering the trust according to its terms.

#### **Harris County Probate Court No. 4**

The wills of Elmer Brunsting [No. 412,248] and Nelva Brunsting [No. 412,249] were admitted to Harris County Probate Court No. 4 without challenge on August 28, 2012 and Letters Testamentary for Independent Administration were issued to Carl Henry Brunsting<sup>10</sup>. The Sole Devisee under both wills is the family living trust created in October 1996. The inventory, appraisement and list of claims were approved and Drop Order issued closing the independent administration of

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<sup>8</sup> [ROA 254-267, SDTX No. 4:12-cv-592 Dkt 55-Exhibit 1]

<sup>9</sup> [SDTX No. 4:12-cv-592 Dkt 62-Exhibit 2]

<sup>10</sup> [FDCA No. 10-22-00513-CV- Tab 14, P.254-257] – [Tab 20, P.303-305]

the estate of Nelva Brunsting on April 5, 2013. [ROA 256-257]

**Estate of Nelva Brunsting No. 412,249-401**

On April 9, 2013, Carl Henry Brunsting, (Carl) one of five beneficiaries to the sole devisee trust, filed civil tort claims in Harris County Probate Court No. 4, Individually and as Independent Executor for both of his parents' estates, naming three of the other four trust beneficiaries defendants and naming the federal plaintiff, Appellant Candace Curtis, a nominal defendant only. [ROA 5, 8 para 6]

**The Federal Pro Se Plaintiff Retained Assistance of Counsel**

Appellant Candace Louise Curtis, a California resident, had been pro se thus far but at the end of 2013 she retained Houston attorney Jason Bradley Ostrom<sup>11</sup> (Ostrom) who filed his appearance January 6, 2014. Rather than litigate his client's claims in his client's choice of forum, Ostrom presented the federal court with a bundle of unopposed motions<sup>12</sup>. The Southern District Court approved the bundle of unopposed motions on May 15, 2014 and the federal docket was administratively closed, showing the case to have been remanded to Harris County Probate Court Number 4, a court from which it had not been removed. [ROA 276-287]

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<sup>11</sup> Attorney Jason B. Ostrom Texas State Bar No. 24027710 (Deceased)

<sup>12</sup> SDTX No. 4:12-cv-592 Docket entries 107-112 ROA 276-281]

### **Estate of Nelva Brunsting No. 412,249-401**

On May 28, 2014 Ostrom filed the federal remand order in the probate court in “Estate of Nelva Brunsting No. 412,249-401” as a motion to enter a transfer order *[ROA 268]* citing jurisdiction pursuant to Texas Estates Code § 32.005, Texas Estates Code § 32.006, and Texas Estates Code § 32.007.

### **Resignation of Personal Representative**

The Order accepting transfer was signed by the Honorable Christine Butts on June 3, 2014. *[ROA 274, & 302]* The federal transfer is alleged to have created ancillary cause No. 412249-402. The -402 file was opened February 9, 2015, nearly eight months later. *[ROA 29 para 2]*

On or about February 19, 2015, Independent Executor Carl Brunsting submitted a request to resign, substituting his wife Drina as attorney in fact *[ROA 25-26]* for Carl individually and moving to appoint Appellant Candace Curtis as successor Independent Executor. February 20, 2015, without a personal representative for the “estate of Nelva Brunsting”, an “Agreed Docket Control Order” was signed by the participating attorneys. *[ROA 27-28]* An “Agreed Order to Consolidate Cases” *[ROA 289]* appears in the record on March 5, 2015, signed by all of the participating attorneys, dissolving “estate of Nelva Brunsting 412249-

402” into “estate of Nelva Brunsting 412249-401” and closing the -402 docket to further filing.

### **Candace Curtis Termination of Ostrom as Counsel**

On March 30, 2015, after data mining to get information on her lawsuit and discovering that Ostrom’s actions had impugned her cause in fatal contradictions, federal plaintiff Candace Curtis terminated attorney Jason Ostrom and found herself having to defend against the Defendant Co-Trustees no-evidence motion for summary judgment, filed June 26, 2015 [ROA 346] arguing that Carl and Candace could not prove that Defendant’s trust modification instrument, called “*Qualified Beneficiary Designation and Exercise of Testamentary Powers of Appointment*” [ROA181] dated August 25, 2010, was invalid (8/25/2010 QBD). Appellant answered [ROA 348] with an objection to assuming facts not in evidence and a demand for the Defendant Co-Trustees to produce the instrument and qualify it as evidence. They have not and they will not because they cannot. Summary Judgment hearings suddenly became a hearing on an emergency motion for a protective order, (filed 7/20/2015) [ROA 349] regarding wiretap recordings disseminated by the Mendel law firm via certified mail in early July. [See ROA 238 para 3]

### **Where is Candace Curtis Lawsuit?**

The first problem confronting the pro se federal plaintiff Candace Curtis at this juncture was: “Where is my lawsuit”? Candace Curtis was named a nominal defendant in the tort suit Carl Brunsting filed in the probate court [ROA 5-24]. *Candace Louise Curtis vs Anita Brunsting, Amy Brunsting and Does 1-100* (SDTX No. 4:12-cv-592) [ROA 219-247] is not the estate of Nelva Brunsting by any number, label or description and is simply not there. To make matters worse, *"Texas probate jurisdiction is, to say the least, somewhat complex."* *Shell Cortez Pipeline Co. v. Shores*, 127 S.W.3d 286, 292 (Tex. App.-Fort Worth 2004, no pet.) (citing *Palmer v. Coble Wall Tr. Co.*, 851 S.W.2d 178, 180 n.3 (Tex. 1992)).

The Defendants immediately began making disinheritance threats and filing pleadings as if Candace Curtis’ lawsuit was in the probate court and somehow blended with Carl’s action and that they were challenging “the trust”. However, Candace Curtis’ federal lawsuit is not a probate proceeding or a matter related to a probate proceeding, [ROA 248-255] was not removed from, returned to, transferred to, or refiled in the probate court and thus, is not in the probate court and has not been consolidated with Carl’s 412249-401 action [ROA 289] or any other action in the probate court.

### **Plea to the Jurisdiction**

October 19, 2018 Candace Curtis filed a plea to the jurisdiction moving the

probate court to dismiss for want of jurisdiction [ROA 352] and as has been previously stated, “*Texas probate jurisdiction is, to say the least, somewhat complex*”.

On November 27, 2018 the Defendant Co-Trustees filed Notice of Intention to depose the Settlor's estate planning attorney, Candace Kunz-Freed, independent executor Carl Brunsting's defendant in the District Court.<sup>13</sup>

### **The Honorable James Horwitz**

The Honorable James Horwitz was elected to Harris County Probate Court Number 4, taking office in January 2019 and inheriting his predecessor's unresolved matters. No pending dispositive motions had been ruled upon in Carl's tort action up to that point.

On February 14, 2019 the Honorable James Horwitz denied Appellant's plea to the jurisdiction [ROA 29-30] stating that the federal case had been transferred into Cause No. 412,249-402 on February 9, 2015 and that the court “*finds that subject matter jurisdiction is proper in Harris County Probate Court No. 4 with regard to the Estates of Nelva and Elmer Brunsting as well as the assets*

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<sup>13</sup> [FDCA No. 10-22-00513-CV- Tab 53, P.1203-1205] Harris County 164<sup>th</sup> Judicial District Court Cause No. 2013-05455

*contributed to Trusts related to those Estates.”*

On November 4, 2019, Defendant Co-Trustees filed what they labeled “Original Counter Claims”, [ROA 304] again raising their no-contest threats, pointing to their 8/25/2010 QBD and arguing that “suing the Co-Trustees” triggered forfeiture provisions. Thereafter Defendant Co-Trustees began a campaign seeking sanctions against Candace Curtis for insisting the probate court was without jurisdiction and for refusing to be deposed on Defendants original counter claims, filed more than seven years after litigation began.

October 15, 2021 Candace Curtis filed her last answer to Defendant Co-Trustees’ counterclaims<sup>14</sup> along with an Addendum<sup>15</sup> raising the question of what instruments are talking about when we say “the trust” and asking why, in more than ten years, had the beneficiaries failed to enjoy a benefit from their vested interest in trust property.

- November 5, 2021 Defendant Co-Trustees filed a Motion for Summary Judgment. [ROA 360]

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<sup>14</sup> FDCA No. 10-22-00513-CV- Tab 37, P.498-517] Answer to Defendant Co-Trustees Original Counter claims.

<sup>15</sup> FDCA No. 10-22-00513-CV- Tab 38, P.518-533] Relators Addendum To Answer

- A Rule 11 Agreement was filed December 5, 2021 in which Drina Brunsting, attorney in fact for Carl Brunsting, and the Defendant Co-Trustees agree not to prosecute their claims against each other. *[ROA 314-317]*
- On January 5, 2022 Drina Brunsting, alleged attorney in fact for Carl Brunsting individually, moves to sever Carl's claims from those of Candace Curtis, *[ROA 318-320]* arguing that Candace and Carl have no claims in common. The February 11, 2022 Hearing on Motion to Sever *[Reporter's Record Vol 2 of 3]* does not specifically identify any issues Carl and Candace have that are not in common, but merely argues that Carl and Candace do not have claims in common and somehow have conflicts of interests that prevent settling the controversy under one roof.
- On February 25, 2022 at a pretrial conference *[Reporter's Record Vol 3 of 3]* visiting judge Kathy Stone signed the Defendants proposed Summary Judgment Order *[ROA 31-34]* concluding that Candace had forfeited her trust property; dismissing her claims against Defendant Co-Trustees Anita Brunsting and Amy Brunsting and stating that Candace, and her share of "the trust", was liable for the Defendant Co-Trustee's attorney fees. There was no hearing and the summary judgment was not rendered *[Reporters Record Vol 3 of 3]* but the Court did say that Appellant's federal injunction *[ROA 258-263]* would remain

in force and effect.

- March 11, 2022 an Order Granting Motion to Sever Carl from Candace Curtis was entered, creating ancillary cause No. 412,249-405 as a place for Drina Brunsting, and the Defendant Co-Trustees to move their no longer being prosecuted tort claims. *[ROA 321-326]*
- March 18, 2022 Drina Brunsting and Carole Brunsting filed a joint notice of non-suit, dismissing Carole's claims against Carl and Carl's claims against Carole and, on March 18, 2022, Drina filed a Notice of Nonsuit of Candace Curtis as a nominal Defendant. *[ROA 327-329]*

## **FACT SUMMARY**

This series of events was a clever sleight of hand among the cooperating attorneys to leave the illusion that Candace Curtis was the only "Plaintiff" remaining in Carl's 412,249-401 action and, after having her non-probate claims dismissed, Candace would be the only remaining defendant subject to the Co-Trustees' non-probate counter-claims. Candace was never served with Defendant Co-Trustees' untimely Counter Claims, which are vague, disloyal and in excess of the powers granted to trustees. The restatement forecloses any such conduct by a trustee. See Art XII B *[ROA 147]*

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

Beneficiary Candace Curtis [ROA 128] is not a plaintiff in the probate court [ROA 219-247] as her federal lawsuit [ROA 219-247] is neither a probate proceeding, nor a matter related to a probate proceeding [ROA 248-255], was never filed in the probate court, could not be filed in the probate court, was not removed from the probate court and could not be returned to the probate court, was never in a state court and could not be transferred from another state court and the alleged Co-Trustees [ROA 174-176] November 4, 2019 “original counter claims” [ROA 304] did not make them plaintiffs. See Texas Rule of Civil Procedure 97(a) - Commint Tech. v. Quickel, 314 S.W.3d 646 (Tex. App. 2010)

As the record now clearly shows, Anita Brunsting, as sole trustee, failed to assemble books and records of accounts, failed to disclose her self-dealing actions and was unable to provide an accounting as required by Article XII Section E, [ROA 156] leaving the beneficiary no option but to bring action to compel specific performance [ROA 264-267]. Beneficiary Anita Brunsting, using the label “trustee” intentionally caused litigation to be brought for the purpose of advancing a theory that, if true, would enlarge her share [ROA 31-34] at the expense of the other co-equal trust beneficiaries. See Candace Curtis original SDTX petition page

20 of 28 [ROA 239 para 4]. This is what triggers in Terrorem (Art XI C) [ROA 144-145].

Defendants' acts and omissions and complete failure to perform the obligations mandated by Article XII Section E (required accounting), Article VIII Section D, Article IX Section D and Article X (division and distribution of trust assets) [ROA 86-173] and their acts of aggression towards the other beneficiaries were not the acts of loyal fiduciaries performing their obligations under the trust, but the actions of beneficiaries using the trustee label to challenge the Settlers' intentions and seeking to enlarge their trust share by using in Terrorem as a sword rather than a shield.

## **ARGUMENT**

### **Legislative Delegation of Statutory Probate Court Jurisdiction**

The Probate Court No. 4 of Harris County is a statutory probate court, Tex. Gov't Code § 25.1031, delegated with the general jurisdiction of a probate court as provided by the Texas Estates Code, Tex. Gov't Code § 25.0022(a)<sup>16</sup> 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 § 25.0021. It is a court of limited

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<sup>16</sup> Tex. Gov't Code § 25.0022(a) "Statutory probate court" has the meaning assigned by Chapter 22, Estates Code.

jurisdiction, *Narvaez v. Powell* 564 S.W.3d 49, 54.

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 § 21.006, 32.001(a), 33.002, 33.052, 33.101) *Mortensen v. Villegas* 630 S.W.3d 355, 361 (Tex. App. 2021).

### **Probate Proceeding**

The Estates Code defines "probate proceeding" at Section § 31.001

Tex. Est. Code § 31.001

*Section 31.001 of the Texas Estates Code provides: Sec. 31.001. SCOPE OF "PROBATE PROCEEDING" FOR PURPOSES OF CODE. 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.*

None of the causes of action asserted by Carl Brunsting's original petition qualify as a probate proceeding under Section 31.001 of the Estates Code and further actions of this nature were neither specifically nor explicitly provided for by Title II of the estate code as required by Tex. Est. Code § 402.001.

### **Matter Related To A Probate Proceeding**

"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, *Mortensen v. Villegas* 630 S.W.3d 355, 361 (Tex. App. 2021).

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:

Tex. Est. Code § 31.002(c)

*(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.*

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

Tex. Est. Code § 31.002(a)

*(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.*

Tex. Est. Code § 31.002(b)

*(b) For purposes of this code, in a county in which there is no statutory probate 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.*

Finally, a probate court may also exercise pendent and ancillary jurisdiction as necessary to promote judicial efficiency and economy, Texas Estates Code § 32.001(b). However, for a probate court to have 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. The estate of Nelva Brunsting closed April 5, 2013, [ROA 256-257] five days before Carl Brunsting filed his civil tort action in the probate court.

Tex. Est. Code § 22.029

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

Tex. Est. Code § 32.001

*Sec. 32.001. GENERAL PROBATE COURT JURISDICTION; APPEALS. (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.*

*(c) A final order issued by a probate court is appealable to the court of appeals.*

*(d) The administration of the estate of a decedent, from the filing of the application for probate and administration, or for administration, until the decree of final distribution and the discharge of the last personal representative, shall be considered as one proceeding for purposes of jurisdiction. The entire proceeding is a proceeding in rem.*

### **Application to the case in point**

The Causes of Action claimed by Carl Brunsting [ROA 5-24] were filed under Chapter 37 of the Texas Civil Practice and Remedies Code and Chapter 115 of the Texas Property Code, neither of which speaks to statutory probate court jurisdiction. Chapter 37 of the Texas Civil Practice and Remedies Code is commonly referred to as the Uniform Declaratory Judgments Act.

Texas Civil Practice and Remedies Code § 37.002

*Section 37.002 - Short Title, Construction, Interpretation*

*(a) This chapter may be cited as the Uniform Declaratory Judgments Act.*

*(b) This chapter is remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and it is to be liberally construed and administered.*

Chapter 115 of the Texas Property Code is located in Title 9 of the property code, (Tex. Prop. Code § 101.001 to 124.002) commonly referred to as the Texas

Trust Code. Texas Property Code § 115.001, reads as follows:

Tex. Prop. Code § 115.001 – Jurisdiction

*(a) 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, including proceedings to:*

*(1) construe a trust instrument;*

*(2) determine the law applicable to a trust instrument;*

*(3) appoint or remove a trustee;*

*(4) determine the powers, responsibilities, duties, and liability of a trustee;*

*(5) ascertain beneficiaries;*

*(6) make determinations of fact affecting the administration, distribution, or duration of a trust;*

*(7) determine a question arising in the administration or distribution of a trust;*

*(8) relieve a trustee from any or all of the duties, limitations, and restrictions otherwise existing under the terms of the trust instrument or of this subtitle;*

*(9) require an accounting by a trustee, review trustee fees, and settle interim or final accounts; and*

*(10) surcharge a trustee.*

*(a-1) The list of proceedings described by Subsection (a) over which a district court has exclusive and original jurisdiction is not exhaustive. A district court has exclusive and original jurisdiction over a proceeding by or against a trustee or a proceeding concerning a trust under Subsection (a) whether or not the proceeding is listed in Subsection (a).*

*(b) The district court may exercise the powers of a court of equity in matters pertaining to trusts.*

*(c) The court may intervene in the administration of a trust to the extent that the court's jurisdiction is invoked by an interested person or as otherwise provided by law. A trust is not subject to continuing judicial supervision unless the court orders continuing judicial supervision.*

*(d) The jurisdiction of the district court is exclusive except for jurisdiction conferred by law on:*

*(1) a statutory probate court;*

*(2) a court that creates a trust under Subchapter B, Chapter 1301, Estates Code;*

*(3) a court that creates a trust under Section 142.005;*

*(4) a justice court under Chapter 27, Government Code; or*

*(5) a county court at law.*

According to Texas Property Code § 115.001(a), a district court has original and exclusive jurisdiction over all proceedings by or against a trustee and all proceedings concerning trusts (d) except for jurisdiction conferred by law on (1) a statutory probate court.

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. *Mortensen v. Villegas* 630 S.W.3d 355, 361 (Tex. App. 2021)

Each provision of a statute must be read within the context of the entire statutory scheme. See *Bridgestone/Firestone, Inc. v. Glyn-Jones*, 878 S.W.2d 132, 133 (Tex. 1994); *Barr v. Bernhard*, 562 S.W.2d 844, 849 (Tex. 1978) ("One provision will not be given a meaning out of harmony or inconsistent with other provisions, although it might be susceptible to such a construction if standing alone."). The jurisdiction provisions of Texas Estate Code §§ 32.005, 32.006, and 32.007 are located in Title II "*ESTATES OF DECEDENTS; DURABLE POWERS OF ATTORNEY*". When read within the context of Title II, Texas Estate Code § 32.005, § 32.006, and § 32.007 do not provide the statutory probate court with jurisdiction to hear matters that do not qualify as recognized probate proceedings or matters related to a probate proceeding.

Courts look to the substance of a pleading to determine its nature, not the form or title given to it. See *BCY Water Supply Corp. v. Residential Invs., Inc.*, 170 S.W.3d 596, 604 (Tex.App.-Tyler 2005, pet. denied) (op. on reh'g) (citing *State Bar v. Heard*, 603 S.W.2d 829, 833 (Tex. 1980)). To determine the nature of the claims, we review the factual allegations in the pleadings, the evidence adduced in support of those allegations, and the type of relief sought. See *Newsom v. Brod*, 89 S.W.3d 732, 734 (Tex.App.-Houston [1st Dist.] 2002, no pet.). Artful pleading does not alter the underlying nature of a claim. See *Omaha Healthcare Ctr., LLC v.*

*Johnson*, 344 S.W.3d 392, 394 (Tex.2011).

Using the term independent executor and adding an estate label do not bring a cause of action within the jurisdiction of a statutory probate court. The basis for jurisdiction cited by Carl Brunsting in his Original April 9, 2013 Petition in Harris County Probate Court No. 4 are clearly stated on page 5 along with the purposes for his action. [ROA 9]

*“Jurisdiction*

*Plaintiff brings this cause of action pursuant to Chapters 37 of the Texas Civil Practice and Remedies Code and Chapter 115 of the Texas Property Code.*

*More specifically, Plaintiff brings this proceeding to:*

*(a) establish, construe the terms of, and determine the rights and liabilities of the parties under the Family Trust, the Successor Trusts, and the trusts purportedly created pursuant to the terms of the tainted 8/25/10 QBD;*

*(b) require an accounting of all the trusts and other transactions resulting from Anita, Amy, and Carole's exercise of control over Elmer and Nelva's remaining assets, however held;*

*(c) determine damages resulting from Anita, Amy, and Carole's wrongful acts, including, but not limited to, numerous breaches of fiduciary duties;*

*(d) impose a constructive trust over assets wrongfully transferred, as well as anything of value obtained through the use of assets wrongfully transferred;*

*(e) obtain injunctive relief to preserve Elmer and Nelva's assets, however held, until the records concerning the transfers of assets can*

*be examined and appropriate remedies can be sought so that the improper transfers can be reversed and the assets can be properly allocated and distributed.”*

An independent administration is considered closed after the debts have been paid, the property distributed, and there is no more need for administration. *Texas Commerce Bank—Rio Grande Valley v. Correa*, 28 S.W.3d 723 (Tex. App.—Corpus Christi 2000, pet. denied).

*Texas Estates Code § 405.012. CLOSING PROCEDURES NOT REQUIRED. An independent executor is not required to close the independent administration of an estate under Section 405.003 or Sections 405.004 through 405.007*

Under a pour-over will, all right, title and interest to property of any kind, formerly owned by an estate, if any, vests in the trustee at the approval of the inventory appraisal and list of claims.

None of the causes of action listed in Carl Brunsting’s original petition: (1) Demand for trust accounting, (2) Breach of fiduciary duties against trustees (3) Conversion of trust property (4) Negligence (5) Tortious Interference with Trust Inheritance (6) Constructive Trust (7) Civil Conspiracy (8) Fraudulent Concealment and (9) injunctive relief to preserve trust assets, qualify as a recognized "probate proceeding" pursuant to statutory definitions, Tex. Est. Code § 31.001, and none of Carl Brunsting’s causes of action in his original petition qualify as matters related to a probate proceeding as defined by Tex. Est. Code §

31.002(c).

Carl's application for injunctive relief to preserve Elmer and Nelva's assets is a non sequitur given the pour-over nature of the wills, the absence of any meaningful property in the inventory, the closing of the estates with the approval of the inventory and the injunction issued in the Southern District of Texas [*ROA* 258-263] the same day that Carl filed his action. Any business involving what should have been, would have been, or might have been in the trust, is trust business that has no potential to tangibly impact an estate as that term is defined in the Estates Code. (Tex. Est. Code § 22.012) This is a discussion involving a living trust governed under the Texas Trust Code (Tex. Prop. Code § 101.001 to 124.002). Damages, if any, would come from the Defendant Co-Trustees individually and not from the assets of an estate.

Carl's resignation as independent executor, due to want of capacity, [*Reporters Record Vol 2 of 3*] and the failure of the probate court to find a need for continuing administration or to appoint a successor, inarguably distinguishes the action as other than a "probate proceeding" or "matter related to a probate proceeding", as only a duly qualified and appointed representative of an estate may file or maintain a suit on the estate's behalf. See Tex. Est. Code § 351.054(a) (West, Westlaw through 2017 R.S.).

A temporary administrator was appointed for the limited purpose of evaluating the “claims” pending in the case. The temporary administrator failed to identify a single “claim” within the meaning of Texas Estates Code § 22.005.

*Sec. 22.005. CLAIMS. "Claims" includes:*

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

### **Standing**

In a probate proceeding the burden is on the person whose standing is challenged to prove that he is an "interested person." In re Estate of Casares, 556 S.W.3d 913, 915 (Tex. App. 2018) 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 § 22.018(1).

Carl, in his individual capacity, is not an heir, devisee, spouse, creditor, or any other having a property right in or claim against an estate being administered.

Carl's individual tort claims, concerning only the devisee; do not bring his person within the jurisdictional provisions of the estates code. Carl's resignation as independent executor and substitution of his wife Drina Brunsting as attorney in fact, does not provide Drina Brunsting with standing in the statutory probate court.

Looking behind the independent executor label to the substance of the claims, the rights asserted and nature of the relief sought, we find that Carl's civil tort claims are about his rights in trust property and do not qualify as established "probate matters" or "matters related to a probate proceeding".

**Tex. Est. Code § 351.054(a)**

*("An executor or administrator appointed in this state may commence a suit for: (1) recovery of personal property, debts, or damages; or (2) title to or possession of land, any right attached to or arising from that land, or an injury or damage done to that land."); Frazier v. Wynn, 472 S.W.2d 750, 752 (Tex. 1971) ("It is settled in Texas that the personal representative of the estate of a decedent is ordinarily the only person entitled to sue for the recovery of property belonging to the estate."); In re Estate of York, 951 S.W.2d 122, 127 (Tex. App.—Corpus Christi 1997, no writ). The general rule is that heirs to an estate are not entitled to maintain a suit for the recovery of property belonging to the estate. See Frazier, 472 S.W.2d at 752; Chandler v. Welborn, 294 S.W.2d 801, 806 (Tex. 1956); In re Guardianship of Archer, 203 S.W.3d 16, 22 (Tex. App.—San Antonio 2006, pet. denied).*

None of independent executor Carl Brunsting's causes of action had the potential to add tangible property to an already poured-over estate. The only interest Carl had in his tort claims was personal. Damages, if any, would come

from Defendants individually and not from assets of an estate, and the only thing produced by Carl's probate court action are more than half a million dollars in attorney's fees paid by trust beneficiaries with over \$600,000 in additional demands against the sole devisee, labeled "fees for legal services", with more than \$135,000 in excess taxes paid as a direct result of the Co-Trustees failure to distribute trust income or perform any other competent fiduciary act for the benefit of the cestui' que. Carl's 412249-401 action has brought nothing but injury and loss of enjoyment of beneficial interests suffered by the trust beneficiaries. Those beneficiaries also include Carl Brunsting in his individual capacity but do not include the estate.

"It is settled law that a trustee is not entitled to expenses related to litigation resulting from the fault of the trustee. See *duPont v. Southern National Bank*, 575 F. Supp. 849 (S.D. Tex. 1983), modified, 771 F.2d 874 (5th Cir. 1985)."

Where litigation is caused by the trustee's misconduct, the trustee is not entitled to recover attorney's fees out of the trust. 76 AM.JUR.2D TRUSTS §673. See also *Tindall v. State*, 671S.W.2d 691, 693 (Tex. App.–San Antonio 1984, writ ref'd n.r.e.) If a beneficiary is successful in a suit to compel an accounting, the court may award all or part of the costs of court and all of the suing beneficiary's reasonable and necessary attorney's fees and costs against the trustee in the

trustee's individual capacity or in the trustee's capacity as trustee." TEX. TRUST CODE §113.151(a).

### **Remanded, Refiled or Transferred?**

#### **Remand Theory Fails because Case Not Removed**

Next we move to the question of whether or not the non-probate tort claims filed in the Southern District of Texas were ever properly before the statutory probate court. "Remand' means 'send back.' It does not mean 'send elsewhere.'" *Taliaferro v. Goodyear Tire*, 265 F. App'x 240, 244 (5th Cir. 2008)

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

#### **Federal to State Transfer Theory Fails 28 U.S.C. § 1404**

"Under 28 U.S.C. § 1404, a federal court only has authority to transfer a case to another federal court, with no authority to transfer to a state or foreign court." *Southeastern Consulting Group, Inc. v. Maximus, Inc.*, 387 F. Supp. 2d 681, 683 n.2 (S.D. Miss. 2005). "While a case improperly removed from a state to a federal court may be remanded, there is no authority to transfer a case from a federal to a state court." *Ridgway v. Baker*, 720 F.2d 1409, 1412 (5th Cir. 1983)

#### **Instate Transfer Theory Fails**

Transferring a case is not dependent upon an assignment or any formal

order. "Trial courts have broad discretion to exchange benches or transfer cases" independent of their Chapter 74 powers of assignment. Rule 330(e) of the Texas Rules of Civil Procedure provides that in any county with two or more civil district courts, any judge "*may in his own courtroom try and determine any case or proceeding pending in another court without having the case transferred.*" *In re Houston Lighting Power Co.*, 976 S.W.2d 671, 673 (Tex. 1998).

The Texas Rules of Civil Procedure do not reach to foreign courts and, having never been filed in a state court, *Candace Louise Curtis vs Anita Brunsting, Amy Brunsting and Does 1-100 SDTX No. 4:12-cv-592* does not come within the purview of Rule 330(e) of the Texas Rules of Civil Procedure and, not coming within the purview of a probate proceeding or matter related to a probate proceeding, the theory of the probate court transferring the matter to itself also fails.

### **Independent Administration**

While there are too many Achilles heels in the parade of horrors to persevere over, the irony of independent administration should at least be mentioned. We are looking at "independent administration" of wills that pour-over into a living trust and an action filed in the probate court after the inventory, appraisal and list of claims had been approved.

Independent Executor is defined by Tex. Estates Code § 22.017 as follows:

*"Independent executor" means the personal representative of an estate under independent administration as provided by Chapter 401 and Section 402.001. The term includes an independent administrator.*

Tex. Estates Code § 402.001, reads as follows:

*"Sec. 402.001. GENERAL SCOPE AND EXERCISE OF POWERS. When an independent administration has been created, and the order appointing an independent executor has been entered by the probate court, and the inventory, appraisal, and list of claims has been filed by the independent executor and approved by the court or an affidavit in lieu of the inventory, appraisal, and list of claims has been filed by the independent executor, as long as the estate is represented by an independent executor, further action of any nature may not be had in the probate court except where this title specifically and explicitly provides for some action in the court."*

### **CONCLUSION**

Appellant adopts by this reference all ground for appeal (A. through S.) stated in her May 18, 2022, Notice of Appeal. No part of this controversy qualifies as a "probate proceeding" or "matter related to a probate proceeding" as those terms are defined by the Estates Code and Carl Brunsting's Original April 9, 2013 Petition failed to invoke the subject matter jurisdiction of the statutory probate court.

Where the trial court lacks jurisdiction, it has only the power to dismiss the suit. *Wren v. Texas Employment Comm'n*, 915 S.W.2d 506, 509 (Tex.App.-

Houston [14th Dist.] 1995, no writ). All orders entered in Cause No. 412249-401 are void ab initio for want of subject matter jurisdiction including but not limited to summary and declaratory judgments, order for sanctions for indirect civil contempt and orders transferring related cases from the district courts to the probate court.

*A judgment is void only when it is apparent that the court rendering the judgment had no jurisdiction of the parties, no jurisdiction of the subject matter, no jurisdiction to enter the judgment, or no capacity to act as a court. Cook v. Cameron, 733 S.W.2d 137, 140 (Tex. 1987); Browning v. Placke, 698 S.W.2d 362, 363 (Tex. 1985). A void judgment is one entirely null within itself, and which is not susceptible of ratification or confirmation, and its nullity cannot be waived. Easterline v. Bean, 121 Tex. 327, 49 S.W.2d 427, 429 (1932); American Universal Ins. Co. v. D.B. B., Inc., 725 S.W.2d 764, 766 (Tex.App. — Corpus Christi 1987, writ ref'd n.r.e.). Furthermore, if a court has not acquired jurisdiction of both the parties and the subject matter of the litigation, the judgment is void and is subject to both direct and collateral attack. Browning, 698 S.W.2d at 363; Martin v. Sheppard, 145 Tex. 639, 201 S.W.2d 810, 812 (1947); American Universal Ins., 725 S.W.2d at 766. Guardianship of B.A.G, 794 S.W.2d 510 (Tex. App. 1990), Antolik v. Antolik 625 S.W.3d 530 (Tex. App. 2021) Decided May 7, 2021 Court of Appeals of Texas, (6th) Appellate District, Texarkana*

In sum, Carl's petition failed to raise a cause of action that qualified as either a "probate proceeding" or as a "matter related to a probate proceeding" and consequently failed to invoke the jurisdiction provisions of the Texas Estates Code. It necessarily follows that Title II does not specifically and explicitly authorize Carl in either persona, to file a non-probate related tort action in the probate court as ancillary to an independent administration of a pour-over estate, after the

inventory, appraisal and list of claims had been approved.

Accordingly, the statutory probate court here had neither power nor constitutional authority to decide Carl Brunsting's claims nor any of the actions 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).

### **REMEDY**

Appellant respectfully requests this to Court reverse the statutory probate court's denial of her plea to the jurisdiction and direct the trial court to vacate and set aside the order accepting the federal remand as a transfer, the order for summary judgment, the order to transfer the district court case to the probate court and to dismiss all other non-probate matters filed as "ancillary" to estate of Nelva Brunsting No. 412,249 for want of statutory probate court jurisdiction.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, Candice Schwager, hereby certify that the foregoing document, along with the Clerk and Reporters records, were served on all counsel of record through the state electronic filing system and via email on the 30<sup>th</sup> day of June 2023

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### **CERTIFICATE OF COMPLIANCE**

I, Candice Schwager, hereby certify that this document was generated by a computer using Microsoft Word which indicates that the total word count of this document is 10,488 words and that the countable content is 11,220 words, including footnotes, and is thus in compliance with TEX. R. APP. P. 9.4(i)(2)(B).

Respectfully submitted,

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